



## Applicability of law to LGBT community: shortfalls and challenges

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### Abstract

The Researcher believes that one of the most contemporary issues of morality arises in cases of homosexuality. It's a big question of debate, that whether The Indian Penal Code can justifiably be employed to protect the people from harming their own moral character. The issue of sodomy confronted judges with the question whether laws upholding sexual morality yield with the demand of sexual freedom in the personal life of LGBT Community? Section 377 - of the Indian Penal Code refers to 'Unnatural offences – 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 10 years and shall also be liable to fine'. Recently in the case of Navtej Singh Johar V. Union of India, the Supreme Court said that Section 377 of the Indian Penal Code was unconstitutional so far as it criminalises consensual sexual conduct between adults of the same sex. It is one of the landmark judgements in the Indian history which won the hearts of LGBT Community while allowing them to perform a symbolic same-sex marriage, yet same-sex couples are not recognised currently in any form though the researcher feels that still there is a loophole in the decision. Though the LGBT Community is yet not recognised in any Indian Law like Hindu Marriage Act 1955, Hindu Adoption & Maintenance Act 1956 or any other Family Laws they seek for their rights like Adoption, Maintenance, Divorce, etc...suppose if they want divorce which law will be applied. What if they get divorced and afterwards have to pay the maintenance, then if they are a same-sex couples who will pay to whom? Can they go for an Adoption? There are many rights which flow out of a legitimate wedding. This paper attempts to analyse the applicability of family laws in same sex marriages.

**Keywords:** homosexuality, LGBT rights, sodomy, section 377 of IPC

### Introduction

Through this study the researcher tries to analyse the situation of LGBT Community under various laws enforced in India As being the citizen of India do they have the rights or can they possess the rights which are there available and enjoyed by a common man or a woman after initiating a family. The laws which are presently accessible by a common man or a woman are they equally available for the LGBT Community? Are the rights which are present mitigating their needs and requirements of LGBT Community? Do the rights which are available to them giving justice to the LGBT Community or they are discriminated?

The great German thinker, Johann Wolfgang von Goethe, had said, "I am what I am, so take me as I am" and similarly, Arthur Schopenhauer had pronounced, "No one can escape from their individuality" But society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency of personal impulses and preferences. Shakespeare through one of his characters in a play says "What's in a name? That which we call a rose by any other name would smell as sweet". The said phrase, in its basic sense, conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called. Getting further deeper into the meaning, it is understood that the name may be a convenient concept for identification but the essence behind the same is the core of identity. The natural identity of an individual should be treated to be absolutely essential to his being. What nature gives is natural. That is called

nature within. Thus, that part of the personality of a person has to be respected and not despised or looked down upon. Destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions<sup>[1]</sup>. The eminence of identity has been stated in National Legal Services Authority v. Union of India and Ors<sup>[2]</sup>, popularly known as NALSA case, wherein the Court was dwelling upon the status of identity of the transgender.

Whether laws upholding sexual morality yield with the demand of sexual freedom in the personal life of LGBT Community?

Through this study the researcher tried to focus on the condition/situation of the LGBT Community. Recently in the judgement of Navtej Singh Johar v. Union of India<sup>[3]</sup> the Supreme Court said that Section 377 of the Indian Penal Code was unconstitutional so far as it criminalises consensual sexual conduct between adults of the same sex. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lies at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

It is one of the landmark judgements in the Indian history which won the hearts of LGBT Community while allowing them to perform a symbolic same-sex marriage. Homosexuality was never illegal or a criminal offence in

<sup>1</sup> MANU/SC/0947/2018

<sup>2</sup> MANU/SC/0309/2014 : (2014) 5 SCC 438

<sup>3</sup> MANU/SC/0947/2018

ancient Indian and traditional codes but was criminalised by the British during their rule in India <sup>[4]</sup>.

### **The Status of Transgender Persons in Existing Laws in India**

One of the most contemporary issues of morality arises in the case of LGBT community. It has always been a subject of debate that whether the Constitution of India and other Laws prevailing in the Country can justifiably be employed to protect people from harming their own moral character. The issue of sodomy confronted judges every time with the question of whether laws upholding sexual morality yield to the demand of sexual freedom within home.

After long battle the transgender persons got the right of recognition and identity. Although the rights they received are lacking with the implementation and sanction part, which is also partial to them. Though in a way it can be said that the Act lacks some necessary & basic rights of transgender persons do exist for all Indians. Though they also reside in India as a Citizen they should get the same rights as other Indians do have like Equality before Law & Equal Protection of Laws.

