

Critical Analysis of Same-sex adoption laws in India

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Abstract: With the changing scenario in the 21st-century orientation of society is also changing. There are been various changes which are been coming in the society. Orientation and thinking about oneself are also changing with changing times. In the changing scenarios, things of people are also changing. The change is also bringing to light other neglected strata of society. The people who are attracted to the sex of their i.e. gay and lesbian. Transgender people are been considered different. In this article, there will be a discussion regarding the laws for adoption for same-sex couples in India. The article will discuss the past present and future of adoption laws for same same-sex in India. The article will also discuss the need for such types of laws in India at the constitutional level and the real spirit of the ethos of the constitution. If there will be any need of changing in present law that also will be suggested by the author. In the end, there will be discussed in what sense the need could be fulfilled with the existing law so that the present and future can coexist with each other.

Keywords: Law, policy, homosexual, adoption, India.

Introduction

India has been a country which constitute of different strata of people. India has been a country which has people who are having different thinking and different orientation. It has been a land in which people have different thinking for other people which can be at times can be considered different or out of orientation for a group of people. There has been a long history of sects or orientation people who has been become part of the country and there will also be the emergence of new orientation sect people who will be emerging, there has been new addition to them is LGBTQ (lesbian, gay, bisexual, transgender, queer) which are been there in existence from quite long and they were playing their part of the role in history.

But with the advent of the 21st century, the LGBTQ community has been quite vocal about their orientation. Although they are considered as different or out of box people or ultra-modern or outcast people. But is necessary to understand that although the community can consider people who lost thoughtful vision and should be outcasts, they are a citizen of India. They are also been granted some basic fundamental rights which are been granted to all other citizens of this country. The reason for it is because per preamble which is part of the constitution and basic law of the land says that “WE THE PEOPLE OF India.....secure all its citizens: Justice, social, economic & political; liberty of thought, expression, belief, faith and worship.....fraternity assuring the dignity of the individual.....”

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So in this research article, there will be a discussion about the right of same-sex people's right to adoption. There will be a discussion about the present legal framework in India, why there is a need to work on the said issue, legal options which are there available across the globe and in which way India could go and the reason for the same.

Concept of same-sex people/homosexual

Before understanding the concept of adoption right for same-sex people/homosexuals, we need to understand who can be considered homosexual, so that it can be easy to grant them their desire if possible. The word homosexual dictionary meaning says as of the same sex. The word originates from Homosexuality is a sexual orientation where individuals experience sexual attraction or romantic love solely towards people of the same sex. The term 'homosexual' is derived from a combination of the Greek prefix 'homo,' which means 'same,' and the Latin root for 'sex.' Men who are attracted to other men are often referred to as gay, while women who are attracted to other women are known as 'lesbians.' When two individuals of the same sex enter into a marital union, it is commonly referred to as homosexual marriage or gay marriage².

Legal Position of same-sex position/homosexual

In India first, we need to understand the present scenario of adoption, so that a foundation could be established and locate some grey areas to see whether there could be some space for homosexual/same-sex partners. It is necessary to understand that adoption as a practice and custom was prevalent in India from ancient times and still practice in today's 21st century.

It is necessary to understand that in older times it was done to continue the lineage of the family for the next generation and was mostly done within the family. So more or less it was a family affair, adoption is among a few concepts which have evolved and have encountered profound change in the course of transmission from a family affair to a more robust and law-infused process with more and more checks and balances approach centric. It is necessary to understand that adoption mostly like other social institutions, of society has evolved and is a product of the historical and evolving law of the land process.

²Marriages between individuals of the same gender are sometimes referred to as gay or lesbian marriages, and in some cases, as gender-neutral marriages, as both partners identify as the same gender.

It is necessary to understand that After India gained independence, reforms were introduced to the old Hindu Law, including the codification of the Hindu Adoptions and Maintenance Act, of 1956 (HAMA). This act allowed any person falling under the definition of 'Hindu' as per Section 2 of HAMA to adopt a child. HAMA also brought about progressive changes such as the eligibility of female Hindus to adopt and the inclusion of girl children for adoption. However, implementing an effective adoption policy uniformly across the country has been challenging due to the country's diverse multicultural, multilingual, and multi-religious sentiments. The primary objective of adoption is to ensure the right to a family for orphaned, abandoned, and surrendered children³.

