

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

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Parenting Rights of the LGBTQ+ Community: A Critical Introspection of the Legal Framework in India

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ABSTRACT

The LGBTQ+ have long struggled to realise their rights across the globe. Until the historic judgement of Navtej Singh Johar vs. Union of India, the Indian Penal Code was used a vehicle for meting out discrimination towards members of the LGBTQ+ community. The Decriminalisation of Section 377 paved way for the recognition of the LGBTQ+ community as a third gender. However, the members of LGBTQ+ community have been deprived from many basic human rights as available to other members of the society which restricts their right to lead a family life akin to any other person. Traditional practices of adoptions and Technological advancements such as surrogacy and IVF have made it possible for any individual to realise his desire of founding a family. However, laws in India have created barriers for members of the LGBTQ+ community to reap the benefits of this scientific progress.

The discourse on the rights of the LGBTQ+ community with respect to their Parenting rights is almost silent and needs to be brought to the forefront as this is one of the pre-requisites and should be a matter of choice. This research article attempts at introspecting the laws in India with respect to the Parenting rights of the LGBTQ+ community while tracing the historical origins and the International principles and practices in this regard.

Keywords: LGBTQ+ Community, right to found a family, adoption, surrogacy, parenting rights.

I. INTRODUCTION

Article 21 enshrined in the Constitution of India guarantees to all persons the Right to Life and Personal Liberty. Adopting a liberal interpretation, the Supreme Court has extended the scope of this Right so as to imply that the word 'Life' does not mean mere animal existence but means the right to live with dignity and includes within its ambit the right to livelihood, the right to reputation, the right to privacy, the right to a clean and pollution-free environment, the right to

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information and many more such rights. The Constitutionality of ‘Unnatural Offences’ under Section 377 of the Indian Penal Code was also tested on the touchstone of Article 21³ and was ultimately repealed.

Although the judiciary has interpreted Article 21 so as to include the Right to Motherhood⁴ and the Right to Reproductive autonomy⁵, this does not seem to apply equally to same-sex couples.

The Constitution of India under Article 21 uses gender neutral term ‘Person’ implying that it extends to all persons, including members of the LGBTQ+ community. Therefore, the Right to Life as enshrined under Article 21 must include within its ambit the rights of members of LGBTQ+ to lead a life of dignity akin to any other person and should be interpreted so as to grant equal parenting rights and the ‘Right to found a family’ to members of the LGBTQ+ community. Parenting refers to the intricacies of raising a child not exclusively including a biological relationship.

The Parenting rights in this regard are laid down under the adoption and surrogacy laws. Most laws and rights that fall within the domain of family law in India, including those related to surrogacy, adoption, succession, guardianship have been directly or indirectly tied to marriage.

Since the members of LGBTQ+ community have been excluded from the right to get married, they are automatically excluded from access to these other rights as well which deprives them from leading a family life akin to any other person. Various jurisdictions across the globe such as England, Israel, New Zealand, Sweden, South Africa and several states of the United State of America have reformed their legal framework so as to include laws accommodating the Parenting rights of the LGBTQ+ community. Although India has recently introduced the Transgender Bill, 2019⁶ (which has been passed) to grant human rights to the LGBTQ+ community, the bill was met with stiff resistance as it does not truly realise the goals of a dignified life for the community.

As aptly stated by Justice KS Radhakrishnan,

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

Gender identity lies at the core of one’s personal identity. Therefore, the expression of one’s gender is also protected under the Freedom of Speech and Expression guaranteed under Article

³ INDIA CONST. art. 21.

⁴ Dr. Mrs. Hema Vijay Menon vs. State of Maharashtra, 2015 (Bom. HC)

⁵ Suchita Srivastava v. Chandigarh Admn., AIR 2010 SC 235.

⁶ The Transgender Bill, 2019.

19(1)(a)⁷ of the Constitution of India and this expression shall not become a means to curtailment of their other fundamental rights. The LGBTQ+ has long struggled to attain equal access to civil liberties and have suffered great discrimination and ignorance at the hands of other people in India, at times, even leading to cultural backlash, abuse and social boycott.

This research Paper is a critical analysis of the legal framework in India with respect to the Parenting rights of the LGBTQ+ community and its importance in light of its recognition as a basic and inherent human right globally.

