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Surrogacy Rights of LGBTQ

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India is a fast-developing country and with its development, it has started recognising various rights and duties of individuals along with the rights of the LGBTQ community. The LGBTQ community is something that can be referred to as somebody who is not heterosexual. The LGBTQ stands for lesbian, gay, bisexual, or transgender, and the alphabet Q stands for the queer community who are still trying to figure out their sexuality or are still in question. The idea of this is to not restrict the sexuality of an individual to just male and female but to give it new dimensions so that the people who are still questioning or you feel differently which is not as per the laws of nature, are given more freedom and more individuality to express themselves. The rights of the LGBTQ community are a need because since olden times if we look into the societal structure, it was treated as a crime or a mental illness.¹ In many religious texts, it has been coronated as an offence and a sin. Even section 377 of the Indian Penal Code defines unnatural offences as punishable. People all across the world are judged on how they look or for who they love.² They need to deal with the openness of the sexuality variations so as to make the world a better place to live in, for all kinds of people.³ These people of the LGBTQ community are usually denied their rights and are not equally treated until and unless they accept the natural laws of sexuality. This forcing upon them makes the living conditions very hard and they cannot express themselves freely which is a violation of one of the fundamental rights that are guaranteed to all individuals.⁴ The researcher of this paper aims to discuss the rights of the LGBTQ community with special regard to the surrogacy rights of lesbian and gay couples.

¹ Amber Tanweer, 'LGBT Rights in India' (2018) 2(1) IJLMH

² *Ibid*

³ *Ibid*

⁴ *Ibid*

Keywords: *lgbtq, surrogacy rights, unnatural offences, punishable, section 377.*

INTRODUCTION

The word homosexual can be defined as of the same sex. It's a Greek root word where the prefix "homo" means 'same'. It is the sexual orientation of a person where the person gets attracted in a love interest way to another of the same sex as the former. The males associated with homosexuality are called gay and females associated with the same are called lesbians. Hence, when a male couple gets married, it is referred to as gay marriage. The Indian Penal Code contains a unified definition of homosexual activity in the form of unnatural offences, as well as its nature and penalty. Although sexual minorities have always existed in India, in various forms. The difficulties were still present in society during the 19th century and LGBT minorities' rights to human rights were violated. Various civil society organisations in India have raised these significant problems. In India, the address of all these things was done in the late 1980s when the first gay magazine called the "Bombay dost"⁵ was launched and the starting of a lesbian collective called "The Sakhi"⁶ in Delhi started where the problems of lesbians, gay and bisexual was for the first time brought into the articulation of the people.

As this paper is in specific deals with the rights of the LGBT community specially surrogacy the researcher here highlights the need to understand what is the concept of the LGBTQ community. The first and primary concept revolves around the sexual orientation of people. Sexual orientation can be usually defined as patterns of romantic and emotional attraction that extend up to sexual attraction in or among people of the same or different sex. A person when attracted to a person of the opposite sex, is called a Heterosexual orientation while a person when attracted toward a person of the same sex, is called a homosexual orientation.

⁵ *Ibid*

⁶ *Ibid*

LITERATURE REVIEW

In “LGBT Rights in India”⁷ by Amber Tanweer, here, the researcher attempted to explore the idea, nature, and discrimination based on sex in society, which leads to violations of their rights, including fundamental and human rights. The researcher also attempted to focus on the legal definition and its breadth, as well as the gaps, concerns, and obstacles that LGBT minorities in India face. The full atmosphere and scope of this community's circumstances and tribulations. The way it has progressed and been dealt with. The researcher of this particular paper has also discussed the constitutional protection that is provided to the LGBT minority community in India apart from their issues and challenges in society and also the consequences of the discrimination that takes place.

