

Lgbtq+ Rights and Legal Recognition in India: Challenges, Progress, and the Way Ahead

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ABSTRACT

This research investigates the complex legal and cultural perspective of LGBTQ+ rights and same-sex relationships, concentrating on their recognition within India and at global level. It explores the relationship between conventional norms, religious doctrines, and the progressive evolution of human rights principles in influencing societal and legal perceptions regarding same-sex partnerships and gender identity. The manuscript examines the foundational interpretations of Islamic jurisprudence, which strictly confines marriage to a union between a male and a female, juxtaposing these with the extensive legal struggles for LGBTQ+ rights in the Indian context. Significant judicial pronouncements, including the decriminalization of Section 377 and the pivotal Navtej Johar and NALSA verdicts, are scrutinized to exemplify the progressive trajectory of legal inclusivity, notwithstanding the enduring obstacles.

The research investigates historical frameworks concerning gender identity, tracing the deterministic perspectives prior to the 1950s to the transformative inquiries that emerged in the latter part of the 20th century. It further analyses the colonial laws that entrenched discrimination, their residual impacts, and the legal endeavours aimed at dismantling these antiquated structures. Special emphasis is placed on the familial law challenges confronted by LGBTQ+ individuals, including the absence of rights pertaining to adoption, surrogacy, maintenance, and property. The exclusion of queer couples from the Special Marriage Act and other legislative protections further highlights systemic inequities.

Through its critical examination, the manuscript emphasizes the pressing necessity for legislative reform to guarantee equal rights for LGBTQ+ individuals and unmarried couples. Recommendations encompass the revision of family law to acknowledge diverse unions, the removal of obstacles to adoption and surrogacy, and the assurance of equitable access to legal safeguards and welfare initiatives. By addressing these disparities, the research seeks to promote a more inclusive legal and social framework, ensuring equality and fundamental rights of all individuals, irrespective of sexual orientation or gender identity.

KEYWORDS: LGBTQ+ Rights, Same-Sex Marriage, Gender Identity, Legal Frameworks and Equality

1. INTRODUCTION

Law is an intermingled system that regulates human conduct in society. The concept of law refers to an aligned and interdependent system of rules. It is important for us to have a comprehensive understanding of the law, not only focusing on individual rules but also understanding the legal relationships that shape the system. In the regard of marriage, there is a complex debate regarding the perspectives of Islamic law, positive law, and human rights concerning this issue. In Islam, the law of marriage holds a particular vision. In Islamic law, marriage is considered as an immaterial and contractual union between bride and

groom with the objective of being together and have a family, based on belief in the One Almighty God. Islamic law regulates marriage by considering it a pious union and a ritual of prayer. Therefore, it is important to deeply examine the views and arguments from various religious perspectives in this matter. In Indonesia, the law regulating marriage is governed by the legislation. This legislation explicitly states that marriage occurs between a male and a female. However, the debate regarding the need to recognize same-sex marriage in positive law is also important in the pursuit of justice and equality within the legal system. In this context, the study of positive law becomes relevant to understand the dynamics of marriage.

2. INDIAN LEGAL CONTEXT

In the recent trends there has been acceptance and endurance regarding the LGBTQ rights that has been seen in India. From landmark Supreme Court decisions India as a country has seen significant changes in perspectives and mindsets of the people surrounding but has also witnessed some challenges. India has a huge population of 2.5 million individuals, this magnificent society continues to deal with institutionalized obstacles that hamper their full integration into society. In the core of this hassle lies the search for equal rights, including the right to form families through adoption. The battle that has been fought by the LGBTQ community for their adoption rights and having family has reflected that how far they have come in this battle of recognition, justice and identity in India.¹ **The National Legal Services Authority v. Union of India**² stands as a testament to this quest, as it sought to dismantle traditional gender binaries and secure legal recognition for individuals transcending societal norms. This pivotal judgment marked the historic ruling in **Navtej Singh Johar v. Union of India & Others**³ reverberated across the nation, striking down the Section 377 of the Indian Penal Code. This landmark ruling not only struck down a law that criminalized consensual same-sex acts but also reinforced the fundamental human rights guaranteed by the Indian Constitution. By highlighting the principles of equality, dignity, and privacy, the Supreme Court sent a powerful message of inclusion and recognition for all citizens, regardless of their sexual orientation. The famous judgment by the Supreme Court's five-judge constitution bench on homo marriage and same gender rights for adoption case has sparked heated arguments regarding the obstacles faced by LGBTQ+ rights in India⁴. In considering the miseries confronted by same-sex couples due to discrimination, the court asserted the requirement of legislative interventions to address these inequalities, marking an important moment in the present discourse surrounding LGBTQ+ rights.⁵

