

## CRITICAL ANALYSIS TO UNDERSTAND THE REALITY OF LGBTQ RIGHTS UNDER THE INDIAN CONSTITUTION

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### **ABSTRACT**

The present paper is aimed at shedding light on the reality of the rights of the LGBTQ+ community under the Indian constitution. The LGBTQ community in India are the sexual minority who are constantly discriminated on the basis of who they are and who they love<sup>1</sup>. Sadly, many people who belong to this community are still not considered to be normal humans and are forced to get themselves medically treated. In most of the cases which are extreme in nature they are avoided by their homes or they become the victims of honour killings.

This present paper is structured in a manner to understand the concept of LGBTQ community in India and their present rights along with this the paper also aims at understanding how their fundamental rights under the Indian constitution are violated and deprived. The paper finally aims at the putting a way forward with giving them a legal recognition for their relationship. The paper portrays how people belonging to the LGBTQ community are deprived the benefits as well as social and legal recognition that married heterosexual couple enjoy<sup>2</sup> and also in reality how their fundamental rights are deprived in an unjust way. While looking at the earlier researches done on the present topic the researcher identified the fact that a wholesome research on the present topic was missing out and that is what the researcher aims at achieving through the present paper. The paper answers the main question that how mere decriminalization is not sufficient and legal recognition of same-sex relationships as heterosexual unions is the need of the hour. The paper is written in a comprehensive manner using doctrinal method of researching which involves analyzing the existing statutory provisions, judicial precedents and various other secondary data.

**KEY WORDS:** LGBTQ Community, Fundamental Rights, Equality, Discrimination, Constitution.

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<sup>1</sup>Amber Tanweer, *LGBT Rights in India*, 2 IJLMH 1(2018).

<sup>2</sup>“FIZA KHAN AND DILSANA KHAN, *LGBT Rights in India The Status Quo* 3 International Journal of Law Management & Humanities 731(2020)”.

### **RESEARCH OBJECTIVES**

1. To understand the unjust way in which the LGBTQ community is being treated in India.
2. To critically understand the reality of the “equal representation” given to this community.
3. To scrutinize the various existing provisions which aim at safeguarding the LGBTQ community.

### **RESEARCH QUESTIONS**

1. What are all the various constitutional safeguards not enjoyed by the LGBTQ community in India?
2. Has decriminalising Section 377 of IPC really created a positive impact on the LGBTQ community?
3. What are the various existing discriminative protections for the community under the Indian constitution?

### **RESEARCH METHODOLOGY**

Generally, there are two methods of researching namely: doctrinal and non-doctrinal. As the current paper aims at analysing the rights of LGBTQ community in India under the Indian constitution in a comprehensive manner, the paper is completed using doctrinal method of researching. In this method, the research is conducted by analyzing secondary sources of data. As the present paper requires analysis of the existing rights and various judicial precedents, understanding what the community is denied and giving a solution based on the analysis done on the existing sources this method seems to fit the present paper. The researcher has made use of various secondary sources like - journal articles, judgements, books, research papers and thesis in order to complete the paper.

### **LITERATURE REVIEW**

*“Is Decriminalisation of Homosexuality Enough”*<sup>3</sup>? The article points out the most important fact that the current paper deals in, which is to understand the reality of decriminalising Section 377. The quite obvious answer which is to that the mere decriminalisation has not helped is brought out in the article. The author then proceeds to

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<sup>3</sup>Astha and Aryaman, *Is Decriminalisation of Homosexuality Enough?* SCC Online Blog OpEd 132(2020).

understand the position of the community in the Indian literature. The concept of homophobia is analysed and how several countries in the world today have legally recognised same sex marriage, which seems to be the perfect solution for all the problems faced by the LGBTQ community along with realising the importance of fundamental right to marry is clearly pointed out in the article. The article added value to the current research by providing information on the reality of the rights of the LGBTQ community. **“Legal Recognition of Same Sex Marriage Rights in India”<sup>4</sup>**: Another article which adds value to the present research by explaining the actual solution for the problems faced by the community. The author has written on the importance of legal recognition of the rights of LGBTQ community in India and points out the fact as to how heterosexuality is considered to be natural while homosexuality is abnormal in India. He then proceeds to explain how despite the judgement in 2018 nothing much has changed in India. As pointed by him all this happens because the people in the community do not have legal recognition and only their sexuality is no longer seen as a crime in India. **“LGBT RIGHTS IN INDIA”<sup>5</sup>**: In the paper the researcher has tried to discuss the fact how LGBTQ people are discriminated on the basis of sex and their sexual orientation which is basically violating a fundamental right. The paper has its focus upon the legal challenges, scope, lacunas and issues faced by LGBTQ community in India. The paper also tries to put forward the fact that while some steps are taken to accept the community in India, much of a difference is not seen. The paper helped the researcher to understand the various steps taken by the society and government to accept the people of the LGBTQ community. **“LGBT Rights in India The Status Quo”<sup>6</sup>**: This paper again talks about how in India same sex marriage is still a far-fetched dream and how even though laws have changed, in reality violence or discrimination against the community still prevails. It sheds light upon the most important question which is whether homosexuals are finally treated as equal citizens in India or not and also analyses their international Human rights to the present rights guaranteed to them. The paper examines the Right to equality with regard to this community and the same helped the researcher of the present paper. **“Law Commission of India, 2000”<sup>7</sup>**: This was the 172<sup>nd</sup> report the law commission of India submitted for the deletion of section 377 of IPC. As written in the report “it will be harmful for public in general because the Section directly attacks a particular community of the society and discriminating them”.