Recently the most awaited judgment passed by the Supreme Court of India in the favour of LGBT Community. In the case of Navtej Singh Johar Vs. Union of India <sup>[5]</sup>, The Supreme Court said that Section 377 of the Indian Penal Code 1860 in the perception of LGBT Community, it violated the rights of the LGBT Community. The Supreme Court decriminalized to marry the same-sex person and said that Section 377 was unconstitutional in this regard.

Criminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional.

— Chief Justice Dipak Misra

History owes an apology to these people and their families. Homosexuality is part of human sexuality. They have the right of dignity and free of discrimination. Consensual sexual acts of adults are allowed for [the] LGBT community.

— Justice Indu Malhotra

It is difficult to right a wrong by history. But we can set the course for the future. This case involves much more than decriminalizing homosexuality. It is about people wanting to live with dignity.

— Justice Dhananjaya Y. Chandrachud <sup>[6]</sup>

Still the battle has to go a long way. As the Marriage is a Social Union a person marries to someone with whom he/she wants to see the future together, in which there are some Rights and duties vis-à-vis i.e. when it's between male and female. If it is between LGBT Community then what will be circumstances...What rights and duties...What if they want Divorce...What if they want to adopt a CHILD. What if they want to get separated...What if they need to ask for maintenance...from whom they seek..?& who will pay..? Will they get inheritance in Property? Will they get Succession? What if they feel violence? Under which law they will seek their rights? Yet the Indian Laws are silent about their rights and do not specifically recognize them in any Laws.

Some of the Laws given below in which we can see that they are gender specific -

Protection of Women from domestic Violence act, 2005- (i) Grants Protection to a woman in a domestic relationship and who alleges domestic violence.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act, 2013 (i) Provides protection against the sexual harassment of women at the workplace

Hindu Marriage Act, 1955 - (i) Recognizes marriage between male and female

The Special Marriage Act, 1954 - (i) Recognizes marriage between male and female

Hindu Adoption and Maintenance Act, 1956- (i) Provides different criteria for man and woman in relation to adoption of a child.

Hindu Succession Act, 1956- (i) 'Heir' refers to either male or female for the purpose of succession in the absence of a will.

The Muslim Personal Law (Shariat) Application act, 1937- (i) Specifies 'special property' of females which includes personal property inherited or obtained by contract, gift etc.

### **The Rights which flows out of a Legal Wedding**

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### **Definitions**

**Transgender:** - Transgender person as one whose gender does not match the gender assigned at birth. It includes Trans – men and trans- women, persons with intersex variations, gender –queers, and persons with socio cultural identities, such as kinner and hijra. Intersex variations is defined to mean a person who at birth shows variations in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.

**Lesbian:** - Women who are attracted to women.

**Gay:** - Men who are attracted to men, although this term is sometimes also used generically for all same-sex attracted persons.

**Intersex:** - Persons who are born with a chromosomal pattern or physical characteristics that do not clearly fall on one side or the other of a binary male female line.

**Sexual orientation** refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-

<sup>4</sup> MANU/SC/0947/2018

<sup>5</sup> MANU/SC/0947/2018

<sup>6</sup> MANU/SC/0947/2018

variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc <sup>[7]</sup>.

### Does the LGBT Person have the right to marry to Same Sex Person?

Since long the LGBT Community is fighting for their Rights, though they are not considered under any Indian Law. They feel discriminated although they are citizens of India. They also have right under the Indian Constitution as Art.14 gives freedom to all & Art.15 says it should be given without any kind of bias or discrimination. Recently in the case of Navtej Singh Johar V. Union of India <sup>[8]</sup> the Supreme Court said that Section 377 of the Indian Penal Code was unconstitutional so far as it criminalises consensual sexual conduct between adults of the same sex. When the courts identified an infringement of a person's Article 8 rights under Constitution and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right <sup>[9]</sup>.

The position in India, after the Naz Foundation case <sup>[10]</sup>, has developed compared to the discriminatory situation it held prior to the case. It purports that the nation is moving towards a more progressive society which is open to new trends which are in consonance with the changing morals. While allowing them to perform a symbolic same-sex marriage, yet same-sex couples are not recognised currently in any form though the researcher feels that still there is a loophole in the decision. Though the LGBT Community is yet not recognised in any Indian Law like Hindu Marriage Act 1955, Hindu Adoption & Maintenance Act 1956 or any other Family Laws.

The researcher feels that it is also necessary to have reorganisation as a married couple to seek legal as well as social rights. Since discriminate them on any bases is objectionable under Art.15 of Indian Constitution.

