

LGBTQ+ COMMUNITY'S RIGHTS TO ADOPTION- ISSUES AND CHALLENGES

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ABSTRACT

The rights of the LGBTQ+ community regarding adoption are a pressing issue around the globe, especially in countries like India that have an ongoing construing of societal norms and laws against the heteronormative backdrop. This paper will analyze the various hurdles confronted by the members and couples of the LGBTQ+ community in their endeavor for adoption rights concerning legal, social, and cultural discourses. It explores existing laws, for example, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Hindu Adoption and Maintenance Act, 1956, etc., and points out the gaps in inclusivity. This research paper brazenly addresses the societal stigma and prejudices compounded by legal barriers while applying intersectional perspectives on LGBTQ+ identity and parenthood in a conservative socio-cultural architecture. It draws comparisons with more progressive concepts from other countries and recently observed comments from judicial decisions, with the intent of illustrating an urgent necessity for legal overhaul and shifts in policy. Ultimately, it argues for an inclusive definition of family sufficient to protect the rights of LGBTQ+ people to pursue family formation while ensuring the best interests of children. This paper thus intends to add to the discussions surrounding equality, human rights, and family law.

KEYWORDS- LGBTQ , Adoption, Rights, Law

INTRODUCTION

"Law cannot assume that only heterosexual couples can be good parents. This would amount to discrimination. So the adoption regulations are violative of the Constitution for discrimination against queer couples"- Former Hon'ble Chief Justice of India, D Y Chandrachud.

The term LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer. This term includes types of people who are not heterosexual and people from other sexual minorities.

LGBTQ+ people and couples adopt children for many reasons, including the desire to provide a loving and stable family, as do others of

heterosexual status. Because an increasing number of LGBTQ are unable to bear children together biologically, adoption provides a crucial route into parenting. Furthermore, LGBTQ parents may be particularly motivated to adopt children who are less desirable to adopt, e.g., older children, children with special needs or siblings, and to that end, can help alleviate important gaps in the foster care system. There is an underlying principle of equality, non-discrimination and the child's well-being for the need of LGBTQ adoption rights. Denying lesbian, gay, bisexual, transgender (LGBTQ) people the ability to adopt, not only is discriminatory to them on the basis of sexual orientation or gender identity but, it also reduces the number of caring and adoptive families raising children

in need. Many researches consistently show that children raised by LGBTQ parents fare just as well as those raised by heterosexual parents in terms of emotional, social, and academic outcomes, debunking any myths surrounding their ability to parent. For example- “American Psychological Association RESOLUTION on Sexual Orientation, Gender Identity (SOGI), Parents and their Children” was made after the research done by the American Psychological Association and it states that- There is no scientific evidence that parenting ineffectiveness is related to parental sexual orientation or gender identity: sexual and gender minority parents are as likely as cisgender heterosexual parents to provide supportive and healthy environments for their children.¹⁰⁴³ Also the article written by Patterson, C. J, “Children of Lesbian and Gay Parents: Psychology, Law, and Policy” is a comprehensive review of psychological research done that proves that kids raised by same-sex couples fare just as well as those raised by heterosexual couples in terms of academic achievement, emotional stability, and social behavior.

Formal recognition of the rights of LGBTQ adoption in law is therefore also necessary to ensure the family stability and security, safeguarding parents and children from legal litigation. Especially given the second point, adoption rights that focus on inclusion between family structures also lessen the acceptance barriers around families of sexual minorities for the whole society. While foster care systems in many areas are overburdened, expanding the number of LGBTQ people who adopt can help create stable homes for thousands of children. Support for rights of LGBTQ adoptive parents is not just about fairness for potential parents, but in ensuring that every child has access to a safe and supportive home in which to grow up.

