

**A CRITICAL ANALYSIS ON THE DEVELOPMENT OF MARRIAGE AND ADOPTION  
AGAINST SAME SEX MINORITIES- THEIR RECOGNITION UNDER HINDU LAW**

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LGBTQ+ - groups of Lesbians, gays, Bisexuals, Transgenders and Queer organizations united by common culture and social movements is as defined in the Cambridge Dictionary. By the Amendment Act of 2018, the Supreme Court decriminalized consensual gay sex under Section 377 of the Indian Penal Code. Hence, making consensual gay sex not an unnatural offence anymore. The lack of social recognition has an effect on the capacity of LGBT people to access and enjoy their rights as a citizen. The main legal duty is to protect their rights from Homophobic and Transphobic violence. These LGBTQ+ members did get their rights by decriminalizing Section 377 but there are many other related rights which are yet to be recognized by the court and be granted to them as they are considered the third genders of the country. Hindu personal law also recognizes same sex marriage but there is no such provision to the third genders with respect to adoption rights in India. The study is made based on the concept of how same sex marriage is recognized in Hinduism and if there is any provision to the LGBTQ+ community to take in adoption any child.

Keywords – LGBTQ+, Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956, Indian Penal Code 1860, Juvenile Justice Act 2015, Same sex marriage, Adoption.

## **INTRODUCTION**

LGBT- Lesbians, Gay, Bisexual or Transgender is an English umbrella term that includes all subsections of a very diverse community. They are termed as LGBTQ+ community, and the country recognizes them as the third genders or sexual minorities of the country. Sexual minorities are recognized by different names like, *Hijras*, transgenders, homosexuals, gays etc. India recognizes "*Hijras*" as the gender different from that of Men and Women, making them legally the Third-Genders of the country. The people of this community hugely face discrimination at every aspect of their lives. They are rejected from getting employment, health care facilities and most importantly education. They are told to be different from the others because of their gender, and because of how the country looks at them. They face rejection from their very own family members, but apart from all this, they are still making an attempt to equally be a part of this society and win major victories. They are deprived of

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many rights in this country. After the partial decriminalization of Section 377 of the Indian Penal Code (IPC) in the year 2018 by a famous landmark judgement of Navtej Singh Johar v UOI (AIR 2018), the country now recognizes same sex marriage in the country. Even though same sex marriage is legalized in the country, this does not make all the win for them. The country is yet to recognize many rights relating to them, and one such is the adoption rights. No codified or uncodified law provides adoption rights to the LGBTQ+ community in our country.

## CHAPTER 1

### AN ANALYSIS ON THE EVOLUTION OF THE LGBT RIGHTS WITH THE PERSPECTIVE OF INDIAN JUDICIARY.

1. The famous extraordinary mathematician, Shakuntala Devi, in 1977 published a book, “The World of Homosexuals” which called for a “decriminalization and full and complete acceptance- not tolerance, sympathy”. The book however went unnoticed at that time.
2. In 1981, the first ever All India Hijra Conference was held in Agra. Over about 50,000 members from over all country of that community attended the conference. In 1994, the Hijras were legally given the voting rights as the third sex.
3. In 1994, the first ever challenging petition was filed against Section 377 by the AIDS Bhedbhav Virodhi Andolan,<sup>2</sup> which was eventually dismissed.
4. In 1999, there was first ever Pride march to be organized in South Asia, for which Kolkata was the host.
5. In 2001, the Naz Foundation filed a Public Interest Litigation in the Delhi High Court, to challenge Section 377. Later the Delhi High Court in 2009, gave decision in Naz Foundation v. Government of NCT of Delhi,<sup>3</sup> that Section 377 and other legal prohibitions against private, adult, consensual and non-commercial same sex conduct, is to be in direct violation of fundamental rights given in the Indian Constitution, which meant Section 377 was “decriminalized but not legalized”. Though it being a landmark judgement, it did not seem to last for long.
6. In June 2013, Harish Iyer happened to be the first Indian citizen to be listed among the top 100 LGBTIQ influencers of the World, in the Guardian’s World Pride Power list.