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<sup>4</sup>Shivam Garg, *Legal Recognition of Same-Sex Marriage Rights in India*, CNLU LJ (9) 158(2020).

<sup>5</sup> Amber Tanweer, *LGBT Rights in India*, 2 IJLMH 1(2018).

<sup>6</sup>“FIZA KHAN AND DILSANA KHAN, *LGBT Rights in India the Status Quo*, 3 International Journal of Law Management & Humanities 731(2020)”.

<sup>7</sup> 172<sup>nd</sup> LAW COMMISSION OF INDIA REPORT, (2000).

Reading this report, it is clear that the law commission wanted to delete the Section but since then no step was taken to delete or modify the Section and only after 18 years it was decriminalised. ***“SAME-SEX LOVE AND INDIAN PENAL CODE § 377 AN IMPORTANT HUMAN RIGHTS ISSUE FOR INDIA”***<sup>8</sup>: The paper talks about how decriminalisation is a major step taken by India and further moves on to examine the trends in international human rights law and does a comparative analysis of the same. Finally, it presents an analysis on NAZ Foundation case and proposes reasoning as to why this community should be empowered. It added value to the present paper by providing information of the community on the international front. ***“SECTION 377 AND LGBT ACTIVISM IN INDIA”***<sup>9</sup>: This paper sheds light on the important element that the present paper focuses on which is basically, how the ancient Indian literature had an accepting outlook towards the concept of people belonging to different sexual orientation and it moves on to point out the fact as to how the Section criminalizing LGBTQ was brought in by foreign rulers who brought in the ideology and how it took so long for India to realise the same. ***“DOES THE NAVTEJ SINGH JOHAR CASE FINALLY ETCH EQUALITY FOR THE LGBTQ COMMUNITY”***<sup>10</sup>? It examines how the battle against Section 377 started around 20 years back and how till today in reality major changes are not visibly seen. It compares the struggle for the Section to be decriminalised through various landmark cases during various timelines. It does a reality check after the landmark 2018 judgement and does a comparative analysis and submits a perspective on South Asian countries to conclude that India has a long way to go. ***“The Global Struggle for LGBTQ Rights: Legal, Political and Social Dimensions Symposium”***<sup>11</sup>: It takes into consideration the various countries across the globe and mentions the struggle that LGBTQ community belonging to each country had to go through before getting officially recognised. It also compares the situations between various countries which helped the researcher in the present paper to do a comparative analysis. ***“The Transgender Persons (Protection of Rights) Bill 2019 Divergent***

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<sup>8</sup>“Robert Wintemute *SAMESEX LOVE AND INDIAN PENAL CODE § 377 AN IMPORTANT HUMAN RIGHTS ISSUE FOR INDIA* 4 NUJS LAW REVIEW 31 (2011)”.

<sup>9</sup> Ankit Srivastava & Dr. Vivek Kumar *SECTION 377 AND LGBT ACTIVISM IN INDIA* 6 E ISSN 2348 1269 30 (2019).

<sup>10</sup>“Harsh Mahaseth & Dikshya Koirala *Does the Navtej Singh Johar Case Finally Etch Equality for the LGBTQ Community* 26 Sri LANKA JINTIL 213 (2018)”.

<sup>11</sup>Charles I. Auffant , Ronald Chen , Whitney Strub , Ben Sifuentes , Anahi Russo-Garrido , Carlos Decena , Jorge Contesse , Macarena Saez, Lisa Davis & Zach Hudson, *The Global Struggle for LGBTQ Rights: Legal, Political and Social Dimensions*, 37 WOMEN's Rts. L. REP. 229 (2016).

*Interpretations and Subsequent Policy Implications*<sup>12</sup>. The article is specifically written towards one of the important categories of people belonging to the LGBTQ community known as transgender. It actually analyses and comments on the Transgender bill, 2019 and mentions the fact that the bill is inadequate in nature because it does not deal with a lot of key issues. It even mentions how the bill misunderstood the category of individuals which it seeks to protect. The present researcher benefitted through the article as it deals with the specific category of LGBTQ people, who are separately analysed in the paper.

