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Prejudice faced by Homosexual Couples during Adoption in India

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“To deny people their human rights is to challenge their very humanity”

– Nelson Mandela

Article 14-21 of the Indian Constitution talks about the equal status of all Indian citizens before the law. It also talks about the non-discriminatory nature of the constitution. The following article brings out in detail, the bias faced by the LGBTQ community in India, despite fulfilling all the criteria set by the Constitution for them to avail the basic rights that are normally experienced by other citizens of the country, including the right to marriage and the right to adoption being at the core of these issues. It elaborates on the outdated laws related to marriage and adoption and how they were transformed into a heterosexual privilege in our country after the commencement of British rule. It also takes into account the ancient literature and instances that clearly point toward the acceptance and open-minded approach of the people than towards homosexuality.

Keywords: *same-sex partnership, adoption, discrimination, sexual orientation.*

INTRODUCTION

On September 6, 2018, the dawn of a historic verdict was given by the Supreme Court of India. The Judgement¹ concerned the decriminalisation of Section 377² of the Indian Penal Code. Like several other laws, Section 377 of the IPC was also introduced in the British Colonial period in 1851, which referred to 'unnatural offences' and said that whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, will be punished with the imprisonment of life³. This Draconian law was struck down by a 5-judge bench, which announced their approval by bringing sexual relations between gay couples in private into the purview of the judicial system, thus providing an impetus to further the rights of the LGBTQ community in India.

Oxford dictionary⁴ defines homosexuality as being characterised by a sexual or romantic attraction to, or sexual activity with, people of the same sex; involving or relating to same-sex desire or sexual activity. There is historical evidence of the existence of same-sex partnerships in the sculptures of Khajuraho temple and Konark temple. In the Valmiki Ramayana also, Lord Hanuman is said to have seen rakshasa women indulging in erotic activities with other women. All these instances show that the entire concept of same-sex relationships has been in existence for eons. However, even now, with major advancements in science and technology in the 21st century, LGBTQ rights are still a matter of debate. They are still viewed as wayward sections of society who experience discrimination in employment, education, and even the basic necessities like shelter, which sometimes becomes a tough row to hoe.

STATUS OF LGBTQ RIGHTS IN INDIA

The reversal of Section 377 of the Indian Penal Code has most definitely laid a foundation for bringing about a change among the other problematic laws in the country. However, despite the 2018 judgement being in favour of the LGBTQ community, there hasn't been a huge

¹ *Navjot Singh Johar v Union of India* (2018), AIR 4321

² Indian Penal Code, 1860, s 377

³ 'What is Section 377 of IPC?' (*The Times of India*, 31 December 2021

<<https://timesofindia.indiatimes.com/india/what-is-section-377/articleshow/66067994.cms>> accessed 10 July 2022

⁴ Oxford English Dictionary Online, *Homosexuality* (Oxford University Press 2022)

transformation observed in the society and legal system at large. Speaking of problematic laws, the Transgender Protection Act, 2019 was enacted to give protection to the transgender community by providing access to education, employment opportunities, and healthcare services. The sole objective of this Bill was to provide a legal umbrella to the Trans community, wherein it would help in curbing unwarranted discrimination that is faced by them on a daily basis. Despite having noble intentions, the legislation turned out to be flawed in a major way. It only extended legal guarantees in government-related sectors, all the while ignoring the fact that the same discernment is faced by the community in the private sector. Thus, Article 14⁵, which extends the right to equality to all citizens of India irrespective of their gender, caste, creed, and religion, stands breached. It is the need of the hour that laws be made which are in tandem and that pay special attention to the basic rights of the LGBTQ community.

EVOLUTION OF SAME-SEX RELATIONSHIPS IN INDIA

India is the land of diverse cultures and ethnicities⁶. It is comprised of communities based on different geographical locations. These communities have their own ancestry and lineage, thus varying customs and beliefs. From ancient times, India has been a country that accepts people of different types, even if they don't have the same appearance, speak the same language, or eat the same food. For this unique trait, there also exists a Sanskrit term – "Atithi Devo Bhava." This acceptance would have been extended to the non-straight community as well, had it not been for some elements in society. These people have a narrow-minded attitude and orthodox religious views. They spew hate and spread fear in society for the advancement of their own political agenda.