Islamic Law: Liwath and Sihaq

Same gender marriage or homo marriage, has always sparked the heated contested debate between educators, philosophers and researchers. In Islamic law there has been majorly two concepts which is the union between two men (liwath) and the nikah between two women (sihaq). In Islam, liwath refers to marriage or sexual behavior between men that is taken as sin. The term originates from the word "Luth," which implies the actions of the people of Prophet Lut (Lot). The term that closely approximates the meaning of "liwath" in English is "homosexuality" or "sodomy." In Indonesian, "liwath" can be translated

¹ BBC News, 'India has 2.5m gays, government tells supreme court' (14 March 2012) <https://www.bbc.com/news/world-asia-india-17363200>

² AIR 2014 SC 1863

³ AIR 2018 SC 4321

⁴ *Supriyo @ Supriya Chakraborty v Union of India*, W.P.(C) No. 1011/2022

⁵ Vaibhav Tiwari, 'No right for queer couples to jointly adopt: SC in same-sex marriage verdict' (Hindustan Times, 17 October 2023) <https://www.hindustantimes.com> accessed 10 January 2025

as "homoseksual" or "hubungan sesama jenis." Islamic law always considers the well-being of humanity when addressing life's issues, including matters of sexual desires that are in contradiction with the morals and guidelines that Islamic law lays down.

3. ANCIENT INDIAN PERSPECTIVE ON GENDER IDENTITY

Instances from Vyasa's Mahabharata

The Mahabharata, attributed to the sage Vyasa, is one of the most significant epics in ancient Indian literature, offering profound insights into various aspects of life, including morality, duty, and relationships. Within this epic, the narrative of Sikhandini stands out as a critical exploration of gender and sexuality, reflecting ancient Indian perspectives on these themes.⁶ Sikhandini is a pivotal character in the Mahabharata, known for undergoing a sex change. This transformation is not merely a plot device but serves to challenge and expand the understanding of gender roles in ancient Indian society. Sikhandin's journey from female to male highlights the fluidity of gender, suggesting that identity can transcend biological determinism. This aspect of the Mahabharata invites readers to consider the complexities of gender and the societal norms surrounding it.⁷

Cultural Context

The Mahabharata was composed in a time when rigid gender roles were prevalent. However, the inclusion of Sikhandin's story indicates a nuanced understanding of gender identity. The epic does not shy away from depicting same-sex love and relationships, as seen in the interactions between characters like Arjuna and Sikhandin. This portrayal suggests that ancient Indian literature recognized and accepted diverse expressions of love, including those that defy conventional heterosexual norms.⁸

Philosophical Underpinnings

The Mahabharata is not just a narrative; it is also a philosophical text that delves into the nature of dharma (duty) and the moral dilemmas faced by its characters. Sikhandin's role in the epic raises questions about the nature of identity and the moral implications of love and desire. The text encourages readers to reflect on the ethical dimensions of relationships, regardless of gender, and to consider the broader implications of love in the context of duty and honor.⁹

Literary Significance

Vyasa's Mahabharata serves as a foundational text that has influenced countless works of literature and philosophy in India and beyond. The themes of same-sex love and gender fluidity found in Sikhandin's story resonate with contemporary discussions about LGBTQ+ identities, illustrating the timelessness of these issues. The epic's ability to address complex human experiences makes it a rich source for understanding ancient Indian perspectives on love and identity.

In summary, the ancient Indian perspective as presented in Vyasa's Mahabharata, particularly through the character of Sikhandini, offers a multifaceted view of gender and sexuality. It challenges the binary notions of gender and highlights the acceptance of diverse identities and relationships. This epic not only reflects the cultural attitudes of its time but also provides a framework for understanding the complexities of

⁶ Kathleen E Hull, 'The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage' (2003) 28 *Law and Social Inquiry* 329

⁷ Ibid

⁸ Ibid

⁹ ibid

human relationships that remain relevant today. The Mahabharata thus stands as a testament to the rich literary and philosophical heritage of ancient India, inviting ongoing exploration and interpretation

4. EVOLUTION OF GENDER IDENTITY UNDERSTANDING

The understanding of gender identity has undergone a significant change over time, reflecting shifts in societal attitudes and scholarly perspectives. Before delving into the legislative landscape surrounding gender inclusion, it is important to recognize the historical background that structured existing beliefs regarding gender and identity. From narrow approach before the 1950s, which associated gender closely with one's assigned sex at birth, to the transformative period beginning the 1960s to the 1980s, identified by reflective research and advocacy efforts, the journey of evaluating and analysing gender identity has been dynamic and significant.

