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# Adoption Rights and the LGBTQ community: Analyzing the Need to give Adoption Rights to the LGBTQ community

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## ABSTRACT

*A significant population in India belongs to the LGBTQ Community which still lacks popular acceptance and equal status like the heterosexual community. The pace of development in this particular area is too slow and, at times, stagnant. The recent case of Adila V. Police Commissioner of Kerala would probably be the latest such incident. Even as it is a noteworthy judgment, it has done nothing new.*

*This paper analyzed the need for giving adoption rights to persons belonging to LGBTQ Communities by referring to multiple research papers and articles that talked about the same. It was observed that despite the much-praised judgment in Navtej Singh Johar V. Union of India, not much had been done in this field of law. This community still lacks civil rights. There is also a need for many empirical studies on this too.*

**Keywords:** Adoption Rights, LGBTQ, Human Rights.

## I. INTRODUCTION

The LGBTQ community and its rights are a much debated topic in the current scenario. The landmark judgment by the Supreme Court in **Navtej Singh Johar v. Union of India**, decriminalizing **Section 377 of the IPC**<sup>2</sup> which considers consensual sexual intercourse between same sex people as an “unnatural offense” which is “against the order of nature” and prescribes imprisonment which could extend up to ten years and fine as punishment, started a plethora of movements as it seemed like a ray of hope to a community which was barely recognized by the law unless it was to be punished. The judgment came out in the year 2018, however, even in 2021 that remains as just the first step as only a few developments have taken place, nothing to be considered as a landmark. Though the Supreme Court, through its recent observation about the need to provide “social welfare legislation” to “atypical manifestations of the family unit”, and by underlining that the LGBTQIA+ community is “equally deserving” of

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<sup>2</sup> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

all legal protections, reflected the ancient Indian wisdom that had created the space for such relationships.<sup>3</sup>

The LGBTQ which stands for Lesbian, Gay, Bisexual, Trans and Queer/Questioning still continues to cover a significant population in our country who still doesn't have many civil rights such as marriage, adoption and much more out of which the focus will be on adoption rights.

## II. A BRIEF HISTORY OF LGBTQ COMMUNITIES AND THEIR STRUGGLES IN INDIA

In spite of the taboo that is associated with the LGBTQ community and sexualities other than the heterosexual, it is quite surprising to know that it can be found in the ancient Kamasutra and even depicted in various sculptures in temples. Images of ladies hugging other women erotically and of men showing off their genitalia to one another can be found in the temples of Khajuraho. This has often been interpreted by academics as an admission that gay activities were performed by people. The Mahabharata also contains an intriguing tale about Shikhandini, a female or transgender warrior who was accountable for Bhishma's demise and defeat at the time. King Drupada's daughter Shikhandini was brought up as a prince in order to exact revenge on Hastinapur's Kurus kings. Shikhandini was even wedded to a woman by Drupada. Her wife was horrified when she realized the truth. Divine intervention gave Shikhandini his manhood during the night, saving the day. Shikhandini began appearing more and more like a hermaphrodite.<sup>4</sup> Despite these references these texts did not approve of these acts except for they may have accepted Shikhandini.

The Indian Constitution came into operation on November 26, 1949, and Article 14's guarantee of equality was included and discrimination on the basis of religion, ethnicity, caste, sex, or place of birth was prohibited, according to Article 15. All citizens have the right to privacy and personal dignity under Article 21. However, homosexuality was considered illegal. It was only sixty years after the independence that the Delhi High Court decriminalized Section 377 of the IPC only to be overturned by the Supreme Court in July 2009 stating that this was not the duty of the judiciary. The Central Government, NGO Naz Foundation, and other parties filed a review petition with the Supreme Court demanding it to reconsider its December 11 ruling on Section 377 of the IPC. However, in 2015 Parliamentarian Shashi Tharoor introduced a Bill to

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<sup>3</sup> *Instances in ancient Indian texts and love songs that Celebrate Queer ...* (no date). Available at: <https://www.outlookindia.com/national/instances-in-ancient-indian-texts-and-love-songs-that-celebrate-queer-relationships-magazine-223384> (Accessed: December 31, 2022).

<sup>4</sup> *Homosexuality in ancient India: 10 instances* (2018) *India Today*. India Today. Available at: <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> (Accessed: December 31, 2022).

Lok Sabha for the decriminalization of Section 377. But this Bill was rejected. Eventually, in 2016 a petition by the Naz Foundation was reviewed by the Supreme Court and a five-judge bench looked into Section 377, but it still remained a crime while Pakistani clerics declared transgender marriages legal in Islam. On September 6, 2018, the Supreme Court rendered a landmark ruling in **Navtej Singh Johar v. Union of India** that invalidated Section 377 and decriminalized homosexuality. The 150-year-old rule was ultimately ended in India. Cut to 2022, the LGBTQ Community is still struggling with very small developments.

### **III. ANALYZING THE ISSUES IN NAVTEJ SINGH JOHAR V. UNION OF INDIA**

#### **(A) Issues:**

Whether Section 377 violates the fundamental rights stated under Article 14, 15 and 21 of the Indian Constitution.

#### **(B) Analysis:**

Section 377 of the IPC used to be a victimless crime. Even though the new development with regards to decriminalizing it was a welcoming one it is quite disappointing that the progress slowed down with it. Just Decriminalizing homosexual intercourse would do nothing to improve the conditions nor acceptance of the LGBTQ community.

