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Decriminalization of Section 377 and Its Aftermath

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Equality is more than just amending laws, it is about acceptance and normalizing. After the landmark judgement of Navtej Singh Johar, decriminalized homosexuality, hope for the community's upliftment was shown to them. However, merely decriminalizing something that shouldn't even have been considered a crime in the first place is not victory. It is crucial to give these basic fundamental rights to lift the community and treat homosexual couples the same way heterosexual couples are treated. For all this to happen, there must be amendments made to the law and new laws to be implemented for equality in marriage and adoption. One's sexual orientation or choice of life partner should not be a barrier to adopting a child or having marital rights. There has long been discrimination in society when it comes to homosexuals, with changing times, it's important that society changes and moves past the old, discriminatory cultures and learns the art of acceptance.

Keywords: *equality, same-sex couples, homosexuality, marriage, adoption.*

INTRODUCTION

India follows a democratic constitution follows the concept of the Rule of Law. It stands for a non-arbitrary form of government that supports and practices the norm of equality of all citizens before the law. The Fundamental Rights, that are guaranteed to all citizens of India, in Article

14¹, Article 15², Article 19³, and Article 21⁴ state that no citizen shall be discriminated against based on “religion, race, caste, gender, or place of birth” and shall have freedom of speech and expression and Equal Rights. For social, political, and religious reasons, there has been both strong acceptance and opposition to same-sex marriage. Some jurisdictions recognize same-sex civil unions or permit full-fledged marriage between same-sex couples. Other jurisdictions prescribe punishments for homosexual relationships.⁵

Article 14 of the Indian Constitution⁶, states that “All citizens irrespective of birth, religion, sex, or race are equal before the law.” While it permits the division of persons into various categories, it also requires that this separation be based on intelligible differentia⁷, along with a rational nexus and the object that need to be achieved. LGBTQ+ is an abbreviation that is used to describe an individual’s sexual orientation or gender identity. It stands for: L - Lesbian, G- Gay, B- Bisexual, T- Transgender, and Q- Queer.

The US Supreme Court ruled that same-sex couples had the right to get married on June 26, 2015, making same-sex marriage legal in the US.⁸ India decriminalized homosexuality in 2018; however, there were no provisions were made regarding same-sex marriage or adoption. After the ruling, the UN in India made a statement stating that “the court's ruling will be the first step towards guaranteeing the full range of fundamental rights to LGBTI persons. We also hope that the judgment will boost efforts to eliminate stigma and discrimination against LGBTI persons in all areas of social, economic, cultural, and political activity, thereby ensuring a truly inclusive society”.⁹

¹ Constitution of India 1950, art 14

² Constitution of India 1950, art 15

³ Constitution of India 1950, art 19

⁴ Constitution of India 1950, art 21

⁵ ‘Recognition of Foreign Same-Sex Marriage in India: A Legal Exploratory Analysis’ (2017) 59 JILI 302

⁶ Constitution of India 1950, art 14

⁷ *State of West Bengal v Anwar Ali Sarkar* AIR (1952) SC 75

⁸ *Obergefell v Hodges* 135 S Ct 2584 (2015)

⁹ ‘Hope SC verdict on Section 377 is first step towards full range of fundamental rights for LGBT: UN’ (*Hindustan Times*, 2018) <<https://www.hindustantimes.com/india-news/hope-sc-verdict-on-section-377-is-first-step-towards-full-range-of-fundamental-rights-for-lgbt-un/story-QBtgdFPTISiAWW8PCrjGbp.html>> accessed 10 November 2022

Decriminalizing consensual sexual actions must be the initial goal. However, this will not by itself put an end to the discrimination experienced by those who have committed, long-term relationships with people of the same sex. “It would require legal recognition of long-term same-sex unions, on par with heterosexual marriages.”¹⁰ This paper talks about how not legalizing same-sex marriage is a violation of the fundamental rights of the LGBTQ+ Community. It suggests possible amendments in laws to protect these rights and also the adoption rights of the community.