BACKGROUND

The existence of people under this umbrella term isn't something new, as in India only there

is proof of their existence since ancient times. What people have discovered about ancient India is the pervasive acceptance and celebration of all kinds of love. This may be evidenced with certain Hindu texts which featured characters and themes as part of its narrative which were favorable towards the idea of being gay. In ancient India, it was remarked to pray ‘Vikriti Evam Prakriti’ (What is not natural is also natural). In the Kamasutra, it is stated that many lesbians known as Swarinis married each other and co-parented children. Another very visible instance is the Khajuraho temple located in Madhya Pradesh which was built in the 12th century and is famous for the explicit erotic sculptures that portray homosexuals as being sexually versatile.

In the Medieval times, there was some reproach toward homosexual acts but people were not cast out of the society for being LGBT. The society was tolerating toward them and nobody was persecuted for having a different sexual orientation.

A son of Alauddin Khalji, Mubarak who ruled The Delhi Sultanate between 1296 and 1316, who reportedly had sexual relations with one of his male courtiers. Babur, who established the Mughal Dynasty, states that he was in love with a boy, Baburi, and wrote it all in his works which did not appear to shock anyone in his time or afterward. Such occurrences also happened when nobles of the Mughal class had same sex relations. Some written examples which throw light on the condition of LGBTQ in the history of India are- “Manu Smriti”- in dharma-sastra such as in Manu-smriti there is an injunction to perform atonement if one engages in sex with the same gender. Manu-smrti also says that “if one engages in crooked sex one will fall down from one’s jati, “The World of Homosexuals”- In 1977, Shakuntala Devi published the first study of homosexuality in India, the book talked about “full and complete acceptance and not tolerance and sympathy”. This means that people should completely accept the people who are heterosexual and not just tolerate them

¹⁰⁴³ APA Psychological Association RESOLUTION on Sexual Orientation, Gender Identity (SOGI), Parents and their Children

or give them sympathy because they are different.

The history of the development of the LGBTQ adoption rights around the globe is a rather complicated one that has been influenced by social, legal and cultural developments for many years. The process of the development towards accepting same sex couples to adopt has been a gradual process and can be traced back to the late 20th century. Thus, although same-sex relationships have always been there in the society, the formal adoption of the LGBTQ adoption started in the 1970s and the first case was reported in this period. This first step paved the way for other legal fights for equality for same-sex couples.

In the United States some of the major events include New Jersey's 1997 ruling which allowed gay couples to adopt children jointly. This was a significant decision that paved way for other states. By 2015 due to the legalization of same sex marriage across the entire United States the adoption rights also changed for the better for the LGBTQ families. Nevertheless, many states still have discriminatory laws and uneven waiting periods that affect the LGBT people who want to adopt children. In contrast, international views on LGBTQ+ adoption reveal differences in acceptance and protection under the law. In Europe, substantial jurisprudential development of the European Court of Human Rights had contributed to the legal recognition of same-sex couples who wish to adopt (on the European legislation see, inter alia, this and this article). But the picture is messier in Asian countries like Vietnam. Cultural stigmas about homosexuality and thus laws that limit LGBTQ+ people's access to fundamental parental rights prevail in countries across Asia.

ADOPTION RIGHTS OF THE LGBTQ COMMUNITY IN INDIA

Adoption laws governing LGBTQ persons and couples in India are complex and involve a mix of personal laws based on religion and secular laws, and face different challenges and

some progress in recognition of LGBTQ and also their rights has been achieved due to judicial activism and landmark judgements like-

Navtej Singh Johar & Ors. v. Union Of India

Facts- Section 375 of IPC permits consensual penetrative acts (the definition of 'penetration' includes oral and anal sex), but Section 377 makes the same acts of penetration punishable irrespective of consent. The LGBT community argues that Section 377 prohibits them from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence.

Issues- Whether Section 377 of the IPC is violative of the fundamental rights guaranteed by Articles 21, 19 and 14 of the Constitution?

Whether Section 377 is vague and arbitrary?

Whether Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private?

