

LGBTQ+ Rights in India: The Legal Struggles of Same-Sex Marriage

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Abstract:

The Same sex marriage and the Lesbian, gay, bisexual, transgender and queer (LGBTQ+) rights have always been a controversial topic in India. Open discussions about homosexuality are rare in Indian society and are seldom addressed. The LGBTQ+ community has always been separated from society and are discriminated against because of their sexual orientation or identity. There exists a social stigma when people marry their own gender and are separated from society and discriminated against. This article aims to provide a comprehensive understanding of the evolution of LGBTQ+ rights in India, the legality of same-sex marriages by examining the challenges faced by the community, their ongoing struggles, the prospects for the future and also provides an overview of the difficulties in implementing gender neutrality in the society.

Keywords: Same - Sex Marriages, LGBTQ+ Rights, Gender equality and neutrality.

Introduction:

Shakespeare through one of his characters in a play says “What’s in a name? If we call a rose by any other name, then it would also smell the same.” This can be related to this setting, expressing that individuals cannot be separated or segregated against or denied essential human rights, fair on the premise of their sexual preferences. Marriage is not just a legal arrangement where partners come together to gain legal benefits or rights for each other. It is also an important way to give their relationship recognition, both legally and socially. The social status that marriage provides is just as important for homosexual couples as it is for heterosexual couples. The marriage between two individuals of the same gender is referred to as Same- Sex marriage. The Oxford Dictionary¹ defines marriage as “a legal relationship between two 'people' who are married to each other”, Article 21 of the Constitution of India² impliedly guarantees the right to marry the 'person' of one's choosing³. The use of the terms 'man' and 'woman' in such definitions and rules of law, directly challenges the customary historical viewpoint that marriage is between a man and a woman. Thus, in the present, the term ‘marriage’ is ambiguous and vague.

The Indian legal system permits same-sex relationships but does not legally recognize same-sex marriages. In *Naz Foundation v. Government of NCT of Delhi* (2009)⁴, the court ruled that Section 377 of the Indian

1 Oxford Learner's Dictionary, Marriage, <https://www.oxfordlearnersdictionaries.com/definition/english/marriage>, accessed on 29 August 2024.

2 Constitution of India, art. 21 (1950).

3 *Madhu Bala v. State of Uttarakhand*, Habeas Corpus Petition No. 8 of 2020; *Laxmibai Chandaragi B. v. State of Karnataka*, W.P. (Crl.) No. 359/2020; *Shafin Jahan v. K.M. Asokan*, Crl. MANU/SC/0340/2018; *K.S. Puttaswamy & Anr. v. Union of India*, MANU/SC/0911/2017, accessed on 29 August 2024.

4 *Naz Foundation vs Government Of NCT Of Delhi And Others*, AIR BOM R 58, (2009)

Penal Code, to the extent that it criminalized consensual sexual acts between adults in private, violated Articles 21, 14, and 15 of the Constitution. However, non-consensual and underage penile non-vaginal sexual acts remain punishable under Section 377. In India, individuals are legally considered adults at the age of 18, while those below this age are presumed incapable of giving valid consent to sexual activity. Despite the decriminalization of consensual homosexual acts, societal stigma against the LGBTQ+ community persisted, posing continued obstacles to achieving full equality and rights.

Historical Context: Prevalent in India:

The concept of homosexuality is deeply rooted in Indian society and dates back to ancient times. References to diverse sexual practices and identities can be found in historic texts such as the Manusmriti, Arthashastra, Kamasutra, Upanishads, and Puranas. Scriptures like the Rig Veda, Ramayana, and Mahabharata also acknowledge sexual diversity. In the Mahabharata, Shikhandi, born with female genitalia but raised as a male and trained in warfare, played a pivotal role in the Pandavas' victory.⁵ Similarly, the Ramayana recounts the tale of Riskha, a Monkey King who transformed into a woman, married the Sun God Surya and Rain God Indra, and became the parent of Sugriva and Vali. Other examples include Lord Shiva taking the form of a Gopi to dance with Lord Krishna, and Budh marrying Ila, a man turned into a woman after trespassing into a magical forest, demonstrating early recognition of gender fluidity and queer identities.⁶

Art and literature also reflect these themes. The carvings at Khajuraho depict women in intimate embraces and men exposing themselves, indicating homosexual practices. In the Valmiki Ramayana, Hanuman witnesses Rakshasa women engaging in romantic acts. However, ancient legal texts like the Manusmriti prescribe punishments for homosexual behavior. A girl involved with another girl faced a fine and lashes, while adult women engaging in lesbian acts could be subjected to head shaving or finger amputation. Male homosexual acts were considered a loss of caste and punished with severe vows of penance.⁷

