



Sex and Sexuality as Civil Rights

ANEESHA SAHOO & MUSKAAN KHURANA

ABSTRACT

All over the world including India, people are stuck with the question of gender and the rights for those people who believe that they to belong to a gender which does not fall within the conventional gender norms of the society. This Article deals with the perception related to the genders other than society created gender spectrum of just 'male' and 'female', which thereby lead to various social and legal problems in today's society. The Article is introduced with some basic ideas of the topic along with various related terms that are attached to it. Using the resources at disposal for an appropriate research on the article, it discusses about sex, the taboo attached to it, the profession involved with the concept of sex and the unConventionality revolving around the same. This article puts forward the taboos related to 'polyamory' and also the idea of the third gender. The authors have put out a detailed study of the third gender rights and its absolute association with the landmark judgement of NALSA v. UOI. Before the concluding wrap-up of the article, the article leans to the idea of free minds within India which care only about humanity and so in consequence, about the rights of the queer individuals to adopt.

Keywords: Opposite sex, society, sex, taboo, polyamory, gender rights.



INTRODUCTION

The freedom of a man to decide on his consensual relationships coupled with the gender, without interference of the state is a basic human right which at any cost should not be violated. Whenever someone tries to prohibit the relationships of people of diverse sexual orientation, this is what we call a breach of right to sexuality and right to privacy. Gender identity is an aspect of an individual's life, which is as fundamental as any other right like, the right to live. If bound in a restricted definition; it is that personal sense of a gender, be it female, male, transsexual or transgender identification of a person. An identity which when assigned at birth, a person can relate with or differ to the same physiology that he/ she had received during birth. The general anatomy in a part of the population may also have features which don't adhere to male or female characteristics; it can rather be a mixture of both. Transsexual persons while transforming themselves according to the sexual identity they associate with, might get a successful operation, the same operation might not be available to someone else within the same community while it might not be possible for a section of people. These identities, which do not fall within the socially restricted gender norm of just 'male' and 'female' gives rise to societal as well as legal complications. These complications arise, greatly due to the difference of personal sense that one has with the assumed identity of gender.

There is a considerable difference between gender identity and sexual orientation. Sexual orientation is more of a concept which defines the state of attraction of an individual to another individual, which may even be emotional or might even be physical. This idea broadly entails categories of people that associate with being heterosexual, homosexual, bisexual, asexual, pansexual, etc. The idea of gender identity as well as sexual orientation is as basic an aspect of a person like dignity and freedom, no person should be forced to follow any kind of procedure which might harm their own wishes even if it hurts the common parlance of legal requirements. Since decades, the people who were unable to talk about their sexuality out loud have been oppressed, imprisoned and even executed. The era of 21st century gave us improvising results on the acceptance of these communities, taking sex and sexuality as civil rights but still in some parts, people are being mauled off of their basic rights. After a long war of rights and liberties, LGBT community was accepted in India. Still this community faces several difficulties. In August 2017, everybody saw a silver lining among the dark clouds when section 377 was struck down. Sexual minorities have always existed in many forms, some of them are culturally allowed like *hijras* while



the others were always positioned in the group of social outcasts. Our society is evolving with time; many individuals have started accepting different ways of life, thereby meaning, genders irrespective of their type. The support system provided to these groups is painfully inadequate and all these minority communities have to suffer a lot. Despite of the amendment, there are many loopholes which still prevail in our society which the government along with the individuals must recognise and help in its removal it from the root.

Still there is space of improvement, sexual orientations like that of, the homosexuals are not recognised when it comes to insurance claims, workmen compensation and many more aspects. The law has been amended but it is now the duty of the society to normalize sexuality and accept it as civic rights of the individuals. Finally put, “Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.”¹

SEX WORK IN LAW AND SOCIETY

When talking about sex work as an occupation it means we are talking about the term prostitution. Prostitution in India is governed by Immoral Traffic (prevention) act, 1956. Before getting into vices and virtues of this act or this occupation it is important to know the main reason of the people practicing it. It is often seen that the main cause why people choose to do this is increasing poverty. **Well, a sex worker answered in an interview, “So what if I have to sell my body for my daughter to have a better future? Is that too much to ask for?”**Each one has their different story for being a sex worker, from joining it by their own choice to getting lured into this business at a very small age. Criminalising sex work would be a blanket order passed ignoring the rights of human kind. It would on the same hand become difficult for these workers to report any injustice done to them, because they are vulnerable to incarceration, further abuse, and retribution. This