## **BACKGROUND ANALYSIS**

### **INTRODUCTION**

While looking at the phenomena of sexual orientation and gender identity from a legal perspective in India, Section 377 of the IPC 1860, is the most important one to be considered. The section reads as “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 ten years and shall also be liable to fine”<sup>13</sup>. Herein the term “against the order of the nature” refers to other kinds of penetration except vaginal by a male and female so this section considered anything other than such intercourse to be unnatural. This section was actually drafted in 1862 by Thomas Babington Macaulay, he based the section on an old anti-sodomy legislation in the United Kingdom, which could be used at any time to intimidate and prosecute same-sex partners<sup>14</sup>.

So, the common man in India was forced to believe that other than heterosexual act other sexual act is to be against nature. The sad reality is that Indian’s are not aware of the Vedic literature that contains three genders of human’s male, female and third sex and mentions about people belonging to the LGBTQ community. People belonging to the third sex were recognised even in Kama sutra. These people were not denied of their basic rights<sup>15</sup>. So, the real question is that being a democratic nation, which enjoys almost 75 years of independence, Is India changing its perspective from what a Britain officer taught us?

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<sup>12</sup>Abhimanini Sawhney and Sara Grover, *The Transgender Persons (Protection of Rights) Bill 2019 Divergent Interpretations and Subsequent Policy Implications*, 6.1 IJLPP 1, (2019).

<sup>13</sup> Indian Penal Code 1860 § 377.

<sup>14</sup> Ankit Srivastava & Dr. Vivek Kumar, *SECTION 377 AND LGBT ACTIVISM IN INDIA*, 6 E ISSN 2348 – 1269 30 (2019).

<sup>15</sup>*Id.*

The answer is in words yes but in reality, the answer is no. After the landmark judgement of 2018 “*Navtej Singh Johar v Union of India*”<sup>16</sup> (referred as *Navtej* case) which decriminalized ‘consensual sexual intercourse’ between the persons of same gender by reading down Section 377<sup>17</sup> of the Indian Penal Code, 1860<sup>18</sup> which explicitly seems to be unconstitutional because it is violating the fundamental rights of the people belonging to the LGBTQ community (Article 19(1)a and Article 14), still the court hasn’t decided anything on the legal status of the same sex marriage in India and thus, the Fundamental right to marry is not guaranteed to people belonging to this community. Even recently, the Delhi HC has dismissed the petition and held that Petitioners belonging to LGBTQ community cannot claim a fundamental right for same-sex marriage being recognised under the laws of the country<sup>19</sup>

But in the landmark judgement of justice “*KS Puttaswamy v. UOI*”<sup>20</sup> the majority held that the right to marry is basically one’s choice and is integral part of Article 21 of Indian constitution. So, right to marry is a fundamental right guaranteed to Indian citizens which cannot be taken away except through legal procedures which are fair and just. But sadly, it is still deprived to the LGBTQ community in an unjust way.

On the other hand, even after the case of “*NALSA VS UOI*”<sup>21</sup> which legally recognised the transgender community and decided that the fundamental rights would be available to the third gender in the same manner as they are available to the male and females in India, still the transgender community are not equally treated and the shortcomings of the transgender persons Bill, 2019 clearly proves the same. The harsh truth is that various Fundamental rights including the fundamental right marry is not available to the people of this community. It is to be understood that these rights are being deprived to the people belonging to this community just because how they identify themselves.

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<sup>16</sup> “*Navtej Singh Johar & Ors versus Union of India thr Secretary Ministry of Law and Justice W P (CrI.) No. 76 of 2016 D. No. 14961 (2016)*”.

<sup>17</sup> Shivam Garg, *Legal Recognition of Same Sex Marriage Rights in India* CNLU LJ (9) 158 (2020).

<sup>18</sup> Supra Note. 3.

<sup>19</sup> *Abhijit Iyer Mitra & ors vs UOI WP(C) 6371 (2020)*.

<sup>20</sup> “*Justice K S Puttaswamy (Retd) and Anr vs Union of India and Ors 10 SCC 1(2017)*”.

<sup>21</sup> *NALSA VS UOI SC 1863(2014)*.

### **BACKGROUND UNDERSTANDING OF THE LGBTQ COMMUNITY**

India being one of the world's oldest civilization and a young nation, is home to almost 1.2 billion individuals out of which twenty-seven lakh people belong to the LGBTQ community as per the latest data<sup>22</sup>. LGBTQ stands for the phrase "lesbian, gay, bisexual, and transgender community". It encompasses of a broad coalition of groups who are diverse with respect to their gender, sexual orientation, race and ethnicity which makes them unique and also separates them from the normal group of individuals. It is noted that gays, lesbians, bisexual men and women are identified according to their sexual orientation. These group of people share the fact that their sexual orientation is not exclusively heterosexual as they identify themselves to have same sex attraction or sexual behaviour towards both the genders known. The other group of people who fall under the community are the transgender people whose gender identity differ from their originally assigned sex or also encompasses of the individuals who reject the traditional cultural conceptualizations of gender in terms of male/female dichotomy<sup>23</sup>.

