

International Survey on Marriage Equality 2021

Lawyers for LGBT and Allies Network



NISHIMURA&ASAHI



**Baker
McKenzie.**

Introduction

This survey provides an overview of laws and jurisprudence in eleven jurisdictions where same-sex marriage is legally recognized: The United States, England and Wales, Australia, Canada, Sweden, Taiwan, Germany, New Zealand, Brazil, France, and South Africa. For each of these jurisdictions, the survey examines and summarizes how same-sex marriage was legally recognized, how judicial decisions on constitutionality were made, the legal requirements for same-sex marriage and effects on other areas of law (such as adoption).

Preeminent law firms in Japan and each respective jurisdiction assisted us in completing a unified questionnaire, conducting additional research and translating the final survey results. Our sincere appreciation goes to DLA Piper and Baker and McKenzie for field research, and Nishimura and Asahi for research and translation work.

We have provided the details of paths for same-sex marriage and summaries of legal arguments for and against same-sex marriage in a prior report entitled “Foreign Law Report on Equal Marriage” published in 2016. In contrast to that report, the focus of this survey has moved beyond the question of whether same-sex marriage should be legalized to how best to implement this change. In determining the survey questions, we have received advice from the legal team representing the “Freedom of Marriage For All” lawsuit filed on February 14, 2019 with the various district courts in Japan.

Same-sex marriage was recognized in 22 jurisdictions at the time of the 2016 research and now has expanded to 30 jurisdictions across the globe. Our research focused on G7 countries (except Italy, which only recognizes same-sex civil partnerships and Japan, which has not yet legalized any form of same-sex union at the national level), i.e., United States, England and Wales, Canada, Germany, and France. We also highlighted Australia, New Zealand, Sweden, Brazil, South Africa and Taiwan (the first country in Asia to legalize same-sex marriage in 2019) in order to expand the survey scope to cover across regions.

Since the publication of our 2016 report, more countries and jurisdictions have recognized same-sex marriage around the globe. We have even seen progress in Japan:

- the Japan Federation of Bar Associations published an opinion officially petitioning for the adoption of legislative amendments to recognize same-sex marriage (July 2019);
- more municipal governments have recognized same-sex partnerships as public approval of same-sex marriage and LGBT+ rights has increased;
- multiple “Marriage for All” lawsuits seeking to legalize same-sex marriage were filed (February 2019) raising the public profile of the fight for marriage equality in Japan; and
- in response to one of the cases, the Sapporo District Court ruled that certain provisions of the Civil Code and relevant laws which limit marriage to opposite-sex couples are unconstitutional (March 2021).

Based on these developments it is clear that there is significant momentum behind the fight for marriage equality in Japan and the time is right to push for further progress. We hope that this survey will play some part (however small) in bringing about meaningful social progress and ultimately the recognition of same-sex marriage in Japan.

November 2021

Lawyers for LGBT and Allies Network

** This survey may be shared and/or adapted freely subject to giving credit to “LLAN Lawyers for LGBT and Allies Network”. Commercial usage is not allowed.*

Table of Contents

I.	List of Survey Questions.....	2
II.	Summary.....	3
III.	Responses.....	4
A.	United States.....	4
B.	England and Wales.....	7
C.	Australia.....	10
D.	Canada.....	13
E.	Sweden.....	17
F.	Taiwan.....	20
G.	Germany.....	24
H.	New Zealand.....	27
I.	Brazil.....	29
J.	France.....	31
K.	South Africa.....	33

I. List of Survey Questions

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	Yes/No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number.	
2. Which of the following legal means was used to recognize same-sex marriage?	Choose from below
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	Yes/No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes/No
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	Yes/No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes/No
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes/No
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes/No
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	Yes/No

II. Summary

List of Survey Questions		United States	England & Wales	Australia	Canada	Sweden	Taiwan	Germany	New Zealand	Brazil	France	South Africa
1. Court Cases												
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	Yes/No	Yes	No	No	Yes	No	Yes	No	No	No	No	Yes
2) If "Yes," please provide the information necessary to identify the judgment(s), such as the date and case number.		See below.			See below.		See below.					See below.
2. Which of the following legal means was used to recognize same-sex marriage? (Choose from below)												
(1) The existing law stipulating heterosexual marriage was amended.												
(2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.												
(3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.		(1) (2) (3) (4)	(2)	(1)	(1) (2) (4)	(1)	(2)	(1)	(1)	(4)	(1)	(2)
(4) Same-sex marriage became possible as a direct result of a court judgment.												
(5) Other (please describe the specific legal form/circumstances)												
3. Legal requirements for same-sex marriage												
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage?	Yes/No	No	No	No	No	No	Yes	No	No	No	No	Yes
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes/No	Yes	Yes	Yes	Yes	Depends	Depends	Yes	Yes	No	Yes	Yes
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	Yes/No	No	No	No	No	No	No	No	No	No	No	No
4. Adoption												
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple?	Yes/No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes/No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes/No	Yes	No	No	No	No	Yes	Yes	Yes	No	Yes	No
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	Yes/No	No	No	No	No	No	Yes	No	No	No	No	No

III. Responses
 A. United States

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	Yes
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	*
2. Which of the following legal means was used to recognize same-sex marriage?	(1)(2)(3)(4)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes*
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes*
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No

【 * Commentary】

1. Court Cases

Important Cases

The two most important cases are: *United States v. Windsor*, 570 U.S. 744 (2013) (striking down an unconstitutional statute that had prohibited federal recognition of same-sex marriage) and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a fundamental constitutional right to marriage, and requiring all states to recognize same-sex marriage). Both were decided by the U.S. Supreme Court and remain “the supreme law of the land” under the federal Constitution’s Supremacy Clause. See U.S. Constitution, Article VI. Prior to *Windsor* and *Obergefell*, a number of lower courts also adopted similar holdings.

Summary of History

Through a series of decisions from the Supreme Court of the United States—the final, authoritative decider of national constitutional law in the United States—the right to same-sex marriage was recognized as a “fundamental right inherent in the liberty of the person,” which may not be denied by law. *Obergefell v. Hodges*, 576 U.S. 644, 676 (2015).