¹ NALSA v UOI, AIR 2014 SC 1863



perpetuates stigma, violence, and impunity, which further endangers sex workers' health and safety.²

This act by itself does not make sex work illegal in India but has certain provisions attached to it. Supporting activities like maintenance of brothels or soliciting customers are punishable offences. Removal of criminal penalties would mean that we recognise sex work as work which should ultimately fall into the ambit of labour laws and should be given same recognition as other occupations. Decriminalising sex work would help the sex workers to fight for their human rights and on the same hand criminalising third party business to protect someone to be lured into this business is efficient too.

THE LINE BETWEEN SEX WORK AND HUMAN TRAFFICKING!

Sex work is more like a consensual work between two adults who both have their own motive to do it and is a matter of choice while on the other hand human trafficking is a form of forced labour which involves threat or use of force, abduction, deception, or other forms of coercion for the purpose of exploitation. To state in simpler words, it is a matter of choice and necessity and no one should be coerced to join this business. As, a matter of fact this sort of coercion or fraudulently luring someone in this business is held illegal according to Immoral traffic (prevention) act, 1957. The act mandates that people rescued from Sex trade remain in 'protective homes' until there are court orders to release them but those homes are just like prisons where women are kept waiting for their release. One women with an experience within that home was quoted saying, "Rescued but not released"

MAGNITUDE AND TREND OF SEX WORK IN INDIA

The data collected by the National Crime Records Bureau (NCRB) shows the increasing problem of Immoral Trafficking in India which includes crimes like procurement of minor girls covered under section 366 A Indian penal code, Importation of girls (Sec 366 B IPC), Selling of girls for prostitution (Sec 372 IPC), Buying of girls for prostitution (373 IPC).³

² *Understanding sex work in open society*, <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> (Last visited April,2019)

³ Indian Penal Code, 1860, Sec 366A, 366B, 372,373 , Acts of Parliament, 1860 (Ind).



According to National Crime Records Bureau (NCRB) human trafficking cases in India hit a three-year-high in 2019. A total of 6616 human trafficking cases were registered across the country which when compared with the data of 2018 and 2017 fall at, 5788 and 5900 respectively⁴.

MISERIES AND SUFFERINGS OF A SEX WORKER

These women staying at brothels (a unit of prostitution) are a lot of times, treated in a manner which is very inhuman in nature. It is seen that these people are often beaten in order to put fear in their minds. They are often kept under house arrest by the brothel owners to prevent them from escaping⁵.

These people suffer as sex workers as they are not given proper medical attention and there is an obvious lack of these medical facilities within their reach. Most of them are not suffering from HIV but other severe diseases and they are not given any medical help. Even if they are provided with the same, they have an ingrained fear of being judged due to their unconventional nature of work that stops them from asking for medical help.

The national Network of Sex Workers (NNSW) is a forum led by the Sex workers in India where they fight to promote and protect the rights of people involved in this profession⁶. Though Sex work in India is not a crime still many sex workers face miseries and threats because of activities which are criminalised in India such as maintaining brothels and soliciting in public spaces.⁷ The fact that the act criminalises keeping brothels, sex workers who are exploited by pimps or brothel owners can't take it forward because, under the law, they will be prosecuted for working in a brothel and hence, they have to suffer that oppression no matter what.

One Sex worker of India explains his plight, "There is no room for respect and acceptance towards our profession as sex workers. When I approach schools with sufficient income and required documents, my child is still declined admission."⁸

⁴Human Trafficking, https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2014.1_5.pdf (Last visited Oct,2019)

⁵K. Davis, *Prostitution in India: Issues, Trends ad Rehabilitation* (2), (1937).

