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Sexual Minorities and the Right to Family: Constitutional and Legal Rights

Under the Guidance and Supervision of

Dr.Athira PS.

The National University of Advanced Legal Studies, Kochi

Submitted by:

Anushka Ojha

Register No: 10589

LL.M (Constitutional and Administrative Law)

CERTIFICATE

This is to certify that Ms. ANUSHKA OJHA Register Number LM0123021 has submitted this Dissertation titled, '**Sexual Minorities and the Right to Family: Constitutional and Legal Rights**' in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that the Dissertation submitted by her is original, bonafide and genuine and the same has been checked for plagiarism in Grammarly on 24.06.2024 at 4:56 pm and is found to be 5%.

Date: 24/06/2024

DR.ATHIRA PS.

Place: Ernakulam

Associate Professor

NUALS, Kochi

DECLARATION

I declare that this Dissertation titled “**Sexual Minorities and the Right to Family: Constitutional and Legal Rights**” is researched and submitted by me to the National University of Advanced Legal Studies, Kochi, in partial fulfilment of the requirement for the award of a Degree of Master of Laws in Constitutional Law and Administrative Law, under the guidance and supervision of Dr. Athira PS., and is an original, bona fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree from this University or any other University.

Anushka Ojha

Reg No: 10589

LL.M (Constitutional and Administrative Law)

NUALS, Kochi

Date:24/06/2024

Place: Kochi

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Anushka Ojha

LIST OF ABBREVIATIONS

- AIDs: Acquired Immune Deficiency Syndrome
- AIR: All India Reporter
- Apr.: April 4. Cri. LJ: Criminal Law Journal
- cl.: Clause.
- Cir.: Circuit
- CARA: Central Adoption Resource Authority
- Dr.: Doctor
- DB: Division Bench
- DEL: Delhi
- DLT: Delhi Law Times
- ECHR: European Court of Human Rights
- Govt.: Government
- IPC: Indian Penal Code, 1860
- ILO: International Labour Organisation
- Lah.: Lahore
- LR: Law Review
- LGBTQIA: Lesbian, Gay, Bisexual, Intersex, Transgender, Queer, Asexual/Ally
- Mad.: Madras
- Mar.: March
- NALSA: National Legal Services Authority
- No.: Number
- Ors.: Others
- P.: Page
- Para: Paragraph
- Prof.: Professor.
- SA: South Africa

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9. Vriend v. Alberta ,[1998] 1 S.C.R. 493.
10. Jayalakshmi v. State of Tamil Nadu, (2007) 4 M U 849.
11. Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
12. Kerrigan v. Commr. of Public Health, 289 Conn 135 (2008).
13. Lata Singh V. State of Uttar Pradesh, (2006) 5 SCC 475.
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16. Lohana Vasantlal Devchand v. State, AIR 1968 GUJ 252.
17. Maneka Gandhi v. Union of India, AIR 1978 SC 597.
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33. Vahini v. Union of India, (2018) 7 SCC 192.
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1. INTRODUCTION

Sexual minorities are the group of people whose gender identity, sexual orientation or sexual identity are different from the majority of the population, which are heterosexual. LGBTQIA+ is an acronym that stands for Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual/Ally, and other sexual orientations or gender identities.¹ This is an umbrella term encompassing different sexuality, romance, gender and many more spectrums. The community comes under the minority around the globe, including India. The term LGBTQIA+ is generally considered an elite or modern concept, but the fact that religions and age-old books have mentioned the community positively or negatively shows that they have existed since forever. We generally confuse the terms associated with the community.² People often confuse terms like gender, sex, identity, and expression.³ An Indian Sociologist, Anita Chettiar, explained that “Sex is something which we are born with, something we recognise is the gender, and something which we discover in our lives is known as sexuality”.⁴ When we look at the right to have a family in the community, it encompasses a lot of rights under its wings. For example, the right to love, adopt a child, marriage, have a child through surrogacy, etc. They all come under the umbrella of the community’s right to have a family.⁵ The legal and social acceptance of the same is still not validated by the courts or the people of India. The decriminalisation of S.377⁶ of the Indian Penal Code, which criminalized homosexuality in all its forms in the case of **Navtej Singh Johar v. Union of India**⁷ gave new hope to the community. Although it’s been more than three years since this judgment, still the

¹ Human Rights Campaign, Glossary of Terms, <https://www.hrc.org/resources/glossary-of-terms>.

² American Psychological Association, "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People."

³ American Psychological Association, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 Am. Psychologist 832 (2015).

⁴ Anita Chettiar, Understanding Gender and Sexuality in India: An Overview, 5 Sociological Review of India 1 (2021).

⁵ Human Rights Watch, All We Want is Equality: Religious Exemptions and Discrimination against LGBT People in the United States (2018).

⁶ [1] Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.— Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.

⁷ AIR 2018 SC 4321.

social acceptance of the community and mental harassment as a result of it has been very prevalent. In the recent decision of **Supriya Chakraborty & Anr v. Union of India**⁸, the apex court ruled against the right of the community to get married, resulting in the increased plight of the people belonging to the community. The right to marriage and have a family is a fundamental right or not, especially when it comes to the union of two people who are not cis-gendered, is still an area where a transformative constitution can play a role.⁹ The recent judgment has shattered the soul of the Constitution as it challenges the basic principles of equality, non-discrimination, and freedom to choose and live.¹⁰

When we delve into the history of how sodomy laws came into the picture, we have to look into different aspects of it, the Western and the Indian.¹¹ The historical basis is not just limited to one aspect of social control. Still, the beginning of religion as a means of social control has a lot to do with sodomy laws coming into the picture for the first time.¹² Sodomy is not expressly mentioned in any of the early Mesopotamian laws, such as those included in the Code of Hammurabi (c. 1754 BCE). Nonetheless, there may be social or legal repercussions for some sexual practices. While sodomy is rarely discussed in detail in ancient Egyptian writings, there is evidence that homosexual partnerships were accepted in specific circumstances. Sometimes, tomb decorations and inscriptions allude to close male connections.¹³

When we look into Greece, in some city-states like Athens, homosexual partnerships were culturally acceptable and sometimes celebrated, especially pederasty, which is defined as an older male mentoring and teaching relationship with a younger male colleague.¹⁴ For young men, these partnerships were frequently regarded as a rite of

⁸ Writ Petition (Civil) No. 1011 of 2022.

⁹ Piyush Srivastava, *Towards a Transformative Constitution: Reflecting on Rights of Non-Cis-Gendered Unions*, 12 Indian J. Const. L. 215 (2021).

¹⁰ Neeti Shikha, *Judicial Review and the Rights of Sexual Minorities: Analyzing Recent Judgments*, 14 J. Indian L. & Soc'y 122 (2022).

¹¹ Vikramaditya Khanna, *The Evolution of Sodomy Laws: Western and Indian Perspectives*, 33 Mich. J. Int'l L. 125 (2011).

¹² Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984).

¹³ John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (Univ. of Chi. Press 1980).

¹⁴ Kenneth J. Dover, *Greek Homosexuality* 16-45 (1978).

passage. Rules governed the positions and conduct of individuals in these kinds of partnerships, even despite social acceptability.¹⁵ Men who are free-born adults and choose to play a passive part in gay relationships, for instance, may be subject to legal sanctions as well as societal stigma¹⁶. In the past, Homosexual activity mainly was accepted under the early Roman Republic.¹⁷ Man-boy relationships often involving slaves were prevalent. As Christianity gained traction, opinions started to change. By the end of the Empire, homosexual behavior was illegal.¹⁸ Supposed Roman legislation from the Republic period called the Lex Scantinia penalized sexual impropriety, although it was applied unevenly. As Christianity became the most popular faith, Roman law was impacted by its moral principles. The Justinian Code, which was in effect from 527 until 565 CE, forbade homosexual behaviour outright and linked it to calamity and plague as a result of divine wrath.¹⁹

The medieval era, which generally spanned the fifth to the late fifteenth century, was characterized by a deep blending of legal frameworks and religious dogma, especially with regard to sodomy and sexual activity. Christian teachings had a significant impact on early medieval Europe, as the Church was crucial in establishing social norms.²⁰ Christian teaching categorically opposed sodomy, with the term being used loosely to refer to a variety of non-procreative sexual activities.²¹ During this time, penitentials were compiled, which are manuals used by confessors to administer penance for sins. These manuals detailed heavy penances for acts of sodomy, reflecting the strict moral stance of the Church.²² These writings demonstrate how deeply uncomfortable Christian communities are with sexual deviation and how much penitence and moral repair are valued.²³

¹⁵ Thomas K. Hubbard, *Homosexuality in Greece and Rome: A Sourcebook of Basic Documents* 53-62 (2003).

¹⁶ Eva Cantarella, *Bisexuality in the Ancient World* 64-65 (Cora Schatz trans., 1992).

¹⁷ Craig A. Williams, *Roman Homosexuality: Ideologies of Masculinity in Classical Antiquity* 27-34 (2d ed. 2010).

¹⁸ Louis Crompton, *Homosexuality and Civilization* (Harv. Univ. Press 2003).

¹⁹ John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* 168-172 (1980).

²⁰ James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 199-205 (1987).

²¹ Asal V, Sommer U, Harwood PG (2013) Original sin: a cross-national study of the legality of homosexual acts. *Comparative Political Studies* 46(3):320–351.

²² Mark D. Jordan, *The Invention of Sodomy in Christian Theology* 43-45 (1997).

²³ David F. Greenberg, *The Construction of Homosexuality* (Univ. of Chi. Press 1988).

The harshness of the rules against sodomy increased as the medieval era developed into the High and Late Middle Ages, according to secular authorities. By the 12th century, such rules frequently stipulated that those found guilty of sodomy would receive the death penalty, which included burning to death.²⁴ Because heretical movements were often accused of sexual perversion, there was a strong link between heresy and sodomy, which contributed to the legal severity. One famous instance of accusations of sodomy being used to legitimise violent persecutions is the Albigensian Crusade (1209-1229) against the Cathars in southern France. The harsh punitive methods were justified by the confusion between heresy and sodomy, which also highlighted the perceived threat that such activities brought to social and spiritual order.²⁵ The inquisition institutionalised the repression of heresy and sodomy, especially starting in the 12th century²⁶. Working under the authority of the Church, the inquisitors attempted to eradicate heretical behaviors and doctrines; sodomy was often mentioned as one such practice. During this time, legal and religious measures to punish and restrict deviant sexual activity increased.²⁷ Due to widespread mistrust and terror in medieval society, the inquisitorial processes frequently depended on accusations and confessions coerced under duress. The harsh penalties used against individuals accused were justified by the Church's belief that sodomy was a profound moral and social violation in addition to a sin.²⁸

Though social reactions and enforcement differed, religious teachings similarly affected views against sodomy across the wider Islamic world during the Middle Ages. The Qur'an expressly forbids homosexual behavior, citing the narrative of Lot's people as a divine indictment of such conduct.²⁹ The severe penalties for sodomy established by Islamic jurisprudence, or Sharia, included death; however, the application of these rules varied greatly between different places and periods.³⁰ Because of regional traditions and

²⁴ Richard M. Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* 285-290 (1980).

²⁵ Malcolm Barber, *The Cathars: Dualist Heretics in Languedoc in the High Middle Ages* 122-126 (2014).

²⁶ Edward Peters, *Inquisition* 88-93 (1988).

²⁷ James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* 382-385 (1987).

²⁸ George Klawitter, *The Enigma of Sodomy: Medieval Latin Texts on Sex between Men (Conflicting Worlds: New Dimensions of the American Civil War)* (Routledge 1997).

²⁹ Khaled El-Rouayheb, *Before Homosexuality in the Arab-Islamic World, 1500-1800* 11-15 (2005).

³⁰ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* 52-56 (2005).

the whims of the ruling class, there was a certain amount of laxity and tolerance in some Islamic civilizations but strict enforcement in others.³¹

The medieval era was characterized by a complicated interaction between legal systems, religious doctrine, and social perceptions of sodomy. Driven by a perceived desire to uphold moral order and religious purity, the period saw the introduction and execution of harsh punitive laws against sodomy in both Christian and Islamic contexts. These historical events set the stage for the ongoing prosecution and stigmatization of homosexual activity, which shaped social perceptions long into the contemporary period.³²

Influenced by both growing secular and religious authority, the early modern era (late 15th to 18th century) saw substantial advancements in the legislation and application of sodomy laws. The Protestant Reformation and the Catholic Counter-Reformation in Europe strengthened moralistic views toward sexuality, which resulted in more stringent laws and severe punishments for sodomy³³. The Buggery Act of 1533, which was passed by Henry VIII of England, is a notable illustration of this trend. It established the death sentence and made "the detestable and abominable Vice of Buggery committed with Mankind or Beast" a crime. This regulation, which reflected the increasing fusion of religious and legal mandates regulating sexual behaviour, established the standard for later sodomy bans in English-speaking nations and colonies.³⁴

The legal system in colonial America was modeled after that of England, with strict enforcement of sodomy statutes. For example, the Massachusetts Bay Colony passed strict prohibitions against sodomy in the middle of the 17th century, demonstrating the Puritanical influence on early American legal frameworks.³⁵ During this time, sodomy accusations were frequently connected to more general worries about morality and social order. The harsh penalties were a reflection of the widespread belief in society that these

³¹ Everett K. Rowson, Homosexuality in Islamic Law and Society 149-153, in *Islamic Homosexualities: Culture, History, and Literature* (Stephen O. Murray & Will Roscoe eds., 1997).

³² Byrne Fone, *Homophobia: A History* (Picador 2001).

³³ Randolph Trumbach, *Sex and the Gender Revolution: Volume 1, Heterosexuality and the Third Gender in Enlightenment London* 66-68 (1998).

³⁴ Paul Johnson & Robert Vanderbeck, *Law, Religion and Homosexuality* 31-33 (2014).

³⁵ Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 114-115 (1983).

kinds of behaviors were not only immoral but also unstable for the community. Enlightenment concepts also started to surface around this time, challenging conventional beliefs about punishment and sexuality, but it would take some time for them to seep into judicial procedures fully.³⁶

Significant changes in legal and social perspectives on sodomy have occurred during the modern era, which spans the 19th century and is defined by broader social, cultural, and political developments. Reform movements that questioned the severe penalties attached to sodomy laws first emerged in the 19th century. With its decriminalisation of sodomy in France in 1810, the Napoleonic Code of 1810 marked a shift away from punitive methods and toward a more private assessment of sexual actions, which had a significant impact on other European legal systems. On the other hand, the British Empire persisted in exporting its strict prohibitions against sodomy to its colonies, therefore solidifying legal frameworks that outlawed same-sex sexual conduct in a wide range of geographical areas.

More significant developments occurred in the 20th century, especially in the years following World War II as campaigns for individual liberties and civil rights gathered steam. The Stonewall Riots of 1969 in New York City were a turning point in the LGBTQ+ rights movement, spurring action for more civil rights and against laws that criminalised sodomy. During this time, several Western nations gradually decriminalised sodomy as a result of increased acceptance of individual autonomy and human rights. The Sexual Offences Act of 1967, which largely decriminalized homosexuality in England and Wales, was the result of the Wolfenden Report of 1957 in the United Kingdom, which advocated for the decriminalization of homosexual behavior between consenting adults in private.³⁷

Sodomy laws have continued to change in the late 20th and early 21st centuries due to persistent campaigning and court successes. Human rights organizations have actively opposed sodomy laws around the world, pointing out their discriminatory nature and pushing for their repeal. Despite these developments, there are still issues in some regions

³⁶ Why Sodomy Laws Matter | American Civil Liberties Union (aclu.org).

³⁷ Ciacci, R., Sansone, D. The impact of sodomy law repeals crime. *J Popul Econ* 36, 2519–2548 (2023).

of the world where sodomy laws are still in effect, which reflects enduring political and cultural resistance to change.

The varied and multifaceted attitudes towards homosexuality in ancient India were a reflection of the various cultural, religious, and social context of the period. In contrast to the strict moral standards imposed in following centuries, this period, which spanned the Vedic era to the early medieval period, had a reasonably tolerant and sometimes joyous approach to same-sex partnerships and gender fluidity.

The Vedic texts, which are among the most ancient religious writings from ancient India, offer a complex picture of sexuality, even if there are few and ambiguous references to homosexuality. For instance, the Rigveda contains hymns that honor all kinds of love and friendship, even if it makes no mention of homosexual partnerships. According to Naradasmriti and Sushruta Samhita, homosexuality is immutable, and they are prohibited from getting married to someone of the other sex.³⁸ The 14 varieties of Panda (men who are impotent with women) are explained by Naradasmriti. Men who have oral sex with men are known as "the mukhebhaga," men who are enjoyed sexually by other guys are known as "the sevyaka," and voyeurs who watch other men have sex are known as "irakshya." The presence of homosexual-related art work and sculptures at Khajuraho Temple makes it very evident that homosexuality was once viewed as a pleasant and natural state rather than a sin. In the epic Ramayana, there are also instances of homosexuality, such as when Lord Hanuman witnesses two Rakshasa ladies cuddling and kissing one another. Another well-known story is the birth of King Bhagirath from a lesbian marriage. Hindu goddess of virginity and fertility, Bahuchara Mata, she is revered as the hijra community's patroness. However, the basic conception of sexuality in ancient Hindu civilization was wide and included a variety of sexual expressions. Though frequently in a regulatory or advisory setting, the acknowledgement of non-normative sexual activities in literature such as the Dharmaśāstras and the Arthaśāstras implies awareness and an implicit acceptance of their presence. The Kama Sutra is a key work from ancient India that discusses sexual conduct, including homosexuality.³⁹ The Kama

³⁸ How same-sex unions are rooted in Indian tradition (bbc.com).

³⁹ Vatsyayana, *Kama Sutra* (Gupta Period).

Sutra, written by Vatsyayana in the Gupta era (between the fourth and sixth centuries CE), is best known as a guide on pleasure and love. The idea of tritiya-prakriti, or "third nature," which includes a variety of non-heteronormative sexualities, including homosexual partnerships, is covered in Vatsyayana's writings. The book offers in-depth explanations of a range of sexual actions and acknowledges the existence of both men and women who desire other women, demonstrating a comparatively accepting attitude toward different sexual practices. Hindu mythology is full of tales that delve into issues like same-sex love, gender flexibility, and challenging inflexible gender roles. A well-known example is the story of Shikhandi from the Mahabharata, a woman at birth who assumes a male identity in order to carry out the duties of a warrior.⁴⁰ The narrative of this character is entwined with themes of divine will, identity, and duty, demonstrating a wider cultural understanding of the complexity of gender. Another important story is about the god Vishnu changing into the beautiful feminine form of Mohini, who mates with the god Shiva to give birth to the god Ayyappa. The flexible and dynamic character of gender and sexuality in ancient Indian thinking is emphasized by these legendary tales. The Bhakti movement, which originated in the medieval era during 7th century CE, and the ensuing Sufi customs made significant contributions to the discussion of love and devotion, frequently surpassing traditional gender roles. Homoerotic interpretations of the poetry and music of Bhakti saints often revealed a mystical love for the holy. Similarly, Sufi mystics exalted love that transcended the physical and gendered in their expressions of spiritual longing and heavenly oneness.⁴¹

The legal and social structures controlling sexuality underwent substantial modifications as a result of British rule, which started in the middle of the 18th century and continued until India attained independence in 1947. Drafted by Lord Thomas Macaulay, one of the most significant legacies of this era was the enactment of Section 377 of the Indian Penal Code in 1860. This ordinance introduced Victorian-era moral sensibilities and legal frameworks into the Indian context by making "carnal intercourse against the order of nature," a phrase that was taken to include gay acts, illegal. Section 377's implementation

⁴⁰ Why legalising gay sex in India is not a Western idea (bbc.com)

⁴¹ Ruth Vanita & Saleem Kidwai, *Same-Sex Love in India: Readings from Literature and History* (Palgrave Macmillan 2000).

signaled a break from pre-colonial India's generally more accepting and diverse views on same-sex partnerships. This law made homophobia official, which made LGBTQIA+ people more stigmatized and persecuted. The emphasis placed by the colonial government on moral regulation was a reflection of larger control and social engineering tactics, which sought to impose a common moral code on a variety of Indian groups.⁴² As a result, colonialism had a profound influence on contemporary perceptions of homosexuality in India, establishing social and legal prejudices that persisted long after the country gained its independence.

The legal recognition of marriage comes along with a series of rights which is denied as of now in India: rights which involve adoption, surrogacy, property, divorce, maintenance, and many more. The landmark judgment where homosexuality was decriminalised⁴³ gave a ray of hope, but same-sex relationships are not socially accepted. A lot of atrocities are committed against the community. The argument for not accepting homosexuality boils down to the fact that a progeny is not created from the union, making it unnatural. Religious beliefs also play a very crucial part in the discrimination faced by the community all across the globe. Different countries have a vast range of treatments towards them, ranging from treating them as equals to the death penalty.

