



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2023

Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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LGBTQ+: A COMMUNITY WITH INHERENT VULNERABILITY AND LAWS TO UPHOLD THEIR DIGNITY

ABSTRACT:

While considering the fact that the LGBTQs form part of one of the most vulnerable groups in the society, statistics like- 70% of lesbian, gay, bisexual, and transgender (LGBT) people are sexually harassed at work ¹ because of their sexual orientation, would raise one's eyebrows. Besides, the ever rising shocking trend of cyber and social bullying aggravates such ostracisation to its fullest, the worst hit of which are the youngstars. Against this backdrop, this paper sets out to highlight a few major aspects on LGBTQ rights, their implementation and the legal framework associated with it. The prime quest of this paper is to provide a blue-print as to the LGBTQ rights jurisprudence. Further it considers LGBTQ as a community with inherent vulnerability because of few aggravating factors which push them towards some unprecedented crisis. At the outset the paper provides a brief account of different LGBTQ classes in order to give a proper clarity as to the subject matter of the paper. Then it goes on to highlight the vulnerability factors rooted in Indian society and critically examines the factors responsible for marginalisation. Afterwards it discusses the legal implications in the form of decriminalisation of homosexuality and the subsequent disentanglement from establishing a marital knot and claiming other social benefits. After considering all the remaining conditionalities, some feasible suggestions are provided at the

¹Kamthan M, 'Need for Inclusion of LGBTQIA+ under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013... ';
<https://www.scconline.com/Blog/Post/2022/07/08/Need-for-Inclusion-of-Lgbtqia-under-the-Sexual-Harassment-of-Women-at-Workplace-Prevention-Prohibition-and-Redressal-Act-2013/>

end of this paper which would throw crucial insights as to the responsibility of the greater society in bringing about a change in their norms and thereby providing a taboo-free environment to all the marginalised classes. Basically the substance of the paper revolves around evaluating how the LGBTQs are positioned in socio-economic-political and legal fabric and thereby ensuring gender inclusivity.

KEYWORDS:

Lesbian, gay, bisexual, transgender, queer, asexual, intersex, homosexuality, homophobia, same-sex, heterosexual.

INTRODUCTION:

The term LGBTQ+ or LGBTQAI+ thrives on the very idea of homosexuality which means showing romantic or sexual attraction to the members of the same sex. Further it stands inclusive as it comprises of Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual and many others, who don't fit to the conventional gender standards. The easiest way to tag them as neither male nor female leads to further controversy. The first and foremost duty in addressing the LGBTQ+ issues, is to get a clarity as to what each of these terms stands for.

Lesbian- The term "lesbian" stands for women who are predominantly attracted to other women both physically and emotionally.

Gay- Any person of a particular gender attracted to the person of the same gender falls under 'gay'. More specifically the relationship between two males who tend to showcase some feminist characters either bodily or mentally.

Bi-sexual- This refers to people who feel attracted to both the genders or more than one at a time. However the attraction varies in different degrees.

Transgender- They do not very often correspond to the gender assigned to them at birth and showcase a different sexual orientation. They also undergo operations in order to change their gender identity to the desired one.

Queer- This is an umbrella term used for all those same sex couples who exhibit non-normative sexuality or non traditional sexuality².

Asexual- This refers to the lack of sexual desire to enter into any relationship or showing little or no attraction at all to any sex.

Intersex: This indicates a bodily condition where a person is born with a combination of male-female physical attributes. Babies born with some discrepancies in their genitals which do not clearly signify the specific gender are called intersex by birth and sometimes undergo surgery to remove that flaw.

