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From Prejudice to Progress: Unleashing Equality in India's Legal Landscape through Same-Sex Marriage

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*India is a country with a rich diversity of people belonging to different religions, castes, and creeds. Despite this diversity, the country has always upheld the principle of unity in diversity and celebrated differences. This has been a defining feature of Indian society for centuries. However, in recent times, there has been a concerning trend among some sections of the population to suppress any form of diversity that goes against their personal beliefs or opinions. One such example is their opposition to the LGBTQ+ community. As I write this article on 18th March 2023, the fate of millions of LGBTQ+ individuals hangs in the balance as the apex court begins hearing petitions to grant them the fundamental right to marriage. This is an issue of immense importance, and the decision taken by the court will have far-reaching consequences for the community. Despite the use of gender-neutral language in many modern marriage laws, the acceptance of same-sex marriages has been a relatively recent phenomenon in many cultures. This shift towards greater acceptance of LGBTQ+ rights is exemplified in the landmark Indian Supreme Court case of *Navtej Singh V Union of India*, which struck down Section 377 of the Indian Penal Code¹. However, despite the growing movement in support of legalizing same-sex marriage, many states around the world have maintained their constitutional bans on such unions. In countries like India, same-sex relationships are not legally recognized, resulting in the denial of various legal and financial benefits afforded to heterosexual couples, including shared tax returns, health benefits, and inheritance rights. This has created an unequal system where patriarchal heterosexual relationships receive benefits and protections that are not available to same-sex couples. The issue of legalizing same-sex marriage raises complex legal and societal questions. This article aims to*

¹ *Navtej Singh Johar v Union of India* (2018) 1 SCC 791

examine these questions in-depth and provide a comprehensive analysis of the potential legal, social, and cultural implications of granting same-sex couples the legal right to marry.

Keywords: *marriage, same sex, LGBTQ+, section 377.*

INTRODUCTION

Reflecting on their 12 years together, Aditi Anand and Susan Dias sit in their Mumbai apartment, the salty breeze from the sea brushing past them, as they ponder the life they've built. Despite coming from different social backgrounds and having different personalities, their love has transcended all barriers². Anand, a successful film producer, knows that if they weren't queer, they would have never crossed paths. Dias, an indigenous liquor entrepreneur, speaks of the support and love she's received from their intertwined families. They've pushed each other to succeed in their careers and are raising a child together. And yet, they still face legal hurdles in their quest for marriage equality in India. Nonetheless, Dias declares that she lives a good life without any fear or nervousness since everyone around her knows about her sexuality. Despite the fact that Anand and Dias have thriving careers and a fulfilling romantic relationship, it cannot be overlooked that they are considered criminals in 73 countries due to existing legislation.³

While many countries around the world have embraced marriage equality, there are still those who staunchly oppose the legalization of same-sex marriage. However, the consequences of denying same-sex couples the right to marry may extend far beyond the issue of marriage itself, potentially opening Pandora's box of legal, social, and cultural implications.

Prime Minister Modi frequently refers to India as the "mother of democracy,"⁴ and the country has long been seen as a leading global supporter of both human rights and democracy. Yet the

² Raksha Kumar, 'Indian LGBTQ couples fight for legal recognition of same-sex marriage' (*NPR*, 11 March 2023) <<https://www.npr.org/2023/03/11/1157569539/india-lgbtq-marriage-supreme-court>> accessed 10 April 2023

³ *Ibid*

⁴ 'India is indeed the mother of democracy, says PM Modi citing Mahabharata and Vedas' (*The Hindu*, 09 April 2023) <<https://www.thehindu.com/news/national/india-mother-of-democracy-home-to-idea-of-elected-leaders-much-before-rest-of-world-pm-modi/article66675267.ece>> accessed 10 April 2023

issue still stands: Is India ready to acknowledge the connections of love and dedication between two people of the same sex who want to get married but are confronted with homophobia and societal abuse?

