

BREAKING BARRIERS: LEGAL HURDLES FOR SAME SEX MARRIAGES IN INDIA

Abstract

Same-sex marriage marks a crucial shift in acknowledging LGBTQ+ relationships, challenging established norms and legal structures. The lack of legal recognition for their marriages deprives them of vital rights and benefits such as inheritance, healthcare decisions, and parental rights that heterosexual couples enjoy. Social stigma and discrimination further exacerbate these challenges, often leading to marginalization and mental health issues. Many same-sex couples grapple with a hostile environment that affects their relationships and personal well-being, struggling for acceptance within their families and communities. Although homosexuality was decriminalized in 2018, same-sex couples still face significant legal, social, and cultural obstacles. The emotional strain from societal rejection underscores the need for comprehensive legal reforms to safeguard the rights of same-sex couples. Greater societal acceptance and a legal framework that supports diverse relationships is imminent. By addressing these issues, it aims to advance the broader conversation on LGBTQ+ rights in India, fostering a more inclusive society where everyone can live openly and without fear of discrimination. This article explores the difficulties faced by same-sex couples in India as they seek equality in a traditionally conservative society.

Keywords: LGBTQ, Same-sex marriage, legal recognition, judicial decisions ,legislation

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I. INTRODUCTION

Same-sex marriage is defined as a legally recognized union between two individuals of the same gender, granting them the opportunity to enter into a formal marriage contract that bestows upon them the same rights, responsibilities, and legal protections enjoyed by opposite-sex couples. This concept underscores the ability of individuals of the same sex to marry one another, establishing a legal and social partnership rooted in mutual love, commitment, and shared aspirations for life together. Marriage has historically been viewed as a partnership between a man and a woman in many cultures globally. However, the acceptance of same-sex marriage represents a substantial shift in societal attitudes and legal frameworks as norms evolve. This acceptance challenges traditional notions of gender roles and broadens the concept of marriage, emphasizing fundamental principles such as equality, non-discrimination, and the inherent right to choose one's life partner, regardless of gender.

Prior to exploring the legal implications of homosexuality and the potential for same-sex marriage, it is essential to grasp the concepts of sexuality and the various sexual orientations that extend beyond conventional norms. Understanding the distinction between gender and sex is equally crucial, as sociologists and scientists emphasize that these terms, while often used interchangeably, hold distinct meanings. Sex pertains to the physiological and biological traits an individual is born with, typically classified as male or female, encompassing factors such as chromosomes, hormone levels, and reproductive/sexual anatomy. Conversely, gender refers to a person's social and personal identity, encompassing a wide range of identities beyond the binary of male and female. For example, a person may be born with female genitalia but identify as male and prefer to use male pronouns such as he/him/his. Sexuality encompasses an individual's feelings, interests, and actions towards others. It involves who a person is attracted to and is a deeply personal and inherent part of their identity.¹ Some individuals struggle to openly acknowledge and embrace their sexuality because of societal disapproval of any sexual orientations other than heterosexual, despite the legal validity of such orientations. Recognizing these differences is crucial in conversations about the legal and social acceptance of same-sex marriages and the wider range of sexual orientations and gender identities. This understanding promotes an inclusive outlook that honors individual experiences and identities. The legal acknowledgment of same-sex marriage is crucial as it often entails the extension of equal rights and benefits to same-sex couples. This includes critical areas such as property ownership, inheritance rights, healthcare decision-making, child custody, and spousal benefits. By allowing same-sex couples to publicly declare their love and commitment, marriage provides them with the opportunity to create a legally recognized family unit, thereby affirming their relationship in a societal context. The degree of acknowledgment and approval of same-sex marriage varies significantly among different nations and regions, reflecting a diverse range of cultural, religious, and legal customs. Some jurisdictions have enthusiastically embraced marriage equality, providing extensive legal safeguards for same-sex couples, while others persist in enforcing limitations or outright prohibitions on such partnerships. The discussion surrounding same-sex marriage raises crucial inquiries regarding human rights, equitable treatment under the legal system, religious liberty, and the changing conception of marriage as an inherent human entitlement. Overall, the movement toward recognizing same-sex marriage represents not just a legal battle but a

¹ Milton Diamond, Sex and Gender Are Different: Sexual Identity and Gender Identity Are Different, 7 CLINICAL CHILD PSYCHOLOGY & PSYCHIATRY 320, 320–34 (2002).

broader struggle for dignity and equality, aiming to reshape societal perceptions and affirm the legitimacy of diverse love and partnership forms.