The **objectives** of the research are to know the definition and identification of members of the LGBTQIA+ community in order to appreciate the diversity and complexity of gender and sexual identities. Terminologies and ideas like lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and other non-heteronormative identities must be thoroughly explored in order to accomplish this. A critical first step in guaranteeing equality and legal protection for the LGBTQIA+ group is determining the rights that they can assert. These rights include things like the ability to marry and adopt children, as well as legal recognition of gender identity and anti-discrimination laws. Examining the legal ramifications and difficulties for the community entails a thorough analysis of the barriers LGBTQIA+ people face on their path to equal rights. This covers matters about gender identification, access to healthcare, marriage and adoption rights.

⁴² Wendy Doniger, *The Hindus: An Alternative History* (Penguin Books 2009).

⁴³ AIR 2018 SC 4321.

Legal issues can have a substantial impact on LGBTQIA+ people's daily lives and well-being and frequently mirror more significant cultural attitudes. Examining how historic court decisions have influenced the evolution of LGBTQIA+ rights and protections across time sheds light on how the legal system is changing. Through an analysis of these cases, one can comprehend the strides made toward achieving legal equality and of achieving legal equality as well as the continued work required to resolve any lingering gaps. This research also holds a comparative analysis of the treatment, laws and stance of queer populations across different countries. This view emphasizes the significance of advocacy and activism in influencing legislative and social reforms, in addition to the necessity of court action in defending rights.

STATEMENT OF PROBLEM

The laws and policies that regulate the LGBTQIA+ community are frequently characterized by ambiguity and vagueness, which makes them insufficient to guarantee this community's full enjoyment of rights and legal status in society. LGBTQIA+ people may face discrimination and legal uncertainty as a result of inconsistent interpretations and enforcement stemming from this lack of clarity. Anti-discrimination legislation, for example, might not specifically address sexual orientation and gender identity, making them insufficient to offer complete protection against discrimination in the employment, in housing, and when gaining access to public services. In addition, the lack of explicit legal frameworks that acknowledge same-sex unions and partnerships means that LGBTQIA+ couples are not granted the rights and advantages that come with marriage, like healthcare decision-making, inheritance, and adoption. LGBTQIA+ people also regularly encounter difficulties claiming their rights in judicial contexts, where prejudices and a lack of awareness among legal professionals can obstruct justice, due to the ambiguity of legal definitions and protections. It is clear from this systemic deficiency that stronger, more inclusive, and explicit legislative protections are required to guarantee the equality and respect of LGBTQIA+ people in society. A more inclusive and just society can only be fostered by removing the structural impediments that support inequality and implementing comprehensive policies with enhanced legal clarity.

RESEARCH QUESTIONS

What are the key legal milestones that have shaped LGBTQIA+ rights, and how have these laws evolved over time in India?

Whether the laws in India are adequate to safeguard the rights and representation of LGBTQIA+ community?

HYPOTHESIS

The current situation of India is discriminatory towards LGBTQIA+ community. There is need for specific reformative legislations in order to preserve the rights of the community.

The recognition and protection of LGBTQIA+ rights represent a crucial aspect of human rights discourse and advocacy in the modern era. As societies evolve, the demand for equal treatment and legal recognition of LGBTQIA+ individuals has gained momentum, prompting significant legislative and judicial interventions worldwide. Despite notable progress, the community continues to grapple with systemic discrimination, societal prejudices, and legal barriers that hinder the full realization of their rights. From decriminalization efforts to the fight for marriage equality, adoption rights, and gender identity recognition, the journey toward comprehensive legal protections is complex and ongoing. This paper aims to explore the historical evolution, current legal challenges, and the role of international organizations in advancing LGBTQIA+ rights, emphasizing the critical need for continued advocacy and reform to ensure equality and justice for the community.

2. MARRIAGE AND ADOPTION: AN ANALYSIS FROM THE CONTEXT OF SEXUAL MINORITIES

2.1 MARRIAGE AS AN INSTITUTION

Marriage is a social institution that teaches the ideas of monogamy, the sharing of property, and the other half. In society, marriage is one of the basic units to start a family. It is more than just a privilege or benefit. Instead, it serves as the cornerstone for a couple's ability to engage fully in society.⁴⁴ Social recognition, self-respect, fulfilment, dignity, and security- both material and otherwise all come from marriage. As well as other civil and legal advantages in inheritance, adoption, taxation, etc.⁴⁵

In India, an individual is not considered as a basic unit but a marriage or a family is. Even the precedents are produced considering marriage and family. Different religions have different take on how and what a marriage should be. But, in all the religious laws, one thing is common: it is not inclusive of people other than cis-gendered males and females. Marriage is regarded as a holy connection between a man and a woman for the sake of procreation in India. Every religion has its own set of rules, beliefs, and practices that members of that community must fervently conform to.⁴⁶

The majority of arguments that come across various cases and discussions are that the whole point of marriage is procreation, and in same-sex marriages, that won't be possible. The question that arises here is whether marital bonds are confined to procreation. Is there no purpose of marriage other than giving birth? If so, as well there are ways like adoption and surrogacy through which a "family" can be formed. Heterosexuals cannot curtail the right to marry and have a family of homosexuals. The minority rights of the people coming under the purview of the LGBTQIA+ community have been curtailed.

The institution of marriage is seen as being threatened by homosexual relationships because it compromises the sacredness of such a union. But when we examine the matter

⁴⁴ Coontz, Stephanie. *Marriage, a History: How Love Conquered Marriage*. Penguin Books, 2006.

⁴⁵ Eskridge, William N., Jr. *Equality Practice: Civil Unions and the Future of Gay Rights*. Routledge, 2002.

⁴⁶ Akshat Agarwal, LGBT+ Rights Claims for Marriage Equality and the Possibilities of Transforming Indian Family Law, 21 Int'l J. Const. L. 1116 (2023), <https://doi.org/10.1093/icon/moad096>.

from the viewpoint of the LGBTQ community, we find that they see marriage not as a means of achieving sexual intimacy but rather as a means of expressing their love and sincerity to their spouse. It appears that homogeneous couples would prefer to "join" the institution of marriage than to "modify" it. They, therefore, demand an understandable distinction under Article 14⁴⁷ to safeguard their right to equality and win over the public.

When we look at the current legal scenario of India regarding marital rights, then most of them are confined to heterosexuals. The equal protection of people guaranteed under Art. 14 of the Constitution comes under question when a particular set of people are denied the right to have a family. Several court rulings have expanded the purview of Article 21 to protect additional rights, such as the freedom to choose and to preserve the right to life and liberty. The lack of religious freedom for individuals to select their mates has long been a contentious issue in multicultural cohabitation. But as time went on, society expanded and became more active. In the recent past, same-sex relationships have emerged as an illustration of a paradigm change in society's beliefs on the role of the family as an institution that has the power to influence and contradict preexisting legal conceptions in our personal laws.⁴⁸

In India, these statutes are acknowledged as personal laws based on religion. These personal laws address issues related to marriage, inheritance, adoption, divorce, and other situations. Therefore, they establish the necessary formalities to give legal force to all religious customs.⁴⁹

Marriage has strong religious and cultural implications and social significance in India. Religious ceremonies are an essential component of marriage, regarded as a sacrament. India is a nation with a diverse population. Therefore, there are different personal laws based on a person's religion. The absence of official authorisation suggests that any progress made toward heterosexual marriages will be lost in these unions. Gay couples

⁴⁷ The Constitution of India, 1950, Art.14.

⁴⁸ Saptarshi Mandal, Do Personal Laws Get their Authority from Religion or the State: Revisiting Constitutional Status, 51(50) Eco. & Pol. Weekly (2016) ('Saptarshi Mandal').

⁴⁹ Ruth Vanita, Democratising Marriage: Consent, Custom and the Law in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 338, 347, 352 (Arvind Narrain & Alok Gupta, 2011) (describing 'maitri contracts' between women).

are not entitled to any of the legal benefits that are available to married heterosexual couples, such as pension rights, maintenance, and succession. Only individuals related by blood or marriage are eligible for financial benefits like the Workers' Compensation Scheme 3 and the EPF Scheme 2. As persons are discriminated against only because of their sexual orientation. The statutes which governs marriage rights in India are:

- a) The Hindu Marriage Act 1955 pertains to Hindus.
- b) The Muslim Personal Law (Shariat) Application Act of 1937 concerns Muslims.
- c) The Indian Christian Marriage Act of 1872 applies to Christians.
- d) The 1936 Parsi Marriage and Divorce Act applies to Parsis.

After closely examining these laws, we can deduce that only heterosexual partnerships are recognised and provided for. As a result, homosexual couples are unable to exercise civil rights like marriage, inheritance, adoption, and so on that is granted to their counterparts. Although some may contend that since section 377 of the IPC was officially eliminated, the community in question is safeguarded by law from prejudice, the reality on the ground is different because social backlash still affects them.⁵⁰

Additionally, the removal of Section 377 did not bestow any sort of civil rights on the two consenting parties; instead, it only authorised their bodily relationship inside the boundaries of their home. As a result, it has grown into a source of fret for homogeneous relationships seeking to legitimise their union since present laws fail to provide these couples the same protections because personal laws are derived from religious traditions and customs, and marriage is universally viewed as a union between a man and a woman. This strong and misleading opposition to liberal policy for the protection of culture, customs, and religion is seen as a barrier.⁵¹

The Hindu Marriage Act of 1955 needs to be interpreted and analysed to understand the complexity of the laws related to the union of homosexual couples. It seems likely that India's current laws on same-sex unions are designed in a way that does not expressly

⁵⁰ Singh, Ramveer, Decriminalization of Section 377 of Indian Penal Code, (2022).

⁵¹ Supreme Court's Same-sex Marriage Verdict In India: A Setback For Lgbtqia+ Rights (lawyersclubindia.com).

forbid homosexual unions. Hindu personal laws recognise same-sex weddings by any of the following methods:

1. Reading the current legislation to allow same-sex unions;
2. Reading that the LGBT community is a distinct group whose traditions also allow same-sex unions;
4. Amending the Act to enable same-sex relationships, or
3. Reading down the Hindu Marriage Act of 1955 to allow same-sex relationships because it would otherwise be declared unconstitutional.

It might not be appropriate to inquire as to whether a statute expressly prohibits homosexual marriage. Instead, the question that has to be answered is whether a homosexual couple can get married under the current legal system. Section 5 of the Code refers to the conditions necessary for a lawful marriage. It excludes the participants in marriage from using terms such as male/female or man/woman. Regarding two Hindus, Section 5 of the Code lists the prerequisites for a lawful marriage. It doesn't cover the use of specific terms by married partners, which are prerequisites for a lawful marriage. It doesn't cover using specific terms by married partners, such as man/woman or male/female. This section has no information regarding the partners' genders in a marriage: "A Marriage may be solemnised between any two Hindus..."⁵². The 1955 legislation lists the people who are allowed to get married under the law⁵³, but it makes no mention of any clauses expressly declaring that only heterosexuals can get married. Neutral phrases, such as "party" and "person," are used in other sections, but "bridegroom" and "bride" are used explicitly in sections 5(iii)⁵⁴ and 7(2)⁵⁵. The terms "bride" and "bridegroom" would undoubtedly represent two different gender roles that the persons prefer in partnerships rather than having to be understood as having a commonly accepted connotation. Gender norms (specifics) and the meaning of the two

⁵² The Hindu Marriage Act 1955 § 5.

⁵³ The Hindu Marriage Act 1955 § 2.

⁵⁴ The Hindu Marriage Act 1955 § 5, cl. iii.

⁵⁵ The Hindu Marriage Act 1955 § 7, cl. 2.

concepts are absent. It makes sense because the law is neutral save for the phrase "bride-and-bridegroom." Gender norms (specifics) and the meaning of the two concepts are absent. It is acceptable to argue that if gays are role-playing as groom and bride, they may be permitted by law to solemnise their union since the legislation is neutral save from the phrase "bride-and-bridegroom."

The use of ceremonies as proof of Hindu marriages is customary for partners to tie the knot without obtaining legal marriage licenses. Furthermore, records like images and videos confirm whether two people have been married. The importance of adhering to the ceremonies is emphasized.⁵⁶ A partnership acknowledged by society between two or more people is called marriage. If the ceremonies were not performed correctly, the union could not be recognised.⁵⁷

In the case of *Arunkumar and Sreeja v. Inspector General of Registration and Ors* (2019)⁵⁸ The Madras High Court stated that the Hindu Marriage Act of 1955 would recognise a legally consummated marriage between a man and a transwoman and that the marriage must be registered with the Registrar of Marriages. The decision refers to the NALSA⁵⁹ ruling, which maintained that transgender people were entitled to choose their “self-identified gender.”

This ruling is very progressive in light of the legal requirements included in the Hindu Marriage Act, particularly those about the "bride." According to the Hindu Marriage Act, section 5⁶⁰ definition of "bride" has dynamic meaning. A court of law can interpret a statute in light of the current situation. The gender statute framework has been examined, and conventional notions like "bride" and "bridegroom" have been construed. Despite being a paradigm shift for the state, the decision also grants the LGBTQIA+ population as a whole access to civil liberties like inheritance, marriage, and ancestry. *Supriya Chakraborty & Anr. V. Union of India* has briefly explained in the upcoming chapter covered facets of the terminology used in the Special Marriage Act, 1954, which are purposely discriminative towards the queer community's right to marry.

⁵⁶ The Hindu Marriage Act 1955 § 7.

⁵⁷ *Vishnu Prakash v. Sheela Devi*, 2001 4 SCC 729.

⁵⁸ *Arunkumar and Sreeja v. Inspector General of Registration and Ors* WP(MD) No. 4125 of 2019.

⁵⁹ *NALSA v. Union of India* W.P. (Civil) No. 400 of 2012.

⁶⁰ The Hindu Marriage Act 1955 § 5.

The right to form a union called “marriage”, which is legally recognised as a fundamental right, has been snatched away from the community. The right to marry a person of our choice was considered to come under the purview of the Right to life guaranteed under Art.21 in various instances where cis-gendered marriage rights were hindered. The case of **Lata Singh V. State of Uttar Pradesh**⁶¹ involving inter-caste marriage was the first case in which the Apex court dealt with marriage as a fundamental right. The Supreme Court ruled that a significant person has the right to marry another person of their choice. However, the recent judgment of the Apex Court leaves the country in a state of confusion where one has a series of questions to be answered. So, the right to marry a person of their choice was considered to be a fundamental right till the time it was restricted to heterosexuals? The moment queer people’s rights need to be recognised, then the decision came denies the right to marry as a fundamental right only?

So, the state agrees that queers and even transgender are citizens of India as much as cis-gendered males and females are. Since both are citizens, the fundamental rights guaranteed against the state by the Constitution of India are the same. Then, how can one portion of society be cornered, discriminated against and denied the right to have a family? The right to reject a particular set of people based on sex of a person to have a family is a violation of Fundamental rights under Art.14, Art.15, Art.19, & Art.21.

2.2 ADOPTION RIGHTS

Lesbian, homosexual, bisexual, and transgender (LGBT) people adopting children are surrounded by numerous societal and economic injustices in India. Although same-sex relationships have existed in India for a long time, the idea of one or more LGBT people adopting children is relatively new in our nation. While there are no explicit laws on the matter, there is a reasonable probability that these rights would soon be granted given the two seminal rulings from the Indian Supreme Court that acknowledged transgender people as belonging to the third gender ⁶²and decriminalised homosexuality⁶³ The Supreme Court of India ruled on April 15, 2014, that transgender individuals who are

⁶¹ (2006) 5 SCC 475.

⁶² National Legal Services Authority v. Union of India. [(2014) 5 SCC 438].

⁶³ Navtej Singh Johar v. Union of India ((2018) 1 SCC 791).

socially and economically disadvantaged are entitled to reservations in employment and education. The court also ordered the Union and State governments to frame welfare schemes for them.

HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

When read together with Section 11⁶⁴ of the HAMA (Hindu Adoption and Maintenance Act, 1956), Sections 7⁶⁵ and 8⁶⁶ address the qualifications needed for Hindu men and women adoption. In Sections 7 and 8 of the HAMA, the terms "spouse" and "wife" are explicitly used, implying that only heterosexual couples are legally allowed to adopt children. In addition, the statute says nothing about "third gender" adoption rights. Furthermore, a casual reading of the act makes it evident that gender is regarded in binary terms. HAMA allows single parents to adopt children. However, this would imply that the adopted child's other parent would have no legal rights.

The Hindu Adoptions and Maintenance Act, 1956, applies to all Indian citizens who identify as Hindu and those who practice Brahmo, Prarthana, Arya Samaj, or Virashaiva. Anyone else who is not a follower of the Jewish, Christian, Parsi, or Muslim religions is also subject to this Act. A significant Hindu of sound mind, whether single, widowed, divorced, or married, may make an adoption, per Section 7 of the Act. A Hindu husband who is married must get his wife's approval. Each wife's agreement must be obtained if a man has multiple wives. Section 8 states that a Hindu woman of sound mind, if she is of the status of spinster, widower, divorcee, or married, may adopt; in the case of a married woman, the husband's approval is required. A female adopting a male child would not be able to do so if there was not a 21-year age difference between them. This Act provides a broader definition of adoption by Hindu men and women, but it makes no mention of adoption by homosexual couples.

In Sections 7 and 8, the terms "spouse" and "wife" imply that same-sex adoption is not recognised by the Act. Additionally, the adoption process is clarified for Hindu men and

⁶⁴ The Hindu Adoption and Maintenance Act, 1956, s. 11.

⁶⁵ The Hindu Adoption and Maintenance Act, 1956, s. 7

⁶⁶ The Hindu Adoption and Maintenance Act, 1956, s. 8

Hindu women, allowing room for interpretation when it comes to the application of these rules to third-gender couples.

CARA

The Central Adoption Resource Authority (CARA) is a statutory body under the Ministry of Women and Child Development. It acts as the principal adoption agency for Indian children. It is also in charge of managing and controlling domestic and foreign adoptions. Adopting children in India is prohibited for foreigners in same-sex partnerships per the guidelines set forth by the Central Adoption Resource Authority.

The Juvenile Justice Act of 2015's section 68(c) allowed for the creation of the Adoption Regulations 2017, which superseded the Guidelines Governing Adoption of Children, 2015.

Applicants must fulfil the conditions outlined in Section 5 of the Adoption Regulation, 2017, to adopt under this. Section 5(2) gives parents the right to adopt regardless of marital status. Therefore, a single parent may adopt; married couples who want to adopt must have approval from both spouses. Same-sex couples would practically be seen as unmarried couples because same-sex marriages are frowned upon in India. Through policy, CARA has allowed live-in partners to file for adoption individually in recent years. The Adoption Regulations, 2017, in India state that a single man may only adopt a male child. In contrast, couples who have been married for two years or longer and single women are permitted to adopt children of either gender. Same-sex couples, transgender people, and live-in couples are not mentioned at all, almost like they don't exist. However, given the absence of a clear direction regarding whether or not same-sex couples can benefit from this circular, it may be reasonably believed that the authorities would reject their request.⁶⁷ In August 2014, the Union cabinet agreed to prevent adoptions by same-sex couples during their review of changes to the Juvenile Justice (Care and Protection of Children) Act, 2000. Since the Central Adoption Resource Authority (CARA) released stringent adoption standards, adopting has become more

⁶⁷ Nayaka, Ruthvik and Talawar, Naveen, Denied Dreams: The Struggle for Same-Sex Couples Adoption Rights in India (April 1, 2024).

challenging for even single individuals and unmarried couples.⁶⁸The Guardian and Wards Act of 1890 applies to foreign nationals, NRIs, and Indian citizens who identify as Muslims, Parsis, Christians, or Jews.

The two other ways that the LGBT community can have their children are through surrogacy and in vitro fertilisation (IVF), though there are restrictions on these as well. They also didn't favour the much-discussed Surrogacy (Regulation) Bill 2020, which the cabinet passed. This Bill outlawed commercial surrogacy altogether and limited the use of altruistic surrogacy to married Indian couples, married Indian couples of Indian origin, and widowed or divorced Indian single women. The LGBTQ+ group, most single parents, and live-in couples are all entirely excluded from this. In addition, India already faces challenges due to its rapidly expanding populace. This is just one more justification for the community to be granted adoption rights.⁶⁹

The general misconception following the trial of queer people having the right to adopt is that the child will face prejudice because of the sexual orientation of the parents. This is a web form of lies and blatant ignorance of the presence of homosexuality. Children flourishing in a family of queer will allow them to be more open-minded. Gender norms don't seem to affect homosexual parents' kids as much as they would have in a heterosexual home.

Experts in medicine, psychology, and social welfare have concluded that children raised in stable same-sex households have equally good adjustment profiles as children raised by heterosexual parents. One of the main advantages of same-sex parenting is this. The American Psychological Association states that there is no connection between a parent's sexual orientation and their child's "adjustment, development, and psychological well-being." Happily, healthful surroundings where children feel safe, secure, and loved are conducive to their growth and well-being.⁷⁰

⁶⁸ Nayantara Ravichandran, Legal Recognition of Same-Sex Relationships in India, Manupatra (Oct. 9, 2018), <http://docs.manupatra.in>.

