

Indian Journal of Law and Jurisprudence

A CASE FOR ADOPTION RIGHTS FOR LGBTQ COMMUNITY

by

Sanjay Gadkari

ABSTRACT

The Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) community is the sexual minority of India, which has been unfairly discriminated in legal and social identity since time immemorial. The civil rights of the LGBTQ community like the right to adopt, right to marriage, etc are also not being recognised at par with their heterosexual counterparts. Equal adoption rights are necessary for the LGBTQ community to live a family life with children's similar to their heterosexual counterpart. However, the adoptions laws of India are discriminatory towards the LGBTQ community and work as an impediment for them in fully exercising their adoption rights. Such discriminatory adoption laws which are based on the binary understanding of gender violates different principles which are enshrined under Article 14, Article 15 and Article 21 of the Constitution of India. The adoption laws of India are also not in line with the principle of the best interest of the child as they exclude potential prospective adoptive parents from the process of adoption. The researcher in this research paper will critically analyse the LGBTQ right to adopt in India and will try to make a case for equal adoption rights for the LGBTQ Community.

INTRODUCTION

In 2018 the Apex Court in its landmark judgement of *Navtej Singh Johar v. Union of India*¹ has decriminalised homosexuality by reading down part of Section 377 which criminalises the consensual sexual act of adults in private. However, the court has not paid heed to the civil rights of the Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) community. The LGBTQ community is fighting a long legal battle to secure basic civil rights like the right to marriage, the right to adoption, etc. Equal right to adoption gains importance for the LGBTQ community as that is the only plausible way through which LGBTQ couples and individual can live a family life with children, as the method of IVF is very expensive² and as they are barred by law from using surrogacy³.

Many social and economic injustices have surrounded the adoption of children by the LGBTQ community. The CJI Deepak Mishra also highlights in *Navtej Singh Johar (Supra)* that it's not about only sexuality as society thinks but one's love or emotional affection that creates bond together and they (LGBTQ community) as a citizen have rights par with all but acts such as adoption laws are discriminatory.⁴ The Adoption laws of India work as a legal impediment for the LGBTQ community in exercising their adoption rights. In light of the recent judgments of the Supreme Court in *Justice K.S Puttaswamy (Retd.) v. Union of India*⁵, *Joseph Shine v. Union of India*⁶ and *Navtej Singh Johar v. Union of India*⁷ which highlights the

¹ (2018) 1 SCC 791

² CNY Fertility, IVF Cost in India – A Cost Comparison with the USA, May 27, 2020 available at <https://www.cnyfertility.com/ivf-cost-in-india/#:~:text=The%20average%20IVF%20cost%20for,procedures%20that%20may%20be%20required> (last visited October 11, 2020)

³ The Surrogacy (Regulation) Bill, 2019

⁴ Kishor Kumar Panchal, "Same Sex Couple and Adoption Rights in India", April 27, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3586147 (last visited October 11, 2020)

⁵ (2018) 1 SCC 908

⁶ (2019) 3 SCC 39

⁷ *Supra* Note 1

importance of fundamental rights it has become important to critically analyse the adoption rights of the LGBTQ community in India. The researcher in this paper will discuss the historic evolution of adoption laws in India. The researcher will then analyse Indian adoption laws to carve out legal impediments faced by the LGBTQ community in exercising their adoption rights. The researcher will then try to make a case for equal adoption rights for the LGBTQ community.

1. EVOLUTION OF ADOPTION LAWS IN INDIA

The Adoption Laws in India that we saw today is a product of the historical and evolutionary process. It has passed through three eras which are Ancient, British and Post-Independence eras. Each era has a significant effect on adoption laws. One can find a reference to adoption in Ancient Hindu scriptures like Mahabharata and Ramayana, where adoption was made by saints and royals. In Ancient India the purpose of adoption was two-fold to carry on the lineage of the father and to perform funeral rites.⁸ According to Hindu Scriptures, it was believed that deceased parents can achieve salvation only if funeral rites were performed by the son.⁹ The ancient practice was to adopt a son after failing to have a natural child because of the importance attached to the son.¹⁰ Thus the substitution of a son was for Spiritual reason a position which was also observed by Supreme Court in *V.T.S Chandrasekhara Mudaliar v. Kulandainsh Mudaliar*¹¹.