One of the main issues were the ones on the basis of religion. On one side some religious folks talk about loving one another and treating them respectfully and on the other they preach the condemnation of the LGBTQ Community. This is quite contradictory. Besides, it is always better to go with the preaching that would promote no harm to anyone.

A few studies in the US found a surge in STDs among homosexuals. This was an argument made against decriminalizing S.377. But again as long as STDs are not just confined to the homosexual, banning consensual intercourse just for them is not reasonable.

The biggest step that can be taken for their betterment would be to properly define the civil rights for this community.

### **IV. THE NEED FOR GRANTING ADOPTION AND OTHER CIVIL RIGHTS TO THE LGBTQ COMMUNITY**

A family is placed at the center of every religion. Familial bonds are formed through marriages which come under personal laws in India. It is a civil right which to this day has not been granted to the LGBTQ community. Adoption in India comes under **Hindu Adoption and Maintenance Act, 1956 (HAMA)** and The Juvenile Justice (Care and Protection of Children) Act, 2000. Both

despite being followed in the midst of the few developments still continue to be discriminative. The HAMA's ( Hindu Adoption and Maintenance Act, 1956) Sections 7<sup>5</sup> and 8<sup>6</sup>, when read together with Section 11<sup>7</sup>, discuss the eligibility requirements for Hindu males and females to adopt. The words "spouse" and "wife" are used explicitly in Sections 7 and 8 of the HAMA, suggesting that only heterosexual couples are permitted to adopt children under the law. The act is likewise silent regarding "third gender" adoption rights. Additionally, it is clear from a cursory reading of the Act that gender is understood in binary terms. HAMA permits LGBTQ adoptions from single parents. But this would mean that the other parent would not have any legal rights on the child so adopted.

Guidelines Governing Adoption of Children, 2015 was replaced by the Adoption Regulations 2017, which was created in accordance with section 68(c) of the Juvenile Justice Act 2015. Applicants must meet the requirements of Section 5 of the 2017 Adoption Regulation in order to adopt under this. Without regard to a parent's marital status, Section 5(2) grants the right to adoption, meaning a single parent may adopt; however, married couples must obtain the consent of both spouses if they wish to adopt. Due to India's disapproval of same-sex marriages, same-sex couples would essentially be considered unmarried couples. In recent years, CARA has permitted live-in partners to apply for adoption on an individual basis through regulation. However, it may be fairly assumed that the request of same-sex couples would be denied by the authorities in the lack of a clear directive on whether or not they can benefit from this circular.

Surrogacy and IVF are the two among the other methods that the homosexual community can use to get their own children, however there are regulations regarding this too. The much debated Surrogacy (Regulation) Bill 2020 that was approved by the cabinet too wan't in their favor. According to this Bill, commercial surrogacy was completely banned, and altruistic surrogacy is allowed only for Indian married couples, Indian origin married couples and Indian single women who are widowed or divorced. This completely excludes live-in couples, most single parents and the LGBTQ+ community. Besides, India already struggles with its ever-growing population. That being yet another reason for adoption rights being granted to the community.

One of the many reasons why the adoption rights are denied to the LGBTQ community was because they were of the impression that this would not be in the best interest of the child. However, multiple studies have proven that the children who grow up in such families are more

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<sup>5</sup> The Hindu Adoption and Maintenance Act, 1956, s. 7

<sup>6</sup> The Hindu Adoption and Maintenance Act, 1956, s. 8

<sup>7</sup> The Hindu Adoption and Maintenance Act, 1956, s. 11

sensitive and understanding when it comes to issues faced by the LGBTQ community and in some cases they perform well academically too. Growing up with parents of the same sex haven't affected the child's proper development, hence, it is an invalid reason to not give adoption rights to them. Besides, a study conducted by the American Psychological Association in the case of **Gill V. Office of Personnel Management**<sup>8</sup> has shown that lesbian or gay parents for that matter aren't any less capable than heterosexual parents for raising children.

The lengthy and herculean procedure also seems to some as a reason to not give civil rights to the LGBTQ Community as it would require making structural changes in multiple personal laws in India including Marriage Acts, Succession Acts and even the Adoption Acts. But again, all the changes we have made so far were herculean and yet we have made them.

Besides this, studies have shown that the adoption rate has been going down steadily. Granting adoption rights to the LGBTQ community would ensure that this would increase adoption and in a way provide families to many children. Besides, it is the very nature of a woman to nurture a child and granting adoption rights for them would fulfill these needs too.

## V. CONCLUSION

Despite the multiple developments in almost all spheres, India still lags behind when it comes to LGBTQ rights. The community has a stigma attached to it even now and this has made way for conversion therapies and such which is now criminalized. However, we are far from making sure that such illegal activities aren't happening at all.

Awareness is the first step that has been suggested in order to normalize it. But I believe that rather than just preaching the theory it is important to normalize it in other ways. The law and the legal system has the biggest role to play here. We could start it by granting civil rights such as the right to marry and adopt to them along with all the rights that the heterosexual section of the society have. This along with the awareness programmes would do wonders. But again, we have to keep in mind that no one is doing the LGBTQ Community a favor by granting these basic human rights. They are entitled to it as a citizen of a country. Because there are human rights and it is for humans and that is the only criteria. Not who you love.

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<sup>8</sup> 682 F.3d 1