When we go through history, we find several instances of events that indicate the presence of homosexuality during that time. It was not only acknowledged but also widely accepted by the people then. The very first Mughal emperor, Babur, was said to be in love with a man he met in Kabul, whom he had to leave for his greater political ambitions, whose detailed account

⁵ Constitution of India, 1950, art.14

⁶ Kishore Kumar Panchal, 'Same-sex couples Adoption Rights in India' (*Research Gate*, January 2020) <https://www.researchgate.net/publication/341698669_Same-Sex_Couples_Adoptions_Rights_in_India> accessed 12 July 2022

is found in his memoir, *Baburnama*⁷. Another excellent example of same-sex relationships was found between AllaudinKhilji, the thirteenth-century ruler of Persia, and his slave Malik Kafur. Queens, too, was said to be in close-knit ties with their female attendants and slaves, and there is literature to support them. However, one of the vital reasons behind lesser-known evidence of female same-sex relationships during this period might be because of the prevalent status of women, which was bogged down by the patriarchal norms of society. So, even if men could pursue such fancies in the open, women were more conscious and expressed their carnal desires in private, away from the eyes of society at large.⁸

Homoeroticism has been acknowledged in the Hindu scriptures from the time of (c. 500BCE-200CE). Upon detailed research, we come to know of the homosexual-friendly practices that were not viewed in a disapproving manner, but as proof of the broad-minded and pragmatic thinking of the people. Even so, we cannot rule out the possibility of some opposition to this kind of relationship, but what is more important to note here is that it was not considered criminal during those days. In the holy books of *Puranas*, it is observed that human and divine creatures have the capacity to change their gender according to their needs. Other gods and goddesses were able to manifest both male and female forms and also both of these forms in one individual. One of the prominent avatars of Lord Shiva who had a half male and half female body was *Ardhananswara*.

MARRIAGE LAWS: FROM THE LGBTQ PERSPECTIVE

In India, marriage is considered a holy union between two individuals. For centuries, it has been believed and practised that marriage and creating a family is the ultimate goal of an individual in life. But this 'privilege' is only applicable to heterosexual people, or rather 'normal' people who are attracted to people of the opposite gender.

⁷ Lubna Irfan, 'From Babur to Dara Shukoh: Fluid sexuality was never 'unnatural' during Mughal era' (*DailyO*, 16 September 2018) <<https://www.dailyo.in/arts/section-377-from-babur-to-dara-shukoh-homosexuality-was-never-unnatural-during-mughal-era/story/1/26694.html>> accessed 12 July 2022

⁸ Ruth Vanita, 'Homoeroticism in Hinduism' (*Oxford Bibliographies*, 19 May 2019) <<https://www.oxfordbibliographies.com/view/document/obo-9780195399318/obo-9780195399318-0223.xml>> accessed 12 July 2022

The British colonisation⁹ has left many deep-wounded scars in India, among which is the anti-LGBTQ sentiment among the general public. Until 2018, the world's largest democracy lived with no proper consideration for the LGBTQ community. This was mainly because of deep-rooted fallacious beliefs on the said topic and also improper education about the same. This erroneous belief stemmed from the arbitrary laws framed by the Britishers during their tyrannical rule, which have been passed upon to the people of India for decades. The rule of same-sex relationships was considered a taboo in the late Victorian ages as the Queen was a devout Christian and wanted the soldiers in the Great British Army to not indulge in 'unnecessary distractions' as she regarded the Asian population as 'oriental and exotic creatures.' This is how Section 377 of the Indian Penal Code came into existence. It was drafted by a British historian named Lord Thomas Macaulay.

Secularity is one of the founding pillars of the Indian Constitution. It was added to the Preamble through the 42nd Amendment, 1976. Secularism means the peaceful coexistence of people belonging to many religions in a particular area. Due to the presence of different religions, there are multiple laws that rule them. We are going to touch down on several laws that govern the various types of marriages in India and view them from an LGBTQ point of view.

1. *Hindu Marriage Act, 1955*

The Hindu Marriage Act, 1955¹⁰, governs the marriage of any man and woman who belong to the Hindu, Buddhist, Sikh, or Jain religion. It provides rules for entering into the institution of marriage. This Act does not specifically prohibit same-sex marriage. But it entails a certain age criterion for a man and woman to be eligible to get married; that is, twenty-one years for a male and eighteen years for female. The Hindu Marriage Act calls for a strictly monogamous marriage that is applicable to individuals getting married in their own religion and not to a person who belongs to some different religion.