⁶*Invisible and Uncounted: Sex workers in India* (page 4), Oct 15, <https://sdg.iisd.org/commentary/guest-articles/invisible-and-uncounted-sex-workers-in-india/>

⁷Immoral Traffic Prevention Act 1956, Sec-3, Acts of Parliament, 1956 (India)

⁸*Understanding sex work in open society*, <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> (Last visited April, 2019)



MAINSTREAMING SEX WORK.

Mainstreaming sex work, easing access to birth control methods and medical aid together with educational opportunities will not only enable sex workers to live a more normal life but will also work to a great extent to prevent their exploitation because they will no longer be vulnerable to their perpetrators.⁹ By legalising prostitution at least we can have a correct track record of number of sex workers in our country. Legalizing prostitution will see that these women, who live life on the edge everywhere, gaining access to medical facilities, which can control the spread of AIDS. It is the need of the hour to recognise sex work and give them chance to exercise their legal rights too. Criminalising prostitution on the other hand would make them an easy target for various crimes like rape, fraud etc. It would be easier to abuse them when someone knows that the other person cannot report the wrong done to him. All the miseries would be remedies if we recognise each one's sexuality and along with its unique identities. It will be a good day on mother Earth if each work is recognised as just a form of work.

A DETAILED STUDY OF THIRD GENDER THROUGH THE LANDMARK CASE OF NALSA V. UOI

This case in its origination was about a type of identity within the gender spectrum which goes beyond the idea of just male or a female gender, that is, it was about the idea of the third gender and the rights involved with it. This is exactly the idea behind non-binary rights. The rights, which are for those individuals of the society, that do not fit in the binary status of 'male' and 'female'. Starting at the very ground level, the genders divided and coming under the umbrella term of transgender community, there exist various kinds of genders with a specific meaning of its own. Now, Hijras are those individuals who neither associate themselves to be male or female nor do they have the capacity of reproduction like a typical male or a female. Among Hijras, are those who are emasculated (castrated, nirvana) men, non- emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). Transsexual persons under this community are those who intend to undergo Sex Re- Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. The whole range of

⁹ Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21 B.C. Third World L.J. 161, (2001)



identities also encompass one more identity, that is, those individuals who like to cross-dress in the clothes of the opposite gender, are called transvestites.

HISTORY TO CORROBORATE!

This community is not of today, it had its presence in the history in various parts of the world, and we as a society have chosen to ignore it conveniently, by denying them their rights and giving them derogatory names. Their presence has been seen strongly in various religious texts as well as Hindu mythology. 'Napunsaka' as an identity is seen to be a part of puranic as well as vedic literatures and is devoted to mean as 'the absence of procreative ability'.¹⁰ History is also evidence to the stories of Hijras in the times of Lord Rama as well as Aravan, the son of Nagakanya and Arjun during Mahabharata. When Lord Rama was exiled for 14 years, devotees were running behind him, so Lord Rama stopped them and asked all the 'men and women' to return back, listening to this, all of them did return back except the Hijras. Lord Rama looking at their devotion gave them a blessing and this is how they were given the boon of blessing in auspicious occasions such as marriage as well as childbirth. There is a mythological story related to the son of Nagakanya and Arjuna, named Aravana as well. When Aravana was to be sacrificed, he desired the fulfilment of only one condition, that was, to live his last night in holy matrimony. But, no girl was ready with the knowledge of the obvious doom the next day, so Lord Krishna transformed himself into a lady called Mohini and married him. This gave rise to the reason as to why the Hijras of Tamil Nadu call themselves 'Aravanis' and consider themselves to be the progenitor (find synonym) of Aravan. The Jains as well as Muslims also have it in their cultural history, facts about the existence and rights of this community.¹¹

Criminal Tribes Act of 1871 was a huge hindrance to the rights of this community during the colonial period when they were criminalized as well as punished for practicing even their basic fundamental or human rights, and this later, was fortunately repealed in the year of 1949. Prior to the injudicious Criminal Tribes Act, section 377 already had its place in the Indian Penal Code, 1860 which criminalized any and every kind of sexual activities which they themselves judged to be unnatural, like, anal as well as oral sex. In Queen Empress v. Khairati (1884), while being acquitted by the Sessions judge, "This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch.