⁶⁹ Paul, N. (2022). When love wins: Framing analysis of the Indian media's coverage of Section 377, decriminalization of same-sex relationships. *Newspaper Research Journal*, 43(1), 7-28.

⁷⁰ Benefits of same sex parenting, <https://www.creatingfamilies.com/benefits-of-same-sex-parenting>.

Hence, it is evident from these current provisions that the laws are predicated on the standards of patrilineal, patrilocal and heterosexual society, and none of them make any explicit or implicit reference to the rights of adoption for the nation's sexual minorities. According to the Supreme Court, the Indian Constitution is violated when someone discriminates against someone based on their sexual orientation. Furthermore, this blatantly violates the gender equality guaranteed by Articles 14 and 15 of the Indian Constitution.

3. LEGAL LANDMARKS AND MILESTONES

3.1 INDIA

a) **Naz Foundation v. Government of NCT of Delhi (2009)**⁷¹:

The petitioners are NGO that deals with HIV/AIDS intervention and prevention. The petitioner contended that the Section 377 comes from the Jeudo- Christian moral and ethical standards according to which sex has only one purpose that is for procreation. According to the petitioner, Section 377 of the IPC symbolically obstructs efforts to prevent HIV/AIDS and to provide access to care for those in need of it, as well as encouraging discriminatory attitudes, abuse, and harassment towards the LGBT community. Simultaneously, a coalition of Delhi-based human rights, women, and LGBT campaigners called "Voices Against 377" entered the case and supported the move to "read down" and repeal Section 377 in order to exclude adult consensual sex from its meaning. Lord Macaulay drafted the Indian Penal Code, which was implemented throughout British India. In this instance, rulings from *Lohana Vasantlal Devchand v. State*⁷² and *R v. Jacob*⁷³ are cited. The court determined that having oral intercourse or sticking the penis inside the mouth would not violate Section 377 in any of the two cases. The primary dispute in this case is that the English criminal law, which forms the basis of the Indian penal code, decriminalizes unnatural sex; however, the British Sexual Offenses Act of 1967 decriminalized homosexuality and acts of sodomy between two adults (above the age of 21). It should be mentioned that the belief in the realms of psychology and psychiatry was that homosexuality was no longer a sickness and that a person's sexual orientation should be a fundamental component of who they are. Section 377 of the Indian Penal Code has a significant impact on the lives of homosexuals by driving them underground and perpetuating social stigma. This puts attempts to prevent HIV/AIDS at risk and increases the risk of HIV/AIDS among gay males. Section 377 of the IPC prohibits homosexuality, which is discriminatory based on sexual orientation.

⁷¹ 2009 (6) SCC 712

⁷² AIR 1968 GUJ 252.

⁷³ (1817) Russ and Ry 331 C.C.R.

This case stands out in that two opposing affidavits from different wings of Union of India which were submitted. First, the Ministry of Health and Family Welfare urged that Section 377 of the Indian Penal Code, 1860 remain in place, while the Ministry of Home Affairs (MHA) attempted to defend its removal. This lawsuit also cites the "Bangalore incident 2004" as evidence of instances of LGBT people being tortured while in custody. Eunuch (Hijra) from Bangalore was the victim of torture in this instance. A group of hooligans forced this hijra to have oral and anal sex and subjected her to gang rape. After that, the hijra was brought to a police station, where he was stripped completely nude, tied to a window, and subjected to severe torture just because of her sexual orientation. In the case of *Jayalakshmi v. State of Tamil Nadu*⁷⁴, the individual was himself was subjected to abuse and coercion by law enforcement officials on the grounds that they suspected him of being involved in the theft.

The decision of the Canadian Supreme Court is cited in this ruling⁷⁵. According to this definition, having self-respect and self-worth makes a person or group feels that they have human dignity. Integrity and empowerment on a psychological and bodily level are important concerns. Unfair treatment based on personal characteristics or external circumstances unrelated to a person's needs, abilities, or merits violates human dignity. Laws that are considerate of the needs, abilities, and merits of various people while taking into consideration the circumstances that underlie their disparities improve it.

It has been established that the right to privacy protects a person's personal space. This is the capacity to operate independently. "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor and reputation," states Article 12⁷⁶ in this context. Everyone is entitled to legal defense against these kinds of assaults and interference." In this context, privacy is further defined by Article 17, which states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor and his reputation." According to Article 7⁷⁷ of the European Convention on Human Rights, everyone has the right to respect for their home, their communications,

⁷⁴ (2007) 4 M U 849.

⁷⁵ *Law v Canada (Ministry of Employment and Immigration)*, 1999 1 SCR 497.

⁷⁶ Universal declaration of human rights 1948.

⁷⁷ European Convention on Human Rights, 1950.

and their private and family lives. No public authority may interfere unless it is required by law, is necessary in a democratic society, or is for the benefit of national security, public safety, the nation's economic well-being, or the individual's health or morals.

Studies carried out across the globe, including in India, demonstrate that making practicing homosexuality illegal has a detrimental effect on these people's lives. Even when the laws are not upheld, homosexual men and women are reduced to what called "Un apprehended felons." Consequently, discrimination is encouraged, and stigma grows stronger in various areas of life. Aside from suffering and terror, a few more clear outcomes include discrimination, extortion, blackmail, and harassment.

The "state shall fulfil everyone's right to the highest attainable standard of health," is mentioned according to Article 12⁷⁸. In its interpretation of article 21 of the Indian Constitution in the context of article 12, the Supreme Court of India ruled that the fundamental right to life includes the right to health.⁷⁹ According to the National AIDS Control Organization, section 377 poses a significant obstacle to effective public health interventions. According to NACO, people in the high-risk group are typically unwilling to disclose same-sex behavior because they are afraid of law enforcement authorities. This keeps a sizable portion of the population hidden and inaccessible, which increases the number of infection cases and makes it extremely difficult for public health personnel to address.

The stigma and provision attached to consensual sex between two adults make people in the community crippled behind curtains and not getting cured. The petitioners submitted Art.21 being violated as the right to privacy comes under the purview of the right to life and liberty. They also contended that Art. 14,15 and 19 were violated.

The Delhi High Court rendered a historic ruling in the Naz Foundation case in 2009, decriminalising consensual homosexual sex between adults and ruling that Section 377 of the Indian Penal Code infringed upon the fundamental rights of LGBT people. The court reasoned that making same-sex relationships illegal violates people's rights to equality,

⁷⁸ The Constitution of India,1950,Art.12..

⁷⁹ (1996) 4 SCC 37.

dignity, and privacy, all of which are necessary for expressing one's sexual orientation and identity. It was decided by a two-judge bench, which stated that criminalising sexual acts between homosexual adults results in a violation of fundamental rights. The court said that public morality is not the basis of changing the laws, but constitutional morality is.

Hopefully, the Delhi High Court's adherence to the constitution would be upheld by the Supreme Court of India in the Naz Foundation case. It may also decide to bolster some of the less persuasive reasons that the ruling accepts.⁸⁰ The verdict is a cause of immense excitement for the heretofore-suppressed sexual minority. It forms a source of deliverance on two separate planes: it decriminalises sexual interactions between homosexuals and concurrently provides as a source of protection against abuse and vilification at the fingers of the protectors of the state. It also provides protection of the sexual minorities from numerous medicinal illnesses by exposing their predicament in the morals of the government. As Justice Michael Kirby stated, the fundamental cause of high instances of HIV/AIDS amongst homosexuals was owing to the lackadaisical attitude of the state regarding the wellbeing of homosexuals.⁸¹ The judgment's constitutional issues provide significant material for consideration in addition to its social ramifications. The court determined that several fundamental rights stated in Part III of the constitution were violated by the contested law. Major modifications brought about by the ruling include the incorporation of sexual preferences within the scope of one's right to life and personal liberty, the application of equal protection under the law to sexual minorities, and the recognition that prejudice against them violates their right against bias.

⁸⁰ Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity*, 2 NUJS L. REV. 505 (2009).

⁸¹ Michael Kirby, *AIDS and Human Rights*, 1 AUSTL. GAY & LESBIAN LJ 3 (1992).

b) Suresh Kumar Koushal v. Naz Foundation⁸²

This case rejected the Delhi High Court's arguments and maintained the legality of Section 377. The Supreme Court ruled that there is no evidence of discrimination or harassment of LGBT people by the government or society and that Section 377 does not violate any constitutional rights. It was overturned by was overturned by a two-judge Supreme Court panel made up of Justices G. S. Singhvi and S. J. Mukhopadhaya, and Section 377 of the IPC was restored.

After the milestone judgment of Naz foundation v. Nct of Delhi, which decriminalized sexual activities amongst homosexuals, and held that s.377 of the Indian Penal Code is unconstitutional; an appeal was filed in the Supreme Court. This decision was appealed against in the case of Suresh Kumar Koushal v. Naz Foundation with the claims that decision given by the Delhi High Court is not right.

Issues which were raised in this case were regarding the fact that Article 14, article 15, and article 21 of the Indian constitution's fundamental rights were violated, and these were the main concerns that came before the court for consideration. Is section 377 legally legitimate or unconstitutional because it contradicts any of the requirements pertaining to part III (art. 12 to 35) of the Indian Constitution? Does Article 21 of the Indian Constitution, which protects the right to life and personal liberty, get in the way of section 377's criminalization of two adults having sex in private? Does the high court have a good reason to consider the section 377 challenge?

The appellant's argued that The high court erred significantly when it declared that section 377 violated articles 14, 15, and 21 of the constitution. This is because the court disregarded important details from the respondent's petition that are necessary to determine whether a legislative provision is constitutional. The documentary evidence that was provided in its place did not support the conclusion that the statute discriminatorily targeted gays.

⁸² CIVIL APPEAL 10972 OF 2013.

Additionally, the appellant claimed that the data was fake and constructed. Furthermore, the statistics provided by the petitioners were inadequate to conclude that decriminalizing section 377 would result in a reduction in the number of cases of HIV/AIDS and that it has a negative impact on HIV/AIDS control. Gender-neutral, voluntary acts of carnal intercourse are covered under Section 377 of the IPC. Since the statute does not specifically target any class, no categorization is being created, making the high court's ruling that the bill violated article 14 baseless. Because Section 377 does not specifically specify any gender or group of persons, it does not violate Articles 14, 15, and 21 of the Indian Constitution. Sec. 377 does not infringe upon Article 21's right to privacy and dignity since it does not provide the freedom to commit any wrongdoing.

The approval of the law will have a negative impact on India's social structure, marital institution, and youth by tempering their attitudes about gay behaviors. By definition, courts are not supposed to enact laws; that responsibility belongs to legislatures. Since there is a constitutional presumption in favor of the law as long as it is in the laws of the land, the top court was unclear whether it was upholding the legislation or just reading it down. Parliament should have the authority to determine whether a legislation is moral or immoral.

On the other hand, the respondent's contentions contained arguments that Section 377 is being used to justify discrimination against LGBT people and is based on traditional Judeo-Christian morality and ethical norms. Section 377 criminalizes profound personal qualities, including sexual orientation, with the intention of targeting LGBT people. Article 21 guarantees human rights, including the right to sexual orientation and rights. LGBT people are denied full civil rights under Section 377. The criminalization of sexual activities between two adults of same-sex or heterosexual with consent is a violation of articles 14, 15 and 21 of the constitution of India. A fundamental part of the human experience is sexual closeness, and making homosexuals' sexual behavior illegal denies them this opportunity while allowing heterosexuals to enjoy it. Criminalization makes LGBT persons more stigmatized and discriminated against, and it hinders HIV prevention initiatives. Section 377 is unconstitutionally expansive, gives the police the authority to make policies, and leads to the harassment and violation of LGBT people's

rights. Sec. 294 recognizes the distinction between lewd behavior in public and private settings. It need to be scrutinized in the context of the constitutional requirements pertaining to the right to privacy.

The Supreme Court's two-judge panel granted the appeal and reversed the Delhi High Court's ruling in the Naz Foundation case.

In the end, the Supreme Court rejected the petition submitted by the respondent, concluding that section 377 of the IPC does not violate the Indian Constitution. The Supreme Court ruled that carnal intercourse which is defined as unnatural lust should be penalised and that section 377 does not violate articles 14, 15, and 21 of the Constitution. The Delhi High Court incorrectly relied on international precedents in its eagerness to defend the rights of LGBT community peoples, notwithstanding the Supreme Court's declaration that a negligible portion of the nation's population identifies as LGBT. According to Justice Sanghvi, as section 377 was passed before the Constitution, parliament would have long since repealed it if there had been any breach of the rights outlined in part III of the Constitution. The Supreme Court ruled that section 377 of the IPC does not have any constitutional flaws, and it is up to the appropriate legislature to determine whether it would be desirable and legal to remove the section from the statute book or amend it to permit sensual sexual relations between two adults of the same sex.

After analyzing one can clearly see that Article 21 of the Indian Constitution protects private, voluntary relationships, hence Section 377 is irrational because there is no compelling state interest to support the restriction of a basic freedom. It is evident that Section 377 violates Article 14 for two reasons: first, the criminalization of non-procreative sexual relations was unjust, absurd, and arbitrary; and second, the legislative intent of punishing "unnatural" acts had no rational connection to the distinction between procreative and non-procreative sexual acts. As a result, Section 377 denies a homosexual person their right to full personhood, which is ingrained in the notion of life under Article 21 of the Constitution. The Court reaffirmed that "personal liberty" has "the widest amplitude and it covers a variety of rights which go to constitute

the personal liberty of a man" in the case of *Maneka Gandhi v. Union of India*⁸³. It must be noted that the Indian Constitution is a less strict document and that it is entirely in the spirit of it to protect every community's, individual's dignity, and well-being, despite the allegation that its approval would negatively impact India's social composition and the basis of marriage.⁸⁴

It is depressing to note that this not-so-minuscule portion of humanity's human rights are discouraged and disregarded by the ultimate defender of fundamental freedoms. It's also critical to note that the Supreme Court primarily focused on criticizing the High Court's decision-making rather than devoting any time to considering how Article 21 applied to Section 377. It shows majoritarian approach of the courts by diminishing the rights of minorities and quoting them as not even a fraction of the society. It reflects on how basic human rights can be snatched away easily if a community is not in majority.

In this regard, Koushal differs greatly from Naz. These rulings seem to be from different universes, despite the fact that they were rendered by two judge benches and appeal courts within a brief period of four and a half years. Koushal's usage of the insulting terms "minuscule fraction" and "so called LGBT rights" will live on in his legacy. Naz, on the other hand, will be recognized for its revolutionary use of the terms inclusion, autonomy, dignity, and self-determination in the context of constitutional morality.⁸⁵

⁸³ AIR 1978 SC 597.

⁸⁴ Chandrika, *Suresh Kumar Koushal & Another v. Naz Foundation & Others*, 1 INT'L J.L. MGMT. & HUMAN. 192 (2018).

⁸⁵ Siddharth Narrain, *Lost in Appeal: The Downward Spiral from Naz to Koushal*, 6 NUJS L. REV. 575 (2013).

c) Navtej Singh Johar v. Union of India⁸⁶

Navtej Singh Johar, a dancer from the LGBT community, and four other people filed a writ on April 26, 2016, challenging the constitutional validity of Section 377 of the IPC, which makes it illegal for same-sex adults to have private, consenting sexual relations. The petitioners requested in their prayer that the "right to sexuality," "right to sexual autonomy," and "right to choose a sexual partner" be declared to be an extension of the right to life protected by Article 21 of the Indian Constitution. The petitioners further requested that Section 377 of the Indian Penal Code be declared illegal.

The respondents contended that since Section 377 of the IPC only specifies a specific crime and its penalty, it does not contradict Article 14 of the Constitution. The State retains the authority to decide which individuals should be considered members of a class for the purposes of the legislation. Article 15 of the Constitution, which forbids discrimination on the basis of caste, religion, race, sex, and place of birth rather than only sexual orientation does not conflict with Section 377 of the Indian Penal Code. The right to privacy cannot be extended to allow people to engage in unnatural offences and so get HIV/AIDS. Individuals who engage in unnatural sexual practices that are illegal under Section 377 of the IPC are more susceptible to HIV/AIDS. It is well within the state's competence to impose reasonable limitations on carnal contact between two people, as it is offensive, harmful, and against the natural order. Section 377 of the IPC criminalizes this offence, which implies sexual perversity. After considering the legal systems and values that were prevalent in ancient India, Section 377 of the IPC was added. Given the current circumstances, this section is more pertinent from a legal, ethical, moral, and constitutional standpoint. Decriminalising Section 377 of the IPC will destabilise the family structure, negatively impact marriage, unleash a plethora of societal problems that the legal system cannot handle, and have a domino effect on already-existing laws.

The bench determined that Section 377 violates Articles 14 and 15 of the Constitution by discriminating against people based on their gender identity and/or sexual orientation. Furthermore, they determined that Section 377 infringes upon Article 21's guarantees of

⁸⁶ AIR 2018 SC 4321.

life, dignity, and the freedom to make one's own decisions. Ultimately, they established that it impedes the complete understanding of an LGBT person's identity by going against Article 19(1)(a) right to freedom of expression. They all cited the Court's recent rulings in Justice K.S. Puttaswamy v. Union of India⁸⁷ (recognized fundamental right to privacy) and NALSA v. Union of India⁸⁸ (recognized transgender identity).

In the 2013 case of Suresh Kumar Koushal v Naz Foundation⁸⁹, the Court affirmed Section 377's constitutionality. The Bench concluded that Suresh Koushal had not only failed to understand how Section 377 breaches fundamental rights but also that the section depended on a justification that is unconstitutional. Suresh Koushal employed the tiny minority argument, which maintains that the Court does not need to become involved because Section 377 only has a detrimental effect on a small proportion of individuals. The fundamental rights of all citizens are guaranteed by the Constitution, regardless of their gender identity or sexual orientation. The protection of "constitutional morality," not "popular morality," is the Court's primary concern.

Therefore, the five-judge Indian Supreme Court panel consisting Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice Rohinton Fali Nariman, Justice D.Y. Chandrachud and Justice Indu Malhotra unanimously ruled that Section 377 of the Indian Penal Code, 1860 was unconstitutional as it is related to adults having consenting sexual relations in private.

The five-judge bench held that the Constitution must direct society's transformation from an old-fashioned to a modern society where Fundamental Rights are enthusiastically guarded, that is, the idea of "Constitutional morality" over "social morality." They did this by drawing on the ideas of transformative constitutionalism as well as progressive understandings of rights.

They stated that there was no justification for Section 377's survival because its justification was derived from Victorian morality, which has long since passed into history. According to Justice Chandrachud's opinion, the LGBT community will face

⁸⁷ (2017) 10 SCC 1.

⁸⁸ AIR 2014 SC 1863.

⁸⁹ CIVIL APPEAL 10972 OF 2013.

marginalization from health services and an increase in HIV prevalence if Section 377 remains in place. Consequently, the law should uphold and defend the community's right to equal citizenship in all of its forms rather than discriminating against same-sex relationships. Additionally, it was decided that "spatial and decisional privacy" is protected under the right to privacy and that HOMOSEXUALITY is "not an aberration but a variation of sexuality."⁹⁰

Without a question, the decision rendered in the Navtej Johar case is historic. The verdict has allowed homosexuals to live in a more respectable atmosphere and to express themselves freely. The ruling also highlighted how people's rights are gradually being realized. But is this the end of the issue? The short answer is "no," since there is still discrimination against homosexuals due to a lack of appropriate legislation. Although the government has been directed by the court to take specific actions to protect the rights of gays, no such actions have been implemented.

⁹⁰ Sandra Sachin, *Case Analysis: Navtej Singh Johar v. Union of India*, 1 LAW ESSENTIALS J. 70 (2021).

d) National Legal Service Authority vs. Union of India⁹¹

Members of the transgender community have asked for a formal declaration of their gender identity in this case. That group also includes Hijras/Eunuchs, who assert legal status as a third gender with full constitutional and legal protections.

The National Legal Services Authority has come out to support their cause by offering free legal services to the weaker and other marginalized groups in society.

Laxmi Narayan Tripathy, a Hijra, brought attention to the trauma that Tripathi had experienced from birth. Despite being born a man, she felt unique from other boys her age and had feminine traits. She experienced frequent molestation, sexual assault, and harassment from both family members and outsiders. Everybody repeatedly called her a "chakka" and a "hijra," abusing her. In her late teens, she began to dress and appear in public in women's clothing, but she did not consider herself a woman. She afterwards became a part of Mumbai's Hijra community.

Siddarth Narrain discovered in his tenth grade that he could only become a member of the Hijra community after learning from his family that he had been struck with a cricket bat. He managed to leave his house and move in with some Hijras.

TG Sachin also shared his feelings about being perceived as a girl by his parents when he was younger and enjoyed wearing makeup. He used to assist his mother with cleaning, cooking, and laundry, but when people saw this, his relatives and neighbours made fun of him, scolded him, and made him feel bad about himself.

These were merely a select few who lived extravagant lives; many others shared their experiences of daily assault. The applicant, a hijra, has experienced severe discrimination due to their gender identification throughout their life. The Applicant has demonstrated that the State's complete non-recognition of hijras' and transgender people's identities has led to a breach of the majority of the fundamental rights that the Indian Constitution guarantees to them.

