

I Have a Dream: The Right to Be a Parent

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Abstract:

“A petition titled *Abhijit Iyer Mitra & others v. Union of India*, W.P. (C) 6371/2020 is pending before the Delhi High Court to recognize the ‘same sex marriage’. The petition was rebutted by the central government on the ground that the same sex marriage cannot be allowed in India as it is against the traditional norms of the Indian culture. However, this rebuttal goes against the very root of *Navtej Singh Johar* judgment in which the court clearly said that a human has an intrinsic right to choose a partner of his choice. However, the focus of my paper is not on the validity of the same sex marriage but beyond that i.e., whether the same-sex couples can be called a ‘family’ as against the definition of govt. which said that only heterosexual’s partner with a child can be called a family and also as to whether the same sex couples can adopt a child in India.”

Keywords: same-sex couples, family, LGBT, adoption, surrogacy, child, *Navtej Singh Johar*, parents

In 2018, with the decision of the constitutional bench of the Supreme Court in *Navtej Singh Johar v. Union of India (2018)*, a new hope was seemingly visible in the eyes of millions of Indians belonging to the Lesbian, Gay, Bisexual, Transgender (LGBT) community, a hope that they can finally be treated as an equal citizen without any discrimination based on their sexuality. This judgment became a ground for the demand of marriage of same sex as previously Supreme Court in *Shafin Jahan v. Ashok K.M. & Ors. (2018)* held that right to marry is a part of fundamental right. Last year a group of same-sex couples filed a petition before the Delhi High Court for the recognition of same-sex marriage. This petition was rebutted by the reply of the Centre by stating that the Indian Society recognizes the concept of "family" as consisting of one male and one female and the child/children born out of the union of the two sexes (*The Hindu 2021*).

This reply of the Centre not only questions the legality of same-sex marriage but more importantly it poses one important question. What do we mean by the term "family"? Going by the logic of the reply of the centre, it not only thwarts the efforts of the petitioners who want the court to recognize same-sex marriage but this reply also questions the single person who wants to adopt children or a woman who wants to become a mother by the act of surrogacy or by the process of In-vitro Fertilization (IVF). It is important to understand what we mean by the term "family" and whether same-sex couples can fit within the boundary of this term. In this article, I shall be referring to some foreign literatures as well since there aren't much data available in this aspect in India or in other countries having similar legal attitude.

1. LGBT & FAMILY

A judgment cannot ipso facto change the attitude of society. Legal acceptability doesn't mean that society has also accepted that thing automatically. Even after several judgments, honour killings are committed when the bride and groom belonging to different castes marry each other. Though Supreme Court stated that inter-caste marriage is the need for national integration (*Lata Singh v. State of Uttar Pradesh 2006*), the society is still far from completely accepting the same. A different but

the same issue lies with people belonging to the LGBT community. There are two aspects to the family issues of LGBT. One aspect is their relation with their blood relatives. Lucky are those whose family accept them open-heartedly about their orientation but that cannot be the case with everyone. In many cases, people from this community are disowned by their family for they are considered to bring "shame" and "embarrassment". Another aspect is their relationship with their partner with whom they want to have a family. The focus of the paper is on this particular aspect only. If the people from the LGBT community are considered as equal citizens under Article 14 of the Constitution, then why do their wish of having a "family" cannot be accepted under the law? Even if a law is silent on this aspect, that cannot preclude the court from filling the gaps in between the same. Supreme Court in the case of *Ritesh Sinha v. Union of India (2019)* expressed "True, the judicial function is not to legislate but, in a situation, where the call of justice and that too of a large number who are not parties to the lis before the Court, demands expression of an opinion on a silent aspect of the Statute, such void must be filled up not only on the principle of *ejusdem generis* but on the principle of imminent necessity with a call to the Legislature to act promptly in the matter."