Although the landmark *Navtej Singh Johar* judgement⁵, which offered protection to millions of members of the queer community, was handed down more than half a decade ago by the Supreme Court, discrimination against these individuals continues to persist. Many have argued that such state-sponsored discrimination runs contrary to the ideals laid out by the founding fathers in 1950. The Preamble to the Constitution clearly declares, "We, the citizens of India," and not "We, the heterosexual citizens of India." The Constitution is meant to protect and uphold the rights of all Indians, not just the majority. Even if the majority does not support a particular demand, if it is just and in line with the Constitution, it should be granted.

LANDMARK DECRIMINALISATION OF GAY SEX

Anand and Dias, like many others in the queer community, were born in independent India but were constrained by a century-old law imposed by the British imperialist regime and drafted by Lord Macaulay. Despite Britain decriminalizing homosexuality in 1967⁶, Section 377⁷ of the Indian Penal Code acted as a hindrance for people to live their lives freely. After years of fighting for equal rights, the landmark *Navtej Singh Johar v UOI* judgment in 2018 finally overturned the 2013 verdict and decriminalized gay sex⁸. This victory not only benefited the 2.5 million identified members of the queer community⁹ but also demonstrated that in a democratic country, justice will prevail if the demand is just.

As we celebrate the landmark *Navtej Singh Johar v UOI* judgment, which decriminalized same-sex relationships and promoted the concept of "Love is Love" in India, it is important to examine

⁵ *Navtej Singh Johar v Union of India* (2018) 1 SCC 791

⁶ 'Regulating sex and sexuality: the 20th century' (UK Parliament) <<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/sexuality20thcentury/>> accessed 10 April 2023

⁷ Indian Penal Code 1861, s 377

⁸ *Navtej Singh Johar v Union of India* (2018) 1 SCC 791

⁹ 'Govt. submits data on gay population' (*The Hindu*, 05 March 2012)

<<https://www.thehindu.com/news/national/govt-submits-data-on-gay-population/article2991667.ece>> accessed 10 April 2023

how deeply this ruling has permeated the mindset of the Indian population. While the judgment challenges the acceptability and global recognition of such relationships, it is imperative that we normalize same-sex marriage and adopt a non-judgmental approach towards it. Despite the progress made, members of the LGBTQ+ community in India continue to grapple with societal stigmas and struggle to assert their autonomy and individuality in a society that remains entrenched in heteronormativity. Since the 1969 Stonewall riots, there has been a significant rise in violence against the LGBTQ+ community, with perpetrators often being motivated by transphobia or homophobia. This violence stems from the societal belief that the community's way of living and loving is incompatible with the societal norm as they are against the Indian familial values, and traditions and that sexual orientation and gender identity are somehow flawed.

IS HOMOSEXUALITY AGAINST THE INDIAN TRADITIONS?

Hinduism is rich in literary, artistic, and sculptural evidence that depicts the lives of the LGBTQ+ community in ancient India. Unlike many other religions, Hinduism does not explicitly condemn homosexuality as a 'sin'. In fact, ancient India can be compared favorably to modern-day USA in terms of its acceptance of the LGBTQ+ community. There are numerous sculptures present in ancient Hindu temples that depict homosexuality in a positive light. One of the most sacred temples in India, the Khajuraho temple, is decorated with erotic sculptures that serve as a testament to the acceptance of homosexuality in ancient India.

The presence of sculptures depicting homosexuality in sacred places serves as evidence that homosexuality was not condemned as a sin in ancient India. Buddhism also recognized the existence of sexual minorities, and homosexuality was considered natural and not something to be condemned.¹⁰ Significant evidence supporting the acceptance of homosexuality in ancient India is found in the Kama Sutra, one of the most renowned texts depicting various sexual acts compiled by the great philosopher Vatsyayana in the 4th century and beyond. The text includes

¹⁰ 'The Origins of Buddhism' (*Asia Society*) <<https://asiasociety.org/education/origins-buddhism>> accessed 11 April 2023

instances of sexual acts between different genders, and the author emphasizes the importance of marriage as a union of love and trust.

Not only this, The Kama Sutra's Second Part, Ninth Chapter contains descriptions of fellatio techniques performed by women, as well as by masculine and feminine types of the third sex, or tritiya-prakriti, which we would now recognize as homosexual men.¹¹ These men were referred to as 'eunuchs' in older translations, but the chapter provides detailed descriptions of their appearances and professions as masseurs, barbers, and prostitutes. The Kama Sutra also notes that some third-sex citizens formed deeply attached relationships with one another and even married, renouncing women in favor of their same-sex partners. The Jayamangala, a twelfth-century commentary on the Kama Sutra, further emphasizes the strong and trusting friendship that bound these same-sex couples together.

