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## Parental Rights of LGBTQIA+

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*Every human being has the right to become a parent or have children because individuals are born with these desires, which is one of the essential prerequisites for living a life of intrinsic integrity. Such a requirement has even been protected as a basic biological human right by legislation on both a global and regional scale, but gays have been excluded. Similarly, in India, surrogacy legislation was drafted, but it did not include provisions for homosexual people. How can a country whose Constitution guarantees inclusivity and equality for all segments of human society and legalizes gay sex discriminate against homosexuals by denying them the right to become parents through artificial insemination, especially when these couples are unable to have children through natural reproductive processes? The historic case of Navej Singh Johar v Union of India, often known as the NavejJohar case<sup>1</sup>, decriminalized homosexuality in India. This ruling was made by the Supreme Court of India in response to many Public Interest Litigations brought by various LGBTQIA+ groups. In an attempt to answer this question, this article concludes that the right to parenthood should only be considered a human right to the extent that it allows a person to become a parent in order to fulfill his or her desire to have children, and that such a right should be available to homosexuals as well. The researcher explains in the given research paper how past and present stereotyping and stigmatization in the social system create obstacles in-laws of adoption for homosexual spouses, and how legalizing the repressive section must consequence in the revision of matrimonial laws since they are governed by court rulings or legislation, and the study will make an argument against the law's gendered nature.*

**Keywords:** *biological human rights, homosexuals, sex discrimination, historical discrimination, legalizing.*

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<sup>1</sup> Navej Singh Johar v Union of India (2018) 1 SCC 791

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## INTRODUCTION

The journey of parenthood is viewed as crucial to a person's identity and a component of most people's life plans in most nations. This desire to be a parent is not exclusive to Indian culture. There are many reasons for wanting children: to share and exchange love, to give legitimacy to or add value to one's life, to relish or enjoy the delight of having children, to be like other friends, to try giving in to family or social pressure, to pass on one's genes to another generation, and so on. Children also bring concrete benefits in the form of aid and protection in old age. In response to this parental need, the Universal Declaration of Human Rights (UDHR)<sup>2</sup> was drafted. It declares that the family is a natural and fundamental cornerstone of society, protected by law from both the state and civil society. The campaign against Section 377 of the Indian Penal Code<sup>3</sup>, which outlaws physical contact between same-gender couples as a violation of their fundamental rights, is far from over. Couples who are attracted to the same sex, such as lesbian (female and female) and homosexual (male and male), are known as same-sex couples. These ties might range from personal to homosocial in nature. As noted by CJI Dipak Mishra in the Navtej Johar case<sup>4</sup>, it is love or interpersonal connection that binds people together, not sexuality, as society suggests, and they have equal rights as citizens to everything except discriminatory legislation like adoption laws. There has been much discussion on whether or not the LGBTQIA+ community should be granted Parenting Rights. The LGBTQIA+ minority, which is still regarded as outdated in current times, is still struggling for its rights. Various jurisdictions have adopted various legislation to safeguard the rights of members of this community. However, only a few nations have passed legislation that protects the LGBTQIA+ community's parental rights. Due to widespread misunderstandings about their gender orientation, sexual inclination, and the intrinsically unforeseeable subtleties involved in transitioning, people in the LGBTQIA+ community continue to encounter legal obstacles in gaining rights for their children. The intricacies of raising a child for reasons other than a biological link are referred to as parenting. When it

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<sup>2</sup> Universal Declaration of Human Rights, 1948

<sup>3</sup> Indian Penal Code, 1860, s 377

<sup>4</sup> Navtej Singh Johar (n 1)

comes to determining who the legal parents are, biology is rarely the decisive issue. In defining a psychological parent, biology is not the only factor to consider. According to the study undertaken by the “American Civil Liberties Union”, there is no proof that members of the LGBTQIA+ community are unsuitable to raise children; rather, a child is more likely to grow up with excellent values and such parenting aids in the child's development than children raised by heterosexual parents. A parent's capacity to care for and instill excellent values in their children influences their ability to be good parents; sexuality has no consequence on parenthood. Adoption is described as the admission of a stranger by birth to a child's rights through an officially recognized form of attachment, such as in Roman and Greek law. We now have certain guidelines in place regarding adoption, however not for all classifications, such as same-sex couples or unmarried couples. The connection between homosexuality and our heterogeneous culture is not new; sensual temple sculptures at Khajuraho, Konark, and Tanjore exhibit queer motifs, and historical documents such as the Kamasutra and certain medieval texts provide proof that it existed well before the pre-colonial period.

In this paper, the researcher will discuss how same-sex couples face discrimination and stigmatization in mainstream culture in all aspects of their lives, as well as how society views them as a couple, with a specific emphasis on family rules like marriage and adoption, as well as how they interact, even if the law allows them to adopt, social stigma creates a barrier. Second, by reviewing the Juvenile Justice Act<sup>5</sup>, the Hindu Adoption and Maintenance Act<sup>6</sup>, and government regulations, the researcher will focus on the legal hurdles they face, such as laws that are biased against same-sex spouses and are specifically for opposite-sex couples. These restrictions make it harder for citizens to exercise their rights as citizens of the country, and so violate the Indian constitution. Finally, the researcher will discuss how regulations discriminate against homosexual spouses and why homosexuals must be permitted to adopt children.