In Ancient India, there were no codified laws for governing adoption and adoptions were governed by scriptures. It was during the British era when authoritative texts of Hindu come up for interpretation in the Privy Council.¹² The reflection of different judgments of the Privy Council is evident in today's adoption laws and these judgments structured the adoption laws

⁸ Niraj Meena, "Adoption Laws in India: Challenging Existing Law", available at <http://docs.manupatra.in/newsline/articles/Upload/E8EFE493-114B-4E5B-A014-682EB1729301.pdf> (last visited October 11, 2020)

⁹ Akshita Prasad & Kunal Nema, "Child Adoption in India: A Comprehensive Study", September 25, 2019 available at <https://thelawbrigade.com/family-law/adoption-law/child-adoption-in-india-a-comprehensive-study/> (last visited October 11, 2020)

¹⁰ Saras Bhaskar & R.A.C. Hoksbergen & Anneloes Van Baar & Subhasini Motiram, "Adoption in India- The Past, Present and Future Trends", December, 2012 available at https://www.researchgate.net/publication/236005514_Adoption_in_India_-_the_PastPresent_and_the_Future_Trends (last visited October 11, 2020)

¹¹ AIR 1963 SC 185.

¹² Karuna Devi, "Adoption in India _ a critical study with special reference to abandoned children in the state of Punjab Haryana and Himachal Pradesh", 2007 available at <http://hdl.handle.net/10603/128127> (last visited October 11, 2020)

of Hindu. Then in Post-Independence Era, Sir B.N Rao Committee placed Hindu Code Bill in front of Parliament, which was divided into four parts one of which was the Hindu Adoption and Maintenance Act, 1956.¹³ This leads to the establishment of the Hindu Codified Adoption laws.

The absence of General laws of adoption has caused dissatisfaction among willing individual and families. The first attempt to create a secular law was made in 1972 through the Adoption of Children's Bill, which has received opposition from the Muslim committee in Rajya Sabha.¹⁴ Another bill was introduced in Lok Sabha in 1980 which include a clause expressing non-applicability on Muslims, however, the bill lapsed.¹⁵ It was the historic case of **Lakshi Kant Pandey**¹⁶ which has led the foundation for secular adoption laws and has lead to deviation of adoption from religious reasons to protect the interest of the child. It is evident from above that there is no mention of adoption rights to LGBTQ couples and individuals in India. The possible reason for such exclusion in the pre and post-independence era is the criminalisation of homosexuality under Section 377 of the Indian Penal Code.

2. LEGAL IMPEDIMENTS IN LGBTQ ADOPTION RIGHTS

2.1.THE HINDU ADOPTION AND MAINTENANCE ACT, 1956

The Hindu Adoption and Maintenance Act, 1956 (HAMA) is the only personal codified law in India which deals with the capacity to adopt, capacity to give adoption and the effect of adoption. Section 7¹⁷ and Section 8¹⁸ read with Section 11¹⁹ of HAMA, deals with the capacity and conditions of adoption for male and female Hindu. The explicit use of the words 'husband' and 'wife' under Section 7²⁰ and Section 8²¹ of HAMA imply that only heterosexual couples are allowed to adopt a child under HAMA. The act is also silent on adoption rights of "third gender". It is also evident from a bare reading of the Act that it is made on a binary understanding of gender. HAMA allows single parent adoption for the LGBTQ community. However, the legal effects of single-parent adoption are different. In a

¹³ *Supra* Note 14

¹⁴ Law Commission of India, Reforms on Family Law, 2018 available at <http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> (last visited October 12, 2020)