Judgement- The Court struck down Section 377 of the IPC as violative of the fundamental rights guaranteed by Articles 21, 19 and 14 of the Constitution. The Court observed that Section 377 is vague and arbitrary as carnal intercourse against the order of nature is neither defined in the Section nor in the IPC or any other law. The Court further held that Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence. Therefore, Section 377 cannot be justified as a reasonable restriction under Article 19(2) on the basis of public or societal morality, since it is inherently subjective.¹⁰⁴⁴

National Legal Services Authority vs Union on India

The Supreme Court of India held that the non-recognition of the identity of hijras/transgenders as a third gender violated their fundamental rights guaranteed under

¹⁰⁴⁴ <https://www.casemine.com/judgement/in/5609af57e4b01497114161c2>

Articles 14 and 21 of the Constitution of India. The Court recognized the right of transgender individuals to self-identify their gender and held that gender identity is an integral part of sex, and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender. The Court also held that discrimination on the basis of sexual orientation or gender identity impairs the right to equality under Article 14 of the Constitution of India. Articles 15 and 16 of the Constitution of India were interpreted to prohibit discrimination on the basis of gender identity. The Court further held that the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India includes the right to express one's self-identified gender.

The Court recognized the historical and cultural significance of hijras in India and noted the discrimination faced by the community under colonial-era legislation. The Court directed the government to take measures to ameliorate the problems faced by the transgender community, based on the recommendations of an expert committee.¹⁰⁴⁵

According to the Hindu Adoption and Maintenance Act, 1956 (HAMA), which covers Hindus, Jains, Sikhs and Buddhists, single individuals including LGBTQ persons can adopt, but same-sex couples are not recognized. HAMA allows only heterosexual married couples to adopt together, as it defines "spouse" in traditional terms, excluding LGBTQ partnerships. According to Muslim personal law, traditionally, adoption would not be recognized, with practices such as Kafalah (guardianship) providing a workaround. In Kafalah, the guardian would have to look after the child, but the child's original family name and right to inheritance would remain. This is not akin to adoption, and for various reasons, LGBTQ individuals and couples suffer additional barriers, as Islamic law does not recognize same-sex relationships, nor does it provide

parental rights to any family other than traditional ones.

For groups of Parsis and Christians, there are no personal laws for adoption. These create a gap, since the communities are governed by the secular Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act). The JJ Act permits a single individual, regardless of religion, gender, or sexual orientation, through the Central Adoption Resource Authority (CARA), to adopt. Yet, it does not conveniently recognize such couples and thereby outlaws joint adoption. In a similar vein, without acknowledging LGBTQ relationships, this law excludes adoption for LGBTQ couples.

Hence the absence of explicit statutory provisions for LGBTQ individuals and couples in any of those legal frameworks indeed poses a formidable barrier. Same-sex couples are denied joint adoption in any of the other personal or secular laws, as their relationship receives no recognition.

ISSUES IN THE LEGISLATION-

The Juvenile Justice (Care and Protection of Children) Act, 2015- The Preamble of the JJ Act states, An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child- friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided and institutions and bodies established, hereunder and for matters connected therewith or incidental thereto.¹⁰⁴⁶

The act does recognise the right of individual LGBTQ persons to adopt children under its section 57(3), but it doesn't allow for the LGBTQ couples to adopt children. This is because of **The Adoption Regulations, 2017** which were framed by the Central Adoption Resource Authority (CARA), it is a statutory body under

¹⁰⁴⁵ <https://www.casemine.com/judgement/in/5609af57c4b01497114161c2>

¹⁰⁴⁶ Preamble of JJ Act

the **Ministry of women and child development.**

The regulations state that- No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.¹⁰⁴⁷ As the LGBTQ people don't have the right to a valid marriage in India, they can't have the 2 years of stable marriage, thus not being eligible for adoption as a couple.

The Hindu Adoption and Maintenance Act, 1960- The act can be considered as discriminatory against the LGBTQ community and violative of their human rights as in many of its sections, it mentions husband and wife but not any gender neutral term. For example-

Section 7- Any **male** Hindu who is sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

PROVIDED that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.¹⁰⁴⁸

Section 8- Capacity of a **female** Hindu to take in adoption.¹⁰⁴⁹

Section 9(3)- The **mother** may give the child in adoption if the **father** is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.¹⁰⁵⁰

So, even just a brief read of the act indicates that it doesn't recognise the adoption rights of the LGBTQ people and only recognises 2 genders : man and woman. There is no third gender adoption option under the act.

