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# Critical Analysis: Marital Legality of LGBTQ Couples

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## ABSTRACT

*“Race, gender, religion, sexuality, we are all people, and that's it. We're all people. We're all equal.” — Connor Franta.*

*On 6th September 2018, In a landmark decision, India's Supreme Court (SC) decided that consenting to adult gay intercourse is not illegal. Additionally, sexual preference is a naturally occurring phenomenon over which individuals have no influence. This judgment inherently abolished or decriminalized section 377 of the IPC(IPC) and also stated Section 377 as “irrational, indefensible and manifestly arbitrary.”*

*But the decriminalization of section 377 is nothing but the first step towards giving legal recognition to the queer community in India. They have fought not only for the judicial recognition of fundamental human rights for a long time but also social prejudices of the society, which are unfortunately are still prevalent. It is now necessary to protect homosexual couples constitutionally and to get them on an equal footing with heterosexual couples . Marriage has been regarded as a fundamental human right since the beginning of time. However, there is no legislative or regulatory structure in place to protect same-sex couples and their rights. As of now, LGBTQ+ marriages are still not legally recognized as valid marriage; it is not illegal per se, but with no legal recognition it creates a void for the community and makes it hard for them to start a family or live a normal life in this society.*

**Keywords:** LGBTQ+, Marriage, Section 377, Fundamental human rights, Discrimination.

## I. INTRODUCTION

Section 21 of the Indian Constitution speaks about the right to life and personal liberty, which encompasses the multiple layers of rights under it. And under this umbrella of rights, there is the right to marry. The right to marry talks about how one gets to choose their own partner, with no undue influence that forces them to make their own choice The liberty that the Constitution guarantees as a fundamental right is intrinsically linked to each one's right to choose on issues that are important to their pursuit of happiness. And there are many other legislations in India that support this belief.

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And in judgments like *Lata Singh Vs. State of Uttar Pradesh*<sup>2</sup>, the supreme court of India upheld how the petitioner had the freedom to marry whoever she chose because she was a major, and no law forbade inter-caste unions. But somehow this right has not been equally extended to the LGBTQ+ people, which has unfortunately left them with no way of legally marrying each other or making a family for themselves.

The Apex Court of India declared that adult gay intercourse with consent is not illegal on September 6, 2018, in a landmark judgment, which was a small victory for the queer community in India. Furthermore, the court added that sexual orientation is a natural occurrence over which people have no influence. In addition to declaring Section 377 given under Indian Penal code to be "irrational, indefensible, and clearly arbitrary," this verdict automatically decriminalized Section 377.

The section in question dealt with "unnatural offenses". The term stated that anyone who engages in voluntary carnal intercourse with a man, woman, or animal in violation of nature's order should be punished with either life imprisonment or imprisonment of either description for a term that may last up to 10 years, as well as being required to pay a fine. This arbitrary section came into force in 1861, during the British rule of India, that criminalized sexual activities that were "Against the order of nature," which included homosexual activities. However, section 377 is still prevalent for intercourse with animals with the same punishment as stated earlier.

Decriminalizing Section 377 is merely the first step in India toward giving the homosexual community legal legitimacy in India. This community has fought not only for their fundamental human rights for a very long time but also against societal prejudices that are still very much present in society.

It is now vital to constitutionally legalize and safeguard gay marriages and to put them on an even playing field with heterosexual unions. Marriage has always been viewed as a fundamental human right in the history of India. But to protect same-sex couples and their rights, however there is, no legislation or framework in existence. Which goes against their fundamental rights. This should now be rectified, to make sure Indian legislation doesn't get left behind in the revolutions of the 21st century.

### **(A) Research Questions**

1. What are the social and legal challenges faced by the LGBT community even after

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<sup>2</sup> *Lata Singh Vs. State of Uttar Pradesh*, (2006) 5 SCC 475.

decriminalizing homosexuality?

2. What is the International position of Human rights of the LGBT community?
3. What are the present marriage and adoption rights given to the LGBTQ+ community in India particularly?

### **(B) Research Objectives**

1. To understand the social and legal challenges faced by the LGBT community even after decriminalizing homosexuality.
2. To ascertain the international position of Human Rights of the queer community around the world.
3. To analyse the present adoption rights given to the LGBTQ+ community.
4. To examine struggles they face that creates obstacles for them from having a normal family.