Pre-Colonial Era- Earlier Perspective on Gender Identity

Before the 1950s, discussions surrounding gender and gender identity were not in the mainstream, with prevailing beliefs suggesting that an individual's gender was inherently linked to their assigned sex at birth. Psychologists like Kagan and Money advocated this view, asserting the role of social norms in making gender roles and identities. However, the exploration of gender identity undergone a deep transformation between the 1960s and 1980s marking a shift from earlier notions that prominently tied gender to one's biological sex during birth. Influential psychologists such as Richard Green, Robert Stoller, Harry Benjamin, and Sandra Bem emerged as key figures in restructuring our understanding of gender and its complexities¹⁰. Sandra Bem's work emphasized the negative impact of societal pressure to conform to traditional gender roles, highlighting its contribution to social inequality. Whereas, Benjamin, Stoller, and Green advocated for perspectives attributing gender identity more to biological factors than psychological ones. Their research was proved to be beneficial in medical related procedures and clinics, and gave useful understanding of indication between gender identity and role. Their collective labor and efforts resulted in acceptance at a wider level and freedom from all sorts of baseless assumptions.

Colonial-Era Legislation and its impact

In India, the British rule and their regime of discrimination for transgenders reflected so much in their legislative scheme and regulations. This can be evidently seen in the laws that were implemented during the colonial period, as the Criminal Tribes Act of 1873¹¹. Under this Act, transgender individuals were referred to by the highly stigmatizing term 'eunuchs'. They were forced to register with local authorities and faced various restrictions, including being barred from taking guardianship of minors, executing gifts or wills, or adopting sons. Transgenders were not even permitted to step out in public fully dressed as a woman wearing sarees and jewelry like them. The Criminal Tribes Act was repealed in 1949, But there was no major impact even after when the law got repealed as there were other laws that were also discriminatory and derogatory that were meant to be surveilling the transgender individuals¹². The Telangana Eunuchs Act, 1919 and was referred to as the Andhra Pradesh (Telangana Area) Eunuchs Act

¹⁰ Substance Abuse and Mental Health Services Administration, *Top Health Issues for LGBT Populations Information & Resource Kit* (HHS Publication No. (SMA) 12-4684, Substance Abuse and Mental Health Services Administration 2012) <LGBT Health Kit> accessed 10 January 2025.

¹¹ The term "Criminal Tribes Act (CTA)" refers to a series of colonial-era laws enacted in India during British rule, beginning in the 1870s. These laws collectively criminalized specific communities by labeling them as habitual criminals

¹² Jayna Kothari, 'Section 377 and Beyond: A New Era for Transgender Equality?' <https://clpr.org.in> accessed 10 January 2025

1329F, detailed about the 'eunuchs' found in the Criminal Tribes Act¹³. Under Section 4¹⁴ of this Act, transgender individuals could be arrested without a warrant for dressing as women or showcasing the dance in public places. Similarly, the Karnataka Police Act of 1963 included provisions in Section 36A that imposed surveillance and presumed criminality on 'eunuchs'¹⁵. These laws not only criminalized transgender identities but also restricted their freedom of expression and participation in public life, bearing striking resemblance to municipal ordinances in the United States from the 1850s onward. Such laws prohibited transgender from wearing and dressing up as another and opposite sex.

5. LEGAL BATTLES FOR LGBTQ+ RIGHTS IN INDIA

Landmark Case Laws: Section 377, NALSA and beyond

The real legal battle for LGBTQ+ rights in India started in 2001 when the Naz Foundation filed a petition challenging the constitutionality of Section 377 in the Delhi High Court. This marked a prominent milestone, as it was the first well structured legal effort to challenge the discriminatory law. However, at that conjecture, the LGBTQ+ community was still dealing with the idea of using litigation as a strategy, with concerns about its effectiveness and evident counterblast. There were certain obstacles, the Naz Foundation's petition was immensely supported by various organizations and activists. A sparkling judgement given by Delhi high court in the year 2009, in *Naz Foundation v. Govt. of NCT (2009)*¹⁶, declaring section 377 unconstitutional. However, this celebration was not satisfactory, as the Supreme Court overturned the Delhi High Court judgment in *Suresh Koushal v. Union of India in 2013*¹⁷, stating that parliament has the power to decriminalize the homosexuality. Section 377 of the Indian Penal Code, which criminalized homosexuality, was reinstated, leaving LGBTQ+ individuals vulnerable to discrimination, harassment, and persecution. This was a major setback which highlighted the limitations of relying solely on the judiciary for social change and undermined the need for broader social acceptance and legislative reform. The LGBTQ+ community continued to mobilize and advocate for their rights. Transgender individuals, in particular, faced disproportionate marginalization and violence, stipulating the burning want for legal recognition and protection. The turning point came with the *National Legal Services Authority v. Union of India (NALSA) judgment in 2014*¹⁸. The Supreme Court ruled that transgender persons have the constitutional right to self-identify their gender identity, regardless of medical reassignment, and affirmed their right to express their chosen gender identity. This ruling marked a pivotal moment in recognizing the rights of LGBTQ+ individuals in India and affirmed their right to life, dignity,

¹³ *V. Vasanta Mogli v. State of Telangana & Others* (2023) Live Law (Tel) 24 <https://www.livelaw.in> accessed 10 January 2025.