RESEARCH QUESTIONS

In the course of this research, the following questions will be addressed –

- Should the people belonging to the LGBTQ+ Community be allowed to marry in India?
- Under which act should the marriage of an LGBTQ+ couple be governed?
- Should people belonging to the LGBTQ+ Community be allowed to adopt a child in India?

HISTORY OF SECTION 377

The right to equality is based on equal rights for everyone, irrespective of sex, caste, and religion. Nobody has the right to question people's sexual orientation based on societal standards. India follows a democratic constitution that is based on the concept of the Rule of Law. It stands for a non-arbitrary form of government that supports and practices the norm of equality of all citizens before the law.

Section 377 was introduced in India for the first time during British Rule in the year 1861. The theory for this was based on the “Buggery Act of 1533”. It was for an unnatural act of sex against the “principle of nature and God”¹¹ Section 377¹² criminalizes carnal intercourse against nature

¹⁰ ‘Legal Recognition of Same-Sex Relationships in India’ (2013-14) 5(1) JILS 95

¹¹ Buggery Act 1533, s 8(6)

¹² Indian Penal Code 1860, s 377

with a man, woman, or animal. LGBTQ+ is an abbreviation that is used to describe an individual's sexual orientation or gender identity.

The evolution of decriminalizing section 377 lets the LGBTQ community continue to live on their terms. Though their voices have been raised to see them as normal individuals in this world, it was not successful before, but a few landmark judgements made a dream come true. The *Naz Foundation v Government Of Nct Of Delhi*¹³, case Nas foundation, which is a Ngo that deals with HIV Aids and other health issues held a deep analysis of the Application of sexual orientation in the definitions of articles 14¹⁴ and 15¹⁵ of the Indian constitution. It also held that section 377 violates article 14¹⁶'s unreasonable discrimination of relating homosexuals as a class. Article 15¹⁷ also raised against 377 because it was observed that homosexuals cannot be discriminated against based on sex and marked that sex determined by biological tests has less weightage than sex determined by psychological tests in concluding the sex of any individual. They also empathized with the importance of the inclusion of article 21¹⁸ (right to life), where an individual has an absolute right to live with dignity and privacy. The High Court held it unconstitutional, but the amendment part was left to the parliament, which did not move further.

Next, in the case of *Suresh Kumar Koushal v Naz Foundation*¹⁹, which overturned the views of before the case, the first argument was that parliament decriminalized the offence of homosexuality. Second, the right to privacy does not mean an extent up to that of committing an offence. This case has raised a flag about homosexuals coming out after the Naz foundation judgement, but this judgement made them criminals before society.

In the further landmark case, *Nalsa v Union of India*²⁰ articles 14-21 were explained on the widened scope. Under article 14, all the rights can be enjoyed by any person, inclusion of

¹³ *Naz Foundation v Govt (NCT of Delhi)* (2016) 15 SCC 619

¹⁴ Constitution of India 1950, art 14

¹⁵ Constitution of India 1950, art 15

¹⁶ Constitution of India 1950, art 16

¹⁷ Constitution of India 1950, art 15

¹⁸ Constitution of India 1950, art 21

¹⁹ *Suresh Kumar Koushal v Naz Foundation* Civil Appeal No 10972/2013

²⁰ *NALSA v Union of India* Writ Petition (Civil) No 604/2013

women, men, and transgender persons. Articles 15²¹ and 16²² under the constitution defined the same as the NAZ Foundation case that there should be no discrimination on the ground of the sexual orientation of a person. Article 19²³, included in the judgement, argues that three important ingredients, privacy, gender intensity, and integrity for the LGBTQ community, are protected under article 19(1)(a)²⁴. This case judgement added the new addition to the right to life article 21²⁵ that the right to choose a gender identity is absolute. Through its judgement on gender identity and self-identity, the supreme court has gained legal recognition, which empowered the committee.

