

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

LGBTQ Rights in India: An Insight into the Provisions of Marriage, Adoptions & Challenges

PRATYUSH JHA¹ AND TANNISHTHA CHATTERJEE²

ABSTRACT

The discussions related to LGBTQ communities have been either for providing them all the rights as other common citizens or ensuring their gender identity. These have been prevalent since a long period of time. Different movements took place world-wide and as a result many countries understood their needs and grievances and thus formed a set of provisions which provide them with the basic rights and ensure other equal opportunities. In India, the courts of law had a bigger role in providing rights to the people of the LGBTQ community. The de-criminalization of Section 377 of IPC was one such initiative which allowed consensual same-sex relationship between any two adults. Prior to this, the Supreme Court of India also declared the Transgender community as the third gender and recognized their gender identity. Despite all these positive aspects, we are lagging behind in providing the community with equal rights, in comparison to other common people, especially when it comes to the provisions related to marriage and adoption.

This paper aims to give an insight into some aspects related to LGBTQ rights in Indian context. Starting with elaborating on the background of the issue which covers important historical part, the paper deals with landmark precedents, highlights marriage and adoption rights of the community, takes references of world-wide provisions, contemporary challenges and finally concludes with providing solutions to the problems in discussion.

I. INTRODUCTION

The issue of LGBTQ has always been in debate and discussion for years, not only in India but also in other countries across the world. The acronym ‘LGBTQ’ stands for lesbian, gay, bisexual, transgender, and queer or, questioning. These words explain an individual’s gender identity or sexual orientation. There are several other terms used for the same. Historically, LGBTQ has been prevalent since olden times where same-sex love or sexuality was observed in various cultures and settings across the world. Though this community was largely ignored in the history, it has gained popularity in the present scenario. The homosexual relationships were considered as a crime according to the laws of the countries in Britain and Germany.

¹ Author is a student at Amity Law School, Noida, AUUP, India.

² Author is a student at Amity Law School, Noida, AUUP, India.

Although the movements for LGBTQ rights have not gained currency, the traces can be found in the poem "Two Loves" written in the 1890s by Alfred Lord (Bosie) Douglas where he wrote "I am the love which dare not to speak". In this line "I" represents homosexuality. Also, there were other instances where voices were raised for the LGBTQ community. One of them was the founding of the Scientific-Humanitarian Committee in Berlin in the year 1897³. Various initiatives were taken by the Committee to bring reforms in Germany, Austria and the Netherlands. Later, these movements and reforms were observed across the world at a large scale. Thus, from the latter half of the twentieth century till date, this community has showcased a remarkable impact on public policy, culture and, politics.⁴ This has also led to the noticeable presence of this community in the society as well as paved ways for activism to obtain certain civil rights and ultimately achieve equality in all aspects. Though the progress has been slow but it has led to bring about progressive changes in the legislations of the countries, across the world. In many countries, the plight of the minority community still continues where they are fighting for their legal recognition and several rights which are availed by other common citizens of the country but not to them.

In India, homosexual acts were considered as a criminal offence under Section 377 of the Indian Penal Code, 1860⁵ before the landmark judgment of the Supreme Court of India dated 6th September 2018, where it decriminalized homosexuality and partially struck down Section 377. It led to jubilant celebrations amongst the LGBTQ community all across the country. The importance of this judgment can be understood by the statement made by Hon'ble Ms. Justice Indu Malhotra while reading the fifty-page verdict, which said "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." This judgment was a result of more than two decades of legal battle for LGBTQ rights. In the upcoming sections, we will be dealing with all the landmark cases related to the LGBTQ community in detail. This proved to be a historic verdict but there are different other issues that are yet to be addressed especially when it comes to the other rights of the LGBTQ community (including marriage, adoption, social acceptance, etc.). These rights are denied to the said community but are availed by other citizens in order to fulfill the spirit behind the Right to Equality enshrined in the Indian Constitution as a fundamental right. In this paper, there is an analysis of important aspects

³ Levy, Michael. "Gay rights movement". *Encyclopedia Britannica*, 15 Jun. 2020, <https://www.britannica.com/topic/gay-rights-movement>. Accessed 21 May 2021.