### **HISTORICAL PERSPECTIVE OF THE COMMUNITY**

It is to noted that the Arthasastra, which is an ancient Indian material on the concept of diplomacy "mentions a good variety of non-vaginal sexual practices that, whether or not performed with a men or women, were sought after to be punished with low grade of fine"<sup>24</sup>. Even the Manu smriti, Dharma shastra's mention about same sex attraction but treat them as a crime with a very little fine to be paid by the offender. So, here there are two elements to be noted, one that non-vaginal sexual activities always existed and was not a concept that aroused in modern or post-colonial India. The other one to be noted is that such sexual activities were not accepted in India as they were considered to be offences but were recognised as minor offences. On the other hand, moving further, "Rigveda, uses a phrase called Vikriti Evam Prakriti, which means to what is unnatural is actually natural"<sup>25</sup> which indirectly means homosexual relations were recognised and existed even then. Even Kamasutra for that matter talks about homosexual relations by explaining it in an entire

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<sup>22</sup>Introduction- *The Health of Lesbian, Gay, Bisexual and Transgender people, Institute of Medicine (US) committee on LGBTQ*, National Academics press, NCBI (2011).

<sup>23</sup>Abhimanini Sawhney and Sara Grover, *Transgender Persons (Protection of Rights) Bill 2019 Divergent Interpretations and Subsequent Policy Implications*, 6.1 IJLPP 1 (2019).

<sup>24</sup>Janees Rafiq, *BEING LGBTQ IN INDIA: SOME HOME TRUTHS*, International Journal of Scientific & Engineering Research vol 11,5 (2020).

<sup>25</sup>Chatterjee Subhrajit, *Problems Faced by LGBTQ People in the Mainstream Society: Some Recommendations*, International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS), Vol 1, 317-331 (2014).

chapter. Surprisingly, “Kautilya’s Arthasasthra” talks about homosexual behaviour and imposes the lowest penalty for such intercourse while illicit and unholy heterosexual behaviour had more serious penalty in place<sup>26</sup>.

Further, during the colonial era when the British were ruling India, as already mentioned they prohibited homosexual relations by recognising it as an offence under Section 377 of IPC which came into force in 1861. It is again worthy to be noted that all the places ruled by the British were recognising it as an offence because of the Christian spiritual beliefs of colonial government. So, LGBTQ community has always existed in India and their sexual activities were not majorly treated to be of an offence, but India under the British influence saw a change towards the same.

Moving further, in 1977 Shakuntala Devi moved a step further and conducted a sex study in India, the results mentioned that Section 377 was mainly used to harass HIV/ AIDS prevention activists, various people belonging to the LGBTQ community and sex workers from the period of 2000 to 2009<sup>27</sup>. Which highlights the fact, how this Section was misused and used to harass various sets of people. With an advent of lesbian collective named “Sakhi” in old Delhi and Gay magazine named “Bombay Dost” which started in India during late 1980’s<sup>28</sup> the problems faced by the LGBTQ community were first articulated in public forums. Since then, the community’s problems have been highlighted and the movement for their rights have enlarged in India.

With the beginning of the twentieth century, the gay/ lesbian/ bisexual/ transgender movement has gained major importance in India.

### **EMPIRICAL DATA AVAILABLE RELATING TO LGBTQ COMMUNITY IN INDIA**

As per the research conducted by the researcher, latest empirical data were not available on the LGBTQ community in India. Two of the important researchers and surveys found by the researcher are analysed below.

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<sup>26</sup>*Id.*

<sup>27</sup>Swain S. Problems of third gender, *Social Issues of India*. New Delhi: New Vishal Publications, (2006).

<sup>28</sup>Supra note 25.

What Do We Know About LGBTQIA+ communities Mental Health in India? A Review of Research From 2009 to 2019<sup>29</sup>- being a reviewal paper written on the survey conducted analysing the mental health, problems faced and nature of the LGBTQ community the paper combines 22 reviews and reports on the community. It found that people belonging to this community showed high mental health issues due to the harassment they undergo in the society. The solution as suggested seems to be the minority stress model. The data reviewed as mentioned in the report were collected considering the societal attitudes, factors related to mental wellbeing and living experiences. The limitation as identified by the researcher in the report was the fact that sub groups of the LGBTQ community were not considered in the data.

