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NAVIGATING ADOPTION RIGHTS FOR TRANSGENDER INDIVIDUALS: LEGAL AND ETHICAL PERSPECTIVES ON REPRODUCTIVE AUTONOMY AND BODILY INTEGRITY

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Abstract

In recent years, much has been said about same-sex couples adopting children. The right to adopt children of same-sex couples has been recognized in many countries around the world. However, many countries do not recognize this right. Eligibility for adoption by these couples is often limited due to their marital status and sexual orientation. Acceptance of same-sex marriage and related rights varies widely around the world. The discrimination suffered by same-sex couples can be seen as a flagrant violation of the right to have a family, a widely recognized right of every person. Adoptions can take many forms, including separate, joint, and international adoptions. Couples worldwide have varying degrees of access to each of these forms. However, same-sex couples are severely discriminated against. Same-sex adoption is opposed, while heterosexual adoption is considered the norm. The main reason for heterosexual couples to adopt is that adoption is perfect for children. Considering the custody of same-sex couples from a child's perspective also requires an in-depth discussion of children's rights in same-sex families. However, little research has been conducted to look at how sexual orientation affects parenthood or child development, especially in India. Regarding same-sex adoption rights, the law is silent. It neither permits nor prohibits such application. It's still a fuzzy line. Denying LGBTQ+ people the right to freely marry without good reason is completely illegal and contrary to the spirit of the Constitution.

Keywords: - Adoption, Same- sex couples, Children, LGBTQ+ community, Transgender.

I. Introduction

An adoption involves establishing a legal bond between a child and a parent through a formal and social procedure.¹ According to Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, "Adoption refers to the process whereby the adopted child is permanently detached from their biological parents and becomes the legal child of the adoptive parents, enjoying all rights, privileges, and obligations associated with a biological child."² This adoption process significantly affects the child's life. Consequently, the primary consideration in adoption is the child's welfare. It is also widely acknowledged that adoptions should only occur when they serve the child's best interests.³

Genetic determinism has been an established aspect in society for determining inheritance from parents. Adoption is associated with social defects in society. However, guardianship and parenthood are not always for biological relationships. Parenting desires are not influenced by sexual orientation but by the ability to take care of themselves and instill good values in their children. Since the beginning of the Vedic sacramental traditions, gender and homosexual flexibility have been recognized and harmonized in society. Catastrophic events occur when this collective group wants to be recognized as the dominant group. India has made significant strides in recent times towards protecting and guarding the rights of transgender individuals. In a country where the transgender community has faced discrimination and marginalization for centuries, the acknowledgment of their rights is a pivotal step toward inclusivity and equality. Many authorities have legislated various laws for the protection of the rights of people belonging to this community. But only a few countries have legislated similar laws that guarantee parenthood rights to the LGBTQ+ Community. People belonging to the LGBTQ+ community still struggle to acquire parenthood rights fairly due to the wide ignorance of their sexual identity and sexual preference, and the indescribable complications essential in transitioning.

¹Dictionary, <https://www.dictionary.com/browse/adoption> (last visited Feb. 15, 2025).

²The Juvenile Justice (Care and Protection of Children) Act, 2015, § 2(2), No.2, Acts of Parliament, 2016 (India).

³ YED AATIF, Adoption and LGBTQ Community, Legal Service India.

II. What is Parenting?

Parenting refers to the complexities of raising a child that are not exclusive to biological relationships. Biology is not always the deciding factor in determining who is the legal parent. For psychological parental determination, biology is not the only factor. The American Civil Liberties Union conducted research in which they found no evidence that people from the LGBTQ+ community were unfit to raise a child; rather, a child is more likely to grow up with better values. Children like those of heterosexual parents. Good parenting is influenced by parents' ability to care for and pass on good values to their children; parenting has nothing to do with sexual orientation.

India recently introduced the Transgender Bill 2019 to ensure the rights of people of the transgender community. However, the bill was not welcomed by the community because it was drafted in a hurry.

The bill has many shortcomings and does not meet the basic needs of the community, one of which is to provide the transgender community with the right to adopt children. The bill doesn't even provide a proper mechanism for determining a person's gender; it does require a person to undergo the appropriate examination by a District Judge, Medical Director, and Psychiatrist. Section 7 physician to certify him as transgender after the person has filed a Section 5 application with the district judge. It is a time-consuming and dehumanizing process, as determining a person's gender based on physical features is imprecise. Judge Radhakrishnan in the *National Legal Service v. The Union of India* develops the principle of self-determination and declares:

“Gender identity is central to personal identity, gender expression, and gender expression and will therefore be protected under Article 19(1)(a) of the Constitution.” The personality of a transgender person can be expressed through their behavior and presentation. The State cannot prohibit, limit, or hinder the expression of this inherent personality.