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<sup>2</sup>AIDS Bhedbhav Virodhi Andolan, (ABVA), 1989.

<sup>3</sup>Naz Foundation v. Government of NCT of Delhi, 160 Delhi Law Times 277.

7. In December 2013, first LGBTQIA alliance high school in India: Breaking Barriers at Tagore International New Delhi was inaugurated.
8. On 11 December 2013, the Supreme Court set aside the 2009 decision of Delhi High Court decriminalizing consensual homosexual activity. The bench of Judges however noted that the parliament should debate and come to a decision on this matter.
9. In January 2014, the Supreme Court dismissed the review petition against its previous verdict on Section 377 of the Indian Penal Code, which was filed by the Central Government, NGO Naz Foundation and many others. Further explaining, the bench said, “While reading down Section 377, the High Court noted that only a minuscule fraction (or a tiny portion) of the country’s population is covered with LGBT people”.
10. In February 2014, the first Indian youth leadership summit for LGBT was held in Mumbai. In February 2014, the Indian Psychiatric Society released a statement saying homosexuality is not a disease and it did not recognize it as one.
11. In April 2014, in the case of National Legal Services Authority v. Union of India,<sup>4</sup> the Supreme Court ruled that the Transgender people should be treated as the category of third gender.
12. In October 2014, a month-long celebration to celebrate LGBT history month at The American College started with a lecture on Gender and Sexual minorities organized by Srishti Madurai.
13. In January 2015, India’s first transgender mayor and the member of Dalit community Madhu Kinnar, was elected as the mayor of Raigarh, Chhattisgarh.
14. In December 2015, a bill was introduced for the decriminalization of Section 377 in the Parliament, but later was rejected by a majority of votes.
15. In February 2016, the Supreme Court decided to review the criminalization of homosexual activity.
16. In November 2016, the first Pride march called Namma Pride, was conducted in India to be made accessible for persons with disability. Around 35 people with disability happened to be a part of the march and other events.
17. On August 24, 2017, the Supreme Court gave the country’s ‘LGBT community the freedom to safely express their sexual orientations’. An individual’s sexual orientation is protected under the law of Right to Privacy. However, the Supreme Court did not directly

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<sup>4</sup> National Legal Services Authority v. Union of India, Writ Petition (civil) No. 604 of 2013.

overturn any law criminalizing same sex relationships, so at this point the legislation stands in a complicated paradox:

“LGBTQIA people are allowed to express their sexual orientation, but homosexual acts still remain criminalized by the Indian Penal code”.

18. On September 2018, the Supreme Court removed Section 377 by legalizing the old colonial rule that criminalized the consensual gay sex. Hence, the consensual gay sex was not considered as an unnatural offence anymore.

## CHAPTER 2

### CONCEPT OF MARRIAGE AND ADOPTION AMONG SEXUAL MINORITIES.

This community is the groping of Lesbians, Gay, Bisexuals, Transgenders, and Queer organizations that is united by common culture and social movements. Section 377 of the Indian Penal Code deals with unnatural offences, where before the Amendment Act of 2018, the provision also considered having intercourse with same sex as an unnatural offence. On the 6<sup>th</sup> of September, 2018, through the case of Navtej Singh Johar v. UOI,<sup>5</sup> the Supreme Court removed Section 377 of the IPC,<sup>6</sup> by legalizing the old colonial rule that criminalized consensual gay sex. Hence the consensual gay sex is not considered unnatural anymore. Coming to the concept of the rights for the third genders in the country, same sex marriages are also made acceptable in India. According to the Hindu law, marriage is considered as a sacrament. Probably no other person has endeavoured to idealize the institution of marriage as the Hindus have done. Even in the patriarchal society of the Rig Vedic Hindus, marriage was considered as a sacramental union. Marriage is one of the essential samskara for every Hindu. This implies several things, first being, the marriage between a man and a woman is of religious and holy character and not a contractual union. For a Hindu, marriage is obligatory, for begetting a son, for discharging his debt to his ancestors and for performing religious spiritual duties. When we speak about same sex marriage, it is something that considers marriage between a man and a man or a woman and a woman, in others words calling it as marriage between two same genders. Even though there are some strong religious beliefs of marriage solemnizing between a bride and a groom (a man and a woman), several court decisions have separated the religious and secular facet of marriage.

