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Rights of Adoption of Transgenders

NITISH MAHAJAN¹

I. INTRODUCTION

“Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice – social, economic and political'. Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice – social, economic and political'.²” When our country got independence we decided to promise every Indian a life which was filled with dignity, offered equality to all, and promised development in all aspects of life. A happy family is a part of what one can call living life with dignity. It was through a dream for a lot of people. These were the people belonging to the LGBTQ. Especially people belonging to the transgender family. One of the most distinctive features of our constitution is that it says no to any form of discrimination. This helps in establishing a system which gives an equal opportunity to every citizen to grow, to reach the highest point of their potential. Our constitution in its article says 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*³.” Justice KS Radhakrishnan while giving judgment in the historic case of *NALSA vs Union of India* case said that "Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue⁴." Our Supreme Court has continuously tried to bring changes in society. Few of these historic changes were made in two very important cases. The first one was the *NALSA vs Union of India* and the other one was Navtej Singh Johar. These were just starting steps for a big and necessary change. There are still many new changes that our society needs to adapt to. One such change is the adoption rights of transgenders.

II. ADOPTION IN INDIA

Kids or children are a little bundle of joys. In India, it is often said that 'kids are an incarnation of God'. Hindu religious text often talks about adoption. Though in some of them it is limited to the adoption of a male child to get a male heir. But still, our different religions have references to adoption. Islam refers to the adopted child of Prophet Mohammed *I.e. Zayd ibn Harithah*. Adoption is a very complex process which is guided by certain rules and

¹Author is a student at Chandigarh University, India.

²*Dattatraya Govind Mahajan vs. the State of Maharashtra*, AIR 1977 SC 915, INDIA

³INDIAN CONSTITUTION, Art. 14 (India)

⁴"*India court recognizes transgender people as the third gender*", BBC NEWS(April 15th,2020), <https://www.bbc.com/news/world-asia-india-27031180>, [Last accessed 31st May 2020]

regulation. These rules and regulations are given under different acts. There are different rules regarding Hindu wanting to adopt and others trying to adopt. The term as defined under the **Hindu Marriage Act, 1955** declares Hindus, Jain, Sikhs, and Buddhists as Hindu. Meanwhile, the personal laws of other religions of India which are Islam, Christianity, and Parsi do not allow adoption. Rules which a Hindu needs to abide for the adoption of a kid have been laid in the **Hindu Adoption and Maintenance Act (HAMA), 1956**.

HAMA has set specific rules regarding who can adopt and who can be adopted.

As per **Hindu Adoption and Maintenance Act (HAMA), 1956** the condition which a Hindu male needs to satisfy in order to adopt a kid are;

1. The male should be a major.
2. Should be of sane mind.
3. If married, should have the consent of the wife. Consent of wife is not needed when the wife has either renounced the world or her Hindu religion or she has become of unsound mind.
4. There is a necessity of taking consent of all the wives the person has at that time⁵.

On the other hand, there is a set of separate rules regarding women who want to adopt a child. *Section 8* of the **Hindu Adoption And Maintenance Act (HAMA), 1956** states that a woman who wants to adopt must be:

1. Major
2. Of sound mind
3. It doesn't matter whether the woman is married or single.

III. CAPACITY UNDER JUVENILE JUSTICE (CARE AND PROTECTION OF CHILD) ACT, 2015

The section 38 of the Juvenile Justice Act, 2015 and regulation number 6 and 7 of the adoption regulation, 2017, a child welfare committee which has been appointed by the law will legally declare an orphan, abandoned or surrendered kid as a kid fit for adoption till he or she reaches the age of 2018. Section 57 of the Juvenile Justice Act, 2015 and Regulation 5 of AR, 2017 talks about the people who will be included in the umbrella or list of Prospective Adoptive Parent (PAP). For any person to be included in PAP they must be:

⁵ Bhooloram & Ors.v. Ramlal & Ors, 1989 JLJ 387

1. The applicant who applies for adopting a child must be physically fit and mentally sound. They should have good financial stability and highly motivated.
2. The consent of both partners is needed. If the only husband or only wife gives consent, they cannot adopt a child.
3. Subject to guidelines for CARA any single or person who is a divorced person can also adopt a child.
4. A male who is either divorced or has not been married yet can only adopt a male child, though a woman can adopt both girl and boy.
5. A couple can only apply for adoption if they have been in a stable relationship for at least 2 years⁶.