The LGBTQ+ does not provide an exhaustive list of the afore-said terms rather that of few primary words which are helpful in assigning a proper gender identity to a third-gender person by categorizing them as either of the kinds, who are very often labelled as “Hijra” or “Gay”. The list is followed by many other terms labelling different kinds of third-genders and suggestive of further diversity. Although such wider connotations for LGBTQ guarantees some protection to their dignity, the root of their maltreatment lies in the medieval period with the advent of the Islamic rulers. However few ancient Indian texts did not fail to confer greater dignity on homosexual practices. The medieval era which marked the inception of numerous sexual and gender related taboos, led to an overall deterioration of third gender’s rights. However the modern era has felt the need for preserving the rights of this community while preventing homophobia. The human dignity which is explicitly guaranteed under the **Universal Declaration of Human Rights 1948 (UDHR)** has provided serious reservations for LGBTQ+ community while ruling out any sort of discrimination based on sex.³ Modern India has also witnessed a series of judicial pronouncements and legislative efforts to legalise same-sex marriages in order to uphold their dignity. Although certain decisions have drawn criticisms or met with sharp reactions from the

² Unconventional sexuality not resembling that of heterosexual people

³ Article 2 states that everyone is entitled to all the freedoms listed in the UDHR, “without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

beneficiaries, it can be observed that the now hue and cry for LGBTQ rights has played its level best in promoting social awareness about third-gender rights which led to further activism and dignity.

RESEARCH METHODOLOGY:

This research methodology is based on doctrinal method as the secondary sources like books, websites, judgements, news reports etc. are referred to while writing the paper.

RESEARCH QUESTION:

The main question formulated by this paper is how the LGBTQ dignity have become a questionable issue in the era of typecasting and attempts have been made to resolve the same. This also throws considerable limelight on the judicial lens in considering the current LGBTQ position.

RESEARCH OBJECTIVE:

Followings are the prime objectives of this research-

- a. To gain an insight into the LGBTQ condition.
- b. Understanding how several social conditionalities have dragged them backwards.
- c. Looking through the lens of the legal framework and the nullities in it.
- d. Deriving some suggestions.

LITERATURE REVIEW:

Rao K, 'A BIRD'S EYE VIEW ON THE DIGNITY OF HOMOSEXUALS IN THE LIGHT OF SECTION 377 OF THE IPC, 1860' (2015) 4(9(3)) INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY EDUCATIONAL RESEARCH <www.researchgate.net/profile/Mahmood-

Khan-

[23/publication/326878507 A Study on Personality Profiles and Academic Achievement of High and Low Achievers/links/5b69c12ea6fdcc87df6d764c/A-Study-on-Personality-Profiles-and-Academic-Achievement-of-High-and-Low-Achievers.pdf#page=155>](#)

This resource has been helpful in gaining an idea as to the nullities associated with S.377 IPC and it has also laid down the earlier legal paradigm of homosexual practices and the take of judiciary in addressing those issues. This has also challenged the inherent flaws and deprivations related to criminalisation of homosexuality.

— **‘Need for Inclusion of LGBTQIA+ under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 | SCC Blog’(SCCBlog) [Need for Inclusion of LGBTQIA+ under the Sexual Harassment of Women at Workplace \(Prevention, Prohibition and Redressal\) Act, 2013 | SCC Blog](#)**

This article is rich in statistics and clearly upholds the need for preserving the LGBTQ rights in line with the existing legal paradigm.

Sunny AM and Deb S, ‘PROTECTION OF THE RIGHTS AND DIGNITY OF THE THIRD GENDER INDIA Need of the hour’, Upholding Justice Social, Psychological and Legal Perspectives (Taylor & Francis 2020) [https://www.google.co.in/books/edition/Upholding_Justice/7rjwDwAAQBA](https://www.google.co.in/books/edition/Upholding_Justice/7rjwDwAAQBAJ?hl=en&gbpv=1)

[J?hl=en&gbpv=1](#) Chapter three of this book provides elaborate limelight on LGBTQ rights mostly featuring the vulnerability factors. It clearly lays down the current picture of social prejudices, stigmas playing a crucial role not only in furthering the social ostracization but also taking a toll in the mental health of LGBTQ workers. This is a detailed work giving a transparent idea in context of

the current social fabric. A careful sociological outlook adopted in this book had added further to its richness.

