
LEGAL FRAMEWORK FOR SAME-SEX COUPLE'S ACCEPTABILITY FOR MARRIAGE AND ADOPTION IN INDIA

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ABSTRACT

The research paper, as indicated by its title, focuses on the concept of marriage and adoption within the context of same-sex couples. With the recent verdict of the Supreme court it has been made clear by the judiciary that the non heterosexual side of the population would still lack its recognition when it comes to the formation of their union in marriage, their status of eligibility on the benefits that are expected to arise out of this union and their capability and mental capacity to form a family for which their rights to adopt comes into place. While many of the legislations including the Constitution of India have been framed and drafted drawing inspiration from the laws around the world, the literature review conducted across seven articles provides valuable insights into the perspectives of same-sex couples marriage and them adopting children. These articles encompass a range of international jurisdictions, including the USA, Taiwan, California, Portugal, and others. Through the analysis of these articles, we gain a deeper understanding of the advantages and disadvantages associated with the adoption of different legislation. Additionally, we explore how these insights can be applied to potentially amend our own country's legislation regarding same-sex adoption and shift societal attitudes towards this issue. Furthermore, the review delves into the examination of whether same-sex couples raising adopted children have any adverse psychological effects on the child's development. It also raises questions about whether denying adoptive rights to same-sex couples might constitute a violation of human rights. Lastly, the review considers the evolution of adoption legislation over time and highlights conflicts that have arisen within various jurisdictions. As the court disagrees to the need to recognize same marriage and their stand as parents, the chosen research focus for this study centers on students, as ontology suggests that any laws and regulations created should align with the preferences of its citizens and resonate with their emotions and interests. In part, refusing to acknowledge the right to marry and establish a family can be seen as a denial of the right to life. This investigation aims to gauge the extent of acceptance of the aforementioned idea.

1. Introduction

Legal structure concerning adoption in India is overseen by the Juvenile Justice (Care and Protection of Children) Act, 2015, and the Guidelines Governing Adoption of Children, 2015. However, the existing legal framework in India neither explicitly permits nor prohibits homosexual couples from adopting children. The homosexual couples are denied the rights of adoptions due to the basis of various stereotypical notions and believes such as the minors raised by a gay couple would have negative impacts on their psychological aspect and would affect their well-being. The adoption laws in India exclusively recognize heterosexual couples as eligible for adoption, as the Juvenile Justice (Care and Protection of Children) Act, 2015 defines a "couple" as a "married man and woman" who have cohabited for at least two years¹. The marriage between a heterosexual and transgender couple are not recognized in India and therefor these couples would be ruled out in the category of being an eligible couple to adopt. There also exists a situation where despite the juvenile justice act guarantees the rights to adopt for a single woman, the same act denies the rights of adoption to a single man. The Indian constitution drew inspiration from various constitutions worldwide during its formulation. To illustrate, concepts such as the preamble, fundamental rights, judicial review, and equal protection under the law were influenced by the United States Constitution. The idea of the rule of law and the legislative process were borrowed from the British constitution. Additionally, the preamble's principles of a republic, liberty, equality, and fraternity were inspired by the French constitution.

Therefore, when examining the global recognition of marriages and adoption rights for homosexual couples, India could consider amending its existing adoption laws and legalizing same-sex unions by studying the approaches adopted by other countries. The situation has been even worse after covid where it was found out that almost 19 lakh students lost their children have lost their parents and primary caregivers. As per reports released by ministry of women and child development 1, 53, 827 children have registered on the portal for adoption including 1, 42, and 949 with single parent, 492 abandoned children and 10,386 children who have lost both their parents². Despite the adoption situations in India, there has been a fall in the the rates of adoption as there exists high rates of illegality and trafficking. Even with the support of the

¹ Michelle brady, Belinda Hewitt, Marriage has changed dramatically throughout the history but gender inequalities remain same,(nov 15,2018)

² Hindu bureau, lancet study on orphanhood in India due to COVID-19” sopihisticated trickery”, says govt,(march 02,2022)

CARA act only 3,559 children were placed for adoptions with families living in India and abroad in 2020 – 21. These statistics indicate that there are significant gaps and deficiencies within India's current adoption legal framework. It underscores the need for reforms and a more permissive approach to potentially improve the quality of life for children who have not yet found permanent placements.