II. GLOBAL PERSPECTIVE ON SAME SEX MARRIAGE

The international landscape of same-sex marriage is diverse, shaped by varying cultural, legal, and political contexts across countries. Although there is no binding international convention specifically on same-sex marriage, several human rights frameworks and regional agreements address LGBTQ+ rights and marriage equality. The Universal Declaration of Human Rights (UDHR) from 1948 establishes the principle of equal rights but does not specifically mention same-sex marriage. The International Covenant on Civil and Political Rights (ICCPR), effective since 1976, emphasizes equality and non-discrimination, which has been interpreted to support LGBTQ+ rights. The European Convention on Human Rights (ECHR) includes protections for LGBTQ+ individuals through its non-discrimination clauses, influencing marriage equality policies in Europe. In the Americas, the Inter-American Commission on Human Rights has contributed to legal reforms through its recommendations, despite lacking binding power. Conversely, the African Commission on Human and Peoples' Rights has not specifically addressed same-sex marriage, with LGBTQ+ rights remaining contentious in many African nations. Notable developments include global advocacy by organizations like Amnesty International and Human Rights Watch, which push for legal reforms and support LGBTQ+ activists. Regional agreements, such as those within the European Union, have promoted LGBTQ+ rights and marriage equality, though implementation varies among member states. Additionally, the UN Human Rights Council has increasingly supported LGBTQ+ rights, including marriage, though its influence is affected by the positions of its member states.

Same-sex marriage is a contentious issue worldwide, with countries exhibiting varying degrees of acceptance and legal recognition. In India, the battle for the recognition of same-sex marriages has been long and arduous, marked by legal battles and societal resistance. In the mid-20th century, LGBTQ+ activists and organizations started pushing for the acknowledgment of same-sex relationships and equal marriage rights. The drive for marriage equality gained significant traction in the 1970s, highlighted by numerous landmark legal challenges to the refusal to issue marriage licenses to same-sex couples²

A ground-breaking and revolutionary decision, the Netherlands became the first nation in the world to legalize same-sex unions in 2001. The Dutch government's choice was motivated by a dedication to equality and human rights, which is consistent with the nation's progressive ideals and long-standing history of defending individual liberties. This legislation was a bold declaration that marriage, as a legal institution, should be inclusive of all partners, regardless of gender, as well as a success for champions of LGBTQ+ rights. Same-sex couples were granted a full set of rights and obligations within the legal framework established by the Netherlands, which largely resembled those granted to heterosexual couples. This implied that same-sex couples were now eligible for all marital-related legal privileges and protections.

² Pew Research Center, Gay Marriage Around the World, <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/> (last visited July 24, 2024).

Same-sex marriage is legal in more than 30 places around the world

Jurisdictions that allow same-sex couples to marry



Note: Classifications as of June 2024.

Source: Pew Research Center analysis of news articles and official government sources.

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Figure 1:

Since the Netherlands became the pioneering country to legally recognize same-sex marriages in 2001, a significant wave of legal reform has swept across various parts of the globe. Over 30 jurisdictions, predominantly in Europe and the Americas, have since enacted legislation permitting same-sex couples to marry. This shift reflects a broader trend towards the acceptance and normalization of LGBTQ+ rights within these regions, driven by evolving social attitudes and advocacy efforts.

In Europe, nations such as Belgium, Spain, and Germany quickly followed the Netherlands' lead, each introducing their own legal frameworks for same-sex marriage in subsequent years. The wave of reform extended to other European countries, contributing to a continent-wide trend toward marriage equality. The Americas also saw substantial progress, with countries like Canada and Argentina leading the charge in the region. Canada became the fourth country worldwide to legalize same-sex marriage in 2005, and Argentina's landmark decision in 2010 paved the way for other Latin American countries to follow suit.

In a notable development beyond Europe and the Americas, Taiwan achieved a historic milestone by becoming the first place in Asia to legalize same-sex marriage in 2019. This landmark decision was a significant step forward for LGBTQ+ rights in the region, challenging traditional cultural norms and setting a precedent for other Asian countries. Following Taiwan, Nepal made headlines in 2023 by also legalizing same-sex marriage. This move marked a progressive shift in South Asia, highlighting the region's gradual but noteworthy steps toward inclusivity and equality for LGBTQ+ individuals.

