



ADDING RAINBOW COLOURS TO MARRIAGE AND PARENTHOOD: A RESEARCH ON CIVIL RIGHTS FOR LGBTQ

By Preksha Gupta & Megha Mukherjee
From University School of Law and Legal Studies, GGSIPU

PART 1 INTRODUCTION

“Every young person — no matter who they are or what they look like or what gender they identify as — deserves to be valued and loved for who they are”

– Barack Obama, 44th President of The United States

When I was a child, I always felt that my closet was a dark scary place filled with demons. When I grew up, I slowly realised that the very closet is a place where people tried to hide with their very own self perceived monsters, not allowed to come outside to see the beautiful world through their unique identity and eyes. They were homophobic of themselves because they were again and again led to believe that it was, they who were the monsters and they themselves were abnormal, unnatural and moreover sin.

Yes, living in a closet is dark and scary, it is like living in the shadows of one who you can

be and want to be but are not allowed to be and no one, I repeat, no one should be made to live their life partially by being just a part of who they really are.

No one deserves to live in that closet fearing that the world outside wouldn't let them be who they truly are but this closet was the reality for around 4.2% of the US¹ (2018) and 2.6% of the UK² population who identify themselves as a party of the LGBTQ+ community, until the laws changed in several parts of these country recognising them and giving them active civil rights regarding marriage, civil unions, employment, joint adoption and several other broad protections³ but what is the stance of the Indian government in development of the community now that it has decriminalised them.

This paper aims to understand the LGBTQ Community, their struggles, the Indian and the global position as well as the the need for the establishment of proper human rights and civil laws for the LGBTQ community regarding same sex marriage and joint adoption.

Further, the paper consists of six parts; Part I of the paper introduces the paper, Part II of the paper introduces the LGBTQ community the evolution and the discrimination they faced, Part III of the paper relays the global position with Part IV painting the Indian scenario, Part V discussed the marriage and

¹ UCLA, LGBT Proportion of Population, (June. 23, 2019, 12 PM) <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density>

² Sexual orientation, UK 2017, Office of National statistics, (June. 23, 2019, 1 PM) <https://www.ons.gov.uk/peoplepopulationandcom>

munity/culturalidentity/sexuality/bulletins/sexualidentityuk/2017#most-of-the-uk-population-identifies-as-heterosexual-or-straight

³ Lucas Ramón Mendos, Maps - Sexual Orientation Laws, State-Sponsored Homophobia (June. 24, 2019, 3:40 PM) <https://ilga.org/maps-sexual-orientation-laws>



adoption right with finally Part VI concluding the paper

PART II

“No matter who you are, where you’re from, your skin colour, gender identity: speak yourself.”

- BTS' Kim Nam Jun (RM) at the launch of Generation Unlimited, at the UN General Assembly

Who is the LGBTQ+ community?

LGBTQ+ an Ever-Evolving unrestrictive term, each letter “L” “G” “B” “T” “Q” describing a distinct community that are diverse with respect to sexual orientation, colour, race/ethnicity and socioeconomic status.

It is an initialism of the phrase “lesbian, gay, bisexual, transgender and queer or questioning” with “+” to portray the unrestrictive nature of the initialism as well as its evolving and expanding further including the terms “intersex, asexual and ally”

Lesbians, gay men, and bisexual men & women are defined in accordance to their sexual orientation typically conceived in terms of sexual attraction, behaviour, identity or some composite of these. This grouping of “non heterosexuals” i.e. individuals whose sexual orientation is not confined to exclusively heterosexual includes; women and men, homosexual or bisexual; people who have labelled themselves under the umbrella or lesbian, gay, bisexual among other terms; and people who didn’t adopt any

such labels but nevertheless adore experiences of same sex attraction or behaviour⁴.

In contrast to the above, transgender people are understood according to their gender identity, expression and presentation. This group embraces individuals whose gender identity differs from the sex given to them at birth or whose gender expression varies from those associated with that gender as well as individuals who reject the traditional dichotomy of gender into men or women⁵.

