

## **RIGHTS OF LGBTQ+ AND TRANSGENDER IN INDIA**

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### **ABSTRACT**

*This paper is written to throw light on the Rights of LGBTQ+ and Transgender. .We all know that our country is rich in diversity, and that it is home to a diverse population. They have a distinct culture and set of beliefs. Some are in the majority, while others are in the minority. According to our Constitution, every citizen has the right to equality on the basis of gender, class, place of birth, and many other factors, however some citizens are disqualified because of their sexual orientation, which is essentially a matter of personal preference.*

*I came across this topic during my internship where I saw these people and felt their pain. This is the message to all the people of the world that everyone is in the same boat of life. Everyone has their own choice and everyone has their own personal life.*

*This paper presents general and legal information about two communities. The first is the LGBTQ+ group; the "+" signifies that there are more persons in this community; and the second is the Transgender community, which is the most vulnerable. Everyone wants them on occasion to get a blessing which is pure but no one wants to live with them as a normal person. In this paper, we will discuss various legal aspects related to these communities.*

**Keywords:** *Constitution, Culture, Equality, Sexual orientation, Transgender.*

## 1. INTRODUCTION

The human rights which are globally accepted state about the equal recognition and protection of all people and their rights irrespective of their sex, race, caste, colour and religion. It follows the concept of all humans are equal, but there are still some communities that are discriminated against and receive disrespect based on their sexual preferences and appearances. The fight for equality for this community in comparison to the rest of the country has lasted a very long period, and the fight was only half won in 2018. In 2014, the National Legal Service Authority vs. Union of India<sup>1</sup> finally recognized transgender as the “Third Gender” and in the year 2018, the case of Navtej Singh Johar<sup>2</sup> set aside Section 377 of the IPC<sup>3</sup> and legalised the mutual intercourse between the adults of the same sex as it infringes the Fundamental Rights of the citizens.

Although the court provides legal recognition and protection to same-sex relationships society remains the same and has problems accepting them as a normal couple. So, the only recognition is not fully satisfied for the existence of the LGBTQ community but also providing actual protection and opportunity to comply with all other laws as in same-sex marriage, adoption, inheritance and other general laws. So, now that homosexuality is fully recognised by the judiciary and the legislation too, why they are still treated as a vulnerable community and deprived of their basic rights and still not accepted by society?

## 2. RECOGNITION OF LGBTQ+ AND TRANSGENDER

The term LGBTQ+ as also termed as “Homosexual” includes the following terms Gay, Lesbian, Transgender, Queer and Bisexual. Homosexuality means a person who is attracted towards his/her same-sex which he/she belongs. As this is not a new concept but also recognised in Ancient History for instance we see the Sikhandi (brother of Draupadi) from the text of Mahabharata was a transgender warrior recognised by only his skills but not by his sexual orientation. Various other ancient texts, such as the Arthashastra (a thesis on politics and economics) and the Kama sutra, have various references to LGBTQ people working in several professions without facing any discrimination and narrative like Lord Ayyappa (born

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<sup>1</sup> NALSA v. Union of India, (2014) SCC 438

<sup>2</sup> Navtej Singh Johar and Ors. vs. Union of India, AIR 2018 SC 4321

<sup>3</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

to Shiva and Vishnu as Mohini) show Hinduism's religious and complex address to gender issues in various circumstances. There are references in the Manusmriti to punishments such as caste loss, large monetary fines, and beating for homosexual activity. The imposition of this penalty certainly shows that queerness was common at that time. However, following the colonial period, legislation was enacted, and Section 377 was inserted, making homosexuality a crime, abnormal behaviour, and an unnatural process<sup>4</sup>.