⁴ Loveland, Barry and Malinda Triller Doran. "Out of the Closet and Into the Archives: A Partnership Model for Community-Based Collection and Preservation of LGBTQ History." *Pennsylvania History: A Journal of Mid-Atlantic Studies*, vol. 83 no. 3, 2016, p. 418-424. Project MUSE muse.jhu.edu/article/624271.

⁵ Indian Penal Code, 1860

related to the LGBTQ community including landmark judgments, several rights, challenges and, suggestions for the welfare of the said community. Further, there is also a discussion on the legal provisions and status of people belonging to the LGBTQ community who reside in different countries across the world.

II. REMARKABLE JUDGMENT RELATED TO LGBTQ COMMUNITY IN INDIA

(A) Naz Foundation v. Govt. of NCT of Delhi (2009) ⁶

In this case, a Delhi based NGO named Naz Foundation filed a Public Interest Litigation before the High Court of Delhi to decriminalize Section 377 of the Indian Penal Code, 1860 claiming that it was unconstitutional and violative of certain fundamental rights like the right to life, right to equality, right to dignity, right to health and freedom of expression. After a long process, in the year 2009, a two-judge bench of the High Court of Delhi held Section 377 of IPC as violative of Articles 14, 15, 19 & 21 of the constitution and further removed the unreasonable restriction over consensual intercourse by two adults in their private space.

(B) Suresh Kumar Koushal v. Naz Foundation (2013) ⁷

After the judgment of Delhi High Court in the case of Naz Foundation v. Govt. of NCT of Delhi, various people disagreed with the idea to decriminalize the same-sex relationship and appealed for consideration of the constitutionality of Section 377 of Indian Penal Code, 1860 before the Supreme Court of India. On 11th December 2013, a bench of two judges of the Supreme Court of India overruled the judgment of Delhi High Court and re-criminalized homosexuality. The court held that people belonging to LGBTQ+ do not need any constitutional protection as they constituted a ‘minuscule minority’ and there is no kind of ‘unconstitutionality’ posed by the Section 377 of IPC.

(C) National Legal Services Authority v. Union of India (2014) ⁸

This was one of the remarkable cases for the rights of the transgender community in India. The National Legal Services Authority and others individuals filed a Writ Petitions before the Supreme Court of India with the issues revolving around gender identity and the protection of rights and safeguarding the interests of individuals who declare themselves as the ‘third gender’. In this case, the bench consisting of two judges of the Supreme Court of India delivered a judgment on 15th April, 2014. For the first time, the transgender community was recognized as the legit citizens of India and provided with all the fundamental rights. Further,

⁶ *Naz Foundation v. Govt. of NCT of Delhi* [2009 SCC OnLine Del 1762]

⁷ *Suresh Kumar Koushal v. Naz Foundation* [(2014) 1 SCC 1]

⁸ *National Legal Services Authority v. Union of India* [(2014) 5 SCC 438; 2014 SCC OnLine SC 328]

the court laid out a set of guidelines to be followed by the State to bring the Transgender community into the public sphere and eliminate marginalization.

(D) Justice (Retd) K S Puttaswamy vs Union of India (2017) ⁹

This was a landmark judgement given by nine-bench panel of judges in the Supreme Court of India in the year 2017, in which it held that “Right to Privacy” is a fundamental right and it is an expansion of “Right to Life” which is enshrined in the Indian Constitution in Part III under Article 21.

As the “Right to Privacy” extended to every person irrespective of the gender and sex they belong, it would also apply to people of the LGBTQ community and by availing this right they can choose their partners. Due to this, the judgment had a significant impact on the 2018 judgment of the Supreme Court of India which de-criminalized Section 377 of IPC.

(E) Navtej Singh Johar & Ors v. Union of India ¹⁰

Navtej Singh Johar & Ors v. Union of India was a historical judgment passed by the Supreme Court of India on 6th September, 2018 where they decriminalized homosexuality and struck down Section 377 of IPC till the portion where it criminalized consensual sex between two adults. Also, the court upheld the provisions related to the criminalization of non-consensual acts with children or with animals. Further, the court held Section 377 of IPC violated the fundamental rights enshrined in the Indian Constitution under Articles 14, 15, 16 and, 19(1)(a).