The Law Commission does advise the substitution with gender neutral terms like "parents" in place of mother and father in acts like JJ Act and HAMA Act.

The Assisted Reproductive Technology (Regulations) Act, 2021- The act lacks usage of gender neutral terms, this causes exclusion of LGBTQ individuals from receiving surrogacy services.

Section 2(u) of the act- defines woman as, any woman above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank.¹⁰⁵¹ The act doesn't consider LGBTQ people as patients and in addition to that, The government said the inclusion of live-in and same sex couples within the ambit of the Surrogacy Act would lead to "misuse". "It would be difficult to ensure a better future for the child born through surrogacy," the government cautioned.¹⁰⁵² To further prove the non inclusion of LGBTQ-

Section 21(g) of the act states that, the clinics shall apply the assisted reproductive technology services,

(i) to a woman above the age of twenty-one years and below the age of fifty years;

(ii) to a man above the age of twenty-one years and below the age of fifty-five years;¹⁰⁵³

The Transgender Persons (Protection of Rights) Act, 2019- This act was enacted for the betterment of conditions of the transgender people In India. Even though it's a very good initiative from the government, it lacks a lot of basic rights which should have been given to the transgender individual. The act doesn't recognise the adoption and parenting rights of the transgender persons, while in an individual capacity they can adopt, as a couple they don't have any family rights and can't adopt as a couple or a family. This means that the transgender people don't have a right to form a family according to their choice because the law in India doesn't allow it. The other rights

¹⁰⁴⁷ The Adoption Regulations, 2017 S 5(3)

¹⁰⁴⁸ HAMA Act, 1960 S 7

¹⁰⁴⁹ HAMA Act, 1960 S 8

¹⁰⁵⁰ HAMA Act, 1969 S 9(3)

¹⁰⁵¹ The ART (Regulations) Act, 2021 S 2(u)

¹⁰⁵² <https://www.thehindu.com/news/national/same-sex-couples-live-in-partners-not-included-in-surrogacy-and-assisted-reproduction-laws-says-govt-in-supreme-court/article66831323.ece>

¹⁰⁵³ The ART (Regulations) Act, 2021 S 21(g)

enjoyed by heterosexual couples like marriage and inheritance are also still absent for the LGBTQ and transgender people even after enactment of this new act.

WORLDWIDE ADOPTION RIGHTS OF THE LGBTQ COMMUNITY

LGBTQ adoption and family rights differ a lot throughout the globe, thus showing various cultural, religious, and legal views on same-sex relationships and LGBTQ parenting. In several Western nations, there has been paramount progress in acknowledging the LGBTQ family rights. Countries such as Canada, Sweden, and the Netherlands permit same-sex couples to adopt together and have equal parenting rights to heterosexual couples, showing their dedication to equality and inclusion. Also, nations such as Australia, South Africa, and Brazil have laws that include same-sex couples for adoption and recognize same-sex marriage, which helps in protection of LGBTQ families legally. However, in many areas of Asia, Africa, and the Middle East, LGBTQ adoption rights are extremely limited or do not exist at all. For instance, countries like Russia, Nigeria, and Saudi Arabia ban LGBTQ adoption and also make having same-sex relationships a crime.

In the **United States of America**, Before 2015, state laws were different about same-sex marriage legality. Some states allowed paternal presumption for same-sex marriage. States like California and New Jersey offered even more. They allowed unmarried same-sex couples to have parental status if they had a civil union or domestic partnership.