This clearly indicates how, over time, homosexuality has developed from a fully natural act to an unnatural act that goes contrary to nature's order. The first case that came in front of the Court of Delhi for decriminalising Section 377 was of NAZ Foundation vs. NCT of Delhi<sup>5</sup> in which Section 377 of the Indian Penal Code was proclaimed unlawful because it discriminated against the LGBTQ community and invaded their privacy. The Delhi High Court ruled that Section 377 of the IPC was an arbitrary restriction on two adults engaging in personal consensual intercourse. As a consequence, it was clearly against their core fundamental rights, which are formulated in the Indian Constitution's Articles 14, 15, 19 and 21. After this judgement, many groups and organisations came forward to challenge this judgment of decriminalising homosexuality as a crime and filed a suit named Suresh Kumar Koushal vs. NAZ Foundation<sup>6</sup>, after fighting a long battle again the Apex Court reversed the judgement of Delhi High Court and re-criminalised the Section 377 of the IPC. The bench, in this case, ruled that LGBTQ+ persons were a "minuscule minority [minuscule: means very small]" who did not justify constitutional protection and that Section 377 of the IPC won't be held unconstitutional. Because LGBT people were a small group, the Supreme Court totally disregard their core fundamental rights under Articles 14, 15, 19, and 21 of the Indian Constitution. The judgment got so many criticisms from all over the country and people came forward and upsurged against the judgement.

If we go through the Transgender community in this LGBTQ+, we can see how much they fight for finding their place in society as they are the most suffering community. For Instance, these persons have never been considered members of society and have always been vulnerable to misuse, social exclusion, disgrace, and violence, whether at the hands of society

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<sup>4</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

<sup>5</sup> NAZ Foundation vs. NCT of Delhi, 160 Delhi Law Times 27

<sup>6</sup> Suresh Kumar Koushal vs. NAZ Foundation, (2014) 1 SCC 1

or the prevailing authority or even from their own family and friends. Because of their recurrent rejection and lack of resources, these people frequently resort to beggary or prostitution, exposing them to abuse, STDs, and crimes such as human trafficking.

For this, a case was brought up in order to recognise transgender people as having a certain gender, such as male or female, and to treat them equally as recognised citizens of India. In the National Legal Service Authority vs. Union of India, the petitioner asked if transgender or Hijras have a right to be referred to as a "Third Gender" for the purpose of enjoying the same opportunities as the other gender. The Apex Court determined the 'third gender' position for hijras, or transgender people, in this landmark decision. Prior, transgender persons had to choose between male and female, but after the decision, they could boldly declare themselves transgender or "Third Gender". Also, the Supreme Court recognised some fundamental Rights of the Transgender for protection as they have equal rights in the country under Articles 14, 15, 16, 19 and 21 of the Indian Constitution.

The Apex Court also stated that the authority should make appropriate terms for the transgender community in light of Articles 15(2) and 16(4) of the Indian Constitution in order to ensure equality of opportunity in education and employment<sup>7</sup>. According to the court decision, the third gender will be classified as other backward classes [OBC] and will be given preference in government jobs and educational institutions. The court also recognised that a dispute between a person's birth gender and identification isn't necessarily a pathological condition. Instead of focusing on "treating the deformity," the focus should instead be on "solving discomfort over a mismatch." This is the life-turning judgement for the community of Transgender as this gives them self-identification of their gender as a "Third Gender". The Court gives direction to the State to identify the Transgender community as a separate gender and make regulation in favour of them to extend the reservations for them.

To make the judgement more strong the parliament passed a Transgender Persons (Protection of Rights) Act in 2019. To further protect the rights of the LGBTQ+ community, the Supreme Court delivered a landmark ruling in the case of KS Puttaswamy vs. Union of India<sup>8</sup>, in which Justice Chandrachud stated that sexual orientation falls under the broad scope of the right to privacy. Puttaswamy's decision also criticises the hypothesis principle of

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<sup>7</sup> INDIA CONST. arts. 15(2) & 16(4)

<sup>8</sup> Justice K.S. Puttaswamy and Anr. vs. Union of India, 2019 1 SCC 1

the Suresh Kumar Koushal decision, stating that the minuscule population of LGBT+ people cannot be used to deny them basic fundamental rights and that such restriction of fundamental rights cannot be justified even when only a few people are subjected to aggressive treatment. According to the Court, the right to privacy encompasses the freedom to have personal relationships of one's choice, as well as the right to sexual orientation and gender identity.

In 2016, Navtej Singh Johar, a dancer who identified as LGBT, filed a Curative Petition in the Apex Court, challenging the constitutional rationality of the Suresh Kumar Koushal case judgment. The Supreme Court agreed to refer the case to a larger panel and heard a number of petitions in the procedure. The government also stated that it will not obstruct the case and will allow the Supreme Court to determine according to its own view. The petitioners claimed that Section 377 violated their constitutional rights to privacy, freedom of expression, equality, human dignity, and protection from discrimination because homosexuality, bisexuality, and other sexual orientations are natural and based on valid consent between two adults and are not a mental or physical disease.