III. MARRIAGE AND ADOPTION RIGHTS OF THE LGBTQ COMMUNITY

As discussed earlier, the battle for the decriminalization of section 377 of IPC took several years of constant struggles and persistent efforts. Finally, in the year 2018, we observed the landmark judgment of *Navtej Singh Johar v. Union of India* ¹¹, where the Supreme Court of India decided to declare Section 377 as unconstitutional and violative of the basic fundamental rights. This initiative was seen as a step towards attaining the Right to Privacy, as also discussed above, declared by this court in the case of *Justice K.S.Puttaswamy (Retd.) vs Union Of India* ¹², as a fundamental right in the year 2017 under Article 21 i.e. Right to Life. However, even after this remarkable change in the provisions of the laws relating to the LGBTQ community, their plight continues. The court still doesn't recognize their certain civil rights i.e., marriage and adoption rights. Marriage rights come under the Hindu Marriage Act, 1955 ¹³ and the

⁹ *Justice (Retd) K S Puttaswamy vs Union of India* [(2017) 10 SCC 1, AIR 2017 SC 4161]

¹⁰ *Navtej Singh Johar & Ors v. Union of India* [(2018) 1 SCC 791 (India)]

¹¹ *Supra* note 10

¹² *Supra* note 9

¹³ The Hindu Marriage Act, 1955 – India

Special Marriage Act, 1954¹⁴. According to Section 5 of the Hindu Marriage Act, 1955: marriage can take place between “any two Hindus”, thus not discriminating against any gender to get married. The right to marry comes under the ambit of the Right to Life, enshrined as a fundamental right in our Indian Constitution under Article 21. Identifying the sexual identity of the LGBTQ community on one hand and denying marriage-related rights on the other, seem contradictory and violative of human rights. Non-availability of such rights to a particular section of the society, prima facie violates the fundamental principles discussed in Articles 14, 15, and 21 of the Indian Constitution.

The Central Adoption Resource Authority (CARA), a statutory body of the Ministry of Women and Child Development¹⁵, in Section 5 of its guidelines for adoption, dated 4th Jan 2017, mentions the eligibility criteria for adopting a child. It doesn't mention any discriminatory rule which prohibits people in a same-sex marriage/relationship from adopting. Other adoption rights are included in The Guardian and Wards Act of 1890¹⁶ and the Hindu Adoption and Maintenance Act of 1956¹⁷. The stringent traditions and culture of our country have failed to incorporate any provisions for the couples of same sexes or anyone from the LGBTQ community. The Transgender Persons (Protection of Rights) Bill, 2019¹⁸ introduced in July 2019 proposed to include the provisions for their education, healthcare and laws to stop the discrimination against them. In the judgment, *Shabnam Hashmi v. Union of India*¹⁹, the right to adopt and to be adopted was recognized as a part of the fundamental rights. Thus, it is pertinent for this right to be available for everyone, irrespective of gender, sex, caste, and religion.

Recently, a petition was filed before the Kerala High Court by a couple from the LGBTQ community challenging the provisions of the Special Marriage Act, 1954 as their marriage registration was denied by the local administration. The Honorable Court agreed to examine their plea and issued notice to the Central and the State Government.²⁰

As a citizen of India and being a stakeholder in this democratic system, no one should be denied the right to lead a decent life according to one's own will. They shouldn't be prohibited to avail basic human rights based on their choice of sexual orientation. In addition, many countries

¹⁴ The Special Marriage Act, 1954 - India

¹⁵ Guidelines for adoption, dated 4th Jan, 2017, The Central Adoption Resource Authority (CARA), a statutory body of the Ministry of Women and Child Development – India, http://cara.nic.in/PDF/Regulation_english.pdf

¹⁶ The Guardian and Wards Act of 1890 - India

¹⁷ The Hindu Adoption and Maintenance Act of 1956 - India

¹⁸ The Transgender Persons (Protection of Rights) Bill, 2019 – India

¹⁹ *Shabnam Hashmi v. Union of India* [WRIT PETITION (CIVIL) NO. 470 OF 2005] – Supreme Court of India

²⁰ Nishant Sirohi, *LGBTQ+: Petition for marriage equality filed in Kerala High Court*, THE LEAFLET (May 19, 2021, 6:25 PM) <https://www.theleaflet.in/lgbtq-petition-for-marriage-equality-filed-in-kerala-high-court-2/>

across the world have already appreciated the importance of this issue and have a well-codified set of provisions in this respect.

