

ADOPTION AMONG HOMOSEXUAL COUPLES: HOW FAR IT IS RECOGNIZED IN THE CURRENT SCENARIO?

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INTRODUCTION

The perspective of human rights is the most contradictory issue around the world that encapsulates human dignity. Everyone is entitled to all kinds of rights and freedoms and equal protection of law without distinction of any kind. However, society has failed to accept LGBT (lesbian, gay, bisexual, and transgender) rights due to which they have suffered from discrimination, social oppression and physical violence. The rights are equally guaranteed under the Indian constitution to the transgender person as the constitution guarantees justice and equality to each and every Indian Citizen. Earlier in 2014, Apex Court ruled that the rights and freedoms of transgender people in India were protected under the Constitution. Also, the court has decriminalized adult consensual same-sex relationships in the Section 377. This judgment is considered as a landmark in empowering LGBT persons. But there is a huge gap in implementing a program for the LGBT community in India that paves the way for discrimination.

In India, people belonging LGBT community face many legal and social difficulties. Adequate legal protections have not been provided for some issues which includes adoption rights as well. According to the current laws, single LGBT Indians are not specifically barred from adopting. But, adoption by same-sex couples is barred. Incapacitating adoption by same-sex couples harms the dignity of the people from the community as it is based on their sexual orientation which does not relate to their capacity or merit as prospective parent. There are personal laws and secular laws in India that guarantees the right of adoption and there are decisions which legitimizing homosexual relations. Nevertheless, none of these laws legitimize

the right of homosexual couples to adopt a child. In fact, if there is a commitment to parenthood then successful parenting is achievable as a homosexual or bi-sexual.

DEFINITION OF LGBT

LGBT is an initialism that stands for “lesbian, gay, bisexual and transgender.” While these terms have increasing global resonance, in different cultures other terms may be used to describe people who form same-sex relationships and those who exhibit non-binary gender identities. In a human rights context, lesbian, gay, bisexual and transgender people face both common and distinct challengesⁱ. The term LGBT emphasize a diversity of sexuality and gender identity-based cultures and is sometimes used to refer to anyone who is non-heterosexual or non-cisgender instead of exclusively to people who are lesbian, gay, bisexual, or transgender. To recognize this inclusion, a popular variant adds the letter Q for those who identify as queer and/or are questioning their sexual identity as LGBTQ, recorded since 1996ⁱⁱ.

CONCEPT OF ADOPTION UNDER THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

The **applicability of the Hindu Adoptions and Maintenance Act, 1956 extends to all Hindus** domiciled in India and to any person who is a follower of Virashaiva, Lingayat or a follower of Brahmo, Prarthana or AryaSamaj. This Act applies to any other person who is not a Muslim, Christian, Parsi or Jew by religion. According to Section 7 of the Act, **A major Hindu of sound mind whether bachelor, widower, divorcee or married can make an adoption.** It is **obligatory** for a married Hindu man **to obtain the consent of his wife**ⁱⁱⁱ. If the man has more than one wife, the consent of all the wives must be taken. According to Section 8, any major Hindu female of sound mind can adopt, whether she is a spinster, widower, divorcee or married person and **the consent of the husband is necessary. If a female adopts a male child, there must be a gap of 21 years between them**, otherwise, the adoption would be void. Adoption by a homosexual couple is nowhere defined in this Act while it gives a broader aspect of adoption by a hindu man and women. The words “spouse” and “wife” are used in Sections 7 and 8 implying that the Act does not recognise adoption by same-sex

couples. Furthermore, the ability for adoption is explained for Hindu males and Hindu females, leaving a grey area when it comes to applying such regulations to third-gender couples.

CENTRAL ADOPTION RESOURCE AGENCY (CARA)

The Central Adoption Resource Authority (CARA) is a statutory entity under the Ministry of Women and Child Development. It serves as the main organization for Indian child adoption. It also responsible for overseeing and regulating both domestic and international adoptions^{iv}. The Central Adoption Resource Authority guidelines prevent foreigners in same-sex relationships from adopting children in India. According to India's Adoption Regulations, 2017, couples who have been married for at least two years, as well as single women, can adopt a child of any gender while a single man is eligible only to adopt a male child. There is no mention of couples in live-in relationships, same-sex couples and transgender individuals, almost as if they do not exist^v.

