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The Right of Homosexual Couples to Adopt in India: Promoting Equality and Inclusivity in Parental Rights

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ABSTRACT

The rights and recognition of the LGBTQ+ community have gained momentum worldwide, especially in the span of last few years. With the advent of modern times people and their approach has become more progressive and open-minded, various countries have taken significant strides towards ensuring equal rights for same-sex couples. In India, interweaving society of diverse cultures and traditions, the question of whether homosexual couples should have the right to adopt children has been a subject of ongoing debate. This paper explores the significance of granting this right, considering both the potential benefits and challenges that come with it.

Keywords: Adoption rights, Discrimination, Homosexual Couples, LGBTQ+ rights and Social attitudes.

I. INTRODUCTION

The rights accorded to LGBTQ+ individuals have been the subject of intense debate among various jurists, media outlets, and lawmakers in addition to courtroom settings.² For a considerable amount of time, LGBT couples have been denied their fundamental human rights due to their sexual orientation. When “Section 377 of the Indian Penal Code, 1860” was passed, making any voluntary carnal relations against the natural order illegal, the fight for LGBT rights began in British India. LGBT rights have been the subject of increased discussion and attention in recent years. Long-suppressed LGBT rights have gained a foothold, thanks to the Supreme Court of India's recent decision to strike down “Section 377 of the Indian Penal Code”³ and recognize consenting same-sex partnerships.

The conversation around LGBT rights recognition and equitable treatment for homosexual couples was sparked by this ruling. Decriminalizing consenting same-sex relationships alone won't guarantee LGBT couples' acceptance in society. Various fundamental rights, such as

¹ Author is a PhD Scholar at KIIT School of Law, India.

² Lacunae in law: LGBTQ+ community's right to adoption, <https://www.orfonline.org/expert-speak/lacunae-in-law-lgbtq-communitys-right-to-adoption> (Last Visited- 14-02-2024).

³ Section 377 of Indian Penal Code, 1860.

parental and marital rights, should be guaranteed in order to prevent prejudice in the future. In contrast to heterosexual couples, homosexual couples are denied the fundamental right to start a family and raise children. The author has made an effort to highlight in this paper the present state of LGBTQ+ rights in relation to adoption and marriage. This paper will compare and contrast various nations' perspectives on this issue from around the world. Numerous laws and regulations have additionally been highlighted to attain a deeper insight into the matter.

(A) Research Questions:

- What is the current legal status and recognition of LGBTQ+ rights, specifically the right of homosexual couples to adopt, in India?
- What are the attitudes and perceptions of the general public in India towards adoption by homosexual couples?
- What are the challenges and barriers faced by homosexual couples in India when seeking to adopt a child through official channels?
- How do adoption agencies and social welfare institutions in India handle adoption applications from homosexual couples, and what are their policies and practices in this regard?

(B) Research Objectives:

- To examine the current legal framework and policies in India regarding adoption rights for homosexual couples.
- To assess the societal attitudes and perceptions towards adoption by homosexual couples in India through surveys or qualitative interviews.
- To identify and analyze the challenges and barriers faced by homosexual couples during the adoption process in India, considering legal, societal, and bureaucratic aspects.
- To investigate the practices and policies of adoption agencies and social welfare institutions in India concerning homosexual couples' applications for adoption.
- To propose recommendations and potential legal reforms that promote inclusivity and equality in adoption for homosexual couples in India.

(C) Research Methodology

Descriptive research, which aims to describe the existing situation of an identified variable, is the methodology of choice for this work. This paper attempts to provide systematic information on a phenomenon. The researcher is unlikely to start an empirical study on this, rather with the

help of case laws and legislative actions tries to analyse the existing situation.

