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LGBTQIA+ civil rights in India

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This article deals with the civil rights of LGBTQIA+ in India. The landmark judgment of 2018 proved to be a reason for celebration for the whole community. Supreme Court partially struck down section 377 of IPC marked the beginning of equal protection to the community. The age-old restriction on same-sex marriage was removed. Supreme Court of India, through judgements of Navtej Singh Johar vs UOI, Justice KS Puttaswamy vs UOI laid the foundation of recognition and equal treatment to the non-binary and providing equal rights, but there is a lot that needs to be done and achieved for the community. Even after such a landmark development in India, the community is yet to grant several civil rights like that of right to marriage, adoption, surrogacy right from sexual assault. Members of the LGBTQIA+ community are harassed and humiliated throughout in workplace and educational institutes. Policies need to be formulated to stop this. Also, proper sex education needs to be provided to students so that they can become more acceptable towards the community.

Keywords: *homosexuality, judiciary, sex education, LGBTQIA+.*

INTRODUCTION

“What is straight? A line can be straight or a street, but the human heart, oh, no, it’s curved like a road on mountains.”

- Tennessee Williams

Indian judiciary marked an important day for LGBTQ+ by decriminalizing homosexuality and partially striking down section 377 of IPC.¹ This breathed life in the LGBTQ+ community, which has been the downtrodden section of society for decades. The whole community released the shackles of boundaries that were set during the colonial era for more than 200 years. 6th September 2018 marked a festival-like celebration all over the country for the whole community. The age-old restriction on same-sex marriage was removed. Indian judiciary was ignorant about addressing the issue of LGBTQ+ civil rights.

This change in the legal system bought a change in the perspective of the people; everybody emerged more accepting towards the community. Hon'ble Justice Indu Malhotra while reading her verdict of 50 Pages mentioned, "*History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries*". Hon'ble Supreme Court of India, through the landmark judgements of *National Legal Services Authority vs Union of India*², *Navtej Singh Johar vs UOI*³, and *Justice KS Puttaswamy vs UOI*⁴ laid the foundation of recognition and equal treatment to the non-binary and providing equal rights, but there is a lot that needs to be done and achieved for the community. These judgments should be seen as a stepping stone for the whole new world ahead. This is the start towards a better world, which is free from prejudice that people possess for the community.⁵

A lot more development is needed in-laws and legislation to recognize equal status of the queer community also comprising of intersex and asexual people, which have been a neglected part until now. LGBTQ+ should now be inclusive of inter-sexual and asexual people and be termed as LGBTQIA+. In a nutshell, same-sex couples can reside and continue their personal life without any threat and panic but there is a lot that needs to be achieved, there are more sexual identities whose rights need to be protected, their issues need to be addressed by the legislature and the judiciary both.

¹ Indian Penal Code 1860, art 377

² *Authority v Union of India* (2014) 5 SCC 438

³ *Navtej Singh Johar v UOI* (2018) 10 SCC 1

⁴ *Justice KS Puttaswamy v UOI* (2017) 10 SCC 1

⁵ *Ibid*

CASES REVOLVING AROUND THE LGBTQ+ COMMUNITY

- **Naz Foundation Govt. vs NCT of Delhi**⁶

Lucknow police in July 2001, arrested some men under section 377 of IPC because the police were suspicious of them being homosexuals, not heterosexuals. The Police also arrested some members of the “Bharosa trust” NGO that was working towards spreading the correct information about safe sex, police assumed that they were running a sex racket. But the accusation was proved false by a legal aid organization, The Lawyers Collective, all the charges were proved false and the innocent were finally released.⁷

After this incident, an NGO “Naz Foundation” filled the writ petition in the Hon’ble Delhi High Court asserting that section 377 is in violation of fundamental rights that fall under the purview of articles 14,⁸ 15,⁹ 19¹⁰, and 21¹¹. Hon’ble High Court of Delhi in 2009, held that section 377 imposed an unreasonable restriction on an individual’s personal life and liberty, and thus the section is in violation of fundamental rights.