¹⁰ NALSA v UOI, AIR 2014 SC 1863

¹¹ Gayatri Reddy, "With Respect to Sex: Negotiating Hijra Identity in South India", Yoda Press, (2006).



The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite – the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.” Although this case had given an acquittal to the ‘accused’, but it clearly shows what kind of degrading harassment the community had to face during those times and how we as an advanced generation must help those downtrodden for a better evolved future.

VIEW OF UNITED NATIONS AND OTHER HUMAN RIGHTS BODIES

United Nations always has had its front foot forward when advocating for rights of sexual minorities. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provide that every individual has the basic right to live and such right of a human being cannot be violated arbitrarily. Article 17 of the ICCPR says that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”¹² A group of experts in the field of human rights in several meetings held at Gadjah Mada University in Yogyakarta, had discussed, formed and drafted the ‘Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity’. The Yogyakarta principle holds rights and obligations of the State mainly under the headers of Right to the Universal Enjoyment of Human Rights, the Rights to Equality and non-discrimination, the right to recognition before the law, the right to life, the Right to Privacy, the Right to Freedom of Opinion and Expression and Protection from Medical Abuses.

LEGISLATIONS IN OTHER COUNTRIES RELATING TO TRANSGENDER COMMUNITY

Different countries have recognized the rights of transsexual persons and also have laws in conformity with the International Human Rights that consider those people who have underwent

¹² International Covenant on Civil and Political Rights, Article 49, General Assembly resolution 2200A (XXI) of 16 December 1966, 1976.



either complete or partial Sexual Reassignment Surgery, countries such as; Netherlands, Germany, Canada, Australia, United Kingdom, Argentina, etc. The General Recommendation Act of 2004 is passed by the United Kingdom so as to provide for the legal recognition to the persons who has acquired a form of gender. One of the feature which stands out within this Act is that, an individual needn't have had a reassignment surgery to be applicable under this Act and an added advantage of this Act is that, one who has acquired a gender will not only be given a legal status but will also be given the right to use the same in the entitlements such as; parentage, succession, marriage, pension, social security, etc.

Australia is another of those progressive examples as a country that have laws to deal with the structure of gender identity, one being, Sex Discrimination Act, 1984 and the second being, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 (Act 2013). The Act of 2013 amends the Sex Discrimination Act, 1984.¹³ Herein, the Act of 2013 speaks about gender identity as a form of mannerism or appearance or other gender - related characteristics of an individual (whether with or without the involvement of medical interference) with or without giving due regard to the designation of a gender given to that person at the time of birth.

Following the resolution of 1989 by European Parliament for the protection of transsexual persons, Hungary had enacted an Act of Equal Treatment and the Promotion of Equal Opportunities in the year 2003 in the furtherance of identifying sexual identity as one of the grounds for determining the conduct of discrimination. The South African parliament had passed the Alteration of Sex Description and Sex Status Act, 2003¹⁴ and the Argentinean senate too passed a law regarding the recognition of rights of gender identity. In 2013, an Act, in specifics; Article 22 of the German Civil Statutes Act allowed a parent of a child to register the gender of their child as 'not specified' if there was a variation in their sexes at the time of their birth.

The transgender community face a huge load of problem not only socially but also in various important as well as common fields of life such as education, employment and healthcare. Addressing this problem wouldn't work on a short term level, it needs to be addressed at a larger level, grabbing the attention of a greater number of population by ingraining knowledge through

¹³ NALSA v UOI, AIR 2014 SC 1863

¹⁴ NALSA v UOI, AIR 2014 SC 1863



awareness about this community and to consequently relieve some of the negative attitude at least towards this community at its initiation.

A reforming plea was made within this case of *Nalsa v, UOI*¹⁵ as to being given a gender status which did not exist in a legal form within the society, which was different to the one (male or female) assigned to them during the birth. The earlier practices and lack of rights brought to light, the violation of the rights of Transgender community (TG) (which included Hijras/ Eunuchs). The non-recognition of the gender, that they actually associate with, violated the basics of Article 14 and 21 of the Indian Constitution. This is a clubbed petition, where one of the petitioner is National Legal Services Authority sharing a common intention of protecting the interests of the Kinnar or the Transgender community.