The Hindu Adoptions and Maintenance Act (HAMA) allows adoptive parents who follow Hinduism to adopt Hindu children. However, due to the diverse nature of India, HAMA does not apply to communities such as Muslims, Christians, and Parsis. These communities only have one option, which is the Guardians and Wards Act, of 1890 (GAWA), where they become guardians of children. However, the downside of this process is that it does not result in adoption; instead, it makes the child a ward. When wards reach the age of 21, they are no longer wards and assume individual identities, and there is no longer any guardian in their life. Additionally, wards do not have an automatic right of inheritance. One inherent problem with HAMA and GAWA is that both laws are silent on the issue of the adoption of orphaned, abandoned, and surrendered children. This lack of codified legislation for these categories of children has sometimes been detrimental to their interests.

In modern times, adoption is considered the most effective way to provide a child who has been deprived of their biological family with a new family life. However, at the international level, several international laws, treaties, and conventions address the protection and assistance of children as a positive duty. The Convention on the Rights of the Child, 1989 (CRC) is among the most important of these international laws, treaties, and conventions. The CRC serves as a vital source of various child-related rights, and it is considered the foremost guiding principle in this regard.

³ Section 56 Of The Juvenile Justice (Care And Protection Of Children) Act, 2015

Examining the legal aspect of the rights of the LGBTQ community in India, it is evident that there has been a longstanding demand for their rights. However, in a landmark judgment, the Supreme Court, through its constitution bench, unanimously held on September 6, 2018, that consensual sex among adult homosexuals or heterosexuals in private space is not a crime. This was a result of a challenge to the constitutional validity of Sec. 377 of the IPC, which criminalized consensual unnatural sex and violated the constitutional right to equality and dignity. The court struck down section 377, which was part of a British-era law. Following this, a review petition was filed to address other related issues, including the non-recognition of same-sex marriages under the Special Marriages Act, of 1954, and the denial of adoption and surrogacy rights to members of the LGBTQ community. By granting these rights, members of the LGBTQ community can be considered part of society, which is a social norm that every person has the right to marry and have children through procreation or adoption.

In this case, later a review petition was also filed on the aspects that some more issues are required to be addressed. It was argued with the review petition that the main issue is not just not limited to the issue of decriminalizing consensual gay sex only. But there are more related issues that have raised other bones of contentions including the issue of 'non-recognition of same-sex Marriages' under the Special Marriages Act, 1954 and the denial of adoption and surrogacy rights to the members of the LGBTQ community members. The reason which could be considered behind this LGBTQ wanted to be part of society and if these rights are been granted to them, they will be considered to be part of society. It is been considered a social norm that every person who is part of society will get married and has a right to have his next generation in any form i.e. by procreation or adopting children.

The LGBTQ community is not considered a part of society because they are not given basic social rights, which results in discrimination against them. Additionally, their rights are not recognized as a part of human rights, as demonstrated by the non-recognition of same-sex marriages under the Indian Special Marriages Act, 1954, and the lack of availability of adoption, surrogacy, or IVF. This prejudice is a violation of Articles 14, 15, 19, 21, and 29 of the Indian Constitution. Furthermore, bias based solely on sexual orientation violates Articles 14, 15, and 21 in the context of serving in any of the armed forces or any other wing of

paramilitary forces. Although the Hon'ble Supreme Court rejected the petition stating that there were no merits in the review petition⁴.

Recently as best known sources Cabinet has voted that same-sex couples/union persons will not be allowed/have the right to adopt. So this is the present status of rights given to LGBTQ persons in India and their rights relating to adoption or becoming guardians of a child.

Need of Law for Homosexual Adoption Rights

In this part, there will be a discussion regarding why there is a need for giving adoption rights to the LGBTQ community. It has to be understood that adoption rights will also be included along with parenting rights for the LGBTQ community. In this, it is required to be drawn that the LGBTQ community has quite a long time of asking for parenting rights. But they are not been given those rights in India it is so as they do have not much significant legal presence and LGBTQ are not been given any significant status. So there are not many significant laws which are been drawn for them. Due to this, they are struggling for their rights. This issue of non-assignment of rights is just not confined to India, it is present in many jurisdictions and only a few jurisdictions have comprehensively given LGTBQ community parenting rights which include adoption.

It is necessary to understand that parenting refers to the intricacies of raising a child not exclusively for a biological relationship. Biology is not always the determining factor for finding who the legal parents of the child are and in any case who can replace them⁵. It is necessary to understand although Transgender Act, 2019 was enacted it was been alleged that said enactment is not working properly

Now looking what are the options which can help the LGBTQ community to adopt a child, now looking into provisions under HAMA & GAWA, an individual they have a right with certain restrictions about the age difference and gender to adopt, but if they have religious restrictions then they will get right only to be the guardian of the child. There is also the enactment of the Adoption Regulations 2017 and the Juvenile Justice (Care and

⁴ Review petition filed against writ petition of Nayyar in order dated 29, Oct, 2018.