- **Suresh Kumar Koushal vs Naz Foundation**¹²

Certain faith-based groups in India did not support this new wave of freedom; they approached Supreme Court to reconsider the following matter. On 11th December 2013 Supreme Court- criminalized homosexuality and stated that LGBTQ+ fall under “minuscule minority” and they did not deserve any constitutional protection. This did not suppress the ongoing movement for equality amongst the community; in fact, it lighted the spirit of the whole community to fight for justice and equality.¹³

⁶ *Naz Foundation Govt v NCT of Delhi* 160 DLT 277

⁷ *Ibid*

⁸ Constitution of India, art 14

⁹ Constitution of India, art 15

¹⁰ Constitution of India, art 19

¹¹ Constitution of India, art 21

¹² *Suresh Kumar Koushal v Naz Foundation* Civil Appeal No 10972/2013

¹³ *Ibid*

- **National Legal Services Authority vs Union of India**¹⁴

The Transgender community has been most vulnerable in the whole LGBTQ+ community, they experienced exploitation, seclusion, harassment and have been the victims of human trafficking as well. In the landmark judgement the Hijra community was recognized as the third gender. Not only this but they were also granted a whole spectrum of rights after this judgement. The court recognized the difference between gender and biological components of sex.¹⁵

- **K.S. Puttaswamy vs Union of India (2017)**¹⁶

This judgement is popularly known as “Aadhar Jugement”. Justice Chandrachud mentioned two cases in the judgement, one of them was Additional District Magistrate, Jabalpur vs. SS Shukla, which upheld the denial of basic fundamental rights and another was the Koushal case which rejected the rights of the LGBTQIA+ community. Justice Chandrachud said that one’s sexual orientation fall in the purview of privacy and a minuscule population cannot be a ground to take away their basic rights.¹⁷The Supreme Court held that the right to privacy falls under the purview of article 21¹⁸.

- **Navtej Singh Johar vs Union of India**¹⁹

Homosexuality was still a crime in India, which was protested by many famous faces like Keshav Suri, Ritu Dalmia, profound dancer Navtej Singh Johar. The writ petition was filed by many before the Hon’ble Supreme Court of India, being ambiguous of the constitutional validity of the same. On 6th September 2018, the court finally decriminalized homosexuality and held section 377 to be unconstitutional as it is in violation of fundamental rights of intimacy and privacy. Even after such a landmark development in India, the community is yet

¹⁴ *National Legal Services Authority v Union of India* (2014) 5 SCC 438

¹⁵ *Ibid*

¹⁶ *KS Puttaswamy v Union of India* (2017) 10 SCC 1

¹⁷ *Ibid*

¹⁸ Constitution of India, art 21

¹⁹ *Navtej Singh Johar v Union of India* (2017) 10 SCC 1

to grant several civil rights like that of right to marriage, adoption, surrogacy right from sexual assault.²⁰

SAME-SEX MARRIAGES

Special Marriage Act, 1954²¹ laid down the provisions for the citizens of India and all the Indian nationals in the other countries allowing them to get married irrespective of their caste, religion, faith, etc. While the marriage laws all over the world are changing progressively with but there is the ray of hope coming for same-sex couples to marry which seems reasonable also considering it's only been three years when the Supreme court decriminalized homosexuality. There are many writ petitions on same-sex marriages pending in the courts all over the country. In the present situation, the Special Marriage Act, 1954 applies to heterosexual couples only, because it clearly mentions that males above 21 years of age and females above 18 years of age could tie a bond of marriage. Homosexual marriages should also be included under the Special Marriage Act, as the same is the need of the hour. Amendments in section 4 (c)²² is the legislative method available for this; it could also include provision for same-sex marriage.

