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**HOMOSEXUALITY AND GENDER JUSTICE VIS-À-VIS SAME SEX  
MARRIAGE**- Mimansha Durgapal<sup>1</sup>**ABSTRACT**

This paper explores the intersection of homosexuality and gender justice with a focus on same-sex marriage. It delves into statutory provisions and the rights of LGBTQ+ individuals, analysing landmark case law regarding LGBTQ+ rights. Additionally, it examines public perceptions of homosexuality in India and legal obstacles faced by LGBTQ+ individuals. By investigating these issues, the paper contributes to the discourse on gender justice and the rights of sexual minorities in the legal framework.

**KEYWORDS**

Homosexuality, Gender Justice, Same-sex Marriage, LGBTQ+ Rights, Statutory Provisions, Case law analysis, Public Perceptions, Legal Obstacles, India.

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**CHAPTER 1: INTRODUCTION**

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In recent years, discussions surrounding homosexuality and gender justice have gained significant traction worldwide, sparking debates within legal, social, and cultural spheres. Central to this discourse is the question of same-sex marriage, a contentious issue that intersects with broader themes of equality, human rights, and societal acceptance. This paper aims to dissect the complex landscape surrounding homosexuality and gender justice, particularly within the context of India, a nation grappling with its traditional values alongside evolving notions of individual freedoms and rights.

As people around the world rethink their views on LGBTQ+ rights, India is also grappling with these issues. In this paper, we focus on how India is dealing with questions about homosexuality and fairness, especially regarding same-sex marriage. With important court decisions and changes in the law, India is trying to balance its traditional values with new ideas about individual rights.

We'll dive into the legal side of things, looking at what the law says, how courts have ruled, and what challenges LGBTQ+ people face in India. By exploring these topics, we hope to shed light on the complexities of achieving fairness and equality for everyone, regardless of who they love or how they identify.

## CHAPTER 2: STATUTORY PROVISIONS AND RIGHTS OF LGBTQ+ INDIVIDUALS

In India, the Rights of LGBTQ+ collective have been a topic of debate and legal battles for several years. The Section 377 of the Indian Penal Code (IPC), which forbidvoluntary sexual acts between adults of the same sex, was struck down by the Supreme Court of India in 2018, marking a note-worthy victory for the LGBTQ+ collective.

### **Key StatutoryRules:**

- **Right to Equality (Article 14):** Article 14 of the Indian Constitution guarantees equality before the law and equal safeguard of the laws to all persons.
- **Right againstDiscrimination (Article 15):** This prohibits discrimination on the grounds of sex, religion, race, caste, or place of birth, thereby laying the foundation to safeguardLGBTQ+ collective against biased treatment. While sexual inclination and gender identity are not explicitly mentioned, the principle of unbiasedness can be extended to protect LGBTQ+ collective from marginalise based on their sexual inclination or gender identity.

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- **Right to Life and Personal Liberty (Article 21):** Article 21 guarantees the rights to life and personal liberty to all persons. This has been interpreted broadly by the Indian Judiciary to encompass various aspects of individual autonomy, integrity, and privacy, which are fundamental to the rights of LGBTQ+ collective.
- **Right to Privacy:** Although it's not explicitly mentioned in the Indian Constitution, the privacy right has been recognised as a fundamental right by the Supreme Court of India. In the landmark judgment, [Puttaswamy (2017)], the court held that an individual's privacy includes the rights to make intimate choices regarding one's sexuality and relationships, providing note-worthy safeguard to LGBTQ+ collective.

**The Transgender Persons (Protection of Rights) Act, 2019:** This Act was introduced in Lok Sabha on July 19, 2019, by the Minister for Social Justice and Empowerment, Mr. Thaawarchand Gehlot. The Act aims to protect the rights of transgender population in India, including their liberty to self-perceived gender identity and prohibition of discrimination in various areas such as education, occupation, medical services, and reach to public facilities. The Act was passed by Lok Sabha on August 05, 2019, and Rajya Sabha on November 26, 2019, and is currently in force.

Some key rules highlighted in the Act are as follows:

- **Definition of a Transgender Person:** According to the Act, a transgender person is the one whose gender perception does not conform with their biological sex. People with intersex variants, gender queerness, transgender people, and those with social and cultural characteristics such as Hijra's or Kinnar's are also included.
- **Prohibition Against Discrimination:** The Act forbids prejudice against transgender people in a number of contexts, including medical services, education, job prospects, access to public accommodations, freedom of movement and housing.
- **Liberty to Residency:** All transgender individuals are entitled to live in their own homes and be part of their families. According to court rulings, the individual may be placed in a rehabilitation facility if their immediate family is unable to care for them.
- **Occupation:** It is illegal for public and private organisations to discriminate against transgender individuals in hiring and advancement processes.