2. Literature review

According to Waxman, Henry A (Quick hits : sex in the news,2008)The periodical covers the views of the citizens of various states of the United States of America and how the public opinion had an influence on the various amendments on the existing legal framework for gay marriage and adoptions and additions to the same. The regulations concerning gay adoption vary across states³.

In the article by Gate Jorge, Fontaine, Anne Marie (Anticipation of the sexual and gender development of children adopted by same sex couples,2008) it was observed by the author that Portugal lags behind its European counterparts in terms of comfort levels with having homosexual neighbors and the extent of non-heterosexual friendships. This skepticism is also evident in the legal framework of Portugal. While same-sex marriage has been acknowledged, the right of lesbian and gay couples to be considered suitable for adopting children, a privilege granted to heterosexual married couples, was explicitly excluded⁴.

According to Takacs, Szalma and Bartus (Social attitude toward adoption by same-sex couples in Europe,2016),it has been discussed about the social attitudes towards same-sex adoption across 28 European countries, this study identifies individual and country-level factors influencing the acceptance or rejection of such adoptions. Through ordered logistic regressions, the study investigates the impact of various individual and country-level traits on agreement with the statement, "Homosexual couples should be able to adopt children" ⁵. The research reveals substantial links between attitudes towards same-sex adoption and factors such as the presence of country-level legislation permitting such adoptions, as well as individual beliefs related to traditional family norms, attitudes towards homosexuality, and preferences for neighbors' sexual orientation.

³ Waxman, Henry A , Encouraging signs in gay marriage debate,[volume 42 issue 6],[page 15],[(June 2008)

⁴ Gate Jorge, Fontaine , Anne Marie, anticipation of the sexual and gender development of children adopted by same sex couples,vol 48, issue 3, [p 244-253],(June 2013)

⁵ Takács, J., Szalma, I. & Bartus, Social attitude toward adoption by same sex couples in Europe

According to Mark Philip Strasser (*Legally wed: same sex marriage and the constitution*, 1997), the book talks about why there has been a denial and aversion in to the acceptance of same-sex marriage. One of the primary reasons to this denial has been formation of a family and reproduction. The author goes on further to say that the same sex couple does raise children whether they are born via surrogacy, adoption or of previous marriages. The states aversion into identifying or giving legal recognition to same-sex marriage undermines the efforts of state to formulate provisions to give recognition to children belonging to same sex marriage ⁶.

According to Nichele marks (*In the courts; same sex couple adoption*, 2012) it has been discussed by the author that there where around 500,000 children that were residing in foster care out of which roughly 102,000 where waiting to be adopted and placed in a foster home. For those children it is the jurisdiction which would decide the criteria for adoption and enlist the eligible adoptive parents ⁷.

In the article (*Barring married same sex couple from joint adoption: comparative perspective and case of Taiwan*, 2020) , the author Holing Lau introduces the paper by providing an insight into the issue of Taiwan where the two couples Ms. Liu and Ms. Tsai who married after eight years of relationship had to deal with a dilemma when Liu's brother and sister-in-law died in a car crash living with them their four year old. This situation led to the question of whether. Events like this have led to the amendment of the legislations making Taiwan the first country in Asia to legalize same sex marriage and adoption. The article had further dealt with the questions of whether same sex couple be treated any different from the rest of the couples and what Taiwan can learn from the foreign judicial legislation ⁸.

3. Research methodology

This research employs both doctrinal and quantitative research methodologies.

Doctrinal research is a meticulous form of legal research that entails an exhaustive investigation into the underlying legal principles and concepts that govern the legal landscape. The term "doctrine" connotes a guiding principle or tenet, thus making doctrinal legal research a comprehensive analysis of such principles and tenets from diverse sources like cases, precedents, statutes, and other legal documents.. The primary objective of doctrinal research is

⁶ Mark Philip Strasser, *Legally wed : same sex marriage and the constitution*,[p 4-5],(1997)

⁷ Nichele Marks, *Same-Sex Couple Adoption*, 32 CHILD. LEGAL Rts. J. 78 (2012)

⁸ Holning Lau, *Barring Married Same-Sex Couple from Joint Adoption: Comparative Perspectives and the Case of Taiwan*, 15 NTU L. REV. 177 (2020).

to interpret and evaluate these legal sources to reach valid conclusions regarding the application of legal principles in specific situations. By engaging in this type of research, legal experts can gain a better understanding of the legal framework that governs their field, allowing them to make informed decisions and provide accurate legal advice.