In Landmark judgment of *Lata Singh vs State of Uttar Pradesh*,²³ the Hon'ble Supreme Court interpreted right to choose a life partner as a part of Article 21 of the constitution of India. The Supreme Court made it clear that any person who attains the legal age of marriage can marry anyone he/she likes. Parents cannot threaten to kill them; all they can do is cut their ties from the children. The same is also acknowledged by Human Rights Charter under "right to have a family", giving it an international outlook. One sociological problem to note is that Indian society is not very accepting of inter-caste marriage. Even in today's fast-paced and developed environment inter-caste and inter-faith marriage can cause complete bloodshed. There is

²⁰ *Ibid*

²¹ Special Marriage Act 1954

²² Special Marriage Act 1954, s 4(c)

²³ *Lata Singh v State of Uttar Pradesh* AIR 2006 SC 2522

chaos in society about inter-caste or interfaith marriage, then in this scenario, acceptance of same-sex marriage becomes a tough task, but can be achieved through proper legislation.²⁴

LAWS REGARDING ADOPTION

Adoption rights in India are both governed by religious and secular laws both. For Hindus, we have Hindu Adoption and Maintenance Act, 2005,²⁵ also there exist no specific laws for Muslims, Parsis, Christians, Jews, etc. Another statute that deals with the adoption of children is Juvenile Justice Care and Protection Act 2005,²⁶ which was framed by *Central Adoption Resource Agency (CARA)*. Under HAMA a man or a woman may adopt a child with the consent of their partners and in the case of an unsound partner or if the partner has renounced the world then consent is not required. Even after decriminalization of section 377, LGBTQIA+ is not allowed to adopt kids, equal protection and treatment under the law to the community still needs to be addressed.

To state regulation 5(3) of the Adoption Regulation Act, 2017,²⁷ a couple having a stable relationship for over a period of two years is allowed adoption, also the act mentions words like 'Husband' and 'Wife' which leaves no scope for same-sex couples to adopt children. The act is also ambiguous regarding the adoption rights of transgender because it has specifically defined terms of 'man' and 'woman'. Despite the fact that adoption is a cumbersome task involving many formalities and paperwork, we cannot ignore the fact that heterosexuals are allowed to adopt but not same-sex couples or people with a queer sexual orientation.²⁸ An irony to note is that it is acceptable for a child to grow up as an orphan rather than being adopted by any member of the LGBTQIA+ community.

OVERVIEW OF GUARDIANSHIP

²⁴ *Ibid*

²⁵ Hindu Adoption and Maintenance Act 2005

²⁶ Juvenile Justice Care and Protection Act 2005

²⁷ Adoption Regulation Act 2017, reg 5(3)

²⁸ *Ibid*

Guardianship refers to the obligations and rights that an adult possesses over his minor child. Under Hindu law guardianship fall under the purview of the Hindu Minority Guardianship Act 1956²⁹ while the secular act for the same is the Guardianship and wards act 1956³⁰. Traditionally, the father is considered the guardian of the child, and the mother can have guardianship only after the father. This was challenged in *Geeta Hariharan vs. Reserve Bank of India* ³¹where the court stated that ‘after father’ means in the absence of a father or when the father cannot provide with the financial, emotional, or material requirements of the child.

In *ABC vs NCT of Delhi*, ³²the court recognized the guardianship of unwed mothers and also stated that disclosure of the identity of the father is not important for the mother. The language of the act is ambiguous in nature because it appears to be gender-neutral in nature. So the situations where gender is not clear might pose some issues regarding guardianship. The court looks into the principle of “best interest of the child” before granting custody or guardianship. The person that displays affection and utmost care towards providing the child with a healthy environment is taken into consideration. The principle hence is very flexible.

The term “best interest of the child” should be interpreted by the court and make the language of the act clearer than before, it should go beyond binary definition so that people regardless of their sexual orientation and gender could become guardians.³³

SURROGACY - A FARFETCHED DREAM!