IV. INTERNATIONAL ACCEPTANCE OF THE MARRIAGE AND ADOPTION RIGHTS FOR THE LGBTQ COMMUNITY

In the present scenario, there are many countries across the world which ban the daily activities of the LGBTQ community on the grounds of sexual orientation. They even have laws criminalizing such activities. But, in few nations around the globe, people have started to welcome the rights of the said community to some extent. This initiative can be seen as a step towards attaining complete acceptance and recognition of this community in society in the future. Long before India commenced its journey towards decriminalizing the laws which didn't recognize the sexual identity of the people of the LGBTQ community, many other countries had already taken a step to bring forth the legal rights of the said community.

In the United States of America, in the year 2015, through landmark judgment of *Obergefell v. Hodges*²¹, same-sex marriage was made a fundamental right in the Constitution. In Canada, by virtue of The Civil Marriage Act, 2005²², same-sex marriage was legalized in the entire country. The year 2001 witnessed the enactment of the marriage rights of homosexuals for the first time in the Netherlands. Belgium followed the same trajectory of the decision by 2003. Other European countries like Denmark, Finland, France, Britain, Iceland, the Republic of Ireland, Luxembourg, Malta, Norway, etc., also gradually recognized the same-sex marriage rights of the people in the countries. The Marriage Amendment Act of 2017²³ made it legal for two people of marriageable age to marry, irrespective of gender, in the country of Australia.

The landmark judgment in *Obergefell v. Hodges*²⁴ paved the way for the recognition of the legal right for joint adoption of same-sex couples in the United States of America. In the European countries, France, Austria, Denmark, etc. joint adoption by same-sex couples also came into being eventually. In the United Kingdom, Sections 144 and 150 of the Adoption and Children Act 2002²⁵, which went into effect in England and Wales in 2005, state that same-sex couples are eligible for joint adoption²⁶. Many countries believe that marriage and adoption rights go hand in hand. Both the rights encompass the right to start a family, which in turn falls

²¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

²² Canada-Civil Marriage Act (2005)

²³ The Marriage Amendment (Definition and Religious Freedoms) Act 2017 – Australia

²⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

²⁵ ADOPTION AND CHILDREN ACT 2002 – UNITED KINGDOM

²⁶ ILGA's annual survey [PDF] examines laws regarding same-sex relations around the globe, https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2013.pdf

under the ambit of right to life. Several steps have been taken worldwide to avail the basic rights to the LGBTQ community. Though the rights of the Transgender community have been mostly vague and still not discussed much, many leaders are working towards the advancement of the community as a whole.

In addition to the above-stated statutes and aspects, there are many other provisions in the laws of different countries across the world ensuring several rights to people from the LGBTQ community. In the countries like England and Ireland, the rights of LGBTQ community are protected by the virtue of the Equality Act, 2010²⁷. It is legal for Transgender to change their sex, and in England & Wales, a same-sex couple can enter into a civil partnership and they can even adopt a child²⁸. Similarly, in Netherlands²⁹, the Equal Treatment Act, 1994 provides the people of LGBTQ community with equal opportunity in housing, employment, and public accommodation and further prohibits discrimination on the ground of sexual orientation. Many other countries have such provisions and are working towards attaining Right to Equality in a real sense.

As far as the implementation of such laws and providing the basic rights to the said community are concerned, the mindset of people and the current customs of the land need to be taken into consideration. Also, as per the principles of Jurisprudence, customs are considered an important source of any law. Mere presence of codified principles is not sufficient to attain the spirit behind the laws. India, due to its age-old orthodox beliefs and a long struggle to recognize the sexual identity of the LGBTQ people, is still reluctant to legalize same-sex marriage and adoption rights. The battle is harder to win because of the strong opposition by certain sections of the society. But, on the other hand, a vast portion of the society (including masses, organizations, and other entities) is constantly supporting and advocating the LGBTQ issues at different fora to bring a prominent change in the laws as well as the perspective of the society, to secure the LGBTQ community with social justice and equality.

