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THE ADOPTION RIGHTS OF LGBTQ COMMUNITY

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Abstract

In Our Country India, community of LGBTQ which stands for Lesbian, Gay, Bisexual, Transgender, Queer is treated as a community of sexual minority, which faces a harsh backlash from society because of getting no proper recognition in law . And because of there no proper identity in legal terms and having less legal rights they are not able to enjoy parenthood which is one of the fundamental rights but they are fail to get their parental right with the process of surrogacy or adoption as well. The normal couple having heterosexuality having all the Right of adoption and surrogacy similarly LGBTQ get equal right of this so that they too enlarge their family by having children and enjoy their life too with them.

There are various laws in India which is related to adoption like Hindu Adoption andMaintenance Act and Juvenile Justice (Care and Protection of children) Act but these laws are not applicable to LGBTQ community, the laws are only exercised by a couple of having opposite sexuality. These are based on gender having dual understanding, which breachesFundamental Right mentioned under Article 14, 15 and 21 of our Indian Constitution. This paper go through some legal that framed adoption rights of LGBTQ community in India.The paper shall discuss the case of Navtej Singh Johar that legalise the relation between same sex couple succeeding judgements that enlarge the freedom of equality of the LGBTQ community.

Keywords: LGBTQ, adoption, homosexuality, heterosexuality.

Introduction

An adoption is a legal or social process of giving someone your name and formed a legal relationship between a child and parent.

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[1]Under section 2 (2) of the Juvenile Justice (Care and Protection of Children) Act ,2015 adoption defines asthe process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child; The process of adoption mark an great effect or impression on child's life. But the key point or the motive behind the adoption is just that the child will get bright future, happiness just that of other children. It is universally accepted that the process of adoption is done only for the betterment for child.

[2]According to Juvenile Justice (Care and Protection of Children act) 2015 sec 2 (9) which states that "best interest of child" means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development; A good environment especially a family environment is important for the good upbringing of child where child get everything a normal child want like Good education, care specially love. A family is not just a word is a place where people connected to each other by emotions, blood , marriage and love But these of mother, father, or a family can only enjoy by a heterosexual couple But not by the couple having same sexuality as there is no guidelines or arrangements under the law for the adoption of process LGBTQ community.

In 2018, The Supreme Court of India in case named [3]**Navtej Singh Johorv. Union OfIndia** give legal status to homosexuality by making amendment in a certain portion of section 377 that makes adults having privatelyconsensualsex unlawful however the LGBTQ topic was not entertain by the court. The LGBTQ community has been ran a long battle to get basic civil rights of adoption and marriage like other couples. The right of adoption to LGBTQ is become more demanding by the community as everyone should or have a right to have its own family. Several research also states that the homosexual parents can upbring their children same as heterosexual couple. Thus, denying LGBTQ from adopting a child will not count as work done for the best interest of the child. Giving the LGBTQ community an adoption right will also make positive impact on number of children adopted per year. The

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sole purpose of this paper is to talk about the or discuss about The importance or need of giving adoption rights to the LGBTQ community in our nation India.[2]

Objectives

1. To analyse the concept of adoption.

2. To explore different laws on adoption right of LGBTQ

3. To analyse the judicial aspects towards the LGBTQ community and their rights

4. To discuss how constitution protect the LGBTQ a minority sex community in India.

Indian Laws and Barrier of LGBTQ Rights on Adoption

In India the process of adoption is mainly done under two laws the Juvenile Justice (Care and Protection of Children) Act of ,2015 and the Hindu Adoption and Maintenance act of , 1956.

- **Hindu Adoption and Maintenance of Act, of 1956:** Section 7[4]and 8[5] talks about the about the adoption criteria of Hindu female and male. The section 7[6]and 8 of HAMAinferred that the act does not acknowledge adoption by same sec couple or LGBTQ community. The act also remain silent on the adoption right of third gendermoreover it is somehow clear from the summary of the Act that gender is recognize only in paired terms here. However, HAMA allows LGBTQ community to adopt but as a single parent. But single parent has go through various legal aspects. A single parent who adopt a child have legal responsibility to take of every single need of child and this restrict the other partner of the same sex relation to have any legal right on child which is not fair enough. Therefore, it is good to say that the provision related to adoption in HAMA is completely discriminatory and violates the Of LGBTQ community.[3]
- **The Juvenile Justice(Care and Protection of Children) Act, 2015:** section 58[6] of this act provides right of adoption to any person without discriminating on the ground