As the above-mentioned requirements are met, parents who want to adopt needs to submit the requisite document. Then they have to obtain an adoption certificate which is given by the court. After this, the adoption processes end in consonance with the procedures prescribed under Section 61 of the JJ Act, 2015.

The adoption procedure under the Juvenile Justice Act, 2005, and the Adoption Regulations 2017 are not limited to any religion or any gender. Any person who satisfies the needs set by the law can adopt a child under this law. All this procedure is set and checked by the **Central Adoption Resources Authority**. CARA is an autonomous and statutory body developed by the Ministry of Women and Child Development, in the year 1990. It deals with both in-country and inter-country adoption.

The Muslim personal law doesn't allow adoption under it. They follow a completely different method which is similar to adoption. This system is called a "Kafil system." Kafil in English means guardian. As per this system, a child is placed under a guardian also known as Kafil. The adopted child and the biological child are never considered equal in the Muslim personal law in terms of the right of inheritance⁷. The legal relationship I.e. the relation of a guardian and a ward, between the child and the adopted parents breaks as soon as the child becomes a major. The adopted kid does not have any right of inheritance. This whole procedure of becoming a guardian is done under the Guardian and Ward Act, 1890. A petition⁸ was filed by human rights activist Shabnam Hashmi when she learned she couldn't adopt a daughter

⁶SUPRA NOTE 4

⁷Ashwaq Masoodi, "The religious contours of adoption in India", Live Mint,(21 Feb 2014, 11:40 AM), <https://www.livemint.com/Politics/3mOuc3wMjppjDG2qx60B8PK/The-religious-contours-of-adoption-in-India.html> [Last Accessed; 3rd June 2020]

⁸ M/S Shabnam Hashmi vs Union Of India, WRIT PETITION (CIVIL) NO. 470 OF 2005

because of the Muslim personal law. In 2014, the Supreme Court of India passed optional legislation that gave the right to every person to adopt irrespective of their religion under the Juvenile Justice Act. Justice P. Sathasivam said that *"To us, the act is a small step in reaching the goal enshrined by Article 44 of the Constitution (Uniform Civil Code). Personal beliefs and faiths, though (they) must be honored, cannot dictate the operation of the provisions of an enabling statute."*⁹

IV. HISTORIC DECISION OF RECOGNISING TRANSGENDER

We Indians have done much injustice towards the transgender community. Their name is often used as an abusive word. They were deprived of basic rights in India. They have been always discriminated, ignored, and suppressed. But things took turn when India finally gave recognition to the Transgenders as the third gender in India. This was held in the *NLSA vs Union Of India*¹⁰. Transgender is a term used as a collective for all such people who don't have their gender identity, gender expression, or behavior in accordance with their biological sex. Under these terms, various types of identities are included in it. One of the petitioners who went to the Supreme Court told her story there.

The applicant in the above case was born as a male. She told in the court about all the problems she had faced while group. She mentioned that growing up she used to feel different from other boys and was always feminine in her ways. Because of her femininity, she used to face repeated acts of sexual harassment, molestation, and sexual abuse. This happened with her in her family and outside her family also. She said that because she was different from others she always felt that she didn't have any place in this society. That this society won't accept her. She was constantly abused and teased by words like chakka or hijra. She showed great courage and started dressing as a woman in society after she reached her late teens. Even then she didn't identify herself as a woman. She told me that she later started living with the hijra community in Mumbai. She told the court that her being deprived of her gender identity she faced serious discrimination.

Such stories can be heard from every transgender. These stories weren't just limited to one area or state. It was something which happened in pan India.

When the Supreme Court recognized the third gender they changed history. They did something which has been waited by a large portion of the society for a long time. This was a small step while improving the life of transgenders but this is was a very small step. There

⁹Supra note 6

¹⁰NLSA vs UOI, WRIT PETITION (CIVIL) NO.400 OF 2012

were some guidelines laid by the court. These were;

1. Hijras, Eunuchs, and anyone who is apart from the binary gender are treated as "Third gender" in order to safeguard their rights which are entitled to them under Part III of the Constitution and the laws made by the Parliament and the State Legislature.¹¹

2. They gave the right to the Transgender person to declare their self-identified gender. The central and the state governments were asked to grant legal recognition to their gender identity.