¹⁵ *Supra* Note 16

¹⁶ 1984(2) SCC 244

¹⁷ The Hindu Adoption and Maintenance Act, 1956, s. 7

¹⁸ The Hindu Adoption and Maintenance Act, 1956, s. 8

¹⁹ The Hindu Adoption and Maintenance Act, 1956, s. 11

²⁰ *Supra* Note 19

²¹ *Supra* Note 20

way, single parent adoption would put a legal obligation on a single parent to take care of the needs of an adopted child. Also, in single-parent adoption one of the spouses of a same-sex couple would need to sacrifice his/her adoption rights.

HAMA is also incapable to handle complexities arising out of sex-reassignment surgery in cases of Transgender. For example, take a case where a female adopts a female child and an adopted child and prospective parent doesn't have an age gap of 21 years. If this female goes under sex-reassignment surgery and become a male. Then it contravenes Section 11²² of HAMA which required a gap of at least 21 years between father and adopted daughter, and the adoption will become void as per Section 5 (1) which states “any *adoption made in contravention of the said provisions shall be void*”²³. It is evident from the above discussion that adoption provisions of HAMA are discriminatory and leads to different legal impediments for adoption to LGBTQ couples and individuals.

2.2. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT

The Juvenile Justice (Care and Protection of Children) Act, 2000 was the first secular law to deal with adoption. It has recognised adoption as one of the ways for the rehabilitation of the child. The former Act was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015).²⁴ JJ Act of 2015 laid down a broad framework for adoption. It defines adoption as the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.²⁵ Central Adoption Resource Authority (CARA) which was created under this act works as an overarching authority over all secular Intra and intercountry adoption. Adoption Regulations 2017 have been framed under section 68(c)²⁶ of the JJ Act 2015, and supersede the Guidelines Governing Adoption of Children, 2015.

Section 5 of the Adoption Regulation 2017 eligibility criteria for prospective adoptive parents. Section 5 (2)²⁷ gives the right of adoption irrespective of marital status which means a single parent can adopt but if married couples want to adopt then the consent of both spouses are

²² *Supra* Note 21

²³ The Hindu Adoption and Maintenance Act, 1956, s. 5 (1)

²⁴ *Supra* Note 14

²⁵ The Juvenile Justice (Care and Protection of Children) Act, 2015, § 2 (2)

²⁶ The Juvenile Justice (Care and Protection of Children) Act, 2015, § 68 (c)

²⁷ Adoption Regulations, 2017s, s. 5 (2)

required.²⁸ Same-sex couples would essentially fall under unmarried couple since same-sex marriages are not recognised in India. Recently CARA through regulation has also allowed partners in a live-in relationship to become prospective adoptive parents on case to case basis.²⁹ However, in absence of a clear mandate on whether same-sex couples can get the benefit of this circular or not, it can be safely inferred that the request of same-sex couples would be denied by the authorities. Also, different forms under 2017 Adoption regulations in case of “couple” use words “prospective adoptive father” and “prospective adoptive mother” which shows that there cannot be joint adoption by homosexual couples.³⁰

The online Registration form for prospective parents under Schedule VI consists of columns only for male and female and there is no mention of the third gender in the form as well as in adoption regulations thus there is uncertainty about third gender adoption rights. Complexities similar to HAMA can also arise in the JJ Act as well, out of sex-reassignment surgery of prospective parent. To overcome the discriminatory nature of the JJ Act the Law Commission of India in their consultation paper has strongly suggested using the term “parents” in place of “mother and father” in adoption provisions under the JJ Act and adoption regulations, to enable individuals of all gender identities to avail of the Act.³¹