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<sup>5</sup> Juvenile Justice (Care and Protection of Children) Act, 2015

<sup>6</sup> Hindu Adoptions and Maintenance Act, 1956

## RESEARCH QUESTIONS

In the course of this investigation, the following questions should be addressed:-

- Will the abolition of Sec. 377 of the IPC allow same-gender couples to foster in the country?
- Is it fair that India's adoption laws infringe on same-sex couples' constitutional rights?

## REVIEW OF LITERATURE

Several periodicals, papers, studies, and booklets dealing with the liberties and issues of the LGBTQIA+ community have appeared during the last couple of decades, bringing the basic rights of the LGBTQIA+ group into clearer light. The concept of non-discrimination as well as the right to equality before the law compel the law to protect people against discrimination not just from official agents but also from private enterprises and individuals {*Louis Arbour, 2019*}. High levels of stress may be harmful to people, and there is a well-established link between anxiety and the appearance of indicators of psychological or somatic disease in humans and other creatures {*Cohen, Doyle, & Skoner, 1999; Dohrenwend, 2000*}<sup>7</sup>. The experts who contributed to the Law Commission's 172nd report said that Section 377 of the IPC is harmful to public health since it has a direct impact on the lives of homosexuals {*Law Commission of India, 2000*}. To win the fight, the LGBTQIA+ group has to establish equality for same-sex couples with social support {*Feld Blum, 2005*}<sup>8</sup>. LGBTQIA+ people account for 20 percent to 40 percent of all homeless children, owing to society's negative effect on them as well as a lack of understanding of their sexual orientation {*Ray, 2006*}. According to Dr. B.R. Ambedkar, Chairman of the Constitutional Drafting Committee, LGBTQIA+ members with the right to vote cannot be addressed differently from people since an individual can only have a single

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<sup>7</sup> S. Cohen, W.J. Doyle & D.P. Skoner, 'Psychological stress, cytokine production, and severity of upper respiratory illness' (1999) 61 (2) *Psychosom Med.*, 80-175 <<https://pubmed.ncbi.nlm.nih.gov/10204970/>> accessed 25 April 2022

<sup>8</sup> Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More* (Georgetown University Law Centre and Legal Theory 2005)

vote {*Dr. Madhurima Chowdhary, 2017*}<sup>9</sup>. Prejudice and alienation of LGBTQIA+ individuals are likely to lead to economic consequences, including decreased work due to employment inequality and health inequalities {*M. V. Lee Badgett, 2014*}<sup>10</sup>. The administration should approve laws to allow LGBT persons to marry {*V. Revathy and Dr S. Pandiaraj, 2018*}<sup>11</sup>. The need of the hour is for brutality to be resisted in a variety of ways, including legislative, societal, and governmental intervention, as well as necessary institutional initiatives, including with police forces {*Johar, 2019*}. The Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQIA+) movements throughout the globe have been involved in this work of appealing and fighting for legal reform {*Hall, 2019*}<sup>12</sup>{*Pergadia, 2019*}. The LGBTQIA+ community and their rights will be accepted by society in the not-too-distant future. Believes that real and total independence has yet to be attained. {*Pukhrabjir Kaur, 2019*}<sup>13</sup>.

## LGBTQIA+ RIGHTS EVOLUTION

Before India's independence, British colonial authorities enacted Sec. 377 of the Indian Penal Code<sup>14</sup>, which made any non-gestation of sexual activity illegal. The despotic edict targeted not only gays but all non-traditional sexual relationships, including heterosexual couples. As a result, this regulation was little more than a relic of British morality that has no position in Indian democracy. This outdated rule, which had become a tool for harassing and assaulting anybody who did not fit into the typical dichotomy of gender and sexual orientation, took over 70 years and probably two decades of judicial battles to be repealed. First, it is worth

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<sup>9</sup> Dr. Madhurima Chowdhury, 'LGBT, Marginalisation and Human Rights in India' (2017) 1 (4) International Journal of Current Humanities and Social Science Researches

<<http://www.indiancommunities.org/journal/index.php/ijchssr/article/view/51>> accessed 25 April 2022

<sup>10</sup> M. V. Lee Badgett, 'The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India' (*The World Bank*, 3 October 2014) <<https://openknowledge.worldbank.org/handle/10986/21515>> accessed 25 April 2022

<sup>11</sup> V. Revathy & Dr. S. Pandiaraj, 'The violation of human rights against LGBT community in India- A Critical Study' (2018) 120 (5) International Journal of Pure and Applied Mathematics <<https://acadpubl.eu/hub/2018-120-5/4/396.pdf>> accessed 25 April 2022

<sup>12</sup> Kira Hall, *Middle-class timelines: Ethnic humour and sexual modernity in Delhi*, *Language in Society* (Cambridge University Press 2019)