INHERENT VULNERABILITY FACTORS:

The vulnerability of a particular social class comes with certain pushing factors where sheer stereotyping is one among many. The Pushing factors for LGBTQ vulnerability are mostly based on social bullying to such an extent that it outcasts that community on the ground of possessing some ‘unnatural’ bodily or sexual features. Such catalytic factors in the form of body shaming turn them into a vulnerable community and threaten their dignity. The worldwide stereotyping of third gender rights owes much of its credit to the then European Catholic principles and the imperial rules. Besides, few catholic sanctions had continued to dominate third gender rights across the globe, to the exclusion of a few tribal communities. The same had percolated through India during the medieval rule. A bird’s eye-view of the present third gender scenario can at most give us an idea as to their vulnerability while not putting forth the pushing factors of such an unprecedented crisis. This requires a careful analysis in order to understand the legal implications and the existing flaws in the system. First of all, the conventional social norms always frown upon any non-normative sexual practice i.e. same sex marriage which marks the beginning of the conditionalities. Such typecasting has to do with family setting or the upbringing of a child where the child who has been assigned a queer gender by birth, ends up falling prey to sheer family abuse and the resultant seclusion from the mainstream society. Further, peer pressure adds more injury to the woe as it hits the child hard, particularly during his adolescence. So it has become evident that instead of imparting proper sex education or gender sensitization training, forceful imposition of heterosexual lifestyle has been strongly into the Indian psyche. Surprisingly two of the biggest pillars of a child’s lifespan, i.e. Family and educational institutes have themselves been instrumental in pushing them further into the crisis instead of mitigating the

same. This sails us through another crucial factor which is lack of education or awareness on third gender issues. The very tendency to mock a queer person or to confer the least importance on their vulnerability issues, is derogatory to their dignity. The much cherished idea of human dignity would come to operation only when the same is recognized by mainstream society which is again allied to proper enlightenment in this regard. However the overall degrading conditions of third gender people is nothing but reflective of want of proper education in this regard. The Indian education system has failed to provide a dynamic space to its students in order to accommodate the sexual variations. Hence the isolation, the seed of which has already been sown in the households, grows further in the educational institutes. The far reaching consequences of such social bullying not only lies in workplace harassment but also doing self harm to committing suicide. Unfortunately the matter has got worse with the legal barrier **u/s 377 Indian Penal Code**⁴ which sought to criminalise homosexual practices between two adults even though the same has been based on consent and committed in private. This is not merely a legal validation given to such criminalisation but also to all the social taboos attached to the LGBTQs. These aggravating factors, have together been in play, led to the shocking statistics coming up from a 2019 National School Climate Survey where it was revealed that **52.4%** students reported hearing homophobic remarks from their teachers or other school staff. Further, two thirds of students (**66.7%**) had heard teachers or other school staff make negative comments about a student's gender expression.⁵ So the overall degradation of LGBTQ dignity thrives on many other conditionalities or pushing factors and it inflicts a long term traumatising or social seclusion, more specifically known as 'Sociopathic Personality Disturbance'. Such a deadlock can be resolved not merely by authoring landmark judgements although it might have helped the LGBTQs to overcome the legal barrier. The social obstacles are

⁴ Indian Penal Code 1860, s.377

⁵ [The 2019 National School Climate Survey](#)

way too deep rooted to be eradicated by some legislations or pronouncements. The real vulnerability lies in social seclusion faced by the gay people which in order to be resolved, requires miles to go.

SECTION 377 AND CONTROVERSIES ATTACHED TO IT:

As discussed earlier the prime legal barrier in ensuring LGBTQ dignity lies in **S.377 of Indian Penal Code**. The demand for decriminalisation of LGBTQ rights has started with the growing angst surrounding this infamous provision which penalises any carnal intercourse between two consenting adults while terming it as an ‘unnatural offence’. Tracing the roots of history it could be derived that the ancient inscriptions if not have validated in clear words, the carnal intercourse between two same sex partners, but also had not imposed any penalization nor considered the same derogatory. However their dignity got much shrunked with the enactment of S.377 IPC which reads as “whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with impris-onment of either description for a term which may extend to ten years, and shall also be liable to fine”. The Explanation provides “Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The very underlying presumption of such Victorian era law is that sexual intercourse between two partners would be effective only on procreation of children and any sort of deviation which does not lead to such procreation is held ‘unnatural’ in the eyes of law. Furthermore the initial judicial pronouncements had held it in the same line i.e. criminalising homosexual practices. The 1925 decision in **Khanu V/s Emperor**⁶ had considered procreation of human beings as the main object of any sexual intercourse, which is absent in homosexual