¹⁴ Section 4: "4. Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with Imprisonment for a term which may extend to two years or with fine or with both".

¹⁵ Section 36A. Power to regulate eunuchs.- The Commissioner, may, in order to prevent or suppress or control undesirable activities of eunuchs, in the area under his charge, by notification in the official Gazette, make orders for,- (a) preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offenses or any other offenses or abetting the commission of such offenses, (b) filing objections by aggrieved eunuchs to the inclusion of his name in the register and for removal of his name from the register for reasons to be recorded in writing; (c) prohibiting a registered eunuch from doing such activities as may be stated in the order. (d) any other matter he may consider necessary.

¹⁶ 2009 (4) AIR BOM R 58

¹⁷ (2014) 1 SCC 1

¹⁸ 1 (2014) 5 SCC 438.

and autonomy. This landmark decision not only affirmed the fundamental rights of transgender individuals but also acknowledged the violence and discrimination they face on a daily basis, laying the groundwork for a more inclusive and equitable society. The verdict of the Supreme Court heralded a new era of inclusivity and respect for diversity. By acknowledging the existence of a 'third gender', the judiciary affirmed the rights and identities of hijra and transgender persons, granting them the legal recognition they had long been denied. Building on the momentum generated by NALSA, subsequent judgments further cemented the rights of sexual and gender minorities in India. The *K.S Puttaswamy v. Union of India* (2017)¹⁹ judgment in 2017 affirmed the constitutional right to privacy as intrinsic to the right to life, equality, and fundamental freedoms. Importantly, the court extended this right to encompass intimate relations of one's choice, explicitly including sexual orientation and gender identity within the ambit of privacy protections. This pivotal ruling set the stage for a reevaluation of discriminatory laws, including Section 377 of the Indian Penal Code²⁰. In 2018, the Supreme Court delivered a historic verdict in *Navtej Johar v. Union of India* (2018)²¹, unanimously striking down Section 377 of the Indian Penal Code as unconstitutional. This decision marked the culmination of years of advocacy and legal battles, affirming the rights of LGBTQ+ individuals to dignity, equality, and non-discrimination under the law. One of the most significant aspects of the Navtej Johar judgment was its elaboration on the right against non-discrimination on the basis of sex, as guaranteed in Article 15 of the Indian Constitution. The Court held that discrimination based on gender identity and sexual orientation falls under the purview of Article 15, challenging societal norms and stereotypes that perpetuate discrimination and violence against LGBTQ+ individuals. From colonial-era laws perpetuating discrimination to landmark judgments affirming constitutional protections, the journey reflects a growing recognition of the inherent dignity and equality of LGBTQ+ individuals.

Present Status of Same-Sex Relationships in India

In a landmark decision on October 17, 2023, the Supreme Court of India rendered a verdict in *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*²², addressing issues such as adoption by LGBTQ+ couples and same-sex marriage. By a majority of 3:2, the five-judge bench led by Chief Justice of India D Y Chandrachud delivered a judgment on a series of petitions seeking legal sanction for same-sex marriage and adoption. While the Chief Justice and Justice Sanjay Kishan Kaul deemed certain guidelines of the Central Adoption Resource Authority (CARA) as unconstitutional, Justices S Ravindra Bhat, Hima Kohli, and PV Narsimha Rao hold other view.

¹⁹ 22 (2017) 10 SCC 1

²⁰ Section 377. Unnatural offenses: 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. In *Navtej Singh Johar v. Union of India* 2018, the apex Court read down Section 377 of the IPC criminalizing "unnatural sex" as being unconstitutional. The Court upheld the right to equal citizenship of all members of the LGBTQ community in India. Thus, it read down Section 377 to exclude consensual sexual relationships between adults, whether between same-sex individuals or otherwise. The Court decided that Section 377 constituted a violation of the right to dignity, privacy and sexual autonomy under Article 21, freedom of expression under Article 19, the right to equality under Article 14, and non-discrimination under Article 15 of the Constitution. Section 377 will continue to apply to non-consensual sexual activity against adults, sexual acts against minors and bestiality

²¹ AIR 2018 SC (CRI) 1169

²² 2023 INSC 920

6. CHALLENGES IN FAMILY LAW

One of the central themes of the judgment was the question of whether marriage is considered a fundamental right under the Indian Constitution. While the Court unanimously concluded that marriage itself is not a fundamental right, the majority opinion emphasized that transgender individuals are permitted to marry in accordance with existing laws and personal customs. This acknowledgment reflects an important recognition of the rights of transgender individuals within the institution of marriage.