In medieval India, the hijra community, encompassing diverse gender identities, held respected roles as entertainers and performers, particularly in royal courts and women's quarters. Their blessings were sought at weddings and childbirths. However, their fortunes declined over time, and with the enactment of Section 377 of the Indian Penal Code by the British colonial government in 1861, criminalizing homosexual acts, hijras faced increased marginalization and societal stigma, forcing many into poverty, begging, or sex work for survival.

In 1977, Shakuntala Devi published India's first study on homosexuality, titled "The World of Homosexuals", which advocated for 'full and complete acceptance and not tolerance and sympathy.' Shortly after, in 1981, the first All-India Hijra Conference was held in Agra, attracting 50,000 attendees from across the country. In 1994, Hijras were legally recognized with voting rights as a third gender⁸. That

⁵ Devdutt Pattanaik, On Krishna's Chariot Stands Shikhandi <https://devdutt.com/on-krishnas-chariot-stands-shikhandi/#:~:text=Krishna%20knew%20things%20were%20more,whose%20life%20Bhisma%20had%20ruined,>, accessed on 29 August 2024.

⁶ Devdutt Pattanaik, Gender Fluidity in Hinduism, <https://devdutt.com/gender-fluidity-in-hinduism/>, accessed on 29 August 2024.

⁷ Homosexuality in Ancient India: 10 Instances, <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>, accessed on 29 August 2024.

⁸ Drishti IAS, LGBTQIA+ Rights and Acceptance in India (2023), <https://www.drishtias.com/daily-updates/daily-news-editorials/lgbtqia-rights-and-acceptance-in-india>, accessed on 30 August 2024.

same year, the AIDS Bhedbhav Virodhi Andolan filed the first petition challenging Section 377, though it was eventually dismissed. A comprehensive understanding of the history of LGBTQ+ identities in India has been elusive in discussions of homosexuality in post-colonial India.

Religious Outlook on Same - Sex Marriages:

The religions have their method of rituals and rules of conduct of marriages. The three major religions in India, Hinduism, Christianity, and Islam have their own definition of marriages and follow their conduct of marriage. None of them have expressly mentioned any provisions for allowing and legality of such same - sex marriages.

In Hinduism, marriage is defined as the joining of two individuals for life. Hindu marriages are recognized by law and are usually between members of the opposite sex. There have been a few cases of same-sex marriages, but authorities have not officially recognized them. While certain religious texts condemn homosexuality, ancient Indian texts also contain stories that portray same-sex relationships as natural and positive. (as mentioned above, Mahabharata, Ramayana).

From the Islamic perspective, marriage is considered to be a legal contract or a “matrimonial contract” between two people. It is essential that the bride consents to the marriage out of her own free will. For an Islamic marriage to be valid, there must be a formal, binding agreement. Islam faces significant issues with accepting same-sex individuals in sexual relationships. The Prophet Muhammad is said to have prescribed punishment as the death penalty for both the active and passive participants in homosexual acts. The reasoning behind this is that engaging in homosexual behavior is seen as a disruption of the natural order established by God, and thus, a defiance of God’s will⁹. As a result, it is believed that members of the same sex cannot marry, and even if they were to marry, the marriage could not be legalized.

In Christianity, marriage is seen as a covenant, ordained by God, between a man and a woman. Various passages in the Bible suggest that marriage is meant to be a union between a man and a woman. For instance, one passage states husbands to love their wives just as Jesus loved the church. Most traditional Christian communities and churches do not acknowledge same-sex unions, believing that marriage should be limited to "traditional" relationships (marriage between a ‘male’ and ‘female’). Some groups even believe that homosexuals should be stoned to death, which has been cited in a passage from the Old Testament.

Buddhism's perspective on sexual orientation and gender identity is not explicitly addressed by Siddhartha Gautama, and there is no specific mention or guidance for lay people regarding sexual orientation or same-sex behavior in the Pali Canon, which contains the Buddha's original teachings. The Vinaya, a Buddhist text for monks, prohibits monks and nuns from engaging in sexual relationships with men, women, or individuals of other genders¹⁰.