The next defining judgment is Justice *K.S.Puttaswamy(Retd) v Union Of India*²⁶; privacy gives the person the power to establish and manage the human aspect, which is always linked to their individuality. The capacity to make decisions on issues affecting human life manifests the human personality's inviolable essence. The individual's autonomy is related to topics that can be kept private.

In the case of *Navtej Singh Johar v Union*²⁷ of India five-judge bench gave a judgement on 6th September 2018, which is widely celebrated. The judgement is a legal argument that criminalizes consensual sex between two individuals. Only because they are homosexuals does not qualify under intelligible differentia or does not stand any rational nexus under article 14²⁸. Traditional norms based on morality and ambiguity, which are based on subjective tests, need to be given away. The Supreme Court held that the right to life and liberty includes the right to privacy, dignity and autonomy. However, these can be restricted and be curtailed to a limit, but, no-one imposing section 377 cannot curtail anyone enjoying those rights.

²¹ Constitution of India 1950, art 15

²² Constitution of India 1950, art 21

²³ Constitution of India 1950, art 19

²⁴ Constitution of India 1950, art 19(1)(a)

²⁵ Constitution of India 1950, art 21

²⁶ *KS Puttaswamy v Union of India* (2018) 1 SCC 809

²⁷ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

²⁸ Constitution of India 1950, art 14

I. MARRIAGE

Marriage is a social contract that binds two people's lives together socially, legally, and emotionally. It is a formal union. Article 16 of the Universal Declaration of Human Rights²⁹ states that – “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”. Two consensual adults competent to contract³⁰regardless of their gender or sexuality should be allowed to marry. Restricting them to choose their life partner on such a basis is a violation of their fundamental right. Everyone should have the right to choose a partner of their choice³¹. The Supreme Court stated in *Shafin Jahan v Ashokan K.M*³² that “The right to marry a person of one's choice is integral to Article 21³³ (right to life and liberty) of the Constitution and the choice of a partner whether within or outside marriage lies within the exclusive domain of each individual”

Indian Constitution in Article 21 provides all Indian Citizens with the fundamental right of - Protection of life and personal liberty. According to this – “No person shall be deprived of his life or personal liberty except according to procedure established by law” This helps the state protect the citizen’s liberty and autonomy and This freedom cannot be restricted unless it is done so by a law that is substantively and procedurally just, reasonable, and fair. As stated by Justice Chandrachud – “all members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution and are entitled to equal citizenship and equal protection of the law.”³⁴

Choosing a life partner should be one’s a personal choice and right. Society or Law has no role to play in determining whom the right match for an individual is or putting a restriction on them based on their partner’s gender. Right privacy also includes the privacy of choice, which includes the protection of an individual’s autonomy over fundamental personal choices.

²⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

³⁰ Indian Contract Act 1872, s 11

³¹ *Singh v State of UP & Anr* AIR 2006 SC 2522

³² *Shafin Jahan v Asokan KM* (2018) 16 SCC 368

³³ Constitution of India 1950, art 21

³⁴ *Navtej Singh Johar* (n 18)

³⁵Marriage is not just a contract or sacrament; it involves two individuals being emotionally invested in one another, it is various “stages of human development and aspiration which give meaning to their personal lives”³⁶. It is understood by the judgements that the right to marry is a fundamental right. Then why is there a restriction put in a marriage for a same-sex couple? Shouldn’t the fundamental rights of a citizen be the same for all? How is a restriction based on an individual’s gender or sexuality just and reasonable?

Some believe that marriage serves the social purposes of stability, financial security, physical and mental support, sex intimacy, and love, as well as facilitating reproduction and childrearing. None of these goals, except procreation, are based on the gender of the persons involved so much as on the bond they share and their capacity to maintain the relationship. Additionally, heterosexual couples would need to demonstrate their fertility and make a commitment to procreate before being permitted to register their marriage if having children were that important to marriage. The Court explicitly recognised the rights of the LGBTQ+ community to “express their individuality, sexual identity, and love on par with heterosexuals as fundamental under Articles 14³⁷ (right to equality), 19³⁸ (right to freedom), and 21³⁹ (right to life) of the Constitution” in *Navtej Johar*⁴⁰, holding Section 377 of the IPC to be unconstitutional.