The traditional importance of "family" was summarized by the Supreme Court of California in the case of *DeBurgh v. DeBurgh* in the following words:

[T]he family is the basic unit of our society, the centre of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people

To say that the traditional norm of the Indian family setup consists of a biological man and a biological woman undermines the judgment of the Madras High Court which upheld the marriage of a man and a transgender (*Arunkumar & another v. Inspector General of Registration and others 2020*). The Indian law lacks a cogent definition of the term "family" and most are related to the issue of succession and inheritance but in that case, also it doesn't explicitly define who shall be the part of the family but only mention the individuals who have the right to inherit the property of the deceased. S. Panov (2008) argues that "marriage or cohabitation without a child is no family." On the other hand, J. Herring (2004) in his book states, "The image of two parents and two children as the ideal family is just that, an ideal; a powerful ideal, but not the most common family form" (Olga Jancic 2010). As we can understand, the term "family" is a notorious term to be defined. However, it also needs to be understood that when any relation subsists between two human beings for instance relation between two friends, what is the basic premise of the relation? That they care for each other and help each other in their bad times. Then why can't such a definition be applied to a group of people who are living together under the same roof? If we establish that the people living under the same roof are related by blood with each other and they care & support each other, wouldn't that be sufficient to be called a family? In this regard, the Wisconsin Supreme Court in the case of *Crowley v. Knapp (1980)* determined the concept of the term "family" and observed:

"'Family' is derived from the Latin familia. Originally the word meant servant or slave, but now its accepted definition is a collective body of persons living together in one house, under the same management and head, subsisting in common, and directing their attention to a common object, the promotion of their mutual interests and social happiness."

In *Braschi v. Stahl Associates (1989)*, New York Court held that two men who were living together constituted a "family" as they were in a "committed and intimate relationship under the applicable regulation". In arriving at the said conclusion, the court used a functional definition of family which is based "on the emotional and financial interdependence of the parties and rejected a formal definition that would have required ties of marriage, blood, or adoption". For any relationship to exist and to sustain, the elements of "love" and "care" for each other are *sine qua non*. We all know the bond between *Arjuna* and *Lord Krishna* in *Mahabharata* and how *Lord Krishna* was a shield against all the attacks which were directed against *Arjuna*. *Kunti's* son was so dear to *Lord Krishna*

that the latter once expressed that *Arjuna* is dearer to him than his wife and children (*Drona ParvaLXXIX: 153*). These are the ideals of "love" and "care" which existed in ancient times. In the notion of traditional family setup that an Indian family can consist of a biological male and a biological female, there is an 11th century Sanskrit story cycle "*Kathasaritsagara*" which talks about the love life of a man known as *Pulindika* who was a bandit chief and fell in love with a woman named as *Vasudatta*. The latter fell in love with a woman and the three lived together. The bond between them was so strong that when *Vasudatta* killed himself, his wife and his friend *Pulindika* also gave up their life (*Ruth Vanita 2004*). All this evidence and stories show that the Indian tradition has been more inclined towards love and care for each other rather than living in an invisible social boundary fixed by society. As was beautifully expressed by the Madras High Court in the *Arunkumar case*: "*Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart.*"

The problem is not confined just to be with your partner and be called a "family" but it comes with the issues of parenting and the view of society to the couple belonging to LGBT and being parents.

2. LGBT & PARENTING

Generally, it is seen that when heterosexuals become parents, they tend to get much support from their friends and family. Everyone is very excited around them and is given emotional and practical support thereby helping them in parenting (Goldberg 2012). The same may not happen in the case of the LGBT community. A study was conducted according to which the response to the LGBT parents may range from total rejection to a grudging acceptance and in some cases a full acceptance also. (Weston 1991, Heaphy B 2001).

In the Indian context, currently, there is no literature available that shows any same-sex couple taking care of a child in Indian society. However, in the ancient context, there are some pieces of evidence in regards to the same. A Bengali literature named "*Krittivasa Ramayana*" talks about a story in which a child is born out of the "*divinely blessed sexual inter course between two women who are co-wives, or rather co-widows*" (Ruth Vanita 2004). Generally, in any traditional societal setup, children are considered as the divine blessing of God which in turn gives a ticket to the couple that they can be accepted by the society for being "fertile" and this, in turn, gives a gun to anti-gay forces to shoot the idea of a couple who are homosexual or even heterosexuals especially infertile women and men, who have to bear the brunt of societal stigmatization that they cannot procreate a child (Archana V. Gopinath 2019). True, the Indian society is slowly accepting the notion and tolerance of having a child by other means but this tolerance as of now is limited to the heterosexual couples only or to say in another way round since there aren't any same-sex couple to have a child in India, there is not much experience or data available to know or to show as to how the Indian society can react to the same.

Since for obvious reasons, the same-sex couples cannot procreate a child, the other options available to them are surrogacy, adoption, alternative insemination. There is one more aspect to this issue. What if a person gets married to the opposite sex, have children with them and then afterwards come out to their spouse? So, whether that person can still have the same right over his/her child even after coming out? These are questions that are not discussed or deliberated by any Indian court in respect to the same-sex couple but in foreign jurisdictions, these issues were deliberated in detail. It is important to understand the background of the same and whether the same can have some effect or be applied in the Indian context or not.