In the Kama Sutra, there are references to svairini, which denotes women who are self-reliant and socialize with their gender or others, as well as liberated women who reject marriage and engage in sexual relationships in their own homes or elsewhere. The twelfth-century commentator on the Kama Sutra, Jayamangala, further elaborates on the concept of svairini, defining her as an independent woman who has no sexual inhibitions and behaves as she pleases, engaging in sexual activities with women and stimulating her partner's genitalia with her mouth. The Kama Sutra's Second Part, Eighth Chapter provides a detailed account of the different practices of lesbianism.¹²

The British colonial government, which ruled India for two centuries, committed numerous atrocities such as torture and imperialism and introduced laws criminalizing homosexuality in India, which were contrary to the practices and traditions of many Indian cultures. Section 377 of the Indian Penal Code, introduced by the British in 1861, criminalized sexual activities deemed "against the order of nature," including same-sex sexual activity¹³ It is worth noting that

¹¹ 'Chapter 9 Of the Auparishtaka or Mouth Congress' (*Wayback Machine*)

<<https://web.archive.org/web/20100313043325/http://www.kamashastra.com/kama209.htm>> accessed 12 April 2023

¹² Alain Danielou, *The Complete Kama Sutra* (VT Park Street Press, 1994)

¹³ Indian Penal Code 1860, s 377

while Britain decriminalized homosexuality in 1967 with the Sexual Offences Act¹⁴, which partially legalized same-sex sexual activity between consenting adults over the age of 21 in England and Wales. It wasn't until 1980 that the age of consent for same-sex sexual activity was lowered to 18, which was then further reduced to 16 in 2001.¹⁵

Britain granted rights to marriage to same-sex couples in 2013 with the passage of the Marriage (Same-Sex Couples) Act¹⁶. This legislation allowed same-sex couples to marry in England and Wales, giving them the same legal rights and recognition as opposite-sex couples. Scotland followed suit later that same year with its marriage equality law, and Northern Ireland finally legalized same-sex marriage in 2019¹⁷. While India continues to follow this law which was granted by its colonial oppressors

GLOBAL RECOGNITION OF SAME-SEX MARRIAGE

It is widely believed that men's rea, or criminal intention, is an essential element upon which a crime is established. Failure to prove men's rea is, therefore, a failure to prove the crime itself. However, when looking at this through the lens of LGBTQ individuals, this may not always hold true. In some cases, children with no criminal intention or intention to harm any individual or society are deemed and declared criminals, not only by society but also by the law of the land. Currently, only 34 countries allow the liberty and freedom to marry a same-sex individual¹⁸. In the remaining 161 countries, a person is declared a criminal from the moment of their birth in the eyes of the law. This population constitutes 17% of the world's population. This means that in the other 83% of countries, a law-abiding citizen is denied rights merely because of their sexual orientation. Nevertheless, people are more accepting today than they were a century ago, and there has been a shift in ideology to 'live and let live'. Unlike in the 19th century,

¹⁴ 'Regulating sex and sexuality: the 20th century' (UK Parliament) <<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/sexuality20thcentury/>> accessed 12 April 2023

¹⁵ *Ibid*

¹⁶ Marriage (Same Sex Couples) Bill 2012-13

¹⁷ Northern Ireland (Executive Formation etc) Act 2019, c 22

¹⁸ Anna Fernandes, 'Which countries in the world allow same-sex marriage?' (*Deccan Herald*, 18 September 2021) <<https://www.deccanherald.com/national/which-countries-in-the-world-allow-same-sex-marriage-1199817.html>> accessed 12 April 2023

homosexuality is no longer termed a mental disorder. It has been removed from the list of mental disorders.

HOMOSEXUALITY: A MENTAL ILLNESS?