After the 2015 Obergefell ruling, all states had to acknowledge same-sex marriage. However, this ruling did not make laws the same on all issues. Some states assume parentage, while others do not. The process is not consistent across states and continues to be a topic of legal disputes. De Boer v. Snyder is an American case in which-

On January 23, 2012, plaintiffs April DeBoer and Jayne Rowse, both of whom have individually adopted children, filed a lawsuit in the Eastern

District of Michigan challenging the state's ban on adoption by same-sex couples. Michigan law restricted second-parent adoption to married couples, a Catch-22 for same-sex couples, since the state excluded them from marriage. At the invitation of District Court Judge Bernard Friedman, the plaintiffs amended their Complaint to challenge the "underlying issue" of the state's ban on same-sex marriage. Judge Friedman heard arguments on March 7, 2013, but delayed ruling until after the Supreme Court's decisions in *United States v. Windsor* and *Hollingsworth v. Perry*.

Following further oral argument and a trial, Judge Friedman on March 21, 2014 ruled that Michigan's same-sex marriage ban was unconstitutional and violated the plaintiffs' right to

the equal protection of the law¹⁰⁵⁴. Adoption laws in the **UK** were initially limited to couples, in its early form permitting adoptions solely to married couples or singles and not to same-sex couples. But in 2000, England and Wales adopted the Adoption and Children Act,

which allows LGBTQ individuals and couples the same right as heterosexual couples to adopt children. The Equality Act of 2010 ensures that LGBTQ people are not discriminated against during the process of adoption by prohibiting discrimination on. Such as gender identity and sexual orientation. Even after the backward society in **South Africa**, the country managed to legalise same sex marriage and uphold the adoption rights of the LGBTQ people. The South African government passed the Civil Union Act, 2006 which legalised the same sex marriage and then in the case of Du Toit and Another v Minister of Welfare and Population Development and Others, the south african court allowed the adoption of children by same sex couple, the court stated that-

I shall grant the relief sought by the applicants in this case and confirm the order made by the

¹⁰⁵⁴ <https://www.theconstitution.org/litigation/de-boer-v-snyder-6th-cir/>

High Court. I am of the view that such a remedy serves to protect not only the applicants equal parenting rights in respect of the siblings, but all permanent same-sex life partners wanting to adopt children jointly or to undertake joint guardianship. I should, however, emphasise that in each decision concerning adoption, prospective adoptive parents should be evaluated on a case-by-case basis as provided for in the Child Care Act. In so doing, care will be taken to ensure that only suitable couples will be entitled to adopt children jointly.¹⁰⁵⁵ In **Vietnam** there has been a removal on ban on same sex marriage in 2015, since then more and more questions have arisen about more family rights of the LGBTQ people there, but the law of Vietnam is silent on many matters like the LGBTQ community's adoption rights. In **Russia**, The Russian President Vladimir Putin on Saturday (23 November, 2024) signed into law a bill banning adoption of Russian children by citizens of countries where gender transitioning is legal.¹⁰⁵⁶ Russian government also bans same sex marriages and the adoption done by LGBTQ people strictly.

ISSUES AND CHALLENGES IN ADOPTION RIGHTS OF THE LGBTQ COMMUNITY

Limitations in the legislation, only one LGBTQ individual can adopt a child, but two homosexual individuals cannot jointly adopt a child. In fact, the Juvenile Justice Act, 2015 and the Hindu Adoption and Maintenance Act, 1956 both state that an adoptive couple can only be heterosexual and married. Other people in a non-heterosexual relationship are denied legal recognition as an adoptive parent when one of the parents adopts the child on his or her own. Such a child will not inherit the assets of the other parent and also is not entitled to all the benefits that accrue as a parent. *Supriyo v. Union of India* – It is well stated in the recent supreme court judgement that the couple need not be heterogeneous to adopt a child. **Less**