II. THE NEED FOR EQUALITY IN ADOPTION RIGHTS

- **Providing Stable Homes:** The central focus of any adoption process should be the welfare and well-being of the child. Numerous studies have shown that the sexual orientation of parents does not impact a child's development or emotional well-being. What matters most is the presence of a loving and nurturing environment, irrespective of the parents' sexual orientation.⁴ Denying homosexual couples, the right to adopt deprives numerous children of the chance to be raised in a stable and supportive family environment.
- **Eliminating Discrimination:** It is discrimination based on sexual orientation to deny gay couples the ability to adopt. Maintaining inclusion and equality entails making sure that everyone has the same chances and rights, regardless of sexual orientation. Encouraging a more compassionate and just society would be greatly aided by the granting of this privilege.
- **Addressing Orphanage Overcrowding:** India has a significant number of orphaned and abandoned children who require loving homes. Allowing homosexual couples to adopt would expand the pool of potential parents, helping to reduce the burden on orphanages and offering more children a chance at a better life.
- **Positive Global Precedents:** Many countries worldwide have recognized and legalized adoption rights for homosexual couples, and their experiences show that such recognition does not lead to any adverse societal consequences.⁵ Nations that have embraced equality in adoption rights have seen the benefits of diverse and loving families in nurturing children.

III. CHALLENGES AND CONCERNS

- **Societal Acceptance:** One of the primary challenges is the deeply ingrained societal stigma against homosexuality in India. Homosexual couples may face resistance from family members, friends, and communities, affecting the child's upbringing and social integration.
- **Legal Reforms:** While Section 377's decriminalization was a significant step, India

⁴ LGBT+ Rights, <https://ourworldindata.org/lgbt-rights> (Last Visited- 14-02-2024).

⁵ LGBT: Moving Towards Equality, <https://www.hrw.org/news/2015/01/23/lgbt-moving-towards-equality> (Last Visited- 15-02-2024).

still lacks comprehensive legislation addressing the rights of the LGBTQ+ community, including adoption rights. Legal reforms would be necessary to ensure that homosexual couples face no barriers when seeking to adopt children.

- **Religious and Cultural Considerations:** India's cultural diversity also plays a role in shaping perceptions of same-sex adoption. Religious and cultural beliefs might pose challenges to widespread acceptance of adoption by homosexual couples.

IV. RIGHT OF ADOPTION OF LGBTQ+ PEOPLE: CURRENT INDIAN SCENARIO

The “Hindu Adoption and Maintenance Act, 1956”, “the Guardianship and Wards Act, 1980”, and “the Juvenile Justice (care and protection of children) Act, 2000” govern adoption in India. The official and informal process of creating a parent-child relationship is known as adoption, as stated in “Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act of 2015”. A sexual orientation known as "homosexuality" is characterized by romantic affection or sexual desire that is almost exclusively reserved for people of the same sex. Although same-sex couples' rights have been acknowledged by the judiciary, in practice these rights remain unfulfilled as the shame associated with them keeps them from using these rights.

According to the Supreme Court's ruling in “Deepika Singh v. Central Administrative Services (2022)⁶”, "familial relationships may take the form of domestic, unmarried partnerships, or queer relationships." The JJ Act (Juvenile Justice Act), 2015, which permits adoption by anybody, regardless of religion, includes provisions pertaining to the Central Adoption Resource Authority. A legal requirement states that no couple may adopt a child unless they have maintained a stable marital unity for at least two years. In India, same-sex weddings are still not recognized, therefore same-sex couples are unable to prove they have been married for two years. Consequently, they are not qualified.

Both the “Hindu Adoption and Maintenance Act of 1956” and the “Juvenile Justice Act of 2015” require that an adoptive couple must be married and be heterosexual. The rights guaranteed by “Articles 14 and 21 of the Indian Constitution” are violated by the discriminatory adoption laws in India.

V. RELEVANT LEGISLATIONS

Lesbian, Gay, Bisexual, Transgender, and Queer+ individuals are collectively referred to as the LGBTQ+ community. These groups typically embrace sexuality, individualism, diversity, and pride. LGBTQ+ individuals might have varying sexual orientations and varying sexual

⁶ Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088.

preferences.

The following are some of the laws that shows how the marital and adoption rights of the LGBTQ+ community are often infringed:

1. “Section 377 of the Indian Penal Code, 1860”-

Sexual relations between gay individuals were prohibited by the former Section 377. Consenting to sexual relations with someone of the same sex is considered a "unnatural offence" and goes "against the order of nature," according to “Section 377 of the IPC”. A term of ten years in jail was specified.

