

A STEP TOWARDS EQUALITY: ADOPTION AND PARENTING RIGHTS FOR LGBTQ+ INDIVIDUALS IN INDIA

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ABSTRACT

The people belonging to the community are a part of a minority group in India. Homosexual couples as well as Queer, and Transgenders have been treated differently from time immemorial. They face discrimination on the grounds of their sexual orientation, and the people from the LGBTQ community are denied their civil and social rights and basic human rights. Various Supreme Court judgments like the Navtej Singh Johar case and National Legal Service Authority v Union of India¹ recognized their rights and identity but still, a huge milestone needs to be covered. There is no legal acceptance of same-sex marriage in India which creates a problem for homosexual couples to adopt a child. Also, the present Adoption laws in India only allow heterosexual couples and 'single' individuals, there is no explicit law for homosexual couples. Equal Adoption rights need to be guaranteed to homosexual couples also, as denying them their 'right to adopt' is in strict violation of their fundamental rights. The Indian Judiciary needs to acknowledge the rights of the LGBTQ community, surpassing the conservative religious beliefs and social stigma.

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INTRODUCTION

The adoption and parenting laws in India are mainly regulated by personal laws such as The Hindu Adoption and Maintenance Act, of 1956. India is a diverse country with a multilingual and multi-ethnic society where only Heterosexual couples and single parents are allowed to adopt children legally. With the evolving society, the rights of people from the LGBTQ+ community have been widely accepted across the globe. After the landmark judgment of Navtej Singh Johar v Union of India,² the constitutional validity of section 377 of the Indian Penal Code was determined, and it decriminalized consensual sex between all adults including homosexual couples. After this landmark, judgment transgender people were acknowledged as

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¹ National Legal Service Authority v Union of India (2014) SC 1863

² Navtej Singh Johar And Ors.v Union of India (2018) SC 4321, (2018) 10 SCC 1

the 'third gender'. Even though India has witnessed these advancements in the legal and social arena, there is still no legislation that talks about the marriage between homosexual couples and their legal rights related to adoption and parenting.

Although the "Transgender Persons (Protection of Rights) Act"³ gives transgender people the right to adopt, there is no explicit law that permits same-sex couples or LGBTQIA+ people to adopt."⁴ However, the single individuals from this community have not been prohibited from adopting. There have been several occasions where the people from the LGBTQ+ community confronted the Indian Legislative system regarding their rights, giving them adoption and parenting rights is one of them. Experiencing parenthood is one of the most essential elements of one's life and everyone has the right to become parents. "Ashok A. Desai, J, (1998) said the right to have a size of a family according to one's own choice is comprehended within the concept of human dignity, since the impugned provisions, namely, Hindu Adoption and Maintenance Act, 1956, Sec 11 (i) prevent such right, they are violative of the constitutional guarantee⁵". Under Article 21 of the Indian Constitution, individuals have been provided with the fundamental right to life and personal liberty, which constitutes the right to marry the person of one's own choice.

The right to marry and form a family is also an inalienable Human Right mentioned under the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. These conventions on Human Rights also protect the basic inalienable rights of individuals and ensure that no discrimination shall be made on the grounds of caste, sex, religion, color, etc. India is a democratic country and a signatory of UDHR and ICCPR, which ensures and guarantees basic human rights for its citizens through provisions enshrined in its Constitution. Indian Constitution ensures that all citizens must be treated equally without facing any discrimination on the grounds of caste, sex, religion etc. But despite these laws and provisions, the LGBTQ+ community faces numerous challenges and discrimination on various grounds.

³ The Transgender Persons (Protection of Rights) Bill, 2016

⁴ A Adhira, "Adoption Rights for LGBTQIA+ Community in India: A Critical Analysis of the Family Law System" (2023), 5 (2), Indian Journal of Law and Legal Research <https://heionline.org/HOL/LandingPage?handle=hein_journals,injlo1w11&div=38&id&page> accessed on 7 July 2024

⁵ Ahona Pal, 'Fundamental Right To Adopt: A Critical Analysis Of Competency Of Persons In Adoption Process' (*iPleaders*, 24 March 2017) <<https://blog.iPLEADERS.in/fundamental-right-to-adopt-a-critical-analysis-of-competency-of-persons-in-adoption-process/>> accessed 7 July 2024

All Indian citizens have the right to be treated equally leaving aside their gender identity and sexual orientation. Forbidding the people from the LGBTQ+ community of the right to adopt will leave a huge room for injustice, as being the citizens of India they have all their fundamental rights guaranteed and protected. Various developments have been made in the Indian provisions and Judicial decisions in this regard but more progress is needed to be achieved in creating a genuine society, where the right of every individual is protected.