The research methodology also incorporates quantitative research, specifically causal-comparative research. Causal-comparative research is employed to establish causal links between two variables, one being the independent variable and the other the dependent variable. In this context, the independent variable pertains to the denial of adoption rights to heterosexual couples, while the dependent variable pertains to the recognition of same-sex couples. This analysis is conducted within the framework of the Indian constitution, which currently permits adoption by married couples and single females, with marriage defined as a contract between a man and a woman.

4. Hypothesis

This paper operates under the assumption that there are significant gaps in current adoption laws. The law currently grants single mothers the right to adopt while denying the same right to single men, raising questions as to the validity of Article 21. Additionally, the definition of a married couple in India's constitution is limited to a union between a man and a woman, preventing same-sex couples from legally adopting and starting a family. Given the challenges that same-sex couples face in reproduction and the growing number of children without homes, it is essential to consider liberalizing these laws.

5. History and tracing back the homosexuality in India

It has been upheld even by the Supreme court that the concept of Homosexuality is not an Urban concept and that it has been existing within our society for decades.⁹ The scriptures that exist in the the infamous Khajuraho temple that has been established by the Chandela clan between 950 AD and 1050 AD has evidently documented same - sex marriages and relationships. The sculptures depicts the males offering their sexual organs to the other males, where by we could conclude that the concept of homosexuality has been long accepted even in Hindu mythology. The sculptures depicts men, women and other third genders. The temples

⁹ Aanandita Aneja, "IN WITH THE NEW" - *Comprehending the Legality of Same-Sex Marriages in India*, INT'L J.L. MGMT. & HUMAN. 1305 (2023).

such as the sun temple ¹⁰, Tamjore and Puri that have been in existence from the thirteenth century have also evidently pictured the concept of homosexuality and Kama sutra through its sculptures.

The sexual behaviour between different genders of mankind has been discussed in various literature texts such as Manu Smriti, Rigveda Arthashastra, Kama sutra, Upanishads and Puranas. Out of these Rigveda considered as one of the greatest texts of all time has elaborated and discussed the concept of “Vikriti Evam Prakirti” which means that what appears to be strange is entirely natural. Even in Mahabharata, one of the most renowned Hindu scriptures speaks about the concept of Shikandini who was being born as a woman and was dismissed from the realm because of the reason he himself identified as a man and in the end went on to marry a woman.

6. Current state of same sex marriage and adoptions in India

” Being homosexual is no more abnormal than being left handed” ¹¹ these words of Abhijit Naskar stands as a denotation to all those who are dead and alive and that have faced pure injustice for merely identifying themselves and living a life they wish to live. On 17th October, a highly anticipated landmark case was decided by a 5-judge bench. However, the verdict delivered was not what the public had hoped for¹². Rather than creating a revolutionary legislation that would bring recognition and acceptance to the queer community, the judgment seemed to reinforce the taboos and myths that had long been ingrained in our society. Despite this, the Supreme Court made significant acknowledgments in its ruling. While the court was of the opinion that the institution was not meant to stand and support the notions and preferences of the majority societal norms, the court would only stand with laws and rights that have been prescribed in the constitution of our country. If we go by that ideology then as per Article 21 guarantees every citizen of our country their right to choose their spouse and marry whom they want to, but then for centuries these rights were denied to the members of LGBTQ community.

For the longest time for the social institutions to exist homosexuality was considered as a mental illness and this notion that has been passed down for generations was the sole reason

¹⁰ Aanandita Aneja, *"IN WITH THE NEW" - Comprehending the Legality of Same-Sex Marriages in India*, INT'L J.L. MGMT. & HUMAN. 1305 (2023).