II. A BREIF HISTORICAL ACCOUNT OF THE LGBTQ+ COMMUNITY IN INDIA:

LGBTQ+ people have for centuries been a part of India's culture and society and have been given acceptance and respect in the society. The ancient Vedas had categorized gender in a tripartite division based on their nature or 'prakriti'; they were Stri-prakriti (female), Pums-prakriti (male) and Tritiya-prakriti (third gender). The third gender was never deprived of their basic rights or given a treatment of the outcasts. They faced absolute inclusion in all aspects of life from marriage to livelihood⁸. The vedic literature also mentions how intersex and transgender identity or homosexuality being the third sex condition is caused and how it is determined by birth⁹.

During the Mughal era in Medieval India, the 'hijras' or trans people were regarded as trustworthy and clever and were entrusted with great responsibilities such as being administrators of territories, political advisers etc.¹⁰, they therefore played a crucial role in politics.

The British Colonists, however, were confused with the regard given to the Trans people in the Indian society and the royal courts. In 1871 they brought in the Criminal Tribes Act¹¹ that categorized them as a separate tribe and included trans people who dressed like women and danced in public places; punishment that could go up to imprisonment of two years was imposed on them. The most severe blow to the rights of the LGBTQ+ community was with the introduction of Section 377 of the Indian Penal Code, 1860 which criminalized consensual sexual activity calling it 'unnatural'. The sexual minorities have faced severed abuse and torture due to this discriminatory section. What is ironic here is that the United Kingdom gave

⁷ INDIA CONST. art. 19.

⁸ Dr. Vasumathi TI & Geethanjali M, Transgender identity as hidden in Vedic Literature and Society, Vol 7, International Journal of Humanities and Social Science Invention (IJHSSI), (2018).

⁹ *Ibid.*

¹⁰ M. Michelraj, *Historical Evolution Of Transgender Community In India*, 4, Asian Review of Social Sciences, (2015).

¹¹ Criminal Tribes Act, 1871, No. 27, Acts of Parliament, 1871 (India).

full legal recognition to the LGBTQ+ people with the Gender Recognition Act, 2004 and in India the archaic section 377 was decriminalized partially only in 2018 through the judgement in *Navtej Singh Johar v. Union of India*¹², wherein the court iterated that if two consenting adults from the same sex indulged in intercourse it was a matter of their personal choice.

From the period of British rule till today, the LGBTQ+ community is facing various forms of discrimination and harsh treatment from facing rejections from their own families to harassment in schools and workplaces. This has led to their weak economic status in the society. A study which the United National Development Programme conducted in 2010 on Hijra/ Transgender in India established that the trans-community faces grave oppression and marginalisation¹³. The decriminalising of Section 377 is not enough, homosexual couples and trans people should also be given proper legal recognition and all rights that are conferred on heterosexual couples and cis-gender people should equally be granted to them also; therefore, rights such as marriage, adoption, surrogacy should also legally be bestowed on them.

III. LEGAL FRAMEWORK IN INDIA

Since the LGBTQ+ community depend upon the options of adoption and surrogacy for securing parenting rights, it is essential to analyse the laws in that respect. The laws of adoption in India are governed differently for different communities and the Parliament has recently introduced the Surrogacy Bill¹⁴ for regulation of Surrogacies in India.

With respect to adoption: In India, Hindus, Sikhs, Buddhists and Jains on the other hand follow the Hindu Adoption and Maintenance Act, 1956¹⁵ and Muslims, Christians, Parsis and Jews are governed by the Guardians and Wards Act, 1890¹⁶, as formal adoption is not allowed in these religions. Under the Hindu Adoption and Maintenance Act, 1956¹⁷, any adult Hindu male who is of sound mind can adopt a child and if such man is married, the consent of the wife is necessary. Similarly, an unmarried, divorced or widowed female adult Hindu of sound mind could adopt a child. Furthermore, an adult Hindu woman can also adopt if her husband has ceased to be a Hindu, renounced the world or has been declared to be of unsound mind by the court.

¹² *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1 (India).

¹³ *Supra* 4, at 64.

¹⁴ The Surrogacy Bill 2019, No. 156 of 2019 (India).

¹⁵ The Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

¹⁶ The Guardians and Wards Act, 1890, No. 8, Acts of Parliament, 1890 (India).

¹⁷ Section 7, 8, The Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

The Islamic term for what is generally called adoption is *kafala*. Adoption under Islamic law is highly regulated. A guardian/ward role is played out rather than a parent. This relationship has specific rules. These rules are mainly to preserve the integrity of the family line. The Islamic laws clearly state that the role of the biological family cannot be substituted by the adoptive family and insists that the vast network of relatives care for the child in the absence of biological parents.

The general law relating to guardianship is governed under the Guardians and Wards Act, 1890 and this Act supersedes other laws in this regard. However, the law is silent on the issue of guardianship by members of LGBTQ+ community and only grants guardianship rights, whether testamentary or otherwise on the order of the court. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit.