EVOLUTION OF LGBTQ+ RIGHTS IN INDIA

The Lesbian, Gay, Bisexual, Transgender, Queer community is the sexual minority in India, which has been unfairly discriminated in legal and social identity since time immemorial⁶. Section 377 of IPC criminalized the penetrative sexual activity amongst homosexual couples, calling them in the category of non-traditional and unnatural activity. The begging of battles for the rights of the LGBTQ community started in the 1990s, but after more than 80 years in the case of Naz Foundation Govt. v. NCT of Delhi⁷ major developments in this regard started taking place.

Naz Foundation Govt. V. Nct Of Delhi, 2009

In this case, a petition was filed by the Non-Governmental organization Naz Foundation challenging the constitutional validity of section 377 of IPC. They contended that this section is violative of fundamental rights of the right to equality, right to privacy and dignity, right to life and liberty also the freedom of expression.

In this case, charges under section 377 were imposed by the Lucknow Police on the impression of them being homosexual individuals. The police also arrested more than 9 men who were running an NGO, working to create awareness regarding sexually transmitted diseases, and accused them of running a sex racket.

Finally, in the year 2009, the Delhi High Court held that section 377 of the IPC imposed an unreasonable restriction over two adults engaging in consensual intercourse in private.⁸ This

⁶ Gaurav Balpande, "A Case for Adoption Rights for LGBTQ Community in India" (2021) 4 (6) International Journal Of Law Management & Humanities
<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/injlo1w11&div=38&id&page>> accessed on 3 July 2024

⁷ *NAZ FOUNDATION v Govt of NCT of New Delhi and ors* (2009) WP (C) No. 7455/2001

⁸ Yatin Gaur, 'Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal' (*iPleader* 21 June 2020)<<https://blog.iPLEADERS.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/>> accessed 5 July 2024

section was said to be in direct violation of Articles 14, 15, 19, and 21 of the Indian Constitution.

Suresh Kumar Koushal Vs Naz Foundation, 2013

After the judgment of the High Court of Delhi on illegalizing Section 377 of IPC, an appeal was filed before the Apex Court of India by various individuals and religious groups to reconsider this decision. After 8 years of a long struggle, this section of IPC was again re-criminalized and made homosexual intercourse an offense. The Court in this case held that the people belonging to the LGBTQ+ minority constitute a 'minuscule minority' and they shall not be provided with constitutional protection hence section 377 of IPC can not be held violative of anyone's fundamental right.

This judgment was highly criticized and opened a new path for the activist movement in India. This judgment clearly discriminated the homosexuals and deprived them of their basic human rights.

National Legal Service Authority V. Union Of India, 2014

Transgender people from the LGBTQ community have suffered the most, as their social, economic education and national rights were not recognized previously. They were treated as inferiors and untouchables and from time immemorial have been exploited in many ways. In this case, the Apex Court of India created a status of 'third gender' for the transgenders and they were guaranteed basic human rights. After this judgment recognition of the third gender and forcing them to identify themselves as heterosexual individuals will be a violation of their fundamental rights.

The court, in this case, recognized the difference between sex and gender, the biological characteristics of an individual are different from their psychological and emotional sense of sex. Sex is attributed to the physical appearance and biological factors of an Individual such as genitals, chromosomes, etc whereas the term gender is broader in senses and inclusive of one's psychological and emotional factors.

K.S Puttaswamy V Union Of India, 2017

Here, the judgment of the Supreme Court in the case of Suresh Kumar Koushal v Naz Foundation was argued before the Supreme Court on the grounds that section 377 of IPC

constitutes to violation of the fundamental right of right to privacy and dignity. In this case, Section 377 of the IPC was disputed in the context of the right to privacy.

The court in this case held that the people from the LGBTQ community shall not be deprived of their fundamental rights on any grounds. The ground of ‘minuscule minority’ was highly criticized in this case. In this case, it was held that one’s sexual orientation is subject to privacy.

Navtej Singh Johar V. Union Of India, 2018

After re-criminalising Section 377 of the IPC India witnessed a huge protest for the rights of the LGBTQ community. A petition was filed in the Apex Court of India testing the constitutional validity of section 377 by the prominent dancer Navtej Singh.

Finally, in 2018 the Supreme Court decriminalised homosexuality. The court unanimously ruled that section 377 is unconstitutional as it infringes on the fundamental rights of intimacy, autonomy, and identity⁹.