¹¹ Abhijit Naskar, *Either civilised or Phobic : A treatise on homosexuality*

¹² Supriya Chakroborty & Anr vs Union of India, 1011 2022

for the abuse and discriminations they faced and the reason why they were presumed to be unethical, misdemeanor and a shame to the mankind. When a suit was filed to claim their rights for recognition and marriage these prevailing notion where perhaps quoted to prove their disability to enter into the institution of marriage and to receive the benefits arising out of the same and also judging their capabilities of being an efficient parent and their role in the upbringing of the child. It recognized that queerness was not restricted to the urban elite, and that homosexuality was not an urban concept limited to the upper classes of society. The court also affirmed that choosing a life partner is an essential aspect of determining one's path in life. The decision at hand is regarded by many as the most crucial one they will ever make. It pertains to their fundamental right to life and liberty as enshrined under Article 21¹³ of the Constitution of India. During the proceedings, the Chief Justice of India, Dr D Y Chandrachud, one of the five judges on the bench, stated that it is challenging for courts to intervene in a matter that lacks a statute. This implies that without a clear legal framework, the judicial system may find it challenging to decide on the issue. Throughout the judgment, he made various other notable remarks, such as the fact that he agreed that all persons, including queer persons, have the right to judge the moral quality of their lives and that material benefits and services flowing to heterosexual couples and denied to queer couples will be a violation of their fundamental right. When it came to adoptions, the Chief Justice stood firm on his view of the fact that the law cannot assume that only heterosexual couples be good parents and that the same would amount to discrimination. So the adoption regulations are violative of the constitution for discrimination against queer couples.

In the landmark case of *Supriya Chakraborty & Anr vs Union of India*, Justice Dr D Y Chandrachud delivered a comprehensive ruling that tackled a wide range of complex and challenging issues. One of the key issues addressed was the persistent societal violence and discrimination faced by the queer community in India. The ruling also delved into the cultural alienation of the concept of queerness from traditional Indian society and culture, and the need for greater awareness and understanding of the diverse range of sexual orientations and gender identities.

Another critical issue discussed in the ruling was the institution of marriage, which was subjected to a thorough analysis in the context of the right to enter into a union. Justice Chandrachud examined the various legal and social aspects of marriage, including its historical

¹³ Constitution of India, Part III, Acts of Parliament, 1949

evolution, social significance, and the rights and obligations of spouses. The ruling acknowledged the need for reform and modernization of the institution of marriage to ensure that it reflects the changing social and cultural realities of contemporary India.

Overall, the ruling in the case of *Supriya Chakraborty & Anr vs Union of India* was a significant step forward in the ongoing struggle for LGBTQ+ rights and equality in India. The comprehensive and nuanced analysis of the complex issues involved highlighted the need for greater awareness, understanding, and acceptance of diverse sexual orientations and gender identities in Indian society.

The judiciary also agreed to the fact that decriminalization made no much difference within the Indian society. It was in the *Navej Singh Johar vs Union of India*, that the court declared section 377 of IPC¹⁴ which states that “ carnal intercourse against the order of nature “ as unconstitutional. This particular section in the provision was considered conflicting the views of the current generation and that they upheld the Victorian morality. This section was many a times used by the executive and the state to humiliate and to scrutinize the dignity of the people from the queer community. Even with the amendment and removal of the aforementioned section the people of the community still to this date face backlash and hatred of all kinds, evident and non evident from the society. Despite the Court recognizing that sexual orientation is a fundamental and inborn trait of individuals, the queer community continues to face a range of forms of oppression, both overt and subtle. This oppression stems from their inability to openly express their gender identity and sexuality without fear of negative repercussions. For instance, there have been several documented cases where members of the queer community have been subjected to violent attacks for publicly displaying affection towards their partners.

This fear of violence and discrimination has a significant impact on the community's economic, social, and political status, hindering their ability to live with dignity and respect ¹⁵. A woman when eloped with another woman was beaten, stripped and paraded around the village within a blackened face and a garland of shoes around her neck. Queer individuals who are from socio-economically marginalized backgrounds are at an even greater risk of being subject to harassment. When it comes to services provided by the state or other institutions such as the washrooms, ticket counters, seats that are reserved in the transportations, security check points they all are unanimously confined to just two genders and in some extent to the disabled and

¹⁴ Indian Penal Code, sec 377, acts of parliament, 1949(India)

¹⁵ Maya Sharma, *Loving Women: Being Lesbian in Underprivileged India* (2nd edn, Yoda Press 2021)

never to that group of the society that does not considers them confined to the walls of gender binary.