In 2009, the Delhi High Court decided that punishing sexual activity between two consenting adults with Section 377 would be against “Article 21 of the Constitution⁷”, which protects the right to privacy and personal liberty. According to the Court, discrimination against and categorization of homosexuals are violations of “Article 14” of the Constitution's equal protection guarantee. Human dignity, which is the cornerstone of the Indian Constitution, was thereby infringed by Section 377. On September 6, 2018, the “Indian Penal Code's Section 377” was largely overturned by a five-judge bench, decriminalizing same-sex relationships between consenting adults. As of this moment, consensual sexual relations are legal for LGBT people. The Court has upheld the rules of Section 377, which make non-consensual actions and sexual acts on animals illegal. As per the ruling in “Puttuswamy's case⁸”, the Supreme Court of India ruled in “Navtej Singh Johar's⁹” case that Section 377 is unconstitutional since it infringes upon the right to privacy. However, the right to marry is still not allowed.

2. Hindu Adoptions and Maintenance Act, 1956: -

A Hindu is defined in Section 2(1) of the Act as a person who practices Hinduism, although it also includes Buddhists, Jains, Sikhs, Virashaiva, Lingayat, and Arya Samaj members. Those who belong to the Brahmo Samaj and Prarthana Samaj are also included in the definition of Hindu. Everyone who resides in India and is not a Christian, Muslim, Parsi, or Jew is essentially covered by the Hindu Adoption and Maintenance Act. The HAMA's Sections 7 and 8 refer to "wife" and "husband," respectively, suggesting that same-sex adoptions are not approved under the Act. Moreover, the rules on adoption leave a blank when it comes to third-gender couples since they only outline the adoption process for Hindu men and Hindu females.

⁷ Article 21 of The Constitution of India, 1950.

⁸ Puttaswamy v. Union of India, Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

⁹ Navtej Singh Johar vs Union of India, AIR 2018 SUPREME COURT 4321

3. Adoption Regulations, 2017: -

The best interests of the child must always come first while processing any development placement, according to the Adoption Regulations. The Indian laws are vague when they say that a parent's marital status is irrelevant when adopting a kid. But this clause only applies to single people who want to adopt children; if a couple wishes to adopt a child together, the law requires that they be married and that both spouses give their approval. The entire goal of decriminalising homosexuality is defeated by these laws, which restrict the civil freedoms of same-sex couples since same-sex weddings remain illegal in India.

4. Juvenile Justice (Care and Protection of Children) Act, 2015: -

According to the UN Convention on the Rights of the Child (1989), "The best interest of the child" must be the main factor taken into account. After guaranteeing "basic rights and needs, identity social well-being and physical, emotional, and intellectual development," decisions about a child's adoption are made in "the best interest of the child," as per the JJ Act. The eligibility of prospective adoptive parents, or "PAPs," is addressed under Section 57 of the JJ Act. One criterion is that "no child shall be placed in adoption to a couple unless they have had at least two years of solid marital relationship." Same-sex couples cannot have a two-year solid marital bond since same-sex weddings are not recognised in India, which disqualifies them from becoming PAPs.

-On 17 October 2023, the Supreme Court rejected the plea for queer persons' right to marry in India.

- By a vote of 3:2, the court ruled that same-sex couples were not eligible to adopt or create civil unions.
- Marriage: Not a right, but a basic freedom, Justice Narasimha said.
- Leading the majority, Justice Bhat maintained that a thorough interpretation of Section 57(2) makes it abundantly evident that it only addresses joint adoptions between married couples.
- The legislation is structured in this manner with the "best interest of the child" in mind, shielding it from situations in which a marriage has failed. Marriage becomes a crucial need in order to be protected from laws pertaining to divorce, custody, guardianship, maintenance, succession, and other matters, as the JJ Act only permits adoption.
- The "guiding principle" of the JJ Act is the best interest of the child, "not to enable adoption for all", SC held.

VI. CASE LAWS

With respect to the issue of equal rights to LGBTQ+ community, 5 notable judgments have been recorded in the history of Indian Judiciary.