The process provided by the measure for determining a person's gender is different from that outlined in the NALSA ruling.

India is one of the countries that is still developing its society to accept people from the LGBTQ community. Various measures have been taken in the country, including Navtej Singh Johar's historic ruling in which the Constitutional Court of the Supreme Court overturned Section 377

of the Indian Penal Code, criminalizing homosexuality. Affection. But in today's world, India is still lagging when it comes to giving some rights like adoption and parenthood.

While India has taken steps to bring justice to the LGBTQ+ community, giving parenthood and adoption rights to members of this community is crucial. In India, adoption laws are governed by the Hindu Adoption and Maintenance Act, 1956, which provides the mechanism and procedure for any Hindu to adopt a child in India. India which has so far remained silent about same-sex adoptions. Article 8 of the law states that unmarried women can adopt children, but under Article 7 of the law, a man can only adopt children if he has a "living wife."⁴

The personal laws of Muslims, Christians, Parsis, and Jews do not recognize adoptions outright. Since non-Hindus have no law allowing legal adoption, those who wish to adopt can only place the child in "guardianship" under the provisions of the Guardians and Wards Act of 1890. Even this law doesn't talk about adoption rights for the LGBTQ+ community.⁵

III. Adoption laws in India

Children are a little bundle of joy. In India, it is often said that "children are the embodiment of God. Hindu religious text often talks about adoption. Although it is limited in some of them to adopt a male child to have a male heir. But still, our different religions have references to adoption. Islam refers to the adopted child of Prophet Muhammad, i.e., Zayd ibn Haritha. Adoption is a very complex process governed by certain rules and regulations. These rules and regulations are laid down in various laws. There are different rules regarding Hindus seeking to adopt and others attempting to adopt. The term, as defined in The Hindu Marriage Act of 1955, declares Hindus, Jains, Sikhs, and Buddhists. At the same time, the personal laws of other Indian religions, such as Islam, Christianity, and Parsis, are not allowed to be adopted. Rules Hindus must follow to adopt a child are laid down in the Hindu Adoption and Maintenance Act (HAMA), 1956. HAMA has established special rules about who can adopt and who can be adopted.

According to the Indian Adoption and Maintenance Act, 1956 (HAMA), a Hindu is

⁴ Hindu Adoption and Maintenance Act, 1956, § 7, No. 78, Acts of Parliament, 1956 (India).

⁵ Guardians and Wards Act, 1890, § 7, No. 8, Acts of Parliament, 1890 (India).

The needs of a man to adopt are⁶;

1. The man should be a major.
2. Should be of sound mind.
3. If you are married, he must have the wife's consent. The wife's consent is not required if the woman either renounced the world or her Hindu faith or changed her common sense.
4. It is necessary to obtain the consent of all the women that the person has at the time.⁷
5. On the other hand, separate rules apply to women who want to adopt a child.

Section 8 of the Hindu Adoption and Maintenance Act, 1956 (HAMA) provides that.

The woman to be adopted must be⁸:

1. Major
2. With a healthy mind
3. It doesn't matter if the woman is married or single

IV. Recognition of Adoption Laws for Transgender Individuals in India

The Hindu Adoption and Maintenance Act of 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2015, both govern the adoption process in India. Currently, only traditional couples (one man, one woman) and single people are allowed to adopt in the country.

However, after landmark decisions like *Navtej Singh v. Union of India*⁹ and the recognition of transgender people as a third gender, great strides have been made in recent years towards inclusion and equality for the LGBTQ+ community. Despite these developments, there is still no consensus on the acceptance of same-sex marriage and adoption rights for LGBTQ+ people. Although the Transgender (Protection of Rights) Act grants transgender people the right to adopt, there is no explicit law allowing same-sex couples or LGBTQ+ people to adopt. They

⁶ Hindu Adoption and Maintenance Act, 1956, § 7, No. 78, Acts of Parliament, 1956 (India).

⁷ Bhooloram & Ors, 1989 JLJ 387.

⁸ Hindu Adoption and Maintenance Act, 1956, § 8, No. 78, Acts of Parliament, 1956 (India).

⁹ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

are denied the basic right to raise a family and create a haven for vulnerable children due to an inadequate legal framework. Although homosexuality has been legalized through amendments to Section 377 of the Indian Penal Code, discriminatory laws and social attitudes have prevented their equal participation in the adoption process.

Adoption of children by same-sex couples was previously prohibited under the discriminatory provisions of the Juvenile Justice Act (Care and Protection of Children Act) (Description of the Juvenile Justice Act) 2017, care for and protect children who break the law and children in need of care and protection by meeting their basic needs through care, protection, development, treatment, and reintegration appropriate social inclusion adopting a child-friendly approach to the ceremony), will be phased out by 2020. The primary objective of this amendment is to give absolute priority to the best interests of the child in the adoption proceedings. Even if this amendment moves in the right direction, much work remains to be done to ensure equal access to adoption for all.