3. MAKING CASE FOR LGBTQ ADOPTION RIGHTS

3.1. Constitutional Morality v. Social Morality

The Apex Court in **Navtej Singh Supra** state that while adjudging the validity of any law the court has to be guided by the conception of constitutional morality and not by social morality.³² The Apex Court explains that constitutional morality does not simply mean mere observance of core principles of constitutionalism or literal interpretation of constitution rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society. The Court also cautioned other courts in India, not to equate constitutional morality with the popular sentiment prevalent at a particular point in time. We should also remember that the constitution of India is an organic and breathing document that

²⁸ *Supra* Note 5

²⁹ Central Adoption Resource Authority, Circular, “Reconsideration of decision to allow single PAPs in live-in-relationship”, CARA-ICA012/3/2017 (Issued on October 11, 2018) available at <http://cara.nic.in/PDF/Circular/reconsideration.pdf>

³⁰ Adoption Regulations, 2017 available at https://wcd.nic.in/sites/default/files/NTESSL_636194033071198891_english%20regulation_0.pdf (last visited October 13, 2020)

³¹ *Supra* Note 26

³² *Supra* Note 1

has been created in such a manner that it can adapt to the needs and developments taking place in society.³³ The landmark cases of *NALSA (Supra)* and *Navtej Singh Johar (Supra)* itself reflects the development of a society where homosexuality is acceptable. In the garb of social morality, the LGBTQ community must not be excluded from equal adoption rights. In light of the discriminatory nature of the adoption laws of India, it is the duty of the constitutional court to protect the right to the adoption of the LGBTQ community.

3.2.VIOLATION OF ARTICLE 14

Article 14 of the constitution of India states that “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*”³⁴. Equality means that every person in India should equally enjoy all rights and freedom. In the case of *NALSA v. Union of India*³⁵, the learned judges of the Supreme Court held that word “person” in Article 14 of the Constitution also covers Hijaras/transgenders in it thus they are entitled to equal civil and citizenship rights, as enjoyed by any other citizens of this country. Thus, the LGBTQ community are entitled to equal civil rights, i.e., right to marry and right to adopt etc. The Apex Court in *Joseph Shine Supra* has held that “The primary task of the Court to achieve substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals”. When we take look at the adoption laws of India it is evident that there is no substantive equality and the provisions further contribute to the subordination of LGBTQ couples and individuals.

When we check the provision of adoption laws from the test of reasonable classification³⁶, there is no evident intelligible differentia for classifying homosexual and heterosexual couples differently for adoptions, i.e., giving joint adoption rights to heterosexual couples but not to homosexual couples. Further, there is no evident object that the state wants to achieve through such classification. Before 2018 it can be argued that such classification is justified as homosexuality was criminalised. However, such an argument is not applicable in the present context. Also, different studies have shown that homosexuality is as natural³⁷ as heterosexuality and that homosexual parent can grow childlike heterosexual parents without any adverse effect

³³ *Supra* Note 1

³⁴ The Constitution of India, 1950, art. 14

³⁵ (2014) 5 SCC 438

³⁶ *State of West Bengal v. Anwar Ali Sarkar*, 1952 AIR 75

³⁷ *Supra* Note 1

on sexual orientation, gender role, etc.³⁸ Thus, there are no points that justify the exclusion of the LGBTQ community and such exclusion would violate the principle of the right to equality enshrined under Article 14 of the constitution. Thus, equal adoption rights should be provided to LGBTQ couples and individuals.

3.3.VIOLATION OF ARTICLE 15

Article 15 (1) of the Constitution of India states that “*The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them*”.³⁹ The Apex Court in **NALSA Supra** held that the word “sex” must have a broader interpretation which includes discrimination based on gender identity and sexual orientation.⁴⁰ The discrimination in the adoption laws in India against the LGBTQ community is based on their gender-orientation and sexual orientation. Such discrimination will not survive constitutional scrutiny as it is grounded in and perpetuates stereotypes about the LGBTQ community constituted by the ground prohibited in Article 15(1), i.e., “sex”.⁴¹ Thus there is a clear violation of Article 15 of the Constitution. One should also keep in mind the object of Article 15, which is to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature. There is enough material that shows the level of discrimination faced by people from the LGBTQ community. Thus, keeping everything in mind adoption laws in India must be amended to ensure equal adoption rights for all gender identity⁴².