In some instances, same-sex marriage was established through judicial decisions. A notable example is the United States, where marriage equality was achieved through the Supreme Court's landmark ruling in *Obergefell v. Hodges*³ in 2015, "affirming that same-sex couples have a constitutional right to marry". Justice Anthony Kennedy cast the swing vote, penned the majority opinion in the closely contested 5-4 decision. He described same-sex couples' hopes as follows: "hope... not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions." They demand legal parity in terms of dignity. They are entitled to that under the Constitution." *Obergefell* judgment mandated that states grant same-sex marriage licenses and recognize same-sex unions lawfully consummated in another jurisdiction. This legalized same-sex unions in all of the US and its territories. While some countries have enacted progressive legislation, others still impose bans or offer limited rights to same-sex couples. Societal attitudes, cultural norms, and religious beliefs continue to shape the progress of marriage equality in different regions.

III.DYNAMICS OF SAME-SEX COUPLE

The dynamics of same-sex couples are intricate, shaped by a blend of emotional, social, legal, and cultural influences. Effective communication is often the foundation of these relationships, allowing partners to openly discuss their feelings, conflicts, and aspirations, which fosters deep emotional intimacy. This strong emotional bond is essential, especially when navigating societal pressures and stigma, as couples frequently rely on each other for support during challenging times, such as coming out or facing discrimination. Many same-sex couples actively engage with LGBTQ+ communities, which provide vital social support and a sense of belonging, while their public expressions of affection can vary significantly depending on the cultural context and acceptance within their surroundings.

Gay/Lesbian marriage has a long and varied history, despite its recent legalization in many places. In ancient civilizations, same-sex unions were often accepted and celebrated. Evidence of these relationships can be found in ancient Mesopotamia, Egypt, and later in Greece and Rome, where texts and artworks depict same-sex partnerships as normal.⁴ For example, the *Almanac of Incantations* in Mesopotamia included prayers for same-sex unions, while in ancient China, domestic partnerships between men were recorded.⁵

During Roman times, same-sex relationships were common, and some emperors, like Nero and Elagabalus, even engaged in same-sex marriages. However, while male-male relationships were acknowledged, female-female partnerships received far less documentation, suggesting they may have been more common than historical texts indicate. The introduction of Christianity in the 4th century marked a significant shift, imposing legal prohibitions against same-sex marriages. Despite this, same-sex unions continued in other parts of the world, such as among women in pre-colonial Africa and during China's Ming dynasty. In the 20th century, the LGBTQ+ community began to push back against prejudice, laying the groundwork for the rights we see today. The decriminalization of same-sex relationships in the UK began in 1967, and support for

³ 576 U.S. 644 (2015)

⁴ Lesbemums, The History of Gay Marriage: From the Ancients to Gen Z, <https://lesbemums.com/lgbtq/the-history-of-gay-marriage-from-the-ancients-to-gen-z/> (last visited July 24, 2024).

⁵ Daily JSTOR, In Han Dynasty China, Bisexuality Was the Norm, <https://daily.jstor.org/in-han-dynasty-china-bisexuality-was-the-norm/> (last visited July 24, 2024).

LGBTQ+ rights has grown steadily. Now, in the 21st century, Gen Z is notably more accepting, reflecting a broader societal shift towards inclusivity and recognition of diverse love and partnerships.

Legal recognition of same-sex marriage greatly impacts their rights related to healthcare, inheritance, and parenting. In places where same-sex marriage is not recognized, couples often face significant legal hurdles, necessitating careful planning to ensure their rights are protected. The division of roles and responsibilities tends to be more egalitarian in these relationships, with partners negotiating household tasks based on personal strengths and preferences rather than traditional gender norms. Additionally, many same-sex couples explore diverse pathways to parenthood, such as adoption or surrogacy, emphasizing love and commitment over conventional family structures. Despite facing discrimination and cultural resistance, same-sex couples develop resilience through supportive networks, community engagement, and therapeutic resources, reinforcing their bonds. Understanding these dynamics not only highlights the unique challenges they face but also celebrates their resilience, ultimately fostering a more inclusive society that honors the diverse forms of love and partnership.