A major milestone has been covered in the area of guaranteeing social and civil rights to the people of the LGBTQ community, but more developments and progress need to be made in this regard.

DISCRIMINATION BASED ON SEXUAL ORIENTATION

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The Preamble of the Indian Constitution declares it to be a sovereign, socialist, secular, and democratic republic, which has its main objective of securing the justice, equality, and liberty of its citizens. Equal treatment and preservation of Constitutional rights of all citizens have been outlined in Articles 19, 20, 21, 21A, and 22, no discrimination shall be made on the grounds of anyone’s sexual orientation or gender identity. Article 14 of the Indian Constitution guarantees equality to every citizen, whereas Article 15 ensures that no discrimination shall be made on the grounds of religion, caste, race, sex, etc. Despite having these rights, there have been several instances where the people from LGBTQ+ community face discrimination due to social and religious factors. The rights of same-sex couples or the people from LGBTQ+ community regarding parenting and adoption rights have not been expressly mentioned in the Constitution. However, under Article 14 of the Indian Constitution, any discrimination based

⁹ Yatin Gaur, ‘Evolution of LGBT Rights in India and taking the narrative forward: Living free and equal’ (iPleaders, 21 June 2020) <<https://blog.iplayers.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/>> accessed 5 July 2024

on the grounds of sexual orientation or gender identity would be considered a violation of one's fundamental right. Article 15 and 16 forbid discrimination against any citizen based on a list of specified reasons, which includes sex¹⁰. Under Article 21 of the Indian Constitution which includes the right to dignity and privacy forming a relationship based on one's personal choice is subject to the right to privacy and dignity. Article 23 of the Indian Constitution protects citizens from any kind of exploitation and immoral behavior.

In the Supreme Court of India, a majority of the opinion refused to strike down the Central Adoption Resource Authority (CARA) regulations that restrict the queer from joining in adopting a child, while it noted that these discriminations are violative of Article 14 and the majority of opinion did not support adoption rights for same-sex couples, citing the need to explore all areas for the benefit of children in need for stable homes.¹¹ Under the Adoption Regulation Act 2017, only heterosexual couples having a stable conjugal relationship for at least two years are allowed to adopt. It does not recognize homosexual couples.

Couples from the LGBTQ+ community are the sexual minorities in India who face a lot of discrimination in the legal and social spheres. The adoption and parenting laws in India are based on the binary understanding of gender which is highly violative of Articles 14 and 15 of the Indian constitution. The term "gender" not only refers to the characteristics of a man and woman but it is inclusive of the deep psychological and emotional sense of one's sexual identity. We can not discriminate and treat people differently just because their psychological sense of sexual identity does not adhere to the stereotypical division of binary genders. It is the duty of the Indian Judiciary to protect these civil rights, such as the right to marry and the right to adopt the LGBTQ+ community.

ADOPTION LAWS IN INDIA

Adoption is a legal process of accepting and taking responsibility for the child by binding him to a family. According to Section 2(2) of the Juvenile Justice Act¹², adoption means the process through which the adopted child is permanently separated from his biological parents and

¹⁰ Forum IAS, 'Rights of Sexual Minorities in India (LGBTQ+ Rights): Status and challenges- Explained, pointwise' (*Forum IAS*, 1 December 2022) <<https://forumias.com/blog/rights-of-sexual-minorities-in-india-lgbtq-rights-status-and-challenges-explained-pointwise/>> accessed 7 July 2024

¹¹ Drishti IAS, 'LGBTQ+ Rights in India: The Supreme Court's Verdict' (*Drishti IAS*, 23 October 2023) <<https://www.drishtias.com/daily-updates/daily-news-editorials/lgbtq-rights-in-india-the-supreme-court-s-verdict>> accessed 7 July 2024

¹² Juvenile Justice (Care and Protection of Children) Act, 2015, Section 2(2)

becomes the lawful child of his adoptive parents with all the rights, privileges, and responsibilities that are attached to the biological child.¹³ In India, a variety of personal laws regulate the process of adoption, such as the Hindu Adoption And Maintenance Act, of 1956, etc. In the cases of Muslims, Christians, and Parsis the adoption process is being regulated by the Guardians and Wards Act, of 1890. This statute does not create the status of “adoptive child”, but makes the child a ward till the age of 21 years, after that, the ward will be treated as an independent individual.

In India, an Indian couple, an unmarried Indian individual, any Non-Resident Indian, or any other person of different nationality are allowed to adopt by adhering to certain guidelines provided. Under HAMA¹⁴

Any male Hindu who is not insane and minor may adopt a child and in case he is married then he may adopt a son/daughter with the consent of his wife (if she is eligible to provide consent).