⁹¹ AIR 2014 SC 1863.

It is evident that the primary concern raised by these petitions is "Gender Identity." It has two aspects, namely: Whether a person who identifies as female but was born as a man (or vice versa) has the right to alter his or her sex after undergoing an operating procedure and to be acknowledged as a woman as per his or her choice. Is it appropriate for transgender people to be called "third genders"?

The court decided that Hijras and Eunuchs should be recognized as "third gender" in addition to binary gender in order to protect their rights under Part III of our Constitution as well as laws enacted by the State Legislature and Parliament. The freedom of transgender individuals to choose their gender identification is also respected, and state and federal governments are required to officially acknowledge transgender identities as male, female, or third gender. There were directions given to the Central Government and the State Governments, regarding making them as socially and educationally backward classes, and to grant them all forms of reservation when it comes to public appointments and entrance to educational institutions. The issues that Hijras and transgender people confront, including fear, embarrassment, gender dysphoria, depression, social pressure, suicide thoughts, and any insistence that revealing one's gender is unethical and illegal, should be taken seriously by the federal and state governments. The federal and state governments ought to take appropriate action to ensure that transgender patients receive medical attention in hospitals as well as private lavatories and other amenities. In the transgender community's history, this case made significant historical waves. For the first time, the case dealt with the rights and legal standing of transgender people in society. This led to this population being acknowledged as the "third gender" and receiving equal legal protection for issues pertaining to employment and admittance into public areas. The goal of the litigation is to provide the transgender community equal recognition. In common law jurisprudence, the Supreme Court's ruling is convincing. The lawsuit addressed a topic that society and occasionally the law have mostly ignored or undervalued. In the constitutional history of law, the case resulted in a landmark ruling.⁹²

⁹² Pragati Verma, *National Legal Services Authority vs Union of India - Position of Concept in Other Countries*, 1 JUS CORPUS L.J. 123 (2021).

3.2 USA

The United States of America has seen immense shift in the are of LGBTQIA+ rights.Over the past century, and particularly in the last two decades, the LGBTQIA+ rights movement in the United States has made significant progress. ⁹³Legal restrictions on homosexual behavior have been overturned, allowing lesbian, gay, bisexual, transgender, and queer people to serve in the armed forces freely. Additionally, all 50 states now allow same-sex couples to marry and adopt children legally. However, the journey for supporters of homosexual rights, who continue to push for housing, jobs, and transgender rights, has been a long and rocky one.⁹⁴ The major cases that helped in shaping laws relating to queer rights are:

a) One, Inc. v. Olesen (1958)⁹⁵

In this case, the rights of queer people intertwined with freedom of speech were discussed. The first “homophile” group was formed in Mattachine society giving rise to a magazine named “One: The homosexual magazine”. After the publication August and October editions were seized by the post authority of Los Angeles, with the claims that it is obscene.

The Supreme Court ruled out lower court’s decision and said that the materials which are targeted toward gay readers are not obscene in nature. This case provided right to publish to people belonging to sexual minority.

b) Baker v. Nelson (1972)⁹⁶

Two men from the University of Minnesota students filed a marriage application, leading to the lawsuit. Based on a state statute that limited marriage to "persons of the opposite sex," the clerk denied the application. The couple subsequently sued Gerald Nelson, the clerk, claiming that he had violated their First and Ninth Amendment "privacy rights" and

⁹³ Carlos A. Ball, The Right to Be Parents: LGBT Families and the Transformation of Parenthood, 24 Colum. J. Gender & L. 1 (2013).

⁹⁴ David W. Austin, Not Just a Common Criminal: The Case for Comprehensive Federal Hate Crimes Legislation, 42 Harv. C.R.-C.L. L. Rev. 301 (2007).

⁹⁵ 355 U.S. 371

⁹⁶ 291 Minn. 310.

their rights to equal protection and due process under the Fourteenth Amendment. A lower court rejected the arguments and maintained the application's refusal. "The appeal is dismissed for want of a substantial federal question" was the Supreme Court's lone ruling. The justices did not hold oral arguments or offer a justification for their ruling.

The Court did, however, uphold the lower court's decision that the same-sex couple did not have a basic right to marriage. Because of this, those who oppose same-sex marriage have been using it as support for their claims for more than 30 years. They contend that *Baker v. Nelson* lends credence to the idea that states and the federal government can define marriage as a partnership between people of different sexes, as Minnesota did without violating the rights of equal protection.

c) *Romer v. Evans* (1996)⁹⁷

The case concerned a Colorado law change that forbade local governments from enacting anti-discrimination statutes that would have protected gay and bisexual persons. The Court decided, 6-3, that the statute violated the equal protection clause of the 14th Amendment because it discriminated against a certain population. "The Colorado law goes well beyond merely depriving homosexuals of special rights, even if, as the state contends, homosexuals can find protection in laws and policies of general application," Justice Anthony Kennedy said in the majority opinion. It places a general disability on those people only, prohibiting them from pursuing particular legal protection while allowing others to do so.

d) *Boy Scouts of America v. Dale* (1996)⁹⁸

In the same year that the Supreme Court ruled that laws may not discriminate against LGBTQ persons, the court also examined whether a private group could do the same with regard to particular regulations, ruling in that organization's favor.

James Dale, an assistant scoutmaster and Eagle Scout, was expelled from the Boy Scouts of America in 1990 after it was revealed in a newspaper that he was a key member of the

⁹⁷ 517 U.S. 620.

⁹⁸ 530 U.S. 640.

Rutgers University Lesbian/Gay Alliance. The New Jersey Supreme Court originally ruled in favor of Dale, citing the Scouts' violation of the state's anti-discrimination statute. However, the Supreme Court later reversed that ruling, voting 5 to 4. The Scouts' First Amendment right to freedom of association would be violated, the Court determined, if they were forced to readmit Dale.

The Boy Scouts claim that homosexual behavior is against the principles outlined in the Scout Law and Oath, especially those denoted by the terms "clean" and "morally straight," and that they have no intention of endorsing homosexual behavior as a suitable way to behave. In the Court's judgment, Justice William Rehnquist stated, "The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression."

e) Lawrence v. Texas (2003)⁹⁹

Lawrence and Garner, who were represented by Lambda Legal, entered a plea of not guilty on November 20 and forfeited their right to a trial. They were found guilty by Justice of the Peace Mike Parrott, who also assessed a \$100 fine and \$41.25 in court costs for each offender. The defense lawyers asked the judge to impose a heavier sentence after realizing that the fee was less than what was necessary to allow them to appeal the verdicts. Judge Parrott, with the prosecutor's approval, raised it to \$125. The judge and all of the parties were aware that a constitutional challenge would be made in this case.

In the course of the appeal, lawyers argued that the legislation was unconstitutional because it forbade sodomy between same-sex couples but not between heterosexual couples, and they requested the court to drop the charges against Lawrence and Garner on the grounds of equal protection under the Fourteenth Amendment. They also argued that the Supreme Court's ruling in *Bowers v. Hardwick* was "wrongly decided" and that people have a right to privacy. Judge Sherman Ross turned down the defence's requests for dismissal on December 22. Once more, the accused entered a "no contest" plea. Ross penalized them \$200 apiece, the sum that had been prearranged by both parties.A

⁹⁹ 539 U.S. 558

three-judge Texas Fourteenth Court of Appeals panel heard the case on November 3, 1999. In a 2-1 ruling on June 8, 2000, they declared the Texas statute unconstitutional. The Equal Rights Amendment of the Texas Constitution, which forbids discrimination based on the basis of sex, race, color, creed, or national origin, was determined to have been violated by the statute, according to Justice John S. Anderson and Chief Justice Paul Murphy. Hudson J. J. dissented the judgment.

The Court of Appeals conducted a review of the case. It overturned the three-judge panel's ruling and affirmed the law's legality on March 15, 2001, without holding oral arguments. It rejected the substantive grounds for equal protection and due process. However, attorneys for Lawrence and Garner chose to go one step further and requested that the case be reviewed by the Texas Court of Criminal Appeals, which is Texas' highest criminal appeal court. On April 17, 2002, a year later, the request was turned down. The majority opinion was written by Justice Anthony Kennedy, with concurrence from Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. The Court found in the majority ruling that homosexuals' moral and sexual choices should be protected by the constitution and that they have a protected liberty interest to participate in private sexual behavior. Ultimately, the court ruled that Texas's law that made sodomy illegal was not justified by moral objections. "Respect for the petitioners' private lives is due. By criminalizing their private sexual activity, the State cannot diminish their existence or dictate their future."

The majority opinion's justification rested on a historical analysis of the laws that outlawed specific sexual behaviors, regardless of the genders of the participants. Justice Kennedy cited cases from the European Court of Human Rights in *Case of Dudgeon v. United Kingdom* (1981)¹⁰⁰, the Wolfenden Report (1963)¹⁰¹, and the Model Penal Code's recommendations from 1955 onwards. "Bowers was not correct when it was decided, and it is not correct today," he said, endorsing the arguments Justice Stevens had made in his dissent in that case. It should not be a legally enforceable precedent. *Bowers v. Hardwick*¹⁰² ought to be overturned, and it is." The majority opinion also declares that the

¹⁰⁰ [1981] ECHR 5.

¹⁰¹ Wolfenden Report - UK Parliament

¹⁰² 478 U.S. 186

private, adult consenting behavior in question was a portion of the liberty safeguarded by the substantive due process guarantees of the Fourteenth Amendment. According to Justice Kennedy, homosexuals "may seek autonomy for these purposes", and the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, and child-rearing." The anti-sodomy law was declared unconstitutional by the court, which held that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual". Justice Kennedy made it clear that this ruling primarily addresses private sexual behavior: There are no minors involved in this case. It does not include people who could be harmed, forced to assent, or in situations where refusing consent could be difficult. Prostitution or public behavior are not included. It is unrelated to the question of whether the government must formally recognize every partnership that a gay person wishes to enter.

Parallelism: In a concurring opinion, Justice Sandra Day O'Connor provided an alternative justification for the Texas sodomy statute's invalidation. She disagreed with the decision to reverse *Bowers* and questioned the court's interpretation of the due process protections of liberty in this particular case, while being one of the justices in the majority in *Bowers*. Justice O'Connor took a less conflicting stance, arguing that she would overturn the legislation because it criminalized male-to-male sodomy but not male-to-female sodomy, and that sexuality should not be covered by protected liberty. She believed that although sodomy laws that were neutral in their application and effect might be constitutional, there was nothing to worry about because "democratic society" would not put up with them for very long. O'Connor pointed out that as long as a legislation was created to "preserve the traditional institution of marriage" and not only because the state disapproves of homosexuals, it would stand up to logical examination.

Dissension:

Chief Justice William H. Rehnquist, Justice Clarence Thomas, and Justice Antonin Scalia all dissented. Scalia disagreed with the Court's decision to reexamine *Bowers*, citing a plethora of lower court rulings that were based on *Bowers* and may now require

re-examination. He also made the argument that *Roe v. Wade*¹⁰³, which three Justices in the Lawrence majority had supported in *Planned Parenthood v. Casey* (1992)¹⁰⁴, could have been overturned using the same reasoning as was used to overturn *Bowers*.

State laws prohibiting bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity would not hold up, according to Scalia, who also stated that "today's opinion is the product of a Court, that is the result of a law-profession culture, that has predominantly signed on to the so-called homosexual goals, by which I mean the agenda promoted by some homosexual activists directed at eradicating the moral contempt that has traditionally associated with homosexual conduct."

f) United States v. Windsor (2013)¹⁰⁵

One of the main cases that led to marital equality was the present one. The Defense of Marriage Act (DOMA) of 1996's definition of marriage as a "legal union between one man and one woman as husband and wife" was struck down by the court.

The case examined the circumstances surrounding Edith Windsor and Thea Spyer, who were wed in Canada and later relocated to New York, a state that acknowledged their union. Windsor's tried to apply for a surviving spouse tax exemption when Spyer passed away, but DOMA denied them. The Supreme Court decided, 5-4, that DOMA is unconstitutional because it circumvents equal protection and due process rights. As a result, the US was mandated to reimburse Windsor's taxes.

The main result of DOMA is to separate and dehumanise a portion of state-approved unions. According to Justice Kennedy's reasoning, "the main goal is to enforce inequality, not for other objectives as governmental efficiency."

¹⁰³ 410 U.S. 113

¹⁰⁴ 505 U.S. 833 .

¹⁰⁵ 570 U.S. 744 .

g) Obergefell v Hodges (2015)¹⁰⁶

It is a significant ruling by the US Supreme Court recognizing same-sex couples have a fundamental right to marriage protected by the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution. The District of Columbia, the fifty states, and the Insular Areas must perform and recognize same-sex marriages on the same terms and conditions as opposite-sex marriages, with all the rights and obligations accompanying them. This is mandated by the 5-4 verdict. Before Obergefell, same-sex marriage was already legalized in 36 states, the District of Columbia, and Guam through legislation, judicial decisions, or citizen initiatives.

Justice Kennedy concluded the Court's ruling that:

Since marriage embodies the highest ideals of love, faithfulness, commitment, sacrifice, and family, it is the most meaningful relationship possible. When two people get married, they grow into something more than they were before. Marriage symbolizes a love that may last beyond death, as several of the petitioners in these cases show. Saying that these men and women turn down the institution of marriage would be incorrect. They beg that they respect it, so much so that they are on a mission to fulfill it for themselves. Their desire is not to be cast out of one of the oldest institutions of society and forced to live in loneliness. They demand equal treatment in terms of dignity. They have that right under the Constitution.

¹⁰⁶ 576 U.S. 644

4. THE RECENT JUDGMENT REGARDING MARRIAGE AS A FUNDAMENTAL RIGHT: A CRITICAL ANALYSIS:

Supriya Chakraborty & Anr. V. Union of India¹⁰⁷

The present case dealt with various issues, including Marriage and adoption rights of the LGBTQIA+ community. This chapter critically analyses the case of Supriyo @ Supriya Chakraborty & Anr. v. Union of India; the Supreme Court's landmark decision was delivered on 17 October 2023, is the first substantive decision to address whether LGBTQ individuals have a fundamental right to marry or form a legally recognised partnership under the Indian Constitution. LGBTQ people filed many petitions with the SC, contesting gendered language in marriage statutes that bar same-sex unions and demanding recognition of their equal right to marriage alongside heterosexuals.

There was a 5 judge bench delivering the judgment, including D.Y. Chandrachud CJI, S.K. Kaul J., S.R. Bhat J., Hima Kohli J., P.S. and Narasimha J. There was disagreement. The majority, led by Chief Justice Dr. D. Y. Chandrachud, acknowledged a constitutional right to a union but not a right to marry in and of itself. Because of the Court's institutional constraints, the decision instructs the Union government to form a committee to determine the extent of rights for queer couples in unions. Still, it does not explicitly recognise same-sex marriage under current statutes. While Justices Kaul and Narasimha had different perspectives in their concurring opinions, Justice Bhat dismissed the idea of an affirmative constitutional right in this area in his dissent. The ruling presents several issues about the judiciary's involvement in societal changes, how it interacts with the legislative on policy issues, and how it interprets constitutional decisions.

The issues involved questions like whether or not the right to marriage is a Fundamental Right. If yes, does that right extend to the members of the LGBTQIA+ community? Can the rights under Art. 14, art.15, & art. 16 can encompass and extend the right to marriage of queers?. There were questions regarding Sections 2, 4, 3, 19, 21A, 27, 31, and 36

¹⁰⁷(2023) INSC 920.

under Special Marriage Act, 1954, in which gendered terms are used, resulting in discrimination against queers. The current legal system for marriage, which includes the Personal Laws and the Special Marriage Act of 1954, unconstitutionally discriminates against same-sex couples by using terms like "wife" and "husband" that are exclusive to heterosexual relationships. The power of the courts to expand the meaning of the rights guaranteed under the statutes and the extent to which it can be done also came into the picture. The intertwined concept of separation of power getting affected by the intervention of the court in the statute and how far the court can go to protect the queers from being discriminated against by the state was discussed. Even the limitations under CARA regulations for adopting a child by the LGBTQIA+ community were examined to determine if they are ultra vires concerning the parent Juvenile Justice Act or violative of the Fundamental Rights guaranteed by the Constitution.

Background and Facts of the case:

LGBTQIA+ individuals and couples in India started a few legal activities to get recognition for their partnerships. Nikesh and Sonu filed a motion in the Kerala High Court in January 2020, and Justice Anu Sivaraman eventually accepted it. A similar request was made in September 2020 at the Delhi High Court by Abhijit Iyer Mitra, Gopi Shankar M, Giti Thadani, and G. Oorvas. Chief Justice D.N. Patel and Justice Prateek Jalan granted it. Thus, in November 2022, Supriya Chakraborty, Abhay Darn, Parth Phiroze Mehrotra, and Uday Raj Anand filed a plea in the High Court, which was granted by Justice Hima Kohli and Chief Justice D.Y. Chandrachud of India.⁹ Connected high court applications to be considered collectively were exchanged and organised by the High Court. The High Court granted 20 related petitions from 52 individuals who identify as sexual and orientation minorities, including 17 couples, in the year 2023. The solicitors tested the defendability of notice and complaint mechanisms, essentially looking for acknowledgement under conventional marriage standards. Some argued against their exclusion from the Hindu Marriage Act, citing a violation of their stringent beliefs, identifying themselves as practising Hindus. Several supporters were included in the legitimate portrayal, and the applicants and respondents, respectively, were assigned Nodal counsel by the High Court to Advocate Arundhati Katju and Kanu Agrawal.

Responding parties were addressed by Solicitor General Tushar Mehta and Head Legal Officer R. Venkataramani.

Members of the LGBTQ community were the petitioners; they went to the Supreme Court to ask for recognition of their legal right to tie the knot and create a legally binding relationship that is comparable to marriage. They argued that terminology like "husband," "wife," "bride," and "bridegroom" are gendered and violate same-sex couples' fundamental rights to equality, dignity, and privacy, unconstitutionally excluding them from marriage.¹⁰⁸ According to the petitioners, queer and transgender people have the same right to marry and adopt as other citizens, and they cited the court's progressive verdicts on LGBTQIA+ rights in *NALSA*¹⁰⁹ and *Navtej Singh Johar*¹¹⁰. To permit same-sex marriages, they looked for gender-neutral interpretations of marriage legislation or the removal or rewriting of discriminatory language. Furthermore, a few petitioners contested Section 5(3) of the Central Adoption Resource Authority (CARA) Regulations 2020, arguing that it excludes queer couples and only permits joint adoptions after a "stable marital relationship" of two years. The Union administration rejected the petitions, claiming that having children is a necessary part of marriage, which has long been understood as a heterosexual partnership¹¹¹. Arguments were made that same-sex partnerships were not taken into consideration by lawmakers and that allowing them would undermine the foundational principles of marriage laws.¹¹² Non-heterosexual marriages are not covered by personal laws or the Special Marriage Act; instead, they need a full legal framework, which can only be enacted by Parliament after appropriate deliberation.¹¹³ The administration also refuted allegations of widespread prejudice that required judicial intervention, police harassment, or forced conversion therapy.¹¹⁴ The majority decision of the Supreme Court stated that although LGBTQ people are not guaranteed the fundamental right to marry under the Indian Constitution, they are entitled to a legally recognised partnership with a specific set of benefits.¹¹⁵ However, because

¹⁰⁸ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, para 18, 2023 INSC 920.

¹⁰⁹ *NALSA v. Union of India*, (2014) 5 SCC 438.

¹¹⁰ *Navtej Singh Johar v. Union of India*, (2018) 10.

¹¹¹ *Id.*, para 41.

¹¹² *Id.*, para 42.

¹¹³ *Id.*, para 47.

¹¹⁴ *Id.*, para 283, 315.

¹¹⁵ *Id.*, para 339.

doing so would amount to the Court engaging in an ultra vires legislative exercise, the current marriage statutes cannot be changed by the courts.¹¹⁶

A powerful government committee was mandated to be established to decide on rights in gay unions.¹¹⁷ Adoption laws that prohibited unmarried couples were overturned because they were unequal.¹¹⁸ Instructions were sent out to prevent coercive medical procedures and to raise awareness of LGBTQ rights.

ARGUMENTS RAISED:

PETITIONER'S SIDE:

The petitioners, who identify as LGBTQ people, passionately argued that they have the constitutional right to marry whoever they choose and to enter into life partnerships that are recognised by society and the law on an equal footing with heterosexual marriages. Their arguments were based on the principles of equality, dignity, and personal autonomy.¹¹⁹

It was contended that the Special Marriage Act of 1954 and other marriage-related laws unconstitutionally bar same-sex couples from entering into marriage through the use of heteronormative language and binary gender conceptions that apply solely to relationships between biological males and females.¹²⁰ The exclusionary effect is always the same whether the exclusion is caused by required implication or by express phrase.¹²¹

The petitioners claimed that the right to equality (Article 14), the prohibition against discrimination (Article 15), the freedom of speech and intimate relationships (Article 19), and the constitutional right to life and dignity (Article 21) are all violated by the refusal to recognise same-sex marriages. It makes distinctions based on fundamental aspects of personal identity, such as gender identity and sexual orientation, over which an individual

¹¹⁶ Id, para 208.