Contemporary Landscape:

Decriminalizing homosexuality alone is insufficient to ensure equality for LGBTQ+ individuals. Equality must extend to all aspects of life, including family, work, and public spaces. In India, the LGBTQ+

9 Imam Khalid Shahu, Marriage in Islam: Definition, Significance & Purpose, <https://muslimknoxville.org/wp-content/uploads/2021/08/Marriage-in-Islam-Definition-Significance-and-Purpose.pdf>, accessed on 30 August 2024.

10 Stances of Faiths on LGBTQ+ Issues: Buddhism, Human Rights Campaign, <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-buddhism>, accessed on 30 August 2024.

population constitutes approximately 7-8% of the total population, and members of this community continue to face widespread discrimination and exclusion. Homophobic violence and abuse are prevalent worldwide, and many LGBTQ+ people experience workplace harassment or feel compelled to hide their sexual orientation due to fear of job loss. Young LGBTQ+ individuals are particularly vulnerable, often facing rejection, bullying, and feelings of invisibility, which can significantly impact their mental health. These challenges can lead to academic difficulties, dropping out of school, and even homelessness.

The stigma surrounding sexual orientation and gender identity or expression that deviate from the expected heterosexual, non-transgender norm marginalizes many LGBTQ+ people. This marginalization often excludes LGBTQ+ individuals from essential support structures, including their own families. As a result, they may have limited access to services that others take for granted, such as healthcare, legal assistance, and education. Discrimination and bias based on sexual orientation and gender identity can prevent LGBTQ+ people from accessing basic necessities like healthcare and housing. This marginalization often begins within families, a study indicates that approximately 30% of LGBTQ+ youth in the United States have experienced physical abuse from family members due to their sexual orientation or gender identity¹¹. Achieving equal rights and acceptance in all areas of life remains a significant obstacle for many LGBTQ+ people.

The Transgender Persons (Protection of Rights) Act, 2019, prohibits discrimination against transgender individuals in areas such as education, employment, healthcare, access to public goods, movement rights, property ownership, and opportunities for holding public or private office. Public and private establishments with over 100 employees must designate a person to handle complaints. A National Council for Transgender Persons (NCT) will advise the government on related policies and include representatives from key ministries, state governments, and the transgender community. Offenses like forcing transgender individuals into begging, denying access to public places, or abuse of any form are punishable with imprisonment of six months to two years and a fine.¹²

The Yogyakarta Principles, published in November 2006 following an international expert meeting in Indonesia, outline human rights standards related to sexual orientation and gender identity. Created by human rights experts from various countries, these principles affirm that all people are born free and equal in dignity, with sexual orientation and gender identity as essential aspects of this dignity. Inspired by the Universal Declaration of Human Rights, the principles emphasize the universality and interdependence of human rights. They also address global human rights abuses and recognize that gender-based violence and inequality are often perpetuated by social norms, laws, and violence.¹³

Literature Review:

Astha Jain and Dhanashree Kodape (2024), in their work titled “Evolution of Recognition: Navigating LGBTQ+ Marriage Rights in India - A Holistic Perspective and Way Forward”, sheds light on the issues and social stigma faced by the LGBTQ+ community at present. It also provides an account of the evolution of LGBTQ+ rights, from the historical context to the Navtej Johar case, where Section 377 was

11 Chatterjee Subhrajit, Problems Faced by LGBT People in the Mainstream Society, International Journal of Interdisciplinary & Multidisciplinary Studies (2014), https://www.ijims.com/uploads/cae8049d138e24ed7f5azppd_597.pdf, accessed on 1 September 2024.

12 The Transgender Persons (Protection of Rights) Act, 2019, Ministry of Social Justice and Welfare

13 The Yogyakarta Principles – 2006, <https://translaw.clpr.org.in/international-conventions-declarations/the-yogyakarta-principles/#:~:text=Published%20in%20November%20of%202006,sexual%20orientation%20and%20gender%20identity>, accessed on 1 September 2024

decriminalized. The authors have also discussed the Special Marriage Act, 1954, raising the question of whether it allows for same-faith marriages. However, they failed to address and elaborate on the key issues that are currently faced by the community. In conclusion, the evolving societal attitudes and legal discourse surrounding LGBTQ+ marriage rights in India reflect a significant shift toward inclusivity, emphasizing the need for continued efforts in legislation, awareness, and acceptance to ensure equality for all citizens.