Any female Hindu who is of sound mind and has attained majority is unmarried, and in case married, is a widow, or is divorced, may adopt a child.

Here the term “Hindu” is inclusive of Sikh, Jain, and Buddhist.

The Central Adoption Resource Authority under the Juvenile Justice Act 2015, provides everyone the right to adopt without any discrimination. Under this Act, a couple can only adopt if they have established a conjugal harmony for at least 2 years. The Juvenile Justice Act only allows married heterosexual couples whereas The Adoption Regulation Act and HAMA allow single individuals the right to adopt. The Transgender Persons (Protection of Rights) Act gives the transgenders the right to adopt, but there is no explicit law that permits same-sex couples or LGBTQ+ people to adopt¹⁵

¹³ Astitva Kumar, ‘An analysis of adoption under the Juvenile Justice (Care and Protection of Children) 2015’ (*iPleaders*, 12 August 2021) <<https://blog.ipleaders.in/analysis-adoption-juvenile-justice-care-protection-children-act-2015/>> accessed 6 July 2024

¹⁴ The Hindu Adoption And Maintenance Act, 1956

¹⁵ A Adhira, “Adoption Rights for LGBTQIA+ Community in India: A Critical Analysis of the Family Law System” (2023), 5 (2) , Indian Journal of Law and Legal Research <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/injllw11&div=38&id&page>> accessed 5 July 2024

CHALLENGES FACED BY THE LGBTQ COMMUNITY DURING ADOPTION IN INDIA

There is no explicit law in India that allows homosexual couples to adopt, but the transgenders under the Transgender Person (Protection of Rights Act) ¹⁶ gives the transgenders parenting and adoption rights. The Juvenile Justice Act 2015 acknowledges the adoption by married heterosexual couples only whereas under HAMA the adoption by single unmarried individuals has also been recognised. However, there is no law regulating the adoption by homosexual couples.

In India only the single individuals from the LGBTQ community but not the same-sex couples jointly as parents. Same-sex marriages are still not recognized by Indian laws creating problems for same-sex couples to adopt a child legally. In the case of *Supriyo v Union of India*,¹⁷ the Supreme Court held that in order to adopt a child the parents need to be a heterosexual couple.

India is a diverse country, people follow and practice a huge number of religious beliefs and customs. Due to conservative religious beliefs, it is very hard for the LGBTQ community to get recognition in Indian society. Adoption centers with religious foundations and few states restrict the adoption by same-sex couples on the grounds of religious freedom.

Various individuals from the LGBTQ community face discrimination in their own families. Various Indian families deny recognizing their emotional and psychological status due to social stigma. They are forced to act normally as a heterosexual individual. The non-acceptance of same-sex marriages by families and society creates a huge barrier in protecting them from being discriminated against.

CONCLUSION

The term 'sex' is different from 'gender', sex basically defines the biological characteristics such as genital, chromosomes, etc, whereas the term gender is inclusive of one's emotional and psychological sense of identity. According to Articles 14, 15, 19, and 21 of the Indian Constitution, as interpreted by the judiciary, no discrimination shall be made on the basis of

¹⁶ The Transgender Persons (Protection of Rights) Bill, 2016

¹⁷ Juris Centre, 'A Legal Study on Issues Faced by LGBTQ During Adoption: In Respect to Human Rights and Adoption Laws in India' (*Juris Centre*, 16 October 2023) <https://juriscentre.com/2023/10/16/a-legal-study-on-issues-faced-by-lgbtq-during-adoption-in-respect-to-human-rights-and-adoption-laws-india/#:~:text=Article%2014%20of%20the%20Constitution,gender%20identity%20would%20be%20illegal.>> accessed on 5 July 2024

anyone's sexual orientation. The people from the LGBTQ+ community are being denied their civil and social rights. In a country like India despite several developments still, the LGBTQ community is treated differently. Same-sex marriage is still a social stigma and has not been recognized by Indian laws. As a result, homosexual couples are restricted from adopting a child legally because the present adoption laws only allow heterosexual couples and 'single' individuals the right to adopt.

Adoption Laws are meant to be made for the welfare of the children and providing them with a family and support. The sexual orientation of the individual should not question their ability to provide proper care and support to the child. Homosexual couples should not be denied to adoption of a child given the contention of their sexual identity. These kinds of discrimination on the social and legal level is in contravention of their fundamental rights and they are also denied their basic human right. The legislation and the judiciary need to work on the recognition of their rights otherwise their struggle for the recognition of rights will go on.