Numerous benefits were highlighted when same-sex marriage was made legal in the United States, and these served as justification for the legalization. Marriage provides numerous benefits to same-sex couples through government recognition, offering significant legal, financial, and social advantages. Joint tax filing can result in lower taxes, especially for couples with disparate incomes. Inheritance rights allow a surviving spouse to inherit their partner's estate without the burden of estate or gift taxes. Legally, married partners can make crucial medical decisions for an incapacitated spouse, ensuring their well-being. Employer-provided family benefits, such as health plans and family leave, are often exclusive to married couples, enhancing their access to essential resources. In the event of death, a spouse has the right to make burial and final arrangements. The divorce process helps ensure fair division of assets and resolution of custody disputes, providing legal protections during separation. Married couples can also apply for family rates on health insurance plans and jointly access federal tax credits, making healthcare more affordable. Confidentiality protections prevent the government from forcing spouses to disclose private conversations. Finally, married spouses have visitation rights in jails, prisons, hospitals, and other institutions that limit visits to immediate family, ensuring their ability to support each other in difficult times. These benefits underscore the importance of legal recognition of same-sex marriages in promoting equality and protection under the law.⁶

IV. INDIA AND SAME-SEX MARRIAGE: A COMPLEX RELATIONSHIP

India's cultural ethos is a tapestry of ancient traditions, rituals, and family values that have been passed down through generations. Marriage in Indian society is not merely a personal affair but a community event, intricately tied to the concepts of duty, family honor, and social order. Traditionally, marriage in India is seen as a sacred union between a man and a woman, primarily intended for procreation and the continuation of the family line. This union is celebrated and reinforced through elaborate rituals and ceremonies that underscore its importance in the social structure. The British colonial period reinforced Victorian moral

⁶ German Lopez, 9 Practical Benefits of Marriage Equality, Vox (June 26, 2015), <https://www.vox.com/2015/6/26/18093652/same-sex-marriage> (last visited July 24, 2024).

values, which further cemented conservative attitudes towards sexuality and marriage. Post-independence, these values were interwoven with Indian traditions, creating a complex web of societal norms resistant to change. In many Indian families, the concept of "family honor" is paramount. The acceptance of same-sex marriage is often viewed as a threat to this honor. There is a fear that it would bring shame and social ostracism, which discourages families from supporting LGBTQ+ relationships.

The conservative outlook prevalent in India, especially in rural and semi-urban areas, significantly shapes societal attitudes towards same-sex marriage. This conservative mindset is characterized by adherence to traditional norms and a resistance to modern, progressive ideas. Discussions about sexuality, particularly non-heteronormative sexuality, are often considered taboo. This silence perpetuates ignorance and stigma, making it difficult for LGBTQ+ individuals to find acceptance. There is a notable generational divide in the acceptance of same-sex relationships. Older generations, who hold more traditional views, are generally less accepting, while younger generations, exposed to global perspectives and digital media, show greater openness. Patriarchal norms dominate many aspects of Indian society, including views on marriage and gender roles. Same-sex marriage challenges these norms by defying traditional gender roles and expectations, leading to resistance from those who benefit from the status quo.

Religious beliefs are a cornerstone of Indian society, influencing laws, customs, and personal values. The major religions in India—Hinduism, Islam, and Christianity—each have their doctrines and interpretations regarding marriage and sexuality, which often contribute to the opposition to same-sex marriage. Hinduism, practiced by the majority of Indians, has a diverse range of texts and interpretations. While some ancient texts acknowledge diverse sexualities, contemporary Hindu leaders often emphasize heteronormative values. The concept of "dharma" (duty) and "sanskara" (rite of passage) related to marriage traditionally involves a man and a woman. Islamic teachings, as interpreted by many scholars, view homosexuality as contrary to the teachings of the Quran and Hadith. The Indian Muslim community largely adheres to these interpretations, resulting in strong opposition to same-sex marriage from religious leaders and followers. The Christian community in India, often adheres to the traditional biblical view of marriage as a union between a man and a woman. Various Christian denominations in India oppose same-sex marriage based on their religious doctrines. Other religions, including Sikhism, Jainism, and Buddhism, also have their unique perspectives, but generally, traditional interpretations lean towards heterosexual norms.

1. Legal Status of Same-Sex Marriages in India and Section 377 of IPC

Section 377 of the Indian Penal Code (IPC), enacted in 1861, represents a significant historical artifact of British colonial rule in India. Modeled after England's Buggery Act of 1533, Section 377 criminalized "carnal intercourse against the order of nature with any man, woman or animal," imposing harsh penalties that ranged from imprisonment for life to imprisonment for a term of up to ten years, along with potential fines. This section was intended to mirror the British legal framework's stance on non-procreative sexual acts, reflecting the moral and ethical viewpoints prevalent during the colonial era.