⁵www.legalserviceindia.com/legal/article_-1878-international-transgender-parenting-rights-and-how-India-lags-behind-it.html last access on 28 June 2021

Protection of Children) Act, 2015, there is no mention of the LGBTQ community as to whether they can adopt or not.

Suggestions to resolve the issue

“The spirit of the constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender.”

Hon’ble Judge K.S. Radhakrishnan⁶

It is necessary to understand that if the preamble is to be read as whole and subsequent cases⁷ after NALSA v/s UOI, are dealing with many issues relating to the LGBTQ community. Parenting is again a subsequent issue which is required to be addressed sooner or later. The NALSA case can be considered an important and pivotal case because it gives the right to identify oneself at a specific time. There is a requirement that discrimination which is required to settle as under the Adoption Regulation, 2017 there is a requirement of a couple (issue can come in gay and lesbian couples) further it says husband and wife should have a stable relationship which automatically says no to same-sex couple. So technically if issues like Trans couples are not addressed, the age bar for male, and female is there & specifically no rule regarding transgender is mentioned.

If the LGBTQ community is allowed in a limited framework within Adoption Regulation 2017 to adopt children then, the huge issue of parentless children or orphan children can get a shelter to lead a good life. This issue can also be resolved through allowed LGBTQ to become the guardian of children, which could be acting as a balance if there are issues of personal law that cannot be handled or conflicts persist. It is necessary to understand that there is no legal data which is available which proves that children if given to the LGBTQ community under adoption or guardianship member will face any psychological or physical issues. If

⁶National Authority Legal Service authority v/s UOI AIR 2014 SC 1863

⁷ Navtej Singh Johar v/s UOI, K.S. Puttaswamy v/s UOI

Since 1987, Sweden has prohibited discrimination based on sexual orientation and gender identity and expression. In 2003, gay and lesbian couples were granted the ability to adopt children, and in 2005, lesbian couples were granted equal access to IVF and assisted insemination. South Africa is the only African country that allows joint adoption by same-sex couples following the *Du Toit v Minister of Welfare and Population Development* case⁸. The Constitutional Court amended the Child Care Act of 1983 and passed the Children Act of 2005, enabling same-sex couples to adopt. Similarly, in England, the Adoption and Children Act of 2002 granted unmarried same-sex couples the ability to adopt a child. To adopt a child, the couple only needs to prove that they live together and have a stable relationship⁹.

At least 594,000 same-sex households and over 166,000 children raised by same-sex couples are present in the United States¹⁰. In such cases where a child has only one legal parent due to conception through donor insemination, second-parent adoption has become increasingly common. This adoption type allows for the birth mother's parental rights to remain intact while creating a second legally recognized parent, usually the natural parent's partner¹¹. 31 states in the US currently acknowledge lesbian and gay second-parent adoption. In the case of *Re Jacob and Dana*¹², the New York Court of Appeal permitted the unmarried partner of a child's biological mother (irrespective of their sexual orientation) to become the child's second parent through adoption, setting a precedent. Pressler J also granted an adoption order to a lesbian co-parent in the case of *Re Adoption by HNR*¹³, ensuring that they receive a formal declaration of parental rights and the continuity of custodial and financial responsibilities involved in the parental relationship.

⁸ 2003(2) SA198(CC)

⁹ www.legalserviceindia.com/legal/article-1878-international-transgender-parenting-rights-and-how-india-lags-behind-it.html

¹⁰ Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1000 (2008).

¹¹ Elizabeth Burleson, *International Human Rights Law, Co-parent Adoption, and the Recognition of Gay and Lesbian Families*, 55 *Loy. L. Rev.* 791 (2009).

¹² 86 N.Y.2d 651

¹³ 666A.2d 535

Conclusion

So it can be said that adoption can be a way through which the LGBTQ community can attain the true spirit of the Constitution. Government must work for the welfare of a specific part of society. The government cannot deny its duty because the concerned part of society is not traditionally found in India. The government should rethink its decision because traditionally India is been considered a progressive society. It has been working and has text which is not to be found anywhere in the world.

It is also necessary to understand that it is rather easy to regulate an aspect rather than banning it. In the case of the LGBTQ community, government should work for them, otherwise, LGBTQ will go to court for their rights and claim discrimination. So after looking into the case judiciary might decide in favour of them, then instruct government to work on it. So it is better that government suo-moto take a call and create a comprehensive policy for the LGBTQ community. There are different options or suggestions which are been given above, the government can look at them and work towards them to create a better society at large which is comprehensively better for every part of society, it will help those who are without parents and those without children.