Finally, in the case of Navtej Singh Johar vs. Union of India, Section 377 was held unconstitutional since it criminalises any type of consensual connection between adults. The court also stated that it also restricts the freedom to show one's sexual identity, as well as the right to freedom of expression guaranteed by Article 19 of the Indian constitution<sup>9</sup>. The court further stated that sexual orientation is an essential element of self-identification and that rejecting it is equivalent to the denial of the right to life and personal liberty enriched under Article 21 of the Indian Constitution, and that the fact that they make up a small percentage of the population cannot be used as a valid reason to deny them this right<sup>10</sup>.

After all of the court's decisions, we can see that the judiciary and legislation have both been attempting to make equality between all people as small as community has a right to treat with equality.

## **2.1 Transgender persons (Protection of Rights) Act, 2019** <sup>11</sup>

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<sup>9</sup> INDIA CONST. art. 19

<sup>10</sup> INDIA CONST. art. 21

<sup>11</sup> Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

It was specially made to protect the rights and identity of the Transgender community to promote non-discriminatory actions from the society but after all this legislation protection there are still some loopholes which have to be rectified as on an immediate basis like penalties for the offences against the transgender people because the same offences if done with the females or children are punishable with up to 7 years of imprisonment with fine but for the transgender its upto only 2 years of imprisonment with fine which basically show the discrimination between the two groups of the community.

## **2.2 A list of some Famous Transgender personalities:**

- Laxmi Narayan Tripathi is one of the most influential transgender women. In 2008, at the UN, she was the Asia-Pacific region's representative. She worked for a number of non-governmental organisations before founding her own organisation Astitva in 2007, a group focused on giving sexual minorities their right. Laxmi has also appeared as a special guest on reality TV shows and has never hesitated away from speaking out for the LGBTQ+ community<sup>12</sup>.
- Manabí Bandopadhyay – First transgender college principal in India. She is the first transgender person in West Bengal to receive a PhD and work as a lecturer. In 1995, she founded Oh-Manab, a magazine dedicated to the hijra community.
- Joyita Mondal, the first transgender Judge appointed in the Lok Adalat in 2017. She is a great advocate for members of her community, and she has been demanding government job reservations for transgender persons. She left her hometown and lived on the streets when she arrived in Islampur, where she worked for the transgender community's betterment. She currently runs her own organisation, 'Dinajpur Notun Alo' (Dinajpur new light), which aims to improve the conditions of her community members.

Many more significant transgender people, including Shabnam Bano [the first transgender person elected to public office], Sathyashri Sharmila [the first transgender lawyer elected in 2018], and many others, represent themselves and their community with dignity and authority. The LGBTQ+ group is being accepted by today's age. Prior to the above judgements, members of the LGBTQ+ community revealed their families and friends about their identities, but they were not welcomed as normal people like others. They experience

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<sup>12</sup> Saavriti, 10 Transgender People Who Are Breaking Barriers Across Fields, SHE THE PEOPLE (15 July, 2023, 5:00 PM) <https://www.shethepeople.tv/home-top-video/10-transgender-people-breaking-barriers/>

physical and mental abuse in their own home and become despondent; some commit suicide to avoid the torture; others are compelled to marry or engage in sexual activity; and so on. The LGBTQ community faces discrimination at work, at religious institutions, in public areas, and even in their own homes. Despite the fact that all of these actions were carried out in modern times, they were mostly carried out in rural areas where there is a lack of awareness and people are still scared to notify their families<sup>13</sup>.

However, as a result of the Supreme Court decisions, many came forward to reveal their identities. Now, the people of this community live their lives with pride, just as other citizens do.