Queer or questioning is an individual still exploring is gender identity or sexual preference

History and evolution of LGBTQ+ community

Every century or so there has been struggles, unrest and fights against discrimination and equal rights

There was for equality on basis of gender, then equality on the basis of colour or race and now it’s for equality on the basis of love and gender identity , a right to let people be who they are and love who they wish to, though this is the struggle of this era it is not a recent phenomena both in the terms of struggles as well as people who belong to this community

We will not be going in depth in the history of LGBTQ+ movements as they are long ranging in many different countries and is not the aim of this paper

The first record of a same sex relation dates as far as 2450 BCE where two Egyptian royal

⁴ Institute of Medicine. 2011. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*. Washington,

DC: The National Academies Press. (June. 24, 2019, 2:30 PM) <https://doi.org/10.17226/13128>.

⁵ Ibid



servants were buried together in a tomb with inscription “joined in life and joined in death” on it with many more immortalised through paintings and poems over several decade⁶

The emergence of the first LGBT movement started rising after the criminalisation of same sex relations, after the world war II a number of homosexual rights groups emerged in the western world, publications demonstration and marches in support of transgenders and same sex relations become very common⁷. A 1962 gay march held in Philadelphia, marked the beginning of the modern gay rights movement soon after which same sex relations were decriminalised in several countries including England and wales. The next step was the gay liberation movement between 1969-1974 in which “homosexuality was removed as a mental illness from diagnostics manual in America⁸

The LGBTQ rights movement after the 1970s asking for proper rights and opportunities for the community as well as laws against discrimination and abuse this community has suffered, in some there has been victories and in some the struggle for equality still persists

Discrimination and abuse

⁶ LGBTQ history, GLSEN (June. 24, 2019, 3:10 PM) <https://www.glsen.org/article/lgbtq-history-1>

⁷ Percy, 2005, "Before Stonewall: Activists for Gay and Lesbian Rights" Archived August 27, 2008, at the Wayback Machine

⁸ Bullough, Vern, "When Did the Gay Rights Movement Begin?", 18 April 2005

⁹ United nations human rights, office of high commissioner, “Combating discrimination based on

“Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere.”

— **UN Secretary-General Ban Ki-moon to the Human Rights Council, 7 March 2012**

The LGBTQ community is not alien to discrimination, physical or even sexual abuse they face deeply homophobic and transphobic behaviour along with no legal protection against such discrimination on the basis of the gender identity or sexual orientation. They face discrimination in markets, schools, hospitals, at work maltreated and even disowned by their families. They are targeted for physical attacks – beaten, tortured, sexually violated or even killed⁹. In some 70 countries, prejudicial laws criminalise consensual private same sex relations exposing them to further risk of imprisonment, further abuse, arrest, prosecution – even in few countries, the death penalty¹⁰

LGBTQ people suffer through plethora of appalling transgressions including torture, rape, wrongful detention, harassment, killings, abduction, mental and physical

sexual orientation and gender identity” (June. 24, 2019, 3:20 PM)

<https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>

¹⁰ Lucas Ramón Mendos, Maps - Sexual Orientation Laws, State-Sponsored Homophobia (June. 24, 2019, 3:40 PM) <https://ilga.org/maps-sexual-orientation-laws>



assaults, bullying and many similar hate crimes¹¹

United Nations Human rights mechanism has repeatedly expressed concerns over such violations as well as has stressed a need to spread awareness, many countries have adopted LGBTQ friendly laws but the efforts are still to be seen more worldwide for laws against discrimination and protection of this community

PART III **International/ Global Position**

"Openness may not completely disarm prejudice, but it's a good place to start."

--Jason Collins, first openly gay athlete in U.S. pro sports

While we have discussed how the LGBTQ+ has gone through a lot of struggle to get recognized in different parts of the world. The most recent development at global arena was the reclassification of *gender-congruence* by the World Health Organisation where transgender people will not be considered "mentally ill" anymore.¹² According to the New Global Acceptance Index for LGBT¹³, amongst the 141 countries ranked on the basis of laws and acceptance more than half of the countries have an increase in the acceptance ratio whereas

around 10% remains unchanged and the rest have experienced a decline.

They sure have come a long way; however, their journey still goes on. Being recognized was not the only struggle, as their existence and them being able to come out from their closet, was not the only thing they wanted. Recent research also shows that the strongest relationship between acceptance and legal inclusion where found in democracies with a responsible free press and the rule of law is practised.¹⁴

Marriage plays a very important role in their relationships as well as it does to any other heterosexual relationship and the society. Their rainbow union also needed legal colors to help them get a married life. The concept of family starts with the union of marriage but does not end there. Part of having a family is also about having children and the same-sex couples seek for adoption to fulfil that dream of becoming parents. This struggle story also started getting having an impact at the global level almost two decades ago.