For many years, homosexuality has been viewed as a mental disease or illness. It was believed that queer children had hormone imbalances that caused them to be attracted to the same sex. However, proponents of such bizarre arguments are unaware of the fact that homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) by the American Psychiatric Association (APA) in 1973. This decision was based on several years of research and debate, as well as growing social and political pressure from the gay rights movement. The APA's decision was a significant moment in the history of the gay rights movement, as it helped to de-stigmatize same-sex attraction and paved the way for greater acceptance and legal recognition of same-sex relationships.

Other professional organizations have also followed suit. In 1990, the World Health Organization (WHO) removed homosexuality from its list of mental disorders in the International Classification of Diseases (ICD). In 2018, the World Psychiatric Association (WPA) released a position statement affirming that homosexuality is not a mental disorder.¹⁹ The declassification of homosexuality as a mental disease has been crucial in reducing the stigma surrounding same-sex attraction. The decision by the APA helped to challenge the notion that being gay or queer was a choice, and it highlighted the fact that same-sex attraction was a natural part of human sexuality. Despite this, many countries and societies still view homosexuality as a taboo subject, and LGBTQ individuals continue to face discrimination and persecution. It is essential to recognize that being gay or queer is not a mental illness or disorder. It is simply a natural part of human diversity, and individuals should be allowed to express their sexuality freely and without fear of persecution or discrimination.

¹⁹ 'Homosexuality not an illness: Indian Psychiatric Society' (*The Hindu*, 18 June 2018) <<https://www.thehindu.com/news/national/homosexuality-not-an-illness-indian-psychiatric-society/article61515009.ece>> accessed 18 April 2023

LANDMARK RULINGS BY INTERNATIONAL JUDICIAL ORGANS

ECHR RULING

In 2010, the European Court of Human Rights (ECHR) issued a controversial ruling in the case of *Schalk and Kopf v Austria*²⁰. The case involved an Austrian same-sex couple who were denied the right to marry, and the court found, by a close vote of 4 to 3, that their human rights had not been violated under Article 12 of the European Convention on Human Rights, which protects the right to marriage for men and women. However, the court also stated that same-sex unions are protected under Article 8 of the Convention, which guarantees the right to respect for private and family life²¹, and Article 14, which prohibits discrimination. The court's decision was met with criticism from LGBTQ+ rights activists, who argued that denying same-sex couples the right to marry constituted discrimination and a violation of their human rights. Despite this ruling, some legal experts have argued that the ECHR could still recognize same-sex marriage as a human right in the future.

In a 2012 speech, British Judge Sir Nicolas Bratza, then head of the ECHR, hinted that the court was prepared to take this step once enough countries had legalized same-sex marriage²². Article 12 of the European Convention on Human Rights²³ does not explicitly limit marriage to heterosexual relationships, but the ECHR has interpreted it as such, citing the use of the terms 'men and women' rather than 'everyone'. However, some legal scholars argue that this interpretation is outdated and inconsistent with the broader principles of equality and non-discrimination enshrined in the Convention.

Thus, while the ECHR has not yet recognized same-sex marriage as a human right under Article 12, it has acknowledged that same-sex unions are protected under other articles of the

²⁰ *Schalk and Kopf v Austria* (2010) Application No 30141/04 Eur Court H R

²¹ *Ibid*

²² Sir Nicholas Bratza, 'Press Complaints Commission' (*Press Complaints Commission*, 26 September 2013) <<https://archive.ph/20131108001904/http://www.pcc.org.uk/news/index.html?article=ODYzMQ==>> accessed 12 April 2013

²³ European Convention on Human Rights, art 12

Convention, and there is an ongoing debate about whether the court should extend full marriage rights to same-sex couples.

IACHR JUDGEMENT

On January 8, 2018, the Inter-American Court of Human Rights (IACHR) made a historic ruling, mandating the legal recognition of same-sex marriage under the American Convention on Human Rights. This ruling changed the course of the history of the development of gay rights since it had a binding effect on Costa Rica, and the other signatory countries by the precedent their governments set. The ruling applied to several states without same-sex marriage which made it significant even more.

