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ADOPTION BY HOMOSEXUAL COUPLES IN INDIA: A COMPREHENSIVE ANALYSIS

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Abstract

This manuscript will endeavour to study the reasons due to which adoption by LGBT couple has not been legalised yet, this research paper explores the complex and evolving landscape of adoption by LGBT (Lesbian, Gay, Bisexual, and Transgender) couples in India. The subject of same-sex adoption has acquired attention in the country in recent years, reflecting shifting society attitudes and legal advancements. The purpose of this study is to provide a thorough examination of the legal, social, and psychological implications of adoption by LGBT couples in India. From a social perspective, the paper delves into the prevalent attitudes and stereotypes surrounding same-sex adoption in India and compares it with the perspectives of other nations, it studies the effect of cultural norms, prejudice, and stigma, as well as how these factors influence LGBT couples' motivation to adopt and society's assessment of their parenting ability. Furthermore, the study compares the psychological well-being of children adopted by LGBT couples to that of children raised in heterosexual households.

This research paper gives a comprehensive overview of the current condition of adoption by LGBT couples in India by combining legal analysis, sociological exploration, and psychological assessment. It highlights the progress that has been done as well as the problems that remain, with the ultimate objective of contributing to a more inclusive and equitable adoption system that prioritizes the best interests of the child regardless of the sexual orientation of their prospective parents.

Introduction

History:

The Indian Penal Code's Section 377 deemed homosexual sex with another person to be unlawful. It said that anyone who voluntarily engages in sexual intercourse against the order of nature with any man, woman, or animal shall be punished with life imprisonment or imprisonment of either sort for a time up to ten years. And homosexuals were included in this law since it was deemed 'against nature' by them. Such was the existence of the LGBTQ+ community prior to Section 377's legalization.

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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.”¹

The Buggery Act of 1533 served as the inspiration for the introduction of Section 377, which came into effect in 1861 under British rule. It is surprising that a law established by the British many years ago was still being respected in India, even though the people who imposed it had given up on it. LGBTQ persons in the United Kingdom have the freedom to have sexual relations as well as many other rights, such as same-sex marriage and adoption rights, to name a few. According to studies, members of the LGBTQ community are more vulnerable to mental health difficulties. Given the hostility they experience from society and the frequent questioning of their existence, these things would undoubtedly have an impact on anyone's mental health. It doesn't help at all to be branded as a criminal in the eyes of the law or to do something that is "against nature."

Finally, the Supreme Court of India overturned its 2013 ruling in the matter of Navtej Singh Johar v. Union of India² in 2018, finding the previous rule to be "irrational, arbitrary, and incomprehensible" and holding that sexual acts between adults cannot be considered crime. Thus, Section 377 was ruled to be illegal by this significant ruling. Despite being a significant accomplishment, it was unsuccessful in making all other rights for homosexuals, including marriage and adoption, equal. Although it was successful in legalizing homosexuality in general, it fell short in legalizing other gays' rights.

¹ Indian penal code

² AIR 2018 SC 4321; W.P. (CrI.) No. 76 of 2018 D. No. 14961/2016

Adoption rights:

When it comes to adoption in India, religion is significant. Hindus are covered under the Hindu Adoption and Maintenance Act of 1956, while other religious groups like Christians, Muslims, etc. are not covered by this kind of personal law. Any Hindu pair or a Hindu married man or woman with their partner's agreement is eligible for adoption under the Hindu Adoption and Maintenance Act of 2005 (HAMA), with the exception of situations where the spouse has abandoned the world, is insane, or has changed his or her children. Individuals and single persons are also qualified for adoption as long as they are of sound mind and are of legal age. The Adoption Regulation Act is stricter than HAMA in terms of regulations, though, as it imposes limitations on individual/single men who wish to adopt a girl child. Overall, secular and religious legislation jointly govern adoption rights in India. The fundamental issue with these regulations is that only men and women were considered when they were being framed, and there is no mention of the third gender. According to section 5(3) of the 2017 Adoption Regulation Act, only a couple who have been together for two years are qualified to adopt a child. Additionally, the phrase "husband" and "wife" in the clause imply that same-sex couples are not covered by the right to adoption. The application of the law to same-sex couples or trans couples will be unclear as a result of the use of terminology that imply that it only applies to men and women. The LGBTQ community therefore struggles with adoption because of the regulations' ambiguity regarding the third gender.