⁶ AIR 1925 Sind 286

practice. Also the court did not hesitate to consider sexual perversity as a driving force behind committing the offence u/s 377 IPC.⁷ This practice was also stereotyped as ‘rape’ in **Pooran Ram Vs State of Rajasthan**. The provision itself has ruled out any sort of homosexual intercourse between two consenting adults in clear language, which marked the beginning of the controversy on the ground of it being derogatory to the dignity of third genders. However the grey area lies in the scope of the provision which punishes any act of bestiality or sodomy. While the latter one suggests having intercourse with an animal, criminalising both men or women, the former one refers to the act of sodomy and has sparked all the controversies. The term sodomy is an umbrella term used for all kinds of unnatural sexual practices in the form of carnal intercourse. Further **Noshirwan vs Emperor**⁸ has typecasted two homo couples for allegedly entering into an attempt to commit sodomy. However the slightest change in judicial mindset was reported when the courts ‘considered sex for procreation as an outdated theory, but still considered oral sex to be a criminal offence because of its sheer inappropriateness’⁹.

The first paradigm shift took place in the 2009 Delhi High Court’s decision in **Suresh Kumar Koushal V/s Naz Foundation**¹⁰, in guaranteeing the LGBTQ dignity and striking down the controversial provision. Although the same stood no basis in the Apex Court’s consideration, it still holds immense significance in judging the crux of LGBTQ rights and its validity. Going by the facts of the case the NAZ Foundation (India) Trust, is an activist organisation advocating for sexual health and rights of STD patients, had filed the petition challenging the constitutional validity of S.377 IPC which violates **Articles 14, 15, 19 and 21 of the Constitution of India** by penalising consensual homosexual practices. Considering the petitioner’s responses, the said decision had upheld the LGBTQ

⁷ Fazal Rab Chaudhary v state of Bihar, AIR 1983 Cr LJ 632 (SC)

⁸ AIR 1934 Sind 206.

⁹ AIR 1968 Gujarat 252

¹⁰ AIR 2014 SC563

rights over the applicability of S.377 in the light of the inherent dignity and inclusiveness of all the genders acknowledged by the constitution. While considering whether the said provision fits to the constitutional fabric of our country, the High court had expanded the scope of ‘sexual intercourse’ manifold and did away with all the social stereotypes attached to homosexual practices although not permitting unrestricted or non-consensual intercourse. The silver lining lies in the consideration that ‘discrimination is the antithesis of equality’ on the basis of what the Ld. Court had wisely taken the stance of holding the said provision violative of **Article 14, 15 and 21** of the Indian Constitution. It went on to clarify that such criminalisation of consensual sexual practice between two adult individuals stands violative of personal liberty and equality before law which further deprives them from a dignified life. Although the judgement had staunchly gone against the pervasive prejudices related to Third gender, it was carefully crafted to preserve the social order by criminalising non-consensual intercourse. Hence it considered the validity of S.377 IPC only to the extent of non-consensual intercourse or intercourse involving minors and thus kept a check on aggressive sexual activities. In toto the crux of the matter stood on prioritising ‘Constitutional morality’ over redundant ‘social morality’.

However on an appeal before the Apex Court, the matter was overruled. The Apex Judicial body had failed to adopt a viewpoint as reformative as that of the Delhi High Court in Naz Foundation’s case. G.S. Singhvi, J, while authoring the judgement considered those who indulge in sexual intercourse against the order of nature as different from the ones engaged in ordinary intercourse. The provision only seeks to punish the perpetrators, i.e. those committing unnatural sex, instead creating any ‘**vice of arbitrariness**’ or ‘**irrational classification**’. Accordingly the validity of S.377 was upheld over the Delhi High Court’s decision and the Supreme Court had also granted the autonomy to the competent legislature to delete or amend the said provision. Such a decision had undoubtedly cast a huge spell of uncertainty on the gay community as well as the gay rights

activists. The decision not only failed to consider the instrumentality of inclusiveness of all genders in ensuring human dignity to every individual but also enabled the legislature to amend the provision which would definitely leave the beneficiaries in lurch.