Chatterjee Subhrajit, in his work 'Problems Faced by LGBTQ+ People in the Mainstream Society: Some Recommendations,' emphasizes the major issues faced by the LGBTQ+ community in both socioeconomic and cultural aspects. In his book, Chatterjee Subhrajit focuses mainly on the issues faced by the LGBTQ+ community in their daily lives, encompassing fields such as family impact, harassment, psychological issues, and so on. However, he does not provide an account of the marriage aspect or an international perspective or comparison. In conclusion, he mentions the rising awareness and the growing connections between the LGBTQ+ rights movement, led by LGBTQ+ organizers and groups.

Objective of The Study:

The objective of this study is to analyze the key challenges in implementing gender neutrality within India's legal framework, while addressing personal laws, the Uniform Civil Code, the Domestic Violence Act, Section 125 of the Criminal Procedure Code and Adoption rights.

Research Problem:

To investigate the legal and societal challenges faced by LGBTQ+ individuals in India, particularly focusing on the recognition and implementation of same-sex marriage.

Research Question:

1. What are the specific legal barriers hindering the recognition of same-sex marriage in India?
2. How do personal laws, the Uniform Civil Code, and other relevant legislation impact the rights of LGBTQ+ individuals, particularly in the context of marriage and family formation?

Research Gap:

While there is growing awareness and activism regarding LGBTQ+ rights in India, the specific issue of same-sex marriage remains under-researched. Existing studies often focus on broader LGBTQ+ rights or specific legal cases, but a comprehensive analysis of the legal, social, and cultural barriers to same-sex marriage is lacking.

Issues in Implementing Gender Neutrality:

Legalizing same sex marriages is a step towards a more inclusive society, yet it comes with significant challenges

1. Personal Laws:

There are issues rising, related to recognition of same sex marriages and implementing gender neutrality in the society. The first issue in discharging gender neutrality is the personal laws. Recognition of same sex marriages can create lack of certainty among the personal laws governing each religion and castes.

Marriage is regarded as a sacrament under Hindu law, which forms an essential samskara across all castes. The Hindu Marriage Act of 1955 (HMA) is the primary legal framework governing Hindu marriages in

India. It introduced substantial changes to Hindu marriage laws¹⁴. The Hindu Marriage Act permits the solemnization of a marriage between "any two Hindus," provided certain conditions are fulfilled. On the surface, this provision does not explicitly restrict marriage to only a man and a woman. The conditions outlined use gender-neutral terms like 'party' and 'parties,' except in sub-section (iii), which specifies that "the bridegroom must be at least twenty-one years old and the bride at least eighteen at the time of marriage." Additionally, terms like 'bride and bridegroom' or 'husband and wife' are used throughout the statute to describe the marriage parties, suggesting that the Act intends a marriage solely between a man and a woman¹⁵. Section 5(i) of the Hindu Marriage Act prohibits both polygamy and polyandry, stating that neither party should have a living spouse at the time of marriage. A violation of this condition renders the marriage null and void and would be held liable for bigamy.

1.1 Redefinition of Marriage:

The legal framework of marriage under the Hindu Marriage Act would need to be redefined to include gender-neutral language, moving away from terms like "bride" and "bridegroom" to "spouse" or "partner." In Muslim Personal Law, or Shariat, a Muslim marriage referred to as Nikah is a sacred and legal contract between a man and a woman, recognized under Islamic law. According to SY Qureshi, a former chief election commissioner and Muslim who has studied polygamy "the general perception is that every other Muslim has four wives". In India, Muslim men are permitted to marry up to four women, with the sanction for polygamy mentioned in the Quran. However, this practice is allowed only under "strict conditions and restrictions" that are nearly impossible to be fully met. "The Quran says that a man can take a second or a third or a fourth wife but only from among orphans and widows and that he must treat them all equally. Anything else is a violation. But loving equally is almost impossible in practice. It's not just about buying them the same clothes, it is much more than that," he adds¹⁶. The Quran does not address such unions and refers to those seeking pleasure outside an Islamic marriage as 'transgressors.'

For example, if a marriage were to take place between a Hindu man and a Muslim man, a significant issue arises regarding the Muslim man's eligibility to marry up to 4 spouses, as Muslim personal law allows Muslim men to have up to four wives under specific conditions. This raises complex legal questions about whether the Muslim man's right to practice polygamy under his personal law would still apply in the context of a same-sex marriage. Such scenarios highlight the challenges of harmonizing various religious personal laws when introducing gender neutrality and same-sex marriage recognition.