Given that marriage entails several legal rights and safeguards, available both during the marriage and after its dissolution by divorce (the ability to seek maintenance) or death((the right to inherit property), failing to recognise same-sex marriage would result in them also enduring tangible damages. Recently, a petition has been filed in the Kerala High Court by, a married gay

³⁵ *KS Puttaswamy* (n 17)

³⁶ ‘A Marriage Story for Everyone’ (*The Hindu*, 13 February 2020) <www.thehindu.com/opinion/op-ed/a-marriage-story-for-everyone/article30812518.ece> accessed 01 January 2023

³⁷ Constitution of India 1950, art 14

³⁸ Constitution of India 1950, art 19

³⁹ Constitution of India 1950, art 21

⁴⁰ *Navtej Singh Johar* (n 18)

couple from Thrissur, challenging the provisions of the Special Marriage Act, 1954 [Act of 1954] to get permission to register their marriage.⁴¹

II. MARRIAGE ACT

Legalizing homosexual unions is frequently mistaken and done so on the grounds of tradition, culture, and religion. The Supreme Court has eliminated the barrier to same-sex marriage's legalisation, thus it is next up to the government to do so to fulfill its obligation to protect everyone's fundamental rights and freedoms. This very same equality as a heterosexual marriage cannot be achieved by simply decriminalising consenting sexual activity between people of the same gender.⁴²

Justice Kennedy Of the United States Supreme Court in the case of *Obergefell v Hodges* observed that “though Lawrence invalidated laws that made same-sex intimacy a criminal act it has only confirmed a dimension of freedom and does not achieve the full promise of liberty and the full promise will only be achieved by legalizing their union as that of heterosexual unions. It can only be ensured when the homosexual couples will be provided equal rights as that of heterosexual couples”⁴³ The question now is – If same-sex marriages were to be legalized in India, under which law would they be governed? There are various ways to answer this question-

- Recognition by introducing amendments to personal laws; or
- Recognition of same-sex unions as ‘civil unions’; or
- By amending Special Marriage Act; or

Marriage in India is governed by personal laws, which are closely linked to the people's religious beliefs. As a result, any change to these rules may be seen by some religious communities as an attack on their values. Bringing statutory amendments to personal laws is the most satisfactory

⁴¹ Nishant Sirohi & Ors, ‘LGBTQ+: Petition for Marriage Equality Filed in Kerala High Court’ (*The Leaflet*, 29 January 2020) <<https://theleaflet.in/lgbtq-petition-for-marriage-equality-filed-in-kerala-high-court-2/>> accessed 01 January 2023

⁴² ‘Legal Recognition of Same-Sex Marriage Rights in India’ (2020) 9 CNLU LJ 158

⁴³ *Obergefell* (n 4)

solution for recognising such marriages but at the same time the most difficult to achieve in practice. Such a move would undoubtedly draw harsh criticism and a negative response from the public because it would be seen as interfering with religious practices and traditions. Therefore, it is not practical to seek changes to personal laws to recognise such marriages because doing so would be met with fierce opposition from the majority culture, who would perceive it as an outrageous intrusion into their faith.

Recognition of same-sex unions as “civil unions” has been adopted by countries around the world. It gives the status of “separate but equal” Considering the traditional opposition to same-sex marriage in Indian society; this alternative seems like the best option. Such unions were formerly permitted in the USA as civil unions or domestic partnerships but not as marriage. However, it should be noted that now many countries that followed civil unions have now legally recognized same-sex marriages. “This status of ‘separate but equal’ gives them the benefit of marriage, however, violates the right of equal protection guaranteed by Article 14 of the Constitution. ‘Separate but equal’ institutions brand a particular class with the badge of inferiority and that they are inherently unequal”⁴⁴. Additionally, merely recognising their unions as civil unions would not grant them the same standing as heterosexual couples, depriving them and their children of the constitutionally significant right to state recognition. The Connecticut Supreme Court rejected the “separate but equal” alternative to marriage in *Kerrigan v Commr. of Public Health*, asserting that denying same-sex couples the right to marry perpetuates their status as second-class citizens and is therefore unconstitutional. Therefore, it appears that the Special Marriage Act of 1954⁴⁵ either be amended or read down by the courts or new legislation guaranteeing the civil rights of homosexual couples should be created.