<sup>13</sup> Pukhrabjir Kaur, 'Unraveled Section 377 IPC: A review of post Navtej Singh Judgment Scenario' (2019) 6 (6) Journal of Emerging Technologies and Innovative Research, 363-372 <<https://www.jetir.org/view?paper=JETIR1908B50>> accessed 25 April 2022

<sup>14</sup> Indian Penal Code, 1860, s 377

considering how India's current laws, even after Section 377<sup>15</sup> was abolished, are insufficient in protecting the LGBTQIA+ community's fundamental human rights. In order to have a full discourse, let us begin with a review of the history of the LGBTQIA+ rights movement in India, followed by a discussion of some significant court rulings and their effect on the LGBTQIA+ action. Despite the fact that the LGBTQIA+ equality movement began in the early nineties, all major advancements ever since might well be analyzed in the context of major Verdicts and their repercussions.

### **NAZ FOUNDATION v NATIONAL CAPITAL TERRITORY OF DELHI<sup>16</sup>**

*Context of the case:* IN the year 2001, police in Lucknow stormed a local park and detained some people suspected of being homosexuals in order to pursue charges under IPC, Sec. 377.<sup>17</sup> Nine more men were arrested in connection with the "Bharosa Trust," a non-governmental organization that attempted to improve public awareness about healthy sexual behaviours and STDs. Those individuals were subsequently charged with conducting a prostitution ring and had their bail refused. Following that, the "Lawyers Collective", a legal assistance organization, stood forth and proved that the accusations levelled against these people were unfounded, and they were ultimately released.

Following the events in Lucknow, the Lawyers Collective and Naz Foundation challenged the legality of Sec. 377 of the IPC<sup>18</sup> in the Delhi High Court in 2001.

*Contentions:* Sec. 377 of the Indian Penal Code,<sup>19</sup> according to the petitioner, violates the basic rights to life, privacy, dignity, and equality, as well as the rights to health, equity, and free speech. The statute was also said to have hampered community healthcare efforts targeted at minimizing the risk of HIV or AIDS transmission since people were terrified of being punished if they openly addressed their homosexuality and habits.

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<sup>15</sup> *Ibid*

<sup>16</sup> *Naz Foundation v State (NCT of Delhi)* (2016) 15 SCC 619

<sup>17</sup> Indian Penal Code, 1860, s 377

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*

*Verdict:* Finally, in the case of Naz Foundation vs National Capital Territory of Delhi,<sup>20</sup> the Delhi High Court declared in 2009 that Section 377 of the Indian Penal Code was an unreasonable limitation on two adults engaging in private sexual intercourse. As a result, it was a flagrant violation of their basic rights, which are protected in the Indian Constitution's Articles 14, 15, 19, and 21.<sup>21</sup>

### **SURESH KUMAR. KAUSHAL *v* NAZ FOUNDATION<sup>22</sup>**

*Context of the case:* Due to India's long history of principles and customs, certain persons and faith-based organizations have been vocal in their opposition to homosexual marriage being decriminalized. They then petitioned at Supreme Court to determine Section 377's<sup>23</sup> validity.

*Verdict:* On December 11, 2013, the Supreme Court overturned the Delhi High Court's ruling and re-criminalized homosexuality, just as the community was breathing a sigh of relief after an eight-year battle. A court bench of Justice SJ Mukhopadhaya and Justice GS Singhvi determined that LGBTQIA+ individuals were a "minuscule minority", Sec. 377 of the IPC<sup>24</sup> was not breached since the defendants did not deserve constitutional protection.

*Aftermath:* However, far from putting a stop to the LGBTQIA+ movement, The Supreme Court's decision in Suresh Kumar. Koushal & Others vs Naz Foundation & Others<sup>25</sup> has spurred a fresh wave of agitation in India. The SC's controversial judgment, which stripped gays of their fundamental human rights, sparked global outrage. As a result, there has been an upsurge in public discussion in India over LGBTQIA+ rights.

### **NALSA *v* Union of India<sup>26</sup>**

**Context of the case:** India's transgender population has been the LGBTQIA+ community's most vulnerable victim of exploitation due to their dysfunctional social, intellectual, and

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<sup>20</sup> Naz Foundation (n 16)

<sup>21</sup> Constitution of India, 1950, art.14, art.15, art.19, and art.21

<sup>22</sup> *Naz Foundation v Suresh Kumar Koushal* (2014) 3 SCC 220

<sup>23</sup> Indian Penal Code, 1860, s 377

<sup>24</sup> *Ibid*

<sup>25</sup> Naz Foundation (n 22)

<sup>26</sup> *National Legal Services Authority v Union of India* (2014) 5 SCC 438

economic status. These individuals were never considered part of society and were always exposed to manipulation, ostracism, humiliation, and cruelty, whether at the hands of society or the governing force. These people frequently resort to beggary or prostitution as a result of their repeated rejection and lack of resources, rendering them more exposed to prejudice, STDs, and criminality such as human abduction. The Supreme Court's 2014 verdict, on the other hand, brought a new light of optimism and enthusiasm for these transgender persons, as they were recognized as the new gender for the first time in history.