### **(C) Scope and Limitations**

The scope of the paper is to find and analyse all the data regarding the LGBTQ+ and legal recognition of their marriage. The social prejudices suffered by the queer community in India will be scrutinized and further, the researchers would scrutinize the policies and legislations in relation to the topic being discussed as of India.

The research will not completely limit its findings and analysis to India, though India will remain the centre of attention, other countries and their policies will also be examined. The paper will look into the approach of the Indian government towards the welfare of this community as well as will help in understanding the current scenario with regard to legislations being made in international forums.

### **(D) Research Methodology**

The current research is primarily based on studying the existing laws and statistics to get a better understanding on the topic discussed which is otherwise called doctrinal research principles. The researcher also analyses the information from various books, journals, articles, websites and E- journals.

The methodology adopted by the researcher is to study, examine and dissect all the relevant data available on the discussed topic and all its aspects to reach an appropriate and fair conclusion for the topic undertaken by the researcher in this particular research.

**(E) Literature review**

- *“Rights of LGBTQ in India and the Struggle for Societal Acceptance.”*

This research paper, helped the researcher understand and analyse the rights pertaining to the LGBTQ community residing in India. Their struggle with the society to try and lead a normal life. It also discusses various other consequence like denial of social existence, isolation, discrimination etc. that this community as to bear and suffer through out their life, because the society sees them as abnormal, just because of their sexual orientation.

- *“Social and Legal Aspects of LGBT Community in India.”*

This paper, similar as the last, the paper gives more depth in understanding the societal pressure exerted on the community and how the lack of a proper legal frameworks, protecting rights and interests, making them legally incapable to fight for their place in the society. This paper signifies the need of a legislation for the LGBTQ community in India, to protect their life and make it safe for them to lead the life as they desire, without any negative influence.

- *“Adoption rights of same-sex couples”*

This article throws light upon the legal situation concerning to adoption rights to the LGBTQ community. The research gains an inner perspective on how not only do this community, have a chance to have a family but allowing adoption to them also give home to millions of orphans a loving home. But due to the controversy in the subject and narrow minded approach of the some people, it hasn't been brought into practice.

- *“LGBT Rights on the International Stage: An Analysis of Diplomatic Practice – LGBTQ Policy Journal.”*

This article gives an insight in the international stand of the world's highest diplomatic powers in the subject of LGBTQ and their basic human rights. It also gives a run down on how different countries have been handling this subjective matter, which helps the research in getting a comprehensive understanding of the subject from an international point of view.

- *“International Human Rights Law and Sexual Orientation & Gender Identity.”*

This article also in similar pattern showcases the international standing of various countries on the topic of LGBTQ and their rights. It also discusses the stand of United Nation in the forefront of this topic and the discrimination and the violence suffered by this community due their sexual orientation. The researcher uses this article to comprehend the depths of the issues of LGBTQ, from a larger perspective.

## **II. SOCIAL AND LEGAL CHALLENGES FACED BY THE LGBT**

One of the most controversial topics in the world is homosexuality. It raises concerns about human rights, since they are the target of violence and discrimination only on the basis of who they love and how they look to people all around the world. This concept creates complications in religious and spiritual matters in India, along putting up with a lot of societal prejudice and pressure on them. The queer community also struggle with the lack of legal recognition, adding more obstacles to their lives.

Even though we have now entered an era where everyone is entitled to have the right to be whoever he or she wants to be. The LGBTQ community has been subjected to abuse so often now, it has become a routine to them or something that they now consider normal.

Due to their sexual orientation, they are more prone to encounter intolerance, discrimination, harassment, isolation, and threats of violence by the rest of society. They endure this injustice and brutality everywhere in the world as well. The privileges enjoyed by heterosexual couples are more often than not extended to same-sex couples. They are not allowed to exercise those rights. They experience prejudice and are unable to take advantage of social safety provided by the government like welfare programs like health care and retirement.

LGBT individuals even have to conceal their gender to save themselves from the obvious discrimination and harassment they are usually subjected to and avoid disclosing it out of concern for their employment and survival. This behaviour of society at large and families in close quarters leads to low self-esteem gradually setting in them.

