

“Adoption: Why Not an Option for all?”

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ABSTRACT

Adoption is an act of undertaking all the responsibilities of a stranger minor's upbringing. It bestows a legal status of parent on the adopter and a son/daughter on the child. In India, the adoption is facilitated by the Central Adoption and Research Authority which is a statutory body of the Ministry of Women and Child Development. Adoption is regulated by the Personal laws of people, based on their religion. The laws providing for adoption give a right of adoption to a single parent, and to couples. Couple here would mean a man and a woman.

This research paper emphasises on right of adoption to homosexual couples, specially after the celebrated 377 judgment¹. It has given validity to consensual gay relations. But the question of giving them a right to marriage and family still remains unanswered. The authors try to analyse the societal perspective, legal hindrance and the ultimate aim of such a legislation concluding with their views if the country deserves a change like this or not.

¹ Navtej Singh Johar and Ors v. Union of India, WP (Crl.) No. 76/2016.

INTRODUCTION

“Adopting one child won’t change the world: but for that child, the world will change.”

Family is the basic and the most important unit in the society. Human beings are bound in a system of ‘family’ which creates and nurtures us. Family is the first school of a child and every child deserves to be a part of this selfless and perpetual union where one learns to love and understand other humans and the society. Unfortunately, India has a population of 20 million orphans. Some live in orphanages while there are many others who spend their lives on roadsides and slums and are subjected to hardships right from the childhood. A rather shocking survey by SOS Children Villages, an NGO working for orphans reveal that out of all the orphans, only 0.3% are actual orphans, of whom both the parents are dead.² Family practically contains two generation staying together. A parent is as important for a child as a child for a parent is. The need is mutual from both sides. Majorly, a child without a parental guidance majorly ends up in a bad space. A survey by an NGO BHOOMI, Pune, recorded that 54% orphans are forced to earn money by doing manual labour even when they are under someone’s care. 85% children who show behavioural disorders do not have parents. Almost, 80% youth in prisons grew up without parents.³

The two problems being discussed here have one solution: Adoption. Allowing adoption to the people who really desire to adopt and need kids in their life will help the children who are compelled to spend their lives on footpaths, begging and stealing for their livelihood, and secure a better life for them.

LAW AND ADOPTION

Adoption is the act of establishing a person as parent to one who is not in fact or in law his child. Thus, adoption signifies the means by which a status or legal relationship of parent and child between persons who are not so related by nature is established or created.⁴ Adoption has been defined in Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 as follows:

Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities that are attached to the relationship.

The ‘Hindu Adoption and Maintenance Act’ regulates adoption for Hindus. It treats adopted child as being equivalent to a natural born child. It regulates the adoption for Hindu, Sikh,

² <https://www.soschildrensvillages.com>, last accessed on 07/02/17.

³ http://manupandgo.org/get-involved/destinations-and-trip-schedule/ethiopia-mission-trip-2016/?gclid=CjwKEAiAoOvEBRDD25uyu9Lg9ycSJAD0cnByOwmML_MIoylx5uIcTwq93-j3VzdpCPeSoUjkyLenwxoCuhPw_wcB, last accessed on 10/02/17.

⁴ ASHA BAJPEI, *CHILD RIGHTS IN INDIA*, Oxford University Press (2nd edition, 2004) at Pg 33.

Buddhist and Jain. Hence, a practicing Hindu male/female can adopt with the following requisites laid down in Section 6 of Hindu Adoption and Maintenance Act.

- i. The person adopting has the capacity, and also the right, to take in adoption;
- ii. The person giving in adoption has the capacity to do so;
- iii. The person adopted is capable of being taken in adoption; and
- iv. The adoption is made in compliance with the other mentioned in this chapter.

Section 7 states any male Hindu of sound mind and is age of majority can adopt, provided that if he is married and has a wife living, he has to take the consent of the wife unless his wife has renounced the world or ceased to be Hindu.

Section 8 states that, any female Hindu of sound mind and of age of majority who is not married and if married ,whose husband is dead or has completely denounced the world or ceased to be a Hindu or has been declared by court to be unsound mind, has the capacity to adopt a child.

Section 10 states that a person may be adopted if:

- i. He/she is a Hindu
- ii. He/she has not already been adopted
- iii. He/she has not been married
- iv. He/she has not completed the age of fifteen years.