Now, MNCs and other big companies have started the inclusion of LGBTQ and Transgender in their employment area. For instance:-

- In 2019, Noida Metro Rail Corporation (NMRC) made a decision to make the Sector-50 metro station a “She-Man” station means all the employees of this metro station are “Transgender”.
- Swiggy's first transgender employee, Samyuktha Vijayan, was appointed as Principal Programme Manager just a few years ago. Swiggy Pride Network is a new 'affinity network' for its LGBTQIA+ employees. She joined Swiggy and immediately became a member of the women in tech and diversity and inclusion groups. Swiggy's and Samyuktha have just launched a Pride network and are actively trying to increase LGBT visibility and diversity within the firm through hiring. She is also an entrepreneur, running her clothing firm, TouteStudio, in Bengaluru, where she employs other transgender people.
- Godrej & Co. is also giving their work platform a fresh look by creating jobs for the LGBTQ+ community and guaranteeing that everyone is treated equally and without prejudice based on sexual orientation. The anti-harassment policies are not gender-based. They also offer the same-sex partners of employees equal benefits, as well as a medical benefit plan that includes an employee's spouse, domestic partner, parents, and children. Under the medical benefit, the company offer medical insurance coverage for staff members interested in gender-reassignment procedures.

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<sup>13</sup> Saavriti, 10 Transgender People Who Are Breaking Barriers Across Fields, SHE THE PEOPLE (15 July, 2023, 5:00 PM) <https://www.shethepeople.tv/home-top-video/10-transgender-people-breaking-barriers/>

Today's youth accept the LGBTQ+ community as they are, generating employment opportunities. As we can see above, MNCs today generate, support, or urge their employees to accept the equality atmosphere in their workplace in order to promote non-discrimination action towards them. Transgender people are now getting more opportunities in education. For example, at Punjab University, the first transgender student who experienced sexual harassment in her college due to the lack of a separate washroom asked the college for permission to have a separate washroom, which she received from the government. These actions genuinely appreciate other individuals taking the initiative for themselves to accomplish something for the good of their lives.

### **3. ACCEPTANCE IN SOCIETY**

Although, now the LGBTQ+ community are accepted in society but do they have all the right that other citizens have? Are they enjoying all the general laws of the country like marriage, adoption, inheritance, guardianship, surrogacy and other general laws?

We will discuss all these general laws separately from the point of both sides of society and the LGBTQ+ community.

#### **3.1 Recognition of marriage in the LGBTQ+ Community:**

Since it has been almost 4 years since Section 377 was declared unconstitutional<sup>14</sup>, marriage of same-sex persons is still a dream. Marriage is a basic right for the people of the country and the basis for many other rights like inheritance rights, adoption rights, guardianship rights, and other general rights for living. Not giving the right to marriage to their own choice of a person on the basis of gender choice is clearly discrimination on the part of this community. The LGBTQ+ community migrates to other countries where homosexual marriage is legal and enjoys the rights of marriage like heterosexual couples. Some countries, like the Netherlands, Belgium, Spain, Canada, South Africa, and many more, have legalised same-sex marriage in their countries. All the couples in those countries enjoy the same rights as heterosexual couples.

India, on the other hand, is changing, as proven by the Madras High Court Verdict. The Madras High Court's ground-breaking decision is unquestionably a ray of hope. The Madras

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<sup>14</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).



High Court in the case of Arun Kumar and Sreeja v. The Inspector-General of Registration & Ors.<sup>15</sup>, declared that "the term 'bride' as per the Hindu Marriage Act would also mean a transsexual and not just refer to someone born as a woman" Every religion has its own personal law by which they regulate marriage laws, but there is also secular law that legalises marriage between people irrespective of their caste, faith, or religion. The person who doesn't want to regulate their marriage from their personal laws is regulated by the Special Marriage Act, 1954.

Section 4(c) of the Special Marriage Act, 1954, expressly said that for solemnization of marriage, the male should have completed the age of 21 and the female should have completed the age of 18 years<sup>16</sup>. Although this act regulates irrespective of the caste, faith, and religion of the parties, it needs a tiny amendment for legalisation of same-sex marriage by adding only the gender-neutral provision, which is appreciated by the LGBTQ+ community, and making them equal to other citizens. Despite the fact that India's marriage laws have evolved over time, same-sex marriage is not permitted. But sooner or later, the legislature will have to deal with these problems. There are numerous same-sex marriage-related legal cases that are still pending. The next move for LGBT activists is to pressure and demand that the government enact laws enabling LGBTQ couples to get married, have children, and inherit their spouse's property. The Union government has stated that it will probably oppose any petition for same-sex marriage, even though it left the constitutionality of Section 377 to the courts in 2018<sup>17</sup>.