There is always conflict within the family rising due to the lack of communication between the parents and LGBT child in his/her/their early years due to the backward thinking of the society and the parents of this community not being able to understand their emotional needs causes a huge communication gap between them and emotional instability of the child. Many LGBT adolescents are taken into care in juvenile correctional centres or even sometimes on the streets.

Due to the rejection they experience from their parents and other primary caregivers from a young age, LGBT teens are much more likely to experience physical and mental health issues as adults. They occasionally become dependent on drugs or alcohol to feel less stressed about their social standing and isolate themselves which somehow falls to the last level. They cut off communication with everyone and end up being the targets of hate crimes. Homosexuality is viewed as a crime in many nations and is occasionally punished with jail time and fines. It is also illegal and considered a sin under several private laws.

These are just some of the social injustice the queer community has to endure to live life freely in this society. The idea that they could live a normal life is still a dream to them, as the legal challenges involved are too big and complicated to be handled in the present time.

Even though the Section 377 of the IPC was repealed and the entire LGBT community achieved a historic victory, same-sex marriage is yet to be legal, and as a result, the community still faces discrimination and isolation within the society. Marriage is a legal essential that grants two people certain rights and obligations, including those related to adoption, inheritance, tax planning, life insurance plans, and other similar privileges.

Unfortunately, the legislation in our country does not grant LGBT couples the same set of privileges as it does for heterosexual married couples. One of a person's most fundamental rights is marriage equality, yet the LGBT community still does not have access to it.

For the LGBT community in India, the lack of any legal provision for marriage, and that leads to them not having any adoption law. Which only leave civil unions as a choice. It is unfair to forbid same-sex weddings since it offers merely a choice or a right to marry anyone one wants. LGBT couples frequently choose to immigrate to nations that accept LGBT weddings so that their union can acquire legal status and enjoy all the same privileges as a heterosexual pair. So even if Section 377 was scraped away, the marriage legality for the queer community seems like dream at the moment.

### **III. ANALYSIS OF THE INTERNATIONAL POSITION OF HUMAN RIGHTS OF THE LGBT**

The core principle of the concept of human rights is that all people are created equally. All people should be treated equally since they all have worth. Anything that lessens that dignity is wrong because it contradicts the principle of equality and encourages discrimination. One of the most polarizing topics in the world, homosexuality raises concerns about human rights. These rights, regardless of political and civic rights are interconnected, universal, and interdependent.

The United Nations Security Council made an unusual statement after the 2016 massacre at Orlando's Pulse nightclub disapproving the violence for "targeting persons as a result of their sexual orientation." This was the first-ever UNSC made a statement

that addressed concerns related to sexual orientation, and even nations known for their anti-LGBT policies, including Russia and Egypt, supported it.

However, this condemnation statement obscured the adamant opposition to the advancement of LGBT rights displayed by a number of UN member states. LGBT rights were deemed

"controversial conceptions outside the internationally recognized human rights legislative framework" as recently as 2017 when Egypt spoke on behalf of numerous UN member nations. Despite recent advancements, international diplomacy continues to debate LGBT rights.

Although LGBTQ rights have gained significant clout in international diplomacy over the past ten years, the international community is still divided on whether they should be supported or not. LGBTQ rights have been supported by international organizations like the United Nations, but formal comments are frequently met with pushback by member nations unwilling to examine their own histories on the matter.

Due to this lack of agreement, the most prestigious diplomatic institution in the world does not formally recognize LGBTQ rights. Instead, informal organizations like the LGBTI Core Group and specific UN agencies stand up for LGBTQ rights.

"So long as people face criminalization, bias, and violence based on their sexual orientation, gender identity, and sex characteristics, we must redouble our efforts to end this violation," Antonio Guterres, UN Secretary-General, on 25 September 2018.

Since the early 1990s, these violations have been a point of concern for United Nations human rights bodies. Similar worries have been voiced for many years by several High Commissioners for Human Rights, UN Secretaries-General, and other top UN officials. As governments change hands, there is frequently internal debate among the nations that reflects their policy changes regarding LGBT rights. In places where the queer community may have previously felt comfortable, this trend has heightened ambiguity about the status of LGBT people.