Section 11 provides other requisites for adoption

- i. If the adoption is of a son, the adoptive parents should not have a Hindu son, son's son or son's son's son.
- ii. If the adoption is of a daughter, the adoptive parents should not have a Hindu daughter or son's daughter.
- iii. If the adoption is by a female and the person to be adopted is male, the adoptive mother is at least twenty one years older than the person to be adopted.
- iv. If the adoption is by a male and the person to be adopted is female, the adoptive father is at least twenty-one years older than the person to be adopted.
- v. An adopted child cannot be adopted again.

Personal law of Muslims, Christians, Parsis and Jews does not recognise complete adoption. As non-Hindus do not have an enabling law to adopt a child legally, those desirous of adopting a child can only take the child in 'guardianship' under the provisions of The

Guardian and Wards Act, 1890. This does not provide to the child the same status as a child born biologically to the family. This Act confers only a guardian-ward relationship. This legal guardian-ward relationship exists until the child completes 21 years of age. Foreigners who seek to adopt an Indian Child may do so under this Act to assume legal Guardianship of the child, after giving an assurance to the Court that they would legally adopt the child as per the laws of their country, within two years after the arrival of the child in their country.

Considering all the aspects mentioned above laudable attempt were undertaken by the legislature by the stipulations, which have been made in Chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2015. This enactment shows that the legislature may be found to have accepted the concept of secular adoption whereby without any reference to the community or religious persuasions of the parents or the child concerned, a right appears to have been granted to all citizens to adopt and all children to be adopted. The Act introduced an expression “child in need of care and protection” and it has been defined in Section 2(d) of the Act. This definition covers what is meant by orphan, abandoned and surrendered children.

Central Adoption Resource Authority (CARA) is a statutory body under the Ministry of Women & Child Development, Government of India. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated/ recognised adoption agencies.⁵ A child can only be adopted from Specialised Adoption Agencies (SAAs) recognised by State Governments. People adopting from nursing homes, hospitals, maternity home, unauthorised institution or individual are not considered valid.⁶

THE LGBT DILEMMA

‘Adoption has the dimension of connection — not only to your own tribe, but beyond, widening the scope of what constitutes love, ties and family. It is a larger embrace. By adopting, we stretch past our immediate circles and, by reaching out, find an unexpected sense of belonging with others.’

Isabella Rossellin

Even though the law states univocally that the right of adoption is bestowed on each and every citizen. But is that the truth? Is there a section of society which is barred from this basic right which is directly correlated with the Fundamental Rights guaranteed by Article 14 and Article 21 of the Constitution? We can see the hypocrisy of Indian society when we see that those people who do not conform to societal norms are considered as others, someone who does not belong to this society and does not have rights to have a normal family and societal

⁵ <http://www.cara.nic.in/>, last accessed on 18/02/17.

⁶ Ibid.

ties, the LGBT (lesbian, gay, bisexual and transgender) community. It is an anomaly to ask adoption rights for them when they are not accepted in the society themselves. They are not allowed to have a legal relationship. They are not allowed to marry and subsequently adopt as a couple. But the question is why not?

Various studies have proved that they are equally and at times more loving and caring. The children brought up by them are strong headed and they are built up with such a mentality from grassroots that they become better rather ideal human being. Society holds the view that a person or a couple from LGBT community cannot give that care and affection to the child that a mother and father can give. Gay parenting runs fundamentally counter to religious views. Hence it would undermine the key role religion plays as moral bedrock in society. Whereas the truth is that they are more committed and motivated towards parenting because they chose to have children unlike many straight couples who stumble into parenthood by accident.

LGBT community is not an alien to the society at present as they were 150 years ago in the country. Section 377 of the Indian Penal Code 1860 which is titled as unnatural offences states that same sex intercourse as against the order of the nature is punishable under the Code. This section does not even let the accused take the defence of consent. The bare provision did not read like that but the interpretation given by the executive and judiciary, in compliance with the societal norms made it an offence to have same sex relations.