ANALYSIS ON NAVTEJ SINGH JOHAR v. UNION OF INDIA AIR 2018 SC 4321

It was one of the landmark judgements of apex court with regard to the right of equality of LGBTQ community. The Navtej Johar case is not the first case in India which dealt with the rights of homosexuals. In *Naz Foundation vs Government of NCT of Delhi*^{vi} challenged the constitutionality of Section 377 (Unnatural offences) for violating Articles 14, 15, 19 and 21 of the Constitution. The court ruled that punishing sexual activity between two consenting adults under Section 377 violates the right to equality, privacy and personal liberty of such persons. This decision was appealed before the Supreme Court and in 2013, the Court reversed the decision of Naz Foundation verdict in *Suresh Kumar Koushal & NAZ Foundation and others*^{vii} and it held that, only the Parliament could decriminalize homosexuality. Later in *Navtej Singh Johar and Ors. vs. Union of India* five individuals from the LGBTQ communities (Navtej Singh Johar, Ritu Dalmia, Ayesha Kapur, Aman Nath and Sunil Mehra) filed a new writ petition challenging the constitutionality of Section 377. In this case, the Supreme Court held that Section 377 of the Indian Penal Code, 1860, which criminalized 'carnal intercourse against the order of nature', was unconstitutional in so far as it criminalized consensual sexual

conduct between adults of the same sex. The *Navtej Singh Johar* judgment was a major step towards upliftment of the position of the community but, there has been no active pronouncement of rights for same-sex couples. The state should not only legalize the same-sex marriages, but it should also amend the existing laws to provide legal recognition to adoption by same-sex couples.

LGBT ADOPTION IN COMPARISON WITH OTHER JURISDICTIONS

The same-sex couples are prevented from their adoption rights in various foreign countries. In India also, the law discriminates against same-sex couples by disregarding their adoption rights. However, some countries like U.S, UK, South Africa and European Union have legalized joint adoption by same sex couple and it enacted progressive laws for the same.

Adoption and Children Act, 2000^{viii} passed by England and Wales provides that same sex unmarried couples can also adopt children. The government introduced regulations illegalizing discrimination based on sexual orientation which ultimately led to the enactment of the Equality Act, 2010.

The European Court of Human Rights plays a vital role in protecting the rights of LGBTQ community with respect to family, life, marriage and the right to be safeguarded from discrimination based on sexual orientation within the European Union^{ix}. The European Convention on Human Rights prohibits the member states from discriminating based on sexual orientation in adoption proceedings. The landmark case of *E.B v France (2008)*^x, The Grand Chamber of European Court of Human Rights held that the refusal to authorise an adoption application by a woman in a same-sex relationship, on the basis of her sexuality, amounted to a violation of arts 14 and 8 of the European Convention on Human Rights and it has altered the landscape of parental rights for the LGBTQ community in Europe. The European Convention on the Adoption of Children envisions a broader concept of family and provides a widespread prohibition on discrimination, thereby further strengthening support for same-sex families.

In United States, the judiciary played an active role in eradicating the discrimination faced by same-sex couples. In the famous case of *Obergefel v Hodges (2015)*^{xi}, the U.S Supreme Court declared that discriminating against homosexuals is against the spirit of the Constitution and the value of individual liberty is equal for every individual within the society. This judgment

has led to various judicial pronouncements and legislation legitimizing adoption for same-sex couples. After this decision many states such as New York, California etc. amended laws and ensure adoption rights of same sex couples.

South Africa also known as rainbow nation has been one of few common law countries which endorsed the rights of homosexuals. The Civil Union Act, 2006^{xii} is an Act of South Africa which legalized the same sex marriage. This enactment led to contentions against the discrimination between married and unmarried couples that did not allow joint adoption for unmarried same-sex couples. In the case of *Du Toit and Another v Minister of Welfare and Population Development and Others (2002)*^{xiii}, the Constitutional Court of South Africa granted same-sex couples the ability to jointly adopt children. Here, the Court held that the Child Care Act, 1983^{xiv} was against the principle of the best interest of the child and families are important pillars of African society, of which everyone should be entitled.