Christians in India can adopt children by resort to section 41 of the Juvenile Justice (Care and Protection of Children) Act 2006 read with the Guidelines and Rules issued by various State Governments.

Therefore, it can be reasonably concluded that the adoption and guardianship laws in India do not provide for parenting opportunities for LGBTQ+ community owing to its varied restrictions.

Likewise, the Surrogacy Bill, 2019 defines 'couple'¹⁸ as a "legally married man and woman" And thereby, implies marriage as a pre-condition for securing the certificate of eligibility for surrogacy. Since, there is no provision at present which allows marriage between same-sex couples and LGBTQ+ community in coherence with their gender identity, it is almost impossible for same-sex couples to secure a child through the same. Such denial of surrogacy to the LGBTQ+ group is like denying them some basic rights which makes the law regressive as it has a very limited way of viewing family. Similarly parenting rights should be beyond sexual preference or gender as exclusion to avail surrogacy which is based on sexuality or gender is discriminatory and is violative of human rights. This surrogacy bill that denies surrogacy as way to become parents for the LGBTQ+ community is an injustice towards the sexual minorities in the country.

The Indian Parliament passed the Transgender Persons (Protection of right) Act, 2019¹⁹ to protect the rights of the community, however this act also does not acknowledge the marriage, adoption and parenting rights of the community and has major flaws and lacunas.

¹⁸ Section 2, The Surrogacy Bill, 2019, No. 156 of 2019 (India).

¹⁹ The Transgender Persons (Protection of Rights) Act, No. 40, Acts of parliament, 2019 (India).

IV. RIGHT TO FOUND A FAMILY: A HUMAN RIGHT

It is often argued that the well-being of children would be compromised on account of being raised in a same-sex family. However, In an empirical study conducted by the American Sociological Association (ASA)²⁰, it was concluded that there is a clear consensus in the social science literature indicating that American children living within same-sex parent households fare just, as well as those children residing within different-sex parent households over a wide array of well-being measures: academic performance, cognitive development, social development, psychological health, early sexual activity, and substance abuse.

The United Nations Convention on the Rights of the Child specifies 'best interests' at many places however, nowhere has it been defined. Hence, it shall differ from case to case²¹. Therefore, the right to found a family and parenting rights of the LGBTQ+ community cannot be compromised on mere baseless arguments which do not stand the test of reason.

Article 16 of the Universal Declaration of Human Rights²² confers the right to found a family and the right to marry on all persons on attaining the legal age without any discrimination or limitation. Similarly, Article 8 of European Convention on Human Rights²³ talks about the private and family life of individuals and reiterates that Public Authorities should not interfere with this right. Principle 24(K) of Yogyakarta Principles, 2006 talks about the right to found a family of people of non-binary gender identities and sexual orientation and states that all states shall, “Ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics”²⁴.

In *Vishakha vs. State of Rajasthan*²⁵, the Supreme Court iterated that where domestic law is silent or there is a void then they could be construed by relying on international norms or conventions. Article 51²⁶ of the Constitution talks about international treaty obligations and suggests that these treaties and international cases shall act as a guide for governance. Therefore according to principles laid down by International Human Rights Treaties, the importance of the rights to found a family and other allied Parenting rights cannot be denied to any person of legal age merely on account of their gender identity and such denial would vitiate the very spirit of our Constitution.

²⁰ Manning et al., *supra* 4 at 485.

²¹ United Nations Committee on the Rights of the Child: General Comment No. 14 (2013) (art. 3, para. 1).

²² Universal Declaration of Human Rights, 1948.

²³ European Convention on Human Rights, 1950.

²⁴ Yogyakarta Principles, 2006.

²⁵ *Vishakha v. State of Rajasthan* (1997) 6 SCC 241.

²⁶ INDIA CONST. art. 51.

V. BEST INTEREST AND RIGHTS OF A CHILD VS RIGHT TO FOUND A FAMILY FOR LGBTQ+ COMMUNITY

An argument often put forth for denying Parental rights to the LGBTQ+ community is the impact of such relationship on the child and the welfare of the child in the absence of either mother or father in case of same-sex relationships. Since adoption and surrogacy by same-sex couples is still not prevalent in India, there was inadequate literature available on this issue. However, An empirical study conducted by **the American Sociological Association**²⁷ on the well-being of child of same-sex parent families comparatively analyses the impact of such parenting by relying upon relevant social science literature. This study used credible methodology for a comparative analysis on the welfare of child in same-sex families and different-sex families. This study covered several parameters of child welfare such as academic performance, cognitive development, social development, psychological health, early sexual activity, and substance abuse. It is pertinent to note that the study considers recent experiences of children. The findings of the study clearly represent that there are no significant differences in conditioning the children same sex parents and . Instead, the positive finding of the study was that children of same-sex parents have never reported any physical or sexual abuse from parent or care-giver.