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- Education: Government-funded or recognised educational institutions are required to offer transgender people inclusive sports and recreational activities free from prejudice.
- Medical services: Transgender people must have reach to health services provided by the government, such as distinct HIV surveillance, sex transition surgery, curriculum reviews, and extensive medical insurance plans.
- Certificate of Identification: The District Magistrate is the place where transgender people may submit applications for a certificate of identification designating them as transgenders. Following gender-affirming surgery, a new certificate can be obtained.
- Welfare Measures: The authorities need to take action to guarantee transgender people's complete inclusion and participation. This includes offering them prospects for self-occupation, vocational training, rescue and rehabilitation, transgender-sensitive programmes and cultural events.
- Violations: The Act identifies a number of violations against transgender people, including forced labour, being denied reach to public spaces, and abuse. The punishments for these offences vary from six months to two years in jail as well as fines.
- The National Council for Transgender population (NCT): NCT is responsible for providing advice to the federal government, keeping an eye on transgender-related policies and projects, and resolving complaints from transgender people.

The Act specifies offences and penalties for crimes against transgender population, which includes, making a transgender person beg, preventing them from entering a public space, abusing them physically or sexually, and making them work as slaves or in forced labour.

Some of these penalties include:

- Offences and Penalties (Chapter 8): The Act recognises several offences, including begging, denial of reach to public places, denial of residence, and physical, sexual, verbal, emotional, and economic abuse of transgender population. These offences are punishable with imprisonment for a term between six months and two years and a fine.

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- Enticing or pressuring a transgender person to perform forced or bonded labour is a crime that carries a minimal period of six months in jail and extendable up to a period of two years in prison, in addition to a fine.
- A transgender person's life, safety, health, or well-being can be harmed, injured, or put in danger. These offence carries a minimal period of six months in jail and extendable up to a period of two years in prison, in addition to a fine.
- Sexual harassment of transgender people is a crime that carries a fine and a minimal period of six months in jail, which can be extended for a period of two years.

These rules aim to safeguard the rights, integrity, and well-being of transgender citizens of India, promoting inclusivity and equality across various sectors of society.<sup>2</sup>

**The LGBTQIA+ Community (Protection of Rights) Bill, 2022:** The LGBTQIA+ (Protection of Rights) Bill, 2022, is a proposed legislation in India aimed at safeguarding the rights of LGBTQIA+ individuals. The bill is not yet enacted, and its rules are not publicly available. It is expected to build on the rules of the Transgender Persons (Protection of Rights) Act, 2019, and provide further safeguards and rights for LGBTQIA+ citizens of India. However, the specific rules of the bill are not yet available.

The difference between the LGBTQIA+ Community (Protection of Rights) Bill, 2022, and preceding bills concerning LGBTQ+ rights in India can be analysed as follows:

- **Scope and Inclusivity:** The 2022 Bill, is poised to encompass a broader array of identities within the LGBTQIA+ collective, including lesbian, gay, bisexual, transgender, queer, intersex, asexual, and other gender and sexual minorities. This bill aims to extend safeguard and rights to a more diverse range of individuals compared to previous legislation, which might have primarily focused on transgender rights.
- **Comprehensive Safeguards:** The 2022 Bill is anticipated to offer more comprehensive safeguards and rights to LGBTQIA+ individuals beyond what was provided in prior bills. This could involve rules addressing discrimination, medical services reach, occupation prospects, legal acknowledgement, and safeguarding against abuse and hate crimes.

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<sup>2</sup>The Transgender population (Safeguard of Rights) Act, 2019

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- **Enforcement Mechanisms:** In 2022, it may introduce stronger enforcement mechanisms, including penalties for violations, to ensure adherence to the rights and safeguards outlined in the legislation. This could rectify the deficiencies of earlier bills that lacked effective enforcement measures.
- **Inclusive Language and Terminology:** This Bill is expected to employ more inclusive language and terminology reflective of the diverse identities and encounters within the LGBTQIA+ collective. This bill may aim to establish a more welcoming and affirming legal framework compared to previous legislation, which might have been more restricted in scope and language.

These key distinctions indicate that the LGBTQIA+ Bill of 2022 is anticipated to be a more comprehensive and inclusive piece of legislation seeking to address a wider array of issues and provide stronger safeguards for LGBTQIA+ citizens of India.