It all started with Netherlands, in 2001, which became the first ever country in the world to legalize same-sex marriage leading to 4 such couples who tried nuptial knots in Amsterdam by the mayor that very midnight. Not only was Netherlands the first country to provide legal marriage rights to same-sex

¹¹ Vitit Muntarbhorn, Action needed to stop violations of LGBT people's rights worldwide, UN News (June. 24, 2019, 4:00 PM) <https://news.un.org/en/story/2017/10/569492-action-needed-stop-violations-lgbt-peoples-rights-worldwide-expert-tells-un>.

¹² Michael K. Lavers, WHO to no longer classify transgender people as mentally ill, Published on May 29, 2019;

<https://www.washingtonblade.com/2019/05/29/who-to-no-longer-classify-transgender-people-as-mentally-ill/>

¹³ Andrew R. Flores, Andrew Park and M.V. Lee Badge, New Measures of LGBT Acceptance and Inclusion Worldwide, Published on <https://www.astraeafoundation.org/stories/new-global-acceptance-index-lgbt-people/>

¹⁴ Supra 12.



couples but it also granted them adoption rights.¹⁵

From that till the latest landmark development at Taiwan on 17th May, 2019¹⁶ making it the 1st Asian nation to give legal recognition to same-sex marriage/ amended its marriage definition wherein including same-sex couples to be legally married as well. Also including custody rights, taxes and insurance. However, it has given just limited adoption rights for them. With that a total of 28 countries, partially or throughout the nation, have allowed same sex marriages. Full adoption rights have been given to same-sex couples in 29 countries.¹⁷ With that also comes a question of what about marriage rights relating to the other members of the LGBTQ+ community and not just same-sex couples. Even though changes are taking place, there is a lot of work that needs to be done to improve the global position of the LGBTQ+ Community.

According to the 13th ILGA Homophobic Report¹⁸, there are 70 countries that criminalizes same-sex sexual activities. Talking about the extremities, there are six nations who impose death penalty, five nations that may end up sentencing to death and around twenty-six other nations where the punishment can be given anything from 10 years imprisonment to life-time

imprisonment for the same-sex consensual activities.¹⁹ Freedom of expression in regard to gender identity and sexual orientation issues have been legally curbed in 32 States. These are just some of the extreme things practiced around the world that we have emphasised on while discussing the Global Position of LGBTQ+ Community. There are other issues as well that exist in societies that are beyond legislation but laws do have an impact on the society and this dynamicity of societies should also have laws backing it parallely for positive development.

SUPREMO AMICUS PART 7 India's Position

“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. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality...”²⁰

-Justice Malhotra

¹⁵ Gay Marriage around the World, (June 23, 2019, 1 PM) <https://www.bbc.com/news/world-21321731>

¹⁶ Taiwan: Same-sex marriage legalised in first for Asian country, Skynews, (June 23, 2019 1 PM), <https://news.sky.com/story/taiwan-same-sex-marriage-legalised-in-first-for-asian-country-11721986>

¹⁷ Starsinsider, these countries allow joint adoption by same-sex couples, (June 23, 2019 2 PM) <https://caen.starsinsider.com/travel/367309/these-countries-allow-joint-adoption-by-same-sex-couples>

¹⁸ Lucas Ramón Mendos, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) launched the 13th edition of its State-Sponsored Homophobia report at its World Conference in Aotearoa, New Zealand, (June 24, 2019, 4 PM) https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf

¹⁹ Supra 10.

²⁰ Navtej Singh Johar And Ors Vs. Union Of India And Ors., MANU/SC/0947/2018



When the British colonised India they introduced their laws including section 377 of the Indian penal code in 1871 which criminalised and penalised sexual activities “against the order of nature” bring persecution against any consensual same sex relations as well.

They decriminalised consensual acts in 1967 with the introduction of the sexual offences act 1967²¹ but it took us more than 50 years for India to strike down a law which was accepted as arbitrary by those themselves who created and introduced the law in India.