DECRIMINALISATION THROUGH JUDICIAL PRONOUNCEMENTS:

On realizing the gross violation or deprivation done to the third genders by upholding the validity of S.377 IPC in its 2014 judgement, the Apex Court had, in 2018, sought to rule out the applicability of the said provision on homosexual practices i.e. decriminalised homosexuality and overruled its earlier judgement. Such landmark pronouncement was made in **Navtej Singh Johar & Ors. V/s UOI**¹¹ on a petition filed by Navtej Singh and few others belonging to the community. They advocated for reading down the said provision as it remains violative of individual dignity and flout the fundamental rights conferred to them. The very instance of homosexuality or bi-sexuality being indicative of natural sexual variations, ought not to be labelled as “unnatural” rather needs to obtain legal protection which will ensure them not only the human dignity and a prejudice free society but also guarantee free thinking and expression of choice. The petition mainly advocated for recognition of such sexual variations instead of bracketing the same as mental illness or taboo. They went on to seeking the protection under Article 21 of the Constitution which ensures Right to life to all those gay couples who privately engage in consensual homosexual practice. Hence the entire crux of the petition revolved around non-penalising a person of different sexual orientation solely on the ground of choosing a queer life partner. The judiciary has shown a progressive stance in the instant case by decriminalising homosexual practices while realizing the Constitutional prerogatives related to such decriminalisation. The prerogative lies in the

¹¹WRIT PETITION (CRIMINAL) NO. 76 OF 2016

progressiveness of our constitution or the transformative virtue of the same, which looks forward to accommodating the ever-changing needs of the society, Gay rights being one of those. “Thus, it is demonstrable that expansive growth of constitutional idealism is embedded in the theory of progress, abandonment of status quoist attitude, expansion of the concept of inclusiveness and constant remembrance of the principle of fitting into the norm of change with a constitutional philosophy”¹². The principle of contemporariness which would justify the inclusiveness of our constitution and the resultant individual dignity has been one of the pillars of legalising homosexual practices.

In this landmark judgement, few potential drawbacks of S.377 IPC were carved out which enlightens us as to the sheer discrimination to which the LGBTQ had been subject prior to such decriminalisation. The first and foremost one being criminalising the voluntary sexual intercourse between two consenting same-sex adults although the same is committed in private. It is portrayed as ‘manifestly arbitrary’ by the Apex court while authoring the judgement. With this we will land up to another prominent flaw of the provision which is barring all such sexual practices on the ground of committing ‘unnatural’ sex, a term which itself remains vague in meaning and application. However the connotation of unnatural sex although remains debatable, may refer to any intercourse not leading to procreation, which is liable to be obsolete keeping in mind the transformative constitutional fabric of our country. Further it does not have any ‘reasonable nexus’ with S.376¹³ IPC nor with any POCSO Act¹⁴ provisions, as the former one i.e. S.377 punishes acts irrespective of whether they are voluntary or not while the latter ones punish acts which are non-consensual. Also such sexual intercourse committed in private cannot be punished exclusively on the

¹² Supra para 94

¹³ Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine..

¹⁴ Protection of Children from Sexual Offences Act, 2012

ground of spreading indecency or affecting public morality because the terms ‘morality’ and ‘public decency’ cannot be measured in some parameters rather remain subjective in their application. Therefore all such voluntary acts committed in private do not harm the society explicitly and any sort of penalisation amounts to nothing but unreasonable curtailment of freedom and dignity.