### CHAPTER 3: CASE LAW ANALYSIS: LANDMARK JUDGMENTS ON LGBTQ+ RIGHTS

**Naz Foundation vs Government of NCT of Delhi<sup>3</sup>:** This is a significant case that dealt with the legality of Section 377 of the IPC, which forbids voluntary homosexual sex between adults. The case was brought by an NGO working in the public health field, disputing the validity and legality of Section 377.

**Facts:** The High Court of Delhi heard a PIL brought in 2001, which contested the legality of Section 377 of the IPC. In 2004, the Court denied the plea, concluding that the issue was purely theoretical and lacked a solid legal foundation. Subsequently, the Petitioner challenged the Court's rulings in a Special Leave Petition filed in the Supreme Court. The ruling was overturned by the Apex Court in 2006, and the matter was sent back to them for further consideration. After eight years of judicial battle for LGBTQI+ rights, the Delhi High Court struck down the rule that criminalised adult homosexual encounters in 2009.

**Issues:** The primary issue was whether Section 377 of the IPC, which forbids voluntary sexual acts between adults in private, violated fundamental rights protected by the Indian Constitution.

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<sup>3</sup>(2016) 15 SCC 619

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**Judgment:** The Delhi High Court held Section 377 of the IPC violated fundamental rights under Articles 14, 15, 19, and 21 of Indian Constitution. The court ruled that Articles 14, 15, and 21 of the Constitution of India are violated by Section 377 of the IPC, to the extent that it makes private, voluntary sexual actions between adults illegal.

**Relevance:**

- The judgment marked a note-worthy step towards decriminalising homosexuality in India, recognising the rights of LGBTQ+ collective to engage in voluntary sexual acts.
- The decision ended the criminalisation of homosexuality, which had been in place for over a century and had been used to discriminate against sexual minorities, including men who have sex with men (MSM), lesbians, and transgender individuals.
- The judgment paved the way for further legal and societal acknowledgement of LGBTQ+ rights in India, although it was later overturned by the Supreme Court in the *Suresh Kumar Koushal vs. Naz Foundation*.

The case analysis highlights the importance of legal obstacles to biased laws and the role of the Judiciary in upholding fundamental rights and safeguarding the rights of marginalised communities.

**Suresh Kumar Koushal & Anr vs Nas Foundation & Ors<sup>4</sup>**

**Facts:** In this case, the validity of Section 377 of the IPC was contested.

In 2009, the Delhi High Court struck down Section 377, which put an end to the prohibition against adult gay relationships. In December 2013, the Supreme Court overturned the Delhi High Court's ruling and affirmed the legality of Section 377, which made homosexuality a crime once again.

**Issues:** The primary concerns centred on the infringement of fundamental rights as outlined under Articles 14, 15, and 21 of the Constitution of India.

- Whether the basic rights guaranteed by the Constitution were violated by Section 377 of the IPC.

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<sup>4</sup> AIR 2014 SC 563

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- Does criminalising private, voluntary sexual relations between individuals of the same sex contradict Article 21?

***Ruling:***

- The Supreme Court held that Section 377 of the IPC did not suffer from any statutory infirmity and reinstated the criminalisation of homosexuality.
- The Court negated the contentions that Section 377 of the IPC violated Articles 14, 15, 19(1)(a) -(d), and 21 of India's Constitution.

***Relevance:*** The judgment was seen as regressive and a setback for LGBTQ+ rights in India.

- It sparked widespread criticism for failing to uphold the interests of marginalised communities and perpetuating discrimination.
- The decision highlighted the ongoing struggle for equal rights and the need for legal reform to protect the rights of LGBTQ+ collective.

This case analysis underscores the legal battle surrounding LGBTQ+ rights in India and the implications of the Supreme Court's decision in reinstating Section 377 of the IPC.

**National Legal Services Authority v. Union of India<sup>5</sup> – Acknowledgement of the Third Gender**

***Facts:***

- The case involved the NALSA disputing the discrimination faced by the transgender collective in India.
- The Apex Court, in a significant judgment on 15<sup>th</sup> April, 2014, recognised a third gender category and upheld the fundamental rights of transgender individuals.

***Issues:***

- The key issues raised in the case included whether transgender individuals should receive legal safeguard under Indian Constitution and be recognised as a third gender.
- The case questioned whether the discriminations faced by transgender individuals violated their fundamental rights enshrined in the Constitution.

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<sup>5</sup>AIR 2014 SC 1863

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***Ruling:***

- The Supreme Court, through a two-judge bench of Justice K.S. Radhakrishnan and Justice A.K. Sikri, upheld the rights of transgender individuals and recognised them as a third gender.
- The court emphasised the importance of self-identification for gender and directed the government to implement affirmative action policies to uplift the transgender collective socially and economically.