3. The court directed the Centre and the State Government to treat transgenders as socially and educationally backward classes of citizens. They were asked to extend all the benefits which all classes of society which are socially and educationally backward classes get, to the transgender community.

4. Center and State Government were asked to take proper care of medical facilities for the medical care of transgender people. They were also asked to create separate toilets and other facilities for the transgender community.

5. Both levels of the governments were asked to take various steps to improve the living condition of the transgender community.

These were some of the main things that the court said in the *NLSA vs UOI case*.

Another historic judgment was the **NAVTEJ SINGH JOHAR Vs UNION OF INDIA**. This was the case where the court announced the decriminalization of section 377 of the Indian Penal code. This section made homosexuality a crime in India. As soon as this section was decriminalized there was a new section of society that had fought long enough for their rights recognized legally. This was the LGBTQ+ community of India. While giving the judgment, Justice Mishra said that the "LGBT community possess rights like others. Majoritarian views and popular morality cannot dictate constitutional rights."¹² Justice Mishra went on to say that, "Shakespeare through one of his characters in a play says —What's in a name? That which we call a rose by any other name would smell as sweet. The said phrase, in its basic sense, conveys that what matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called."¹³

¹¹Niyati Acharya, "NLSA vs UOI", Law time journal, (Mar. 15, 2019), <http://lawtimesjournal.in/nlsa-vs-union-of-india/>, [Last accessed; 3rd June 2020]

¹²Debjani Chatterjee, "Homosexuality Not A Mental Disorder": 5 Big Quotes From Sec 377 Verdict", NDTV, (Sept. 6, 2018, 12:32 pm), <https://www.ndtv.com/india-news/section-377-top-5-quotes-of-the-supreme-court-1912214>, [last accessed; 3rd June 2020]

¹³ Navtej Singh Johar vs Union Of India, WRIT PETITION (CRIMINAL) NO. 76 OF 2016

V. ADOPTION RIGHT OF TRANSGENDERS AND LGBTQ+ COMMUNITY

Reading the above two judgment one might assume that India will be one of the countries which will be giving adoption right to the transgenders and the LGBTQ+ community. But this is not true. There are no adoption rights for transgenders and the people belonging to the LGBTQ+ community.

When any Indian wants to adopt a kid, as stated above there are two different ways of doing so. For a Hindu person, the person has a right to adopt either through the *Hindu Adoption and Maintenance Act*, and the other option being the CARA. Now if we go through the rules and regulations stated above in the *Hindu Adoption and Maintenance Act*, the Rights of adoption and the rules governing them include only male and female. They set guidelines regarding when a male can adopt a child or when a female can adopt a child. Similarly, the form given by the CARA for adoption contains three options, first single male, single female, and couple. All the methods of legal adoption have closed doors for people of the transgender community. Similarly, the present methods don't allow homosexual couples.

It is one of the biggest rights that they are deprived of. If one reads the constitution of India there exists Article 14 which guarantees the right to equality for every citizen of India. It states that the government at the state and at the center to not deny any person equality before the law and the equal protection of the laws in within India's territory¹⁴. It is one of the fundamental rights which are guaranteed to the people of India. This right is the basis of the right that a person can ask. Equality before the law is a principle that says that every person is equal before the law. This is a negative concept. This principle also helps in the prohibition of discrimination. The principle of equal protection of laws says the governments or state should always give special treatment to different persons in different situations to establish equality amongst all. The supreme court of India through various legislation has developed a basic structure theory. This basic structure theory highlights characteristic of the constitution which cannot be removed. Hence not giving the right of adoption to transgender is a violation of the right to equality. Article 15 of the Indian constitution states that there should not be any sort of discrimination against any citizen of India based on the grounds only of religion, race, caste, sex, place of birth or any of them. This law makes sure that the state can't discriminate amongst the citizen by giving unreasonable favor to any one gender, religion, sex, or people limited to any one area. Though the constitution allows reasonable classification which will help them in uplifting the status of such class of people. The classification which deprives the

¹⁴THE INDIAN CONSTITUTION, Article 14

transgender community of the rights of adoption cannot be said that it is a reasonable classification. There is no valid reason to stop someone from adopting a kid. It's discriminatory in nature. It deprives a community of the basic happiness which one gets from having a family.