Although some people didn't accept this system, some of the homosexuals married in their families and friends presence, and they accepted them as they were. As we see in one couple of homosexuals who have done a very lavish wedding, Mr. Supriyo Chakraborty and his husband, Abhay Dang, had been dating since 2013 and had chosen to marry. This shows that all people are equal, and the feelings towards anyone can't be only determined by the other person's gender. The above incidents are taking place in our country, although these marriages are not legal in the eyes of the law. But homosexual couples do marriages, and they are accepted by their families and friends, and they are satisfied with that. Even the law doesn't accept them, but for their regulation of general things like nominees for their bank

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<sup>15</sup> Arun Kumar and Sreeja v. The Inspector-General of Registration & Ors, (2019) SCC Online Mad 8779.

<sup>16</sup> Special Marriage Act, 1954, § 4(c), No. 43, Acts of Parliament, 1954 (India).

<sup>17</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

accounts and adoption, they are not recognised as equal to heterosexual couples, which is clearly discrimination on their part.

Project Marriage by the two advocates Arundhati Katju and Menaka Guruswamy, where they fought in 2018 for decriminalisation of Section 377, became successful, and their next aim was to also legalise gay marriage. Katju also said that "We hope that in the future, this right to pick your spouse will include the right for LGBT couples to marry." In terms of recognising multiple sexualities, India falls behind many other countries. In the last few years, same-sex marriages have been legal in more than 25 countries around the world. Menaka Guruswamy explained that they are promoting the "Marriage Project," a legal campaign aimed at making same-sex marriages lawful. Gay or straight, Hindu or Muslim, upper caste or lower caste, male or female, all desired the same thing: a permanent, long-term relationship recognised by society and the law.

According to Guruswamy and Katju, more young people will claim their rights in the next appeal for same-sex marriage. This petition was presented in front of the Supreme Court and is waiting for the recognition of same-sex marriage. All over the country, young couples start sending their petitions for recognition, and it is still their dream that they get it as soon as possible.

### **3.2 Status of Adoption in the LGBTQ+ community:**

A family is created by a group of people who are united by marriage, blood, or by adoption. There are some conditions to adopt a child to give them a simple life by a stable couple who are motivated to give a perfect and futuristic life to their child. This process is somehow easy for heterosexual couples but not for the same-sex couple as for them marriage is still not legalised. In India, adoption be subjected to Hindu Adoption and Maintenance Act, 1956, which is only applicable to married couple, single men and single women who profess the Hindu religion<sup>18</sup>.

The Guardianship and Wards Act, 1890<sup>19</sup>, and the Juvenile Justice (care and protection of children) Act, 2000<sup>20</sup> both are secular laws applicable to all irrespective of their faith, religion

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<sup>18</sup> Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

<sup>19</sup> Guardianship and Wards Act, 1890, No. 8, Acts of Parliament, 1890 (India).

and caste. Adoption Regulations, 2017, drafted by the Central Adoption Resource Authority ("CARA"), a statutory authority under the Ministry of Women and Child Development, which includes provisions for this. This law does not explicitly prevent same-sex couples from adopting. Nonetheless, it restricts adoption to couples that have been wed for at least two years. All these legislations provides provision for the adoption of a child, but neither of the legislation mentions anywhere same-sex couple or same-sex partners could also apply for the adoption. On October 29, 2018, the Supreme Court dismissed Nayar's new petition on LGBTQ concerns, stating that a five-judge constitution bench led by then Chief Justice Dipak Misra had already dealt with the batch of homosexuality cases. Consensual intercourse between adult gays or heterosexuals in private space is not a crime, the constitution court unanimously decided on September 6, 2018.

"Non-recognition of same-sex weddings" under the Special Marriages Act, 1954, and denial of adoption and surrogacy rights to members of the LGBTQ community were among the points cited in Nayar's new appeal, according to the court. This clearly shows the discrimination against the LGBTQ+ Community basically their human rights. Non-recognition of same-sex weddings (Indian Special Marriages Act, 1954), adoption, surrogacy, and IVF (only for LGBTQ people) are all violations of Articles 14, 15, 19, 21, and 29. The Supreme Court's September 6, 2018 decision did not address the definition of marriage for LGBTQ people, it added. When we compare the rights of the LGBTQ+ community to adopt a child to other developed nations, we see:

The Adoption and Children Act of England, enacted in 2002, defines a "couple" as two persons who live as partners in a family relationship, irrespective of their sex<sup>21</sup>.