Even when these population shows the courage to step out of their comfort zone and makes progress with their transition, they are forced to feel inferior and not included. Taking the example of trans women across the country, even though through deliberate and rigorous thoughts and process they have come out of the binary walls and identify themselves as women, many a times they are considered only as a man and would be made to stand alongside other me, being mainly evident in the above mentioned senerios of offices, transportations and other waiting lines.

The field of education and employment are no less inferior when it comes to being evidence and examples of such discrimination. Many a times due to such discriminatory attitude put forward by the officials or people who holds the chair their, the members of queer community are often forced to take a back seat and more often forced to quit their profession or the journey of pursuing their education. In many professional settings, queer individuals face a range of discriminatory practices, including being denied job opportunities, excluded from office events, and passed over for promotions. Shockingly, a recent study by a human rights organization found that just 12% of the 3,619 transgender individuals surveyed were employed, with half earning less than Rs. 5,000 per month. This underscores the pressing need for greater equality and inclusion across all facets of society ¹⁶. Despite common misconceptions, the high rate of unemployment in the transgender community is not due to a lack of desire to work or a preference for begging. Rather, their gender nonconformity often leads to discrimination from potential employers. A study by the National Human Rights Commission found that 75% of transgender individuals in the National Capital Region and 82% in Uttar Pradesh never completed high school. Additionally, obtaining proper identification documents can be a significant obstacle for members of this community, limiting their access to available opportunities.

While in the Navtej case, the petitioners appealed for the space to navigate their position in the public settings and for the state not to interfere, in this particular scenario the community stands in a different footing where they want the state to recognize their sexuality and union in

¹⁶ Shreya Raman, 'Denied Visibility in Official Data, Millions of Transgender Indians Cant Access Benefits' (India Spend, 11 June 2021)

marriage and by that wants the state to interfere. Marriage is a meaningful institution that has been recognized and defined by the state and the law. The legal system has established a comprehensive definition of what constitutes a valid marriage, which is reflected in numerous legislative acts such as the Hindu Marriage Act, the Christian Marriage Act, the Muslim Marriage Act, and the Special Marriage Act. These laws outline the rights and responsibilities of married individuals and provide a framework for resolving disputes and addressing violations of the institution. The importance of marriage in society cannot be overstated. It serves as a fundamental building block for the continued stability and prosperity of communities. By recognizing this significant institution, the state grants both tangible and intangible benefits to those who enter into a union. These benefits include legal recognition and protection, tax benefits, social security benefits, and access to healthcare and other services.

If we look back into the History marriage was never a regulated institution supervised by the state. But with the increase in violences and other significant reasons, the state considered its intervention in such union as a need of the hour. While the court recognizes the marriage between a heterosexual couple, it provides provisions for their protection such as protection against domestic violence faced by women in marital house which is covered under the domestic violence act of 2005, legal dissolution of marriage, the statute to provide maintenance by both husband and wife and many more.

State analyses the perspective of sexual behaviour of a marriage and has provided provisions to regulate this behaviour. This statement can be defended by taking the shadow of the conditions for granting divorce, which includes impotency which is a man or a women disability to engage in sexual activities, which in turn would hurdle the couples procreation process.

Observing the traditions and practices from the past to the future, we could all agree that the practice and views upon what an ideal marriage is let it be removing disparities among inter caste, inter religion, family planning and much more. The only element that would stand constant would be the the loyalty and commitment expected. Even with these existing notions, the judiciary and the courts fails to provide recognition to same sex marriages.

7. Disparity within the legal framework

In the year 2019 the parliament of India had enacted the Transgender Persons act to safeguard their rights and welfare. The act provides frameworks and guidelines for recognition of their

identity, right to residence, right to education, social security and health. When a dispute arose for the constitutional validity of this particular act in the course of hearing, the solicitor general was of the opinion this particular act was formulated with the intention to prohibit the various forms of discrimination faced by the members of the transgender community.