In line with human dignity, Article 21¹⁵ of the Indian Constitution has been associated, which further stands on the liberty of expression and recognition of individuality of a person. The landmark decision in **Maneka Gandhi V/s UOI**¹⁶ which expanded the scope of right to life under the said provision to the extent of living a dignified life instead of having mere animal existence, was cited. Recognition of gay rights comes with proper dignity without which the community would be left in the state of mere animal existence. But so long as the victorian era law i.e. S.377 IPC remains in force, the dignity of gay community has been curtailed in the manner of denying them even the basic human rights including bodily autonomy and privacy rights and thus preventing them from exercising their liberty to choose companions and engage in voluntary sexual intercourse. The five judge bench has been careful enough to take into cognisance the unique biological characteristics of an individual which he/she may showcase depending on his /her sexual orientation. Recognition of the same may lead to full nourishment of their personhood. Realizing the same as the carnal principle of an egalitarian society, the court had considered the said IPC provision as a nullity to the extent that it creates hurdles for persons possessing homosexual attributes.

Against the backdrop of criminalising the very “private intercourse” between two adults, the Court held that the scope of the right to privacy must be widened

¹⁵ No person shall be deprived of his life or personal liberty except according to a procedure established by law

¹⁶ (1978) 1 SCC 248

to incorporate and protect ‘sexual privacy’ as well. The leading **Puttaswamy’s**¹⁷ judgement stands relevant here as it unanimously considered the “right to privacy” as one of the important facets of Part III of the Constitution of India. The term privacy revolves around freedom of choice and decision which unambiguously covers that of sexual orientation as well. Hence barring the right to engage in voluntary sexual intercourse to the queer community on the ground of unnatural sexual intercourse, amounts to sheer violation of the right to privacy and resultant violation of dignity. The unanimous decision in striking down the most controversial provision criminalising homosexuality stands valid as it overruled the earlier decision in Suresh Koushal and granted an exclusive autonomy to same sex couples as to their sex-life.

In conclusion it can be remarked that the leading 2009 judgement which reserved the dignity of LGBTQ community by upholding the validity of homosexual practices, holds much significance and the Ld. Apex Court had erred in overruling the said judgement by taking into account the primitive ideas associated with sexual intercourse. But the instant ruling remains well-crafted not only in terms of rectifying its earlier position but also doing the same by invoking the progressive principles of constitutional morality, the international legal framework to address human dignity and many other leading judicial pronouncements. Since letting any prejudice or injustice continue for perpetuity leads to a constant gross violation of human rights and the inherent dignity to which every individual is entitled by virtue of their very human existence, the five judge bench led by the then CJI Dipak Misra had consciously read down S.377 IPC notwithstanding the fact that the gay community constitutes only a miniscule portion of the population. Although the same was not made inapplicable in cases involving bestiality or involuntary intercourse under the same section. This indicates the prudence of the judiciary in keeping checks on

¹⁷ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. AIR 2017 SC 4161

the social order which might be affected on commission of any of the afore-said acts. Thus the very substance of such a reformatory stance is based on a robust crux of balancing between rights and duties, which is not likely to be defeated easily and ushers in a ray of hope for uplifting the overall condition of LGBTQs in a society marred by numerous prejudices and taboos.

THE PRESENT DILEMMA:

The entire LGBTQ rights jurisprudence in India however went topsy-turvy on pronouncement of the recent 2023 judgement in **Supriyo@Supriya Chakraborty & Anr V/s UOI**¹⁸ which refuses to recognize same-sex marriage and subsequently denied a slew of rights essential for the dignity of the LGBTQ community while putting the entire onus on the legislature. The judiciary had maintained a diplomatic stance in this 3:2 verdict. The constitution bench of five judges, comprising Chief Justice of India Dhananjaya Y Chandrachud and justices Sanjay Kishan Kaul, S Ravindra Bhat, Hima Kohli and PS Narasimha chose to refrain from issuing any overt direction as to the same-sex marriage rather sought the legislative intervention in order to deal with such issue.