The origin of Section 377 is rooted in a broader context of colonial imposition, wherein British authorities sought to enforce their own legal and moral standards upon their colonies. The Buggery Act, which preceded Section 377, was part of a wider body of legislation in

England aimed at regulating sexual behavior and criminalizing acts deemed "unnatural." In this framework, sexual acts between individuals of the same sex were condemned as deviant and contrary to established societal norms. When this legal perspective was transposed to colonial India, it effectively entrenched similar moral judgments within the Indian legal system.

Under Section 377, the scope of criminalization extended beyond same-sex relations, encompassing various forms of sexual activity that did not align with procreative purposes. This broad and ambiguous language rendered the section susceptible to misuse and exploitation. The law's vague definitions enabled it to be applied in a manner that criminalized a range of behaviors, contributing to significant legal and social challenges for those affected. The criminalization of homosexual acts, in particular, reinforced pervasive societal stigmas and discrimination against the LGBTQ+ community in India.

For more than a century, Section 377 remained largely unchallenged, functioning as a tool for moral policing and repression. Its presence within the IPC facilitated the marginalization of LGBTQ+ individuals, whose identities and relationships were deemed unlawful and immoral by the prevailing legal standards. This legal framework not only perpetuated societal prejudices but also institutionalized a climate of fear and persecution for those whose sexual orientation deviated from heteronormative expectations.

The impact of Section 377 on Indian society was profound, as it underscored the intersection of law and social values. The criminalization of same-sex relationships contributed to the systemic stigmatization of LGBTQ+ individuals, affecting their social standing, mental health, and overall well-being. The law's enforcement often involved invasive scrutiny and harassment, with individuals being targeted based on their sexual orientation. This legal environment fostered an atmosphere of discrimination and exclusion, further marginalizing an already vulnerable community. Despite its entrenched position in the legal system, Section 377 faced increasing scrutiny and opposition over time. Activists, legal scholars, and human rights organizations began challenging the section's constitutionality and its adverse effects on LGBTQ+ rights. This growing resistance was part of a broader global movement advocating for the decriminalization of homosexuality and the recognition of LGBTQ+ rights.

Section 377 of the IPC, introduced during British colonial rule, criminalized non-procreative sexual acts, including same-sex relationships, and reinforced societal stigmas against the LGBTQ+ community. Its vague and broad language allowed for significant misuse and harassment, perpetuating discrimination and marginalization. The law's vague and broad language allowed for significant misuse and harassment of individuals based on their sexual orientation.

2. Early Challenges and the Naz Foundation Case

The first significant challenge to Section 377 came in the early 21st century. In 2001, the Naz Foundation, an NGO working on HIV/AIDS and sexual health, filed a petition in the Delhi High Court, arguing that Section 377 hindered HIV/AIDS prevention efforts and violated fundamental rights guaranteed by the Indian Constitution. The case, known as *Naz*

*Foundation v. Government of NCT of Delhi*⁷, argued that the section infringed upon the rights to equality, privacy, and non-discrimination. In 2009, the Delhi High Court delivered this landmark judgment, reading down Section 377 to decriminalize consensual homosexual acts between adults. The court held that criminalizing such acts violated the fundamental rights to privacy, dignity, and equality. This decision was a significant victory for LGBTQ+ rights in India, providing a ray of hope for the community.

3. The Supreme Court Reinstates Section 377

However, the victory was short-lived. In 2013, the Supreme Court of India set aside the judgment of the Delhi High Court in *Suresh Kumar Koushal Vs. Naz Foundation*⁸ and reinstated section 377 in its entirety. The court argued that a judge cannot change or repeal a law because it is the prerogative of the legislature. The decision was met with widespread anger and frustration both domestically and internationally, as it reinstated the criminalization of same-sex relationships and pushed the LGBTQ+ community back into the shadows..

4. The Final Decriminalization: Navtej Singh Johar Case

The battle against Section 377 did not end with the Koushal judgment. In 2016, a fresh petition was filed by a group of eminent personalities, including dancers, chefs, and LGBTQ+ activists, challenging the constitutional validity of Section 377. This case, known as *Navtej Singh Johar v. Union of India*,⁹ was heard by a five-judge Constitution Bench of the Supreme Court.

On September 6, 2018, the Supreme Court delivered a historic verdict decriminalizing consensual homosexual acts between adults. The court unanimously held that Section 377, insofar as it criminalized consensual same-sex conduct, was unconstitutional as it violated the rights to equality, dignity, and privacy under Articles 14, 15, and 21 of the Indian Constitution. The judgment emphasized that sexual orientation is an intrinsic part of one's identity and that societal morality cannot be a basis for denying fundamental rights.