***Relevance:***

- The judgment marked a note-worthy milestone in recognising the rights of transgender citizens of India and addressing the discrimination they faced.
- It highlighted the need for legal reform and social acceptance to protect the rights and integrity of transgender individuals.
- The case set the stage for further legal developments and initiatives aimed at promoting equality and inclusivity for the transgender collectives in India.

**Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law & Justice<sup>6</sup>**

This is a landmark case decided by the Supreme Court on 6<sup>th</sup> September, 2018. The case concerned the statutory validity of Section 377 of the IPC, which forbids voluntary sexual conduct between adults, including homosexual sex.

***Facts:*** The case was filed by five individuals belonging to the LGBTQ+ community, including Navtej Singh Johar, a Bharatanatyam dancer, Ritu Dalmia and Ayesha Kapur, restaurateurs, Aman Nath, a hotelier, and Sunil Mehra, a media person. The petitioners argued that their concerns differed greatly from those made in the earlier case of Suresh Koushal, which supported Section 377's validity.

***Issues:***

The primary issue was whether Section 377 of the IPC, which criminalises voluntary sexual conduct between adults, violated fundamental rights under Articles 14, 15, 19(1)(a) -(d), and 21 of India's Constitution.

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<sup>6</sup>AIR 2018 SC 4321

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***Ruling:***

- The Supreme Court unanimously declared Section 377 of the IPC invalid "in so far as it criminalises voluntary sexual conduct between adults."
- The court held that LGBT population in India is entitled to all statutory rights, including the ones protected by the Constitution.

***Relevance:***

- The verdict was celebrated as a turning point for LGBTQI+ rights in India since it decriminalised adult consenting sexual relations, including homosexual intercourse.
- The ruling represented a noteworthy advancement in the acknowledgement and defence of the LGBT collective's rights in India.
- The ruling also emphasised the relevance of individual liberty and the privacy liberty in relation to gender identity and sexual inclination.

Thus, this case is a note-worthy milestone in the fight for LGBT rights in India, as it permits voluntary sexual conduct between adults and recognised the statutory rights of LGBT individuals. The ruling has opened up new avenues for social and legal advancement in India's acknowledgement and defence of the rights of members of the LGBT collective.

**CHAPTER 4: PUBLIC PERCEPTIONS OF HOMOSEXUALITY IN INDIA**

Public perceptions of homosexuality in India are complex and influenced by various factors, including traditional philosophies, colonial-era laws, and contemporary social and cultural dynamics. Historically, homosexuality was tolerated and even celebrated in ancient Indian society, with evidence of its existence in various artworks and literary works. However, the acceptance of homosexuality was largely imported from the Western world through Islam and Christian-derived morality during European colonialism, culminating in the criminalisation of homosexuality under the Fatawa-e-Alamgiri of the Mongol Empire and the IPC.

With greater representations and conversations of homosexuality in Indian media and cinema, there has been a change in the country's views regarding homosexuality in recent years. Nonetheless, homophobia still exists today, and throughout European colonisation, prejudice towards homosexuality was mostly brought from the West via Islam and morals deriving from Christianity.

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The legitimisation of homogamous marriage has had a positive impact on the LGBTQ+ collective in countries where it is legal, but there is still work to be done to address discrimination and abuse against LGBTQ+ collective worldwide. The Supreme Court of India overturned the Sodomy Law (Section 377 of the IPC) in 2018, making homosexual sex legal again. Nonetheless, other rules of Section 377 of the IPC remained intact and were the only domain for the prosecution of adult homosexual rape under the penal code. Homosexual rape became prohibited in India when the Bhartiya Nyaya Sanhita replaced the IPC in December 2023. This is because there is no longer a term that is equal to Section 377 of the IPC.

The number of LGBTQ persons varies; in 2012, the Government said that there were "at least 2.5 million" of them, based on self-declarations; activists, on the other hand, put the number closer to 125 million. A poll conducted by Ipsos between April 23, 2022, and May 7, 2022, revealed that less than 30% of respondents identified as LGBTQ. In India, homophobia is pervasive. The fact that sexual inclination in general is rarely discussed has stifled public discourse about homosexuality in India. However, perceptions about homosexuality have slightly changed in recent years. Specifically, there have been increased conversations and representations of homosexuality in Indian film and media.

Larger cities like Mumbai, where LGBTQ organisations like Gay Bombay and LABIA have been active for decades, are the main places where partners of the same sex find acceptance. Lesser towns and villages seldom ever talk about queer concerns. "It's difficult for family members to accept their own children when they come out as queer," explains Sahgal. "The families' love for their children is conditional to the point that you subscribe to cisgender heterosexual norms. The moment you transgress those norms, there is a problem," he adds.