Similarly, the Bible traditionally views homosexuality as a sin, the laws governing Christians in India, which are much the same like those for Hindus, are governed by statutory law, namely the Indian Christian Marriage Act of 1872. Like the Hindu Marriage Act, the Indian Christian Marriage Act allows for the solemnization of marriages between two Christians or between a Christian and a non-Christian¹⁷.

1.2 Inheritance and Property Rights:

Same-sex couples would be entitled to the same inheritance and property rights as heterosexual couples. This would necessitate amendments to succession laws across different personal laws, including those governing Hindus, Christians, Muslims, and others.

¹⁴ The Hindu Marriage Act, 1955

¹⁵ Satchit Bhogle, The Momentum of History – Realising Marriage Equality in India, <https://nujlawreview.org/wp-content/uploads/2020/02/12-3-4-Satchit-Bhogle.pdf>, accessed on 1 September 2024.

¹⁶ Polygamy: Muslim Women in India Fight 'Abhorrent' Practice, <https://www.bbc.com/news/world-asia-india-61351784>, accessed on 2 September 2024.

¹⁷ Bhogle, *supra* note 15.

1.3 Parental Roles in Same-Sex Marriages

A significant issue in same-sex marriages pertains to parental roles, such as the designation of "father" and "mother." Additionally, considerations regarding the child's desire to be with their biological parents may arise.

1.4 Cultural Resistance:

Marriage is traditionally viewed as a sacred bond between a man and a woman in many cultural contexts. Changing this view to include same-sex marriages might face opposition from people who hold traditional beliefs about marriage being sacred.

1.5 Impact on Other Personal Laws:

Personal laws in India are deeply rooted in religious beliefs, any changes to one set of laws could set a precedent for others, which can induce uniformity across communities. This may also lead to an increase in debates about the need for a Uniform Civil Code (UCC), which seeks to replace various religious personal laws with a common set of laws applicable to all citizens.

2. Uniform Civil Code:

The Uniform Civil Code (UCC), as mentioned in Article 44 of the Indian Constitution, is a directive principle aimed at unifying personal laws related to marriage, divorce, inheritance, and succession across all communities, regardless of religion. The implementation of a UCC has been a matter of long-standing debate in India, where personal laws governing family matters differ significantly between religious communities. The recognition of same-sex marriages could intensify calls for a UCC, leading to both legal and social consequences.

2.1 Existing Legal Frameworks:

In India, personal laws related to marriage, divorce, and inheritance are governed by distinct laws for different religious groups—Hindus, Muslims, Christians, Parsis, and others.

The introduction of a UCC, especially if it includes provisions for same-sex marriages, is likely to be viewed as an infringement on religious freedoms.

2.2 Same-Sex Marriage and UCC:

The recognition of same-sex marriages within any one of these personal laws, or through a general statute like the Special Marriage Act, could create disparities between communities. If same-sex marriages are allowed under one legal framework but not recognized under another, it would lead to inconsistent application of rights across communities. This inconsistency could strengthen the argument for a UCC, which would create a unified set of rules applicable to all citizens, regardless of their religion or personal laws.

2.3 Conflict of Rights:

The introduction of same-sex marriages within a UCC could lead to a direct conflict between individual rights to equality and dignity and collective religious rights. For example, if Muslim, Christian, or Hindu personal laws are modified to permit same-sex marriages, it may lead to an argument that their freedom to practice and propagate religion, as protected by the Constitution, is being undermined by a secular law.

3. Domestic Violence Act, 2005:

The Domestic Violence Act, officially called the Protection of Women from Domestic Violence Act, 2005, was implemented by the Indian government in October 2006. Domestic violence is any act or behavior that causes physical, emotional, or psychological harm within a domestic relationship. This can include

various forms of abuse, such as physical assault, emotional manipulation, or economic control. The Domestic Violence Act was enacted to provide protection for women who experience domestic violence by their husbands or male live-in partners. The Domestic Violence Act also protects women who are widows, mothers, or sisters from acts of domestic violence¹⁸. The Domestic Violence Act, 2005 only recognizes domestic violence as violence committed by a man against a woman. This means that under the Domestic Violence Act, a man cannot be considered an "aggrieved person." While a woman in a same-sex relationship could technically qualify as an "aggrieved person" because of her gender, her same-sex partner cannot be categorized as a "respondent."¹⁹

4. Maintenance Under Sec 125 of Crpc:

As stated in the Section 125 of the Criminal Procedure Code, 1973, and now section 144 of BNSS

4.1 Order for Maintenance of Wives, Children, and Parents

A person is obligated to provide maintenance to their wife if she cannot sustain herself, their legitimate or illegitimate minor child (married or unmarried) who is unable to support themselves, their adult legitimate or illegitimate child (excluding a married daughter) who is incapable of self-support due to physical or mental disability or injury, and their father or mother if they are unable to sustain themselves.