5. Current Status and Implications

As of today, Section 377 is no longer applicable to consensual same-sex relationships between adults. The 2018 Supreme Court judgment was a watershed moment in India's LGBTQ+ rights movement, providing legal recognition and protection to same-sex relationships. However, the judgment did not address issues related to marriage, adoption, or inheritance rights for same-sex couples, leaving many aspects of legal equality unaddressed.

The decriminalization of Section 377 has significantly impacted societal attitudes and has encouraged greater visibility and acceptance of the LGBTQ+ community. Nevertheless, challenges such as societal stigma, discrimination, and the need for comprehensive legal reforms persist. The journey towards full equality and acceptance for the LGBTQ+ community in India continues, but the decriminalization of Section 377 remains a

⁷ 2010 CRI. L. J. 94, 2009

⁸ AIR 2014 Supreme Court 563

⁹ AIR 2018 SC 4321

monumental step in that direction. Significant legal milestones have marked the journey towards the recognition of same-sex relationships in India. The decriminalization of homosexuality in 2018 by the Supreme Court of India in *Navtej Singh Johar v. Union of India* was a landmark decision, overturning Section 377 of the Indian Penal Code, which criminalized consensual same-sex relations. However, this ruling did not address the issue of marriage equality but led to the enactment of the new legislation i.e. The Transgender Persons (Protection of Rights) Act, 2019.

The Transgender Persons (Protection of Rights) Act, 2019, is a significant legislative measure enacted by the Indian Parliament to safeguard the rights of transgender persons and promote their welfare. The Act comprises several chapters that outline comprehensive provisions aimed at ensuring equality and protection for transgender individuals across various spheres of life. A crucial aspect of the Act is the prohibition against discrimination. It explicitly forbids any form of discrimination against transgender persons in areas such as education, employment, healthcare, access to public places, property rights, and the right to hold public or private office. It aims to ensure that transgender individuals receive fair and equal treatment in all aspects of life. The recognition of the identity of transgender persons is of utmost importance. The Act affirms their right to be recognized as transgender and to have a self-perceived gender identity. The process for obtaining a certificate of identity is outlined, allowing transgender persons to apply to the District Magistrate for such certification. Furthermore, provisions are made for changing gender on official documents following sex reassignment surgery, ensuring that their legal identity aligns with their gender identity. The Act mandates welfare measures by the Government. The appropriate Government is required to take steps to ensure the full and effective participation of transgender persons in society. This includes formulating welfare schemes, promoting non-discriminatory practices, and facilitating access to welfare programs. The objective is to integrate transgender individuals into mainstream society and provide them with equal opportunities. The obligations of establishments and other persons include preventing discrimination in employment, ensuring adherence to the Act, and providing essential facilities for transgender individuals. Establishments are also required to implement a grievance redressal mechanism to handle complaints regarding violations of the Act. Furthermore, the right of residence for transgender persons is protected, prohibiting their separation from family and ensuring non-discriminatory access to household facilities. The Act gives importance to education, social security, and the health of transgender persons. It obliges educational institutions to provide inclusive education and mandates the Government to facilitate vocational training and self-employment. Healthcare provisions include access to sex reassignment surgery, hormonal therapy, counseling, and medical insurance, ensuring that transgender persons receive comprehensive healthcare services tailored to their needs. The establishment of the National Council for Transgender Persons is provided under the Act. This Council comprises representatives from various ministries, state governments, and the transgender community. Its functions include advising the Government, monitoring policies, coordinating activities, redressing grievances, and performing other prescribed functions to ensure the effective implementation of the Act. The Act underscores the legal consequences of discriminating against or harming transgender individuals. Violations can result in imprisonment ranging from six months to two years, along with fines. The Transgender Persons (Protection of Rights) Act, 2019, aims to eliminate discrimination, ensure the right to self-identification, and promote the welfare of transgender persons through inclusive education, employment, healthcare, and social security measures. The establishment of the National Council for Transgender Persons and the imposition of penalties for violations further reinforce the Act's

commitment to protecting and empowering the transgender community in India. The Act does not recognize same-sex marriage.

The Act primarily focuses on the recognition and protection of transgender persons' rights, including legal recognition of gender identity, protection from discrimination, and access to social welfare measures. It does not address the issue of marriage or the legal status of same-sex relationships.