Any law which violates the fundamental right is not valid in India. Hence one can say that not giving adoption right to transgender is ultra vires and should not exist.

Many would raise the question that the community is not indulged in good economic activities. Which makes the adoption cases for the transgender weak. But one can't deny the fact that the reason their community suffers socially and economically is because of us. It is us who had deprived them of the basic rights and opportunity to uplift themselves. We have forced them to stay at the lowest level of society. If one reads the court judgment of the *NLSA vs Union Of India* case, the guidelines laid by the supreme court. It clearly states that their recognition as the third gender is meant to help that the state must enforce the rights given under Part III of the Indian Constitution for them also. But not giving adoption right which violates articles 14 and 15 contradicts the guidelines of the society.

A similar problem is faced by homosexual couples in India. They cannot legally adopt a child in India. Even though a homosexual person can adopt a kid alone. This can be done by filling as a single male or single female in the form while adopting. Till now court has not recognized same-sex marriage in India. This doesn't give them the right to officially or legally as a couple. This is what makes their adoption process not open for a homosexual couple. Even though our Supreme Court had decriminalized section 377 of the Indian Penal Code which meant that now it was not a criminal offense for being a homosexual. Years back a law made by Britishers criminalized falling in love and professing it for a part of society. This was stopped and changed by the Supreme court. But there were many things which they left unanswered. Questions that were of importance to a large part of the society, questions which defined the future of a community. These were related to marriage, surrogacy, and adoption of the LGBTQ community. A big injustice is being done to people who belong to these communities.

VI. RIGHTS OF LGBTQ+ AROUND THE WORLD

There has been a recent development in the rights of the LGBTQ community. There are many countries that have now given recognition to transgenders and others in their country. One of the biggest events was when Argentina passed the Gender Identity Bill and made it a law in 2012. It gave rights to transgenders to marry, and adopt. Even the countries which are

considered to be less developed like Mexico have passed the rights for marriage and adoption. England and Wales have also recognized same-sex marriage now. Presidents of different countries have now openly come in supporting the LGBTQ community which includes Barack Obama. The United States of America has now legalized same-sex marriage after the supreme court had struck down the law that prohibited same-sex marriage as unconstitutional. The Prime Minister of Trinidad and Tobago had written a letter to the Kaleidoscope Trust, expressing her wishes that she wants to repeal the laws that ban homosexuality¹⁵. The same wishes had been shown by the Prime Minister Of Jamaica. One of the safest continent in the world is Europe regarding the rights of the homosexuals where only Northern Cyprus has still banned homosexuality.

VII. CONCLUSION

We have been living in a society that has deprived a large section of people living amongst us of the basic rights that one has. They have been denied equal treatment. We have done many injustices towards them. But things started to change for them when their fight was recognized by others. When our courts and governments started to recognize their rights. This changed things and moved us towards a forward change. We still have a long way to go. India is a nation where there are 30 million abandoned or orphaned kids who are looking for a family. In words of Shruti Venkatesh, the injustice of not allowing adoption can be summed as "It's unfortunate and sexist that partners don't have legal rights over a child and that only women as single parents have the right. The new proposed surrogacy law makes it even harder for queer persons looking to adopt. I see a lot of people satisfied with the striking down of section 377. A lot of them believe that the queer community has all their rights now. But in reality, there is so much more work to do and we are far from equality."¹⁶ It is unfair on the behalf of the child and also the parents or community that they deprived of a happy life only because the sentiment of some orthodox religious groups get hurt. We have already seen that illegal adoption done by the Transgender community has served and saved girls in India. In many states, they have saved girls from getting sold. It's time that we promote their efforts by giving them the right to adopt kids. This will provide the kids happy families and the transgender community their right of having a child which they can't have naturally.

¹⁵Emine Saner, "Gay rights around the world: the best and worst countries for equality", *The Guardian*, (July 30, 2013, 20:08), <https://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries> [last Accessed: 3rd June 2020]

¹⁶Prashasti Awasthi, "India's Adoption Policy Discriminative Against LGBTQIA+, 20 Million Kids Remain Without Family", *The Logical Indian*, (10 Nov 2019 8:41 AM), <https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lgbtqia/> [Last seen: 3rd June 2020]