The new surrogacy bill passed allows only married couples to opt for it and restricts single parents and LGBTQIA+ couples from opting for surrogacy. This act aimed to stop the commercialization of surrogacy, allowing only ‘close relatives’ to be a surrogate mothers to the couple who have been married for 5+ years. This fails to explain the primary objective. The objectives of this act are the protection of the rights of a surrogate mother and grant her a safe environment but the act suffers from loopholes that need to be taken into consideration as the

²⁹ Hindu Minority Guardianship Act 1956

³⁰ Guardianship and Wards Act 1956

³¹ *Geeta Hariharan v Reserve Bank of India* (1956) 2 SCC 228

³² *ABC v NCT of Delhi* (2015) 10 SCC 1

³³ *Ibid*

same is discriminatory to many people. Looking for a surrogate mother is in itself a task for a heterosexual couple so such flaws need to be addressed. The act should not just deal with the protection of surrogate mothers but also expand the scope of regulations mentioned.³⁴ A comparison needs to be looked into like single men and women can adopt a child and become guardians but the same is denied to the LGBTQIA+ community. The legislature and the judiciary need to be more vulnerable and make society a better place for them to live and thrive.

INHERITANCE LAWS IN INDIA

Inheritance laws in India are covered by a wide spectrum of personal laws, like by their respective religions and community. They are distinguished as per the males and females and there is no category available for the Transgender community. The first act to discuss is the Hindu Succession Act, 1956³⁵ which is to be followed by everyone following in the purview of the same. The major flaw with the act is that it deals only with male and female inheritance and has no mention of the LGBTQIA+ community. The definitions are binary and consist of terms like daughter, female, son, male, etc. It has no provision for transgender people or people with different sexual orientations. If they have to inherit the said property then they have to show them off either gender and mainly they recognize themselves as females and therefore after this said process they can inherit the property from the parents and grandparents. This type of recognition by the authorities is a clear violation of *article 15*³⁶ of the constitution of India which prohibits discrimination on the grounds of sex.

The Muslim Laws are governed by personal laws as well i.e. *Sharia Laws*³⁷. In India, Muslims fall under two sects - Shia and Sunni. Both of them have their own set of rules and regulations for inheritance. Same as the Hindu Laws for succession Muslim Laws are also subject to males and females only. Inheritance of Property of the Christians is done by the Indian Succession

³⁴ *Ibid*

³⁵ Hindu Succession Act 1956

³⁶ Constitution of India, art 15

³⁷ Sharia is Islamic law, evolved from Quran, Hadith and Sunnah

Act, 1925³⁸ which is a way broader in concept than the Muslim and Hindu laws. Under this act, the Christian community has somehow approved the concept of including transgender and giving them equality in Section 44 of the Indian Succession Act, 1925³⁹. *“Law Commission of India was recommended this proposal by the Delhi Minorities Commission after getting majority approval from the Advisory Committee of Christians.”*⁴⁰

ANALYSIS OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

Transgender Persons (Protection of Rights) Act, 2019⁴¹ was enacted by the legislature for the protection of the community. This act claimed to protect transgender from all sorts of evils prevailing in society, be that related to healthcare, educations, sanitation, employment, or equal dignity in society. The whole LGBTQIA+ Community has sturdily rejected the Bill citing that this bill completely infringes their Fundamental rights granted to them by the constitution and does not abide by the NALSA Judgement of the Hon’ble Supreme Court. One of the most important components of NALSA judgment, i.e. right to determine his/her sexual orientation has been violated by this act.⁴²

According to what the bill states,⁴³ change in gender identity in documents of the person can be done only after approval of District Magistrate on proof of sex reassignment surgery, this procedure again violates the right to privacy of the whole community and makes them more vulnerable to the harassment. Harassment and abuse against the body should be treated equally, but this is not the case. Any sort of sexual abuse against women might lead to a serious punishment of up to 7 years of imprisonment whereas sexual abuse against the LGBTQIA+ community might end up in two years of imprisonment. This clearly shows discrimination and denial of equal protection.⁴⁴ Another loophole could be that the act seeks