Through this act we could get a better understanding of the difference between a gender which is different from sex of a person which is assigned to one during his or her birth. The gender of a person is not same as their sexuality. The sex of a person is based on their reproductive organs that they are born with, the gender of a person is what they identify themselves and within an the sexual orientation of a person is their attraction to what they feel towards others.

The section 3 of the transgenders persons act talks states that no person or establishment shall put forward any discriminatory practice against the same transgender community and its people. The term establishment refers to any statutory body or authority established by the central or state act, or any body owned or governed by the central or state government. A flaw to this act is that violation of section 3 of this act does not attract any penalty, which does not encourage the people to refrain from doing acts of discrimination. Every act that govern the institution of marriage in India are governed by the sex of a person and has provided definitions between a man and women, husband and wife or bride and a bridegroom. Even laws that are follow up to marriage such as the domestic violence act, the dowry prohibition act or Section 498A of IPC seeks to address only the heterosexual couples and defines the act between a man and a women.

8. Approval for same - sex couples as parents

If we look at the existing laws such as Juvenile Justice act, if we read through the various sections we could understand how it caters for the basic needs of those homeless children who either lost their parents or where abandoned by their guardians. The act when read along with regulation 5 of the Central Adoption Resource Authority provides the concept for “prospective adoptive parents”. the regulation overall speaks about how the prospective adoptive parents must be mentally, physically and emotionally fit with a financial stability to look after the children. These parents must not be suffering from any life threatening diseases and that they could adopt a child irrespective of their marital status and whether they have a biological child or not. The act also talks about the necessity of consent of both the partners while moving forward for adoption and that while a single female is given the right to adopt, a single male on the other hand is denied with the same right.

Even though this regulation does not expressly denies the right of an unmarried couple to adopt a child, if we take into consideration both the regulations of 5(2)(a) and 5(3) we could come into the conclusion that only a married couple with a minimum of 2 years stable marriage can be considered as eligible prospective adoptive parents. Regulation 5(3) permits only persons in individual capacity to adopt and not jointly as an unmarried couple. While the CARA assumes that all marriages that have achieves 2 years of stability could be considered as a successful relationship and that only these families would be able to provide a living for a child is absurd. In a circumstance where the Constitution of India have recognized and guarantees the right to different form of association, the authorities must refrain from providing recognition to only a single form of a stable household and with the assumption that only a heterosexual couple would be able to provide a stable living for an adopted child.

Regulation 5(3) even though it gives the perception of neutrality, it definitely does discriminate a section of the society which are the non - heterosexual couples whom have not been recognized by the state. If we give a close read of the regulations put forward by CARA, it states that a non heterosexual or a queer couple can only adopt on an individual capacity and not in a union of marriage as the state has not provided a legal recognition to them.

9. Conclusion

As per the above done readings and findings, we could conclude by saying that the concept of queerness is not something which is alien to the ancient culture of India or that could be considered as an urban concept. Marriage is an evolving concept and there must not exist a pre determined notion that the union between a man and a women would only be considered as a legally binding marriage. This definition of the parties involved in marriage holds great importance because, by giving a legal recognition to this union, the state also grants various benefits to the partners. Even though articles 245 and 246 while read along side list III of the seventh schedule, the act has delegated the power to the parliament and respective state legislatures to frame laws to regulate queer marriages, but while observing the current scenario it is evident that both these institutions makes no such efforts into drafting any statues of this nature which in turn denies the non heterosexual couples the benefits which arise out of marriage.

One such important benefit is the right to adopt children. Even though there exists laws such as the Juvenile Justice act and CARA, these legislation only promotes adoption by a married couple and a single women. Even though the act provides provisions for an individual to adopt,

while reading the sections closely we could draw the conclusion that a married couple who have achieved two years of stable marriage would only be considered as eligible parents to adopt. The CARA circular disproportionately impacts the queer community and is violative of Article 15. In a recent judgment Justice Kaul stated that the moment should be considered as an opportunity to remedy the historical injustice and discrimination and thus governance needed to grant rights to such union or marriages and that non - heterosexual unions and heterosexual unions must be seen as both sides of the same coin and the court was of the opinion that law cannot assume that only heterosexual couples can be good parents and that this would amount to discrimination. So the adoption regulations are considered as violative of the constitution for discrimination against queer couples.