“The reversal on Gay Rights in India”⁸ by T. S. Satyanarayana Rao and K. S. Jacob talks about By upholding a law barring gay intercourse, India's Supreme Court has decided against human rights. The Court restored Section 377 of the Indian Penal Code,⁹ a 19th-century regulation barring "carnal intercourse against the order of nature." The ruling has infuriated liberals and progressives, as well as activists and advocacy groups that use the legal system to address issues affecting India's minorities of all colours. It's also been reprimanded in terms of law and human rights.¹⁰

“Humjinsi” a resource book on lesbian gay and bisexual rights in India by Bina Fernandes. This book talks about the various rights of gays and bisexuals regarding marriage and domestic partnership. It also highlights the anti-discrimination policies against gay and lesbian couples extended up to transgenders. This book also highlights the confluence of the efforts of various organisations such as non-governmental organisations and various groups of peoples and individual that focuses on the different aspects of the rights of lesbian, gays, and bisexual.

⁷ *Ibid*

⁸ T S Satyanarayana Rao, K S Jacob “The reversal on Gay Rights in India” Indian Journal of Psychiatry 56(1), Jan-Mar 2014

⁹ Indian Penal Code 1860, s 377

¹⁰ *Ibid*

“BEING LGBT IN INDIA: SOME HOME TRUTHS.”¹¹ By Janees Rafiq. This research article primarily dealt with the case for the conception of LGBT and their terminologies along with the legal provisions associated with it and the rights imparted to them. Apart from that the constitutional protection of the minority, LGBT in the republic of India has been analysed along with the problems and challenges within the society and how to deal with them.¹²

Law Commission of India, 2000¹³. The members of the law commission's 172nd report suggested that Section 377 of the Indian Penal Code be repealed, arguing that it is injurious to public health owing to its direct impact on homosexuals' lives. They also stated that prohibiting such relationships leads to homophobia among LGBT people, which leads to the unlawful practice of same-sex behaviours in private.¹⁴

ANALYSIS

Section 377 of the IPC has an ambiguous scope. The extent of unnatural offences under section 377 of the IPC is confusing since there is no clear distinction between consensual and coerced sex, against the order of nature, and so on. Discrimination based on gender Discrimination based on sex is prohibited by the Indian Constitution's fundamental right. Workplace discrimination against LGBT people in the workplace is a key influence on LGBT people's socioeconomic situation. Discrimination in the workplace is a major source of financial inequity for gay and transgender people. Discrimination has a direct impact on their career, stability, and economic well-being, resulting in unemployment and poverty. In a research paper published in the international journal of an applied research drug addict, a person from the LGBT community becomes a drug addict and turned towards alcohol and drug abuse popularly known as substance abuse and this is caused due to loneliness.

¹¹ Janees Rafiq, 'Being LGBT In India: Some Home Truths' (2020) 11(5) International Journal of Scientific & Engineering Research

¹² *Ibid*

¹³ Law Commission of India, '172nd Report on Rape Laws' (LCI, 2000) <www.lawcommissionofindia.nic.in> accessed 11 March 2020

¹⁴ *Ibid*

LEGAL PROVISIONS

Section 377 states: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."¹⁵ There are several legal provisions and constitutional protection for the LGBT community in India. These are majorly related to equality, non-discrimination, and minority protection.

The right to privacy is included under the right to life and personal liberty in article 21 of the Indian Constitution.¹⁶ The constitution does provide the LGBT minority community with the right to privacy and states that their privacy rights must not be abridged in any sense and should be provided under full protection. Further, the right to equality¹⁷ is provided to the community by ensuring equal protection of the law and equality before the law¹⁸ inside and within the territory of India guaranteed under article 14.¹⁹ Further based discrimination and to stop discriminatory measures the community is given protection under article 15 of the Indian Constitution which provides them protection from discrimination based on caste race sex place of birth and religion.²⁰

Section 377 of the Indian Penal Code, which was adopted by British people during their reign in India in 1860, made having sexual intercourse "against the order of nature" with any man, woman, or animal a crime punishable by up to ten years in jail or a fine.²¹ In that, it criminalises a couple of sexual activities and their identities, the clause appears to be neutral. It has, however, never been used against consensual heterosexuals and has only been used against homosexuals. The law's first flaw is that it excludes age and consent from its scope. As a result, it makes adult same-sex actions that are consenting illegal.²²