Originally, the availability of same-sex marriage was decided only at the state level, and the number of states recognizing same-sex marriage increased gradually from one state (Massachusetts) in 2004, to 12 states and the District of Columbia in 2013. These states legalized gay marriage through a variety of lower court decisions and legislation at the state level (including referenda submitted to a popular vote).

Then, in *United States v. Windsor*, 570 U.S. 744 (2013), the U.S. Supreme Court struck down a federal law that prohibited the federal government from recognizing those same-sex marriages that were already permitted at the state level. Following *Windsor*, the federal government was required to recognize all same-sex marriage that had been recognized by the states. Building on the momentum and victory in *Windsor*, same-sex couples in a number of additional states challenged prohibitions on marriage as inconsistent with a modern conception of fundamental rights. By 2015, 38 states had recognized same-sex marriage to at least some degree.

In *Obergefell*, the U.S. Supreme Court then held that same-sex marriage is a fundamental right under the U.S. constitution, and held that every state is required to permit same-sex marriage. Recognizing “substantial cultural and political developments” in American democracy, the Court found no basis to distinguish between the marriage of same-sex couples and the marriage of opposite-sex couples—both were “marriage” in every relevant sense. *Obergefell*, 576 U.S. at 661. While acknowledging historical practice prohibiting same-sex marriage, the Court explained that “[t]he nature of injustice is that we may not always see it in our own times.” *Id.* at 664. The Court pointedly set to rest any doubt that laws prohibiting same-sex marriage are unconstitutional: “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.” *Id.* at 666.

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended /(2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage /(3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage/(4) Same-sex marriage became possible as a direct result of a court judgment)

Same-sex marriage became recognized nationwide through the U.S. Supreme Court decisions in *Windsor*, 570 U.S. 744, and *Obergefell*, 576 U.S. 644 ((4)). However, prior to these decisions,

numerous states gradually legalized same-sex marriage at the local level through a variety of court decisions and legislation. The complete list of lower court decisions and state statutes is published in an appendix to the Obergefell decision. The decisions were also the court's developments of interpretation of the Due Process Clause in the federal Constitution ((3)).

3. Adoption

2) (Joint adoption of a child without biological relationship by married same-sex couples - Yes)

Following Windsor, 570 U.S. 744, and Obergefell, 576 U.S. 644, it is unconstitutional to treat married same-sex couples different from married heterosexual couples, and both types of couples are able to adopt children regardless of blood relationship.

Note the following: (1) 25 states and Washington D.C. explicitly prohibit discrimination in adoption based on sexual orientation and gender identity; (2) 4 states explicitly prohibit discrimination in adoption based on sexual orientation only; (3) 21 states do not have any explicit protections against discrimination in adoption based on sexual orientation or gender identity; and (4) 11 states permit state-licensed child welfare agencies to refuse to place and provide services to children and families (including LGBTQIA+ people and same-sex couples) if doing so conflicts with their religious beliefs. No state prohibits placement of children with same-sex couples as a general matter.

3) (Difference between married same-sex couples and unmarried same-sex couples - Yes)

Second-parent adoption (i.e., adoption laws that apply regardless of marital status) is only available in 15 states and Washington, D.C. Where available, second-parent adoption allows an individual to become an additional adoptive parent, without terminating the existing parent's legal rights.

B. England and Wales

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(2)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes*
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	No*
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No

【 * Commentary】

2. Legal means to recognize same-sex marriage ((2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage)

The Marriage (Same-Sex Couples) Act 2013 is an Act of the Parliament of the United Kingdom which introduced same-sex marriage in England and Wales. The Act was passed on 17 July 2013, and same-sex couples who got married abroad under foreign law, are now recognised as being married in England and Wales¹.

The 2013 Act was passed mainly to provide a choice for couples who wished to formally recognise their union. Same-sex couples in the UK can currently choose between a civil partnership and marriage, the same ability to choose civil partnership over marriage also made available to heterosexual couples in 2019.

Surprisingly though, the differences between marriage and a civil partnership are not significant and include the following:

- For legal purposes, civil partners cannot call themselves “married”, and married couples cannot refer to themselves as being “civil partners”.
- When it comes to getting a divorce or dissolution, adultery cannot be stated as grounds for dissolving a civil partnership, but can for marriage.
- Civil partnership certificates include the names of both parents, whereas marriage certificates only contain the father’s name.
- Civil partnerships are registered by signing the civil partnerships document, whereas marriages are solemnised by saying a prescribed form of words.

Civil partnerships are required to be irreligious and denominational, carried out on premises authorised by the local authorities. Civil partnerships were generally not offered in places of worship such as churches, which offered only marriage. The 2013 Act has therefore enabled same-sex couples to have their union recognised in places of worship and on the basis of religious vows. This combination of practical legal differences between marriage and civil partnership and the desire for same-sex couples to be legally “married” with a religious dimension underpinned the argument for equality behind the 2013 Act.

3. Legal requirements for same-sex marriage

2) (In case of foreign nationality - Yes)

A visa must be applied for to get married or form a civil partnership in the UK in certain cases².

¹ Accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306000/140423_M_SSC_Act_factsheet__web_version_.pdf.

² There will be no change to the residence rights and status of EU citizens currently living in the UK until 30 June 2021. If the individual is living in the UK by 31 December 2020, they can apply to the EU Settlement Scheme to continue living in the country after 30 June 2021. If the individual comes to the UK on or after 1 January 2021, they may need to apply for a visa.

A visa must be applied for to get married or form a civil partnership in the UK if the individual is from outside the EU, European Economic Area (“EEA”) or Switzerland, is not a British citizen or does not have indefinite leave to remain in the UK. The visa/permit depends on where the individual’s partner is from and whether they want to live in the UK after the ceremony. To summarise, same-sex marriage is allowed but requires a visa or other relevant permission for a foreign national to live in the UK.

4. Adoption

3) (Difference between married same-sex couples and unmarried same-sex couples - No)

In 2002, prior to the legalization of same-sex marriage, the Adoption and Children Act 2002 removed the marriage requirement for adoption. The Act has been in effect since 2005 and since then same-sex couples who were unable to legally marry prior to enactment were permitted to jointly adopt a child.