A Magistrate of the first class, upon proof of such neglect or refusal, may order the individual to provide a monthly allowance for the maintenance of his wife, child, father, or mother. The amount of such maintenance will be determined by the Magistrate as appropriate. The payment must be made to the concerned person as directed by the Magistrate.

Also, it is stated in the section that "Wife" also includes a woman who has been divorced by her husband or has divorced him, provided she has not remarried²⁰.

4.2 Redefining "Wife" and "Husband" in Law:

Under Section 144 of the Bharatiya Nagarik Suraksha Sanhita, 2023, maintenance rights are granted to a "wife" from her "husband." Legalizing same-sex marriages would require these terms to be redefined or replaced with gender-neutral terms like "spouse" to ensure equal rights for same-sex couples. Without such changes, maintenance laws would remain inaccessible to partners in same-sex marriages.

4.3 Ambiguities in Claiming Maintenance:

If the law doesn't clearly address who is eligible to claim maintenance in a same-sex marriage, it could lead to confusion. For instance, who would be the "provider" and "recipient" in cases where both partners may claim the role of a "wife"? Courts would need to develop guidelines to address this ambiguity.

4.4 Inheritance and Financial Dependency:

If same-sex marriages are legalized, courts will need to consider the financial dependency of one partner on the other in the context of maintenance, similar to that they do in heterosexual marriages.

5. Adoption Rights:

India's adoption laws are primarily governed by the Juvenile Justice (Care and Protection of Children) Act, 2015, and the accompanying Guidelines Governing Adoption of Children, 2015. While the Act emphasizes providing a safe and nurturing environment for children in need, and the guidelines outline a

¹⁸ Sri M. Chandrasekhara Reddy, Domestic Violence Act, 2005, <https://cdnbbsr.s3waas.gov.in/s3ec03333cb763facc6ce398ff83845f22/uploads/2024/09/2024091127.pdf>, accessed on 4 september 2024

¹⁹ Bhogle, supra note 15.

²⁰ Section 144 of The Bharatiya Nagarik Suraksha Sanhita, 2023

comprehensive adoption process, the current legal framework remains ambiguous regarding same-sex couples' eligibility to adopt.

The Guide lines focus on the prospective parents' ability, suitability, and commitment to the child's well-being, without explicitly mentioning sexual orientation as a factor. However, there's no clear provision allowing or prohibiting homosexual couples from adopting. Consequently, India's current adoption laws restrict adoption to heterosexual couples, as defined by a married man and woman living together for at least two years.

Under Indian law, adoption rights are governed by:

5.1 Hindu Adoption and Maintenance Act (HAMA) 1956:

This law allows for adoption by individuals but does not explicitly recognize same-sex couples.

5.2 Juvenile Justice (Care and Protection of Children) Act, 2015:

This law governs adoption for individuals across religious backgrounds. However, there is no explicit provision for same-sex couples to adopt jointly. While individuals from the LGBTQ+ community may adopt as single parents, joint adoption as a couple is not legally permitted.

Stance of Other Countries on Same Sex Marriages: Same-sex marriage is legal in 36 countries worldwide, including Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, The United States, and Uruguay. These countries have legalized same-sex marriage through legislative acts or court rulings²¹.

Netherlands: In 2001, the Netherlands became the first nation globally to legalize same-sex marriage. The Dutch Parliament passed a law allowing same-sex couples to marry with the same legal rights as opposite-sex couples.

Denmark: Denmark legalized same-sex marriage on 2012. A bill introduced by the Thorning-Schmidt I Cabinet was passed by the Folketing and Queen Margrethe II gave her royal assent to the bill and the law came into effect.

Germany: Same-sex relationships were considered illegal in Germany until 1994. In 2017, Germany became the 15th EU country to fully legalize same-sex marriages.

United Kingdom: In 1967, the UK became the first country to decriminalize homosexuality. This was followed by the Criminal Justice Act of 1980 in Scotland and the Northern Ireland Act of 1982, which decriminalized certain forms of same-sex conduct.

United States of America: On June 26, 2015, the US Supreme Court ruled that same-sex marriage is a constitutional right, effectively legalizing it nationwide. The same-sex couples had previously been allowed to marry in individual states due to a mix of court rulings and state legislation.