There is still a problem with psychological, physical, emotional, and financial abuse of the LGBT collective in India. Many victims of gay rape go unreported because they lack support from their families, the collective, or the police. The online knowledge-sharing site Capacity4dev, maintained by the European Commission, published a report in May 2021 about a project called Solidarity and Action Against the HIV Infection in India, which was funded by the EU. The project's goals were to lessen prejudice and abuse against LGBTI people in India and to increase their reach to the legal system. Capacity4dev noted that 'Lesbian, gay, bisexual, transgender, intersex and queer people in India are often confronted

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with stigma, discrimination and restrictions in reach to health services due to biased laws and negative social attitudes. For many LGBTIQ, the lack of family or collective support increases their vulnerability to violence, inoccupation, India' (paragraph 3.155, page 46), 10 December 2020.

In 2021, a survey by Ipsos found Ipsos reported that 58% of Indians think couples of the same sex deserve to be able to marry or have some other legal acknowledgement, and 66% think partners of the same sex should be permitted to adopt children. The study sample consisted of 500 people in India. '... more urban, more educated, and/or more affluent than the general population. The survey results for [India] should be viewed as reflecting the views of the more "connected" segment of their population.'

Thus, public perceptions of homosexuality in India are influenced by traditional philosophies, colonial-era laws, and contemporary social and cultural dynamics. While there has been a shift in attitudes towards homosexuality in recent years, homophobia and discrimination against homosexuality are still prevalent. The legitimisation of homogamous marriage has had a positive impact on the LGBTQ+ collective in countries where it is legal, but there is still work to be done to address discrimination and abuse against LGBTQ+ collective worldwide. In India, partners of the same sex mainly find acceptance in bigger cities, and psychological, physiological, emotional, and fiscal abuse against the LGBT collective remains a problem.<sup>789</sup>

## CHAPTER 5: LEGAL OBSTACLES FACED BY LGBTQ+ INDIVIDUALS

LGBTQ+ citizens of India continue to face a host of legal and societal obstacles, including hate crimes, discrimination in occupation and medical services, and social ostracization.

<sup>7</sup>Kent et al (2020): The Global Divide on Homosexuality Persists, Pew Research Centre, available at: <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-perightsists/>

<sup>8</sup> IND CPIN Report August 2023, Country Policy and Information Note India: Sexual inclination and gender identity and/or expression, available at: [https://assets.publishing.service.gov.uk/media/64dba4a760d123001332c5c7/IND\\_CPIN\\_Sexual\\_orientation\\_and\\_gender\\_identity\\_and\\_expression.pdf](https://assets.publishing.service.gov.uk/media/64dba4a760d123001332c5c7/IND_CPIN_Sexual_orientation_and_gender_identity_and_expression.pdf)

<sup>9</sup>Cole et al (2023): Don't You Be My Neighbour! Perceptions of Homosexuality in Global Cross-Cultural Perspective, 1990 to 2019, Sage Journals, available at: <https://journals.sagepub.com/doi/10.1177/23780231231178426?icid=int.sj-abstract.citing-Art..26>

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Despite the legalisation of homosexuality under Section 377 of the IPC in 2018, same-sex unions remain illegal, and the LGBTQ+ collective lacks the privilege of equal prospects for all residents.

### **Lack of Acknowledgement for the Homogamous marriages**

The lack of legal acknowledgement for same-sex relationships is a note-worthy legal challenge faced by LGBTQ+ citizens of India. Despite the legalisation of homosexuality under Section 377 of the IPC in 2018, same-sex unions remain illegal, and the LGBTQ+ collective lacks the privilege of equal prospects for all residents. The Transgender Community (Protection of Rights) Bill, approved by the Lok Sabha in 2019, has shortcomings and needs to be strengthened and modified to benefit the LGBT collective. The struggle for true inclusivity in India is ongoing, with the collective fighting for more rights and ensuring integrity for all.<sup>10</sup>

LGBTQ rights campaigners criticised the Indian Supreme Court's decision to refuse to recognise homogamous marriages as lawful, calling it "regressive." Although the court upheld gay couples' rights, it is still illegal to marry members of the same sex. With guaranteed statutory safeguard, Indians can now freely participate in same-sex partnerships as a result of the verdict. On the other hand, legalising same-sex partnerships is an advancement towards marital equality. Adoptive and foster parents' rights are another goal of campaigners.<sup>11</sup>