The counsel of the petitioner argued how this community, not being able to associate with the society formed dual genders, and not having a third gender of their own on papers, that is, legally, made it difficult for them to even receive what are called as the basic human rights provided by the Constitution. They are discriminated, treated as outcasts, are severed from enjoying social and cultural participation and also restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. This being discrimination according to the gender falls under the violation of Article 16 and this also violates Articles 14 & 21. They must have a right to choose from the classification as presented before them and thereby given equal rights just like any other male or female gender classification. The outcastism that this community faces shows a clear violation of their fundamental right under Article 19(1). They like any other citizen have a right to freedom of speech and expression and this surely includes the right of being able to express the gender that one associates with. The manner one expresses oneself, be it through action, dress, words, behaviour or in any other form, it doesn't fall under Article 19(2) which addresses the idea of 'reasonable restriction'. The fact that the rights of life and personal liberty of this community is being denied is not a question of doubt and this deprivation leads to them living a life without dignity. The rights protected under Article are vast and when unravelled, there lies a clear deprivation of personal autonomy, the right of privacy, etc. The recognition of gender as well as the right of not being ostracised for it in the society is part of right to live a life of dignity under Article 21 of the Indian Constitution.

¹⁵ 2014 SC 1863



However blind we might pretend towards the problems of TG community, it exists and some to such a depth, that it may just send shudders down the spine. Finally in the case of *National Legal Services Authority vs. Union*¹⁶ of India, the SC in the view of a liberal democracy ruled that discrimination on the basis of gender identity is constitutionally prohibited. K.S. Panicker Radhakrishnan, Supreme Court Judge, said that “gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as the third gender. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of transposing equality by the law or the equal protection of the law guaranteed under our Constitution.”¹⁷

LEGITIMISING POLYAMORY AS A CIVIL AND SOCIAL RIGHT

Anais Ninn, a person with an experience as well as a practice of polyamory “I reserve the right to love many different people at once, and to change my prince often.”¹⁸ The practise of intimate relationships with more than one partner, with the consent of all parties is what we call as polyamory. The word polyamory draws its meaning from ‘poly’ means ‘multiple’ and ‘amour’ means ‘love’. The thought of three or more people together happily, still makes our society cringe collectively. As a matter of fact, polyamory is the opposite of extra-marital affair in which a person is found to be cheating on another person. Polyamory has not yet found its acceptance in India. In the case of polyamory there is no involvement of cheating or self-denial, it is done with the consent of all the persons involved. If the person who is supposed to be affected by another person’s relationship has no problem with it then, who are we to tag this as illegal or even immoral for that matter? Polyamory should be treated as normal a status like married or single. At least no one is hurt in this kind of relationship. The aim of polyamory is maintaining an open relationship with trust and without any secrets. To be precise it is a form of consensual non-monogamy. People who are in a polyamorous relationship claim that they are not disloyal like the other portion of

¹⁶ AIR 2014 SC 1863

¹⁷ Mukti Heliwal *On LGBTQ Adoption And Legal Reform: The Fight For The Community Is Still Not Over*, Youthkiawaz, (April 2, 2020, 10:04 AM), <https://www.youthkiawaz.com/2020/04/why-should-there-be-an-amendment-in-c-a-r-a-for-the-lgbt/>

¹⁸Anais Nin, Goodreads, <https://www.goodreads.com/quotes/tag/polyamory>



society cheating upon their spouses. A polyamorous relationship needs to be necessarily sexual in nature. Due to its consent, it is also known as ethical non-monogamy.

We cannot deny the fact there are a number of men cheating on their wives and vice versa. A report of extramarital dating service showed that the website had more than 1,000,00 subscribers from India. These numbers clearly explain the willingness of married couple to indulge with someone else for any reason whatsoever. This clearly shows how polyamory is ethical non-monogamy which is far better than adultery or cheating.