The LGBTI Core Group, a loose confederation of nations and Non-governmental organisations (NGOs) devoted to tackling LGBT rights beyond the official UN entities, represents LGBT rights at the UN. The Central Group, which was established in 2008, backed both the 2008 General Assembly declaration and the 2011 Human Rights Council statement for the LGBTQ rights, even if they were unable to win specific protections for LGBT people inside the Sustainable Development Goals.

Regardless of this loss, the Central Group has pushed for collaboration between the Global North and the Global South, including participation from Western nations and Latin American nations, and even incorporating Albania as its first observer state with a majority of Muslims. In 2010, the Office of the High Commissioner for Human Rights became a member of the Core Group.

An external and unbiased expert was appointed by the UN Human Rights Council in 2016 to look into international discrimination and violence against LGBT people. The appointment of

this expert formalised the LGBT Core Group's activity within UN-affiliated organisations. Assessing, bringing attention to, collaborating with governments to implement anti-discrimination measures, increasing awareness of, and advising with states, NGOs, and UN organisations on issues of anti-queer attacks were all part of its mandate.

A lot of countries have started taking initiatives to overturn anti-homosexuality laws in Trinidad & Tobago, India, Kenya, and Botswana. In Taiwan, the Constitutional Court ruled in 2018 that same-sex marriage is now a legally protected right.

There is a significant LGBT community in Brazil, that is a big economic force and helps to make the nation popular with LGBT travellers. The image Brazil displays worldwide reflects this development; Ex- mayor of Rio de Janeiro, Eduardo Paes claimed that Rio is a home for people of pride (the queer community), devoid of any bias. The largest pride parade in the world is held in Sao Paulo, and more than three million people attended the festival in 2018.

In United Kingdom, discussions over amendments to the 2004 Gender Recognition Act has shown rift within feminism as well as between UK and US political standards. The law was the first in the world to permit gender self-identification without the need for a medical transition to change one's legal status.

In United States, the Obama administration demonstrated its steadfast commitment to defending LGBT rights both nationally and globally in 2011 when Ex-secretary of state, Hillary Clinton said in front of the UN that "gay rights are human rights."

However, these pro-LGBT tendencies both domestically and abroad were reversed after President Donald Trump was elected. An initial indication that LGBT rights were not of importance for the administration was the White House website's removal of any references to LGBT problems around the time of his inauguration. The prohibition on transgender individuals serving in the military was upheld by the Supreme Court in January 2019 under the Trump administration. With US military stationed in almost 150 nations, the removal of transgender visibility represents a significant loss in terms of pushing LGBT rights diplomacy on the ground. Additionally, the same-sex partners of foreign ambassadors and UN staff have been denied visas by the Trump administration. President Trump had made it clear that he strongly disagrees with the earlier-established human rights priority by withdrawing from LGBT diplomacy.

These are the legal standing of some countries, pertaining to the human rights of the LGBTQ, internationally.

#### **IV. MARRIAGE AND ADOPTION RIGHTS FOR THE LGBT COMMUNITY**

Since the dawn of time, marriage has been seen as a fundamental human right. However, it appears that there is no legislation in place to safeguard same-sex unions and their rights. Many advanced economies have approved same-sex marriages when it pertains to civil and fundamental freedom. Without a question, discrimination based on sexual identity has consistently been experienced by the LGBTQ+ community for many decades now. They have fought for the judicial recognition of their fundamental human rights for a long time. It is necessary to protect homosexual weddings constitutionally and put them on an equal footing with heterosexual marriages.

Marriage is seen as a very important sociocultural and legal institution in India, due to its adherence to culture and tradition. In our value system, marriage comprises societal obligations as well as matrimonial privileges. The "Right to Marry," which is recognized under Article 21 of the "Right to Life and Personal Liberty," has given each of us the ability to select our future spouse because marriage has grown to be an essential part of an individual's life.

In *Shakti Vahini v. Union of India*<sup>3</sup>, the Supreme Court held that a person has the constitutional right to marry whoever he chooses. There is no need for marriage to be entirely between a heterosexual pair in the Hindu Marriage Act of 1955 either.

The legal system has recognized marriage as a fundamental human right, embodied under Article 21 of the Indian Constitution because it is necessary for upholding the rights of all individuals and leading a safe society for everyone. Even if the ability to marry according to one's preferences has been declared a fundamental right, same-sex unions have not been included in this right.