The LGBTQ+ collective in India continues to face a host of legal and societal obstacles, including hate crimes, discrimination in occupation and medical services, and social ostracization. The plight of the LGBTQ+ collective is pervasive and permeates various aspects of their lives, including difficulty in reaching quality education, housing, and medical services, and facing bias and exclusion in occupation. Individuals of the LGBT+ collective suffer serious and frequently disregarded mental health issues. High levels of stress, anxiety,

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<sup>10</sup>Juris Centre Blogs, Obstacles and Progress: Law and LGBTQ+ Rights Acknowledgement in India, available at: <https://juriscentre.com/2024/02/10/obstacles-and-progress-law-and-lgbtq-Rights-acknowledgement-in-india/>

<sup>11</sup>Aljazeera Art., Unpacking Indian SC's verdict on same-sex marriage, available at: <https://www.aljazeera.com/features/2023/10/17/unpacking-indian-supreme-courts-verdict-on-same-sex-marriage>

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depression, and other mental health problems might result from the stigma, prejudice, and discrimination they face.

In India, the LGBTQ+ collective is pushing for the Hindu Marriage Act of 1955, the Special Marriage Act of 1954, and the Foreign Marriage Act of 1969 to officially recognise same-sex unions. The outcome of these lawsuits could have a big impact on how LGBTQ+ rights develop in India. There is hope for a future when everyone's rights are upheld, irrespective of sexual inclination or gender identity, thanks to the ongoing legal conversation and activity.<sup>12</sup>

### **Medical services Access**

Reach to medical services is one of the biggest legal obstacles LGBTQ+ people in India must overcome. The LGBTQ+ population faces systemic exclusion from medical services due to a number of factors, including stigma, prejudice, a lack of coverage, and a lack of knowledge about LGBTQ+ concerns. These factors result in policy gaps and discrimination when it comes to obtaining medical services treatments.

Discrimination against LGBTQ+ citizens of Indian hospitals are pervasive, with studies highlighting the stigma and barriers faced by the collective in seeking medical services, including issues related to sexual health, mental health, and general medical services reach. The interaction of sexual and gender minorities with other identities, such as caste, exacerbates their exclusion from medical services and increases their discrimination in medical services settings.

Efforts are needed to reform public health policies, sensitise medical services providers, and ensure that all LGBTQ+ collective feel comfortable seeking medical services without facing bias or barriers based on their sexual inclination or gender identity.<sup>13</sup>

### **Inadequacy of the 2019 Act**

The 2019 Act has faced criticism and scrutiny for its inadequacies in addressing the rights and safeguards of the transgender collective in India. Critics have pointed out various

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<sup>12</sup> Century Law Firm Art., Rights and Laws Related to the LGBTQ+ collective in India: An In-depth Exploration, available at: <https://www.centurylawfirm.in/blog/Rights-and-laws-related-to-the-lgbtq-collective-in-india-an-in-depth-exploration/>

<sup>13</sup> Reach to Medical services Art., Pervasive marginalise against LGBTQIA+ people in Indian hospitals, available at: <https://www.aidsmap.com/news/nov-2022/pervasive-marginalise-against-lgbtqia-people-indian-hospitals>

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shortcomings in the legislation, including issues related to the understanding of discrimination, lack of rules for gender self-identification, and obstacles in tackling workplace biasness<sup>14</sup>. The Act has been criticised for not providing a comprehensive framework to secure the rights of transgender citizens of India, with concerns raised about the convoluted process for obtaining identity certificates, barriers for trans-binary persons, and the absence of adequate grievance redressal mechanisms<sup>15</sup>. Additionally, the Act's procedure for legal gender acknowledgement has been highlighted as problematic, as it mandates a two-step process that requires proof of surgery for gender change, potentially coercing individuals into medical procedures they may not desire. The Act's approach to legal gender acknowledgement has been deemed as violating fundamental rights and contrary to international standards that advocate for the separation of legal and medical processes in gender acknowledgement<sup>16</sup>. Overall, the Transgender Community (Protection of Rights) Act, 2019 has been criticised for its limitations and the need for note-worthy modifications to effectively protect and uphold the rights of the transgender collective in India.