PROBLEMS FACED BY POLYAMOROUS PEOPLE

Multiplying your relationships can sometime also multiply your problems. It can magnify the intensity of your interactions and emotions and on the same hand it can magnify pain too. Some of them are listed below-

STIGMA

We all are aware of the fact that being polyamorous or being in a polyamorous relationship can be a huge stigma in an Indian society. It is the fact that polyamory is still not accepted openly. For some people who stick to monogamy the idea of a non-monogamous relationship can be very disturbing and they feel very uncomfortable around polyamorous people which often results in 'polyphobia'. This phenomenon is basically the hatred or fear that people have towards polyamorous people.

People in a polyamorous relationship feel the pain when they hear about how much they are hated by the society that they live in. This stigma can be expressed in the form of friendships which grow distant or terminate, or family members who will no longer speak with the people that maintain polyamorous relationships.¹⁹ People who are not familiar with this concept often find this as a taboo and think it will have a bad effect on the upcoming generation.

DISCRIMINATION

People with polyphobia and the members of the society who showcase this, can lead to acts of discrimination. This has been seen in several cases where custody of child was taken away from a father who was involved in a polyamorous relationship or sometimes couples are not allowed to

¹⁹Elisabeth Sheff, *Polygony: When Polyamory goes really wrong, The Polyamorists Next Door*(May 21,2018) <https://www.psychologytoday.com/intl/blog/the-polyamorists-next-door/201805/polyagony-when-polyamory-goes-really-wrong>



rent a place just because they are polyamorous. It is seen that people are fired from their jobs; they, in some cases, are cut off by their family too. As polyamory is seen as a social stigma it sometimes becomes very stressful for the people involved in these relationships.

HINDRANCE IN FINDING HONEST PARTNERS

We all know that some people find easy cheating than being honest and accepting the other partner. This type of unconventional relationship can cut down on the number of honest partners that polyamorous people are able to find. As people prefer cheating it can be hard to find someone who is truly in love with you and face the society with you.

Many people in U.S follow strict monogamy (where they are with one person at a time until they break up and then re-couple with one other person at a time) and even cheating to polyamory, in part because honesty can be more emotionally challenging—especially at first—than lying and cheating.²⁰

Sometimes there occurs a mis-match. A polyamorous person falls in love with the one who strictly follows monogamy. For a poly person this may not be a problem because this is what they are and this is what they like to accept. But telling them to settle and be with can be a serious problem and on the other hand telling a serious monogamous partner about his polyamorous partner can be a disaster. He may or may not accept it and will probably not settle down on believing it as a sexual orientation of his/her partner. They cannot be happy together because, prima facie they want opposite things.

JEALOUSY

Many people are attracted to the idea of having multiple partners but at the same time giving the same choice to their partners is difficult. A very less number of polyamorous people feel this jealousy while others are filled with compersion. Compersion is a term poly people use to express the feelings of joy that they get by seeing their partner happily in love with someone else. While some of them face jealousy, insecurity, fear at some point of time.

²⁰Sonam Joshi , *Meet the Throuples*, (April 8,2018, 11:30 IST) <https://timesofindia.indiatimes.com/home/sunday-times/meet-the-throuples/articleshow/63660754.cms>



WHY IS IT NECESSARY TO LEGALISE POLYAMORY?

It should be taken into account that polyamory is nothing but a moral relationship which isn't new to the society. If we look at our Indian mythology, there are several instances of polygamy (male having several partners) and polyandry (female having several partners). For eg- Draupadi's relationship with "paanchpandavaas" is a sort of polyandry and on the other hand "Maharaja Dashrat" having many wives is an example of polygamy (male has several partners). Though Draupadi's five husbands had an obvious knowledge about each other and their shared relationship, we as a society seem to be ok with this fact. This in present day's term can be termed as a form of a polyamorous relationship. In the present scenario too, polyamory should be legalised as it is personal form of relationship that is consensual in nature. In the case of a monogamous relationship there are several insecurities which often destroy the relationship, sometimes one of the partners always tries to change the other person and tries to change the person in a way that he/she ideally would want him/her to be. But in this case of a polyamorous relationship one never tries to change the other person as there are no insecurities, its just love.

Polyamory is all about equity and equality. Each person in the relationship has same rights, irrespective of their gender, sexual orientation etc.²¹ A point of note must be taken into account in polyamorous kind of a relationship, there is not one committing couple but rather there is a group of polyamorous people who is committed to every member of that group physically as well as mentally. Polyamory is a way to assert oneself's freedom as a person.