Marriage as a fundamental right

The judgement also answered whether the LGBTQ couple will have their rights and legal recognition that any other legally married couple will have. This decision underscores the limitations of judicial intervention in matters of legislative policy, emphasizing the role of the state in ensuring access to rights established in prior judgments. Chief Justice Chandrachud, however, offered a dissenting view that called for a more expansive interpretation of constitutional rights. He argued that the ability to form a union is inherent in fundamental freedoms such as freedom of speech, expression, and conscience, as enshrined in Articles 19, 21, and 25 of the Indian Constitution. Chandrachud emphasized that the right to form unions is essential for self-growth and understanding the essence of humanity. The importance was laid down on recognition and resources that were given by state to LGBTQ community. There was exclusion of LGBTQ couple from the Special Marriage Act, it raised a lot of contentions. While the majority opinion justified this exclusion based on historical intent, Chief Justice Chandrachud dissented, suggesting alternative avenues for inclusivity without compromising legislative objectives. The "reasonable categorization test" serves as a fundamental approach in evaluating the legality of statutes concerning equality. It requires a discernible distinction and a logical connection between the distinction and the objective of law. The prevailing viewpoint contends that the SMA does not violate constitutional principles, as it aims to enable marriages between individuals from diverse social backgrounds. However, this argument falls short in addressing the exclusion of queer couples. Discrimination based on sexual orientation undermines the constitutional guarantees of equality. Thus, the SMA's exclusion of queer couples raises significant concerns regarding discrimination and constitutional validity. Further, the majority opinion highlights the challenges in interpreting and reforming the SMA. Substituting terms like 'spouse' for 'wife' and 'husband' presents significant legal implications, touching upon various areas of law such as succession, adoption, and domestic violence laws. Moreover, engaging in such interpretation risks overstepping judicial authority, as it delves into legislative territory. Chief Justice Chandrachud proposes two potential avenues for addressing constitutional deficiencies within the SMA: nullifying pertinent sections or interpreting and amending language across multiple statutes. Nullification risks eroding the progressive intent of the legislation, while interpretation and amendment encroach upon legislative authority. In light of these considerations, it becomes imperative to reassess the SMA to ensure alignment with constitutional principles of equality and non-discrimination. This may involve amending the language of the statute to explicitly include queer couples or striking down discriminatory provisions while preserving its overarching purpose. Legislative action may also be necessary to address broader legal ramifications stemming from such reforms, including succession, adoption, and domestic violence laws. In the next part of this analysis, we will delve deeper into the court's stance on adoption by LGBTQ+ couples and its implications for family law and societal norms.

Adopting and Surrogacy Rights

In India, the concept of family holds profound significance, deeply ingrained in the cultural fabric as the cornerstone of society. Families are seen as the bedrock of support, nurturing strong bonds and providing

the foundation for the proper care and upbringing of children. There has been a lot more discussion over importance of having a family but when it comes to LGBTQ+ couples and their right to adopt we see the outdated laws and regressive mindset²³. The essence of family extends beyond biological ties, encompassing love, care, and support. However, the current legal framework fails to acknowledge this reality, maintaining barriers that impede LGBTQ+ couples from providing nurturing environments for children in need²⁴. Adoption laws in India has been governed by personal laws and they all come under the purview of regulation by personal laws and hence uniformity in its application is lacking²⁵. This fragmented approach has obstructed the ability of LGBTQ+ couples to exercise their right to adopt, perpetuating discrimination based on sexual orientation. The question of whether sexual orientation should be a determining factor in one's eligibility to adopt is a complex and deeply contentious issue. There has been a lot of studies that have shown that the children raised by same sex couple are also well brought up and excel as much as the children raised by other couples do but social prejudices still exist that present agender bias view²⁶. The crux of the matter lies in assessing the ability of prospective parents, regardless of sexual orientation, to provide a nurturing environment that fosters a child's holistic development. Education, emotional support, and love are fundamental components of a nurturing home, qualities that are not exclusive to any particular sexual orientation. Denying same-sex couples the right to adopt solely based on their sexual orientation not only perpetuates discrimination but also deprives children of the opportunity to thrive in a loving and supportive family environment. The staggering statistics of orphaned children underscore the urgent need for inclusive adoption policies that prioritize the best interests of the child above societal prejudices²⁷. According to UNICEF, there were over a million orphaned and abandoned children in India in 2020. Such laws do not allow the want of love and care the children in need are deprived, only because of societal biases²⁸. It is imperative to challenge these prejudices and embrace the reality that parenting transcends gender. By reforming adoption laws to reflect the diverse nature of modern families, India can take a significant step towards ensuring that every child has the opportunity to grow up in a supportive and nurturing environment, regardless of their parents' sexual orientation. The disparity in treatment between homosexual and heterosexual couples raises profound questions about equality and acceptance. The reluctance of the legal landscape in India to acknowledge the parenting rights of LGBTQ+ individuals only serves to marginalize and exclude them from the institution of family. By not allowing an adult to be a parent only on because they have specific sexual preferences proves to be discriminatory as well as depriving children to be in a nurturing atmosphere. Family dynamics vary

²³ Mishra S, 'Case for Allowing Adoption for Same-Sex Couples' (2023) *Jus Corpus Law Journal*