V.CURRENT LEGAL FRAMEWORK IN INDIA

At present, India does not legally recognize same-sex marriages. The existing framework of marriage laws, including the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, The Indian Christian Marriage Act, 1872, Parsi Marriage And Divorce Act, 1936, and the Muslim Personal Law, remains strictly limited to heterosexual unions. This exclusion has persisted despite ongoing advocacy and legal challenges aimed at extending marriage rights to same-sex couples.

Attempts to amend these laws to be more inclusive have faced formidable opposition.¹⁰ The resistance comes from various quarters, including the government, which has expressed reservations about redefining traditional notions of marriage. Additionally, conservative segments of society have vocally opposed any changes, arguing that such reforms conflict with cultural and religious norms. This opposition has created a significant barrier to progress, leaving same-sex couples without access to the legal and social benefits that marriage confers. These benefits include, but are not limited to, rights related to adoption, surrogacy, inheritance, and spousal support. As a result, the lack of legal recognition continues to perpetuate inequality and discrimination against the LGBTQIA+¹¹ community in India.

The recent Supreme Court judgment *Supriyo Chakrabarty and others vs. UOI*¹² is of importance. On November 14, 2022, two same-sex couples filed writ petitions in the Supreme Court of India seeking legal recognition of same-sex marriages. The petitions focused on the constitutionality of the Special Marriage Act, 1954. The petitioners argued that Section 4(c) of the Act, which recognizes marriage only between a 'male' and a 'female', discriminates against same-sex couples by denying them matrimonial benefits such as adoption, surrogacy, and employment and retirement benefits. They requested the Court to declare Section 4(c) of the Act unconstitutional. These petitions were tagged with others challenging various personal laws on similar grounds, including the Hindu Marriage Act, 1955, and the Foreign Marriage Act, 1969. The petitioners contended that "the non-recognition of same-sex marriage violates the rights to equality, freedom of expression, and dignity". They relied on precedents set by *NALSA vs Union of India* (2014) and *Navtej Singh Johar vs. Union of India* (2018), which recognized non-binary gender identities and guaranteed equal rights to homosexual persons. On November 25, 2022, a Supreme Court Bench comprising Chief Justice D.Y. Chandrachud and Justice Hima Kohli directed the Union to respond to the

¹⁰ India: Marriage, Same-Sex, LGBT Rights, Religion, ABC News, May 4, 2023, <https://www.abc.net.au/news/2023-05-04/india-marriage-same-sex-lgbt-rights-religion/102266472> (last visited July 24, 2024).

¹¹ Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual

¹² W.P. (C) 1011/2022 <https://www.scobserver.in/cases/plea-for-marriage-equality/#:~:text=On%20October%2017th%2C%202023%2C%20the,to%20marry%20under%20the%20SM> A.

petitions. Similar petitions were pending before the Delhi and Kerala High Courts. On October 17, 2023, the 5-Judge Bench pronounced its verdict on the petitions seeking marriage equality for LGBTQIA+ persons. The Bench unanimously held that “there was no fundamental right to marry and that the Court could not recognize the right of LGBTQIA+ persons to marry under the Special Marriage Act.”

The Bharatiya Nyaya Sanhita (BNS) of 2023 takes the place of the Indian Penal Code of 1860 and brings about big changes in India's criminal justice system.¹³ Yet, it doesn't talk about same-sex marriage. Section 69 of the BNS makes it a crime to have sex by tricking someone, like lying about marriage or a job, but this rule works when a woman complains. Men and transgender people can't use this law to get help. Also, the BNS doesn't have anything like Section 377 from the old IPC. This makes people worry that there's no law to protect against forced same-sex acts, which leaves out the LGBTQ+ community. These things show we need better laws to protect everyone's rights, no matter their gender or who they love.

VI.CONCLUSION

The judgment in *Supriyo Chakrabarty and Others v. Union of India* (2023) represents a pivotal moment in India's ongoing struggle for same-sex marriage recognition. Although the case did not directly legalize same-sex marriage, it marked a significant advance by emphasizing the need to address LGBTQ+ rights within the existing legal framework. The ruling brought to light the inherent inequalities faced by same-sex couples under current laws, reinforcing the argument that such couples should receive the same legal protections and rights as their heterosexual counterparts. This acknowledgment is crucial as it sets a foundation for future legal and legislative changes by highlighting the gaps in the current legal system and advocating for a more inclusive approach to marriage equality.