Legal recognition and freedom from persecution have long been recognized as pivotal to the well-being and functioning of same-sex parent families by social scientists. Another empirical study published in **Frontiers in Psychology**²⁸ analysed the global trends of laws with respect to Parenting rights of same-sex couples and its psychological impact on children in such countries. Globally, the laws vary considerably from one country to another, ranging from full legal recognition to criminalization. The psychological consequences of living in an ambiguous or hostile legal climate likely interfere with parental health, family functioning, and child development. This study was particularly significant for comprehending the impact on a child's development and concluding upon its psychological state in a country like India, where laws with respect to Parenting Rights of LGBTQ+ community are silent and resist any revisitation. This study considered both qualitative and quantitative factors and was particularly relevant as it also considered the perceived impact of anti-sodomy laws among Indian Sexual and Gender Minorities and minority stress and well-being in India in light of such laws. Therefore it can be

²⁷Manning et al., *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33(4), Population research and policy review, 485 (2014).

²⁸Siegel, M., *The Legal Vulnerability Model for Same-Sex Parent Families: A Mixed Methods Systematic Review and Theoretical Integration*, 12, *Frontiers in psychology*, 644258. 8(2021).

reasonably concluded that a progressive and liberal legal regime for the rights of LGBTQ+ community is more appropriate for better family functioning, child development and parental health.

VI. GLOBAL TRENDS WITH RESPECT TO THE PARENTING RIGHTS OF LGBTQ+ COMMUNITY

Globally, parents and children in same-sex parent families are impacted by many laws related to the parental sexual orientation. These laws vary considerably from one country to another, ranging from full legal recognition to criminalization. The psychological consequences of living in an ambiguous or hostile legal climate likely interfere with parental health, family functioning, and child development.

The detrimental impact of restrictive sexual orientation laws (e.g., constitutional marriage bans), lacking legal relationship recognition or protection from discrimination, and a country's overall (socio-)legal climate have been repeatedly linked to adverse physical and mental health outcomes in sexual minority youth and adults. These include reduced life satisfaction impaired physical health increased general mental distress increased psychiatric morbidities etc.

Eg.: concealment of the sexual orientation, internalized homonegativity, and expectations of and sensitivity to rejection, (i.e., expecting rejection, interpreting ambiguous situations as evidence of rejection) and anxiety or anger about experiencing future rejection.

On the family level, lacking legal recognition of family relationships places an economic burden by the need to secure a legally binding family structure by means of wills and power of attorney.

Hypervigilance because of the non-recognized, ambiguous, or criminalized legal status of the family.

Psychologically, being in a legally unrecognized family has been found to be a chronic source of stress, anxiety, and safety concerns for both parents

Globally, the legal landscape for sexual minorities is varied and in constant flux. In 2020, sexual minorities could face the death penalty (11 countries) or imprisonment (57 countries) in some parts of the world, while enjoying access to civil marriage (28 countries) in others.²⁹ A multitude of laws (collectively referred to as sexual orientation laws) regulate the lives of sexual minorities in many other areas as well, including protection from hate crimes or

²⁹ ILGA-Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia (2020)

discrimination, freedom of assembly, or even blood donation. The detrimental impact of restrictive sexual orientation laws (e.g., constitutional marriage bans), lacking legal relationship recognition or protection from discrimination, and a country's overall (socio-legal climate have been repeatedly linked to adverse physical and mental health outcomes in sexual minority youth and adults. These include reduced life satisfaction, impaired physical health, increased general mental distress, increased psychiatric morbidities, and suicide attempts³⁰.

29 countries of the world have made laws to legalise same-sex marriage. Netherlands is the first country in the world to legalise same-sex marriage³¹ in 2001. Adoption rights of the homosexual or the trans community are also recognised and include stepchild and joint adoption. IVF treatment can be availed by lesbian couples and they also have right of parentage over their children. Commercial surrogacy is not legal in Netherland irrespective of the gender of the party while Altruistic surrogacy is legal.