The petitioners' submissions mainly revolved around legalising same-sex marriage by doing necessary interpretations to all the marriage laws including Hindu Marriage Act 1955 (HMA) and Special Marriage Act 1954 (SMA), in order to include homosexual couples within the framework of traditional male-female marriage. Followed by a reference of the landmark Navtej Singh's decision, they pursued the Apex Court to read down the SMA provisions as it restricts the connotation 'marriage' as only between the heterosexual couples. This, according to the petitioners, would not only grant them the right to enter into a civil-union but also provide them with other post-marriage social advantages and entitlements. However the respondent union has reverted back with certain

¹⁸ Writ Petition (Civil) No. 1011 of 2022

staunch contentions against the submissions and labelled it as an ‘urban elitist’ idea. The prime contention being wrecking ‘complete havoc’ if homosexuals are granted access to civil union like-marriage. It is for the interest of the greater society that marriage must evolve with the traditional idea of creating a bond between two heterosexuals. It should not be stretched any further as the same might contradict the rooted Indian ethos. Further, as against the demand for reading down the provision of the afore-said marriage laws, the centre maintained that the parliamentary laws are enacted exclusively for recognizing marriage as a sacrament or civil union between two heterosexuals and any kind of legal validation or recognition to same-sex marriage should rest on the Parliament’s autonomy. It had also countered petitioner’s claim as to ensuring privacy to such marriage and the consequent doing away with issuing notice under SMA, on the ground that marriage is more of a personal bond as it seeks to confer some socio-economic benefit to each of the partners, over and above the conjugal entitlements. Hence the Union sought the maintenance of the status quo of LGBTQ rights while not widening the framework.

In this entire 366 page long judgement the judiciary has been confronted with few crucial questions governing the validity of same-sex marriage. Questions like- whether the Indian ethos are in sync with queer rights, the marriage ideals, the validity of the SMA provisions etc. were answered, some with much diplomacy while others with much clarity. However throughout the instant case, the court had deliberately avoided exercising judicial activism by pushing the ball towards the Legislature.

While considering queer rights as fitting perfectly with the Indian ethos, the court went on to clarify on whether a straight jacket formula regarding marriage can ever be derived. It was noted that marriage has to do with the personal bond between two individuals irrespective of with or without child. Rejecting the respondent’s view to keep same-sex marriage out of the purview of traditional marriage it was observed that “there is no legal basis to elevate these personals

ideals to the status of normative requirements”. It was observed that marriage being a complete personal affair as it varies from individual to individual, cannot be kept within certain normative bounds. Even after considering all these, the court refused to legalise same-sex marriage as it clearly expresses its inability to read beyond the letters of SMA. It was held in favour of the law-makers as in pursuance to Articles 245 and 246 of the Constitution both the parliament and the state legislature can formulate laws governing marriage between homosexuals as and when required. As SMA stands applicable only to the male-female civil union, any deviation from the same would be subject to the Lawmaker’s discretion. Thus the judiciary had abstained itself from legalising same-sex marriage.

On the other hand since the same-sex marriage does not lead to any biological fructification, adoption being the only option available to them, the Apex court recognized that any deprivation of adoption rights would amount to violation of Article 14 of the Constitution. But this remained a mere judicial observation as the majority opinion refused to strike down the **Central Adoption Resource Authority (CARA)** regulations placing such restrictions. Therefore adoption rights too were denied.

Although some directions were issued in order to prevent the stigmatisation faced by same-sex couples living together, the entire judgement remained too stillborn to facilitate quality life of LGBTQ either personal or social, which would have borne fruit had it legalised the practice. Mere civil unions as recognized by the judiciary, but not supported by a legal base are likely to be frustrated in the garbs of legislative autonomy. Such non-recognition of same sex marriage had failed to uphold the dignity of the minority LGBTQ population and the follow up judicial acknowledgements although not leading to any sort of legalisation, would not only deprive them of the basic social schemes like- pension, ration card etc. but also leave them at the mercy of the Legislature.

POSSIBLE SUGGESTIONS:

Time and again the queer people are categorised as “illicit sex”. This is nothing but an outcome of the ongoing social stereotypes associated with the third genders. But however there has been a noticeable change in social perception as the issues are nowadays coming into limelight, calling for the attention of the socio-political pillars. As already mentioned earlier, the community suffers from some inherent vulnerability factors and accordingly being so prone to typecasting, needs special protection. Some specific suggestions as to possible measures for their upliftment could be relevant in this context. Although these suggestions are subject to modification, keeping the matter oriented towards the betterment of LGBTQ people.