²⁴ Gupta R & Bagaria R, 'Embracing Same-Sex Nuptial Ceremony' (2021) 4 *International Journal of Law Management & Hums*

²⁵ Bhowmik N, 'Concept of Adoption- Historical Perspective of Adoption in India' (2021) 1 *Nyaayshastra Law Review*

²⁶ Helena Campos Refosco & Martha Maria Guida Fernandes, 'Same-Sex Parents and Their Children: Brazilian Case Law and Insights from Psychoanalysis' (2017) 23 *William & Mary Journal of Race, Gender, and Social Justice* <https://scholarship.law.wm.edu>

Deni Mazrekaj et al., 'School Outcomes of Children Raised by Same-Sex Parents: Evidence from Administrative Panel Data' (2020) 85 *American Sociological Review* <https://www.researchgate.net>

HM Bos et al., 'Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children's Health' (2016) 37 *Journal of Developmental & Behavioral Pediatrics* <https://pubmed.ncbi.nlm.nih.gov>

²⁷ David Keenan, 'The Situation of Orphans in India' (13 March 2023) *The Borgen Project* <https://borgenproject.org/orphans-in-india/>

²⁸ Vaishnavi Kaushik, A discussion on the adoption and marriage rights of LGBTQ + community 2018 verdict is not the end of issues facing the LGBTQ+ community., *The Daily Guardian* (Jan. 28, 2021), <https://thedailyguardian>

widely, and the paramount consideration in adoption decisions should always be the well-being of the child²⁹. It is imperative to challenge these prejudices and update adoption laws to embrace the diversity of modern families, ensuring that all children have the opportunity to thrive in loving and supportive environment.

Rights enjoyed by LGBTQ and Unmarried couple

The goal of the Bill of 2019, was to safeguard the rights of the transgender community by outlawing discrimination against them in the workplace and schools, access to government or private institutions and healthcare. Hence the Act was passed with the objective of —An Act to provide for protection of rights of transgender persons and their welfare and matters connected therewith and incidental thereto. This Act was a complete failure to comment about the Family rights of Transgenders. Queer and unmarried couple have different rights ensured by the common Acts, but they lack Marriage laws and other matrimonial laws. Due to that they failed to get the benefits and justice as enjoyed by any normal married couple

Rights the LGBTQ community demands for

That's obviously the above said Family rights at its priority list that the Queer couple, as well as the unmarried couple sought for. Because it is of great importance in their life as they really wanted to have for. In some places, the LGBTQ couples or an unmarried couple are being denied shelter on saying that they are not legally married or that they don't have a marriage certificate. Also, some provisions like Adoption, Surrogacy, Insurance benefits, Family benefit schemes, etc. will be possible only after the marriage is identified. Hence the importance of identifying these couple equally within the preview of a normal married couple also need to be thought of and there must be a law drafted for it.

Rights for adoption and surrogacy for married couple in India

About adoption or surrogacy rights in India, the law restricts the unmarried couple from adopting or moving ahead with surrogacy methods within the purview of the law. These people are legally restricted from availing of those rights. Only the couple with legal marriage history can avail those methods of adoption rights as well as legal surrogacy measures in India. This is an infringement of personal Rights. The Hindu Adoption and Maintenance Act, 1956 and the Juvenile Justice Act, 2015 govern adoption in India. While the JJ Act grants the right to adoption regardless of religion, the HAMA only permits adoption by Hindus, Jains, Sikhs, and other faiths that follow Hindu law. Sections 7 and 8 of the HAMA refer to parents as "husband" and "wife," which automatically disqualifies same-sex couples from being recognized as parents. As per the Hindu Law of adoption Sections 7 and 8 specify a Hindu man's and Hindu woman's ability to adopt. Thus, it is clear that only a Hindu male or female can proceed for adoption, not a Third gender couple. Articles 14, 15, and 21 of the Indian Constitution are violated by the above-mentioned actions, which can be contested in court. Discrimination based on sexual orientation violates the rights to equality, the prohibition of discrimination-based race, religion, caste, sex, or place of birth, as well as the rights to life and personal liberty. Although the legalization of same-sex unions will allow LGBTQ people to adopt together since live-in couples are not yet allowed to do so in India, the law does not specifically forbid adoption based on sexual orientation. Even though one of the partners can adopt a child as a single parent, the other parent's legal rights to the child will be entirely overridden. Many LGBTQ couples in India have migrated to nations with greater legal freedom because of the absence of legislation on adoption for LGBTQ people and the horrendous obstacles to adoption. Countries like Spain, Belgium, etc. already permit adoption by same-sex couples. Regarding Surrogacy rights, the inclusion of

²⁹ Dhairya Mamtara, 'LGBT Acceptance and Adoption in India' (2022) 4 *Indian Journal of Law and Legal Research*

protections for cohabitating couples, divorced women, and widows is a positive move, however, the LGBTQ group and single fathers have been purposefully excluded. This bill's definition of surrogacy restricts participation to cis-heterosexual couples, which is problematic because it excludes single persons and members of the LGBTQ community