1. “NAZ Foundation v. Govt. of NCT Delhi¹⁰”

A landmark 2009 lawsuit, “Naz Foundation v. The Government of the NCT of Delhi”, declared Section 377 of the IPC illegal on grounds of discrimination against and invasion of privacy of the LGBTQ population in the nation. A non-governmental group called Naz Foundation filed a challenge to the validity of Article 377 in 2009, citing “Articles 14, 15, 19, and 21 of the Indian Constitution”¹¹. The Delhi High Court was watching this case closely. According to the foundation, Section 377 of the IPC reflects an antiquated understanding of sex that is not socially acceptable. The Delhi High Court first rejected the petition, stating that the petitioner lacked standing to appear before the court in this particular case. But following the Naz Foundation's hearing, the Supreme Court ruled that it was permitted to bring the Public Interest Litigation (PIL) before the High Court.

As a result of violating the fundamental right to privacy, which is an inherent component of Article 21, the Delhi High Court found that Section 377 of the IPC cannot be utilized to penalize two consenting adults for having intercourse.

2. “Suresh Kumar Koushal v. NAZ Foundation¹²”

In the 2009 landmark decision “NAZ Foundation v. Government of N.C.T. Delhi”, the Delhi High Court ruled in favor of the LGBT community, declaring Section 377 of the Indian Penal Code—which makes homosexuality illegal in India—unconstitutional and in violation of “Articles 14, 15, and 21”. The court then read down the section to allow for consensual sexual relations between two homosexuals who are older than eighteen. The case was appealed to the Supreme Court of India, which overturned the High Court's ruling in the NAZ Foundation Case in “Suresh Kumar Koushal and Others v. NAZ Foundation and Others”.

3. NALSA v. Union of India¹³

A writ petition “(writ petition no. 400 of 2012)” was submitted by the National Legal Services Authority, which was established by the “Legal Services Authority Act, 1997”. In the current case, Laxmi Narayan Tripathi, who identified as a Hijra, also approached the court and was

¹⁰ Naz Foundation vs Government of Nct of Delhi and Others, 2010 CRI. L. J. 94, 2009 (6) SCC 712

¹¹ Constitution of India, 1950

¹² Suresh Kumar Koushal & Anr vs Naz Foundation, AIR 2014 SUPREME COURT 563

¹³ National Legal Ser.Auth vs Union of India, WRIT PETITION (CIVIL) NO.400 OF 2012

admitted. He stated that because he is a hijra, the Court had to step in to ensure that he and other members of his community are no longer subjected to discrimination and that his rights under Articles 14 and 21 were being denied. Through their legal representatives, the petitioners adamantly maintained that the notion of binary genders violates the fundamental rights to “freedom of expression (Article 19), life and personal liberty (Article 21), and equality (Article 14)”. Those who do not identify as either gender have been further harmed and alienated by the standardization of binary genders.

A distinction between psychological and biological sex was made by the Court. The Court rejected gender identity predicated on biological sex and placed complete weight on identification predicated on psychological sex. According to the Court's ruling, transgender people need to be fully recognized by the State and federal governments in order for them to get healthcare and education without facing any form of discrimination.

4. “Justice K.S. Puttuswamy v. Union of India¹⁴”

In this instance, it was strongly asserted that the "right to privacy" is a fundamental freedom and that sexual orientation is a necessary component of that freedom. The Court recognized that some rights are inherent to every human being and are not granted by the government. No matter their social position, economic standing, gender, or sexual orientation, everyone has inherent rights. Notably, it was acknowledged that the freedom to choose one's own sexual orientation is a natural right. The Court rejected the contention that the right to privacy and state-provided welfare benefits had to be traded off. The argument that the right to privacy is "a privilege for the few" was deemed to be without merit. It also contested the idea that socioeconomically disadvantaged populations prioritized their economic standing over their civic and political rights. The Court acknowledged that everyone, regardless of socioeconomic background, has a right to intimacy, privacy, and autonomy.

5. “Navtej Singh Johar v. Union of India”¹⁵

The equality, liberty, and dignity values outlined in “Articles 14, 19, and 21” were put to the test by the Supreme Court in this case to determine if Section 377 was constitutional. Section 377 penalizes people who have same-sex relationships in an arbitrary manner, the Court noted. In support of this, the Court cited Section 377, which forbids carnal relations as a violation of nature's order and punishes offenders in order to safeguard women and children. However, as unnatural offenses are also punished separately under Section 375 and the “POCSO Act”, this

¹⁴ Puttaswamy v. Union of India, Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

¹⁵ Navtej Singh Johar vs Union of India, AIR 2018 SUPREME COURT 4321

goal has no legitimate connection to the classification. Consequently, the Court decided that it is against Article 14 to treat LGBT people differently. It is impossible to see sexual behaviors only through the prism of morality, which limits them to being done for the purpose of procreation.