¹¹⁷ Id, para 339.

¹¹⁸ Id, para 318.

¹¹⁹ Id, para 20.

¹²⁰ Id, para 188.

¹²¹ Id, para 195.

has limited control.¹²² It was argued that the Constitution is a living constitution that must change to reflect the diversity of lifestyles and the ever-evolving social landscape.

Regarding adoption, petitioners argued that CARA rules that prohibit unmarried couples from adopting a child together violate the Juvenile Justice Act, equality principles, and children's best interests. Queer couples who are singled out for exclusion from motherhood suffer disproportionately from it.

It was argued that courts in India and other countries have acknowledged people's rights to marry and form partnerships to engage in society fully. Therefore, to prevent the discriminatory application of marriage laws, the petitioners asked the Supreme Court for appropriate declaratory and injunctive action. They also requested that statutory provisions be read down or interpreted harmoniously to promote marriage equality.¹²³

The court's progressive rulings in *Navtej Singh Johar* (2018), *NALSA* (2014), and *Puttaswamy* (2017), which supported rights to sexual orientation, gender identity, and privacy, were a major source of support for the petitioners seeking LGBTQ marriage rights.¹²⁴ These were argued to include, without any discrimination, an implicit right to companionship and legal recognition of LGBT relationships. Similar conclusions regarding autonomy in partnership rights were drawn from 31 judgments, including, among others, *Shafin Jahan v. Asokan K.M.* (2018), *Shakti Vahini v. Union of India* (2018), and *Deepika Singh v. Central Administrative Tribunal* (2022), which required state protection for interfaith/intercaste marriages and atypical families.¹²⁵ The petitioners used global legal precedents from South Africa and the United Kingdom in the cases of *Ghaidan v. Godin-Mendoza* and *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999)¹²⁶, using legislative interpretation changes to promote

¹²² *Id.*, para 290, 293.

¹²³ *Id.*, para 57.

¹²⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *NALSA v. Union of India*, (2014) 5 SCC 438; *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹²⁵ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368; *Shakti Vahini v. Union of India*, (2018) 7 SCC 192; *Deepika Singh v. Central Administrative Tribunal*, 2022 SCC OnLine SC 1088.

¹²⁶ *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, [2000] 4 LRC 292; *Ghaidan v Godin-Mendoza*, (2004) UKHL 30.

marital equality. The argument that same-sex marriages might be just as serious and committed as other marriages was supported by the US ruling in *Obergefell v. Hodges* (2015),¹²⁷ which addressed due process and equal protection for such unions.

RESPONDENT'S SIDE:

With the argument that marriage has traditionally been seen as a heterosexual social institution and that marriage laws are specifically predicated on unions between biological males and females, the Union of India vehemently opposed the petitions seeking recognition of same-sex marriages. It was stated that if same-sex marriages were to become legal, extensive legislative action would be necessary to synchronise the numerous benefits of marriage status across other domains, such as succession planning and taxation. Public involvement and parliamentary debate are required for this. The respondents said that the purpose of marriage laws is to control and grant legal recognition to heterosexual married couples, which are essential to procreation and the continuation of society.¹²⁸ It was contended that equating heterosexual and homosexual marriages would weaken the former and the organisation as a whole. The government denied that the current ban on marriage represented discrimination against LGBT people, who were granted all other constitutional rights and had had Navtej Johar¹²⁹ decriminalised.

The Union of India further contended that the judiciary's attempt to interpret statutory provisions in a way that broadens the definition of marriage is institutionally inadequate since it would involve making decisions about policy and values that belong in the legislative branch.¹³⁰ The separation of powers guaranteed by the constitution would be violated by any judicial decision that created new laws and relationships, making it unlawful judicial legislation.

¹²⁷ *Obergefell v. Hodges*, 576 US 644 (2015).

¹²⁸ *Id.*, para 42(k).

¹²⁹ *Supra.*

¹³⁰ *Id.*, para 136.

Citing *K.S. Puttaswamy* (2017) and *NALSA* (2014), the Center contended that, given prevalent cultural conceptions of marriage, decriminalising sodomy or mandating equality of trans rights could not inevitably enable same-sex weddings in the absence of legislative law-making.¹³¹

The NCPCR took the position on adoption, arguing that the research suggested that allowing LGBT couples to adopt could be detrimental to the children's interests because adopted children may experience stigma or developmental delays as a result of not having dual-gender parenting, which is different from what happens to children raised in traditional family structures. It was argued that this was an acceptable state interest that supported exclusion.¹³²

Precedents from Rajasthan, Madhya Pradesh, and Kerala were cited to support the claim that any significant societal change should not be imposed by the courts but rather must result from extensive deliberation. Foreign case laws, such as *Fourie* (South Africa) and *Obergefell v. Hodges* (US), were invoked to support comparative perspectives favouring legislative action over court authority.¹³³

So, the respondents pointed out that the right to marry is not recognised by the Constitution. Article 19(1)(a) of the Constitution protects a person's expression of sexual orientation. Nevertheless, Article 19(1)(c) states that marriage cannot be linked to the freedom of speech or the ability to form partnerships. Not every kind of connection has to be given legal status by the state. The government only acknowledges relationships when they serve a justifiable governmental interest. For the sake of maintaining society, the State has a right to recognise heterosexual unions officially. The decision of whether to grant legal recognition to a non-heterosexual couple is not within the jurisdiction of the courts. The legislature is required to decide on this matter, as they are the directly elected representatives.

¹³¹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1; *NALSA v. Union of India*, (2014) 5 SCC 438.

¹³² *Id.*, para 45(d).

¹³³ *Minister of Home Affairs v. Fourie*, (2006) 1 SA 524 (CC); *Obergefell v. Hodges*, 576 US 644 (2015).

Legal Aspects Revolving The Case:

Puttaswamy and Navtej Johar have underlined the constitutional rights to dignity, privacy, and personal autonomy under Article 21 as the fundamental basis for LGBTQ claims to relationship recognition. To live with dignity, people must be free to choose relationships and other important aspects of their lives without unjustified external restrictions. Queer people have a deep-rooted right to privacy that includes the freedom to engage in sexual activity, be in a married relationship, and fully participate in society.

The court talked about how certain liberties, like the right to free speech, have both positive and negative rights that call for the state to take accommodating measures. Others, such as Justice Bhat, issued a warning, pointing out that not all aspects of autonomy equate to an enforceable positive claim necessitating the control of social institutions such as marriage by the state. The question concerned the boundaries of constitutional duties in areas that have traditionally been dominated by religious or customary norms.

Marriage laws, despite their nominal neutrality, have been accused of covertly discriminating against LGBT people by denying them acknowledgement of their relationships and the benefits that come with them, which are normally available to spouses and families. Articles 14 & 15's anti-discrimination guidelines had to be applied to exclusionary effects rather than actual objects. Nevertheless, unlike vertical obligations against state discrimination, carving out horizontal duties was not without its challenges. Careful consideration was given to how various governmental organs' constitutional obligations should be balanced.

JUDGMENT:

In the historic case, the Supreme Court bench returned a divided decision. Chief Justice Chandrachud's leading opinion acknowledged a limited right for queer couples to have their relationships acknowledged by the state and receive benefits similar to marriage, but without the need for judicial intervention to make same-sex marriages legal in the first place.¹³⁴

Regardless of sexual orientation, the Court unanimously held that there is no unqualified fundamental right to marry under the Constitution because marriage is conditioned by statutory restrictions, religious/customary beliefs, and societal standards.¹³⁵ However, earlier rulings had acknowledged a number of related rights, including the freedom to choose a life partner, the freedom to live with one's spouse, and the right to fully engage in society without being subjected to prejudice. The Chief Justice discovered According to Articles 19 and 21, LGBT people have the constitutional right to form an "abiding cohabitation union" with their partner. This right entails governmental recognition and access to certain benefits to make the union meaningful. But given the division of powers and institutional restraints, the Court declined to order any legislative measures to permit same-sex unions.¹³⁶

The judges all concluded that same-sex couples cannot claim marriage as a fundamental right since there is no absolute right to marriage. The challenge to the Special Marriage Act's provisions was likewise unanimously dismissed by the Honorable Supreme Court. Additionally, the majority of judges ruled that same-sex couples cannot legally claim the right to adopt children and that their civil unions are not recognised. The Central Government should form a high-powered committee (HPC) headed by the Cabinet Secretary to thoroughly investigate the factors associated with same-sex marriage, taking into account the opinions of all relevant parties, states, and union territories. The wording used in their arrangements, such as "lady," "a couple," and "in the case," is confirmation that the legislative body never intended for these statutes to apply to any connection other than heterosexual couples. The phrases used are specific, ready to perform only one

¹³⁴ Supriyo @ Supriya Chakraborty & Anr. v. Union of India, para 339-340, 2023 INSC 920.

¹³⁵ Id, para 185.

¹³⁶ Id, para 339(vii).

possible definition. This ruling has gained significant importance and sparked a great deal of public interest because the court should neither undertake a development that would defeat such a purpose nor would it be wise for it to expand the meaning of marriage for such classes who were never intended to be covered under it. Regarding adoption, CARA laws that prohibited single gay couples from adopting were asked to get overturned because they unfairly discriminated against them and violated their rights to equality.¹³⁷The Indian Supreme Court has rendered a divided decision regarding gay couples' ability to adopt. In their separate and concurring decisions, Chief Justice D Y Chandrachud and Justice Kaul ruled that one of CARA's guidelines which forbids single and LGBT couples from adopting children is unlawful and unconstitutional. But the majority of the bench, which included Justices Sanjay Kishan Kaul, S. Ravindra Bhat, PS. Narasimha, and Hima Kohli, ruled 3:2 against permitting adoption by single and gay couples. Justice S Ravindra Bhat, Justice PS Narasimha, and Justice Hima Kohli dissented, even though CJI Chandrachud and Justice Kaul recognized adoption as a legal right of LGBT couples. However, the CJI noted that it was incorrect to "assume that only heterosexual couples can be good parents". It was decided that the marriage laws did not need to be read down since doing so would be equivalent to illegal judicial legislation that went against the assumed intentions of Parliament.¹³⁸ Directives, including ones prohibiting families and the police from using coercion against LGBT people, were issued to lessen systemic discrimination.

¹³⁷ Id, para 208-212.

¹³⁸ Id, para 340(f).

CRITICAL ANALYSIS

The Central government was requested to set up a commission to discuss the legality and rights of same-sex couples by the esteemed Supreme Court. However, the court's ruling in favour of the equality clause for homosexual couples did not issue a harsh decision regarding the legalization of such unions or marriages. Individual liberty and dignity were emphasized, and the words were reinforced without the need for any large black-and-white texts. The bench might have ordered the federal government to draft legislation before making a decision on the particular case. Through their rulings, the courts have occasionally passed laws and rules. As an illustration, consider the criteria established by the Supreme Court in the case of *Vishaka v. State of Rajasthan*¹³⁹, when it established standards for sexual harassment.

The court's decision to become far more accommodating when debating the morality of homosexual marriages is quite concerning. A petition was filed asking the court to review its rulings on the appointment and transfer of judges in the recent case of *Suraz India Trust v. Union of India*¹⁴⁰. The argument posits that the Supreme Court, in the cases of *Advocate on Record Association v. Union of India*¹⁴¹ in 1994 and 1998, essentially altered constitutional provisions, despite the fact that only Parliament has the authority to amend the constitution. On the other hand, the judiciary was given the primary authority to appoint and remove justices as a result of two Supreme Court rulings. Nevertheless, the judiciary did not even attempt to provide a brief clarification of the gender-specific rules in the same-sex marriage case, under the pretext of the division of powers. Although it was not the method of operation, the court may have invalidated the arbitrary restrictions that discriminated on the basis of gender.

The people of disadvantaged classes have often had their rights empathetically guaranteed by the Supreme Court, upholding its obligation in the process. In most circumstances, the court uses the felicitous application and interpretation of the law to ensure that the starving of the destitute classes is quenched. But in this instance, the court

¹³⁹ MANU/SC/0786/19977.

¹⁴⁰ MANU/SC/0707/2017.

¹⁴¹ MANU/SC/1183/2015.

doesn't seem to be feeling as warm and fuzzy as one might want. Without the blood of active legal competence and the life of judicial interpretation, bare words have no value.

Numerous historical rulings by the Indian Supreme Court have freed the oppressive customs of the past. The court's daring and progressive rulings revitalized the laws, customs, and rusty brains.

Our society is inextricably linked to politics. No single law can be passed without considering the wishes of the majority party in Parliament. Political parties in our current situation are not supportive of the homosexual ideology, and as a result, they are not actively working to modify the laws in a meaningful way. Our court is neither immune to the influence of politics nor untainted by it. One political party may support an idea while being vehemently opposed by another. Nonetheless, a Supreme Court ruling is final and enforceable indefinitely, barring any additional developments pertaining to the ruling. Such verdicts have a lasting effect that can quickly undermine one's justifications for legitimate identification and, consequently, one's trustworthiness. The decisions made by the court have the power to cause waves of grief or profit. In this instance, none of the gay couples are coming home with anything. Their emotions are heavy with grief, and they feel empty inside, indicating that the verdict was not in society's best interests. The proverb "majority wins" has once again proven true in modern times. Why does the majority always come first? Minorities have little choice but to adopt the mainstream viewpoint or to end the conversation. In a nation like India, where laws are in place to protect all potential minorities, the interests and preferences of the majority rule when it comes to the legalization of homosexual unions and weddings. Is this not, to put it mildly, ironic or hypocritical? It is said that the Legislative Assemblies and Parliament members serve as the representatives of Indian democracy. But shouldn't we also discuss the base rates? Furthermore, should the desires of the majority be taken into account while creating laws for minorities? Is there enough representation of gays in the current administration for legislation to be made specifically for them? Before the Parliament passes LGBTQIA+-friendly legislation, we need definitive, theoretical answers to our problems.

The dissenting view of Justice Bhat offers a robust rebuttal grounded in constitutional text, noting the absence of precedent on a right-to-state regulation of marriage per se. However, its distinction between Article 21 rights and Article 19-25 entitlements is somewhat unconvincing given their intersectional linkages. More engagement was expected on the discriminatory impact of neutral laws denying queer couples' joint adoption, parental leave, etc., which could remedy inequities without mandating same-sex marriage recognition. The judgment was keenly awaited given rising queer activism and early hopes of it enshrining marriage equality were belied. While a historic step forward, it's treading cautiously on such a socially volatile issue is unsurprising. It reveals the judiciary's tendency to privilege procedurecentric notions of democracy and legislative wisdom over substantive rights in such domains. The impact of a declaration without remedies also remains doubtful. A fortiori, this incremental step still denotes progress in ensuring constitutional promises to marginalized communities. It is high time for Indian courts to use strict scrutiny principle and find out compelling state interest in cases which holds so much gravity. Matters involving basic human rights should not be ignored so relentlessly.

5. GLOBAL PERSPECTIVES TOWARDS LGBTQIA+ RIGHTS:

Different countries have very different levels of approach towards the rights granted to the community. The difference can be very amusing, from treating them as equals to death sentences. We will study various approaches of countries across the globe. For the study, we have taken a few countries.

Despite varying positions under various administrations, Western Europe and the Americas are generally more accepting of homosexuality. The United States has been a leading global advocate for LGBTQ+ rights.¹⁴² Whereas the Middle East, Sub-Saharan Africa, Russia, Ukraine, and Eastern Europe are typically less tolerant of homosexuality. Anti-LGBT propaganda laws have been introduced and strengthened by nations like Hungary and Russia, severely restricting the freedom of expression of gender identity minorities¹⁴³. Significant progress has been made by several countries in strengthening LGBTQ rights, including the legalization of homosexual marriage, adoption by same-sex couples, and protection against discrimination based on gender identity and sexual orientation. Canada, the Netherlands, Spain, Sweden, Iceland, and Argentina are a few countries with a more progressive equality index and less discrimination than others. To varied degrees, many nations recognize same-sex partnerships, from civil unions to full marital rights. However, discrimination and social stigma against LGBTQ people may persist even in nations where same-sex marriage is legal.¹⁴⁴ Within the LGBTQ rights movement, transgender rights can often be a separate but connected issue. Transgender people face prejudice in some nations due to a lack of legal recognition and protection, which shows itself in areas including work, healthcare, and legal documentation.¹⁴⁵ Attitudes about LGBTQ rights are often shaped by religious institutions and ideas. While religious leaders and groups often support LGBTQ inclusion and equality, in other instances, their teachings may be used as justification for prejudice and violence against LGBTQIA+ people. There are still difficulties in ensuring that laws protecting LGBTQ

¹⁴² Thoreson, Ryan R. *Transnational LGBT Activism: Working for Sexual Rights Worldwide*. University of Minnesota Press, 2014.

¹⁴³ Queerness as Extremism: The Assault on LGBTQ+ Rights in Russia - The Moscow Times.

¹⁴⁴ Holning Lau, Sexual Orientation and Gender Identity Discrimination: A Comparative Law Perspective, 19 *UCLA J. Int'l L. & Foreign Aff.* 37 (2015).

¹⁴⁵ Paisley Currah, Gender Pluralisms under the Transgender Umbrella, 13 *Minn. J.L. Sci. & Tech.* 147 (2012).

people are effectively enforced and in overcoming prejudice and discriminatory attitudes in society, even in nations where LGBTQ people are legally protected. Overall, even though LGBTQ rights have advanced globally, there are still significant obstacles to overcome, and the fight for equality is still ongoing in many regions of the world. To advance LGBTQ rights as fundamental human rights, international cooperation and campaigning are still necessary.

5.1 ICELAND

Iceland has a long history of being seen as a progressive nation that supports LGBT rights and exemplifies an accepting and inclusive society. This wonderful island nation offers a welcoming environment to individuals of homosexual orientation from all over the world, thanks to its breathtaking scenery and rich cultural heritage. The history of legislation started when Iceland implemented its first complete penal law, modelled after the Danish one. Its features included making it illegal for two people of the same sex to have sexual relations, regardless of their age or permission. The following was the language of Clause §178, which addressed both sexual contact with animals and between people of the same sex: "Unnatural forms of sexual intercourse are punishable by a term in prison." The legal provision that said that having sex with a person of the same sex, regardless of age or permission, was illegal was removed by the Althing. It was now not conceivable to find the section that stated, "Unnatural forms of sexual intercourse are punishable by a term in prison." Iceland became the second nation in the Nordic region to decriminalize same-sex relationships, regardless of consent or age. A similar phrase was removed by Denmark in 1930, and it was scheduled to be removed by Sweden in 1944, Finland in 1971, and Norway in 1972.¹⁴⁶ In 1993, Ireland became the last country in Western Europe to do away with a similar punishment. So, homosexuality was legalized way back in 1940 in Iceland. In 1996, a law was passed acknowledging a binding partnership among individuals of the same sex. The general penal code's sections §180¹⁴⁷

¹⁴⁶ Iceland: Homosexuality and the Law (gayice.is)

¹⁴⁷ [Any person who, in the course of business operations or the provision of services denies a person goods or services on an equal footing with others on grounds of that person's nationality, color, race, [religion, sexual orientation or gender identity]1) shall be fined ...2) or imprisoned for up to 6 months. The same punishment shall be applied for denying someone access on the same footing as others to a public meeting place or other places that are open to the public.]

and §233¹⁴⁸, dealing with discrimination based on sex, nationality, colour, ethnicity, religion, or other factors, were amended by the Althing by including the phrase "on the grounds of sexual orientation." The age of consent was equalized for all sexual relations in 1992. Since 2006, same-sex couples have been able to adopt children and use assisted reproduction, and same-sex marriage has been permitted since 2010. LGBTQIA+ people are protected by anti-discrimination laws, and there is a gender-neutral option for formal identity.

Remarkably, Jóhanna Sigurðardóttir, the first openly gay head of state in history, served as president of Iceland from 2009 to 2013. This progressive perspective encompasses several legislative protections, such as rights to same-sex marriage and adoption, prohibitions against discrimination, and acknowledgement of gender identity. Iceland is ranked highest when it comes to LGBTQIA+ rights. The country ranks 92/100 in the equality index, 97/100 in the legal index and 87/100 in the public opinion index.¹⁴⁹ Thus, Iceland is one of the most progressive states, with maximum rights granted to the community.

¹⁴⁸ [Anyone who publicly mocks, defames, denigrates or threatens a person or group of persons by comments or expressions of another nature, for example by means of pictures or symbols, for their nationality, color, race, religion, sexual orientation or gender identity, or disseminates such materials, shall be fined or imprisoned for up to 2 years.]]