III. ADOPTION

Marriage is a sacred ceremony believed by the people; it involves emotion, culture, and societal norms. So when two people come together, it is important that each other respect and constitute a family by making it completely raising the children. Legalizing same-sex marriage would be

⁴⁴ *Brown v Board of Education of Topeka* (1954) SCC OnLine US SC 44

⁴⁵ Special Marriage Act 1954

the first step toward securing adoption rights for same-sex couples in a country like India, which is rich in traditions and culture. But in India, marriage is mostly seen as a holy ritual guided by local laws and traditions. Therefore, there needs to be a perspective shift for Indian society to embrace same-sex relationships and marriage. The only choice left to them at that point is to adopt under one of their partners' names. According to India's Adoption Regulations, 2017⁴⁶, which were made public on the website of the Central Adoption Resource Authority (CARA), single women and couples who have been married for at least two years are both eligible to adopt children of any gender. However, single men are only permitted to adopt children who are male. Live-in partnerships, same-sex relationships, and transgender people are not mentioned, almost as if they do not exist. The same could make custody and maintenance-related issues even more complicated. There is no proof that same-sex couples are at all way less capable of raising children than heterosexual ones. Contrarily, new data suggests that children fostered by same-sex couples are likely to be more successful academically than children nurtured by heterosexual couples. Additionally, Justice Bhagwati stated in *National Textile Workers' Union v P.R. Ramakrishnan*⁴⁷ that the law cannot stand still. It must adapt to the shifting social ideals and notions.

"The United Nations' Universal Declaration of Human Rights states, Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."⁴⁸

The mindset that homosexual couples can't raise children is offensive to people who are single parents. A child has the absolute right to be brought up in a family where they are treated with love and where these couples make the best out of their job as parents. The juvenile justice (care and protection) act 2000⁴⁹ mentioned the elements to fulfill while adopting a child. That the parents should be physically fine, financially sound, and should be mentally alert, and eligible to and encouraged to take a child, and that it must be the sole concern.

⁴⁶ India Adoption Regulation Act 2017

⁴⁷ *Naz Foundation* (n 9)

⁴⁸ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948

⁴⁹ Juvenile Justice (Care and Protection of Children) Act 2000

According to the pew research centre, about 30 countries of the world have passed laws granting same-sex marriages in North America, Europe, and others. As more same-sex couples marry and have children together, they are already beginning to share ideas on the desire for and purpose of marriage. Same-sex couples are just as capable of raising children as their heterosexual counterparts, despite the difficult circumstances of societal and legal inequity between the two types of relationships. So the approach and aftermath should consider their right to marriage and that is taken into consideration their rights for family and adoption will make a path in legally including laws for adoption in same-sex couples.

CONCLUSION

LGBTQ+ Community has come a long way globally fighting for equal treatment and equal rights. In India, with the landmark judgement of 2018 related to decriminalizing homosexuality, there can be hope seen for the Indian community members. Society needs to understand that love is love regardless of one's gender or sexuality and it shouldn't hinder their freedom to live life to the fullest with dignity. Marriage is a crucial part of life and one should be allowed to choose their life partner. The legislation or the society interfering in one's choice of living is a violation of their fundamental right. Hence, the marriage of same-sex couples should be added to the Special Marriage Act, where provisions are made for inter-religion heterosexual couples. Everyone has inner peace in starting a family and for the ones who are not physically capable of starting a family, there shouldn't be a restriction on adopting a child. Laws need to be amended to include the adoption rights of same-sex couples the same as the adoption rights of different-sex couples. All this is required to overthrow the social stigma and the hetero-normative culture that forces other beings to live life a certain way.