IACHR courts were of the opinion, that governments must and should acknowledge and guarantee all the rights that derive from a family bond between individuals of the same sex. The Court deemed it unacceptable and discriminatory, a violation of international law for separate legal provisions such as civil unions to be established instead of same-sex marriage. They demanded that governments ensure access to all existing domestic legal systems, including the right to marriage, to ensure the protection of all family rights of same-sex couples without discrimination. The ruling led to the legal recognition of same-sex marriage in Costa Rica. In the aftermath of the decision, lawsuits related to same-sex marriage were filed in Bolivia, Honduras, Panama, Paraguay, and Peru, all of which fall under the jurisdiction of the IACHR.

HOW WILL DENYING SAME-SEX MARRIAGE OPEN A PANDORA BOX?

While some people may argue that granting the right to same-sex marriage could threaten the family structure that Indian society is built upon and upon Pandora's box, the reality is quite different and even the opposite. Denying the right to marry individuals of the same sex creates a hierarchy of rights where some people are deemed less worthy of protection under the law. This hierarchy of rights can then be used to justify further discrimination against same-sex couples, including the denial of access to essential services. This goes against the fundamental right to equality enshrined in Article 14 of the Indian Constitution and the very principles upon

which our constitutional fathers designed the Constitution to protect the just demands of minorities²⁴.

Our constitutional fathers believed that even the smallest and most marginalized groups should be protected under the law if their demands are just and in accordance with the Constitution. Denying LGBTQ+ individuals their fundamental rights go against the very principles enshrined in the Preamble of the Indian Constitution, which guarantees justice, equality, and liberty for all. Any violation of the Preamble is, in effect, a violation of the Constitution itself.

DENYING HEALTHCARE SERVICES

Since the law doesn't recognize the union between the same sex so hospitals and healthcare providers may refuse to provide medical treatment or visitation rights to same-sex partners, which can lead to serious consequences in emergency situations. This can also impact access to health insurance and other benefits that are typically available to married couples.

According to a 2010 report by the Human Rights Campaign, 57% of LGBT Americans surveyed reported experiencing discrimination in healthcare settings²⁵, including refusal of treatment, harsh language, and physical roughness. In a 2013 survey of LGBT individuals conducted by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, 19% reported being refused medical care due to their sexual orientation or gender identity, and 28% reported experiencing harassment in healthcare settings²⁶. Thus, the denial of medical treatment or visitation rights to same-sex partners by hospitals and healthcare providers can have serious consequences, including discrimination, harassment, and life-threatening situations. It is important for healthcare providers to ensure that all patients, regardless of their sexual orientation or gender identity, receive the care they need and deserve.

²⁴ Constitution of India 1950, art 14

²⁵ 'Healthcare Equality Index 2010' (*Human Rights Campaign*, 2010)

<https://www.geneticcounselingtoolkit.com/pdf_files/HRC-Healthcare-Equality-Index-2010.pdf> accessed 13 April 2023

²⁶ 'National Gay and Lesbian Task Force and National Centre for Transgender Equality, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey' (*National LGBTQ Task Force*, 2011)

<<https://www.thetaskforce.org/injustice-at-every-turn-a-report-of-the-national-transgender-discrimination-survey/>> accessed 13 April 2023

HOUSING DISCRIMINATION

Denying same-sex marriage can also lead to housing discrimination against LGBTQ+ individuals. Without legal recognition of their relationship, landlords or housing providers may refuse to rent or sell housing to same-sex couples. A 2014 report by the U.S. Department of Housing and Urban Development found that same-sex couples were less likely to receive a positive response from landlords when inquiring about rental housing than heterosexual couples. The report found that same-sex couples were more likely to be quoted higher rents, offered fewer rental units to choose from, and subjected to higher levels of discrimination and unfavorable treatment²⁷.

According to a 2017 report by the National Association of Gay and Lesbian Real Estate Professionals, nearly half of LGBTQ+ homebuyers and renters feel some level of discrimination when trying to rent or buy a home. The report found that nearly a quarter of LGBTQ+ individuals had experienced some form of discrimination in the home-buying process, such as being turned away by a real estate agent or lender or being shown fewer properties than heterosexual couples.