¹⁴⁹ LGBT Equality Index | Equaldexs

5.2 CANADA

The LGBTQIA+ community, also referred to as LGBTQ2+ in Canada, is a significant part of the country's demographic. The Criminal Law Amendment Act, 1968-69, also known as Bill C-150, was ratified by the royal assent on June 27, 1969, decriminalizing private same-sex relationships between consenting adults.¹⁵⁰ The Canadian Human Rights Commission¹⁵¹ is responsible for monitoring the application of the Act. Section 15 of the Canadian Charter of Rights and Freedoms believes all people should be treated equally, regardless of color, religion, national or ethnic origin, gender, age, or physical or mental disability. About one million LGBTQ2+ individuals live in Canada, making up 4% of the country's population over 15. Roughly 75,000 Canadians identify as transgender or non-binary, making up 0.24% of the country's population over the age of 15. The LGBTQ2+ community is a young one. Compared to 14% of the non-LGBTQ2+ population, youth aged 15 to 24 constituted 30% of the LGBTQ2+ population. Over fifty per cent of LGBT Canadians over the age of fifteen identify as bisexual. The proportion of bisexual women (332,000) to bisexual males (161,200) is two to one. Gay men make up 25% of Canada's LGBTQ2+ population (255,100), while gay or lesbian women make up 17% (150,600). In Canada, there were 72,880 same-sex couples according to the 2016 Census. In Canada, one-third of same-sex couples are married, and the other two-thirds are common-law partners.¹⁵²

The cases shaping the delivery of rights to the community date back to 1995 in the case of *Egan v. Canada*¹⁵³ The Supreme Court of Canada ruled that the equality clause in the Canadian Charter of Rights and Freedoms protects sexual orientation as a constitutional right. The Court concluded in *Vriend v. Alberta*,¹⁵⁴ that provincial human rights laws that excluded sexual orientation as a factor violated section 15(1). Canada became the fourth country to legalize same-sex marriages. All Canadian provinces and territories granted same-sex couples equal adoption rights in 2011. The first province to allow adoption by same-sex couples was Ontario. Nova Scotia, Alberta, and British Columbia came next. In

¹⁵⁰ LGBT Equality Index | Equaldexs

¹⁵¹ Rights of LGBTI persons - Canada.ca

¹⁵² LGBTQ2+ communities in Canada: A demographic snapshot (statcan.gc.ca)

¹⁵³ [1995] 2 S.C.R. 513

¹⁵⁴ [1998] 1 S.C.R. 493

terms of adoption accessibility, Canadian same-sex couples are now given the same consideration as heterosexual couples.¹⁵⁵

In summary, Canada has been a progressive nation regarding rights for LGBTQ2+ people. It has made significant strides toward ensuring the equality and rights of its large LGBTQ2+ population. The LGBTQ2+ community's environment has been affected by significant court rulings, such as the acceptance of sexual orientation under the Canadian Charter of Rights and Freedoms, the approval of same-sex unions, and the awarding of equal adoption rights. Remembering that more needs to be done to guarantee complete acceptance and equality in society is crucial. Every victory in the ongoing struggle for LGBTQ2+ rights moves us closer to a more welcoming and inclusive society.

¹⁵⁵ [Title] (oecd.org)

5.3 THE USA

The first known LGBT rights organization in American history was established in Chicago in 1924 by German immigrant Henry Gerber. Gerber was motivated to create his organization while serving in the U.S. Army during World War I by the Scientific-Humanitarian Committee, a German "homosexual emancipation" movement.¹⁵⁶ Gerber's small group issued the first gay-interest newsletter in the nation, "Friendship and Freedom," in a few issues. The group broke apart in 1925 as a result of police raids, but 90 years later, Gerber's Chicago home was recognized as a National Historic Landmark by the US government. While LGBTQ+ people all around the world did occasionally make headlines, the homosexual rights movement stalled for the following few decades.¹⁵⁷

For instance, when English poet and novelist Radclyffe Hall released her lesbian-themed book *The Well of Loneliness* in 1928, it caused an uproar. Additionally, the Nazis detained homosexual men in concentration camps during World War II. They marked them with the notorious pink triangle insignia, which is a badge also issued to perpetrators of sexual misconduct.¹⁵⁸

Harry Hay established one of the first gay rights organizations in the country, the Mattachine Foundation, in 1950. The term "homophile," which was more focused on sexual activity and less clinical than "homosexual," was created by an organization in Los Angeles.¹⁵⁹

Despite its modest beginnings, the organization grew after founder member Dale Jennings was imprisoned in 1952 for soliciting and eventually released owing to a

¹⁵⁶ John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970*, 13 (1983).

¹⁵⁷ Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society*, 257 (1999).

¹⁵⁸ Giles, Geoffrey J. "The denial of homosexuality: Same-sex incidents in Himmler's SS and police." *Journal of the History of Sexuality* 11.1/2 (2002), 256-290.

¹⁵⁹ Stein, Marc. *City of sisterly and brotherly loves: Lesbian and gay Philadelphia, 1945-1972*. University of Chicago Press, 2000.

deadlocked jury. The nonprofit's goal was to better the lives of gay men through discussion groups and similar activities.¹⁶⁰

By year's end, Jennings established One, Inc., a new organization that embraced women and released ONE, the nation's first gay magazine. In 1953, Jennings lost his job at One, Inc. partly due to his communist views; he and Harry Hay were expelled from the Mattachine Foundation for similar reasons, but the journal continued. The U.S. Post Office was sued in 1958 by One, Inc. after they had deemed the magazine "obscene" in 1954 and refused to send it. Members of the Mattachine Foundation re-organized the group to create the Mattachine Society,¹⁶¹ which went on to establish local chapters around the nation and start publishing The Mattachine Review, the nation's second gay publication, in 1955.¹⁶² The first lesbian publication of any type, The Ladder, was a newsletter published by the Daughters of Bilitis, an organization founded by four lesbian couples in San Francisco that same year. The American Psychiatric Association classified homosexuality as a mental illness in 1952, one of the movement's major early failures. The following year, President Dwight D. Eisenhower issued an executive order prohibiting federal employment for homosexuals or, more precisely, those convicted of "sexual perversion." This prohibition would be in place for about 20 years. Some early success was made in the LGBT rights movement. During the 1960s the first state to decriminalize homosexuality was Illinois in 1961, when anti-sodomy laws were repealed. The same year, The Rejected, the first documentary about homosexuality, was broadcast on a small TV station in California. The term "transgender" was first used in 1965 by Dr. John Oliven in his book *Sexual Hygiene and Pathology* to refer to people who were born into the wrong sex. However, transgender people first came to the attention of Americans over ten years ago when Christine Jorgensen came out as transgender after undergoing gender confirmation surgery. Despite these advancements, LGBTQ+ people continued to face discrimination and harassment in public places like pubs and restaurants. They also lived in a sort of urban subculture. In reality, liquor regulations in New York City

¹⁶⁰ Charles, Douglas. "From subversion to obscenity: The FBI's investigations of the early homophile movement in the United States, 1953-1958." *Journal of the History of Sexuality* 19.2 (2010): 262-287.

¹⁶¹ Archive activism for LGBT civil equality (mattachinesocietywashingtondc.org).

¹⁶² Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429 (2006).

prohibited serving alcohol to gay men and women in public because they deemed homosexual gatherings to be "disorderly." Bartenders who suspected a client was gay would either refuse to sell them alcohol or kick them out of the establishment out of fear of being shut down by the police. In other cases, they would serve the client alcohol but have them sit facing away from other patrons to keep them from mingling. A "sip-in" was organized in 1966 by members of the Mattachine Society in New York City, an alternative to the "sit-in" protests of the 1960s. Participants went to bars, identified as gay, and waited to be turned away so they could file a lawsuit. After being refused service at the Greenwich Village bar, Julius, there was a lot of media coverage and a swift repeal of the anti-gay alcohol legislation. A few years later, in 1969, the gay rights movement was ignited. In Greenwich Village, the homosexual club Stonewall Inn was a landmark due to its size, affordability, dance policies, and acceptance of drag queens and young people experiencing homelessness. However, New York City police attacked the Stonewall Inn early on June 28, 1969. As police carried the detained individuals into police vans, patrons and neighbourhood residents, fed up with years of police harassment, started throwing objects at the officers. After a while, the scenario descended into a full-fledged riot, and protests continued for five more days¹⁶³. Furthermore, several openly LGBTQ+ people were elected to public office. In 1974, Kathy Kozachenko became the first American to be elected to the Ann Arbor, Michigan, City Council. Harvey Milk was the first openly homosexual man elected to a political position in California when he ran for San Francisco city supervisor in 1978 on a platform supporting gay rights. Artist and gay rights activist Gilbert Baker commissioned Milk to design an insignia to symbolize the cause and be viewed as a source of pride. In 1978, Baker introduced the first rainbow flag, which he had designed and sewn together, during a pride march. In 1979, the year after, over 100,000 participants participated in the inaugural National March. During his 1992 presidential campaign, Bill Clinton pledged to remove the prohibition on homosexuals serving in the armed forces. However, President Clinton enacted the "Don't Ask, Don't Tell" (DADT) policy in 1993 after failing to secure enough support for an open policy. ¹⁶⁴This policy permitted gay men and

¹⁶³ Licata, S. J. (1981). The Homosexual Rights Movement in the United States: A Traditionally Overlooked Area of American History. *Journal of Homosexuality*, 6(1-2), 161-189.

¹⁶⁴ Feder, Jody. "' Don't Ask, Don't Tell': A Legal Analysis." (2013).

women to serve in the military, provided that they concealed their sexual orientation. The Don't Ask, Don't Tell policy was criticized by gay rights activists because it did little to prevent people from being fired due to their sexual orientation. After promising to repeal DADT throughout his campaign, President Obama finally delivered on his pledge in 2011. At that point, almost 12,000 officers had been dismissed from the military for not hiding their sexual orientation. This policy was repealed on 20 September, 2011. A law allowing gay and lesbian couples to register as domestic partners in the District of Columbia in 1992 gave them some of the rights of marriage (a similar ordinance had been passed by the city of San Francisco three years earlier, and the state of California would later extend those rights to the entire state in 1999). Hawaii's highest court decided in 1993 that the state constitution might be violated by a ban on gay marriage. Nevertheless, state voters disapproved and in 1998 enacted a legislation outlawing same-sex unions. After that, a series of cases came into picture.¹⁶⁵

The USA marked the decriminalization of sexual intercourse between homosexuals in 1961 in the case of *Lawrence v. Texas*¹⁶⁶. It ruled that laws prohibiting any kind of criminal punishment for any form of private, consenting adult sexual activity between two people also known as sodomy laws are unconstitutional. Although the "right to privacy" is not expressly stated in the U.S. Constitution, the Court upheld the notion that it exists, as determined by previous instances. Its decision was founded on the American custom of not interfering with any kind of private sexual activity between consenting adults and the idea of individual sovereignty to define one's own relationships. One of the significant instances that led to marital equality was *United States v. Windsor* (2013).¹⁶⁷. The Defense of Marriage Act (DOMA) of 1996's definition of marriage as a "legal union between one man and one woman as husband and wife" was tossed down by the court. After that, one of the historic judgments of *Obergefell v Hodges* (2015)¹⁶⁸ decided that the equal protection and due process clauses of the 14th Amendment to the Constitution guarantee same-sex couples the fundamental right to marry. The District of Columbia, the fifty states, and the Insular Areas must perform and recognise same-sex marriages on the

¹⁶⁵ Gay Rights - Movement, Marriage & Flag | HISTORY.

¹⁶⁶ 539 U.S. 558 (2003).

¹⁶⁷ 570 U.S. 744 (2013).

¹⁶⁸ 576 U.S. 644 (2015)

same terms and conditions as opposite-sex marriages, with all the rights and obligations accompanying it. Adoption rights are also provided to same-sex couples in the USA.

The USA currently ranks 76/100 in the equality index, 90/100 in the legal index, and 61/100 in the public opinion index¹⁶⁹. The journey towards full equality for the LGBTQIA+ community in the United States is ongoing. While significant progress has been made, much work remains to be done. We must continue to advocate for comprehensive legal protections, promote social acceptance, and challenge discriminatory practices and policies. Only then can we hope to achieve a society where all individuals, regardless of their sexual orientation or gender identity, are treated with dignity and respect.

5.4 IRAN:

Iran is the most regressive country after Afghanistan and Brunei. Since the revolution of 1979, Islamic laws have been ruled. There is rigorous punishment, extending up to the death penalty¹⁷⁰. There are frequent protests but no significant change in the current scenario. To be a person from the LGBTQIA+ community is considered a sin and is illegal in the country. There is no protection guaranteed to the citizens against discrimination.

However, sex reassignment surgery is used to identify transgender identity. Despite this, sex reassignment surgery is permitted in Iran under a legally perverse statute. However, this regulation reflects the nation's inflexible gender norms rather than being a sign of progressivism. It is frequently thought of as a means of "curing" homosexuality, which is perceived as an illness. The government provides some financial help for sex reassignment procedures. The subject of LGBTQ rights in Iran is complicated. It is illegal to be gay, and there are fines, jail time, and sometimes even the death sentence associated

¹⁶⁹ LGBT Equality Index | Equaldex

¹⁷⁰ Fact Sheet: LGBTQ Community in Iran Faces Deadly Violence and Severe Rights Abuses - Center for Human Rights in Iran (iranhumanrights.org)

with it. For the LGBTQ community, this has resulted in an environment of fear and secrecy.¹⁷¹

There is a lot of violence and discrimination against the LGBTQ community in society, and sentiments about them are mainly negative. However, there are also indications of improvement, as more and more NGOs and activists are trying to improve things.¹⁷²

There is a severe problem with state and social violence in Iran against LGBTQ people. One of the few nations that still apply the death penalty to minors for same-sex relationships is Iran. Flogging and incarceration are two further penalties for same-sex acts and cross-dressing. Proponents of LGBTQ rights are frequently found guilty of crimes related to national security. Due to the law's leniency towards such crimes, honour killings of LGBTQ people by family members are encouraged. According to a poll, 77% of Iranian LGBTQ individuals reported having encountered violence in their homes and communities.¹⁷³ The government also imposes jail time and flogging as penalties for any online sharing of LGBTQ-related content. Iranian government representatives frequently incite violence against the LGBTQ population by using hate rhetoric. The outlawing of same-sex relationships prevents LGBTQ people from contacting the police or the courts for assistance since doing so puts them at risk of being prosecuted. In this case, there has been a major breach of fundamental rights, and immediate attention and action are needed. Officially, the Iranian government denies that LGBTQ people exist in the nation because it views homosexuality as a Western import and a symptom of moral decay. The government frequently target LGBTQ people for persecution; they may imprison, torture, execute, or arrest them. Human rights groups and foreign governments have criticized Iran's treatment of LGBTQ people and demanded the removal of legislation that makes same-sex relationships illegal.¹⁷⁴ However, the effectiveness of initiatives to lobby Iran on LGBTQ rights has been restricted due to geopolitical conflicts and diplomatic considerations.

¹⁷¹ Mireshghi, Sholeh I., and David Matsumoto. "Perceived cultural attitudes toward homosexuality and their effects on Iranian and American sexual minorities." *Cultural Diversity and Ethnic Minority Psychology* 14.4 (2008): 372.

¹⁷² Karimi, Aryan, and Zohreh Bayatrizi. "Dangerous positions: Male homosexuality in the new penal code of Iran." *Punishment & Society* 21.4 (2019): 417-434.

¹⁷³ <https://iranhumanrights.org/wp-content/uploads/LGBTQ-Iran-Fact-Sheet.pdf>

¹⁷⁴ Iran: UN experts demand stay of execution for two women LGBT rights activists | UN News

In conclusion, there are significant restrictions on LGBTQ rights in Iran and those who identify as LGBTQ may face violence, social shame, and legal prosecution. The government's oppressive policies and Iran's more extensive cultural and religious background make it difficult to advocate for change.

5.5 THAILAND

After Thailand's House of Representatives unanimously approved a marriage equality law, the country is poised to become the first in Southeast Asia to allow same-sex unions. According to Reuters, just 10 of the 415 legislators in attendance voted against the proposal, which was approved by 400 of them.

The ten-year Thai effort to legalize same-sex unions has now overcome a significant obstacle. All of Thailand's major parties supported the bill, and its passage is anticipated to happen as a matter of course, even though it still needs to be approved by the Senate and endorsed by the king to become law. After the king agrees, the law will formally go into effect 120 days later, making the country the third in Asia to allow same-sex unions, following Taiwan and Nepal.

The country's Civil and Commercial Code would have 68 sections amended by the measure, changing the definition of a marriage from "a man and a woman" to "two individuals." It will alter their formal legal relationship from "husband and wife" to "married couple." With these developments, LGBTQ couples will have the same rights to inheritance and adoption as married heterosexual couples.

To give legal protections against gender-based discrimination, including the unjust treatment of LGBTQ+ persons, Thailand passed the Gender Equality Act in 2015. The law does, however, still permit the use of national security or religious grounds to justify discrimination against LGBTQ+ persons. Transgender and non-binary people are still unable to legally change their title or gender on official documents because there is still no legal acknowledgement of gender identity.

Thailand's Constitutional Court upheld the status quo in November 2021, holding that regulations restricting marriage to unions between men and women are constitutionally

permissible. However, it also stated that rules protecting the rights of people with gender identities should be drafted by Thailand's legislators. In 2019, Taiwan continued to be the first country in Asia to legalize same-sex unions. Nepal became the second country in 2023, and local officials officially recorded the first-ever marriage of an LGBTQIA+ couple in November.

At the moment, Thailand does not recognize civil unions, domestic partnerships, same-sex weddings, unreported cohabitations, or any other type of same-sex unions. However, the Thai cabinet has accepted a bill allowing same-sex civil partnerships, and if approved by the Senate and the royal crown, it is anticipated to become law by the end of 2024. Thailand will be the only nation in Southeast Asia to acknowledge same-sex unions, solidifying its standing as a relative sanctuary for LGBTQ+ couples in an area where such sentiments are uncommon.

India can also follow a similar approach to Thailand when it comes to changes in laws related to marriage. The Supreme Court of India, in the recent case clearly mentioned that it is up to the Legislative to make the laws to legalize same-sex marriages. A correlation can be found between the structures of their laws. Like Thailand, in India also, lawmakers can come up with a particular bill in order to protect the marital and adoption rights of the LGBTQIA+ community. The Bill is finally passed on the 19th of June 2024.¹⁷⁵

.Although there have been obstacles in the way of both nations' advancement of LGBTQ+ rights, progress is being made. With the lower house passing a bill recognizing same-sex marriage legally, Thailand has made a historic leap toward marital equality. The campaign to legalize same-sex marriage in India is still ongoing, with numerous court cases and grassroots initiatives.

¹⁷⁵ Thailand becomes first South-East Asian country to legalise same sex marriage - ABC News.

5.6 INTERNATIONAL ORGANIZATIONS

Globally, international organizations are essential in promoting and defending the rights of LGBTQIA+ people. These groups seek to advance societal acceptability, advance legislative changes, and offer LGBTQIA+ communities services and assistance. The following highlights several significant worldwide organizations and their contributions to LGBTQIA+ rights:

UNITED NATIONS ORGANIZATIONS (UN)

The UN has played a vital role in promoting LGBTQIA+ rights through several programs and resolutions. In 2011, the UN Human Rights Council passed its first resolution on gender identity and sexual orientation, expressing severe concern about acts of violence and discrimination against people based on their gender identity and sexual orientation. The establishment of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity in 2016 came next. This person's primary responsibility was to evaluate how well LGBTQIA+ people's human rights were being implemented around the world and to suggest policies to counteract violence and discrimination.

Recognizing the significance of LGBTIQ+ rights, the UN actively works to advance equality, put an end to discrimination, and protect the human rights of LGBTIQ+ (lesbian, gay, bisexual, transgender, intersex, and queer) people.

Discrimination against members of the LGBTI community is an affront to the values outlined in the Universal Declaration of Human Rights. Sadly, prejudice and violence against LGBTI people are still all too commonplace on a global scale. Lesbian, homosexual, bisexual, and transgender individuals confront both common and unique issues in the context of human rights. People who are intersex those who are born with abnormal sex traits also experience institutional abuse in healthcare institutions and violations of their human rights. Under international human rights law, all states must uphold and defend every individual's rights without distinction. Nonetheless, many

nations continue to impose discriminatory laws that criminalize same-sex relationships and put LGBT people in danger of abuse, incarceration, and even the death penalty.

UN Secretary-General António Guterres declared, "*Every attack on LGBTIQ+ individuals is an attack on human rights and the principles we cherish.*" The United Nations maintains its strong support for the LGBTIQ+ community and keeps pushing for the protection of everyone's human rights and dignity. As equal members of the human family, LGBTIQ+ people's human rights must be protected, according to UN High Commissioner for Human Rights Volker Türk.¹⁷⁶

No new human rights legislation or regulations are needed to protect LGBTI individuals. Under international law, states are already obligated to protect the human rights of LGBTI people. Even with advancements, problems still exist. Transgender people are punished by laws prohibiting cross-dressing because of their gender identification and expression. Furthermore, same-sex relationships are prohibited by discriminatory laws in more than 60 countries.