In *Halpern vs. AG of Canada*,³² the Ontario Court of Appeal of Canada held that the definition of marriage with its reference of 'one man' and 'one woman' is discriminatory as it does not recognise equal rights of same sex couples as per the Canadian Charter of Rights and Freedoms and therefore the definition was reformulated as, "voluntary union for life of two persons to the exclusion of others." The Civil Marriage Act of 2005³³, made same sex marriages legal for whole of Canada. Same-sex couples are given the right of adoption and have a family life; different provinces made adoption permissible at different times of which British Columbia was the first province in 1996 and Nunavut was the last province to legalise it in 2011.

*South African Constitutional Court in Minister of Home Affairs vs. Fourie*³⁴ held that the law of marriage that did not allow same-sex marriage is in contravention and violation of Section 9(3) of the constitution. Even joint adoption by same-sex couples is legally valid and permissible in South Africa with the passage of Children's Act, 2005 which permits adoption regardless of sexual orientation.

England and Wales³⁵ recognised civil unions in 2004 of same-sex couples which was 'separate' but 'equal' to marriage. Same-sex marriages also have been granted legal status in England and

³⁰ Seigel, *supra* note. 5.

³¹ Government of Netherlands website, <https://www.government.nl/topics/family-law/same-sex-marriage>

³² Halpern v. AG of Canada, (2003) 169 OAC 172.

³³ Hillary A. Rose, *Canada's Same Sex Marriage Law: Exception To Or Exemplar Of Canada's Family Policy?*, Journal of Child and Family Studies 21(1) (2012).

³⁴ Minister of Home Affairs v. Fourie, (2006) 1 SA 524 (CC).

³⁵ N. Ravichandran, *Legal Recognition Of Same-Sex Relationships In India*, Vol. 5, Journal of Indian Law and Society.

Wales in 2013³⁶. Adoption rights of same-sex couples is recognised since 2002 based on Adoption and Children Act³⁷ that, previous condition of only married couple being able to adopt was dropped which made it permissible for single people as well as same-sex couples to adopt a child and have a family life and parenting rights. Surrogacy is permissible similarly for same-sex couples as for different sex couples. Amendment to the Human Fertilisation and Embryology Act in 2008 made this possible and earlier only married heterosexual couples were permitted for surrogacy.

In United States of America, adoption is permitted equally to same-sex couples across all states. Surrogacy laws for same-sex married couples vary from state to state and are more or less permitted across all states except Louisiana, Michigan, Nebraska and are stringent in states like Arizona, Indiana and Idaho. These laws are most liberal in states like California, UTAH, Washington, Maine, New York where pre-birth orders are granted throughout the state and both parents will be named on the certificate. In other cases, only post- birth parentage orders are permitted.

We therefore see some progressive and exemplary laws of different countries that permit marriages between the same sex and their rights of parenting and having a family life by permitting methods of adoptions, surrogacy, IVF etc. which brings the LGBTQ+ community at par with marriage rights of heterogeneous people. These rights show dignity and respect for the community as they are not discriminated by gender identities or sexual orientations and live a life that is dignified and free from any deprivation or violation of human rights.

VII. CONCLUSION

Family life constitutes one of the fundamental units of any person. The debate around LGBTQ+ rights needs to be stirred effectively so as to fully bring their struggle to fruition by granting them marital rights and Parenting rights.

The purpose of Science and Technology is to bring progress to humanity, which it has achieved by introducing advanced technologies like surrogacy which can realise the desires of any individual to found a family. However, lawmakers ought not act as Gods in such situations by denying these rights to any person merely on account of their gender identities while portraying to be messiahs for the Protection of the Human Rights of the LGBTQ+ communities.

In light of the above, it can be reasonably concluded that the recognition of LGBTQ+ community is merely a façade with inadequate provisions for the realisation of all their

³⁶ The Marriage (Same-sex Couples) Act, 2013 (UK).

³⁷ The Adoption and Children Act, 2002 (UK).

aspirations. The laws in India, even the bills recently introduced in the Parliament lack effective recognition of their existence and reflect discriminatory tendencies.

VIII. SUGGESTION

Either there should be a specific legislation in India with regard to family life of adoption, marriage, surrogacy of the LGBTQ+ community or the current laws should be amended to incorporate these provisions and grant them equal right. If amending personal laws seem to be a problem as it is based on religion and can face backlash from the community then Special Marriage Act, 1954³⁸ should adequately be amended to legalise marriage and provide other such basic rights for the LGBTQ+ community.

India should trace its roots and revive its ancient history by according dignity to members of LGBTQ+ community by conferring upon them all the rights akin to other members of the society in line with constitutional principles. India should follow the exemplary laws enacted by several countries across the globe and revamp its personal laws so as to grant Parental rights to the LGBTQ+ and realise the full potential of technology.

³⁸ The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

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