Taiwan: In May 2019, Taiwan became the first Asian nation to legalize same-sex marriage. Taiwan is considered one of the most progressive countries in Asia on issues related to sexual orientation and gender identity.

Austria: Austria legalized same-sex marriage on January 1, 2019, after a 2017 ruling by the Constitutional Court, which declared that restricting marriage to opposite-sex couples was discriminatory. Although

²¹ Marriage Equality Around the World, Human Rights Campaign, <https://www.hrc.org/resources/marriage-equality-around-the-world>, accessed on 5 September 2024.

Austria had allowed civil partnerships since 2010, the court's decision led to full marriage equality. The first same-sex marriages took place at the beginning of 2019²².

Thailand: Thailand has become the first country in Southeast Asia to allow same-sex marriage. The king recently approved a law that will legalize same-sex marriages starting on January 22, 2025. This new law uses gender-neutral language and gives same-sex couples the same rights as heterosexual couples, such as the right to adopt children and inherit property. With this law, Thailand joins Taiwan and Nepal as the only countries in Asia where same-sex couples can get married.²³

Landmark Judgements Regarding to Recognition of Same Sex Marriage

Naz Foundation vs Government of NCT of Delhi and others, 2009²⁴: The Delhi High Court's ruling in *Naz Foundation v Government of NCT of Delhi* was the first legal challenge to Section 377 of the Indian Penal Code, which criminalized homosexuality. The court struck down Section 377, finding it unconstitutional and violating the rights to equality and non-discrimination. However, this decision was later overturned by the Supreme Court in *Suresh Kumar Koushal v Union of India*²⁵, re-criminalizing homosexuality.

Despite this setback, a significant breakthrough occurred in 2014 with the Supreme Court's ruling in *National Legal Services Authority vs Union of India*²⁶. This landmark case recognized transgender individuals as a third gender, affirmed their fundamental rights, and provided guidelines for their inclusion in society. The NALSA case remains a crucial milestone in the fight for transgender rights in India.

Justice K.S.Puttaswamy(Retd) vs Union of India, 2018²⁷: The K.S. Puttaswamy case established the right to privacy as a fundamental right in India. This right, protected by Article 21 of the Constitution, extends to all individuals, including LGBTQ+ people. By recognizing privacy as an inherent right, the court affirmed the autonomy and protection of LGBTQ+ individuals, safeguarding their freedom to choose their partners. This, along with the NALSA judgment, paved the way for the decriminalization of Section 377 in 2018.

Navtej Singh Johar vs Union of India, 2018²⁸: The *Navtej Singh Johar* case was a landmark decision by the Supreme Court of India that decriminalized consensual same-sex relationships. This ruling came after several legal challenges by members of the LGBTQ+ community.

The court struck down Section 377 of the Indian Penal Code, which criminalized consensual same-sex relationships. However, the court upheld the provision that criminalizes non-consensual acts involving children or animals. The Supreme Court decided that Section 377 violated Articles 14, 15, and 19(1) (a) of the Indian Constitution. The court recognized that everyone, regardless of their sexual orientation or identity, has the right to live with dignity, autonomy, and personal freedom without any interference.

²² Same-Sex Marriage: A Major Issue and Challenge in the Legal Aspect <https://www.legalserviceindia.com/legal/article-10681-same-sex-marriage-a-major-issue-and-challenge-in-the-legal-aspect.html>, accessed on 5 September 2024.

²³ Thai King Signs Same-Sex Marriage Bill Into Law, BBC News, <https://www.bbc.com/news/articles/cn03we6zpk10>, accessed on 28 September 2024.

²⁴ *Naz Foundation v. Government of NCT of Delhi*, (2009), supra note 4.

²⁵ *Suresh Kumar Koushal v. Naz Foundation*, (2014), Indian Kanoon

²⁶ *National Legal Services Authority v. Union of India*, (2014), Indian Kanoon

²⁷ *Justice K.S. Puttaswamy (Retired) v. Union of India*, Writ Petition (Civil) No. 494 of 2012, Judgment, (Sept. 26, 2018)

²⁸ *Navtej Singh Johar v. Union of India*, (2018), Indian Kanoon

Arunkumar vs The Inspector General of Registration, 2019²⁹: In Arun Kumar v Inspector General of Registration, Tamil Nadu, a landmark case heard in the Madras High Court, the definition of 'bride' was expanded to include transgender women. While the Hindu Marriage Act of 1955 traditionally recognized marriage only between men and women, this judgment broadened the scope of 'woman' to encompass transgender individuals who identify as women and seek to marry. It aligns with the principle of self-identification established in the NALSA judgment, which allows individuals to identify themselves without external verification. This judgment recognizes the constitutional right of a person to identify as a transwoman and paves the way for marriages within the LGBTQ+ community, thereby expanding the right to marry.