V. CONTEMPORARY CHALLENGES FACED BY LGBTQ COMMUNITY

The LGBTQ community has been constantly fighting for their rights and the recognition of their sexual identity since times immemorial. Even after the landmark judgment of 2018, they still feel undermined in our society. We, as a country, have not been able to accept them and their choices as individuals.

²⁷ Equality Act, 2010 – United Kingdom

²⁸ *10 LGBTQ-friendly countries to study abroad in*, STUDY INTERNATIONAL (May 19, 2021, 6:25 PM) <https://www.studyinternational.com/news/10-lgbtq-friendly-countries/>

²⁹ Equal Treatment Act 1994 – The Netherlands

They have to face discrimination at various places and are denied basic facilities because of who they are. This attitude is fundamentally wrong and yet they still get harassed. They are often left to live in poor conditions. Transgenders, especially resort to prostitution for a living. The people belonging to the said community deal with bullying, blackmailing, physical violence on a regular basis. At times, there have instances where they have been denied healthcare facilities. In some cases, they are not given proper education and there is always a fear of discrimination while applying for jobs. The people in the community go through extreme mental stress and suffer from mental health issues like depression, anxiety, bipolar disorder, etc. A common problem with every person in the LGBTQ community is “gender dysphoria”. It happens due to change in the sexual hormones. This is mainly because their families and the society-at-large treat them poorly and mentally harass them for coming out of the closet. Our dearth of empathy, prevent them from getting medical attention. Due to such instances, they develop a fear of abandonment, which leads to cases of suicides and other self-harming activities.

As it has been extensively discussed that the LGBTQ community are denied their civil rights such as, right to marry and adoption rights, we have noticed that such a treatment affects them mentally and makes their lives extremely complicated. If two consenting adults, love each other and wish to complete their family by marrying each other or adopting a child, they should be given the full freedom to do so. Homophobia is deep-rooted and usually the stringent traditions in our country make it unusually hard to change our perspective. A simple change can bring about major progress for the community.

VI. CONCLUSION/ SUGGESTIONS

In the year 2018, through the famous landmark judgment of *Navtej Singh Johar v. Union of India*³⁰, the Apex court finally de-criminalized section 377 of IPC, which initially criminalized same-sex relationships. Even after the age long battle to get recognition in society, the people from the LGBTQ community have not been given the privilege to enjoy some basic civil rights, such as marriage and adoption rights. In many countries like Canada, Denmark, Finland, France, Britain, the continent of the United States of America, it is legal for same-sex couples to marry and adopt a child as per their will. But, in our country, due to our strict culture and traditions, people seem to be adamant regarding this change. They often frown upon the fact that same-sex relations are unnatural and would stop the reproduction cycle.

But, are we really progressing if we still rely on such arguments to stop human beings to express

Supra note 10

love in a way they want to? It is fundamentally wrong to not let people from a particular community enjoy basic civil rights. The right to marry comes under the ambit of Article 21 of the constitution and it covers the right to personal liberty. Denying such rights also amounts to discrimination under Articles 14, 15 and 19 of the Constitution of India. So, being a citizen of India, everyone, irrespective of one's life choices should be allowed to live with dignity.

Our leaders, lawmakers, and powers that be should educate people about the plight of people from the said community. We, as a country should keep an open mind and accept them for who they are. There have been several cases of violence and discrimination against people belonging to the LGBTQ community. Keeping everything aside, humanity should be our top priority. To treat them as normal human beings, is the bare minimum requirement and the first step towards acceptance. Our bias against the LGBTQ community makes them an isolated part of society. Such a perspective compromises the principles of our country and constitution, which is our subject of pride. It is a matter of concern that in the world's largest democracy, in the 21st century, the citizens of the country have to fight battles for basic civil rights. Every citizen of this country should be groomed in such a way so that it instills acceptance and maintains the spirits of our constitution. Stringent traditions are meant to be followed but not by putting humanity at stake.