2.1. Adoption

Section 57 of the Juvenile Justice Care & Protection Act 2015 provides the eligibility for the "prospective adoptive parents". Sub-section (2) and (3) are of relevance in this context. It states:

"(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.”

There are two issues to be dealt with under this provision: adoption by a couple and adoption by a single person.

On reading the JJ Act 2015 and particularly section 57, it can be understood that this provision is made for a married couple only. However, there have been several judgments by Supreme Court as well as High Court that the live-in couples also have married couple like rights but again the issue is whether a couple who is in a live-in relationship can adopt a child? A circular was issued by Central Adoption Resource Authority in 2018 that live-in couples cannot adopt a child. However, this circular was taken down by the nodal agency stating that the application of the prospective parents shall be determined on a "case-to-case" basis (*Jagriti Chandra 2018*).

There have been several judgments by different High Courts recognizing the concept of the live-in relationship between the same-sex couple (*Madhu Bala v. State of Uttarakhand, 2020; Chinmayee Jena @ Sonu Krishna Jena v. State of Odisha, 2020; Paramjit Kaur & another v. State of Punjab, 2020; Sultan Mirza v. State of U.P. 2020*). There is still a great lack of literature to state that whether same-sex couples can adopt a child or not in India. As per a news report (Awasthi 2019), one of the officers of an adoption centre in Bangalore stated that LGBT family is not acceptable in India and therefore the adoption centres should take into consideration that the orphans should be given to heterosexual couples only and not “inferior couple” presumptively LGBT couples. Also, when the Women and Child Ministry in 2015 rolled out “Guidelines Governing Adoption of Children, 2015” which provided the single parent (unwed, divorced, separated) a platform to adopt the child, the adoption centres run by Missionary of Charities stopped the adoption process (Economic Times 2015). One of the in-charge of such adoption homes stated, “*What if the single parent who we give our baby turns out to be gay or lesbian. What security or moral upbringing will these children get? Our rules allow only married couples to adopt.*” (Abantika Ghosh 2015). Though such statements or thoughts can be argued or counter-argued, however, the issue is that if any same-sex couple approaches the court that they want to adopt a child, can the court allow the same considering the societal norms existing in India?

There are no such judgments available in the Indian context, however, another counterpart country to India which still criminalizes homosexuality i.e., Singapore, allowed a same-sex couple to adopt a child who was born out of surrogacy in the USA, in 2018. Singapore High Court in the case of *UKM v. Attorney General (2018)* made some interesting observations. It is also to be noted here that the High Court of Singapore itself upheld the constitutional validity of section 377A of the Singapore Penal Code which criminalises homosexuality in *Ong Ming Johnson v Attorney-General (2020)*. In *the UKM case*, an argument was raised that the parenting by a same-sex couple in a "conventional family" setup of Singapore Society may undermine the full psychological development of the child. However, the court rejected the contention in Para 82 of its judgment by stating that this argument is based on the mere perception of the officer of the government and that the sexual orientation of the appellant is not relevant in deciding the welfare of the child. Moreover, in Para 192 of the Judgment, while deliberating whether the order of adoption in favour of same-sex couple will counter the public policy of Singapore, the court rejected the argument and held:

“192. In our judgment, however, making an adoption order in this case would not be contrary to this public policy. The reason is that a public policy in favour of parenthood within marriage is not the same thing as a public policy against other forms of parenthood. In fact, there is indication to the contrary. The Act, for example, contemplates adoption orders being made in favour of single applicants. It may well be that many single applicants are in a stable heterosexual relationship. But even on that count, they may not be married. And the Act contains no requirement that a single applicant must at least have a partner of the opposite sex at the time of the adoption. Given that single parenthood is permitted by the Act, and is therefore not contrary to the public policy in favour

of parenthood within marriage, the same conclusion must also hold for single parenthood on the part of a person of homosexual orientation.”