**Issue:** The Supreme Court had to consider *NALSA vs UOI*<sup>27</sup> whether hijra and transgender people should be recognized as a third gender for the sake of public safety, education, labour, quotas, and other social aid.

**Verdict:** In a major decision, the SC established the 'third gender' designation for trans individuals. Before the ruling, transgender persons had to choose between being a man or a woman, but now they may freely identify as transgender. Apart from that, this decision was significant since it provided the framework for the trans community's access to a wide range of vital human rights, which can be summarized below:

- The non-identification of their personalities, according to the court, breached Articles 14, 15, 16, and 21 of the Indian Constitution.<sup>28</sup>
- The Supreme Court also ordered that individuals of the "Third Gender" should be classified as an economically deprived group by the Indian government.
- It was also said that the government should create appropriate measures for the transgender population in accordance with Articles 15(2) and 16<sup>29</sup> in order to promote equality of opportunity in school and work (4). The third gender will be classified as a member of the other backward classes [OBC] in order to qualify for reservations in government positions and educational institutions, according to the Verdict.

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<sup>27</sup> *Ibid*

<sup>28</sup> Constitution of India, 1950, art.14, art.15, art.19, and art.21

<sup>29</sup> Constitution of India, 1950, art.15(2), and art.16

- A discrepancy between a person's biological gender and identity is not always a serious scenario, according to the court. The focus should be on "resolving sadness over a mismatch" rather than "fixing the anomaly."

It shows that the court acknowledged the difference between gender and biological sex components. The court defined biological characteristics as sexual organs, secondary sexual characteristics functionalities, genotypes, and so on, gender characteristics, on the other hand, were described as an individual's inner emotional or psychological sense of sexual identity and character, which was not restricted to a binary notion of male or female but might be anywhere on a continuum.

*Corollary:* As a result of this verdict, transgender people can now change their appearance without undertaking gender reassignment surgery. Persons also have the option of identifying as the third gender and registering as such. Aside from that, several state governments have made little effort to help the transgender population by enacting health and housing laws. The Transgender Persons Bill<sup>30</sup>, which was approved in 2018, delivered a major blow to this judgement, whose ramifications will be discussed further down in this paper.

### **JUSTICE K.S. PUTTASWAMY *v* UNION OF INDIA<sup>31</sup>**

*Background:* The Supreme Court went into considerable depth concerning constitutional adjudication and the growth of the right to privacy when the NAZ Foundation contended in the Suresh Kumar. Koushal & Others vs Naz Foundation & Others<sup>32</sup> case that Sec. 377 of the Indian Penal Code<sup>33</sup> infringed the right to privacy. Despite highlighting the crucial relevance of this right, the court devalued the right to privacy argument in the context of 377<sup>34</sup>. Although there have been instances of Section 377<sup>35</sup> being used against the LGBTQIA+ community, placing their dignity and privacy at risk under the pretense of blackmail, abuse, or violence,

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<sup>30</sup> Transgender Persons (Protection of Rights) Bill, 2019

<sup>31</sup> *K.S. Puttaswamy v Union of India* (2018) 1 SCC 809

<sup>32</sup> *Naz Foundation (n 22)*

<sup>33</sup> Indian Penal Code, 1860, s 377

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*

the court acknowledged that in general. However, because the clause neither allows nor endorses such conduct, it fails to represent the fact that such legislation is much beyond the constitutional limits.

**Verdict:** In Justice K. S. Puttaswamy (Retd.) and Anr. versus Union Of India And Ors.<sup>36</sup>, Justice Chandrachud introduced a section called "discordant observations." Its main focus was on two Supreme Court rulings. The first half of the case dealt with the controversial ADM Jabalpur v Shiv Kant Shukla<sup>37</sup> case, in which the denial of basic fundamental rights was supported, and the second section dealt with the Suresh Kumar. Koushal<sup>38</sup> rejected the LGBTQIA+ group's "so-called" rights rhetoric.

Sexual preference, according to Justice Chandrachud, falls under the broad definition of the right to privacy. Justice also criticized the minimal hypothesis principle used in the Suresh Kumar. Koushal's decision, stating that the relatively tiny population of LGBTQIA+ people couldn't be used to deny them fundamental rights, so much degradation of basic human rights cannot be considered acceptable even when only a few people object to aggressive reception

**This acknowledgement is important for the following reasons:**

The Suresh Kumar. Koushal's<sup>39</sup> verdict found that because just a few people were convicted under Section 377<sup>40</sup>, the offence had no consequence. However, because the agreement is not a component in the prosecution of Section 377<sup>41</sup>, the information can be utilized to assess the volume of its usage because it does not cover cases of consenting sexual interactions. Another concern raised by this statement is that the legislation's impact is not limited to convictions or penalties, but also encompasses downstream impacts such as the creation of a hostile atmosphere for LGBTQIA+ people. The Supreme Court's recognition of the right to privacy

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<sup>36</sup> K.S. Puttaswamy (n 31)

<sup>37</sup>ADM, Jabalpur v Shivakant Shukla (1976) 2 SCC 521

<sup>38</sup> Naz Foundation (n 22)

<sup>39</sup> Naz Foundation (n 22)

<sup>40</sup> Indian Penal Code, 1860, s 377

<sup>41</sup> *Ibid*

under Article 21 of the Indian Constitution<sup>42</sup> as a primary basic right has given the LGBTQIA+ community optimism that Section 377<sup>43</sup> would be removed soon.