The UN System has a long history of addressing discrimination, violence, exclusion, and stigma against all individuals, including LGBTIQ+ individuals. This pledge aligns with both internationally recognized obligations and current international law. In 2015, UN agencies united to denounce acts of violence and prejudice against LGBTIQ+ individuals, demonstrating the UN's commitment to advancing equality and combating discrimination.¹⁷⁷

RIGHT TO FAMILY AND UN:

The family is acknowledged as "the natural and fundamental group unit of society" and is "entitled to protection by society and the State" (UDHR16)¹⁷⁸ by the Universal

¹⁷⁶ About LGBTI people and human rights | OHCHR

¹⁷⁷ Ten Ways the United Nations has Protected LGBTQ Human Rights - Human Rights Campaign (hrc.org.)

¹⁷⁸ Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

1. Marriage shall be entered into only with the free and full consent of the intending spouses.
2. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Declaration of Human Rights. It acknowledges that a man and a woman coming together in marriage creates a family (UDHR 16). Every person has the right to a family life, which includes the right to develop and preserve family connections and to have their current family life respected. The Universal Declaration of Human Rights, Article 23¹⁷⁹ of the International Covenant on Civil and Political Rights, and Article 8¹⁸⁰ of the European Convention on Human Rights are only a few of the international human rights documents that acknowledge this right. A study on the effects of States' compliance of their commitments under pertinent articles of international human rights law concerning family protection has been prepared by the UN Office of the High Commissioner for Human Rights (OHCHR). The report also addresses how families help their members realize their rights to a sufficient quality of life, especially when it comes to ending poverty and promoting sustainable development. The UDHR's Article 16 explores people's private lives. It states that everyone who is an adult has the freedom to get married and start a family. In addition, men and women enjoy equal rights during and after marriage.

The United Nations endeavours to guarantee that the family right is upheld and safeguarded worldwide, acknowledging it as an essential human entitlement.

EUROPEAN UNION (EU)

The European Union has taken the lead in advocating for LGBTQIA+ rights inside and outside its member nations. It is expressly forbidden to discriminate based on sexual orientation under the EU's Charter of Fundamental Rights. Additionally, the EU provides funding for several initiatives that defend LGBTQIA+ rights and fight prejudice. Furthermore, the European Court of Human Rights has rendered several significant rulings that have improved the rights of LGBTQIA+ people, such as the acceptance of

¹⁷⁹ 2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*

3. *No marriage shall be entered into without the free and full consent of the intending spouses.*

¹⁸⁰ Article 8 1 Everyone has the right to respect for his private and family life, his home and his correspondence.

same-sex relationships and the defence of these people against prejudice and hate crimes.¹⁸¹

The first-ever Commission policy on LGBTIQ equality, the LGBTIQ Equality Policy 2020–2025, has been accepted by the EU. With the help of this plan, a Union where diversity is valued as an integral part of their shared richness and where everyone is free to be who they are without fear of violence, prejudice, or exclusion will be created. The strategy lays forth several significant goals to be accomplished by 2025, spread over four pillars. Its main objectives are to combat prejudice and guarantee the safety and fundamental rights of those who identify as LGBTI within the European Union. Additionally, the strategy calls on Member States to create and carry out national action plans. However, prejudice against the LGBTQIA+ population still exists throughout the EU, despite these efforts. According to data from the European Union Agency for Fundamental Rights, discrimination in the EU was rising on the grounds of sex traits, gender identity/expression, and sexual orientation.¹⁸²

ORGANIZATION OF AMERICAN STATES (OAS)

In addition, the Organization of American States has actively worked to advance LGBTQIA+ rights throughout the Americas. Numerous resolutions on human rights, gender identity, and sexual orientation have been enacted by the OAS General Assembly, which calls on member nations to oppose violence and discrimination against LGBTQIA+ people. The Rapporteurship on the Rights of LGBTI Persons was created by the Inter-American Commission on Human Rights. Its duties include monitoring and reporting on the state of LGBTQIA+ rights in the region and making recommendations for improving the social and legal environments that these communities face.¹⁸³

¹⁸¹ PROGRESS REPORT ON THE IMPLEMENTATION OF THE LGBTIQ EQUALITY STRATEGY 2020-2025, European Commission.

¹⁸² PROGRESS REPORT ON THE IMPLEMENTATION OF THE LGBTIQ EQUALITY STRATEGY 2020-2025, European Commission.

¹⁸³ Samantha S. Ulin, *Advancing LGBT Rights Globally: The International Legal Landscape*, 41 *Fordham Int'l L.J.* 1205 (2018).

HUMAN RIGHTS WATCH (HRW) and AMNESTY INTERNATIONAL

Non-governmental groups that expose human rights violations against LGBTQIA+ people and fight for their rights include Human Rights Watch and Amnesty International. These groups carry out in-depth investigations, write publications, and launch advocacy initiatives to spread the word and put pressure on legislators to enact laws and regulations that are inclusive and protective. Their work has been crucial in drawing attention to problems, including discriminatory legislation, police violence, and social stigmatization that LGBTQIA+ people experience all over the world.¹⁸⁴

ILGA World (International Lesbian, Gay, Bisexual, Trans and Intersex Association)

A global federation of more than 1,600 organizations from more than 150 countries, ILGA World, is committed to securing equal rights for people who identify as LGBTQIA+. In addition to offering assistance and resources to member organizations, ILGA participates in international forums for advocacy and produces in-depth reports on the global status of LGBTQIA+ rights. The work of ILGA is essential to creating a unified worldwide movement for LGBTQIA+ rights and giving underrepresented groups a forum to be heard internationally.¹⁸⁵

The rights of LGBTQIA+ people have advanced globally thanks mainly to the work of international organizations. Through the use of their power, these groups have supported LGBTQIA+ communities vitally and campaigned for societal acceptance and legislative reforms. Even though there has been a lot of progress, there is still more work to be done in terms of international collaboration and persistent advocacy because of the ongoing struggles that LGBTQIA+ people confront in many areas of the world.¹⁸⁶ For LGBTQIA+ people, the combined efforts of these groups remain a ray of hope for the realization of justice and equality on a global scale.

¹⁸⁴ Kees Waaldijk, *The Right to Relate: A Lecture on the Importance of Civil Legal Recognition of Same-Sex Partnerships*, 1 *Duke J. Gender L. & Pol'y* 141 (1994).

¹⁸⁵ ILGA World: welcome! - ILGA World

¹⁸⁶ Ryan Goodman & Derek Jinks, *International Organizations and the Protection of Gay Rights*, 102 *Am. J. Int'l L.* 768 (2008).

6. CHALLENGES AND ONGOING STRUGGLES: IN LIGHT OF LEGAL ISSUES

6.1 HATE CRIME

A hate crime is a criminal offence that is perpetrated against a person or group of people because the perpetrator believes that the victim is different or "other" because of their perceived color, ethnicity, religion, sexual orientation, gender identity, handicap, or any other feature. Prejudice, bias, or hatred directed towards the victim's identity or perceived affiliation with a specific social group is the driving force behind these crimes. Over the period of time, there has been a lot of hate crime committed against the queer community. One of the most cruel forms of it was in Germany. The pink triangle was meant to be a badge of shame before it gained international recognition as a symbol of LGBT strength and pride. Gay men in concentration camps had a pink triangle with a downward pointing stitched onto their clothing in Nazi Germany in an attempt to degrade further and identify them. Activists would not reclaim the emblem as a freedom symbol until the 1970s.

Although it was officially declared unlawful in Germany in 1871, homosexuality was not strictly forbidden until the Nazi Party came to power in 1933. In an attempt to "purify" German culture and race, the Nazis detained thousands of LGBTQ+ people, primarily gay males, who they believed to be degenerate. According to estimates from the US Holocaust Memorial Museum, 100,000 gay men were detained, and 5,000–15,000 of them were sent to concentration camps.¹⁸⁷ Similar to how Jews had to wear yellow stars to identify themselves, homosexual males in concentration camps were required to wear a giant pink triangle. (Triangles coloured black for "asocial" individuals, such as lesbians and prostitutes, and red for political prisoners, criminals, and immigrants, and blue for immigrants were substituted for brown triangles.)

Gay males were subjected to ruthless treatment in the camps, both from fellow inmates and guards. Between 1933 and 1945, an estimated 65% of homosexual males who were housed in concentration camps perished. The anti-gay laws in Germany were kept by

¹⁸⁷ Gay Men under the Nazi Regime | Holocaust Encyclopedia (ushmm.org).

both East and West Germany even after World War II, and many gay people were still behind bars until the early 1970s. (The statute wasn't formally overturned until 1994.)¹⁸⁸

Although, the Nazi era has seen the most brutal form of death and discrimination leading to hate crimes against gays. It does not mean that in a lower amplitude, these crimes don't happen regularly all across the globe. Hate crimes can take many different forms, such as physical assault, intimidation, property damage, vandalism, and harassment. The aim to attack people based on their membership in a particular social group and the underlying motivation founded in prejudice set hate crimes apart from other criminal acts. Hate crimes not only cause immediate injury to the victim but also have wider societal repercussions, as they promote fear, division, and increased marginalization of the targeted community. Legislative actions that strengthen anti-hate crime legislation, law enforcement awareness and training programs, community outreach and education campaigns, and victim support services are commonly employed in the fight against hate crimes. Societies can endeavour to create safer and more inclusive communities for all people by tackling the underlying causes of hate and intolerance.

In India, there are no specific hate crime laws, which make it more difficult to curb the issues pertaining to a particular community. However, the constitution of India contains many provisions in order to protect the minorities against discrimination. Art.1¹⁸⁹, clearly states that there shall be no discrimination on the basis of sex, Art.14¹⁹⁰ that ensures equality before law as well as equal protection of law. Moreover, Art.19¹⁹¹ gives the right

¹⁸⁸ The Pink Triangle: From Nazi Label to Symbol of Gay Pride | HISTORY.

¹⁸⁹ Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth(1)The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.(2)No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-(a)access to shops, public restaurants, hotels and places of public entertainment; or(b)the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

¹⁹⁰ 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

¹⁹¹ 19. Protection of certain rights regarding freedom of speech, etc.(1)All citizens shall have the right-(a)to freedom of speech and expression;

to freedom of speech and expression, and Art. 21¹⁹² gives right to life which encompasses right to privacy of a person.¹⁹³

There are many real-life incidents which take place on a regular basis that torment the people of this community; not only the mental but also physical health of these people are encroached upon because they belong to a certain strata of society. Some of the instances of hate crimes towards the community are mentioned below.

Manoj, 17, whose assigned sex at birth was female, was beaten up brutally when he told his family he felt like a man and loved a woman¹⁹⁴. Police reported that a young person who seemed to be HIV positive and his companions killed 39-year-old gay rights campaigner Anil Sadanandan because they believed the activist had spread the infection to them.¹⁹⁵The body of Sangeetha, an old trans woman, was discovered in Coimbatore on October 21, 2020. She was inside her own home when she was brutally murdered. After being brutally murdered, her body was placed into a plastic drum that had been salted. After she vanished for three days, neighbours found her body. There are no precise statistics on violence against LGBTQ individuals from the National Crime Records Bureau. The number of LGBT individuals living in the nation is not documented in the census.¹⁹⁶ Indian citizen Aditya Tiwari talked about the homophobic abuse he was the victim of in 2017. Eight males attacked him, touching him sexually and calling him derogatory names pertaining to homosexuality. Hate crimes against homosexuals and queers are still frequent, even though homosexuality was decriminalized in India in 2018. There are a lot more instances which happen every day. The discrimination is quite pertinent, and a lot of times, it leads to violence against them. The jurisprudential basis of Mill's harm principle is clearly disregarded when it comes to the community's rights. A specific group of people are tormented just because they are not the majority. Hate crimes in India can be seen against certain caste, religions and sets of people as well. But there is

¹⁹² 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁹³ 2019 (1) SCC 1.

¹⁹⁴ India LGBT couples: 'My parents were ready to kill me for their honour' (bbc.com).

¹⁹⁵ Four held for gay rights activist murder - News18.

¹⁹⁶ I was victim to a homophobic attack in 2017 – here's why I'm speaking up about it (thenewsminute.com).

no law specifically to prevent the same. The communal violence between religions is an age-old tale and is still very much eminent. Instead, there is no term such as a hate crime that is introduced in the statutes or in the Indian constitution.

6.2 CYBER BULLYING

Cyberbullying was defined as "willful and repeated harm inflicted through the use of computers, cell phones, or other electronic devices" by Patchin and Hinduja (2006).

Regardless of gender or sexual orientation, cyberbullying has been a persistent problem since the beginning of the internet. Even though cyberbullying has been persistent for a decade now, but the area of research for cyberbullying, specifically against the LGBTQ+ community, is niche. As a result, there are very few to no research studies on cyberbullying that are available. Regretfully, the majority of research was conducted on heterosexual and cisgender people.

Bullying on social media poses a severe problem for the LGBTQ community in real life. Their confidence is undermined by the negative feedback they receive on social media from various sources, including offensive remarks and improper methods. Some people experience mental illness, suicidal thoughts, and psychological issues. Governments, educational institutions, and college administrations should use awareness campaigns and programs to foster a welcoming environment for all students, regardless of gender. Parents' and kids' attitudes about the LGBTQ community need to be changed. Low self-esteem and suicidal thoughts are two of the main consequences of cyberbullying. Adolescents who experienced cyberbullying exhibited higher suicidal ideation and attempted suicide at a higher rate than those who did not encounter such kinds of peer hostility. The problem of cyberbullying has gained significant attention in society as a result of the growing popularity of social networking sites and applications. Despite a sharp increase in awareness of cyberbullying, research on the best ways to address this issue is still lacking. It is evident that cyberbullying has a detrimental impact on people's mental and physical health, especially within the LGBTQ community, as gender identification has been found to be a significant indication of people's psychosocial adjustment and peer group welfare. One may even contend that the impacts of

cyberbullying are particularly detrimental to sexual minorities, with extended cyberbullying contributing to mental health issues such as depression, substance misuse, suicidal thoughts, sleep difficulties, and other mental illnesses.

The LGBTQ community is the segment of society that has been abandoned in terms of cyberbullying. In addition to cyberbullying, research shows that 43% of LGBTQ students questioned between the ages of 18 and 20 reported experiencing sexual harassment in primary schools and that over 70% of face-to-face bullying perpetrated against LGBTQ students in India results in anxiety, sadness, and loss (UNESCO, 2018). Research in the field of public health must evaluate the shift in perceptions and discrimination against sexual and gender minorities. According to a study by Garaigordobil & Larrain (2020), non-heterosexuals (13.7%) are more likely than heterosexuals (6.7%) to become cyber victims of any sexual orientation.¹⁹⁷

Despite efforts to stop it, cyberbullying targeting the LGBTQ+ community is a serious problem that continues. Online harassment, discrimination, and threats against LGBTQ+ members are commonplace due to their sexual orientation or gender identity. Bullying can take many different forms, such as doxxing, targeted harassment campaigns, and offensive remarks on social media. The anonymity and distance offered by the internet can encourage people to express their prejudice without worrying about immediate repercussions, which is one of the reasons cyberbullying against the LGBTQ+ community is so common. In November, a 16-year-old Indian boy, Priyanshu Yadav, faced homophobic cyberbullying after posting selfies in a saree and makeup. The abuse he received on social media may have contributed to his tragic suicide.¹⁹⁸

The amount of bullying and harassment faced by the queer community is at its par. The disheartening part of all of this is that they cannot express themselves freely, whether it is

¹⁹⁷ CYBER BULLYING IN THE LGBTQ AND DELINEATING INDIAN GOVERNMENT'S ROLE FOR LGBTQ IN THE CYBERSPACE , Amala Saju, Sajan Abraham.

¹⁹⁸ CYBER BULLYING IN THE LGBTQ AND DELINEATING INDIAN GOVERNMENT'S ROLE FOR LGBTQ IN THE CYBERSPACE , Amala Saju, Sajan Abraham.

offline or online. In India, words like “chakka”, “meetha”, “kundan”, etc have been used against them regularly, especially on social media. This serious issue has been neglected for a very long time. In the cyberspace era, it is essential to have particular laws based on the horrors of it.

6.3 LEGAL RECOGNITION

Ensuring the rights and equitable treatment of LGBTQIA+ individuals in society is contingent upon their legal recognition and protection. Although there has been notable progress in some regions, obtaining complete legal recognition is still a challenging task on a worldwide scale. Legal recognition is the official acknowledgement of LGBTQIA+ identities, partnerships, and families inside the legal system. This covers the acceptance of gender identities other than the binary distinction between male and female, as well as the legalization of same-sex unions and marriages. LGBTQIA+ couples can affirm the legal validity of their relationships by gaining access to a plethora of benefits, such as inheritance rights, tax benefits, adoption rights, and next-of-kin status, in countries like Canada and the Netherlands, where same-sex marriage is legal.

However, because LGBTQIA+ people are not recognized in many parts of the world, they are more susceptible to prejudice and marginalization. For instance, homosexuality is still illegal in many Middle Eastern and African nations, which makes LGBTQIA+ people more vulnerable to discrimination and marginalization. Same-sex couples in these areas lack legal standing, which makes it difficult for them to speak up for their rights and defend their families. Due to their lack of legal protection, LGBTQIA+ people frequently face assault, harassment, and arbitrary arrests with little chance of redress. This legal obscurity perpetuates discriminatory behaviours and public stigma, further solidifying inequality.

Comprehensive anti-discrimination legislation is necessary for the legal protection of LGBTQIA+ individuals, even beyond relationship recognition. These laws are essential for protecting LGBTQIA+ people from discrimination in a variety of contexts, such as the workplace, housing market, healthcare system, and educational system. Legislation that effectively combats discrimination must specifically designate gender identity and

sexual orientation as protected categories, giving people the legal means to contest discriminatory actions. Anti-discrimination solid laws are in place in places like the European Union, where member states are required by directives to put safeguards against discrimination based on gender identity and sexual orientation. These frameworks are vital in developing a just and inclusive society.

Furthermore, procedures for legal gender recognition must be courteous and approachable to provide transgender people with protection and legal acknowledgement. This entails removing undue bureaucratic obstacles and invasive medical procedures from transgender people so they can change their gender markers on official documentation. Legal recognition of self-determined gender identity has been pioneered by progressive jurisdictions like Argentina, which sets an example of best practice.

In a nutshell, attaining equality and eliminating systematic discrimination depend heavily on the legal acknowledgement and protection of LGBTQIA+ people. It is essential to implement comprehensive legal reforms that include gender identity recognition, anti-discrimination laws, and relationship recognition. These reforms must be implemented in conjunction with efficient enforcement mechanisms and social awareness campaigns to guarantee that legal progress results in noticeable enhancements for LGBTQIA+ people. The continuous struggles to protect these rights serve as a reminder of the giant fight for human rights and the necessity of steadfast support from throughout the world.

7. CONCLUSION

The dissertation explores the background of sodomy laws throughout history, following its ancestors from prehistoric Mesopotamian laws through early modern and medieval Europe and ultimately to their implementation in colonial India. The analysis shows that sodomy laws, which are instruments of societal control, have frequently been derived from religious and moralistic views. Gay activity was long stigmatized and illegal in medieval Christian and Islamic countries due to a slow transition from acceptability in some ancient cultures to harsh punitive measures.

Significant progress has been made in the legal landscape for LGBTQIA+ rights because of important rulings and legislative changes that have gradually increased the rights and safeguards available to sexual minorities. In 2009, the Delhi High Court rendered a landmark verdict in *Naz Foundation v. Government of NCT of Delhi*, which struck down Section 377 of the Indian Penal Code and decriminalized consensual gay conduct between adults. Based on the equality, privacy, and dignity principles found in the constitution, this ruling was first overturned by the Supreme Court in 2013 and then upheld in *Navtej Singh Johar v. Union of India* in 2018. This landmark Supreme Court decision clearly decriminalized homosexuality and strengthened LGBTQIA+ people's constitutional rights to equality and nondiscrimination. The Supreme Court's 2014 ruling in *NALSA v. Union of India*, which acknowledged transgender persons as a third gender and required their inclusion in employment and educational reservations, was another critical turning point.

The advancement of LGBTQIA+ rights in the US has been shaped by several significant Supreme Court decisions. A landmark decision for LGBTQIA+ free speech came in *One, Inc. v. Olesen* in 1958, which held that pro-gay publications were First Amendment-protected speech since they were not intrinsically offensive. *Romer v. Evans*¹⁹⁹ established a significant precedent for anti-discrimination provisions under the Equal Protection Clause in 1996 by overturning a Colorado amendment that prohibited laws protecting LGBTQIA+ people from discrimination. The landmark *Obergefell v.*

¹⁹⁹ 517 U.S. 620.

Hodges ruling in 2015 made same-sex unions legal across the country and affirmed that a person's right to marry is an inalienable freedom regardless of their sexual orientation.

Iceland has taken a very progressive stance when it comes to LGBTQIA+ rights. In 1940, homosexuality was made legal, and by 1992, all sexual partnerships had equal consent ages. Same-sex relationships were legalized in Iceland in 1996 and were accorded the same rights as heterosexual marriages. When same-sex marriage was made legal in 2010 and given access to assisted reproductive technology as well as the ability to adopt children, this openness went even further. In 2009, Iceland demonstrated its support for LGBTQIA+ rights when Jóhanna Sigurðardóttir was elected as the first openly gay head of state in history.