[2]Juvenile Justice (Care and Protection of Children) Act, 2015, S 2(2)
[2]Juvenile Justice (Care and Protection of Children) Act, 2015, S 2(9)
[3]2018) 1 SCC 791
[4]The Hindu Adoption and Maintenance Act 1956, S. 7
[5]The Hindu Adoption and Maintenance Act 1956, S. 8
[6]Juvenile Justice (care and protection of children) Act 2015, S. 58(1)
[7]juvenile Justice (care and protection of children) Act 2015, S. 68 (c)

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of religion. The **Adoption Regulations 2017** framed by the**Central Adoption Resource Authority ("CARA")**includes provisions, rulesand detailed guidelines of adoption under section 68(c)[7]of the Juvenile Justice Act,2015. CARA is a constitutional body deals in adoption matters works under the Ministry of Women and Child Development. One of the condition for adoption is that a couple should have at least two years of solid martial status for adopting a child. But yet again even this right is not given to the same sex marriage couple even after they have two years of solid martial as their marriage is not legalised in India. New CARA ruling also made it Possible even for a live-in spouses to become a parent of adoptive child on individual basis. But it may be predicted that if the same sex couple requested for the same their demands will be declined by the authorities or unclear that anyhow same sex couple will get the benefits of this circular or not. Same as HAMA, the JJ act can have issue related to the sex- reassignment surgery of the subsequent partner. The Law Commission of India strongly guided to pronounce the word 'parents' in place of 'father and mother' in the adoption clauses under the JJ Act and embrace rule which guarantee that the person of all gender recognition can use the act unless its discriminatory nature.

Surrogacy Bill :according to section 2 of the bill "couple" means a "a man or woman who is legally married". This therefore clearly indicate that getting married is compulsory to get the surrogacy eligibility certificate.Taking into account as there is no law till now who is permitting the same-sex marriage and the member of LGBTQ community consistent in their gender identity so it is not feasible for same-sex couple to have a child together. Such refusal to the LGBTQ community is utmost a breach their basic rights, which is injustice or discriminatory for the sexual minorities in the country.

- **The Transgender Person (Protection of Right) Act,2019:** This act was passed by the Parliament of India to protect the rights of the community but unfortunately also has some loopholes as it does not acknowledge marriage, adoptionand parenting rights of the community.

Judicial Approach

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Indian Judiciary play an pivotal role in protecting and supporting the rights of LGBTQ (the act of homosexuality) constantly by its landmark judgements in various cases.

In **Suresh Kumar Kaushalv. Naz Foundation**[8],in this case the judgementof the Delhi Court was reversed by the Supreme Court and homosexuality was recriminalized. A court panel consist of Justices GS Singhvi and SJ Mukhopadhaya ruled that LGBTQ + people are a small minority they are not having or entitled to constitutional protection . This bench of judges declared section 377 of the Indian Penal Code unconstitutional.

In **Naz Foundation v. Govt.of NCT of Delhi**[9] **,**the Delhi High Court held that the section 377 of the Indian Penal Code, enforce unwanted restrictions over two persons i.e. adults having consensual sex relations privately. As a result, it was a clear restrictions or breach of their fundamental right which was guaranteed by the Indian Constitution under article 14, 15 and 21.

In **National Legal Service Authority v. Union of India**[10]**,**The Supreme Court of India in its landmark judgementgave the 'third gender' transgender people a status of hijras. The court ruled that the third generation have equal rights of protection under the Indian Constitution. The court additionally stated that recognition must be made on physiological sex rather than biological sex.

In **Justice K.S. Puttaswamy v. Union of India**[11] The Supreme Court of India held that the right to privacy is a fundamental right under the Indian Constitution mentioned under Article 21. It was mentioned in this case that everyone despite of their sex or gender has a right to privacy. LGBTQ community also have this right and have freed-elect whoever they want and this right of the LGBTQ community should be protected by the state.