In a democratic country like India, there should be no room for discrimination, and towards the goal of equality before the law. To address the issues facing the LGBTQ+ community, leading to a multitude of concerns and challenges, some discriminatory laws need to be changed. Equal treatment and protection of their constitutional rights as outlined in Articles 19, 20, 21, 21A, and 22 are due to all Indian citizens. Regardless of sexual orientation or gender identity¹⁰.

All citizens of India must be treated equally and without prejudice as a sovereign, democratic, and republican country. It is important to understand that the standard of good business conduct applies to everyone, regardless of compliance with company conventions. All citizens of the country must have access to basic rights, such as the ability to adopt children, to promote a truly egalitarian society with no room for prejudice.

In India, the path to equal adoption rights for LGBTQ+ people is still open. Although much progress has been made following court decisions and changes in the law, much remains to be done to create a comprehensive legal system that protects the rights and dignity of every individual. People. It is important to uphold equality and inclusion in a democratic country, renounce discriminatory practices, and adopt a culture that values and protects the rights of all citizens.

¹⁰ INDIA CONST. art. 15, cl. 1

V. Changes to be made in adoption laws

Elimination of heteronormative language the phrase “adoption is only between heterosexual couples,” should be removed from adoption laws. Instead, the focus should be on a person’s suitability as a parent based on their capacity to raise a child in a caring atmosphere.

By ensuring that adoption regulations do not discriminate against anyone based on their gender identity, the adoption of gender-neutral terminology would put an end to prejudice towards LGBTQ+ people and couples adopting children. The value of the family definition of family in adoption regulations is broadened to encompass varied households to promote inclusivity and consider shifting social norms.

VI. Historical Decision of Recognising Transgender

We Indians have done a lot of injustice to the transgender community. Their name is often used as an offensive word. In India, they were deprived of their basic rights. They were always discriminated against, ignored, and suppressed. But things turned around when India finally caved on the Recognition of transgender people as a third gender in India. It was held in NLSA Vs Union of India.¹¹ Transgender is a term used collectively for all such people who do not know their gender identity, gender expression, or behavior is consistent with their biological gender; in these terms, it contains different identities. One of the petitioners who went to the Supreme Court told his story there.

The complainant in the said case was born male. He told everything in court about the problems he faced in the group. He mentioned that he felt like an adult was different from other boys and was always feminine. Because of her femininity, she had to face repeated sexual harassment, bullying, and sexual abuse. This happened to him in his family and also outside his family. He said it because he was unlike others; he always felt that he had no place in this society. This society does not accept him. She was constantly abused and teased with words like chakka or hijra. She showed great courage and started dressing like a woman in society after catching up with him late teens. Even then, she did not identify as female. He told me he

¹¹ NALSA vs UOI, WRIT PETITION (CIVIL) NO.400 OF 2012

started a later life with the hijra community in Mumbai. He said in court that he was deprived of gender identity, and he faced serious discrimination.

Such stories can be heard from the mouths of any transgender person. These stories were not limited to just one region or state. This happened all over India.

When the Supreme Court recognized a third gender, they changed history. They did something that a large part of society has been waiting for a long time. It was a small step in improving the lives of transgender people, but it was a small step. There are several guidelines established by the courts, such as:

1. Hijras, eunuchs, and all persons regardless of gender are considered “third gender” to protect their rights recognized under Part III of the Constitution and laws passed by Congress and the State Legislature.¹²
2. Give transgender people the right to self-declare their gender. Central and state governments have been encouraged to legally recognize their gender identification.
3. The court ordered the Centre and the state government to treat transgender people as socially and culturally backward citizens. They were asked to fully expand benefits, including all classes of society, which are socially and educationally backward yes, to the transgender community.
4. Centres and state governments are required to take care of medical facilities for medical care for transgender people. They were also asked to create their own toilet and other facilities for the transgender community.
5. Both levels of government are required to take different measures to improve the situation of the transgender community.

¹² Niyati Acharya, NALSA vs UOI, Law time journal, (2019)

VII. Equal Treatment to the LGBTQ+ Community

Legislation that protects LGBTQ+ individuals and couples from being discriminated against based on sexual orientation or gender identity must be passed. All aspects of the adoption process, such as eligibility, evaluation, and placement, must be governed by these laws.

The best interests of the child ensure that the child's welfare and discriminatory practices are protected by making the best interests of the child the most important factor in adoption cases, regardless of the intended parents' sexual orientation or gender identity.

VIII. Adoption Rights of Transgender and LGBTQ+ Community

When an Indian wants to adopt a child as mentioned above, there are two different ways to do it.