The fact that same-sex marriages are forbidden in India is another reason why homosexual couples cannot adopt a child jointly. Indian citizens and Indian nationals living abroad are able to get married without restriction due to the Special Marriage Act of 1954, regardless of their caste, religion, or philosophical beliefs. As a result, although marriage laws have changed over time, there is still a lack of provisions for same-sex marriages.

Religious beliefs about adoption by LGBT couples

It is unfortunate that a certain segment of the community has been denied the freedom to select their own family in a country like India, where family is seen as the fundamental support system in a person's life and is accorded the utmost priority. While homosexuals must contend with numerous obstacles in order to adopt a child, heterosexuals have access to this right and are even urged to do so. Many people enjoy the luxury of having a close-knit family. Unfortunately, a lot of people lose their family members, become orphans, or have their family reject them in this

world. When it comes to LGBTQ people in particular, many of them experience parental disapproval after coming out and telling them who they really are. Not just in India but all throughout the world, homosexuality is still stigmatized or seen as a disease. Such people can find comfort by adopting children, which is one method through which they can find a new family. It is impossible to quantify the mental stability and emotional support they can have through adoption.

Many conservative Christians believe that homosexuality is both a changeable and unnatural behaviour and a lifestyle choice. They also believe that such activity is prohibited by the Bible and rejected by God. Pentecostalism, a Christian faith, believes that homosexuality is a choice, that it is evil, and immoral. Equitable rights for LGBT people and heterosexual people would be harmful to society. Same-sex marriage threatens heterosexual relationships and the family system. They believe that the family structure is jeopardised by same-sex marriage because they lack a mother or father figure in a homosexual home, children raised in these types of households would suffer. According to another hypothesis of Christian faith, children who see the homosexual lifestyle run the danger of developing homosexual tendencies themselves. However, it has been discovered that fundamentalist Christian, Muslim, Jewish, and Hindu sects in general cannot tolerate homosexuals and lesbians or any LGBT population, regardless of their behaviour. The utterances attributed to the Prophet Muhammad (Hadiths) interpret the Quran from a historical viewpoint, and these are frequently used to justify religious bigotry, denouncing same-sex activity. Whereas in Judaism, there is room for a broad interpretation of religious texts, which means that some Judaism groups are less likely to exhibit religious hostility towards the LGBT community.

Legal status of adoption by LGBT couple

Adoption is a vital legal and social institution that provides loving and secure homes for children in need of care and protection. The contentious issue of whether or not homosexuals can adopt demands for more thought and discussion.

The current legal status of homosexual adoption in the nation: The Guidelines Governing Adoption of Children, 2015, and the Juvenile Justice (Care and Protection of Children) Act, 2015, establish the legal framework for adoption in India. The rules provide a comprehensive framework for the adoption process, and the Act aims to ensure that every child in need of care

and protection is put in a home that is safe and caring. According to the 2015 Guidelines Governing Adoption of Children, prospective adoptive parents' eligibility is established based on their aptitude, suitability, and willingness to adopt as well as the child's best interests. The criteria for selecting potential adoptive parents do not list sexual orientation as a criterion. The guidelines do not, however, make it clear whether or not homosexual couples may adopt children.

India currently prohibits adoption by same-sex couples. Adoption eligibility in India is limited to heterosexual couples only. As per the Juvenile Justice (Care and Protection of Children) Act, 2015, which regulates the adoption process, a "married man and woman" who have cohabitated for a minimum of two years is considered a "couple".