Second, in January 2007, Scotland enacted the Adoption and Children (Scotland) Act<sup>22</sup>, which granted certain same-sex couples the right to adopt children jointly.

However, in 2013, Scotland amended their law to allow countrywide same-sex couples to adopt children.

### **3.2.1 Why is our country, India, refusing to accept an adoption system for the LGBTQ+ community?**

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<sup>20</sup> Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56, Acts of Parliament, 2000 (India).

<sup>21</sup> Adoption and Children Act, 2002

<sup>22</sup> Adoption and Children (Scotland) Act, 2007

In the case of National Textile Workers Union vs. P.R. Ramakrishna, Justice Bhagwati held that law can't be standing still. The LGBTQ+ community was legalised in the British era, but as time and social mentality changed, our judiciary finally accepted same-sex couples as equal to heterosexual couples in 2018 but said nothing about the couples' marriage or any other rights such as adoption and surrogacy. So, from the start of the relationship between same-sex couples, it is not allowed for them to adopt any child which is basically discrimination towards them. By opting for a progressive approach Madras High Court in one of their judgment provided protection to same-sex couples. This shows that the law is accepting this community as other communities but society still threatens the community and demotivate them to do anything for their acceptance.

### **3.2.2 The status of adoption under the Transgender community:**

They are really being denied one of their most basic rights. When examining the Indian constitution, one will come across Article 14, which guarantees all Indian citizens the right to equality<sup>23</sup>. It declares that the government, including at the state and federal levels, must not refuse anyone within India's borders equal treatment before the law or equal protection under the law. It is one of the fundamental rights that Indian citizens are guaranteed. This right is the foundation for all other rights a person may follow. The classification that denies the transgender people the right to adoption cannot be called fair. It has a racial aspect to it. It deprives a community of the basic joy that comes with having a family. In India, any law that infringes on a fundamental right is unconstitutional. Illegal adoption by the transgender community has helped and saved females in India. For example: people, who are unable to care for their children in some parts of Tamil Nadu, leave them with the transgender community. Adoption is also very common in that area. However, such adoptions have no legal standing. In many states, they have prevented girls from being sold. It's long past time to recognize their efforts by allowing them to adopt children. This would provide happy families for the children, as well as the right for the transgender population to have a child that they would not be able to have normally.

### **3.2.3 Guardianship**

In general, guardianship describes a collection of rights and responsibilities an adult has towards the person and property of a child. Custody and guardianship go hand in hand. Hindu

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<sup>23</sup> INDIA CONST. art. 14

Minority Guardianship Act of 1956 (HMGA) governs guardianship for Hindus in India<sup>24</sup>, while the Guardianship and Wards Act of 1956 (GWA) is a secular legislation that is applicable to all residents<sup>25</sup>. Historically, only the father was regarded as the child's natural guardian in India and held complete authority over them. Furthermore, the mother can only have the right to guardianship over the kid after the father, according to Section 6 of the Hindu Marriage Act<sup>26</sup>.

### 3.2.4 Recent changes:

Law was changed by the parliament in 2010 to give fathers and mothers equal guardianship rights. In the 2015 case of ABC v. NCT of Delhi, the court rendered an extremely lenient decision, recognizing the unwed mother's guardianship rights and stating that the mother does not have to reveal the father's identity. The legislation is based on the gender binary even if its wording is gender-neutral. It is crucial to define these terms because the presence of LGBTQ+ parents or transgender parents whose gender is unclear will make it difficult to apply these laws.

Therefore, the language of the legislation should expand beyond the binary in order for such people to become guardians regardless of gender, the type of relationship they are in, or their sexual orientation. This is in compliance with the NALSA and Navtej Singh Johar verdict. However, how a court interprets the phrase "best interest of the kid" in the context of the LGBTQ+ community will largely determine how this turns out. So, according to all these legislation, there are many hindrances for the LGBTQ+ for becoming a guardian of a child. Although a single parent may become a guardian but not a same-sex couple can become a guardian as a couple legally.