Section 377’s historical reading down

Earlier in 2017, The supreme court of India, gave the LGBTQ community the freedom to freely and safely express their sexual orientation including an individual’s sexual expression and orientation under the ambit of the country’s right to privacy law but didn’t directly overturn or strike down the laws criminalising same sex relations²². In 2018, the revolutionary Supreme court judgement introduced an era of greater freedom and equality for the community by decriminalising consensual same sex relations putting an end to a 16-year long fight²³.

The court’s decision didn’t only decriminalise but also acknowledged the responsibility of the state to end this oppression and discrimination against the community, it also addressed the disowning of the child and called for mechanisms that

will allow reconciliation of the shunned individuals of the community into the society²⁴

The massive judgement spanning up to almost 500 pages talked in depth about the rights of the minority about discrimination of the social attitudes on individuality as well as on transgender rights

Justice Misra in the historical 2018 Supreme court judgement on transgender rights.

“The very existence of section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression, and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream²⁵.”

Firmly embedding the rights of the LGBTQ community under the constitution in this judgement had opened the doors for further

²¹ Aaron day, The Pink News Guide to the history of England and Wales equal marriage, The Pink News (June. 25, 2019, 11:00 AM).

²² Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors., MANU/SC/1044/2017

²³ Supra 20.

²⁴ Frank Mugisha, India and the Global Fight for LGBT Rights, FP Global Thinkers (June. 25, 2019, 1:00 PM) <https://foreignpolicy.com/gt-essay/india-and-the-global-fight-for-lgbt-rights/>

²⁵ Supra 20.



evaluation of civil rights such as marriage, adoption, maintenance right as well as family insurance policies for same sex partners

Aftermath and effect of the judgement

This ruling of the Indian supreme court has transnational significance and value and will compel common law countries having similar laws to re-evaluate the lawfulness and legality of such provisions the criminalise same sex relations but the fear of discrimination is still there and it will persist till the stereotype attached to the community and the lack of understanding persists Justice Dhananjaya Y Chandrachud addressed the issue of homophobia and stereotype in the country against community because of the archaic section 377 as well as lack of awareness about sexual minorities.

“The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces, and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship.²⁶”

Although this battle has been won the war still hasn't, proper laws need to be put in place to address the civil rights of the

community, they have been given the freedom to express their individuality but the rights that make that possible are still not legally provided making the freedom hollow and futile

PART V

Need and Effect of Legislation allowing them Marriage and Adoption

“The LGBTQ community has the same fundamental rights as citizens. The identity of a person is very important and we have to Manquish prejudice, embrace inclusion and ensure equal rights²⁷”

former Chief Justice of India Dipak Mishra

In a country like India where acceptance of the LGBTQ+ Community has been a very recent phenomenon with the 377-landmark judgement, as we have discussed. The society has slowly started to become more accommodating, however slowly but improvement is there.

Ensuring ‘equal rights’ to them irrespective of their sexual orientation or gender preference as stated in the judgement also includes the other basic rights of marriage, adoption, custody and not just mere decriminalizing their sexual intercourse. Right to life also include right to life with dignity which in the case of LGBTQ+ Community means being able to come out openly and live with dignity of their true identity. But that is far from being practised in most India.

²⁶ Supra 20.

²⁷ Supra 20.



Why Marriage should be Legalised?

“Marriage is about love, not gender”

- *Scotland's Health Secretary Alex Neil*

India being a place where marriage plays a very important role in society. Here, majority of the cultures consider or recommend that marriage should take place before sexual activity. The Supreme Court of India decriminalized Sec 377 of IPC allowing sexual intercourse between people of same sex but still marriage, adoption, custodial rights amongst the LGBTQ has not been explicitly permitted to obtain civil partnerships. While introducing LGBTQ group it needs to be given attention to the fact that it does not include only the same sex relationships but also goes in the case of marriage as well.

Many people who belong to this category, it still takes a whole new level of courage to come out with their identities and their struggle is real as the social acceptance is still low. Laws can help a great deal for these people to come out as they will have something to back themselves with. Not only that, if legislations come up, it will result in more awareness and of course the fact no one can go against the law denying the fact.