VIEWS OF A POLYAMORIST!

Coming out as a polyamorous person in this society is very difficult. Credit goes to the society. One face's several repercussions from his family or society if he accepts that he wants to be in a polyamorous relationship. There are certain groups called "polycules" which basically serve as the comfort zone for the people who need to share their feelings about wanting to be in a polyamorous relationship and so on. A survey was conducted by a group of polycules in Bangalore and it was found that 72% of members inform their partners about their other relationships and other 85% quoted that they would continue with their relationships even if there is no sex. This leads us to a point that for these people, ethics as well as love exist at a greater height than assumptions like

²¹Jayanti Madhukar, *Is polyamory finally ready to become an open secret in India?* (Dec 09,2017, 16:30 IST) <https://www.thehindu.com/society/is-polyamory-finally-ready-to-become-an-open-secret-in-india/article21315836.ece>



promiscuity labelled on them. The polycules' group also laid out that they have a mixed type of people with there being; hetrossexuals, bisexuals, homosexuals and each of them feels that communication along with understanding is the key for every relationship. One of the members of the group who is a demi-sexual said, "Being receptive to each other's needs, desires and preferences is crucial" also added that "honest communication" is the key to satisfying polyamorous relationships. Polyamory and monogamy are just part of a large spectrum; the only difference is the extent of love that they can provide.

QUEER FAMILIES' RIGHT TO ADOPT

Adoption or the right of any parent to carry and give a home to a baby/ individual that they haven't given birth to, is a complicated process. It is a right which sees its complexities in many parts of the world, including India. The process of adoption does not even have to involve the existence of two parents, one eligible parent must be enough to take care and provide a home for a child. The parents who intend to adopt in India have mainly two legal possibilities that they can undertake, one being, either through Hindu Adoptions and Maintenance Act, or through CARA and in CARA, anybody can make use of this route irrespective of their religion.²² CARA or Central Adoption Resource Authority is a statutory body of Ministry of Women & Child Development, Government of India.²³ It is a body which mainly deals with adoption of children of India and it is on them to mandate and regulate not only adoption inside the country but also adoptions occurring within countries.

CARA has an included guideline among others preventing foreigner bound in same sex marriage to adopt a child in/of India. According to a statement given by a lady, Malti who is head of an adoption agency in Bangalore, "A child cannot be given away to an "inferior couple", such gay or lesbian couples. Gay culture is still not acceptable in India. A child should not go into such an inferior family. We prefer to place them in a wonderful healthy family, a family that is physically, mentally, and financially healthy".²⁴ She was too of the opinion that a child must be allowed to

²² Prashasti Awasthi, *India's Adoption Policy Discriminative Against LGBTQIA+, 20 Million Kids Remain Without Family*, The logical Indian (Nov 10, 2019, 7:10 AM) <https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lqbtqia/>

²³ http://cara.nic.in/about/about_cara.html

²⁴ Prashasti Awasthi, *India's Adoption Policy Discriminative Against LGBTQIA+, 20 Million Kids Remain Without Family*, The logical Indian (Nov 10, 2019, 7:10 AM) <https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lqbtqia/>



understand the value of both ‘mother’ and a ‘father’ thereby denying same-sex couples or people of the queer group the status of a ‘wonderful healthy family’. This statement from an individual at such a position only demonstrates the sad state of affairs of adoption when it comes to people that do not fit within their regressive stereotypical minds. Same sex marriages have no legal recognition in India and the rights offered to them are so limited that the basic right such as that of civil union is also not granted to them. This therefore means that, homosexual couples aren’t legally given a strong position to adopt a child together and the law prescribed, completely debar the community of LGBTQIA+ to adopt a child which all the more questions the concept of ‘equality before the law’ founded in the Constitution of India.

It was a long way to reach to the decriminalization of homosexuality, that is, particularly section 377 of the Indian Penal Code involving decades of struggles and court cases but the ground reality still happens to be different than to what is portrayed in the papers. The mindsets of a large number of people still stigmatise the idea of LGBTQIA+ people as well as couples and this is largely prevalent in India too. India isn’t one of the 44 countries that allows adoption by the same sex couples, is still stuck with the heteronormative idea of partnership between cisgender male and a female, thereby maintaining an archaic idea on the right of queer family to adopt a child.