3.4.VIOLATION OF ARTICLE 21

Article 21 of the Constitution of India, states that “*No person shall be deprived of his life or personal liberty except according to the procedure established by law*”.⁴³ Article 21 is the heart and soul of the Indian constitution and even State has no authority to take away right ensured under this article. In the case of **NALSA Supra**,⁴⁴ the Supreme Court held that “Article 21 take all those aspects of life which go to make a person’s life meaningful. Article 21 protects the dignity of human life, one’s personal autonomy, one’s right to privacy, etc”. Family is

³⁸ Charlotte J. Patterson, “Lesbian & Gay Parenting, American Psychological Association”, 2005 available at <https://www.apa.org/pi/LGBTQ/resources/parenting-full.pdf> (last visited November 8, 2020)

³⁹ The Constitution of India, 1950, art. 15 (1)

⁴⁰ *Supra* Note 34

⁴¹ *Supra* Note 1

⁴² *Supra* Note 26

⁴³ The Constitution of India, 1950, art. 21

⁴⁴ *Supra* Note 34

considered to be a basic unit of society and integral to one's life and everyone has a right to live with a family of their choice.⁴⁵ Studies show that Parenthood increases social integration leading to greater emotional support and a sense of belonging and meaning.⁴⁶ The State is obliged to protect the family rights of its citizens. One can argue that children are an important part of the family and having children is one of the things which make a person's life meaningful. Individuals and couples who are not able to have their own children depend on methods like adoption. Bombay High Court in one of its judgement also held that right to adopt is a facet of the right to life under article 21.⁴⁷

The Supreme Court in *M/S Shabnam Hashmi vs Union of India & Ors*⁴⁸ while refusing to elevate the right to adopt to a status of a fundamental right had emphasized the prevailing situation at the time and had accepted that it can be elevated to a fundamental right at right point of time in future. In the present scenario, it can be argued that this is the right time to elevate adoption rights as fundamental rights, considering the fact that courts in India are leaning towards a more right based approach to the interpretation of statutes. The Apex Court in *Justice Puttuswamy Supra*⁴⁹ held the right to privacy as a fundamental right. The Court further state that privacy encompasses within itself the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Thus, Excluding the LGBTQ community from the right to adopt would amount to interference with their right to privacy and the right to adopt is closely intervene with the sanctity of the family life of the LGBTQ community. It is evident from the above discussion that the "right to adopt" forms an important part of the right to life and thus excluding the LGBTQ community from this right would violate Article 21 of the Constitution.

3.5.BEST INTEREST OF CHILD

Section 2 (9) of the JJ Act, 2015 state that the best interest of the child must be the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development⁵⁰. It is

⁴⁵ *Supra* Note 5

⁴⁶ Patricia A Thomas & Hui Liu & Debra Umberson, "Family Relationships and Well Being", NCBI, November 2015 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5954612/#:~:text=Studies%20show%20that%20adult%20child ren.sources%20of%20care%20for%20aging> (last visited November 8, 2020)

⁴⁷ *In Re Adoption of Payal @ Sharinee Vinay Pathak*, 2010(1) Bom CR434

⁴⁸ *M/S Shabnam Hashmi vs Union of India & Ors*, (2014) 4 SCC 1

⁴⁹ *Supra* Note 7

⁵⁰ The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 2 (9)

important for the harmonious development of a child that child grows in a family⁵¹ environment, in an atmosphere of happiness, love and understanding.⁵² The family is responsible for the primary socialisation of the child. Recognising the importance of family UNICEF states that “For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care which should be used only as a last resort and as a temporary measure”.⁵³ Hence it is necessary that all possible means of ensuring family for orphaned abandoned and surrendered children must be explored before sending them to child care institution considering the best interest of the child. Studies have also proved that homosexual parents can grow a child as effectively as their heterosexual counterpart.⁵⁴ Also, joint adoption rights are important so that both the parents can be held responsible for the care and protection of a child. Thus, excluding the LGBTQ community from adoption rights will deprive children of potential prospective adoptive parents and thus cannot be called for the best interest of the child. Giving adoption rights to the LGBTQ community will surely show a positive effect on the number of Childs adopted per year.