C. Australia

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(1)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No*
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes*
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	No*
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No*

【 * Commentary】

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended)

The Marriage Act 1961 (Cth) (“Marriage Act”) was amended following the Australian Marriage Law Postal Survey (“Survey”) held via the postal service between 12 September and 7 November 2017. Subsequent to a “yes” vote on the Survey, the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) (“Marriage Amendment Act”), which amended the definition of marriage to provide that “marriage means the union of 2 people to the exclusion of all others, voluntarily entered into for life”, came into effect on 9 December 2017.

For information, responding to the Survey was voluntary, unlike voting in elections and referendums in Australia which is compulsory. The Survey was instigated by the Australian Government (Liberal National Coalition at the time), which had pledged to facilitate a private member’s bill to legalise same-sex marriage if the outcome of the Survey was a “Yes” majority. Ultimately, 61.6% of responses received were in favour of legalising same-sex marriage.

3. Legal requirements for same-sex marriage

3) (Difference between same-sex marriage and heterosexual marriage - No)

However, in addition to amending the definition of marriage to allow same-sex marriage, the Marriage Amendment Act also introduced religious protections into the Marriage Act, which effectively allows ministers of religion and religious marriage celebrants to refuse to marry same-sex couples on the basis that it would be contrary to their religious beliefs. Subsection 47(3) of the Marriage Act provides that a minister of religion may refuse to solemnise a marriage if:

- refusing to solemnise the marriage is consistent with the doctrines, tenets or beliefs of the minister’s religious body or organisation, or
- refusing to solemnise the marriage is necessary to avoid causing injury to the religious susceptibilities of adherents of the minister’s religion, or
- the minister’s religious beliefs mean the minister must refuse to solemnise the marriage.

If a minister’s religious body or organisation does not recognise or provide a form or ceremony for a type of marriage (for example, same-sex marriage), the minister should consider whether they can solemnise the marriage. Failure to solemnise a marriage in compliance with section 45 of the Marriage Act may result in a void marriage.

4. Adoption

1) (Joint adoption of a child with biological relationship by married same-sex couples - Yes)

In Australia today, all same-sex and heterosexual adult couples have equal rights to child adoption. The Northern Territory became the last remaining Australian jurisdiction to allow same-sex adoption when its legislature passed the Adoption of Children Legislation Amendment (Equality) Act 2018 (NT). This landmark amendment ended the prohibition against same-sex adoption some 16 years after Western Australia became the first state to legalise the practice³. However, the position as it relates to the joint adoption of children who are blood relatives of one member of a same-sex couple varies slightly depending on state or territory jurisdiction.

³ Nick Hose, ‘Same-sex adoption laws pass in the NT after personal debate on Parliament floor’, ABC News (Online, 19 March 2018) (accessible at: <https://www.abc.net.au/news/2018-03-19/nt-becomes-last-jurisdiction-to-pass-gay-adoption-laws/9547274>).

3) (Difference between married same-sex couples and unmarried same-sex couples - No)

State and territory laws also recognise the adoption rights of same-sex couples in Australia outside of marriage. Couples are able to adopt in most jurisdictions if they are in a de facto relationship or an otherwise “significant partnership” outside of marriage.

4) (Difference between married same-sex couples and married heterosexual couples - No)

Most restrictions concerning adoption in Australia today relate to a child’s age and the duration of cohabitation between that child’s prospective adopted parents. The sexual orientation of the child’s parents is immaterial.

D. Canada

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	Yes
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	*
2. Which of the following legal means was used to recognize same-sex marriage?	(1)(2)(4)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes*
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	No*
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No

【 * Commentary】

1. Court Cases

Halpern v Canada (AG) [2003] O.J. No. 2268 (ON CA), aff'g [2002] 60 O.R. (3d) 321 (ON DC) was the first and most significant case actually striking down a restriction against same-sex marriage. The ruling at the Divisional Court level had previously held that marriage rights must be extended to same-sex couples, but that such declaration of invalidity should be suspended for 24 months to enable Parliament and any applicable legislatures to “bring the law respecting marriage into line with the requirements of the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms...” (at para 145). Subsequently, the Court of Appeal “decline[d] to order a suspension of the declaration of invalidity or of the reformulated common law definition of marriage” (at para 154) and the new definition of marriage instead took immediate effect to allow same-sex marriage.

British Columbia, Ontario, and Quebec were the first three provinces where the courts held that the opposite-sex requirement for marriage was unconstitutional. The cases were:

- Ontario: *Halpern v Canada (AG)*, [2003] O.J. No. 2268 (ON CA)⁴.
 - “it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage. Accordingly, we conclude that the common-law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” violates s. 15(1) of the Charter [of Rights and Freedoms].” (para 108)
 - “we conclude that the violation of the Couples’ rights under s. 15(1) of the Charter cannot be saved under s. 1 of the Charter.” (para 125)
- Quebec: *Hendricks v. Québec* (Procureur général), 2002 CanLII 23808 (QC CS), [2002] R.J.Q. 2506 (Sup. Ct.).
- British Columbia: *Barbeau v. British Columbia* (Attorney General), 2003 BCCA 251⁵.

Other cases (referred to in *Reference Re Same-Sex Marriage*⁶ where the federal government petitioned the Supreme Court of Canada for a constitutional interpretation as to whether it is constitutional to enact a law recognizing same-sex marriage) include *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL), 2004 YKSC 54; *Vogel v. Canada* (Attorney General), [2004] M.J. No. 418 (QL) (Q.B.); *Boutilier v. Nova Scotia* (Attorney General), [2004] N.S.J. No. 357 (QL) (S.C.); and *N.W. v. Canada* (Attorney General), [2004] S.J. No. 669 (QL), 2004 SKQB 434. These cases arose in the Yukon, Manitoba, Nova Scotia and Saskatchewan.

The Supreme Court of Canada noted in the *Reference Re Same-Sex Marriage* that: “In each of those instances, the Attorney General of Canada conceded that the common law definition of marriage was inconsistent with s. 15(1) of the Charter and was not justifiable under s. 1, and publicly adopted the position that the opposite-sex requirement for marriage was unconstitutional” (*Re Same-Sex Marriage*, at para 66).