### **NAVTEJ SINGH JOHAR *v* UNION OF INDIA THR. SECRETARY MINISTRY OF LAW AND JUSTICE<sup>44</sup>**

*Context of the case:* After the Delhi High Court's ruling was reversed in 2013, gays were labelled criminals once more. When high-profile figures are like Navtej Johar, Ritu Dalmia, and hotelier Keshav Suri, among others, happened to come forward as well as filed a petition with both the Supreme Court and challenged the constitutionality of Sec. 377 of the IPC<sup>45</sup>, this number of LGBTQIA+ rights protests in India increased.

*Contentions:* After hearing many petitions on the subject, the SC decided to remand the matter to a larger bench. The government has declared that it will not intervene and will let the case be determined by the court's wisdom. Section 377<sup>46</sup> was said to infringe the constitutional right to privacy, equality, and freedom of speech and expression.

*Verdict:* On September 6, 2018, the Court issued its decision, which can be summarized as follows:

- The court ruled that Sec. 377<sup>47</sup> is illegal because it violates basic rights to companionship, individuality, and individuality. By altering Sec. 377<sup>48</sup>, it decriminalized homosexuality by making consensual encounters among individuals of the same gender or sex unlawful.
- The court ruled that Sec. 377<sup>49</sup> is unclear and does not make clear distinctions between "natural" and "unnatural" actions. It also limits the right to express one's sexual identity

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<sup>42</sup> Constitution of India, 1950, art.21

<sup>43</sup> Indian Penal Code, 1860, s 377

<sup>44</sup> Navtej Singh Johar (n 1)

<sup>45</sup> *Ibid*

<sup>46</sup> *Ibid*

<sup>47</sup> Indian Penal Code, 1860, s 377

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid*

and the freedom of expression provided by Art. 19 of the Indian constitution<sup>50</sup>. The court further ruled that sexual orientation is an integral component of self-identity, that rejecting it is equal to rejection of the right to life, and that the fact that they constitute a tiny fraction of the community cannot be used to deprive them of their rights.

- Koushal's<sup>51</sup> ruling was lambasted by the court, which described it as absurd, unreasonable, and unconstitutional.
- It was also highlighted that sex prejudice is forbidden because it is a common occurrence, as biological and scientific facts demonstrate.
- The Supreme Court also instructed the authorities to increase community awareness of LGBTQIA+ rights and to eradicate the stigmatization associated with them. The judges then discussed psychological health, respect, secrecy, self-determination, and transgender persons.

## ADOPTION

Adoption in India is governed by both secular and religious laws. Adoption for Hindus is controlled by the Hindu Adoption and Maintenance Act of 1956;<sup>52</sup> however, adoption for Parsis, Muslims, Christians, and others is not governed by personal laws. However, the Juvenile Justice Care and Protection of Children Act of 2015 (JJ Act)<sup>53</sup> must be studied in conjunction with the CARA, 2017<sup>54</sup> adoption legislation. This is a secular law that allows for adoption regardless of religious views.

## ADOPTION REGULATIONS

### *Hindu Adoption and Maintenance Act, 2005*<sup>55</sup>

HAMA<sup>56</sup> allows a Hindu married couple to adopt a child with the consent of their spouse. However, if the spouse is insane, has abandoned the world, or has converted his or her

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<sup>50</sup> Constitution of India, 1950, art.19

<sup>51</sup> Naz Foundation (n 22)

<sup>52</sup> Hindu Adoptions and Maintenance Act, 1956

<sup>53</sup> Juvenile Justice (Care and Protection of Children) Act, 2015

<sup>54</sup> Central Adoption Resource Authority, 2017

<sup>55</sup> Hindu Adoptions and Maintenance Act, 1956

children, this agreement will not be necessary. Similarly, this rule permits unmarried men and women of legal age who are not mentally unstable to adopt children.

### *Regulation regarding adoption*

In terms of limitations, the Adoption Regulation Act<sup>57</sup> is even more stringent than the HAMA.<sup>58</sup> Unmarried men and women can accept HAMA<sup>59</sup> as long as they are in good mental, bodily, and financial health and do not have a life-threatening condition aside from that, the law forbids a single guy from adopting a female child but allows a woman to adopt a newborn baby boy. In HAMA<sup>60</sup>, on the other hand, a single man can adopt a female child if the two children are at least twenty years apart in age.

### *Transgender individuals and same-sex spouses*

Despite the fact that Sec. 377<sup>61</sup> of the Indian Penal Code has been decriminalized, LGBTQIA+ people are still not allowed to seek children. This demonstrates that the law does not treat LGBTQIA+ people equally.