Marriage laws in India do recognise hereto – sexual unions, depriving same – sex couples of the state benefits as well as Social and Legal reorganisation that a married person enjoys. The judgement is not satisfactory or it is not complete although it is saying that they can marry but it is silent about the part of implementation of the same that how they will be recognised and under which law they will be recognised after marriage?

### Conclusion

After doing study about the condition/situation of the LGBT Community in perspective of the applicability of Family Laws to them the researcher feels that there is an urge of amendment in Family Laws as well as in The Special Marriage Act.

Sanction is Missing-

As we know that the sanction is required for implementation of any law. Though they received the right to marry the same sex person under Section 377 of IPC in the case of Navtej Singh Johar V. Union of India <sup>[11]</sup> although the right they received lacks of the implementation part i.e. why the

right they received under Section 377 becomes invaluable for them. The question how is overlooked i.e. what will be the rights available to them if something goes wrong, where they can claim the remedy and what will be the remedy? Are they justified? Are they given equal priority like any other Indian Citizen? These questions remain unanswered.

The struggle against social and legal discrimination of lesbian, gay, bisexual and transgendered Community (LGBT) has been long. The researcher feels that it is not the end of their struggle, the judgement in Navtej Singh Johar V. Union of India <sup>[12]</sup> is not satisfactory or it is not giving them liberty or do not protect their rights which are available to any Indian citizen i.e. man/woman after a lawful wedding. The most practical way of attaining legislative recognition of same – sex marriages will be an amendment of Special Marriage act, 1954.

Recently The Transgender Persons (Protection of Rights) Act, 2019<sup>13</sup> passed under which a person recognized as transgender person shall have a right to self- Perceived gender identity. It's good that the government is tries to give justice and equality to them but yet here to it can be observed that the question how is overlooked. What the Act emphasis more is as we can see below:-

The Act prohibits discrimination against a transgender person, including unfair treatment or denial of service in relation to (i) education; (ii) employment; (iii) healthcare; (iv) access to public goods and facilities; (v) right to movement; (vi) right to rent or own property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment which has custody of a transgender person.

The Act is Bias -

The Act specifies these offences as crime against transgender i.e. (i) compelling transgender persons to do forced or bonded labour (excluding compulsory government service for public purposes); (ii) denial of use of a public place; (iii) removal from house hold, village or other place of residence; and (iv) physical, sexual, verbal, emotional or economic abuse. These offences will be punished with imprisonment which is not less than 6 months and which may extend to 2 years or a fine.

The Sanction is weak - The Transgender Act, 2019 specifies these offences as crime against transgender i.e. (i) compelling transgender persons to do forced or bonded labour (excluding compulsory government service for public purposes); (ii) denial of use of a public place; (iii) removal from house hold, village or other place of residence; and (iv) physical, sexual, verbal, emotional or economic abuse. These offences will be punished with imprisonment which is not less than 6 months and which may extend to 2 years or a fine rather in case of rape on woman the punishment is Death Penalty.

Gender Identification is focused more than the Recognition and Implementation - according to analyses of the researcher the whole judgment speaks more about the identification and their dignity and their protection but what about their Rights after Marriage? The question is as it is. Rather to strengthen them the judgment is demoralizing them. What if they get marry to same – sex person will they get the recognition under any Family Laws? Will they get Property Rights? Will they get succession? What if they

<sup>7</sup> Transgender Persons (Protection of Rights) Act, 2019

<sup>8</sup> MANU/SC/0947/2018

<sup>9</sup> (08.01.2018 - SC Order) : MANU/SCOR/00577/2018

<sup>10</sup> MANU/DE/0869/2009

<sup>11</sup> MANU/SC/0947/2018

<sup>12</sup> MANU/SC/0947/2018

<sup>13</sup> Bill No.169 of 2019

want to have a child and wish to go for Adoption? What if they want to get separated? Will they get Maintenance? If yes who will give to whom?

Priority & Status–

The Rights of LGBT Community after marriage are untouched. The Indian Laws are silent. They should be prioritized as an Indian Citizen and being a human they also have their basic needs and requirements, which are needed to be fulfilled to live a happy life. They should be given their social status to live a respectful life without it they may feel discriminated.

Parenting Rights –

They must be given right to adopt a child and to enjoy the parenthood and they should be allowed for surrogacy if they can surrogate the child, they may get the child of their own.

### References

1. MANU/SC/0947/2018
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3. MANU/SC/0947/2018
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