⁴ Accessible at: <https://www.canlii.org/en/ca/scc/doc/2004/2004scc79/2004scc79.html>.

⁵ In this case, the lower court ruled the law to be constitutional, but the decision was reversed at the BC Court of Appeal.

⁶ *Re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79 (accessible at: <https://www.canlii.org/en/ca/scc/doc/2004/2004scc79/2004scc79.html>).

The Supreme Court of Canada was asked by the government to consider whether proposed federal legislation on same-sex marriage (the Civil Marriage Act) was constitutional. The legislation provides that, inter alia, “marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.” The Court found the legislation constitutional. It became law across Canada on July 20, 2005.

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended /(2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage /(4) Same-sex marriage became possible as a direct result of a court judgment)

The answer is a combination of (1), (2) and (4).

- Constitutionally, the Federal and provincial governments each have different powers to legislate laws pertaining to marriage. The Federal government has the authority to enact legislation dealing with marriage and divorce, whereas each provincial government has exclusive jurisdiction over the solemnization of marriage and property rights within each province. As a result, certain cases involving challenges to provincial laws considered matters such as the constitutionality of marriage license issuance and marriage solemnization between same-sex participants (e.g., *Halpern*, *Hendricks*, and *Barbeau* cases), whereas the federal government is concerned with regulating the concept of marriage between same-sex participants.
- The decision in *Halpern* meant that same-sex marriage became legal in Ontario even without the introduction of the new Federal Act. ([4]), as did *Hendricks* in Quebec and *Barbeau* in British Columbia. In these provinces, governments began to issue marriage licenses to same-sex couples prior to any federal action being taken in relation to the definition of marriage.
- Federally, the *Civil Marriage Act*, SC 2005, c 33 (the Federal Act), was the first statute that officially recognized same-sex marriage. The *Civil Marriage Act* declared that same-sex marriage was lawful and set out the marriage framework in Canada. The *Civil Marriage Act* applies to both heterosexual and homosexual couples. It also made several amendments that are consequential to expanding the definition of marriage in Canada to include homosexual couples, such as changes to the *Income Tax Act* and *Evidence Act*.
- While the amendments to the *Civil Marriage Act* that officially recognized same-sex marriage could be considered as a new law (and was certainly promoted at the time by governments as new law), technically it amended an existing law to add these provisions.
- As discussed, provincially, the conduct of marriages was also governed by provincial legislation. For example, the *Marriage Act*, RSO 1990 (the Ontario Act) existed prior to the legalization of same-sex marriage, and has undergone multiple amendments. There were no provisions that actively banned same-sex marriage in the 2003 version of the Ontario Act. However, the old regulation that accompanied the Marriage Act between 1998 and 2004 had registration forms that stated “man” and “woman”/“bridegroom” and “bride”. The forms have since been amended and the partners are now referred to as “Applicant” and “joint applicant” on the Marriage Licence Application, Form 3.
- As the *Civil Marriage Act* applies to both heterosexual and homosexual couples, it is not the case where heterosexual partners use the old law and same-sex partners use the new law to get married as mentioned in [2], but rather a new law recognizing same-sex marriage was enacted.

3. Legal requirements for same-sex marriage

2) (In case of foreign nationality - Yes)

Requirements for applying for a marriage licence do not include nationality or residence, but it requires other marriage capacity requirements, such as age, mental capacity, etc.)⁷ Since the Federal Act legalized same-sex marriage, Canada has become a wedding destination for same-sex couples from other countries who wish to marry but are not allowed to do so in their country of residence. In 2013, the Federal Act was amended (with retroactivity) by clarifying that if a marriage is performed in Canada and that would have been valid if the spouses were domiciled in Canada, then it is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective jurisdiction of domicile. Many foreign nationals get married in Canada. In most provinces, legal and physical presence in the province is required, but there is no domicile requirement.

4. Adoption

2) (Joint adoption of a child without biological relationship by married same-sex couples - Yes)

It is more complicated than “family adoption” (joint adoption as referred to in 1) but it is possible.

3) (Difference between married same-sex couples and unmarried same-sex couples - No)

Generally, no. Most provinces and territories allow common-law partners (or “spouses” where the law includes common-law partners, or “two adults”) to adopt jointly. However, PEI and Saskatchewan in particular limit joint adoption to married couples.

⁷ The direct source of the law is section 5 (1) of the Civil Marriage Act, reproduced below.

Civil Marriage Act 5 (1): A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile.

E. Sweden

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(1)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Depends *
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	No *
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No *

【 * Commentary】

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended)

In May 2009 the Swedish Marriage Code (“Äktenskapsbalken”) was amended with gender-neutral wording, thus enabling same-sex marriages. However, this amendment was predated by several years of political debate and different legislative proposals.

The amendment of the Swedish Marriage Code to enable same-sex marriage was discussed in a legislative process through 1984-1987 but was rejected because of the perception that society considered marriage as a social institution between a man and a woman. Instead, a law was passed that granted same-sex cohabitants (“Sambo”, a kind of partnership that has legal definition and effects in Sweden) the same rights as heterosexual cohabitants. However, this legislation concerning same-sex cohabitants did not comply with the wishes of same-sex couples, growing political groupings and public opinion. In 1990 the National Board of Health and Welfare (“Socialstyrelsen”) proposed, on its own initiative, a new legislation regarding a partnership for same-sex couples. A legislative process ensued, and a new law was enacted in 1994, enabling same-sex couples the possibility to enter a registered partnership, a partnership with virtually the same legal consequences as marriage. Political debate and opinion followed this law as well and the question arose if Sweden discriminated against same-sex couples. The law later became obsolete with the amendment of the Marriage Code in 2009 that enabled same-sex marriage.

3. Legal requirements for same-sex marriage

- 2) (In case of foreign nationality – Depends)

Before any couple is married in Sweden, a couple must apply for a consideration of impediments to marriage (“Hindersprövning”). The consideration of impediments to marriage (henceforth shortened to “the Consideration”) regards various requirements, such as if the couple has reached legal marriage age or that neither person is not already married to someone else (the Consideration is determined by the Swedish tax Agency (“Skatteverket”), which handles population registration, marital status, etc.). If the couple passes the Consideration, a marriage certificate (“Vigselintyg”) will be issued, and the couple may be wed.