## **HOW ADOPTION LAWS ARE DISCRIMINATORY AGAINST LGBTQIA+ SPOUSES?**

According to Regulation 5(3) of the "Adoption Regulation Act"<sup>62</sup>, only a couple who has been in a stable relationship for at least two years is allowed to adopt a child. Furthermore, the provision uses the terms "husband" and "wife," indicating that the right to adoption for same-sex couples is not recognized. The applicability of such regulations to trans-couples will be problematic because there are separate adoption requirements for men and women.

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<sup>56</sup> Hindu Adoptions and Maintenance Act, 1956

<sup>57</sup> Central Adoption Resource Authority, 2017

<sup>58</sup> The Hindu Adoptions and Maintenance Act, 1956

<sup>59</sup> *Ibid*

<sup>60</sup> *Ibid*

<sup>61</sup> Indian Penal Code, 1860, s 377

<sup>62</sup> Central Adoption Resource Authority, 2017, r 5(3)

Furthermore, the NALSA<sup>63</sup> Verdict states that persons have the freedom to select their gender and undertake sex reassignment surgery. As a result, the legal ramifications are unclear if a woman adopts a kid but subsequently undergoes a sex change to become a male. Without a doubt, adoption is a hard subject, and due to anti-trafficking regulations, even heterosexual couples have trouble adopting a child. A heterosexual couple, on the other hand, is allowed to file for adoption, but same-sex spouses are not.

### *The argument about the inferior family*

- Another reason that same-sex spouses are not permitted to adopt is that every child must appreciate the value of both a mom and a dad. As a result, same-sex spouses should be barred from adopting in order to prevent the child from growing up in an "inferior family." It's paradoxical that the legislation allows a kid to grow up as an orphan without both parents, as opposed to being raised by homosexual and trans people.
- Despite the reality that India has over a million orphans and neglected children, most of whom live in appalling conditions, the government continues to prohibit LGBTQIA+ couples from adopting a child.

### *Same-sex weddings are not authorized.*

Another reason is that homosexual spouses are not permitted to adopt a child jointly in India since same-sex unions are illegal.

## **GUARDIANSHIP**

### *Synopsis*

Guardianship is a collection of rights and responsibilities that an adult has over a minor's personality and possessions. Custody and guardianship are inextricably linked. The Hindu

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<sup>63</sup> National Legal Services Authority (n 26)

Minority and Guardianship Act of 1956<sup>64</sup> governs Hindu minorities in India, whereas the Guardianship and Wards Act of 1956 governs all residents

### *Context*

In India, the father was considered the natural guardian of the kid and held complete power over him. According to Section 6 of the Hindu Marriage Act,<sup>65</sup> the mother can only claim guardianship of the child after the father. The court determined in *Ms. Githa Hariharan & Anr v Reserve Bank of India & Anr*<sup>66</sup> that the phrase "after the father" should not be interpreted to mean that a mother can have guardianship only after the father's death, but that such a right can be exercised even if the father is still alive. As in the case of a father who is unable to provide for his kid financially, intellectually, or practically.

### *Significant Advancements*

In 2010, the legislation was amended to provide both the mother and the father equal guardianship rights. In the case of *ABC v The State (NCT of Delhi)*,<sup>67</sup> the court rendered a reasonably liberal Verdict in 2015, admitting the unwed mother's guardianship rights and highlighting that the woman is not required to reveal the name of the father.

## **PRESUMPTIONS OF HETERONORMATIVITY**

Despite the act's gender-neutral name, it is founded on gender binary concepts. Enforcing these requirements will be difficult because there are LGBTQIA+ parents or transgender parents whose gender is unknown, hence such categories must be defined.

## **CHILD'S BEST INTEREST**

The idea of the "best interests of the child" is the primary factor for determining custody or guardianship. The court recognizes that child custody is granted to the person who shows

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<sup>64</sup> Hindu Minority and Guardianship Act, 1956

<sup>65</sup> The Hindu Marriage Act, 1955, s 6

<sup>66</sup> *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228.

<sup>67</sup> *ABC v The State (NCT of Delhi)* (2015) SCC 609

concern, and care, and can offer a familiar environment for the kid. This theory is exceedingly adaptable and may be used with a wide range of data. To create guardianship legislation that is inclusive of the LGBTQIA+ community, the wording of the law should go beyond the binary, enabling such persons to become guardians regardless of sex, relationship structure, or sexual orientation, in accordance with the NALSA<sup>68</sup> and NavtejJohar<sup>69</sup> judgments. However, how the phrase is used will have a significant influence. A court of law will interpret the phrase "best interests of the child" in the context of the LGBTQIA+ community.

## **SURROGACY**

Single persons and LGBTQIA+ couples are forbidden from having their own children through surrogacy, according to a new surrogacy bill passed by parliament. The bill has been reduced to an "inflexible" piece of legislation that restates preconceptions of an "archaic family system" that is out of touch with current reality, rather than accomplishing its goal of prohibiting the commercialization of surrogacy and preventing the exploitation of mother and child.