⁹ Tessa Wong, '377: The British Colonial law that left an anti-LGBTQ legacy in Asia' (*BBC News*, 29 June 2021) <<https://www.bbc.com/news/world-asia-57606847>> accessed 12 July 2022

¹⁰ Amrita Sony, 'Same sex marriages in India under personal laws' (*IPleaders*, 24 April 2021) <https://blog.ipleaders.in/sex-marriages-india-personal-laws/#Under_Hindu_Marriage_Act> accessed 12 July 2022

Features of the Hindu Marriage Act

Except for sections 5(ii) and 7(2)¹¹, which use the terms "bride" and "groom" specifically, the rest of the Act uses neutral terms such as "person" or "party." Thus, these roles can be interpreted according to the wishes of the people and as per their choice. In a Hindu marriage, there is a pious union of spirits and not mere mortal bodies, hence even homosexual partners can enter into this union. It also does not talk about the solemnisation of a marriage that can be mandatorily done between a male and a female only. However, under section 2¹², it enlists the criteria of who has the right to marry under it.

2. Muslim Marriage

In Islam¹³, marriage is formed by the way of contract between the husband and wife. This contract is signed during the religious ceremony called *nikah*. This ceremony allows the husband and wife to form a family by indulging in sexual activities. All the rules and regulations related to the signing of the contract are governed by the Shariat Law, which is the most dominant Islamic law followed in India. Unlike in Hindu law, polygamy is permitted in a Muslim marriage, with the husband having the option of marrying up to four wives. Polygamy as a practice was codified to be illegal in the year 1956 for everyone except for Muslims, who were permitted to follow the practice for religious reasons.

3. Special marriages Act

All marriages in India are solemnised based on the religion to which both the bride and groom belong the Hindu Marriage Act lays down the rules for marriage between individuals belonging to the Hindu, Sikh, Jain, and Buddhist communities, the Muslim Marriages are governed by Muslim Marriages Act. 1957. Apart from that it also deals with dowry, maintenance, guardianship, etc. However, if people belonging to different religions decide to marry each other, the rules for such kind of marriage are governed under the Special

¹¹ Hindu Marriage Act, 1955, ss 5(2) and 7(2)

¹² Hindu Marriage Act, 1955, s 2

¹³ Anushka, 'Things To Know About Muslim Marriage And Laws Related To It' (*Get Legal India*)

<<https://getlegalindia.com/muslim-marriage/>> accessed 12 July 2022

Marriages Act, 1954. It is an Act of the Indian Parliament¹⁴ providing for civil marriage for Indian citizens and all Indian nationals abroad, regardless of religion or belief practised by either party.

ANALYSIS OF LEGAL IMPEDIMENTS TO THE LGBTQ COMMUNITY

The year 2018 became a year of celebration and relief for the LGBTQ community in form of the Navjot Singh Johar vs Union of India case wherein the Supreme Court of India gave its verdict on Section 377 of IPC making it legal to pursue gay relationships in private. Even if the judiciary has recognized and the legality of facts is established, society proves to be a much more difficult opponent to overcome. Marriage between LGBTQ couples is illegal in India. It is almost absolutely impossible to believe that, with a country of 1.3 billion population, there is no proper acknowledgement of the LGBTQ community, much rather acceptance in certain shapes and forms.

With such advancements in science and technology, it is now time for the citizens to take matters into their own hands. We are no longer a country that must rely solely on the government to effect radical social change. Along with the judiciary working for the betterment of people, it is also the duty of the people of the country to not only act for their own benefit but also proceed towards the collective furtherance of their fellow citizens. As a democratic nation, the citizens have several rights which they can use and bring to the attention of the government in power, the various shortcomings of the lesser-privileged section of the society whose basic human rights are ignored due to the presence of pre-conceived notions of some people.

THINGS CITIZENS CAN DO TO BREAK THE TABOO

- The first and most important step that we, as members of society need to take is to stop making fun of any person who seems different from us. This habit can be cultivated through systemic moral education.

¹⁴ Animesh Bharadwaj, 'What is Special Marriage Act?' (*India Today*, 6 March 2021) <<https://www.indiatoday.in/information/story/what-is-special-marriage-act-all-you-need-to-know-1776395-2021-03-06>> accessed 12 July 2022

- We can run educate our present and budding future generations by making them aware of the LGBTQ community which involves teaching them about their traits and even if they are not what society calls 'normal', they are humans, just like the rest of the population.
- We can spread awareness in society by organizing campaigns in busy public places that ensure maximum outreach. Also, social media is a very powerful tool that can utilised to further these efforts.
- Including texts about the various factions of the society in the educational curriculum in the schools might also provide a major boost.

At the end of the day, it all depends on one thing only that is the narrative! Spreading credible information through various sources does not suffice unless we also control the narrative. Monitoring and directing of correct narrative help in fighting any misinformation that is being spread in society which has given birth to this taboo-like behaviour towards the LGBTQ community in the first place.