All members of the LGBTQI community in India are entitled to equal citizenship, according to the Court. It therefore interpreted Section 377 to bar consenting adult relationships for sexual purposes, whether or not they involved same-sex partners. Non-consensual sexual acts against adults, sexual acts against children, and bestiality will all still be covered by Section 377.

From the above cases, we can see that even though Section 377 of Indian Penal Code 1860 has been decriminalized, marriages between homosexuals is still not recognized in India. Since the laws regulating adoption stress on the couples being in a marital bond, it is not possible on part of the homosexual couples to adopt.

VII. STATUS OF ADOPTION RIGHTS OF LGBTQ+ COMMUNITY ACROSS THE GLOBE

Not just in India but in many other nations across the world, homosexual adoption is a contentious topic. Let us examine the legal and social ramifications of permitting or forbidding homosexual adoption in other nations, as well as a comparison of Indian adoption laws with those of other nations and an analysis of the attitudes of other nations toward homosexual adoption. It is forbidden for Member States to discriminate in adoption procedures on the basis of sexual orientation under the “European Convention on Human Rights”. Parental rights for LGBTQ people in Europe have changed as a result of the historic “E.B. v. France (2008) case”. The European Court of Human Rights (ECHR) in the case of E.B. v. France used the concept of the "best interest of the child" to mandate that domestic authorities are prohibited from making distinctions based on sexual orientation in adoption proceedings. This ruling rejected the position taken in earlier decisions such as “Salgueiro da Silva Mouta v. Portugal (1999)” and “Frette v France (2002)”, where custodial and adoption rights were restricted based on sexual orientation.

“Out of the 53 countries in the Commonwealth – a loose association of countries, most of them former British colonies -36 have laws that criminalise homosexuality”.

On the other hand, the rights of LGBTQ people have been acknowledged, and having a family is now a recognized right. Regardless of gender, "couples" in England were defined by the Adoption and Children Act of November 2002 as two individuals living together as partners in a long-term family connection. Same-sex couples living north of the border are now able to adopt children together thanks to the “Adoption and Children (Scotland) Act 2007”, which was

ratified by the royal assent in January 2007. At last, same-sex adoption became lawful throughout the United Kingdom in 2013 after rules in Northern Ireland were changed to permit it. With 50% legal equality for same-sex adoption, South America leads the continent, while Asia trails far behind with only 2% equality. Europe stands at the second position with 40 percent legal equality and has the first country, Denmark, to have recognised same-sex partners' status along with adoption.¹⁶

Although homosexuality was made legal in Bhutan in 2021, homosexuality is still illegal in Afghanistan and the Maldives. India has the potential to serve as a model for South Asian nations, much like Denmark did for European nations, thanks to its relatively more developed legal system and its efforts to ensure equitable treatment for all LGBTQ+ couples. One of the few common law nations that acknowledge same-sex couples' rights is South Africa, notwithstanding social stigmas.¹⁷ In the 2005 decision of “*Ministers of Home Affairs v. Fourie*”, the South African Constitutional Court set aside the preconceived notions that were common at the time and approved legalized same-sex marriages. The government implemented the Civil Union Act, 2006, which legalized same-sex marriage in the nation, in response to complaints from the Court on the demeaning conditions of life for members of the LGBTQ community.

The discrimination between married and single couples, which prohibited unmarried same-sex couples from adopting a child together, was eventually challenged by this legal and legislative action. The Court held in the 2002 case of “*Du Tuit and Others v. Minister of Welfare and Population Development and Ors*” that the Child Care Act, 1983 went against the ideals of South African society and the best benefit of the child. In order to guarantee equality for every member of the community, it was determined that the discriminatory Act needed to be changed.¹⁸

VIII. WAY FORWARD: EMBRACING EQUALITY IN ADOPTION FOR HOMOSEXUAL COUPLES IN INDIA

The recognition and acceptance of the rights of homosexual couples to adopt in India require a multifaceted approach involving legal reforms, societal transformation, and widespread awareness campaigns. The following steps can pave the way forward towards building a more

¹⁶ LGBTI Rights, <https://www.amnesty.org/en/what-we-do/discrimination/lgbti-rights/> (Last Visited- 16-02-2024).