### ***Regulations and Restrictions***

Even a heterosexual couple will struggle to meet the legal criteria for surrogacy due to the provisions of the act that was established. The new surrogate mother must be a "near relative," which the law does not define, and the pair must have been married for at least five years, regardless of their age or how late they married, and so on. Surrogacy is also outlawed for unmarried men and women, as well as LGBTQIA+ couples, who want to start a family.

### ***Failure to create a link with the primary goal***

According to Congress, the bill's main purpose is to defend surrogate mothers' rights and make commercial surrogacy illegal in India. The bill's contents and objectives, on the other hand, appear to be unconnected; if this had been the legislature's primary goal, greater emphasis would have been placed on surrogate mother rehabilitation and reintegration into our social framework.

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<sup>68</sup> National Legal Services Authority (n 26)

<sup>69</sup> Navtej Singh Johar (n 1)

## CONDEMNATION

As it prohibits a significant portion of the population from becoming parents through surrogacy, the law is defective. Surrogacy is prohibited solely on the basis of a person's marital status or sexual orientation, and heterosexual marriages are severely restricted. It has a lot of flaws that must be rectified, as the current law discriminates against a large number of people.

*Couples who are identified as LGBTQIA+ are the most vulnerable members of the community.*

As a result of these conditions, delivering surrogacy to the LGBTQIA+ community looks to be an even further-fetched ambition. Another important point to remember is that people who are not part of the LGBT community, including single females, single males, and so on, can adopt or become legal guardians; however, LGBTQIA+ couples cannot adopt or become guardians.

## IMPERFECTIONS IN THE LAW FOR SAME-SEX SPOUSES

The Supreme Court legalized this discriminatory section in the Navtej Johor<sup>70</sup> decisions, but this jubilation is meaningless without basic or necessary rights, and the major question in front of us is if we are procrastinating on it or providing them fake books without contents. The right of same-sex couples has been recognized by the judiciary, but only on paper, not in practice because the people's cultural shame prevents them from using their rights, and not all rights, such as family and adoption, are recognized. They will be unable to exercise their rights even if they are recognized. It is not just the job of the judiciary; in a democracy like ours, the legislature should also break the old conservative taboo against same-sex couples in society and ensure that they have all of their rights as citizens.

In delivering justice, the judicial system must continue to stay politically independent and spiritual bodies, but in the Suresh Koushal<sup>71</sup> judgment, the court gave extremely ambiguous and utterly irrational purposes for section 377<sup>72</sup> as intra vires of the constitution, claiming that

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<sup>70</sup> Navtej Singh Johar (n 1)

<sup>71</sup> Naz Foundation (n 22)

<sup>72</sup> Indian Penal Code, 1860, s 377

only a handful of cases have been noted against by the section and that it does not violate basic rights. In the case of *Arun Kumar Sreeja v Inspector general of registration*,<sup>73</sup> the Madras High Court affirmed the rights of same-sex couples, stating that under the Hindu marriage statute, a marriage between a transgender woman and a man is valid if both declare Hindu religion and are instructed to register the marriage. As a result, each organ in a democracy has its own power, and if one fails to act democratically, the others must act as checks and balances.

The legislature should amend oppressive laws in terms of same-sex couples' family rights that are in violation of the constitution, such as the Hindu Adoption and Maintenance Act, 1956,<sup>74</sup> and the Juvenile Justice (Care and Protection) Act, 2015,<sup>75</sup> which provide capacity for a person to accept the child and only allow married people to adopt the child. According to the Ministry of Women and Child Development's recommendations under the Juvenile Justice Regulation for Adoption, marital status is not taken into account while adopting.

Single parents are allowed to adopt, however, couples who want to adopt together must be married and have both spouses' agreement. These adoption regulations are discriminatory for same-sex couples since they only allow married couples or single parents to adopt a child, and they will defeat the goal because homosexuality is no longer a felony. This legislation expressly states that unmarried single persons or married couples may adopt children, but that unmarried couples or same-sex couples may not adopt children. The law is not static; rather, it is latent, evolving in response to changing needs and circumstances. These actions are unlawful and violate the Indian Constitution's Articles 14, 15, and 21.<sup>76</sup> Despite the fact that Article 14<sup>77</sup> of the constitution promises equal protection under the law and equality before the law, the law discriminates against married and unmarried couples since marriage is about more than merely procreation; people marry or live in partnerships for love and companionship. As a consequence, these activities fail the Article 14<sup>78</sup> classification test

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<sup>73</sup> *Arun Kumar Sreeja v Inspector General of Registration* (2014) 3 SCR 861

<sup>74</sup> Hindu Adoptions and Maintenance Act, 1956

<sup>75</sup> Juvenile Justice (Care and Protection of Children) Act, 2015

<sup>76</sup> Constitution of India, 1950, art.14, art.15, art.19, and art.21

<sup>77</sup> Constitution of India, 1950, art.14

<sup>78</sup> *Ibid*

because the category is unequal, unjust, and irrational, and the legislator failed to show a clear distinction or reasonable relationship. No one should be discriminated against on the basis of sex, which includes sexual desire, according to Art. 15,<sup>79</sup> and same-sex spouses, who are a minority, face hostile prejudice as a result of society's stereotype thinking.