In the landmark judgment of *Navtej Singh Johar and Ors v. Union of India*⁷, this particular interpretation was held to be unconstitutional. Presently, Section 377 cannot be read in a manner so as to criminalise consensual sex between any two individuals. The most celebrated landmark judgment of the present time has laid a path for the rights of people from LGBT community. It is not the space to stop, as what has been given to them is not enough. It is just the beginning of an era of equality and justice, and rights like marriage and adoption shall follow. The problem which arises after the recent amendment to the law is that the right to do consensual sex in a private place is not enough to deliver them the apology which Hon'ble Justice Indu Malhotra stated in her judgment in the 377 judgment "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism they have suffered." Therefore, only when other rights like having a happy family, right to marriage, to adopt children, to enrol as a couple at all eligible places are provided that their Right to Life shall fulfil.

SOCIETAL PERSPECTIVE

The change in law is always a product of change in society. In our society, not one gets ostracised for being straight and heterosexual life is promoted and praised. Homosexuality have always been labelled as sinful and immoral.. Indeed the Courts always lean towards the morality of the majority, but in a matter like this where the Right to live a dignified life is in

⁷ WP (Crl.) No. 76/2016.

question, the answer cannot be the morality of the society. It has to be based on Constitutional principles and the law. For bringing the LGBT community in par with others, we need strict amendments to the law. Though law can ensure the rights of the LGBT community but the task of combating stereotypes and prejudices relating to same sex marriages still need to be handled. The biggest difficulty in providing rights of family to the LGBT community is not the irrational laws that are present but the mindset of the society which does not accept it. Before everything else, the problem begins at home. The process of coming out to family members is stressful for LGBT people. Following the disclosure to their families about their sexual orientation, they are victimised by their families and are subjected to verbal abuse and even physical attacks. The basic need is that the family members accept this tendency as normal and encourage their children to live a normal life. The society at large needs to consider this as a natural activity and not a prohibition. The prejudices in one's mind can be tackled only by him.

While we compare the laws and the facilities provided in foreign countries, many of the foreign countries have progressed a lot through legalising same sex marriages and giving them adoption rights. The progressive laws made by the government definitely compel the society to change their perspective and accept sexual orientation of every human being as a part of natural process. There are 25 countries which have legalised same sex marriages and most of them recognise adoption by a LGBT couple valid. Norway allowed the gay couples to enter in civil union back in 1993 which reflects the progressive approach of the government towards the sensitive issue of rights of LGBT community. The bill enacted in January 2009 granted the right to marry and adopt children as well. The list includes the most developed countries and a few developing ones also such as France, Netherlands, Denmark, etc. While safeguarding the rights of the people of country, the law makers should take guidance from such progressive laws of developed countries which can be implemented in accordance to the need of Indian society.

CRITICAL ANALYSIS

While discussing and emphasizing on the need of marriage and adoption rights to LGBT couples, the flip side of this right is the condition of the children who will be adopted by such couples. Are we ready to expose the small children to the trauma of 'why there family is different from the other normal families'? Will the child be able to accept that he has only fathers or only mothers? The answer cannot be affirmative considering the present mentality of the society. As per Section 13 of the Hindu Adoption and Maintenance Act, 1956, the best interest of the child shall be the biggest consideration while any adoption is being considered. Keeping that in mind, the adoption cannot be granted to LGBT couples as the welfare of the child cannot be ensured in such conditions. There are bigger chances that those children will be ostracized and always feel left out. Firstly, they might not like or fit into their own family's system. Secondly, even if they are brought up in a manner that they understand their identity and accept it, the people around them might make them feel like an outsider and such behaviour can lead to a trauma and depression for the child. The law of the nature is such that

there are set gender roles. For a growing child, there is a need for a mother and father, the need cannot be effectively addressed by a lesbian/gay couple. The views are relating to the present Indian society. Therefore, it is strongly recommended that the country is not presently ready for such a law.

CONCLUSION

Considering both the views, the authors are of such view that the perspective of the society can be no reason to infringe a human's Right to Life, to live with dignity, Right to Equality and the freedom to live their life in a manner they want. The supposed trauma to the child can be tackled if the child is brought up with such a mindset which encourages him to realise that sexuality is not an abnormal tendency or a problem, then it would not be difficult to eliminate the stereotype or prejudice in the mind of the child. The society has to play a major role here; nonetheless, the role of the law cannot be underestimated. It is an urgent need to amend the laws of the country in a manner so as to facilitate basic rights like marriage and adoption to LGBT Community. Even if the personal laws cannot include provisions in this regard, but the legislature should bring new secular laws to facilitate such a change in the society.