## CHAPTER 6: SOCIAL STIGMA & DISCRIMINATION

Societal stigma and discrimination are note-worthy obstacles faced by LGBTQ+ citizens of India. The LGBTQ+ collective in India faces exclusion and discrimination in various aspects of life, including medical services, education, occupation, and social interactions. The societal stigma associated with being LGBTQ+ in Indian society leads to exclusion and discrimination, especially for visible individuals like hijras, transgender, inter-sex, queer individuals, and those with androgynous expressions. Discrimination against LGBTQ+ collective is further compounded by factors such as caste, with Dalit transgender and inter-

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<sup>14</sup> Law School Policy Review & Kautilya Society, The Inadequacy of the Transgender population Act to Tackle Workplace Marginalise, available at: <https://lawschoolpolicyreview.com/2020/10/09/the-inadequacy-of-the-transgender-perightsons-act-to-tackle-workplace-marginalise/>

<sup>15</sup>Oxford Human Rights Hub Article, Transgender population Rules 2020: A Half-hearted Attempt at Redemption, available at: <https://ohrh.law.ox.ac.uk/transgender-perightsons-rules-2020-a-halfhearted-attempt-at-redemption/>

<sup>16</sup>Human Rights Watch Article, India's Transgender Rights Law Isn't Worth Celebrating, available at: <https://www.hrw.org/news/2019/12/05/indias-transgender-Rights-law-isnt-worth-celebrating>

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sex persons facing a higher degree of exclusion and discrimination in medical services compared to their upper-caste counterparts.<sup>17</sup>

LGBTQ+ collective often report encounters of violence, rejection, and discrimination in occupation, education, medical services, and reach to social services, highlighting the pervasive nature of societal stigma and marginalise faced by the collective. The prejudice and exclusion faced by LGBTQ+ citizens of India have economic implications, leading to lower productivity, diminished human capital development, and poorer health outcomes, which ultimately reduce the economic contributions of LGBTQ+ collective in the country. Efforts are needed to address societal stigma, discrimination, and exclusion faced by LGBTQ+ citizens of India to ensure equality, justice, and inclusivity for all members of the collective.<sup>18</sup>

**Impact on Mental Health:** The stigma against the LGBTQ+ collective in India has a profound impact on their mental health. The prejudice, discrimination, and abuse faced by LGBTQ+ collective due to their sexual inclination contribute note-worthily to mental health obstacles within the collective. Social stigmas and stereotypes can lead to psychological distress and impact the psychological health of LGBTQ+ collective at both social and personal levels. The fear of facing prejudice and discrimination can create internal struggles, hindering individuals from fully accepting and expressing their sexual inclination, leading to psychological stress and anxiety. The process of "coming out" is crucial for LGBTQ+ collective, and the societal stigma can make this process disputing, affecting their mental well-being. Research indicates the negative effects of stigma and discrimination on the mental health of LGBTQ+ people are highlighted by the fact that they are more likely to have poor mental health, including greater rates of major depression, anxiety disorders, PTSD, substance misuse, and suicide thoughts and attempts. Getting expert assistance and

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<sup>17</sup>Arora et al (2022): Understanding marginalise against LGBTQIA+ patients in Indian hospitals using a human Rights perspective: an exploratory qualitative study, National Library of Medicine, available at: <https://www.ncbi.nlm.nih.gov/pmc/Art./PMC9423841/>

<sup>18</sup>World Bank Document, The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India, available at: <https://documents1.worldbank.org/curated/en/527261468035379692/pdf/940400WP0Box380usion0of0LGBT0People.pdf>

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participating in LGBTQ+ supportive therapy can help people overcome obstacles and enhance their general and mental health.<sup>19</sup>

## CHAPTER 7: ANALYSIS OF SPECIFIC CASES OF DISCRIMINATION OR ACTIVISM

### **Supriyo Chakraborty v Union of India<sup>20</sup>**

This is a landmark judgment in India that deals with the rights of LGBTQ+ collective to marry and form families. The case was heard by the Supreme Court Constitution Bench, comprising Chief Justice Dhananjaya Y. Chandrachud and Justices Sanjay Kishan Kaul, Sudhanshu Dhulia, Bela M. Trivedi, and J.B. Pardiwala.

**Facts:** The case involves several petitions filed by LGBTQ+ collective seeking acknowledgement of their liberty to marry and form families. The petitions were originally filed before various High Courts, including the Delhi High Court, Gujarat High Court, and Kerala High Court, but were later transferred to the Supreme Court.

#### **Issues:**

- Whether LGBT couples have the liberty to form civil unions or if marriage is a Fundamental Right.
- Is the 1954 Special Marriage Act (SMA) illegal because it prohibits marriages between LGBT people?
- Is it possible for queer couples to adopt children?

**Judgment:** The Apex Court upheld the validity of the Special Marriage Act, 1954, but held that it is unlawful to exclude queer couples from marrying under it.

The justices reached a unanimous decision that marriage is not an absolute liberty, and as such, partners of the same sex cannot claim it as a basic liberty. In addition, the Special Marriage Act's challenge was unanimously rejected by the Honourable Supreme Court.

Furthermore, the vast majority of judges declared that same-sex civil unions are not recognised by the law, and as a result, these couples are not eligible to adopt children.