It is also important to note here that the Singapore Court explicitly accepted that there is a public policy against the same-sex family unit in Para 207 of its judgment, the court went on to state that it is deliberating on what the law states and that there is no explicit prohibition under section 3 of Adoption of Children Act which can preclude a single homosexual to adopt a child. Therefore, the court upheld the adoption by the same-sex couple. This judgment though being foreign can be of great relief to the Indian LGBT community if they want to file the petition in court for the adoption of a child, on two bases:

- a) Singapore's traditional family setup is almost the same as the Indian traditional family set up. This is evident by Indian government reply to Delhi High Court in regards to same sex marriage plea and in the case of Singapore, the Prime Minister Lee Hsien Loong specifically endorsed in 2007 traditional family setup which means a heterosexual married couple raising a child together as mentioned in the Singapore High Court Judgment (2018: 100).
- b) This judgment was decided in favour of the same-sex couple even knowing the fact that there is a law in force that criminalises homosexuality. In India, that provision has been pulled down partially. This can give an edge to the LGBT community in India to enforce their rights for adopting a child in a court of law.

2.2. Surrogacy

The issue of Surrogacy is not only a ground for legal complications but always a fight between the moral, ethical issues and the rights of a person's reproductive autonomy. Currently, in India, there is no legislation in force that regulates Surrogacy but only guidelines. The Surrogacy (Regulation) Bill 2019 is still pending to be passed by Parliament. It was referred to the Select Committee after being passed by Lok Sabha on 5th August 2019. As per the bill, commercial surrogacy and even compensatory surrogacy is prohibited but Altruistic Surrogacy can be allowed in India. The members of the Select Committee deliberated on each clause extensively. Two issues were part of the major discussion: (i) *Defining Altruistic Surrogacy* and (ii) *Eligible prospective parents*. After the deliberation among the members of the committee, the committee allowed a “couple” and an “intending woman” to go for surrogacy.[sec. 4(ii) of the bill] The term "couple" has also been defined in this bill stating a man and a woman [sec. 2(r)] and the term "intending woman" refers to a woman who is a divorcee or a widow age between 35 to 45 years. This definition of "intending woman" can include a lesbian or a transsexual who considers herself as a woman, as there is no explicit prohibition against them.

However, it is not as easy as it looks. As per the Select Committee report and minutes of the deliberation, the issue of the live-in couple, single male, a gay couple was also raised that they should also have a right to go for surrogacy. It is provided in Para 4.31 of the report. However, no response was given by the Health Department in this regard whether people belonging to such a category should be prohibited or not on any legal or ethical basis (2020: 36). Another point here to be noted is that the committee or the bill derives its authority from 228th Law Commission Report, 2009 which asked the Govt. to bring legislation for regulating surrogacy in India. The Commission pointed out a seminar “Surrogacy – Bane or Boon” organised by India International Centre. In that seminar, the issue was raised as to whether “*a single or a gay parent can be considered to be the custodial parent of a surrogate child*”? The discussion answered in affirmative by stating that “*as of today, it may be stated that a single or a gay parent can be considered to be the custodial parent by virtue of being the genetic or biological parent of the child born out of a surrogacy arrangement*”(2009: 22)

There is no valid argument presented by the concerned authorities that how homosexual couples can be disqualified from conceiving a child. All that can be argued that the Indian society is not matured enough to accept such a type of family setup. If that is the argument, then let it be reminded that the

Supreme Court in *the Navtej Singh Johar case* clearly stated that Constitutional morality prevails over societal morality. The discrimination created by this Surrogacy Bill goes to the root of the violation of right to equality of right and of parenthood. It is to be noted that in Israel, a same law was passed in 2018 which allowed only heterosexual couples and single woman to go for surrogacy. This law was declared unconstitutional by the Supreme Court of Israel in *Judgment in Case 781/15*. The court observed that such discrimination “*appears to be a “suspect” discrimination, which attributes to this group a lower status, and thus creating an additional, critical and humiliating infringement upon human dignity on the basis of gender or sexual orientation.*” (Douglas Nejame et. al. 2020)

The law has to develop with changing times and it cannot remain static. At the end of the day, the purpose of the law is to serve the people and society and not to create explicit discrimination between the two groups without any reasonable differentiation.

2.3. Best Interest of Child

The “best interest of the child” doctrine is supported by the Convention of the Rights of the Child and the same has occupied as a primary consideration in Indian Constitution (*R.D. Upadhaya v. State of Andhra Pradesh & Ors. 2006*). Section 13 of Hindu Minority and Guardianship Act, 1956 provides that welfare of the child should be a primary consideration in the custody of the child and the same is mentioned in JJ Act, 2015.