The possible role of the psychiatrist: The lesbian, gay, bisexual, and transgender population in India<sup>30</sup>: along with pointing out the importance for psychological support to the LGBTQ community the research also analyses the population data of LGBTQ community in India as of 2011 census. As it mentions “3.8% of the population of India fall within the LGBT group, an estimated 45.4 million people in 2011, based on the last national Indian census”<sup>31</sup> It further shows that “the cultural experience of an LGBT person in India may be vastly different to someone in the USA; yet, the experience of discrimination and invalidation because of membership of the LGBT group may share common themes”<sup>32</sup>. The report seems to conclude that the nature of problems and issues faced by the LGBTQ community faced in India is similar to what the community faces across the world. Thus, the researcher suggests that further data and study should be conducted on the LGBTQ community in India to understand more about the community and to further pass laws protecting them.

### **PROBLEMS FACED BY THE COMMUNITY**

The people belonging to the LGBTQ community are treated like the marginalized category of people and are excluded by the society by depriving them of various resources and opportunities which the normal man enjoys. They are highly discriminated by the general members of the society, which makes their lives extremely hard. Majorly the families of the

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<sup>29</sup>Jagruti R. Wandrekar, Advaita S. Nigudkar, *What Do We Know About LGBTQIA+ Mental Health in India? A Review of Research From 2009 to 2019*, Journal of Psychological Health, (2020) <https://doi.org/10.1177%2F2631831820918129>.

<sup>30</sup> Warren Kealy, *The possible role of the Psychiatrist: The Lesbian, gay, bisexual and transgender population in India*, Indian Journal of Psychiatry, Vol 60, 489-493 (2018).

<sup>31</sup>*Id.*

<sup>32</sup>Bastia BK, *Socio-cultural aspect of sexual practices and sexual offences – An Indian scenario*, Clin Forensic Med., 13,208–10 (2006).

people belonging to the community don't accept them because of their sexual orientation and either treat them badly or just throw them away from the family. The people of this community also become victims of violence and suffer from, harassment, homophobia, psychological distress, poor mental health, poor economic conditions and homelessness as people are not ready to accommodate them<sup>33</sup>.

From a legal perspective, even though Article's 14,15 and 21 of the Indian constitution aim to protect the community by providing them the right to equality, non-discrimination and privacy as well as life and private liberty in reality no such protection is actually enjoyed by the people belonging to the LGBTQ community. They are regularly discriminated, treated differently and never accepted for how they see themselves.

Further, the Adoption regulation act in India does not recognise the Right to Adoption in the case of the people belonging to the LGBTQ community and also the people belonging to this community cannot become parents through surrogacy. They are further not even allowed to become guardians.

### **LGBTQ: COMPARSION ACROSS COUNTRIES**

To start off, countries which recognise homosexuality as an offence punishable with death penalty which is the most severe punishment any person could deserve are discussed. This includes Sudan, Yemen, Iran and Saudi Arabia. Further in countries like Mauritania, Afghanistan, Pakistan, Qatar and the United Arab Emirates, Somalia (few parts) and northern Nigeria wherein under the Syria law, death penalty is applicable in case of homosexuality<sup>34</sup>. Almost 33 countries across the globe have laws which prevent same-sex marriage.

On the other hand, when we look at the data as of 2021 nearly twenty-nine countries have legally recognised LGBTQ marriage across the globe. These countries mainly are the most advanced economies in the world. In case of African countries, only 22 countries have explicitly legalised homosexuality and it is also punishable by death in four countries in four

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<sup>33</sup>*Id.*

<sup>34</sup> Jacob Poushter&Nicholas Kent, *The Global Divide on Homosexuality Persists*, Pew Research centre (June 2020) <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/>.

countries. The United Nations have also recognised LGBTQ rights and urged all its members to pass laws protecting the community<sup>35</sup>.

In India Same- sex and their sexual activity is decriminalised but the rights are not legally recognised. So, while looking at the status of the community across various countries, it can be noted that most of the Muslim dominated countries have strict laws not allowing the activities between same-sex as their personal laws don't allow the same. While on the other hand most of the developed nations with advanced economies have recognised the rights of the community including their marital rights. Thus, India being one of the advanced economies competing with the world's largest economies it is high time, India legalises the rights of the LGBTQ community.

### LEGALITY LEGAL ANALYSIS

As already mentioned, Section 377 of the Indian Penal Code, 1860 was the Section which basically criminalised any sexual activities between the same sex as it considered them to be unnatural by nature. This concept was brought into India by the British and as a residue of their ruling it just stayed in India. In order to understand the Section lets further dive into case laws relating to it.