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<sup>19</sup>Deccan Herald Art., Mental Health issues among the LGBTQ, available at: <https://www.deccanherald.com/opinion/mental-health-issues-among-the-lgbtq-810246.html>

<sup>20</sup>Writ Petition (Civil) No. 1011 of 2022

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The Central Government created a High-Powered Committee (HPC) under the direction of the Cabinet Secretary to undertake a thorough investigation into the variables surrounding homogamous marriage. Input from states, union territories, and other participants will be taken into account throughout this study.

The language employed in these rules, such as 'lady', 'a couple', ' ' in the case, serves as evidence that the legislature, in formulating these regulations, never intended for them to apply to any union other than heterosexual relationships. The terms used are specific, allowing for only one possible interpretation. The court should refrain from adopting an interpretation that would contradict this intent, nor should it expand the definition of marriage to encompass categories that were never intended to be included. Consequently, this judgment has generated note-worthy interest and raised awareness among the public.

The court also recognised the liberty of queer couples to form families and adopt children. However, the court did not recognise a fundamental right to marry for LGBTQ+ collective.

### **Amburi Roy v Union of India & Rituparna Borah v Union of India<sup>21</sup>**

The cases of Amburi Roy v Union of India and Rituparna Borah v Union of India deal with the rights of LGBTQ+ collective to choose their family and challenge the centrality of marriage to define family. The petitions argue for relational equality and question the assumption that marriage is the sole gateway to a host of socio-economic rights.

This petition draws attention to two distinct forms of discrimination: discrimination based on marital status and the other based on sexual inclination. The law discriminates based on marital status because married couples are allowed to adopt but live-in homosexual couples are not. The underlying presumption in this case is that other types of partnerships are not stable and that wedding is the sole one. Considering the rising divorce rate in urban India, this claim is dubious.

On the other hand, the Rituparna Borah petition recognises the limitations of the legal definition of "family" and makes a compelling case for the acknowledgment of chosen families as a means of promoting relational equality. The petitioners contend that Indian

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<sup>21</sup>W.P.(C) No. 1011/2022Diary No. 36593/2022

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Constitution's guarantee of relational equality encompasses the liberty to intimacy and freedom, which may include the freedom to choose not to be married.

**Facts:**The petitions in these cases advocate for the acknowledgement of the rights of LGBTQ+ collective to form families and challenge the societal norms that limit family structures to traditional marriages.

The case highlights the discrimination faced by LGBTQ+ collective in reaching legal benefits such as inheritance, adoption, and spousal rights due to the lack of legal acknowledgement for same-sex relationships.

**Issues:**The central issues revolve around the fundamental rights to marry, the liberty of queer couples to enter civil unions, the legality of laws like the Special Marriage Act, 1954, and the ability of queer couples to adopt children.

These cases question the exclusion of queer couples from legal frameworks that govern marriage and family rights, emphasising the need for legal acknowledgement and safeguard of diverse family structures.

**Ruling:**The Supreme Court's verdict in these cases reflects a nuanced approach, acknowledging the absence of a fundamental right to marry while recognising the liberty to intimate association and relationships under Article 21.

The majority opinion emphasises the importance of the liberty to intimate relationships for personal development and identity, calling for state safeguard against abuse and discrimination faced by queer couples.

However, the verdict falls short of granting a fundamental right to civil unions for LGBTQ+ collective, leaving them without legal benefits associated with marriage.

The dissenting opinions by Justices Chandrachud and Kaul challenge the majority's stance, advocating for a broader acknowledgement of relational equality and the need to move beyond the traditional marriage-centric view of family.

## CHAPTER 8: CONCLUSION

In conclusion, this paper has examined the intricate dynamics surrounding homosexuality and gender justice, particularly within the context of India's legal framework. Through an

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exploration of statutory provisions, landmark case law analyses, public perceptions, and the legal obstacles faced by LGBTQ+ individuals, we have uncovered the multifaceted challenges and opportunities in the pursuit of equality and recognition for sexual minorities.

While significant strides have been made in recent years, including the enactment of legislation such as The Transgender Persons (Protection of Rights) Act, 2019, and ongoing judicial activism in safeguarding LGBTQ+ rights, much remains to be done. The journey towards full inclusivity and acceptance requires continued efforts to dismantle discriminatory attitudes, reform outdated laws, and foster a culture of empathy and understanding.

As India evolves, it is imperative that policymakers, activists, and society as a whole remain committed to upholding the principles of equality, dignity, and human rights for all individuals, regardless of sexual orientation or gender identity. Only through collective action and unwavering dedication can we truly achieve a society where every individual is free to love and live authentically, without fear of discrimination or prejudice.

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