If both people in the couple are foreign nationals and neither have residence in Sweden, the Consideration will however also include if the couple’s country of nationality/residence recognizes same-sex marriages. If same-sex marriage is not allowed in that country the couple will not be able to get married in Sweden. Sweden does not want to officiate a marriage that will not be recognized in the country that the couple has all their connections to.

This means that if the same-sex couple is of a foreign nationality but at least one person in the couple has their residence in Sweden, then the Consideration will only be considered by Swedish law, meaning that there is no impediment to the marriage and the couple may be wed. This is also the case if at least one person in the couple is Swedish (but both person’s residence is abroad).

4. Adoption

- 3) (Difference between married same-sex couples and unmarried same-sex couples - No)

No differences since January 2003, when the law regarding adoption was changed.

- 4) (Difference between married same-sex couples and married heterosexual couples - No)

The only requirement for unmarried couples of any kind is that the couple must be cohabitants.

F. Taiwan

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	Yes
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	*
2. Which of the following legal means was used to recognize same-sex marriage?	(2)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	Yes *
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Depends *
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	No
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes *
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	Yes *

【* Commentary】

1. Court Cases

In May 2017, Taiwan Constitutional Court rendered Interpretation No. 748 (Case No. 748) ruling that the prohibition of same-sex marriage under the Civil Code is unconstitutional. Case No. 748 elaborated that the Civil Code by not allowing two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together is in violation of both the people's rights to equality and freedom of marriage protected by the Constitution.

The Constitutional Court also ordered the Legislative Yuan to amend or enact relevant laws in accordance with Case No. 748 within two years. If relevant laws are not amended within the 2 years, two persons of the same sex are allowed to have marriage registrations with the authority in accordance with the Civil Code.

In 2019, following Case No. 748, Taiwan promulgated the Act for Implementation of J.Y. Interpretation No. 748 (Act for No. 748⁸) allowing two persons of the same sex to register their relationship through “partnership registration” granting them almost all the rights available to married heterosexual couples under the Civil Code. Nonetheless, the Act for No. 748 explicitly excludes the joint adoption and the IVF.

2. Legal means to recognize same-sex marriage ((2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage)

In addition to the existing Civil Code for heterosexual marriage, a new law of Act for Implementation of J.Y. Interpretation No. 748 (Act for No. 748) (“Act”) has come into effect on 22 May 2019 and legalized same-sex marriage.

In February 2018, a Taiwan conservative group proposed to hold a referendum on the same-sex marriage issue aiming to overturn Case No. 748. The proposals were accepted by the government and included in the referendum held on 24 November. Among the 10 referendum questions, 3 questions related to same-sex marriage:

- Question 10 (proposed by the conservative group): Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman?
- Questions 12 (proposed by the conservative group): Do you agree to the protection of the rights of same-sex couples in co-habitation on a permanent basis in ways other than changing of the Civil Code?
- Question 14 (proposed by pro-equality advocates): Do you agree to the protection of same-sex marital rights with marriage as defined in the Civil Code?

The final results showed that Questions 10 and 12 were passed while Question 14 failed. It was noted that 72% of the voters agreed that the marriage defined under the Civil Code should be limited to men and women while 61% of the voters agreed that the rights of same-sex marriage should be protected outside the Civil Code. Consequently, the same-sex marriage will not be achieved through the amendments to the Civil Code and should be reformed through other means.

After the referendum in 2018, the Taiwan government announced that the government respected the results of the referendum and would not amend the Civil Code but prepare a special

⁸ Accessible at: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008>.

law to achieve the same-sex marriage. In 2019, Taiwan promulgated the Act allowing two persons of the same sex to register their relationship through partnership registration.

3. Legal requirements for same-sex marriage

1) (Differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage – Yes)

Under the Act, most of the requirements are similar to the existing Civil Code for heterosexual marriage, but there are some slight differences:

1. Both parties must be above the age of 18 to have same-sex marriage, while the female must be above age of 16 to have heterosexual marriage;
2. A person may not have same-sex marriage with a collateral relative by blood within the fourth degree of kinship, while a person may not have heterosexual marriage with a collateral relative by blood within the sixth degree of kinship.

2) (In case of foreign nationality – Depends)

Please find a summary below:

	Taiwan nationals	Foreign nationals
Taiwan nationals	Same-sex marriage is allowed.	According to the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, as long as the foreign national’s national law allows same-sex marriage, it is allowed ⁹ .
Foreign nationals	According to the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, as long as the foreign national’s national law allows same-sex marriage, it is allowed.	According to the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, as long as both the foreign national’s national laws allow same-sex marriage, it is allowed.

For foreign nationals whose national laws do not allow same-sex marriage, although they cannot register the marriage, Taiwan government can provide the “partnership registration” same-sex partner registration and issue the certificate. This registration does not have legal effect, but it

⁹ In 2019, a Taiwanese-Macanese same-sex couple requested to make marriage registration but was rejected by the Household Registration Office on the grounds that same-sex marriage was not legally recognized in Macau. As a result, the couple filed an administrative lawsuit against this decision. During the trial, the plaintiff, the Taiwanese-Macanese same-sex couple, argued that, according to the Macau Civil Code, the marriage status of the Macau citizen follows the laws of their habitual residence. In this case, given the plaintiff from Macau had moved to Taiwan for years, Taiwan should be deemed as his habitual residence, the plaintiff’s marriage status should therefore be registered in accordance with Taiwan laws.

In May 2021, Taipei High Administrative Court rendered a judgment ruling that the Household Registration Office should allow the plaintiff, a Taiwanese-Macanese same-sex couple, to legally register their marriage in Taiwan.

This case was the first case where Taiwan approved same-sex marriage between Taiwan nationals and foreign nationals. Nonetheless, before any further amendments on the restrictions on same-sex marriages with all foreigners, the ruling applies only to the plaintiff’s marriage, and other same-sex couples wanting to marry continue to face restrictions and legal challenges.

can serve as a supporting document for the identity under certain situations, for example, signing surgery consent, apply for governmental documents¹⁰.