¹⁷ The Changing Landscape of Global LGBTQ+ Rights, <https://www.cfr.org/article/changing-landscape-global-lgbtq-rights> (Last Visited- 16-02-2024).

¹⁸ The Rights of Lesbian, Gay, Bisexual and Transgender People, <https://www.aclu.org/documents/rights-lesbian-gay-bisexual-and-transgender-people> (Last Visited- 17-02-2024).

inclusive and equitable society:

- **Legal Reforms:** To ensure equal adoption rights for homosexual couples, the Indian government must amend existing adoption laws to explicitly include them as eligible adoptive parents. This requires the removal of any ambiguous language or discriminatory clauses that hinder their eligibility. Additionally, new legislation should be drafted to protect the rights of LGBTQ+ individuals, ensuring that they enjoy the same privileges and responsibilities as any other citizen.
- **Sensitization of Adoption Agencies:** The process of adoption is greatly aided by adoption agencies. Educating and training adoption agency staff about LGBTQ+ rights is crucial, as is clearing up any prejudices or misunderstandings they may have. By promoting a more inclusive approach, these agencies can contribute to providing children with loving homes without any discrimination based on sexual orientation.
- **Awareness Campaigns:** To combat societal stigmas and prejudices, comprehensive awareness campaigns must be launched across the country. These campaigns should focus on highlighting the realities of LGBTQ+ families, showcasing successful adoption stories, and dispelling myths and misconceptions related to same-sex parenting. By engaging with communities, religious leaders, and schools, these campaigns can promote acceptance and foster a culture of respect for diverse family structures.
- **Support Networks:** Creating support networks for homosexual couples looking to adopt can prove immensely beneficial. Support groups, both online and offline, can offer a safe space for prospective parents to share experiences, seek advice, and find emotional support. Such networks can also serve as valuable resources for navigating the adoption process and understanding legal rights and responsibilities.
- **Collaboration with NGOs and LGBTQ+ Organizations:** Collaboration with non-governmental organizations (NGOs) and LGBTQ+ advocacy groups can be instrumental in furthering the cause of adoption rights for homosexual couples. These organizations can provide valuable insights, legal expertise, and lobbying efforts to push for legislative reforms and raise awareness on the issue.¹⁹
- **Inclusive Education:** Incorporating inclusive education in schools can help inculcate a sense of acceptance and understanding among young minds. By integrating LGBTQ+

¹⁹ The LGBT Population and the Fight for Adoption Rights, <https://soar.suny.edu/bitstream/handle/20.500.12648/4278/awards/5/fulltext%20%281%29.pdf?sequence=1&isAllowed=y> (Last Visited- 15-02-2024).

topics into the curriculum, students can develop empathy and respect for diverse family structures, thus laying the foundation for a more inclusive society in the future.

- **Encouraging Positive Media Representation:** Views held by the people are significantly shaped by the media. Stereotypes can be dispelled and acceptance can be fostered by supporting realistic and positive representations of LGBTQ+ families in films, television shows, and other media.
- **International Examples and Best Practices:** Government officials and the general public in India can benefit much from studying and implementing best practices from nations that have successfully allowed gay couples to adopt children.
- **Celebrating Diversity:** As a nation with a rich tapestry of cultures, India should celebrate its diversity and encourage acceptance of all individuals, regardless of their sexual orientation. Public events and celebrations that showcase the contributions of LGBTQ+ individuals can foster a sense of pride and inclusivity.

IX. CONCLUSION

More lobbying is required in India to support gay couples' adoption rights. The Indian government should change the adoption rules to permit gay couples to adopt lawfully. This will increase societal acceptance of homosexuality and give the country's many abandoned and orphaned youngsters access to loving homes. Adoption legislation reform, however, is probably going to be a challenging and drawn-out process that calls for constant work by activists and advocates. The Legislature might be reluctant to approve same-sex unions because of resistance from groups with religious and cultural views. The Court's request for a government committee on the rights of queer spouses offers optimism to the LGBTQIA+ community, but achieving legal equality will take time.