ADOPTION LAWS: SKEWED AND OUTDATED

If we ask any Indian about the most important aspect of their life, there is a maximum probability of their answer containing something about their family. It is a very natural phenomenon and it is not only limited to Indians. The Indian culture pays a lot of respect and importance, spends time cultivating good family relations, and lastly takes good care of their children and provides for a correct environment for their upbringing. The motive for adoption may be of various kinds. It may have the aim¹⁵ of prolonging the family legacy when no biological children are present, it may include the humanitarian instinct of providing an orphan child with a family full of affection and care, the desire of parents to have a care-taker in their old age or an heir to their assets.

Adoption has been prevalent in society for a long time. Its purpose and motive have always remained the same. However, since the time of its inclusion in the legal system, there has been

¹⁵ Almas Shaikh, 'Legal Framework Governing Adoption Laws in India' (*Academike*, 4 February (2015) <<https://www.lawctopus.com/academike/legal-framework-governing-adoption-laws-india/>> accessed 12 July 2022

a lack of uniformity in its mechanism and usage. It is governed on the basis of personal laws of different religions found in India.

LAWS DETERMINING ADOPTION IN INDIA

1. The Hindu Adoptions and Maintenance Act, 1956

The old Hindu law had its roots deeply set in discrimination and patriarchal traditions such as only a son can be adopted into a family. He should be of the same caste as that of the adopting family. The consent of only the male head of the family was taken into consideration, whereas the mother, who was tasked with the proper upbringing of the child was ignored. Case –*Malti Roy Choudhury v Sudhindranath Majumdar*¹⁶. However, with time, these arbitrary laws have also evolved into a more liberal form. This law is applicable to Hindus, Jains, Buddhists, and Sikhs. It also illustrates who is eligible for adopting a child, be it a Hindu male, female, married couple, or widowed person.

2. Guardians and Wards Act, 1890

It legalises the adoption by people belonging to Islam, Jews, Christians, and Parsis as their religious texts had no mention of the rules of adoption, so this Act became applicable universally throughout India and any individual belonging to the above-mentioned religion needs to follow the guidelines stated in the Guardians and Wards Act to proceed in the line of adoption.

NEED FOR UNIFORM CODE

Article 14 of the Indian Constitution speaks about the Right to Equality. This right ensures all citizens have equal status before the law and no discrimination will be made on any basis. However, the lack of a uniform code in issues like adoption creates a discrepancy between the law enshrined in the Constitution and the legislations and judgements given by the government and courts. One significant flaw is that a married Hindu female has no right to adopt a child, even with her husband's prior consent. Only the husband has the right to adopt a child, with or without the consent of his wife. Thus, the law views women as an inferior part

¹⁶ *Malti Roy Choudhury v Sudhindranath Majumdar* (2006) CALLT 323 HC

of society which is in direct conflict with what Article 14 says. If Uniform Code¹⁷ is brought into action, then all sections of society, including the people belonging to the LGBTQ community will come under its purview, hence some of their rights will be restored.

CONCLUSION

The majority of family law legislation and rights in India, including those concerning adoption, surrogacy, succession, guardianship, and other issues, are in some way connected to marriage. ¹⁸Additionally, as the LGBTQ+ population has not yet been granted the right to marry, access to all of this other legislation is also restricted. In 2015, the Union Minister for Women and Child Development relaxed the norms related to adoption. As a result, many adoption centers stopped taking applications from single males and females because they feared what would happen if the person turned out to be gay or lesbian. This deep-rooted fear stems from the government's inability to take stringent actions and make LGBTQ marriage legal. I believe that marriage should no longer be a heterosexual privilege and that legalising it in India would not only provide for their basic rights but would also help to lift the stigma that exists in society.

The Supreme Court or the government does not have the right to decide who gets to be a parent and who does not. The right to parenthood is a universal right unless there are exceptions. There are still thousands of children, in need of a home. Who are we to follow if they don't discriminate on the type of parent they want? All that these children require for proper upbringing is love and affection, so how does it matter if the parents are a little different from 'conventional' families? Instead of debating whether or not the LGBTQ community should be granted equal rights and respect, the discussion should centre on how society's mentality and those in positions of authority prevent them from helping those who are most in need. Every relationship has its own beauty, so rather than being an obstacle, let us help it blossom into something even more incredible.

¹⁷ Almas Shaikh (n 15)

¹⁸ Tarini Mehta, 'Where are India's queer parents? Having a family is not even an option for many Indians' (*The Print*, 21 Febraury2021) <<https://theprint.in/opinion/where-are-indias-queer-parents/608267/>> accessed 12 July 2022