In the case of "**NAZ FOUNDATION VS NCT DELHI**"<sup>36</sup> wherein Lucknow police in the year of 2001, arrested two men on suspecting them to be gay couple, along with them nine men from an NGO trying to educate people on sexually transmitted diseases were also arrested on the grounds of running a sex racket. The same led to a huge outburst and they were finally released. Following the incident Naz Foundation files a petition before the HC of Delhi in the same year challenging the validity of Section 377 of IPC. The court was of the opinion that the Section was violating the Fundamental rights of the community. This idea of decriminalizing which was pointed out by the court in this case was clearly rejected by many individuals as they based their arguments on the ethics and morality of India which has been always followed for years and thus challenged the same. Thus, in the case of "**SURESH KUMAR KOUSHAL VS NAZ FOUNDATION**"<sup>37</sup> With the various faith-based groups opposing the idea of decriminalising sexual activities between same sex, the court in this case

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<sup>35</sup>José Fernando Serrano Amaya, Oriol Ríos González, *Introduction to the Special Issue: Challenges of LGBT research in the 21st century*, (2019)<https://doi.org/10.1177%2F0268580919856490>.

<sup>36</sup> Naz foundation vs NCT Delhi, WP(C) no.7455/2001(2009).

<sup>37</sup>Suresh Kumar Koushal vs Naz Foundation, Civil Appeal no.10972 (2013).

again re-criminalised the Section. The judgement given by the Honourable court was criticized by people in all parts of the country because the bench held that the LGBTQ community were the minority community in India and thus do not deserve constitutional protection.

The reasoning behind the judgement being totally unacceptable as just because a community is minority, it does not mean it cannot avail constitutional protections, the same was challenged and finally in the landmark case, "**NAVTEJ SINGH JOHAR VS UNION OF INDIA**"<sup>38</sup>, the honourable SC of India, held Section 377 to be unconstitutional as it infringes various Fundamental rights of the individuals belonging to the LGBTQ community. As the court mentioned that sexual orientation is basically how an individual identifies himself and the same should not be opposed, which will ultimately result in violating the Article 21. The court also overruled the Suresh Kumar judgement, as it was baseless and not justifiable. Further it held that Article 19 of the constitution was violated as the Section was infringing the freedom to choose one's partner and express oneself sexually<sup>39</sup>.

So, since the judgement the courts have emphasised on creating more awareness on the LGBTQ rights and about the community as a whole. In the recent judgement in the case of "**S. Sushma and another v Commissioner of police and others**"<sup>40</sup> the Madras HC has finally issued guidelines against harassing the LGBTQ community and has also requested the Union to ban conversion therapy wherein the people of the community are forced to convert themselves by undergoing a surgery. Thus, major developments towards accepting the community and safeguarding the community can be clearly seen.

While on the other hand if we look at the transgender people who fall under the community, the case of "**NATIONAL LEGAL SERVICES AUTHORITY VS UNION OF INDIA**"<sup>41</sup> stands to be the landmark judgement. In this case the court finally recognised them to be third gender legally and mentioned that all the Fundamental rights are equally available to the third as they are available for the others in the society. For the purposes of reservation, employment, public health benefits the recognition was much needed. The court further held that psychological test as opposed to the biological test must be used to determine who identifies as a transgender. Before the landmark judgement in 2014, the transgender

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<sup>38</sup>Navtej Singh Johar & Ors versus Union of India thr Secretary Ministry of Law and Justice W P (CrI.) No. 76 of 2016 D. No. 14961 (2016)".

<sup>39</sup>Supra Note 24.

<sup>40</sup>S. Sushma and another v Commissioner of police and others, W.P.No.7284 (2021).

<sup>41</sup>NALSA VS UOI SC 1863 (2014).

community had to forcibly identify themselves to be either male or female as no other gender was legally recognised. The court held the non-recognition was thus violating the various fundamental rights of the community and finally gave them the recognition they deserved. The bench also held that insisting on sex reassignment surgery as a condition for changing one's gender is illegal.

### **UNDERSTANDING THE REALITY OF THE RIGHTS GIVEN TO THE COMMUNITY**

From the above it can be clearly viewed that a progressive approach is being adopted by India towards the LGBTQ community and the times are changing. Various judgements have been a positive step towards empowering the community. Even recently the New Delhi municipal council (NDMC) in its recent annual budget has allocated funds for constructing separate toilets for trans community<sup>42</sup>. This shows the new acceptance of the community in the society.

