

Decriminalization of Section 377 viz-a-viz Same-Sex Marriage in India: Continuing Battle of LGBT+ Community

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ABSTRACT

**No two leaves are alike and yet there is no antagonism between them or between
branches on which they grow. - Mahatma Gandhi**

Marriage and right to marriage have been recognized by the Courts as an integral part of personal liberty to choose the person he/she wants to enter a marital relation with irrespective of race, religion or community or for that matter nationality. It has morphed into a concept of mutual love and affection. Marriage in India, especially amongst Hindus, is considered as a sacrosanct act. It is the genesis for creation of society and hence a matter of joy and celebration amongst all. But with the progress of world, the notion of marriage is drastically changing. But even in 21st century the right to marry has till date largely remained exclusive to only heterosexuals. Except few countries in the world, the LGBT individuals are either still in closets in fear of prosecution or protesting for equal rights as that of the heterosexuals.

In a country like India where cultures, customs and religions govern the thought process of the majority and everything is viewed through a binary lens, being a transgender comes as

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Her areas of interest and expertise include Human Rights, queer studies, LGBT rights, government initiatives, humanitarianism, gender and sexuality, equality, securitization, and governmentality. She has published more than 10 articles in peer-reviewed national and international journals and contributed 1 book chapter. She has supervised the Term Papers and Projects of numerous students. She has adjudged numerous national and international Moot-Court Competitions. She has also organized, participated, and presented in many national and international conferences, webinars, and workshops in Australia, England and Canada. Recently she has presented her research paper in the esteemed Asian Society of International Law 8th Biennial Conference, Canberra (Australia) (24th – 28th May 2021). She is the member of Internship Committee, Discipline Committee, Anti-Ragging Committee, and Internal Quality Assurance Cell at the Rajiv Gandhi National University of Law, Punjab (Patiala) INDIA.

a bit of a challenge. The members of LGBT community are drawing a worldwide recognition in recent times and the dialogue is taking place all around the globe regarding the discrimination and violation of basic human rights they face as a group.

Even after the recognition of Trans people, *Hijras* and eunuchs as the third gender in India,² there still exists scads of social stigma, disparity in attitudes and behaviours, lack of health care which in turn paves the way to poverty, poor health, ostracism, sexual and mental abuse with no stringent legal recourse which makes Trans people even more vulnerable.

The LGBT community in India was deprived of its fundamental rights since the very inception of the Constitution of India. The decriminalization of homosexuality in Navtej Singh Johar's case was a phenomenal step towards transformative constitutionalism in India. The constitutional morality has ensured protection to the miniscule minority from the tyranny of the majority. Undeniably, this affirmative step by the Hon'ble Supreme Court has played an impeccable role in safeguarding the rights and dignity of the LGBT community. However, this community is still prone to discrimination by society and statutes. The non-recognition of same-sex marriage jeopardizes the fundamental rights of the LGBT community. Moreover, it is also against the mandate of various international conventions to which India is a signatory, such as; UDHR and ICCPR.

This study aims to advocate that right to marry of every individual including of the LGBT and if this right is not granted then it is violative of Article 14, 15 and 21 of the Constitution of India. Nonetheless, there exists various lacunae and therefore in actuality their rights have not been half implemented and they still await full assimilation in the society. This situation is exacerbated by denial to the transgenders of a basic human right, that is of, right to family which includes right to marry, to have or bear child (artificially; adoption and surrogacy), and right to inherit the family property. Moreover, this study emphasizes the dire need for sensitization of society vis-à-vis the LGBT+ community to secure a dignified existence for them. Equality before the law and equal protection of the law demands protection of the right to marry of every individual including of the LGBT+ individuals. The present research paper will explore legal impediments associated with LGBT+ marriages and whether such marriages are feasible in India or not. Though, through rigorous protests and activism many countries today have incorporated legislative provisions for LGBT+ community in their respective Civil and Family laws they are yet to

² National Legal Services Authority v. Union of India & Ors., AIR 2014 SC 1863.

be accepted socially and culturally by all the countries around the world. Further the author will try to throw light on certain issues such as, the personal rights of the LGBT+ individuals recognized in few countries, the history of evolution of rights of the LGBT+ individuals in India.

Keywords: Human Rights, Injustice; LGBT+ Community, Reformations, Right to Marry, Same-sex Marriage, Equality, Relationship, Legitimacy, Customs, Ceremonies.