³⁸ Indian Succession Act 1925

³⁹ Indian Succession Act 1925, s 44

⁴⁰ Maria Akram, ‘Christian transgender to have equal rights on ancestral property’ (*The Hindu*, 12 May 2016) <<https://www.thehindu.com/news/cities/Delhi/christian-transgenders-to-have-equal-right-on-ancestral-property/article8587686.ece>> accessed 15 October 2021

⁴¹ Transgender Persons (Protection of Rights) Act 2019

⁴² *Ibid*

⁴³ Akram (n 40)

⁴⁴ *Ibid*

to provide “inclusive education and opportunities” but fails to do so. There is no such plan to be executed and provide the community with a better educational standard. The act has no mention of scholarships, reservations, or any sort of relief to the members of the community.

DISCRIMINATION IN HIGHER EDUCATIONAL INSTITUTIONS

The cases of discrimination and bullying are rampant in universities in India. Every year we have an unacceptable and annoying number of LGBTQIA+ students dropping out of schools and colleges because they are yet not over their bad experiences throughout. Students are less educated and aware about the differences in sexual orientation and harass such students, many of them even become rape victims.

But University Grants Commission (UGC) is taking constant actions against such complaints and addressing them at their best. The introduction of UGC Anti - Ragging Regulations in 2009⁴⁵ binds all the universities to check for ragging in their campus and address the same. The act also provides harassment and bullying as a provision for ragging, including sexual orientation as the same ground. Such bullying and discrimination cause mental breakdown to the students as a result of which many of them drop out, many fall victim to a mental problem, and yet many commit suicide.⁴⁶ The prejudice that people hold about the community is the reason that such inhuman acts take place. Students are not aware that the issue is vulnerable and needs to be supported rather than suppressed.

SUGGESTIONS

- **Better sex education**

In India speaking openly about sex education is still taboo, awareness about sexual orientation, safe sex should be provided to students at the school level itself rather than them being learning from online platforms that misguide them. There are so many people that treat

⁴⁵ Ragging Regulations 2009

⁴⁶ *Ibid*

homosexuality as a disease, which is really a sad story of the present scenario. UN⁴⁷ in collaboration with NCERT, ⁴⁸NACO⁴⁹, and UN agencies introduced Adolescence Education Programme (AEP) in secondary and higher secondary schools. But yet, the implementation is a far cry.

- **Cross country narrative**

In 2017, the Japanese government made regulations to stop bullying of LGBTQIA+ youth. The world is growing to be more acceptable and so does our country need to be too. Several changes need to be brought to the National Education Policy, implementation of strict anti-bullying and anti-ragging laws need to be taken into consideration. The staff should also be educated about the same. Each and everyone should become more accepting of the different sexual orientations.

CONCLUSION

After the landmark judgment of 2018, the LGBTQ+ community took a leap step towards equality and better treatment in all spheres but still there are several instances where the LGBTQIA+ community is denied equal treatment and has been victim to discrimination ever since. It is important to educate people about LGBTQ+ rights and also understand various sexual orientations and grow acceptable towards them. Undoubtedly this needs to start somewhere from the school itself. Children need to be taught about sex education. If we still stick to our public morality, cultural ethics then we shall never go along with the increasing pace of the world and rather succumb to the evils prevailing. It is important to wipe off the stigma associated with different sexual orientations to avoid bullying. The legislature needs to work upon giving equal status to the LGBTQIA+ community otherwise the struggle for recognition will go on.

⁴⁷ UN – The United Nations is an international organization, aiming to maintain peace and harmony in between nations

⁴⁸ NCERT – The National Council of Educational Research and Training is an governmental organization established in 1961, it works as a charitable society, aims at providing quality education to everyone irrespective of social status

⁴⁹ NACO – The National AIDS Control Organization, working under Ministry of Health and Family Welfare, currently runs 35 HIV/AIDS prevention and control societies