Right to get maintenance from the partner

Regarding maintenance rights, the provisions of The Code of Criminal Procedure, 1973³⁰, discuss the legal benefits available for the wife who has been legally divorced. Section 125(1) (a) of Code says —If any person having sufficient means neglects or denies to take care of his spouse, who is not having sufficient means to take care of herself, upon proof of such neglect or denial a Judicial magistrate class I may give order to such who shall make monthly allowance to maintain his wife. And here "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried but when considering this with that of LGBTQ couples, this provision cannot apply to them. Thus, it is another provision that the Queer couple or the unmarried couple cannot seek for. Because the law specifically defines the wife here means legally married to or legally divorced. As a result, the possibility of receiving maintenance from the spouse is not constrained by their current legal rights. Because they are not legally married, a partner cannot be sued even if they are unable to support themselves. Additionally, this is a violation of human rights. Furthermore, it will be simpler for someone to simply leave their relationship without any obligation to them. The Protection of Women from Domestic Violence Act, 2005³¹ granted rights and protections to woman who are not legally married but who live in a relationship that is similar to marriage with an unmarried man. Thus, the women from an unmarried couple within the purview of Live-in-relationship can seek maintenance Rights from her partner.

Rights including Property Rights, Succession Rights or the Law of Inheritance etc.

Couple from the LGBTQ community and unmarried couples are both negatively impacted by this legal issue that the Legislators failed to be explicit about inheritance or succession rights, which is a failing on their side. But for that, they have made the Right of heirs in terms of Male and female only, that too from a married couple. This affects the Queer community since they have been identified as a third gender, and they have no Rules of devolution of property as being an heir. Also, the property belonging to them devolves upon which rule is still a question before legislatures. And concerning an unmarried couple, as per the existing laws of intestate succession, the legal heirs are identified from a legally married wedlock only, otherwise, the family from which they have been raised will be included as the heirs having the right. Thus, this is a very important question before the Justice that, a property earned by either of them does not devolve upon to their partner or children born out of that relation, and it goes to the family from which he/she descended is justifiable? To address this, there should be legislation that eliminates all ambiguity and resolves all conflicts, making the situation as straightforward as that of a typical married pair.

7. OTHER DISCRIMINATORY STATUTES AND POLICIES FACED BY UNMARRIED AND QUEER COUPLE

Domestic violation and challenges faced by queer people and unmarried couple

Another important aspect of law in which the community faces discrimination is about the enjoyment of Domestic rights as well as the reservation under the Domestic Violence Act. The definition of aggrieved person as per the Act is as follows: —aggrieved person means any woman who is, or has been, in a

³⁰The Code of Criminal Procedure, 1973

³¹ The Protection of Women from Domestic Violence Act, 2005

domestic relationship with the respondent and the one who claims to have been imperiled to domestic violence by the respondent³². And the —domestic relationship means a relationship between two persons who live or have, at any point in time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family³³ Here, women in unmarried relationships can apply for domestic rights, but an LGBTQ couple is not recognized and are ineligible.

Executive schemes and LGBTQ couple and their restricted rights

There are many kinds of legal as well as Government schemes and provisions for which the members of the family including the spouse and the children have benefited with. That includes service benefits, insurance, healthcare, compensation, education, welfare, etc. National Family Benefit Scheme by the India government is a perfect example for this. The program intends to give bereaved households a lump sum family benefit of Rs 10,000 regardless of the cause of death in the event that the principal earner passes away. The program is available to anybody between the ages of 18 and 64. Under this program, a family's homemaker woman is also regarded as the "breadwinner." But the family of the dead must meet the criteria for a family below the poverty line³⁴ The department of Ex-Serviceman Welfare, financial aid is being offered at a rate of Rs. 1000 per month per qualifying ESM and their widows, payable in one installment each financial year. This applies to undergraduate classes at degree-granting colleges as well as school grades 1 through 12. The widows who want to take a 2-year postgraduate degree are also eligible for this scholarship. Assistance is only available to the widows of ESM and their two dependent children who are ESM members up to the level of Havildar in the Army or equivalent in the Navy and Air Force Here also it is specific about the rights of children and the widow of an Ex-serviceman. The family here means a legally married couple and their children. There is another scheme, this program offers financial aid to Ex-Servicemen (ESM) who are Pensioners/Non-Pensioners who have reached the level of Havildar or an equivalent rank in the Navy or Air Force. The Marriage Grant is Rs 50,000 per daughter for marriages, with a maximum of two daughters. The same Rs 50,000 fee also applies to widows getting remarried Discrimination based purely on sexual orientation is against Articles 14, 15, and 21 of the Army, Navy, and Air Force Act. LGBT people are not permitted to serve openly in the Indian Armed Forces. Late in December 2018, BJP member Jagad Ambika Pal introduced a bill to the Indian Parliament to change the Army Act of 1950, the Navy Act of 1957, and the Air Force Act of 1950 to allow LGBT individuals to serve in the armed forces. The bill wasn't put to a vote in the Lok Sabha. Thus, this itself shows how discrimination is faced by the people belonging to the LGBT community in serving the Nation. It is up to the physical constraint the limitation to join the Armed forces has been decided by the panel. But the efficiency or the talent is not been assessed. The major reason not to admit the LGBT community into the Armed force is said to be against the Morality of the country, said by General Rawat —The deterioration of morality is the main justification for General Rawat's opposition to the inclusion of gays in the military. The Life insurance corporation of India provides insurance for the family, including children, a spouse, and parents, and is covered by the LIC Jeevan Arogya health plan for specific illnesses. In the event of medical demands, it provides the insured with prompt cash assistance. Similarly, the Government of India offers several programs for the welfare of family members from many sectors, but the lawfully married