## 4. INHERITANCE LAW

In India, inheritance accounts for the vast majority of property, especially in rural areas. Transgender people face difficulties inheriting property for two main reasons:

1. Laws governing inheritance only distinguish between men and women.
2. Difficulty in identifying a replacement.

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<sup>24</sup> Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956 (India).

<sup>25</sup> Guardianship and Wards Act, 1890, No. 8, Acts of Parliament, 1890 (India).

<sup>26</sup> Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).

India's succession and inheritance laws are guided by a combination of personal and secular laws. Hindus are governed by the Hindu Succession Act of 1956<sup>27</sup>, while Muslims and Parsis are subject to their own customary laws. In addition, there is the Indian Succession Act of 1925<sup>28</sup>, which is now applicable to all Indians who get married under the Special Marriage Act of 1954<sup>29</sup> thanks to a number of amendments.

#### **4.1 The Hindu Succession Act of 1956**

The Hindu Succession Act of 1956 is a codified law governing Intestate succession in Hinduism. It also governs Jain, Sikh, and Buddhist religions. The Act, however, mandates that heirs must be either male or female and makes no mention of transgender people. The Act defines agnates and cognates rights in a definition clause that is based on a binary conception of gender. According to the Act, an "heir" is any male or female who is qualified to receive the assets of an intestate. Although it acknowledges the rights of sons and daughters, transgender people and those who change their gender identity are not included.

The general guidelines for male succession are outlined in Section 8 of the Act<sup>30</sup>, which also establishes the order of inheritance through different classes of heirs. Sons, daughters, and typically the mother and lineal descendants of a male instate make up Class I heirs, whereas fathers, siblings, and sibling lineage make up Class II heirs. Similar to Section 14, Section 15 contains a list of individuals who may inherit the property of a female Hindu who passes away intestate and defines the general guidelines of Hindu female succession<sup>31</sup>. Priority is given to sons, daughters, husbands, and husband heirs.

The Act's treatment of men and women is explained here, but it doesn't address whether a transgender person who identifies as either a man or a woman is eligible for inheritance under Sections 8 and 15 of the Act. Article 15 of the Indian Constitution, which forbids sex discrimination, is generally broken by transgender people who identify as females and assert inheritance rights<sup>32</sup>. Being transgender is not one of the grounds for disqualification from inheritance listed in Sections 24 and 26 of the Act, which is gender-neutral.

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<sup>27</sup> Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

<sup>28</sup> The Indian Succession Act, 1925, No. 39, Acts of Parliament, 1925 (India).

<sup>29</sup> Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

<sup>30</sup> Hindu Succession Act, 1956, § 8, No. 30, Acts of Parliament, 1956 (India).

<sup>31</sup> Hindu Succession Act, 1956, § 15, No. 30, Acts of Parliament, 1956 (India).

<sup>32</sup> INDIA CONST. art. 15

## 4.2 Shariat (Muslim Personal Law) Act

Most Muslim inheritance laws are based on guidelines found in the Quran or customs. In India, Muslim succession is governed by Shariat Law, which has not been modified. Shia and Sunni are the two main Muslim sections in India, each with their own set of beliefs. In accordance with Muslim law, women are entitled to one-half of a man's share because they are subject to fewer obligations and responsibilities. Finally, Muslim law acknowledges male and female as subjects in accordance with the terms used in the list of sharers in Shia and Sunni inheritance laws.

The Muslim Personal Law (Shariat) Application Act was passed in 1937 and mandated the application of Islamic law to all Muslims, with a few exceptions (under Section 2)<sup>33</sup>. These exceptions included female personal property inherited or acquired through gift, contract, marriage, or dissolution of marriage. Finding out whether transgender people are subject to personal laws or receive different protection under the Act is made more difficult by all of the provisions. Only a male member of a Muslim family was permitted to make a declaration under the conditions outlined in Section 3 of the law.