The judgment also implicitly called for legislative reform, recognizing that the current legal framework does not adequately address the needs of same-sex couples. By underscoring the necessity of inclusive legal provisions, the court's ruling set the stage for more in-depth discussions and potential legislative action. This could involve amending existing laws like the Hindu Marriage Act and the Special Marriage Act to explicitly include same-sex couples. Such changes are essential to ensure that same-sex marriages are legally recognized and that couples have access to the same rights and benefits that heterosexual couples enjoy. The judgment, therefore, acts as a catalyst for legislative bodies to engage in meaningful reform to bridge the gaps in existing laws.

By reinforcing the need for laws to align with contemporary human rights standards, the judgment creates a precedent for future cases involving LGBTQ+ rights. The judiciary's proactive stance in addressing fundamental rights issues highlights its crucial role in shaping legal norms and advancing societal acceptance. This judicial approach can lead to more progressive rulings in the future, influencing both the legal landscape and public discourse on LGBTQ+ issues. In addition to its legal implications, the judgment played a significant role in raising awareness about LGBTQ+ issues within Indian society. By bringing these issues to the forefront of legal and public discourse, the case contributed to a gradual shift in societal attitudes. Increased visibility and discussion can foster a more accepting and inclusive

¹³ <https://www.lexology.com/library/detail.aspx?g=8b6e523a-8ba1-4575-9408-c58a70cd31cc>

environment, which is essential for achieving broader societal acceptance of same-sex marriages. Public awareness campaigns, educational initiatives, and media representation will be key in promoting understanding and reducing stigma associated with LGBTQ+ relationships.

Examining the experiences of other countries provides valuable insights into how India might progress towards marriage equality. The *Obergefell v. Hodges* (2015) decision in the United States, for instance, was a landmark ruling that legalized same-sex marriage nationwide. It demonstrated the transformative power of the judiciary in enacting widespread legal change and highlighted the importance of aligning national laws with principles of equality and human dignity.¹⁴ India can learn from the U.S. experience in terms of the legal arguments employed and the societal impacts of such a ruling, which can provide a framework for its own legal and social strategies. Similarly, Canada's approach to same-sex marriage, beginning with *Halpern v. Canada* (2003)¹⁵ case and culminating in nationwide legalization in 2005, illustrates the effectiveness of a progressive legal and social strategy. Canada's experience underscores the need for both judicial and legislative efforts in achieving marriage equality. The Canadian model demonstrates how a combination of judicial rulings and legislative reforms can effectively address the legal and social dimensions of marriage equality.

South Africa's legalization of same-sex marriage in 2006, within the context of its progressive constitution and legal framework, further highlights the role of constitutional guarantees in advancing LGBTQ+ rights. South Africa's journey emphasizes the importance of having a strong constitutional foundation that explicitly protects the rights of marginalized groups. This approach underscores the significance of embedding equal rights within the constitutional framework to ensure robust protection and recognition.

Moving forward, India must undertake comprehensive legal reforms to address the recognition of same-sex marriages. This involves revising existing marriage laws to include same-sex couples and provide them with equivalent rights and benefits. The judiciary's role in advancing LGBTQ+ rights will remain crucial, with future legal challenges potentially influencing the discourse on marriage equality. Societal attitudes towards same-sex marriages must also evolve through public awareness campaigns and educational initiatives to foster a culture of acceptance. Advocacy and activism by LGBTQ+ rights organizations will continue to play a vital role in pushing for legal changes and societal acceptance. The opposition to same-sex marriage in India is deeply rooted in cultural ethos, conservative outlook, and religious sentiments. As the country navigates the delicate balance between tradition and modernity, fostering inclusive dialogues and promoting education are essential steps towards achieving equality. Understanding and addressing these complexities can pave the way for a more inclusive society that respects and celebrates diversity. In conclusion, the journey towards marriage equality in India, which began with the landmark *Navtej Singh Johar* case, continues to evolve with the *Supriyo Chakrabarty* judgment marking another important milestone. However, this judgment is just one part of the ongoing struggle for same-sex marriage recognition. To advance towards a more inclusive and just society, it is crucial to draw lessons from international experiences and focus on both comprehensive legal reforms and societal changes.

¹⁴ https://www.law.cornell.edu/wex/obergefell_v._hodges#:~:text=Hodges%20is%20a%20landmark%20case,Protection%20clauses%20of%20the%20Fourteenth

¹⁵ (AG), [2003] O.J. No. 2268