The most important and obvious one is raising awareness not only about their legal entitlements but also about their biological orientation. More particularly the mainstream population should be made aware of such gender orientation as it begets the triggers of LGBTQ vulnerability. Despite having some legal weightage, they tend to be bullied by others mainly because of their biological or sexual orientation. The issues lie at the root of such biological ostracization. So more focus should be put in the form of sensitization training, Third gender awareness workshop, seminars, social media campaigning and speedy grievance resolution mechanism, in order to make the public, particularly the youngs aware about such sexual variations. This would eventually enable them to accept all such variations without any scepticism.

By virtue of the 2023 decision (Supra), ruling out the validity of same sex marriage, the legislature is to exercise a wide range discretion in such matters. Hence it should be more careful while drafting the laws relating to same-sex marriage or adoption. The lawmakers as are already equipped with the onus of coming up with effective legislations, are expected not to repeat the same victorian law which would make the LGBTQ status further miserable. Mere judicial pronouncements cannot take effect in void and hence it should be

followed by instrumental legislations, crafted truly for the holistic development of the community.

Separate emphasis should be given to the mental health of all the LGBTQ people as the social stigmas are likely to persist, howsoever effective laws are made. Such stigmas although may not always lead to physical abuse, but the mental toll inflicted by any obnoxious utterance or verbal abuse made at their sexual orientation, is sufficient in itself to affect them individually. Since it is not always feasible to keep a check on every single social gathering where a queer person is likely to be trolled, latently or manifestly, constitution of separate clinics for dealing with the psychological challenges or traumas, would be helpful. Necessary counselling would be provided to them while maintaining confidentiality of each such case. Another positive aspect of such psychological aid would lie in motivating the individuals to undergo treatment for changing their sexual orientation.

Safeguards are expected for those in live-in relationships as they are more vulnerable to social violence or at the fear of being persecuted. Instances of mob lynching, ostracization, social isolation are on rise. These live-in couples face subjugation not only for their sexual orientation but also as those involved in an illicit relationship. Arrangements should be made to inform the local body in any neighbourhood or corporation, in case any same-sex couple lodges in that area. The instances of violence should be reported immediately to such body which would eventually be brought to the notice of the concerned Police station without any exception. Further, regular administrative checks should be done to ensure them a safe prejudice free environment. However proper implementation of such measures are mostly dependent on the people's mindset and without inculcating awareness and sympathy the laws would only remain on pen and paper.

CONCLUSION:

As aptly remarked by Pt. Jawaharlal Nehru, while discussing the issue of homosexuality in the Constituent Assembly debate, 'If there is one constitutional tenet that can be said to be the underlying theme of the Indian Constitution, it is that of inclusiveness'. So Indian constitution being a living charter on gender equality, inclusivity seeks to confer a wide range of recognition to all the beneficiaries whoever has submitted themselves to such modern democratic charter. As noted by the Hon'ble judiciary, our constitutional morality solely thrives on the very idea of transformative constitutionalism instead of clinging to the backdated values. Since time immemorial sexual taboos and prohibition have been part and parcel of the society. Although such restrictions stand meaningful only to the extent of ensuring social order by prohibiting involuntary sexual acts, they in no way should be stretched to intrude into the sexual privacy of two consenting adults. But unfortunately, the homosexual couples, mainly because of their unique sexual orientation, fall prey to these kinds of social norms and end up leading a lifestyle devoid of human dignity. The drawback lies in this kind of overlapping between one's private life where the individual has the full autonomy as to his or her sexual choices, and one's social life where reasonable restrictions are mandatorily to be present in order to preserve the social order. So long as a queer couple is not hampering the social order by privately engaging in voluntary sexual intercourse, the normative impositions should not come into play. On this basis only the judiciary has prudently held S.377 IPC partly valid in order to safeguard the social order from aggravated sexual offences. Simultaneously the same stood invalid for consensual homosexual intercourse practiced in private. Such idea of gender inclusivity and recognizing human privacy should percolate through the entire society in order to bring about change and make living better for the LGBTQ community.

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