3.6.FOREIGN JURISDICTION

Few foreign jurisdictions have allowed equal parenting rights to the LGBTQ community. England and wales pass the Adoption and Children Act, 2000 which allowed same-sex unmarried couple to adopt children and the Equality act 2010 which has illegalized discrimination based on sexual orientation. In South Africa, the historical judgement of *Du Toit and Another v. Minister of Welfare and Population Development and Others*,⁵⁵ the Constitution Court of South Africa held that “that the Child Care Act is discriminatory not only for the rights of same-sex couples but also against the paramount interest of the child and the families are important pillars of the African society, of which everyone should be entitled”. In the USA in the case of *De Boer v. Snyder*,⁵⁶ the Supreme Court of the U.S has declared Michigan state ban on joint adoption by the same couple as unconstitutional. The US Supreme

⁵¹ Wendy D. Manning & Marshal Neal Fetto & Esther Lamidi, “Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief”, NCBI, August 1, 2015 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4091994/> (last visited November 12, 2020)

⁵² Jennifer Mertus, “Barriers, Hurdles, and Discrimination: The Current Status of LGBTQ Intercountry Adoption and Why Changes Must be Made to Effectuate the Best Interests of the Child”, 39 Cap. U. L. Rev. 271 (2011) available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/capulr39&div=13&id=&page=> (last visited November 13, 2020)

⁵³ Elizabeth Burleson, “International Human Rights Law, Co-parent Adoption, and the Recognition of Gay and Lesbian Families”, 55 Loy. L. Rev. 791 (2009) available at <https://core.ac.uk/download/pdf/46714073.pdf> (last visited November 13, 2020)

⁵⁴ *Supra* Note 37

⁵⁵ *Suzanne Du Toit and Another v. Mister of Welfare and Population Development and Others*, 2002 SCC Online ZACC 21

⁵⁶ *De Boyer v. Snyder*, 772 F.3d 388, 2014 WL 5748990

Court further in the case of *Obergefell v. Hodges*⁵⁷, upheld the rights of homosexual and declared that discriminating against them violates constitutional provision like due process of law where the value of individual liberty is treated equally in the society rather than the majority. It is evident from the above decision that in the UK the legislature and in the US and South Africa the Judiciary has played an activist role in upholding equal parenting rights for the LGBTQ community.

CONCLUSION

The discriminatory adoption laws of India violate rights provided under Article 14, Article 15 and Article 21 of the Constitution of India. The LGBTQ couples and individuals being citizens of India deserves equal rights in the social, economic and political arena. Recent Judicial trends of the Supreme Court also shows that the court has taken up a more right based approach of interpretation of Statues and thus we can argue that this is the right time to accept the right to adopt as a fundamental right. The right to have a family is inherent to the right to life. Everyone must have equal adoption rights if they are capable of taking care of children. Such equal adoption rights would lead to an increase in adoption and more orphan children would get a safe place for their development and thus such equal rights would be in line with the best interest of the child. In India, there is an urgent need that either the parliament should take steps for ensuring equal adoption rights for the LGBTQ community same as the parliament of the UK or the judiciary should ensure equal adoptions rights for the LGBTQ community same as the judiciary of US and South Africa. Allowing equal adoption right to LGBTQ couples and individual will further the principles enshrined under the Constitution of India.

⁵⁷ *Obergefell v. Hodges*, 2015 SCC Online US SC 6.