4. Adoption

3) (Difference between married same-sex couples and unmarried same-sex couples - Yes)

Under the Act, married same-sex couples are only allowed to jointly adopt children who are biologically related to one of the members of the couple. Married same-sex couples are not allowed to adopt any child not biologically related to them. In addition, a member of a married same-sex couple is not allowed to individually adopt a child. On the other hand, any member from an unmarried same-sex couple could independently adopt a child who is not biologically related to him or her when meeting the requirements set forth in the Taiwan Civil Code.

4) (Difference between married same-sex couples and married heterosexual couples - Yes)

In Taiwan, a married heterosexual couple could adopt the other party's child or jointly adopt a child who is not blood-related to either of the members when meeting certain requirements.

	Unmarried		Married	
	Individually	Jointly	Individually	Jointly
Same-sex Couples	Yes, as long as he/she meets requirements	Not allowed	Not allowed	Yes, but only if child is biologically related to either of them
Heterosexual Couples		Not allowed	Not allowed	Yes, regardless child is biologically related to either of them

¹⁰ Accessible at: <https://www.immigration.gov.tw/5385/7229/7238/227021/>.

G. Germany

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(1) *
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes *
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes *
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes *
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No

【 * Commentary】

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended)

Initially a new law was enacted that created a “registered life partnership” for same-sex couples and gave them more rights, although not all the same rights that married couples had - regarding adoption, taxes etc. (August 2001 – September 2017). In October 2017 the old law stipulating that marriage is a union of heterosexual persons was amended and marriage (as a term and the rights coming with marriage) was “opened” for same-sex couples. The new law now says that marriage is a union for lifetime of two persons of the same or different sexes.

If you registered a “life partnership” before Sept. 2017, you can easily change it into a marriage and one will have to do so if e.g., the couple wants to jointly adopt a child, because only married couples (whether same or different sex) can adopt together.

The *Bundesverfassungsgericht* (Federal Constitutional Court) changed its legal within the years following the creation of a “registered life partnership”. In July 2002 the Federal Constitutional Court ruled (1 BvF 1/01): The civil partnership, according to the majority of the Senate, is an “aliud” to marriage, something different. Therefore, the civil partnership is also not a “danger” for different-sex marriages: “The extent of legal protection and promotion of marriage is not reduced in any way if the legal system also recognizes other forms of life that cannot compete with marriage as a community of different-sex partners. There is also no constitutional justification for inferring from the special protection of marriage that such other partnerships are to be structured at a distance from marriage and to be provided with lesser rights.” So, at that time it just said that the creation of a “registered life partnership” is no “danger” for marriage.

But in July 2009 the Federal Constitutional Court changed its view and came to the conclusion that the “registered life partnership” (although also open to different sex couples) typically covers same-sex people who therefore are disadvantaged compared to people of the opposite sex because only they could enter into a legally better off marriage (1 BvR 1164/07). The Federal Constitutional Court has come to the conclusion that the “unequal treatment of married couples and registered partners is linked to sexual orientation”. Therefore, “considerable differences” between marriage and civil partnership are necessary “in order to be able to justify the specific unequal treatment” of those – both permanent, legally established forms of partnership.

The court changed the original question completely. Previously the question was: Are there reasons that allow the civil partnership to be designed a bit like marriage? In 2009 it changed into: Are there considerable reasons that justify treating the civil partnership worse? The court now demanded a declaration from those who wanted to deny the civil partnership the same rights as marriage.

From then it became a political battle: There were legislative proposals for opening marriage, from the opposition parties and the Federal Council. The grand coalition of CDU / CSU and SPD postponed the proposals around thirty times in the committees with the argument that there was still a need for advice. In the spring of 2017, the Bündnis 90 / Die Grünen parliamentary group tried to oblige the majority of the Bundestag before the Federal Constitutional Court to deal with the content of the legislative proposals. Even if the court made declared the claim to be inadmissible, this initiative as well as the fact that numerous other states (such as Ireland) had opened marriage in the meantime, changed a lot in the public opinion. In the course of June 2017, all potential coalition partners of the Union parties, i.e., Bündnis 90 / Die Grünen, FDP and SPD, decided to make the opening of marriage a condition for entering into coalition negotiations.

In this situation, the Union parties and the – at that time – Chancellor candidate Angela Merkel came under pressure. Her remark in an interview (the opening of marriage it should be “more in the direction of a conscience decision” then following the parliamentary obligation)

developed such an attention that the Bundestag walked the path to opening marriage at high speed within just five days - in the last week of the legislative period. One day later, the CDU and CSU made the decision to open marriage a “question of conscience”.

Since than Section 1353 (1) sentence 1 of the German Civil Code (BGB) defines as follows: “The marriage of two persons of different or the same sex is concluded for life.”

3. Legal requirements for same-sex marriage

2) (In case of foreign nationality - Yes)

It is necessary that each of the two parties meets the requirements for marriage according to the law of his or her home country, if both of them are of foreign nationality.

4. Adoption

1) (Joint adoption of a child with biological relationship by married same-sex couples - Yes)

But if one partner is the mother/father of the child (“blood-related”), only the other partner can/has to adopt (stepchild adoption). But the “other” original “blood-related” parent needs to renounce parenthood. A child can’t have more than two parents.

3). (Difference between married same-sex couples and unmarried same-sex couples - No)

Unmarried partners can adopt the child of their partners (stepchild adoption), if the relationship lasted more than 4 years or they all live together and the other parent consents. It doesn’t matter whether the partners are same or different sexes.

Unmarried partners however can’t jointly adopt a child who is not blood-related to one of the partners. Whether the adopting couple is hetero or same-sex: they can only adopt not related children if they are married.

H. New Zealand

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(1) *
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No *
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No *
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes *
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes *
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes *
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No

【 * Commentary】

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended)

The Marriage (Definition of Marriage) Amendment Act 2013 amended the definition of “marriage” in the Marriage Act 1955, to read “the union of 2 people, regardless of their sex, sexual orientation, or gender identity”.

3. Legal requirements for same-sex marriage

1) (Differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage - No)

Same-sex marriage was legalised by altering the definition of marriage, so all requirements or prohibitions relating to heterosexual marriage also relate to same-sex marriage.