But on the other hand, the reality is still different. Sadly, even though several judgements are passed the rights of the people belonging to the community are still violated because even though section 377 is criminalised in India, the people of the LGBTQ community are not allowed to marry in India. As held in the cases of "*SHAKTI VAHINI VS UNION OF INDIA*"<sup>43</sup> and in "*KS Puttaswamy v. UOI*"<sup>44</sup> Right to marry is a fundamental right under the Article 21 of the Indian constitution. As mentioned by the court "right of a person's choice to marry whom she pleases in an inherent part of individual dignity and intrinsic to Article 21". So, if right to marry is a fundamental right, then isn't the same violated in case of the LGBTQ community by not allowing them to get married to the person they love. Further it is to be noted that Article 15 of the Indian constitution, mentions that state shall not discriminate any citizen based on the race, sex etc and the exact discrimination is done by the state by not recognising the marital rights of the community. On the other hand, Article 19 is also being violated as the people belonging to this community do not Enjoy the Right to freedom which they deserve as a citizen of the country. As held in the case of "*Shafin Jahan v. Asokan*

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<sup>42</sup>Set up separate toilets for transgender people in offices, Delhi govt tells MCDs, departments, The Print, (Feb 2021) <https://theprint.in/india/set-up-separate-toilet-for-transgender-people-in-offices-delhi-govt-tells-mcds-departments/606589/>.

<sup>43</sup>Shakti Vahini vs union of India, writ petition (civil) no. 231(2010).

<sup>44</sup>Supra Note 20.

*K.M. and others*<sup>45</sup> “it has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution”. While in the case of “*Alamat Ansariand others versus State of UP and others*”<sup>46</sup> the court clearly held that Right to choose a partner is a fundamental right and falls under the ambit of Article 21, thus going on the same line what is the use of having the right to choose a partner if they are not allowed to marry. On the other hand, Article 21 as held by the court in the case of “*SureshKumar Koushal v NAZ foundation*” (“*Koushal*”)<sup>47</sup> “the sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21”<sup>48</sup> again, if a citizen is allowed to develop human relations with another without any interference by the state, then what is the point of the same if the person is not allowed to marry legally whomever, he/she loves. The final right which needs to be highlighted here is the Right to adopt, as mentioned in the case of “*Payal vs Sharinee Vinayak Pathak*”<sup>49</sup>, right to adopt is a basic right covered by the right to life under the Article 21 of the constitution. The same is again violated by the state, in case of the LGBTQ community as they are not allowed to adopt a child under the Indian adoption Act.

On the other hand, while we look into the status of the transgender community, post their landmark judgement and legal recognition of their rights the community has gained societal acceptance. But the first step taken towards protecting the community by ending the discrimination they face was taken by the government by introducing the Transgender bill 2019. Even though the prime objective of the bill seems to be to protect the transgender community, it does not seem to fulfil the same. The bill does not allow the trans person to self-identify themselves as it requires them to get an identity certificate. Also, as the court held in the case of “*NAVTEJ SINGH JOHAR VS UNION OF INDIA*”<sup>50</sup>, “right to privacy under Article 21 also includes right to sexual orientation then not allowing oneself to identify

<sup>45</sup>Shafin Jahan v. Asokan K.M. and others, CRIMINAL APPEAL NO. 366 (2018).

<sup>46</sup>Alamat Ansariand others versus State of UP and others, CRIMINAL MISC. WRIT PETITION No. – 11367 (2020).

<sup>47</sup>Supra Note 37.

<sup>48</sup>*Id.*

<sup>49</sup>Payal vs Sharinee Vinayak Pathak, CR 434 (2010).

<sup>50</sup>Supra Note 38.

as a particular sex without getting a certificate again seems to violate the fundamental right”<sup>51</sup>. The same is clearly violated. The bill also punishes the people performing crimes against the transgender only for a period of two years, which is comparatively a smaller number of years because when a similar crime is performed against a woman the punishment is for seven years, thus again it discriminates citizens based on gender violating a fundamental right. Even though the bill is aimed at protecting the LGBTQ, it introduces no particular provision to protect the interests of the community or saves them from the discrimination they generally undergo in the society.

In order to summarise it can be said that the fundamental right to marry is not guaranteed to the people belonging to the LGBTQ community. As per the Article 12 it is the state which is not supposed to violate the fundamental rights of the citizens of the country. But in case of the LGBTQ community the fundamental right to marry not being recognised clearly leads to violation of the many other fundamental rights of the community as already mentioned above, by the state. In the case of “*Additional district magistrate, Jabalpur vs S.S. Shukla*”<sup>52</sup>, the court held that just because the LGBTQ community is a minority community it does not mean their rights can be violated and they can be deprived from constitutional protection. So, even though courts have ruled that the rights of the LGBTQ community not to be infringed just because they have less representation and the Indian constitution prohibits from doing so, sadly in the present their rights are explicitly violated without any reasonable cause.

Even in the case of “*Udit Sood and Ors. v. Union of India and Anr*”<sup>53</sup>, recently in 2021 the court held that LGBTQ community in India do not enjoy fundamental right to marry, stating that marriage is a union between a “biological man and biological women who are capable of producing children” as that’s how it has been followed in India. While considering the societal morality, the court held that LGBTQ marriage is against morality and ethicality and moreover several other laws in the India would need change thus, in the current situation legalising the marital rights of the community is not possible. So, it can be said that the fundamental right is deprived in an unjust manner without a reasonable cause, because age old principle being followed and used by courts for judgements makes no sense.