In the context that whether a child can be given a welfare environment among the LGBT parent(s), several researches were carried out by many scholars to investigate about the same and also on the children to whom their parent came out as a transsexual. S. Zadeh et. al. (2021) stated on the parent-child relationship when either of the parent came out to be transsexual, that:

“Indeed, the vast majority of participants described their parent’s gender identity as having had no impact on their family, using phrases such as “nothing’s really changed, it’s just been the same” (13-year-old) and “it doesn’t bother me, it’s not a problem” (12-year-old).”

The research took the final sample of 29 children aged 5–18 from 19 families and all participants had at least one parent who identified as Trans. In this aspect, there is a case study in this regard. It dates back to the 1970s and the setup is of USA society. It is a story about a couple of Duane Christian and Mark (formerly Gay) Randall. Mark was a female to male transsexual person and this transformation happened after the couple had 4 children. The couple got divorced and the fight for the custody of the children started. It was argued on behalf of Duane that he should get the custody of children because the transformation change of Mark shall have a great psychological effect on the children. This was rebutted by Mark stating that there is no evidence to state that his sex change had or is having any psychological impact on children. The eldest daughter of the couple stated in the court *“that about the transsexual thing, I believe in it very much and I think it’s a very fantastic thing. And we were told about it six or seven years ago, and so it’s no new thing to us. It may be new to Duane, [but] it’s not that traumatic of a thing. . . . We have gone through the changes with Mark, and I consider Mark my father and Ruth my mother. But naturally, we’ve always had respect for Duane and [his new wife] when we’ve gone out there.”*

It is to be noted here that all the four children ran away from the house of Duane to stay with Mark and his partner because of the love and affection they were getting from Mark, the same wasn't there in the house of Duane who got married to another girl. The Court of Appeal finally accepted the plea of Mark to allow him the custody of all the children (*Christian v. Randall, 1973*). The example is not from India but an important thing here to be noted is that it is not compulsory that a child may be happy in a traditional family setup only. If a child is getting love and affection from a couple belonging to the LGBT community, then there shouldn't be any bar to the same. In the *UKM case* also the Court by taking into consideration the concept of "welfare of the child" held that the child should live with the same-sex couple as the couple expressed that they can provide a great love &

support environment in such a way that there shall be no barrier in the psychological development of the child.

If we take the above examples into consideration then it can be safely concluded that in India there is no legal bar on the court to give the custody of a child to a person belonging to LGBT community, as the primary consideration should be the interest of child and not some legal barriers or considerations of the parties (*V. Ravichandran v. Union of India & Ors. 2010*)

3. CONCLUSION

An irony exists in Indian society today. The example of two wives or two co-widows which I mentioned above, it is the story of the wives of King Dilip, King of Ayodhya. He died childless and this became a great issue for the royal lineage and more importantly, it was putting the human civilisation at stake because if there won't be any child, the royal kingdom will vanish. In this case, as pointed out by Padma Purana and Kritivasa Ramayana, there was then the direct intervention of God. In Kritivasa Ramayana, the co-widows asked Lord Shiva that how they will conceive the child to whom Lord Shiva replies, "By my blessings, one of you will have a lovely child". Lord Shiva is considered to have fathered children with the help of another male, for instance, he fathered Lord Ayyappa with the help of Vishnu-Mohini and Kartikeya with the help of Agni (Ruth Vanita 2004). This has been part of Indian culture. The same Indian society in today's scenario is not ready to accept such culture. D' Silva, a mother of twins who is living with her lesbian partner in London shared her difficult phase of hiding from Indian society about her relationship and how more difficult is to raise children in India when the parents are of the same sex. When questioned whether she wants to come back to India, *"The prospect of moving back to India does not excite me. Who wants to go through all that drama and nonsense, you know? I'd rather be in a country where I'm free to be who I am."* (Tarini Mehta 2021)

However, there is one thing to be noted and that is that the "traditionalistic" heterosexual family system which is supported by the government and majority population and is counted as true Indian culture cannot be accepted in its entirety. This is also a fact that today the traditional setup of Indian society is not matured enough to accept same-sex couples leave alone same-sex family and this, in turn, leads to violence on the couple and this is evident by the High Court judgments mentioned above where the same-sex couple had to take the police protection. The only way to tackle the same is the reach of education to the masses on this particular issue. E.g., there are several govt sponsored advertisements supporting girl child education. In the same way, there should be some steps taken by the govt. in this regard. The only way society can become truly inclusive is to accept each other's view and to accept the fact that "love is love".

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