And that puts the LGBTQ+ community's fundamental rights in danger. The lack of legislative action leaves them vulnerable to losing their constitutional right to wed. Homosexual couples are not permitted to get potential benefits like maintenance and succession that are provided to heterosexual spouses, setting them on uneven ground with heterosexual couples.

Due to the fact that current family law only recognizes heterosexual unions, LGBT couples are effectively denied social acceptance, legal protection, and other benefits that marriage confers. There is no doubt that discrimination based on sexual orientation violates the basic rights guaranteed by Article 15.

The Delhi High Court is now debating the legality of homosexual marriages in the case of

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<sup>3</sup> *Shakti Vahini v Union of India*, (2018) 7 SCC 192.

Abhijeet Iyer Mitra v. Union of India<sup>4</sup>. According to the Centre, the Special Marriage Act, 1954 only permits marriages between biological men and biological women. The Center further argued that there is a "legitimate State interest" in restricting the recognition of marriage to people who are the opposite sex only because the concept of marriage is not just restricted to an individual's right to privacy. However, denying homosexual people the ability to marry would have many negative effects on their fundamental rights.

Different nations have different perspectives on gays and same-sex relationships. While some nations have allowed same-sex unions and welcomed these relationships, others are adamantly opposed to homosexual marriage and occasionally consider it a crime. In 22 countries, same-sex marriage has been legalized by federal law. Australia, Ireland, and Switzerland did not enact laws allowing same-sex marriage until after national referendums. Among the countries that have legalized same-sex marriage are Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, South Africa, Taiwan, and the United States of America. Two countries—South Africa and Taiwan approved a bill recognizing same-sex civil unions in response to court judgments

Adoption is the establishment of a guardian-child relationship through a recognised socio-legal process. The process by which a biological child of one set of parents becomes the child of another pair of parents, or guardians, or a single parent, is described in Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015.

Social prejudices and a disregard for child care have corrupted adoption laws in India. Adoptions are permitted independent of the parents' and the child's communal and religious beliefs thanks to revised legislation like the Juvenile Justice Act of 2000, which reflects the secularity notion. The legislation, meanwhile, did not achieve equality between biological and adopted children. The Juvenile Justice (Care and Protection of Children Act) of 2006 fixed this statutory weakness by allowing an adopted kid to be considered as the parents' legal biological child and to enjoy all the rights, benefits, and relationships that flow from that relationship.

Legislators haven't, however, properly considered the civil rights of same-sex couples who want to start a family by adopting children. In the Navtej Johar ruling, the judiciary decriminalised homophobic legislation and acknowledged same-sex couples' legal rights in India.

Nevertheless, a significant barrier to the exercise of some rights by same-sex couples continues to be social stigma. Even if these rights are acknowledged, they cannot be used. By limiting the use of adoption rights to heterosexual couples and single people, the Juvenile Justice Act and Adoption Regulations passed in 2015 and 2017 fell behind the development of the law and

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<sup>4</sup> *Abhijeet Iyer Mitra v. Union of India*, WP(C) 4695/2020

society.

## **V. CONCLUSION**

In nations that previously opposed to the acceptance of international human rights norms, LGBT rights diplomacy has the potential to influence these communities and creates standards. It is reassuring to believe in history's progressive course given the increasing recognition of LGBT rights in countries throughout the world. Countries must uphold internal human rights obligations while promoting change internationally if they want LGBT rights to become a reality on a global scale.

Members of the Queer community are also Indian citizens in terms of financial, political, and cultural rights. In our secular, democratic, and republican society, everyone is treated equally irrespective of sexual preference, gender, or any other factor.

Both Article 14, which ensures that everyone is treated with equality without any discrimination, and Article 15, which prohibits discriminatory practises on race, religion, or sexuality. Moreover, Article 19 guarantees the right to free speech and expression.

The state should change current laws to recognise same-sex couples' adoptions in addition to allowing same-sex marriages. Government legalisation of same-sex marriage and parenting would have a significant positive impact on the children who suffer from this pervasive ambivalence. In contrast to developed countries, it is more challenging to gain cultural and legal acceptability in this rather conservative society.

However, disregarding the standoff between the civil partnership and life's basic structures would be narrow-minded and could have disastrous results if not handled properly. A significant shift in perspective is required if regulations are intended to represent the terms and conditions that are considered acceptable in a certain culture.

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