Supriya Chakraborty & Anr. Vs. Union of India, 2023³⁰: In the Supriyo ruling, the Supreme Court held these directions “a) Ensuring there exists no discrimination against the LGBTQ+ community based on their gender identity or sexual orientation, or access to public goods and services. b) Establishment of hotline numbers for the LGBTQ+ community to approach in case of harassment or violence faced by them in any form. c) Steps to be taken for the sensitization of the public about queer identity. d) Creation of modules under the Mental healthcare Act to cover LGBTQ+ community. e) Directions to police machinery to not harass queer couples by way of summoning them to the police station or visiting their residence for the sole purpose of interrogation due to their sexual orientation and/or gender identity.”

The Hon'ble Supreme Court observed that queerness has been a part of India's history for centuries. The Court expressed that its role does not include creating laws, as that responsibility belongs to the legislature. Regarding the constitutional validity of the Special Marriage Act, 1955, the Court noted that striking down the entire act would lead to discrimination against individuals in interfaith marriages³¹.

Strategic Outlook:

To implement gender neutrality effectively within India's legal framework, personal laws must be amended to incorporate gender-neutral terms, ensuring equal recognition of same-sex marriages across all religious communities. The gradual introduction of a Uniform Civil Code (UCC) that incorporates gender-neutral principles can address inconsistencies in rights related to marriage, inheritance, and adoption, ensuring uniform protection for all. Laws like the Domestic Violence Act should be expanded to recognize domestic abuse within same-sex relationships, allowing individuals of any gender to seek legal protection. Section 144 of the Bharatiya Nagarik Suraksha Sanhita should be amended to include gender-neutral language, ensuring that same-sex partners have the same maintenance rights as heterosexual couples. Clear guidelines are also necessary to address potential ambiguities related to financial roles in same-sex marriages. Further initiatives should be taken to foster awareness, helping to alleviate cultural resistance and encourage broader acceptance.

Conclusion:

As Stated by the Hon'ble Chief Justice of India, DY Chandrachud, “It is incorrect to state that marriage is a static and unchanging institution. Queer is a natural phenomenon known for ages. Homosexuality or

²⁹ Ritesh Arora, The Evolution of LGBTQ+ Rights in India: A Journey Towards Equality, AKLegal, <https://aklegal.in/the-evolution-of-lgbtq-rights-in-india-a-journey-towards-equality/#:~:text=The%20Supreme%20Court%20determined%20that,without%20interference%20from%20the%20State.>, accessed on 2 September 2024.

³⁰ Supriya Chakraborty & Another v. Union of India, (2023)

³¹ Decoding the Supriyo Judgment on Right to Marry Between Same-Sex Partners, Bar and Bench (Oct. 17, 2023), [https://www.barandbench.com/law-firms/view-point/marriage-lgbtqia-perspective-decoding-supriyo-judgement-right-to-marry-samesex-couples.](https://www.barandbench.com/law-firms/view-point/marriage-lgbtqia-perspective-decoding-supriyo-judgement-right-to-marry-samesex-couples)

queerness is not an urban concept or restricted to the upper classes of society.”³² While India has made progress in recognizing and protecting LGBTQ+ rights, there is still much work to be done to achieve full equality and acceptance. The legal recognition of same-sex marriage and comprehensive anti-discrimination laws remain crucial steps. Society should foster an inclusive environment that embraces and respects all individuals, including those who identify as homosexual. There are some recent positive advancements including the recognition of gender identity in the national census and the implementation of job quotas and reservation benefits for transgender individuals by various state governments. However, it's important to note that resistance to LGBTQ+ rights still exists in India. While significant strides have been made, there is still much work to be done to ensure full equality and acceptance for the LGBTQ+ community.

³² Same-Sex Marriage: Here's What Chief Justice of India Chandrachud Said in His Judgment, Business Standard (Oct. 18, 2023), https://www.business-standard.com/india-news/same-sex-marriage-here-s-what-cji-chandrachud-said-in-his-judgement-123101700415_1.html.