In Navtej Singh Johar v. Union of India[12] the court states that section 377 of the Indian Penal Code, which prohibits any type of sexual behaviour between two adults of (homosexuality (same sex) is unconstitutional. The court further stated that this clause of IPC breaches the fundamental right mentioned under Article 14 and 15 of the Indian Constitution by discriminating against LGBTQ community. Furthermore, the court found that the section 377 of Indian Penal Code restrict the LGBTQindividuals to disclose their identity which

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violates Article 19(1) (a) of the Indian Constitution. In pursuance of this the Supreme Court of India declares section 377 unconstitutional and legalise the consecualsexual activity between two adults having homosexuality.[4]

From the landmark cases mentioned above, it is found that the refusal of adoption right to the LGBTQ community breaches the Fundamental Rights which is given by the constitution of Indian to everyone irrespective of their caste, religion or gender. In the NALSA case, the Supreme Court of India stated that the term 'sex' under Article 15(1) include discrimination based on gender identity and sexual orientation. Such type of inequality will not have constitutional protection as it promote stereotypes about the LGBTQ community under Article 15(1) i.e. the term sex so it is directly beaches the Article 15 of the Indian Constitution. Hence, it is important to make necessary amendments in the adoption laws of India and provides equal rights of adoption to all gender types.

Conclusion

The LGBTQ people are also a citizens of India and should be entitled to equal rights whether it is political , social or economical rights. Recent judgements also showcase that the Hon'ble courts are focusing on giving equal rights to LGBTQ and alsoplay an important role in creating status of LGBTQ community equal to that of the heterosexuals. So, it is not wrong to say that right to adopt is a basic right. The Juvenile Justice Act and Adoption Regulations, passed on 2015 and 2017 straggle behind the growth of society and law by putting limitation to use the adoption rights to the single individuals. The laws and Article 14,15,19 and 21 of the Indian Constitution provides right to have a family will be a part of fundamentals right of Right to Life. If someone have a capacity of upbringing a child or give good care to a child that person should have an adoption right. Such rights for adoption would encourage adoption and give more children who lives in an orphanage a protected or secure environment and these rights will be for the Child's best interest.Many research shows that gender identity or sexual orientation of gender has no impact on child's well being. Adoption institutions or agencies should mainly focus on characters of parents rather than their sexuality. So, now it is need of timetolegitimate the adoption right of LGBTQ community. The states are not making

[8] Suresh Kumar Kaushal v. Naz Foundation, Civil Appeal No. 10972 OF 2013
[9] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277
[10] NALSA v. Union of India & Others, Writ Petition (civil) No. 604 of 2013
[11] Justice K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161
[12] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321

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same sex marriage legal but the state should make changes in the current laws to provide legal acknowledgmentfor adoption of same-sex couples.

Suggestions

Adoption rights of LGBTQ couples and individuals always been a topic of discussion as well as a topic of controversy specially in India and always finding its path for legal and social recognition or progress in many countries, but challenges and inequalities still existing in some regions. Here are some suggestions on enhance the adoption rights of LGBTQ individuals:

- Making sure that adoption laws do not be biased against LGBTQ couples and individuals. Make important changes in existing laws to making it clear that gender identity will not be a barrier for adoption.
- Ensures that adoption institution whether it is private or public should not discriminate or have policies that does not provide equal rights of adoption to LGBTQ individual and couples. If it is done by these agencies then they should be accountable for such practices.
- Make legal measures available to LGBTQ couples and individuals who face any type of discrimination during adoption process.
- Develop and promote education resources that uncovers misconception about LGBTQ parenting and highlights the importance of lovable environment for children.
- Develop and promote the ideas that supports the rights of LGBTQ people and families during the process of adoption with close collaboration withLGBTQ advocacy organisation.
- Best Interests of the Child: the most important and primary concern in adoption cases will not be a gender identity or sexual orientation of the prospective parents. It should be typically based on the best interest of child. As research shown that the children raised by the LGBTQ parents is same as the child raised by heterosexual parents.

It is important to accept that the legal landscape and social attitudes differs widely among countries and regions. The aim is to create a comprehensive and understanding surroundings and environment where all expected parents are evaluate on the basis of their capacity to provide loving and secure home to child, instead of seeing parent sexual orientation and

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gender identity. Development in this area fill not beachieve in one go but it will purely depends on social acceptance, legislative changes as well as advocacy efforts.

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5. Navtej Singh Johar v. Union of India

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