The Supreme Court of India has acknowledged the human rights and legal equality of LGBTQ+ individuals, as well as their entitlement to equal protection under the law. In a significant ruling in 2018, the court determined that the right to sexual orientation is an essential part of the right to privacy and honour guaranteed by the Indian Constitution. The decriminalisation of homosexuality in India was made possible by this court's decision.

In 2016, the Bombay High Court granted permission to a gay couple to adopt a child in the case of Shivy and Aditya v. The State.³ The long-term couple's application to adopt a child was turned down by the adoption agency. The couple argued that since adoption of homosexuals is not illegal in India, they should be allowed to adopt. The Bombay High Court supported their lawsuit, ruling that the adoption agency's decision was arbitrary and prejudiced. The legality of homosexual adoption is still a controversy, although this case did not set a clear precedent. Despite the verdict of the above mentioned case, adoption organizations and authorities continue to use their discretion to deny applications from homosexual couples. This has made it extremely difficult for homosexual couples who want to adopt children in India.

In 2017, the Ministry of Women and Child Development released draft adoption regulations which only specified adoption by heterosexual couples and held nothing about homosexual couples. The absence of a well-defined legal framework allows adoption agencies and officials to unfairly treat homosexual couples in the adoption process, even though the existing legal

³ Shivy Sachdeva & Anr. v. The State of Maharashtra & Ors., Writ Petition No. 12144 of 2016 (Bombay High Court, 2019)

structure does not explicitly prohibit same-sex adoption. Regardless of their sexual orientation, every potential adoptive parent should have equal opportunities and rights protected by a clear legal framework.

Perspectives from around the world on adoption by homosexuals

Homosexual adoption remains a controversial issue not only in India but also in numerous countries globally. It is worthwhile to explore a comparative analysis of adoption laws in India and other nations, examining varying perspectives on homosexual adoption and the legal and social consequences associated with the permission or prohibition of such adoptions.

The Netherlands holds the distinction of being the initial country to legalize both same-sex marriage and adoption of children in 2001. Several other countries, such as Spain, Belgium, Canada, and the UK, now also allow the adoption of children by same-sex couples. The examination of how different nations approach and regulate homosexual adoption sheds light on the diverse legal and social implications surrounding this issue. On the contrary, some countries, such as China and Russia, maintain strict policies opposing homosexual adoption. In many nations, including the United States, regulations concerning gay adoption differ from state to state, creating a complex legal scenario. While permitted in certain states, it remains illegal in others, contributing to an ambiguous legal landscape. Additionally, a prohibition on homosexual adoption may perpetuate bias and discrimination against the LGBTQ+ community, potentially leading to adverse mental health effects such as depression, anxiety, and feelings of alienation. Allowing same-sex couples to adopt can contribute positively to the well-being of the LGBTQ+ community by fostering acceptance and inclusion.

Adoption of homosexuals is a complicated issue globally. Although some countries currently permit gay couples to adopt, progress remains uneven globally. It is essential to consider the well-being of children in search of caring homes, irrespective of the sexual orientation of potential parents,

Conclusion

Harvey Mill, an LGBTQ Activist once said: “It takes no compromise to give people their rights, it takes no money to respect the individual, it takes no political deal to give people freedom, it

takes no survey to remove repression”.⁴

LGBTQ persons are one such group that continues to fight for their rights. Their challenges are the same whether they are dwelling in India or any other country. Some individuals consider homosexuality to be a sin, a crime, a disease, and so on, but when laws back such foolish views, these people lose faith in the judicial system and our judges. Along with combating societal prejudices, they must also battle such discriminatory laws. Their daily conflicts are not only with the people, but also with the system, which claims, ironically, that every citizen of the country would be treated fairly and will obtain justice at whatever cost. It is a failure on our part as humans that we live in a society where certain groups of people are denied basic human rights, and we are still failing to do more.



⁴ <https://theamikusqrae.com/adoption-rights-of-lgbtq-community-in-india>