## 5. ESTABLISHING GENDER NEUTRAL LAWS

When the word "marriage" is used in inheritance laws, it is implied that only heterosexual marriages are permitted, similar to other laws. Therefore, before the law can be applied to LGBT+ couples, it is essential that same-sex marriages be recognized. The terminology must also be completely neutral to prevent discrimination against anyone, including transgender people or those who experience sex changes, even though gender is unimportant and inheritance is determined by proximity. Following the "guru-chela parampara" of the Hijra community, the Himachal Pradesh High Court recognized the appellant Sweety's "guru" claim to her deceased chela's property in the case of *Sweety (eunuch) V. General Public in 2016*<sup>34</sup>. The appellant was acknowledged by the court as the deceased's family and her legitimate heir. This was in accordance with the Madhya Pradesh High Court's 1990 ruling in the case of *Ilyas Ors. v. Badshah*<sup>35</sup>, where the court concluded that despite knowing the deceased's religion, the property could not be bequeathed outside the Hijra community in accordance with Hijra custom. However, it is regrettable that despite ongoing calls for Hijra

<sup>33</sup> The Muslim Personal Law (Shariat) Application Act, 1937, § 2, No. 26, Acts of Parliament, 1937 (India).

<sup>34</sup> *Sweety (Eunuch) v. General Public*, AIR 2016 HP 148

<sup>35</sup> *Ilyas & Ors. v. Badshah Alias Kamla*, AIR 1990 MP 334

families to be recognized legally, particularly in the wake of the NALSA ruling, the Transgender Persons (Protection of Rights) Act, 2019, and subsequent versions of Private Member Bills continue to undermine the legal standing of such families.

### **5.1 How we can make this stigma of LGBTQ+ mitigate from the country's people:**

#### 1. Sex Education:

Sex education is essential because: It is impossible to imagine fostering an open, supportive dialogue about LGBT+ rights in the school setting given the historical mentality that Indian schools have displayed in relation to doing anything that is related to sex. It should be emphasized that conversations about sexual awareness and education among young people are frequently discouraged and receive harsh criticism, in addition to being ignored.

#### 2. Adolescence Education Programme (AEP):

The Adolescence Education Programme (AEP), which the central government tried to implement in all secondary and higher secondary schools in 2007, was an effort to educate children. However, laws prohibiting the program were swiftly passed by thirteen states. They argued that the explicit content of the AEP, which was created to provide comprehensive sexuality education, violated Indian culture and morals.

To date, the only action taken by the schools to prevent child sexual abuse has been to hold conversations on appropriate and inappropriate touching. As long as things remain the same, schools will continue to regard homosexuality as a disease and intimate relationships as "immoral," promoting outdated biases and misunderstandings.

#### 3. Making laws to combat bullying:

Bullying and prejudice are not currently addressed by any formal anti-bullying laws or rights-based policies in India. The policy must address bullying as well as homophobic and transphobic violence, which is in line with the fact that everyone has the right to a high-quality education in conditions that are non-violent, secure, and welcoming.

#### 4. Cross-country narrative

There have been some positive developments across Asia in the fight to end bullying and discrimination against LGBT adolescents. For instance, in order to expressly safeguard LGBTQIA+ kids, the Japanese government amended the country's national bullying



prevention policy in 2017. Similarly to this, the Philippines adopted a law in 2013 that directs schools to deal with bullying and ragging related to sexual orientation and gender identity.

In order to enumerate strict anti-bullying rules while identifying discrimination based on sexual orientation and gender identity, it is proposed that it is imperative to introduce the required revisions to the National Education Policy (NEP). In addition to safeguarding vulnerable pupils, this can also be a big step toward recognizing diversity. Additionally, initiatives must be made to train school employees so that they have the information and abilities to deal with such abuse.

## **6. CONCLUSION WITH RECOMMENDATIONS**

India is a developing country, and it needs progressive laws that treat all citizens equally and give them the same opportunities to make meaningful contributions to the future of the country in order to promote that growth and development. In India, one of the most severe laws from the Victorian era has finally been overturned. Same-sex marriages are still forbidden, though. If we had started to defend everything on the basis of cultural beliefs, societal norms, and governmental policies, we would never have been able to eradicate the social ills of child marriage, Sati, dowry, infanticide, and other related issues. In order to end the stigma, discrimination, and abuse that surround LGBTQIA+ people, the government must set aside its conservatism and act decisively. For the benefit of LGBT+ people's education, social security, and health, with a special focus on Transgender People, it is past time for the government to create new laws or amend existing ones governing marriage, adoption, guardianship, inheritance, educational institutions, employment, healthcare services, etc. Finally, I'd want to stress that the LGBT+ community in India will continue to battle for social acceptability in a fair and equitable manner until and unless the government provides them equal status.