Therefore, a Hindu has the right to adopt a child through the Hindu Adoption and Maintenance Act, and the other option is CARA.

Adoption and the rules governing it cover only men and women. They set the rules about when men can adopt and when women can adopt. Likewise, the form issued by CARA for adoption has three options: single man first, single woman, and in pairs. All legal adoption methods are closed to transgender community. Likewise, current methods do not allow same-sex couples. It is one of the greatest rights they are deprived of. If one reads the Constitution of India, Article 14 guarantees equal rights for all Indian citizens. He declares that the government in the state and the centre refuse to be equal first to the rule of law and the equal protection of the law in the territory of India. It is one of the fundamental rights guaranteed to the people of India. This right is the basis of rights that a person may claim. Equality before the law is the principle according to which everyone is equal before the law. It is a negative concept. This principle also contributes to the prohibition of discrimination. The principle of equal protection of law states that a government or a state should always treat people differently in different situations to establish equality among all. The Supreme Court of India, through various Acts, has developed a basic principle of structural theory. This basic structural theory highlights features of the constitution that cannot be deleted. Therefore, not giving adoption rights to transgender people is a violation of the right to equality. Article 15 of the Indian Constitution states that there should be no discrimination against any citizen of India solely based on religion, race,

caste, gender, place of birth, or any of them. This law ensures that the state cannot discriminate among citizens by giving undue Favor to any gender, religion, sex, or person limited to a single domain. Although the Constitution allows a reasonable classification that helps them raise the status of this class of people.

The classification depriving the transgender community of the right to adopt a child cannot be considered a reasonable measure. There is no good reason to prevent someone from adopting. That is a discriminatory nature. It deprives a community of the basic happiness that comes from having a family.

Any law that violates fundamental rights is invalid in India. So, can we say that empowering transgender people to adopt children is beyond the jurisdiction and should not exist?

Many will question whether the community is not engaged in good economic activities. This makes adoption cases for transgender people low. But we can't deny that the reason their communities are struggling socially and economically is because of us. That is, we who have deprived them of their basic rights and the ability to rise. We have been forced to stay in the lowest class of society. If a person reads a court judgment NLSA v Union of India case, the guidelines set forth by the Supreme Court. It clearly shows that recognizing them as a third gender helps the state maintain the rights given under Part III of the Constitution of India to them. But not giving custody violates Articles 14 and 15, and contradicts the Company's instructions.

Same-sex couples in India have a similar problem. They can't legally adopt children in India. Even a gay person can adopt a child alone. This can be done by filling in as a single man or a single woman in the form of adoption. So far, the court has not yet recognized same-sex marriage in India. This does not give them official rights or legality as a couple. Here's Why Their Adoption Process Isn't Open to Homosexual Couples. Even our Supreme Court legalized Section 377 of the Indian Penal Code. The code means that now homosexuality is not a criminal offense. Back year a law was introduced by the British that criminalized falling in love and claimed it to be a section of society.

This was prohibited by the Supreme Court of India. But there are many things they have not answered. An important question for a large section of society, this question defines the future of a community. These relate to marriage, surrogacy, and acceptance by the LGBTQ community. A great injustice is done to those who belong to these communities.

IX. LGBTQ+ Rights Around the World

LGBTQ rights have been on the rise recently. There are a lot of countries that now celebrate bisexual people and others in their countries. One of the biggest events was when Argentina passed a bill to determine sex and make it law in 2012. It gives bisexual people the right to marry and bear children. Indeed, countries considered less developed, like Mexico, have passed the right to marry and adopt children. England and Wales have also honoured same-sex marriage. Chairpersons of different countries have now openly supported the LGBTQ community, including Barack Obama. The United States of America has now legalized same-sex marriage. After the Supreme Court ruled the law banning same-sex marriage unconstitutional. The Prime Ministers of Trinidad and Tobago have written a letter to the Kaleidoscope Trust, expressing their desire to repeal the law banning homosexuality. The Prime Minister of Jamaica also expressed the same desire. One of the safest mainland countries in the world is Europe when it comes to gay rights, where only Northern Cyprus has yet to ban homosexuality.

X. Conclusion

Little has been done, and much more has to be done to protect the legal, moral, and social rights of transgender people. The organizations that fight for these rights are stronger and more motivated than ever, but the justice system must also play its vital role and exercise “equal rights” in its own right. At a time when so much talk and debate are happening regarding human rights, it is a shame for us as a society that we have not brought a particular community into the mainstream. In all terms. It’s never too late, though. It all starts with us. Every child deserves the love, safety, and warmth of childhood, and every adult who wants to be a parent deserves to experience that. Putting these two statements together, it is very simple to understand that every individual (regardless of gender) who can bring love, safety, and warmth to a child can be a parent. Hopefully, shortly, we will be mentally, legally, and socially ready to accept such a simple statement.