In India, there are no laws stating same-sex couples or transgender marriages to have a legal sanction or registration but at the same

time there is no law that strictly prohibits or makes it ‘illegal’ per se. Despite the decision of the Supreme Court in *National Legal Services Authority (NALSA) v. Union of India*²⁸, where the Central and State governments were required to amend laws to provide ‘right to marry’ for transgender persons, among other rights, “the open question still exists as to whether the un-amended marriage laws in their present state legally permit solemnization and registration of a marriage involving a transgender spouse.” All the Marriage Acts followed in India have pin-pointed that fact that marriage is between a ‘man’ and a ‘woman’, or ‘husband’ and ‘wife’, or ‘bride’ and ‘groom’ hence implying the gender specificity.

Recently in April, in Madras High Court case where a transgendered woman came to court because she was denied to get married to another man several times. However, on approaching the High Court allowed the marriage stating it as a ‘valid marriage ‘as transgendered woman is also a bride and hence the registrar is compelled to register their marriage.’²⁹ Not only are the same-sex couples denied legal recognition to their marriage, but the whole LGBTQ+ Community is suffering because of it in one way or another.

Here, when a transgendered woman who obviously qualifies as a woman has to go through so much to marry the she loves. Think about the same-sex couples who want to spend their lives by marrying their loved ones. Simply amending the personal marriage laws or just including the same-sex

²⁸ AIR 2014 SC 1863

²⁹ ETB Sivapriyan, Marriage between man and transwoman is valid: Madras HC, (June 27, 2019, 6 PM)

<http://www.deccanherald.com/national/marriage-between-man-and-transwoman-is-valid-madras-hc-730260.html>



marriage in the Special Marriage Act will not only be revolutionary in itself but will also be a huge step forward towards providing them equal rights.

can contribute to changing public attitudes, and they concretely tell people that they are equally worthy of rights.”

- Helen Kennedy & Ruth Baldacchino,

Co-Secretaries General of ILGA

**Why Adoption should be Allowed?
(Rainbow after dark clouds)**

“What makes you a parent is not your ability to make a child, but the courage to raise one”

-Barack Obama, 44th president of the United States

It is a well-accepted fact that moulding a society takes time, especially when it is a new issue to the whole world. Such a revolutionary yet sensitive issue where one’s gender identity and sexual orientation’s acceptance is debatable.

Adoption laws are as ancient in India as India itself. Being parents or having children is not just about creating a progeny of their own because it is much more than that. It is the ability to raise one and have a family live together. Adoption processes are there in almost all the personal laws that exist within India. So, what if due to certain circumstances, someone or a couple is not able to conceive their own progeny. Their dream of parenthood can always be filled with the process of adoption.

Many people who belong to this category, it still takes a whole new level of courage to come out with their identities and their struggle is real as the social acceptance is still low. Laws can help a great deal for these people to come out as they will have something to back themselves with. Not only that, if legislations come up, it will result in more awareness and of course the fact no one can go against the law denying the fact.

Similarly, in the case of same-sex couples, like others, they also want to have a family and children. Then why would they not be allowed to adopt children and fulfil their dream of getting married, becoming parents and starting a family of their own.

There is a need for a separate legislation for dealing with the issues of the LGBTQ+ community as there is so much that needs to be changed in order to give them equal rights and protect them from discrimination. That mere amendments in the existing laws cannot do so.

Should there be a Separate Legislation?

“These are not just numbers, but laws that actually impact the daily lives of people of diverse sexual orientations around the world. Positive laws make all the difference: they

PART VI

CONCLUSION

“The civil rights of none shall be abridged on account of religious beliefs or worship”

-James Madison 4th US President 1751-1836



The LGBTQ+ community as a whole have come a long way, the destination not out of reach but still away. The first mark of this struggle was to acknowledge this community as human, as people the same as anyone else with nothing unnatural about them and once that was won the next mark is to recognise the rights that make humans, human because just acknowledging is not enough.

The aim is not just providing only marriage and adoption laws for them. That sure needs to be given attention but rights such as nominating other same-sex spouse for insurance, tax and custodial rights, property are also something that needs to be given proper attention.

A society is made up of people and for a harmonious community acceptance is crucial, legal recognition is one side of the coin and sociological recognition the other. It is important for people to understand that LGBTQ+ individuals are no different from anyone else, they have the same rights and duties that everyone else was born with. The ultimate goal here is to make it such that there is no difference between any communities on the basis of their rights and on the basis of what they can do and they can't do.