These legal turning points demonstrate how LGBTQIA+ rights are being protected and acknowledged in various legal contexts. They are a reflection of a larger worldwide movement toward increased inclusiveness and equality, which is being fueled by both legislative and judicial reforms. They also highlight the continued need for activism and vigilance to guarantee that LGBTQIA+ people's rights are fully realized and upheld in all spheres of life.

The LGBTQIA+ group faces complex and deeply embedded constitutional and legal difficulties that are a reflection of more considerable cultural prejudices and institutionalized discrimination. While key rulings like *Navtej Singh Johar v. Union of India* have decriminalized homosexuality in India, LGBTQIA+ people still face enormous obstacles in obtaining equal rights and protections due to the absence of comprehensive anti-discrimination laws. The Supreme Court's ruling in *Supriya Chakraborty & Anr v. Union of India* highlights the constitutional issue of attaining marriage equality, since it rejects the rights of same-sex couples to marry. In addition to being against the Indian Constitution's guarantees of equality and non-discrimination, this denial upholds societal stigma and marginalization. Furthermore, even though transgender people are acknowledged as a third gender, the vagueness of current legislation pertaining to their rights causes uneven application and enforcement, which impedes their access to jobs, healthcare, and education. In addition, the lack of clear legal

procedures on matters like adoption, surrogacy, and inheritance for those who identify as LGBTQIA+ further compounds their marginalization. Law enforcement and judiciary personnel's insensitivity and ignorance, which can lead to distorted legal interpretations and implementations, exacerbate these difficulties. Comprehensive legal reforms that clearly safeguard the rights of LGBTQIA+ people and guarantee their full inclusion in all facets of society are desperately needed to address these issues. By recognizing same-sex marriages, passing particular anti-discrimination laws, and establishing precise legal rules for transgender people's rights, the legal system will be in keeping with the fundamental values of justice, equality, and dignity included in the constitution.

Comparative research on LGBTQIA+ rights in various legal systems shows a complicated picture of victories and failures that reflects various legal, cultural, and religious contexts. Several important revelations and conclusions can be made by looking at significant legal turning points and current issues in different nations.

Numerous progressive nations, including the Netherlands, Iceland, and Canada, have strong legislative protections and acknowledgements for LGBTQIA+ people. These nations have approved same-sex unions, permitted same-sex adoptions, and passed extensive anti-discrimination legislation. As an illustration of its progressive attitude, consider Iceland's early decriminalization of same-sex relationships and subsequent acceptance of same-sex adoptions and marriages.

Legal developments and societal acceptance frequently go hand in hand. Higher rates of LGBTQIA+ acceptance and inclusion are typically found in Western Europe and some regions of the Americas. On the other hand, severe anti-LGBTQIA+ laws and cultural norms are frequently upheld in areas like the Middle East, Sub-Saharan Africa, and portions of Eastern Europe, which results in severe discrimination and violations of human rights. The persistence of discriminatory behaviors in these regions is mostly due to the influence of religious and cultural beliefs.

In many jurisdictions, judicial interventions have played a crucial role in the advancement of LGBTQIA+ rights. Historic rulings, like the US case *Obergefell v. Hodges*, which made same-sex marriage lawful everywhere, demonstrate the judiciary's

involvement in overturning discriminatory legislation. However, although societal acceptance and legal recognition of same-sex weddings remain elusive, the recent judgment in India to decriminalize homosexuality in *Navtej Singh Johar v. Union of India* marked a significant step forward.

Those who identify as transgender encounter distinct obstacles in contrast to their fellow LGBTQIA+ peers. Diverse laws recognize gender identity in different ways, provide access to quality healthcare, and shield people from discrimination. Transgender people are granted legal protections in certain countries, such as India, where they are recognized as a "third gender," while social acceptance and practical application are still lagging behind. In contrast, the legal frameworks enabling gender identity recognition and rights are more extensive in many Western nations.

Legal and social improvements have been propelled by activism and advocacy. LGBTQIA+ activists' tenacious efforts have resulted in important legislation reforms and raised awareness of LGBTQIA+ problems. The comparative analysis highlights the significance of international advocacy and grassroots movements in promoting legislative reforms and societal acceptance

The comparative examination of LGBTQIA+ rights highlights a highly uneven global environment. While some nations have made admirable strides toward recognising and defending the rights of LGBTQIA+ people, others still impose oppressive laws and regulations that further marginalized these groups. Comprehensive safeguards and social acceptability are attainable, as seen by the progress made in nations such as Iceland, the Netherlands, Canada and the United States. These nations serve as role models for legislative and social reforms.

Nonetheless, the ongoing difficulties in areas where LGBTQIA+ rights are strongly opposed by deeply ingrained cultural and religious beliefs underscore the necessity of continuing campaigning and external pressure. A strong legal system and active advocacy are essential in opposing discriminatory policies and legislation. Fostering international solidarity, assisting grassroots groups, and advocating for inclusive policies that protect

the rights, dignity, and well-being of LGBTQIA+ people everywhere are critical as the battle for equality continues.

There are many different aspects and a continuous journey towards complete equality for LGBTQIA+ people. Governments, legal systems, and civil society must work together to remove discriminatory barriers and create a more inclusive and equitable world.

In conclusion, the **suggestions** and fair alternatives to achieve marriage equality in India would be:

CIVIL UNIONS

One option is to advocate for same-sex couples to be recognized legally as partnerships or **civil unions** rather than as married couples. Many states in the United States of America, a number of nations in Europe and Latin America, Australia, and New Zealand have passed laws recognizing civil unions.²⁰⁰In these jurisdictions, various civil union models have been put into practice. Domestic partnerships exist in certain US states, although recognition of them is limited to municipal councils and private businesses that provide spousal benefits to their employees' same-sex spouses.²⁰¹Only restricted legal powers have been granted to individuals forming a civil partnership in nations such as Germany. The benefits of the law are limited to those pertaining to tax, pension, and adoption laws.

Alternative arrangements, such as the one implemented in Vermont in response to a ruling by the Supreme Court of Vermont²⁰², grant partners the same legal advantages as those who are married.²⁰³ Recently, the Supreme Courts of Vermont²⁰⁴ and New Jersey²⁰⁵ have ruled that same-sex couples are entitled to all of the advantages of marriage;

²⁰⁰ Nicola Barker, Not the Marrying Kind – A Feminist Critique of Same-Sex Marriage 48 (2012).

²⁰¹ B.N. Sampath, Hindu Marriage as a Samskara: A resolvable conundrum, 3(3) J. Ind. L. Inst. 319-331 (1991).

²⁰² Baker v. Vermont, 744 A 2d 864 (Vt 1999).

²⁰³ Nicola Barker, supra note 125.

²⁰⁴ Baker, supra note 128.

²⁰⁵ Lewis v. 188 NJ 415 : 908 A 2d 196 (NJ 2006).

however, the State may choose to grant these benefits outside of the context of marriage or in favor of a parallel domestic partnership. These "separate but equal" institutions ought to resemble marriage and grant the same set of legal privileges.

This approach has the advantage of being less opposed, at least from a religious standpoint, and it does not include the contentious discussion of whether "marriage" is inherently heterosexual. It has also served as a precursor to same-sex marriage recognition. France passed legislation recognising partnerships in 1999 and same-sex marriages in 2013.²⁰⁶ Similarly, Wales and England approved civil unions in 2004 but passed laws recognising same-sex partnerships in 2013.²⁰⁷

However, restricting marriage to same-sex couples and only offering civil unions as a choice is discriminatory in and of itself since it gives some people access to a choice that is fundamentally inferior to marriage. Marriage is more than just a legally binding union created for the partners to acquire rights and legal advantages from one another. It also serves the equally significant purpose of granting official legal and social legitimacy to a relationship. Status benefits from marriage include giving the spouse a higher status than other family members and bestowing on them specific rights, such as the ability to make decisions in the event of their incapacitation, the ability to register deaths, etc. Furthermore, just because two organizations uphold the same legal rights does not mean that they are equal. A civil partnership lacks the historical, cultural, and social significance that marriage, as an institution, possesses. Same-sex couples place equal value on the social status that comes with marriage as do heterosexual couples.²⁰⁸ Therefore, even if same-sex couples have the same legal rights, a rule that restricts their options to civil unions will discriminate against them based on their sexual orientation. The Connecticut Supreme Court ruled that the state's "separate but equal" education system was unconstitutional due to these reasons.²⁰⁹ Furthermore, acknowledging civil unions as an alternative to marriage implies that heterosexual and same-sex partnerships

²⁰⁶ Angela Charlton, French President Signs Gay Marriage Into Law, Huffington Post (May 18, 2013).

²⁰⁷ Gay Marriage Is Now Legal In England and Wales After 'Historic' Bill Gets Royal Assent, Huffington Post (July 17, 2013).

²⁰⁸ Jeffrey A. Redding, Queer Theory – Law, Culture and Empire 125-127 (Robert Leckey & Kim Brooks eds., 2010).

²⁰⁹ *Kerrigan v. Commr. of Public Health*, 289 Conn 135 (2008).

are not equal. It would entail admitting two types of marriages, according to US Supreme Court Justice Ginsberg: "full marriages" and "*skim-milk marriages*."²¹⁰

In order to give a partner in a civil union the same status as a spouse and make them considered "family," it would be necessary to amend numerous laws in addition to creating a new one governing civil unions. These laws would include the **Indian Succession Act of 1925**, the **Guardians and Wards Act of 1890**, the **Workmen's Compensation Act of 1923**, and numerous others pertaining to succession, adoption, pensions, and other topics. However, legislation is likely to be delayed, particularly when it comes to a topic like this where there will probably be strong opposition. It could be challenged on the grounds that it gives legislative permission to nonmarital live-in relationships, which is against Indian culture, even though it cannot be alleged to interfere with religious freedoms. Therefore, it does not appear that pursuing legislation to recognize civil unions is the best course of action, even from a tactical standpoint.

ADDING PROVISIONS TO SPECIAL MARRIAGE ACT

To allow same-sex marriages, a change to the Special Marriage Act, 1954 (the "SMA") should be pursued. This alternative shouldn't provoke objections from religious quarters. The SMA is a secular statute that makes it easier for people who practice various religions or who don't want to be bound by their own laws to be married. A Marriage Officer registers the marriage rather than performing a religious ceremony. Given that it stipulates that the male must be twenty-one years old and the female must be eighteen, the SMA appears to apply to heterosexual couples in its current version.²¹¹ However, it is not challenging. to allow same-sex unions to operate within SMA's guidelines. All that would need to be done is change Section 4(c) to say that a party, if male, should have reached the age of twenty-one, and if a woman, the age of eighteen. Additionally, an explicit clause allowing same-sex weddings should be added. In any event, the SMA would need to be changed to grant relationships between members of various religions

²¹⁰ John Lewis & Stuart Gaffney, From Skim Milk to Harvey Milk: How Our Community Made History at Last Week's Supreme Court Arguments, Huffington Post (May 4, 2013).

²¹¹ The Special Marriage Act, 1954, S. 4(c).

the same status, even if personal laws were to be changed to recognise same-sex marriages.

Even if it is simple to draft and does not infringe upon religious freedoms, there will undoubtedly be strong opposition to the proposed change. The proposed amendment to the SMA would be comparable to other nations' same-sex marriage legislation. Currently, sixteen nations have passed such legislation, ranging from the Netherlands in 2000 to Wales and England in 2013.²¹²In a similar vein, laws allowing same-sex marriages have been passed in thirteen US states.

READING DOWN SPECIAL MARRIAGE ACT

The last resort is to ask a judge to interpret the SMA to allow same-sex marriages because, in the absence of such a determination, the law would discriminate against same-sex couples and be unconstitutional. Numerous international examples bolster this claim. The United States has three State Supreme Courts: Massachusetts, Connecticut, and Iowa. These courts have ruled that a marriage legislation that prohibited same-sex marriages was unconstitutional. Each of the three judges cited the due process and equal protection clauses, emphasising that the freedom to marry is a fundamental right that encompasses equality. A group of persons cannot be denied the opportunity to marry, which has been provided to others without a compelling reason, which the court determined did not exist.

When the US Supreme Court struck down DOMA, the majority opinion did not support the idea that same-sex marriages were protected by the Constitution.²¹³ Its rulings were primarily grounded in the constitutional framework that gives the States control over the meaning of marriage. However, as Justice Scalia noted in his dissenting opinion, the majority opinion opens the door for the argument that same-sex marriages are protected by the Constitution. Citing the majority argument, he stated that if DOMA unconstitutionally stripped same-sex couples of their "personhood and dignity" in states

²¹² 5 Freedom to Marry Internationally, Freedom to Marry.

²¹³ 570 U.S. 744 .

that allowed the practice, courts may conclude that laws opposing gay marriage must also be repealed.

The Constitutional Court of South Africa has held⁷⁴ that marriage laws that prohibited same-sex marriages were in violation of this provision. Section 9(3) of the Constitution states: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."

A number of other Canadian decisions follow, starting with one from the Court of Appeal for Ontario⁷⁵, which held that the common law definition of marriage as it was previously understood violated same-sex couples' equality rights under Section 5 (1) of the Canadian Charter of Rights and Freedoms by referring to marriage as "one man and one woman." The definition was then reformulated as "the voluntary union for life of two persons to the exclusion of all others."

According to the Naz Foundation court, having intercourse as a since "discrimination on the basis of orientation is grounded in stereotypical judgments and generalizations about the conduct of either sex," it encompasses sexual orientation.²¹⁴

But even many of those who uphold the aforementioned constitutional and legal precepts and agree with the aforementioned tactical justifications would question whether courts should be consulted instead of democratically elected authorities.

²¹⁴ Tarunabh Khaitan, Reading Swaraj into Article 15 – A New Deal for All Minorities, in *Law Like Love* 281-283 (Arvind Narrain & Alok Gupta eds., 2011).

PERSONAL LAWS AND SAME-SEX MARRIAGES

Hindu marriages and weddings carry great religious and cultural significance in addition to their social relevance. Religious rites are an integral aspect of marriage, which is regarded as a sacred institution.²¹⁵

This could account for the numerous lesbian marriages that occur, such as religious ceremonies, garlands being exchanged at temples, and quasi-legal friendship contracts (*maitrikarar*)²¹⁶ in a number of documented cases. For example, two police officers wed in a Hindu ceremony in 1988. Their family and the community welcomed and supported their marriage, despite the fact that it could not be legally recognized and they faced work suspensions.²¹⁷ It's interesting to note that the majority of the many lesbian marriages that have been documented have involved non-LGBTQI women from small towns, lower middle class backgrounds, and no affiliation with the LGBT movement.²¹⁸

The most appropriate course of action in this situation would be for Indian personal marriage laws to recognize same-sex unions. Different laws apply to Christians, Muslims, and Hindus in India with regard to marriage, succession, and other matters. Any two Hindus may get married, according to the Hindu Marriage Act, which regulates Sikhs, Jains, Buddhists, and Hindus.²¹⁹ There is no official definition of "marriage" for Muslim marriages since they are not subject to statutes; instead, they are typically understood to be contracts made with the intention of having children.²²⁰ Thus, it would seem that marriage is only intended for heterosexual couples under Indian personal rules.

Under Hindu personal laws, same-sex weddings can be recognized through any of the following methods: (i) reading the current legislation to allow same-sex unions; (ii) reading that the LGBT community is a distinct group whose traditions allow same-sex unions; (iii) interpreting the Hindu Marriage Act of 1956 (the "Act") in order to same-sex

²¹⁵ B.N. Sampath, Hindu Marriage as a Samskara: A resolvable conundrum, 3(3) J. Ind. L. Inst. 319-331 (1991).

²¹⁶ Arvind Narrain, Queer – Despised Sexuality, Law and Social Change 79 (2004).

²¹⁷ Somak Ghoshal, The Well of Loneliness, The Telegraph, November 25, 2008.

²¹⁸ Ruth Vanita, Wedding of Two Souls, 20(2) J. Feminist Stud. Rel. (2004).

²¹⁹ Hindu Marriage Act, 1955, S. 5

²²⁰ Siddharth Narrain & Birsha Ohdedar, A legal perspective on Same-Sex Marriage and other Queer relationships in India, Orinam.

partnerships, arguing that doing so would violate the Constitution; or (iv) changing the Act to allow for same-sex relationships. Due to the Act's gender neutrality, with the exception of the terms "bride" and "bridegroom".

It is arguable, that same-sex couples may have their marriages formally dissolved under the Act as long as one of them is identified as the bride and the other as the groom. Lesbian couples have attempted this strategy, in which one partner poses as the bride and the other as the bridegroom.²²¹ This argument strains the text of the statutes and goes against the conventional understanding of the terms bride and groom, making it impossible to establish under the standards of statutory interpretation. Additionally, the interpretation seeks to standardize same-sex partnerships with conventional marriage arrangements. This interpretation will perpetuate old oppressive gender stereotypes that genders are fundamentally different, that two people in a marriage have predetermined roles, and that even same-sex couples must accept traditional roles in order to get married, at a time when relationships between heterosexual spouses are being reshaped to make them more equal.

All personal laws have the same challenges as these three methods. The last option would be to look for legislative changes to the personal laws because none of the aforementioned strategies appear to be workable. It's possible that the most ideal option might also be the hardest to implement in real life. Due to the animosity of a loud segment of society against the LGBT community, such an amendment would be extremely contentious.

It is evident that denying same-sex couples the option to marry perpetuates discrimination by treating them differently. The most satisfying course of action in a country where marriage is so highly valued religiously would be to allow same-sex unions under personal laws. Still, it would be difficult to propose changes to the individual laws of all the major religions. Any court intervention in this matter would be interpreted as interfering with the right to practice religion. The best practical course of action in this case seems to be legislative changes to the SMA to allow same-sex unions.

²²¹ Ruth Vanita, *Democratising Marriage: Consent, Custom and the Law*, in *Law Like Love*, 351, (Arvind Narrain & Alok Gupta eds., 2011).

Although there have been notable developments in the acknowledgement and defense of LGBTQIA+ rights, the group still faces formidable obstacles. The fight for equal rights is still hard, even though homosexuality has been decriminalized in many places across the world, including India, where the historic case of Navtej Singh Johar v. Union of India occurred. Crucial issues that still need a lot of thought and legislative action include the legal recognition of marriage, adoption rights, surrogacy, and protection against discrimination.

Due to societal norms and historical prejudices, the legal landscape has progressively changed to become more inclusive. Nevertheless, there are numerous legal and constitutional obstacles to obtaining complete legal recognition and protection. These issues go beyond only legislative regulations; they also include ingrained cultural beliefs and the sluggish progress of social acceptability.

In order to guarantee the equality and dignity of every person, regardless of their sexual orientation or gender identity, international organizations have been instrumental in promoting LGBTQIA+ rights. However, because different regions have varied legal and cultural settings, there are considerable regional differences in enforcing and accepting these standards. The LGBTQIA+ community's continual difficulties serve as a reminder of the importance of ongoing advocacy and transformation. Prevalent issues include violence, discrimination, and the absence of legal recognition for same-sex relationships and family rights. These difficulties are made worse by societal biases and the sluggishness of legal system reform.

In addition to decriminalizing same-sex relationships, legal recognition and protection for LGBTQIA+ people also entail guaranteeing full rights, including those related to marriage, adoption, inheritance, and anti-discrimination. This calls for a multipronged strategy that includes court interventions, legislative modifications, and public acceptance. Much work has to be done even if there have been major advancements made in the fight for equality. Famous human rights activist Desmond Tutu famously

remarked, "*I would not worship a God who is homophobic... I would refuse to go to a homophobic heaven.*" This quotation perfectly captures the spirit of the fight for LGBTQIA+ rights: the pursuit of equality, dignity, and the ability to live according to who they are.

To sum up, the struggle for LGBTQIA+ rights is far from being rectified. All facets of society must continue to work towards it; this includes lobbying, legal changes, and a change in public perceptions. We can only hope to achieve true equality and justice for all LGBTQIA+ people by taking a thorough and inclusive approach.

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APPENDIX

1.	NAME OF THE CANDIDATE:	ANUSHKA OJHA
2.	TITLE OF THE DISSERTATION/THESIS	SEXUAL MINORITIES AND THE RIGHT TO FAMILY: CONSTITUTIONAL AND LEGAL RIGHTS
3.	NAME OF THE SUPERVISOR	Dr. ATHIRA PS.
4.	SIMILAR CONTENT(%) IDENTIFIED	5%
5.	ACCEPTABLE MAXIMUM LIMIT(%)	10%
6.	SOFTWARE USED	GRAMMARLY
7.	DATE OF VERIFICATION	24/06/2024

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DISSERTATION

Submitted in partial fulfilment of the requirement of the award of a degree of

MASTER OF LAW (LL.M)

(2023-24)

ON THE TOPIC

**Sexual Minorities and the Right to Family: Constitutional and
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