The numbers of orphans in India as well as in other countries are on a day-to-day rise. As per a study done by the international charity for orphaned and abandoned children²⁵, there are about 20 million orphans who aren’t claimed by any of the families, the graph which is just predicted to show an increase in the year of 2021. It is an evident knowledge that most of the orphanages aren’t even in their prime condition for the maintenance of these children and thereby these children have to live in conditions which are so poor in quality that it might affect their growth as well development. CARA has some requirements in its guidelines, which when fulfilled, must be also provided to a queer family just like any other citizen of the country. Although the laws do not explicitly criminalize adoption by a queer family but still there exists a restriction and the added stigmatization just strengthens the need for explicit laws to provide for an allowance of the same. Now, keeping this in mind, it is just sad to re-live with this fact that the laws provided in India wouldn’t allow for a child to have a family with all the nourishment to give but would rather just keep them in orphanage homes which do not care enough for them. The recent surrogacy bill also

²⁵ Prashasti Awasthi, *India’s Adoption Policy Discriminative Against LGBTQIA+, 20 Million Kids Remain Without Family*, The logical Indian (Nov 10, 2019, 7:10 AM) <https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lgbtqia/>



doesn't provide for them to carry a child through surrogacy to prevent the commercialisation of surrogacy and is just available to Indian married couples thereby, disallowing people on the basis of sexual orientation as well as marital status. With the onset of the 'Transgender Persons (Protection of Rights) Bill, 2019', it is important to fight for the total liberation of the queer community and hold their civic rights on an equal platform.²⁶ Law is dynamic in its nature; it needs reforms as according to the time and need. The struggle for the LGBTQIA+ to attain a position in the society and to live with dignity just like any other individual is achieved but other civil rights still remain to be addressed. Adopting is a privilege as well as a chance for a parent to stay happy which must be for every member of the society to enjoy.

CONCLUSION

What we now conclude from our research is that the discrimination against these minorities is from both sides i.e. the State as well as society. Surely, the government is trying to come up with adequate reforms but it has been slow in its process. One part of the society is adjusting as well as accepting the new norms while the other part fails to comfort them. It is the need of the hour to have an open mind and stop judging people for their preferences whether we like them or not. Now, talking about Sex work in the society, we all know the root cause- to abject poverty. Then why this highly sensitive issue is treated as a taboo? We can only understand the pain of these people when we are in their shoes, so till that time we should stop harassing them and give them the respect that they truly deserve.

The whole issue of the third gender being acknowledged is a huge step to a better and accommodating society. Now, what is left is for us as individuals to be accepting towards not just a community but rather, humans. We all are free citizens governed by law, it means we should also have the right to love anyone or be in a relationship with more than one at the same time but it needs to be consensual. The state or the society should not have any problem with this unless one is involved with any sort of cheating, fraud or legal wrong. This is why polyamory should be legalised as it is ethical-non-monogamy and everybody's right to love anybody must be acknowledged. We should ascertain the fact that polyamorous relationships are the opposite of

²⁶ Harshil Shah, *Pride and Privilege | An Exposition On Adoption Laws That Affect Queer Parenting*, The future collective, (Oct. 5, 2019, 4:57 PM) <https://onefuturecollective.org/pride-and-privilege-an-exposition-on-adoption-laws-that-affect-queer-parenting/>



what extra-marital affairs are and from this the state or the society should not have any problem with, till the time group of polyamorous individuals are living happily. Lastly, adoption shouldn't be a right that must be restricted to some part of the eligible group rather must be a right that should be happily enjoyed by both eligible parents as well as the child who exists in this world without parents.

At the end of the day, we all are humans made of flesh and bones that only need the spread love at these times, not war. The authors of this article lean towards nothing but humanity and finally, conclude this article with the famous quote **'LIVE AND LET LIVE'**.

REFERENCE: WWW.LEXFORTI.COM/LEGAL-NEWS