3) (Difference between same-sex marriage and heterosexual marriage - No)

Although ministers/celebrants are not obliged to solemnize a marriage if it will contravene religious beliefs, philosophical convictions, or humanitarian convictions (s29 Marriage Act 1955).

4. Adoption

1) (Joint adoption of a child with biological relationship by married same-sex couples - Yes)

A natural parent and their spouse can adopt a child jointly under the Adoption Act 1955, s3(3).

2) (Joint adoption of a child without biological relationship by married same-sex couples - Yes)

Married couples can jointly adopt a child (Adoption Act 1955 s3(2)). The term marriage has included same-sex marriages since the Marriage (Definition of Marriage) Amendment Act 2013.

3) (Difference between married same-sex couples and unmarried same-sex couples - Yes)

The legislation authorizes two “spouses” to adopt a child. In 2010 the High Court ruled that this includes a heterosexual de facto couple in a stable and committed relationship¹¹. A couple that is not in a stable and committed relationship cannot jointly adopt a child.

In 2015, the Family Court ruled that the term “spouses” also includes an unmarried same-sex de facto couple¹². Future cases are not bound to follow this Family Court ruling, although it seems likely that future courts will. This means that the law for same-sex couples is less settled than it is for heterosexual couples¹³.

¹¹ *Re Application by AMM and KJO to adopt a child* [2010] NZFLR 629.

¹² *Re Pierney* [2015] NZFC 9404.

¹³ Accessible at: <https://communitylaw.org.nz/community-law-manual/chapter-14-parents-guardians-and-caregivers/adoption/who-can-adopt>.

I. Brazil

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No*
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(4) *
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	No
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	No
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No*

【 * Commentary 】

1. Court Cases

The first decision related to same-sex unions came in a federal lawsuit of unconstitutionality (*ação direta de inconstitucionalidade*) relating to a Brazilian Civil Code provision establishing that civil unions of a man and a woman are recognised (such as marriage) for all legal purposes. Among other things, the lawsuit sought for constitutional interpretation when applying the same legal protection for heterosexual civil union to same-sex couples. The Supreme Court decision ruled that Brazilian Federal Constitution forbids any kind of discrimination and should be interpreted recognising a same-sex union as a family just as in heterosexual relations. This decision gave grounds for other kinds of rights of homosexual couples, such as social benefits, marriage etc. (Case number “ADI n° 4277”; date of judgment May 5, 2011).

2. Legal means to recognize same-sex marriage ((4) Same-sex marriage became possible as a direct result of a court judgment)

In Brazil there is no law authorizing same-sex marriage, however, in 2011, the Supreme Federal Court ruled a decision recognizing same-sex unions. Considering that even with such a decision some same-sex couples were still facing difficulties in getting married, in 2013 the National Council of Justice published the Resolution 175 that prohibits notaries from refusing to register same-sex couple marriages. Such a decision and Resolution are the basis for same-sex marriage in Brazil.

4. Adoption

4) (Difference between married same-sex couples and married heterosexual couples - No)

There are no laws related to adoption for same-sex couples, instead the same requirements for heterosexual couples were “extended” to same-sex couples. Couples, for adoption, amongst other criteria, must evidence a stable relationship, including interviews with psychologists and social assistants. We believe that these interviews are the only step that could differentiate same-sex couples for heterosexual ones, as depends on perception of individuals that could result in bias.

J. France

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	No
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	
2. Which of the following legal means was used to recognize same-sex marriage?	(1)*
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	No
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	Yes*
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No

【* Commentary】

2. Legal means to recognize same-sex marriage ((1) The existing law stipulating heterosexual marriage was amended)

The old law stipulating that marriage is a union of heterosexual persons was amended by the Law n° 2013-404 dated 17 May 2013 to accommodate the concept of marriage as a union of same-sex persons.

4. Adoption

3) (Difference between married same-sex couples and unmarried same-sex couples - No)

Cohabiting partners (meaning by civil union or generally unmarried same-sex couples) cannot adopt a child together. A child can only be adopted by one of the cohabiting partners (who is legally considered single). Social and psychological assessments must certify that the conditions offered by the applicant (from a familial, educational and psychological levels) correspond to the needs and interests of an adopted child and therefore take into account the composition of the home where he will be welcomed.

K. South Africa

1. Court Cases	
1) Are there any judgments by a court wherein it was found that not recognizing same-sex marriage is unconstitutional?	Yes
2) If “Yes,” please provide the information necessary to identify the judgment(s), such as the date and case number	*
2. Which of the following legal means was used to recognize same-sex marriage?	(2) *
1) The existing law stipulating heterosexual marriage was amended.	
2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage.	
3) Without legislative amendments or new legislation, changing interpretation of existing law to recognize same-sex marriage.	
4) Same-sex marriage became possible as a direct result of a court judgment.	
5) Other (please describe the specific legal form/circumstances)	
3. Legal requirements for same-sex marriage	
1) Are there any differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage, such as marriage age, prohibition of consanguineous marriage (prohibition of marriage due to familial relation), or prior marital status (e.g., waiting period before, or prohibition of, remarriage)?	Yes *
2) Is same-sex marriage allowed if one or both parties are a foreign national?	Yes
3) Are there any differences in the procedures for heterosexual and same-sex marriage?	No *
4. Adoption	
1) Is it possible for a married same-sex couple to jointly adopt a child who is blood-related to one member of the couple? (Joint adoption means an adoption which creates a legal parent-child relationship with both members of the couple.)	Yes *
2) Is it possible for a married same-sex couple to jointly adopt a child who is not blood-related to either member of the couple?	Yes *
3) Regarding questions 1) and 2) above, are there any differences in the case of an unmarried same-sex couple?	No
4) Regarding questions 1) and 2) above, are there any differences in the case of a married heterosexual couple?	No *

【 * Commentary】

1. Court Cases

Minister of Home Affairs and Another v Fourie and Another [2003] JOL 11351 (CC) (Decided on 1 December 2005).

In this case the applicants challenged the validity of the South African Marriage Act 25 of 1961 (“South African Marriage Act”), which codified the common law definition of a marriage as the legally-recognised voluntary union of one man and one woman to the exclusion of others.