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<sup>51</sup>*Id.*

<sup>52</sup>*Additional district magistrate, Jabalpur vs S.S. Shukla, AIR 1207 (1976).*

<sup>53</sup>*Udit Sood and Ors. v. Union of India and Anr, 289/RG/DHC (2021).*

**IMPACT OF DECRIMINALISATION IN REALITY**

It is indeed explicitly clear that decriminalising the sexual activities of the LGBTQ community does not serve its purpose, which is to protect the interests of the community. The reason is because even though the community's sexual preferences is no longer considered to be a criminal offence the community suffers from lack of legal recognition. In most of the instances the lack of legal recognition of their rights is creating problems like, house owners are not ready to rent their house to the people from LGBTQ community by citing the fact that they are not allowed to be married by law and live-in relationships are also not recognised<sup>54</sup>. Along with denying their basic rights, the violation is also clearly creating a lot of problems. Like already mentioned even though right to sexual orientation is a fundamental right, still it is violated by the state itself which make the other citizens not to accept the community in general, provide them with job opportunities to list a few. On the other hand, the legislature has also not passed any anti- bullying laws to protect the community. Even though the landmark judgement aimed to change the scenario in reality it hasn't changed much. The report released by the government clearly shows the fact that the crimes against the people of the community as well as the bullying hasn't much decreased much. Also, as mentioned by the court in various cases about inclusiveness of the community there seems to be no actual step taken in the reality because there is no particular reservation made for people of the community or equal treatment being given in the society.

On one hand even though the existing Articles like 14, 15, 19, 21 aim to protect the interests of the LGBTQ community, the very notion of the same is getting defeated as the community's rights are not legally recognised. On the other, it cannot be said that decriminalisation did not create its effects, it indeed did. It made people in the society realise that people belonging to the LGBTQ community are not criminals. But it did not change much because the discrimination and hate crimes continue to happen against the community because of the above said reasons along with other reasons like lack of sex education, orthodox approach towards sexuality, lack of awareness of the community and narrow-minded approach leading to not inclusiveness of the community.

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<sup>54</sup>Bairagi, K.K. & Kumar, S. & Murugan, M, *Section 377 Indian penal code and its present scenario*, 4. 23-24 (2010).

**SUGGESTIONS**

Thus, the question that crosses one's mind now is, what will be the possible solution or remedy which will actually benefit the community in reality.

The same are as follows:

1. The best and the most benefiting solution would be to recognise the Rights of the community. If the people belonging to the community are just like any other citizen as said by the courts, why not give them what they deserve. This includes recognising their Fundamental Right to marry which will help to solve most of their problems.
2. The other Right which they are deprived of is the fundamental Right to adopt. Even though there are a lot of arguments against not allowing the LGBTQ couples, in reality they too equally deserve to be parents if they wish to like any other couples. Likewise, they should be allowed to become guardians.
3. Allowing the couples of the community to even opt for surrogacy should be considered. Recognition of their Fundamental rights seems to be the best solution as decriminalising is not serving its purpose.
4. Strict Anti- bullying laws should be passed by the legislature to protect the interests of the community, as this will help to prevent the discrimination, harassment the community faces.
5. Reservations for the people of the community, by the government in government jobs, educational institutions along with health benefits will certainly help to increase the inclusiveness of the community in the society.
6. A proper Transgender protection Act, by correcting all its failures as mentioned above should be passed. The Act should ensure that in reality the community and its interests are protected.
7. Sex education at school levels and awareness about the community in the society will certainly help in the long run.
8. More scientific research should be conducted by the government in order to understand about the community.

9. Mental health issues faced by the community should be solved by hiring more psychologists in government hospitals and by making more health benefits available to the people of the community.
10. Finally, more gender-neutral laws should be passed by the legislature and awareness on gender neutrality will increase the inclusiveness of the community.

### **CONCLUSION**

The researcher through the present research paper has tried to substantiate on the LGBTQ community in the best possible way. The paper has explained about the LGBTQ community by critically analysing their history and how their rights evolved in India. It further examined the landmark judgements decriminalising the community's sexual preferences and activities and proceeded to understand how in reality the community still suffers from a lot of problem. The best solutions for the problems were also suggested by the researcher in the paper. It is to be understood that the community is slowly gaining acceptance which is undoubtful. The same starts with the smallest of small steps like presently allowing people to identify themselves sexually and mention their sexual preferences in online dating apps which was taken by various dating apps in India. But the same is happening at a slow rate while the problems continue. In order to increase their inclusiveness and legally recognise them the suggestions given by the research paper will surely help in the long way forward.

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