As a result, their marriages are protected by the Constitution's Art. 15.<sup>80</sup> Same-sex couples have the right to individual choice, independence, and self-determination under Art. 21.<sup>81</sup> Individuals can choose whether or not to marry, and any regulations that are arbitrary, discriminatory, or unreasonable are illegal and unconstitutional. The court held in *Maneka Gandhi v Union of India*<sup>82</sup> that no one shall be denied the right to life guaranteed by law and that the process cannot be arbitrary or impair constitutional rights. The categorisation fails the test because there is no discernible difference or rational nexus, as distinguishing same-sex couples serves no logical purpose, as does sections 377 and 365,<sup>83</sup> where the former is about the unnatural offence (decriminalized) in which sex with consent is an offence and the latter defines sex with consent as a non-offence, rendering the categorisation null and void and unlawful. The government should utilize its authority in accordance with the constitution's principles, while also respecting the dignity of individuals in the law-making process. These laws were enacted during a period when homosexuality was illegal and same-sex couples were ignored by the government. When we consider the aim of these activities, we may see why they are necessary at that particular moment. The Hindu Law Committee, directed by Sir B.N. Rau was formed in 1914 to offer proposals for a standard Hindu code, and a draft bill was presented to the parliament's province committee in 1948. Based on the suggestions, a bill was filed in parliament in 1948 to codify the legislation, which was based on traditional practices of the period, religion, and sacred values of the society, and the objective of the JJ Act is to provide a family for abandoned children. As a consequence, the act's purpose is to safeguard children's welfare while also allowing those who have been unable to reproduce a kid to have a family, which is a win-win situation for both spouses and children.

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<sup>79</sup> Constitution of India, 1950, art.15

<sup>80</sup> *Ibid*

<sup>81</sup> Constitution of India, 1950, art.21

<sup>82</sup> *Maneka Gandhi v Union of India* (1978) 1 SCC 248

<sup>83</sup> Indian Penal Code, 1860, s 377

## CONCLUSION

Same-sex spouses are Indian citizens with equal rights in social, economic, and political matters. Because our society is secular, socialist, democratic, and republican, all people are treated equally, regardless of their sexual orientation or gender. Section 377<sup>84</sup> is decriminalized when the Supreme Court of India found in *Navtej Singh Johar & Ors. v Union of India* the Secretary Ministry of Law and Justice<sup>85</sup> that it violates Art. 14 of the Indian constitution<sup>86</sup> since it is completely arbitrary, imprecise, and has an unconstitutional goal. This also applies to legislation that discriminates against same-sex couples when adopting children, and Art. 21<sup>87</sup> and the Yogyakarta principle uphold the right to self-identity. Bypassing the Mental Healthcare Act of 2017,<sup>88</sup> Justice Nariman explains parliamentary statutory knowledge and dispels all cultural misunderstandings regarding same-sex couples, since most people assume that children adopted by same-sex couples have poor mental and physical development. The right of each and every person of India to live in dignity and privacy, including the freedom to choose their own intimacy and the manner in which they choose to spend their lives, is protected by the constitution, according to the *K.S. Puttaswamy* judgment.<sup>89</sup>

According to J. Chandrachud, laws should not be based on moral notions that are incompatible with the constitution, and the rights of same-sex couples are hampered by structures such as lineage, sex, class, religious practice, and community, which are not fought separately for homo sexuality but collectively as a lifetime ban for spouses. As the adoption regulations clearly state capacity only for married couples and single persons, they do not fulfill the categorization test of Art. 14<sup>90</sup> of the constitution, and thus are discriminatory. Why can't single or same-sex couples adopt if married ones can? Marriage is a societal norm; however, not all citizens adhere to these conventions, and it may or may not be appropriate for everyone. Rather than majoritarian ideas, our constitution is built on the idea of an inclusive

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<sup>84</sup> *Ibid*

<sup>85</sup> *Navtej Singh Johar* (n 1)

<sup>86</sup> Constitution of India, 1950, art.14

<sup>87</sup> Constitution of India, 1950, art.21

<sup>88</sup> Mental Health Care Act, 2017

<sup>89</sup> *K.S. Puttaswamy* (n 31)

<sup>90</sup> Constitution of India, 1950, art.14

society that accepts people's many opinions. The peaceful and progressive nations abolished laws that discriminated against same-sex couples, enabling both spouses to adopt children jointly via judicial pronouncements or legislation. Individuals must then decide whether or not to marry, and laws must be non-discriminatory for everybody so that the LGBTQIA+ population enjoys equal rights in all aspects. Because our constitution is progressive, the government or the judiciary in India might change the regulations of adoption for a same-sex couple, like in the Sabarimala temple issue, when the laws are discriminatory and contradict the constitution. Governments in some countries are making progress, while others are clinging to outdated ideals. Since many of their children are in the foster system, it'll be a lifesaver for them and LGBT. As a result, India should likewise adopt this forward-thinking move for their rights, either through the judiciary or through legislative law.