¹⁵ Indian Penal Code, s 377

¹⁶ Constitution of India 1950, art 21

¹⁷ Constitution of India 1950, art 14

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ Constitution of India 1950, art 15

²¹ Indian Penal Code 1860, s 377

²² Janees Rafiq (n 11)

SURROGACY RIGHTS OF LGBTQ

Several acts can be made possible to protect the surrogacy rights of the LGBTQ. However, the right needs to be protected by the Indian government and much more years are needed for society to completely accept the rights of this minority community. The Assisted Reproductive Technology (Regulation) Bill, 2008²³: The Assisted Reproductive Technology (Regulation) Bill, 2008²⁴ was passed by the Indian Council of Medical Research (ICMR), and it is expected to become legislation in the parliament. However, the law has certain ambiguous terminology that requires more explanation and clarification. The Bill's enabling clause, Section 32(1),²⁵ states: Assisted Reproductive Technology (ART) must be available to all. This term is broad in scope and applies to all types of relationships, whether homosexual or not. Furthermore, the term does not prohibit a country's inhabitants from having a surrogate kid.

This leaves us befuddled, as Section 32(1) is not restricted, but rather expanded to cover "single people," "married couples," and "unmarried couples."²⁶ The courts should be able to fill in the gaps using the non-exhaustive terminology employed here. Because a gay relationship or marriage is illegal in India, the ICMR's bill appears to be discriminatory towards Indian homosexuals.²⁷ Homosexuals from countries where homosexual marriages are permitted, on the other hand, are free to travel to India and obtain a surrogate kid.²⁸ Furthermore, the discriminatory part as highlighted by the researcher of this paper is that an Indian gay couple would not be able to have a surrogate child and can only claim to have it under the name of an Indian gay person by mentioning the fact that he is a single person and would be a single parent in the case of the infant, but would be denied if he is a homosexual. As a result, a gay person's marital status has no bearing on having a surrogate kid.

The certificate of birth issued at the time of the birth of the surrogate child needs to carry the names of the genetic parents along with the parents under whom the custody will be issued.

²³ Assisted Reproductive Technology (Regulation) Bill 2008

²⁴ *Ibid*

²⁵ Assisted Reproductive Technology (Regulation) Bill 2008, s 32(1)

²⁶ *Ibid*

²⁷ Assisted Reproductive Technology (Regulation) Bill 2008

²⁸ *Ibid*

According to Section 34 (10) of the Bill.²⁹ This means that the child born would belong to them who contributes to the child's genetic make-up excluding anonymous donors.³⁰ Only one of the two members in a gay partnership can make such a gift, as stated in the Bill.³¹ It is stated in the bill that a donor would relinquish, all the possible parental rights over the child in question conceived from the gamete donated.³² As a result, the surrogate infant would solely wear the name of the gay couple's contributing partner for this reason.³³ But now the question arises is that whether the marital status of the homosexual Indian couple has an impact on having a surrogate child.³⁴ The answer to this is no and proves a point for discrimination against these homosexual couples as per ICMR.

CONCLUSION AND RECOMMENDATIONS

The researcher of this paper concludes that the rights of the LGBTQ community people should be given utmost protection because they are a minority and there is a lot of discrimination that happens to them. Apart from that, the main focus of this paper was surrogacy rights which need to find even more space in Indian society, because till now the marriage of a homosexual couple is still a distant dream in Indian society. The surrogacy rights of these people need to be brought into the context of the Indian scenario and the laws made regarding it. The primary fact that the researcher has found out is that the community majorly needs its rights which are the two basic rights of equality and non-discrimination recognised and undivided. Because they also form a significant part of Indian society and if given chance can contribute significantly to the country's growth.

²⁹ Assisted Reproductive Technology (Regulation) Bill 2008, s 34(10)

³⁰ *Ibid*

³¹ Assisted Reproductive Technology (Regulation) Bill 2008

³² *Ibid*

³³ *Ibid*

³⁴ *Ibid*