³² Section 2(a), The Protection of Women from Domestic Violence Act, 2005

³³ Section 2(f), The Protection of Women from Domestic Violence Act, 2005

³⁴ National family income benefit- transforming India (n.d.) <https://transformingindia.mygov.in/scheme/national-family-benefit-scheme> accessed 14 November 2022.

couple and their offspring are the only ones who are initially eligible. The Queer or the unmarried couple had not been given any instructions. And as a result, these folks are also ignored by government policies. This in and of itself demonstrates that the government has not fully embraced these individuals. These are the major problems faced by the LGBTQ community and the unmarried couple concerning to family law. There are still many other issues that they intended to cure and need to be eliminated. Unquestionably, the decision of gender identity is a matter of human rights. The problem extends beyond the right to choose one's gender or sex. Since the community of transgender people would be denied many of the valuable rights and privileges that other people enjoy as citizens of this country if they were not given the status of a third gender, many other rights that stem from this choice would also come into play. Also, the choice of proceeding for a legal marriage lies with the individual only. Any distinction upon this choice is to be considered Unconstitutional.

8. CONCLUSION AND RECOMMENDATIONS

As a step towards accepting the family rights of Queer couple or an unmarried couple, The Supreme Court of India has stated that "family relationships may take the form of domestic, unmarried partnerships, or LGBT relationships," adding that an "atypical" representation of a family unit is just as genuine as its conventional counterpart and merits legal protection⁵⁵. This is yet another historical judgment after that happened in 2018 regarding the decriminalizing of Section 377 of the Indian Penal Code, 1860.

As a developing nation, India is required to implement several laws that assure justice, equity, and good conscience for its citizens. However, to truly achieve equality, LGBT people must have explicit and unrestricted access to marriage and divorce rights. The laws have also been changed to ensure that they apply to LGBT people and unmarried couples alike. The International aspect of accepting the Queer community has the 29 principles that make up the Yogyakarta Principles place a high value on the equality and inalienability of all human rights, regardless of sexual orientation or gender identity. The arrangement of these principles indicates the type and degree of prejudice experienced by the LGBT community, which is ingrained in society and upheld by its legal framework. These guidelines are founded on the philosophy of rights-based approaches, which gives the State Parties the responsibility of carrying out the laws.

Another crucial clause emphasizes protection from all types of trafficking, sale, and exploitation. This clause recognizes and considers the vulnerability of people with different sexual orientations due to prejudice and social isolation, which may make them vulnerable to trafficking and exploitation. Everybody has a basic right as a human being to live with dignity in our society, whether they are men, women, or transgender without any limits, as stated in the slogan "My life, my choice, my partner with consent." Human rights should include recognition of LGBTQ rights. Articles 14, 15, 19, 21, and 29 are all infringed by not recognizing same-sex unions, not allowing adoption, guardianship, surrogacy, or IVF, and not having access to secure and LGBT+ inclusive workplaces. Additionally, discrimination based purely on sexual orientation is against Army, Navy, and Air Force Act Articles 14, 15, and 21. Anything that lessens its dignity is wrong because it breaches the equality principle and opens the door for discrimination. Considering the rights of an unmarried couple, in nations like the USA, China, India, and France, live-in relationships are becoming more and more common. People are starting to see disenchantment or marriage breakup in the aforementioned countries, especially in their urban centers, or when a couple is still reluctant to move forward. This is also a significant step toward future marriage because it allows partners to get to know and understand one another. Due to several factors, including cultural and religious taboos, the fact that a live-in relationship does not require married status, and the conservative nature of some

nations, marriage is often regarded as having greater value than a live-in relationship. Lack of laws and legal identity for their cohabitation are the biggest barriers facing unmarried couples when it comes to adoption and surrogacy rights. This is a violation of the Fundamental Right to Life for the unmarried couple as well.

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