The South African Marriage Act was challenged on the grounds that the common law and section 30(1) of the South African Marriage Act denied same-sex couples equal protection and benefit of the law, which was argued to be in contravention of section 9(1) of the Constitution of the Republic of South Africa, 1996 (“South African Constitution”). In addition, these provisions resulted in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the South African Constitution. In a constitutional democracy this position needed to be remedied.

The Constitutional Court of South Africa acknowledged that the common law definition of marriage was inconsistent with the South African Constitution and declared the provisions of the Marriage Act invalid to the extent that it did not permit same-sex couples to enjoy the status, benefits, and responsibilities it accords to heterosexual couples.

2. Legal means to recognize same-sex marriage ((2) In addition to the existing law stipulating heterosexual marriage, there was enactment of a new law which only stipulates same-sex marriage)

Same-sex marriages are recognised under the South African Civil Union Act 17 of 2006 (“Civil Union Act”), which came into force on 30 November 2006 and provides for the solemnisation of civil unions either in the form of a “marriage” or a “civil partnership”.

Same-sex marriages in South Africa have been legal since the Civil Union Act came into force. The decision of the South African Constitutional Court in the case of Minister of Home Affairs v Fourie¹⁴ extended the common-law definition of marriage to include same-sex spouses, as the South African Constitution guarantees equal protection before the law to all citizens regardless of sexual orientation. The South African Constitutional Court also held that the omission from section 30(1) of the Marriage Act after the words “or husband” of the words “or spouse” was inconsistent with the South African Constitution and as a result the Marriage Act was declared to be invalid to the extent of this inconsistency and Parliament was given one year to remedy this defect. It should be noted that this case led to the enactment of the Civil Union Act, which (as aforementioned) provides for same-sex couples to enter into a civil union¹⁵.

¹⁴ The South African Constitutional Court in Minister of Home Affairs v Fourie held that the failure of the common law and the South African Marriage Act to provide for means whereby same-sex couples could enjoy the same status, entitlements, and responsibilities that are afforded to heterosexual couples through marriage, constituted an unjustifiable violation of their right to equal protection under the law, their right not to be unfairly discriminated against and their right to dignity in terms of the South African Constitution. Ultimately the South African Constitutional Court declared the common-law definition of marriage to be inconsistent with the South African Constitution and invalid to the extent that it did not permit same-sex couples to enjoy the benefits coupled with the responsibilities it accords to heterosexual couples.

¹⁵ De Vos P and Barnard J Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga. The South African Law Journal, accessible at: <https://constitutionallyspeaking.co.za/wp-content/uploads/2015/11/Same-sex-marriage1.pdf>.

Section 9(3) of the South African Constitution prohibits “unfair” discrimination —whether of a direct or indirect nature on any ground, including on the ground of “sexual orientation”¹⁶.

3. Legal requirements for same-sex marriage

1) (Differences between heterosexual marriage and same-sex marriage in terms of requirements for, or obstructions to, marriage - Yes)

Generally, the marriage requirements and formulae are similar with regards to both heterosexual and same-sex marriages. However, in terms of section 8 (Requirements for solemnisation and registration of civil union) of the Civil Union Act:

“(1) [...]

(2) A person in a civil union may not conclude a marriage under the Marriage Act or the South African Customary Marriages Act 120 of 1998 (“Customary Marriages Act”).

(3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.

(4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.

(5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

(6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act. Thus, looking at the aforementioned section, it is evident that there are a few between the requirements for heterosexual and same-sex marriages.”

¹⁶ The prohibition against discrimination on the ground of sexual orientation was not originally included in the first drafts of the Constitution (bearing in mind that South Africa did not have any constitution during Apartheid).

In the Explanatory Memorandum on the Draft Bill of Rights of 9 October 1995 that was prepared for the Constitutional Committee, the Technical Committee recommended that sexual orientation be included as a prohibited ground of discrimination in the equality clause. The Technical Committee referred to the similarities between sexual orientation and other forms of forbidden discrimination that had been highlighted in various human rights documents. It emphasised that the enumerated grounds of discrimination in international law related to characteristics and choices that all formed an integral part of human personality and identity. The forbidden discrimination specifically related to groups that were particularly vulnerable to discrimination, exclusion and subordination, such as gays and lesbians. The Technical Committee’s strongest recommendation was that sexual orientation be included as a prohibited ground of discrimination in the equality clause.

Further, discussion on the international sources that the Technical Committee referred to can be found here:

http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2013000200003.

South Africa’s history provided a strong reason to oppose unfair discrimination on grounds of race. All parties recognized the need to do away with this form of unfair discrimination and virtually none wished to be seen to support new forms of such discrimination. Consequently, the wider political and moral values underlying the new Constitutional order supported the eradication of unfair discrimination in all its forms. Argumentation that discrimination on grounds of sexual orientation was similar to that on grounds of race successfully ensured support for the inclusion of sexual orientation in the equality clause (Sources: David Bilchitz, Constitutional Change and Participation of LGBTI Groups: A Case Study of South Africa (accessible at: <https://constitutionnet.org/sites/default/files/constitutional-change-and-participation-of-lgbti-groups-a-case-study-of-south-africa-pdf.pdf>).

3). (Difference between same-sex marriage and heterosexual marriage - No)

The criteria and requirements for marriage are similar in both the Marriages Act and the Civil Unions Act. Further, the marital regimes remain unchanged, affording parties the same rights and responsibilities. However, the Civil Unions Act differs in that it recognises partnerships that are not solemnised by marriage. This affords couples who choose not to marry the right to enjoy the benefits that marriage brings, in terms of sharing in the joint estate.

4. Adoption

1) (Joint adoption of a child with biological relationship by married same-sex couples - Yes)

In the case of *Du Toit v Minister of Welfare and Population Development and Others* [2002] JOL 10181 (CC) (10 September 2002), the court held that same-sex couples are permitted to jointly adopt children.

4) (Difference between married same-sex couples and married heterosexual couples - No)

There is no distinction between the treatment of married same-sex couples and married heterosexual couples, they can both jointly adopt a child who is not blood-related to either member of the couple.