Support from Birth Parents, when the birth parents first learn about their child's "abnormal" sexuality, whether they identify as lesbian or gay, their initial reaction is often one of denial. Many refuse to accept this aspect of their child's identity and may even insist on psychological and physical testing or therapy. This denial can stem from societal or religious pressures, as well as the misguided belief that being gay or lesbian will lead to a harsh or unsuccessful future for their child. Some parents may try to convince or threaten their children to conform to what they consider "normal," while others may choose to cut ties altogether. As a result, same-sex couples often find themselves without the personal support they need during challenging times, making their struggles even more difficult. **Discrimination and societal issues**, there seems to be no permeable boundary regarding same-sex parenting or opposite-sex parenting. Children with same-sex parents perform as well or even better than their peers. However, it does not stop people from spreading old-fashioned ideas of regarding stereotypes of LGBTQ parents. Both the children's as well as the LGBT's community is bound to undergo brutal discrimination. The societal stigma and the people's shaming will encircle the same sex adopted parents as well as people. They are often being discriminated in schools, workplaces and in other social gatherings. The book named "Gay Fathers: Rights and Responsibilities" – by Nancy J. Mezey, goes over the psychological impact on gay fathers and their children due to societal discrimination faced by them, emphasizing the importance of legal protections in adoption. **Religious beliefs affecting society and agencies**, our most frequent demographic explanations for public views on gay sexual relationship involve religious observance and theological conservatism in far more than attitudes about same sex marriages and need for brooding and/or fathering. Even though, same sex couples are supported greatly, it is often even the adoption centres whose institution is based on religion that discriminate

¹⁰⁵⁵ <https://lawlibrary.org.za/akn/za/judgment/zacc/2002/20/eng@2002-09-10>

¹⁰⁵⁶ <https://apnews.com/article/russia-lgbtq-adoption-putin-b8d16be856d811458ef8d41f9017d8dd>

the same sex couples more often, shutting them out of the process where they are trying their best in order to adopt children. **Issues regarding gender role**, our society and world over the years is mold in such a way which has given different roles to both male and female, now when a third gender comes into play it becomes very hard for people to assign them their roles. Also, couples transform into parents and face a lot of stress. As for the same sex couple it is harder when it comes to assign with the gender roles like the responsibilities taken and such. **Lack of legal assistance and protections**, even if a gay couple or a third gender person is successful in adopting a child, there is a possibility of them facing legal challenges, such as guardianship, inheritance, and child custody, this is because of the lack of specific provisions for same-sex couples in our legislation.

SUGGESTIONS AND RECOMMENDATIONS

- The judges should pass judgements with an open heart and keep in mind the changing times when it comes to cases related to the LGBTQ rights like in the case of Ms. S. Sushma vs. Commissioner of Police, Greater Chennai Police where the judge took a counselling to better understand the LGBTQ people and stated that “I need to be fully ‘woke’ on this aspect for the judgement to come out from my heart rather than my head.”
- The lawmakers should learn from developed countries or regions which have better societal conditions like the United Kingdom which has acts like Adoption and Children Act, 2002 and Equality Act, 2010 which prohibit discrimination against same sex couples and allow them to adopt children as a couple.
- Lawmakers should also understand the essence of constitutions of democratic countries all around the world and the international laws which promote

freedom to choose family and right to dignity.

- The government and local authorities should normalise giving jobs, placements, reservation, etc to the people from LGBTQ community so that they can gain some dignity and respect in the society and live a life without facing discrimination.
- There should be inclusion of LGBTQ education in the course curriculum of students in schools everywhere so that there is promotion in understanding of LGBTQ people. This will result in society slowly accepting the existence of such types of individuals and there will be more realisation of the necessity of their human rights.

CONCLUSION

There has been progress and development in the recent few years regarding the recognition and human rights of the LGBTQ community, but their rights and recognition is still far from ideal. This is because many laws and acts still don't recognise their rights to marriage, right to form a family, the laws and society still discriminate against them a lot, the old laws are outdated and need to be amended and the new laws too are not properly made and lack many provisions which are needed to provide support the LGBTQ community. LGBTQ persons are humans too just like the heterosexual persons and deserve the human rights which heterosexual persons have been enjoying for centuries. There is need for more open minded judgements by courts and the law makers should implement rules, policies, etc which uplift the LGBTQ community and their adoption rights. As long as same sex couples and third genders are proven to be able to fulfill the best interest of children, which they have been due to many researchers and cases, they should be able to adopt children and form a family of their choice.

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