Mere decriminalization of LGBTQ persons won't do complete justice to the community. Both legal and social acceptance is mandatory, which will emanate from civil rights. Hence, many countries by considering the concerns for individual liberty created a framework that protects the interests of same sex couples and there is a requirement for realization of the rights of the community and a treatment which is equal to that of the heterosexual section of the society.

ADVANTAGES OF LGBT ADOPTION

It is a vast misconception that children in same sex households will face problems as a direct result of their parent's sexual orientation. It's been proven that children raised in LGBT homes tend to be more open-minded. This allows the child to be more open-minded to themselves should they ever have questions and need a safe place to ask. Children of gay parents feel less hindered by gender stereotypes than they might have been if raised in a heterosexual household. Medical, psychological and social welfare professionals have developed the consensus that children raised in healthy same-sex households are as well-adjusted as those raised by heterosexual parents. This is one of the biggest benefits of same-sex parenting. According to the American Psychological Association, "the adjustment, development, and psychological well-being" of children is unrelated to parental sexual orientation. Children thrive and benefit from happy, healthy environments where they feel safe, secure and loved^{xv}.

Children of same sex parents had a better understanding of the diversity of families that exist in the world. Despite encountering adversity due to having LGBT parents, studies show that these children have greater resilience in navigating difficult situations. They also had positive perceptions about their families and these children showed more confidence than those with heterosexual parents. Greater self-esteem was likely the result of a greater level of active involvement by the same sex parents. Homosexual couples can be just as good at parenting as straight couples and more committed than heterosexual parents. Many homosexual couple relationships are more stable and giving adopted children a secure, emotionally stable home.

LGBTQ community must provide with equal rights like other citizens in all spheres. Everyone should treat equally regardless of sexual orientation, gender etc. The understanding that same-sex couples can't raise children properly is absurd and an insult even to single parents. Children have the right to be brought up in a family where they are treated well and loved. Navtej Singh Johar's case has paved a great change by decriminalizing sexual activity of homosexual couple. The state should alter existing legislations to recognize adoption by same-sex couples. Children who are victimized by this widespread ambivalence would benefit substantially if governments legalized same-sex marriages and parenting. Now, most of the developing nations abolished the laws which are discriminatory to same sex couples and allowed to adopt children jointly by both partners. India should take a progressive step for LGBT rights gets inspired by other countries that have given way for adoption rights for LGBT couples.

ENDNOTES

ⁱ Fact sheet - LGBT Rights: Frequently Asked Questions, <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>

ⁱⁱ Chatterjee Subhrajit, Problems Faced by LGBT People in the Mainstream Society: Some Recommendations, Vol 1, No.5, 317-331, 2014, https://www.ijims.com/uploads/cae8049d138e24ed7f5azppd_597.pdf

ⁱⁱⁱ Zeta Teresa Pereira, Adoption under Hindu Law, <https://racolblegal.com/adoption-under-hindu-law/>

^{iv} Shohom Roy, Adoption rights of same sex couples, <https://blog.ipleaders.in/adoption-rights-of-same-sex-couples/>

^v Tarini Mehta, where are India's queer parents? Having a family is not even an option for many Indians, <https://theprint.in/opinion/where-are-indias-queer-parents/608267/>

^{vi} WP(C) No.7455/2001

^{vii} CIVIL APPEAL 10972 OF 2013

^{viii} Adoption and Children Act 2002, s 144(4)

^{ix} Diganth Raj Seghal, Adoption rights of same sex couples, <https://blog.ipleaders.in/adoption-rights-of-same-sex-couples/>

^x 43546/02, Council of Europe: European Court of Human Rights, 22 January 2008, available at: <https://www.refworld.org/cases,ECHR,51e6b9bb4>.

^{xi} 135 S. Ct. 2584 (2015)

^{xii} Available at http://www.saflii.org/za/legis/consol_act/cua2006139/

^{xiii} 2002 (10) BCLR 1006 (CC)

^{xiv} Available at https://www.justice.gov.za/legislation/acts/1983-074_childcareact.pdf

^{xv} Benefits of same sex parenting, <https://www.creatingfamilies.com/benefits-of-same-sex-parenting/>