EMPLOYMENT DISCRIMINATION

Same-sex couples may face employment discrimination if they are not legally recognized as a couple. For example, they may be denied spousal benefits, such as health insurance, retirement benefits, or bereavement leave - support with facts and figures. Same-sex couples were more likely to face employment discrimination than their opposite-sex counterparts. In a survey conducted by the Human Rights Campaign, 53% of LGBT individuals reported experiencing some form of discrimination in the workplace²⁸.

²⁷ 'Housing Discrimination Against Racial and Ethnic Minorities 2012' (*US Department of Housing and Urban Development*, June 2013)

<https://www.huduser.gov/portal/publications/fairhsg/hsg_discrimination_2012.html> accessed 13 April 2023

²⁸ 'A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide' (*Human Rights Campaign*, 2021) <<https://www.hrc.org/resources/a-workplace-divided-understanding-the-climate-for-lgbtq-workers-nationwide>> accessed 13 April 2023

One specific example of employment discrimination that same-sex couples may face is the denial of spousal benefits. Prior to Obergefell, many employers were not required to provide same-sex couples with spousal benefits such as health insurance, retirement benefits, or bereavement leave. This meant that same-sex couples were often left without crucial support during times of illness or loss. In a survey conducted by the Center for American Progress, 30% of LGBT respondents reported experiencing employment discrimination related to their sexual orientation or gender identity, including being denied spousal benefits²⁹.

Overall, the lack of legal recognition for same-sex couples prior to Obergefell left them vulnerable to employment discrimination, including the denial of spousal benefits. While the Supreme Court's ruling has helped to address this issue, there is still work to be done to ensure that all individuals, regardless of their sexual orientation or gender identity, are protected from discrimination in the workplace.

EDUCATION DISCRIMINATION

According to a report by the National Center for Transgender Equality, transgender students face higher rates of discrimination and harassment in education than their cisgender peers. This discrimination can lead to decreased educational opportunities and lower academic achievement³⁰. In a survey conducted by the Human Rights Campaign, it was found that 30% of LGBTQ+ youth reported experiencing discrimination or harassment in school based on their sexual orientation or gender identity³¹. This discrimination included being verbally harassed or threatened, being excluded from school activities or events, and being physically assaulted.

²⁹ 'A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers' (Centre for American Progress, 2012) <<https://www.lgbtmap.org/policy-and-issue-analysis/a-broken-bargain-full-report>> accessed 13 April 2023

³⁰ 'National Gay and Lesbian Task Force and National Centre for Transgender Equality, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey' (National LGBTQ Task Force, 2011) <<https://www.thetaskforce.org/injustice-at-every-turn-a-report-of-the-national-transgender-discrimination-survey/>> accessed 13 April 2023

³¹ 'Growing Up LGBT in America: HRC Youth Survey Report' (Human Rights Campaign, 2018) <https://assets2.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf> accessed 13 April 2023

Denying same-sex couples the right to marry and legal recognition of their relationship can also lead to education discrimination in terms of access to benefits. For example, same-sex couples may be denied access to tuition assistance or scholarships that are available to opposite-sex married couples. This can limit educational opportunities and create financial barriers for LGBTQ+ individuals and their families.

CONCLUSION

The fight for LGBTQ+ rights and recognition in India has been a long and arduous journey, with many obstacles along the way. The landmark *Navtej Singh Johar v UOI* judgment was a significant step towards decriminalizing homosexuality and promoting equality and justice for all individuals, regardless of their sexual orientation or gender identity. However, the battle is far from over. The LGBTQ+ community still faces discrimination, violence, and societal stigmas, which are deeply entrenched in the Indian societal norm.

As we strive towards a more inclusive and accepting society, it is essential to recognize the historical and cultural context of the LGBTQ+ community in India. The acceptance of homosexuality in ancient India is well-documented, and it is crucial to acknowledge this as a part of our cultural heritage. It is also important to understand that the fight for LGBTQ+ rights is not about imposing Western values or ideologies on Indian culture but rather recognizing and affirming the diverse identities and expressions that have always existed in our society.

Ultimately, the issue of legalizing same-sex marriage in India raises complex legal, social, and cultural questions. However, as we move forward, we must prioritize the fundamental human rights and dignity of all individuals, regardless of their sexual orientation or gender identity. We must work towards building a more inclusive and accepting society, where everyone can live and love freely and without fear.