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<sup>5</sup> Navtej Singh Johar v. UOI, AIR 2018 SC 4321.

<sup>6</sup> Section 377 of Indian Penal Code, 1860.

## CHAPTER 2.1.

### AN ANALYSIS ON THE ACCEPTANCE OF SAME SEX MARRIAGE ACROSS OTHER COUNTRIES.

According to reports, Belgium and Netherlands were the first countries to legalize same sex marriage worldwide, followed by South Africa being the first African nation to incorporate Lesbian and gay rights in their Constitution. As Latin America is being heavily influenced by the religious norms, Catholic Church has strictly prohibited same sex marriage, and further Nepal and Taiwan being the only countries in Asia to have been recognized same sex marriages, having Israel accepting same sex marriage performed outside its borders or jurisdiction. When it comes to India, the issue as to whether people with same sex are allowed to form a family by marriage and the related consequences, with taking into consideration traditional notion of marriage and family is a very sensitive and deliberated topic.<sup>7</sup> Section 5 of the Hindu Marriage Act, 1955 lays down certain conditions for a Hindu marriage, making the solemnization of marriage valid on the fulfilment of these conditions namely,

- a) Neither party has a spouse living at the time of marriage.
- b) Neither party is incapable of giving valid consent due to unsoundness, mental disorder, or is subjected to repeated attacks of insanity making the person unfit for procreation.
- c) Bride having completed 18 years and the bridegroom having completed 21 years at the time of marriage.
- d) Parties are not within the prohibited degrees of relationship unless custom or usage permits them.
- e) Parties not being sapindas of each other unless custom or usage permits them.<sup>8</sup>

This provision is made very gender neutral by saying that the marriage under Hindu Marriage Act, 1955 can be solemnized between two Hindus. The question arises as to whether a homosexual couple can claim themselves to be the bridegroom and the bride respectively just to satisfy the conditions mentioned under Section 5 of the Hindu Marriage Act, 1955? Because if they do so, it will defeat the judgements and decrees passed by the legislations, and the jurisdictions that have permitted same sex marriage have permitted on the basis that same sex couples can contract to the marriage, or they have by time amended the definition of marriage in their laws and legislations to include same sex marriages.

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<sup>7</sup> Recognition of Foreign same sex marriage in India, by Stellina Jolly and Ritika Vohra.

<sup>8</sup> Section 5 of Hindu Marriage Act, 1955.

**CHAPTER 2.2.****THE ERA OF ANCIENT PRACTICES OF HINDUISM TO THE ERA OF SAME SEX MARRIAGES.**

As far as the concept of Hinduism is concerned, before interpreting the provisions of the Hindu Marriage Act, it is necessary to determine whether same-sex marriages are compatible with Hinduism or not. In the Arun Kumar case,<sup>9</sup> the Madras High Court discussed certain mythological tales that clearly show that same-sex unions are not against Hinduism's tenets. While there are numerous examples, one of the most important that the court cited was the birth of Lord Ayappa, who is thought to be the result of a union between Lord Shiva and Lord Vishnu in the form of Mohini.

Same-sex marriages are prohibited if the literal rule of interpretation is applied to the word "bride" in section of the Hindu Marriage Act, 1955. This is because the provision requires a bridegroom and a bride to be involved in a marriage. Because the word "bride" in its literal English definition refers to women, if two men wish to marry, the marriage would fall outside of this provision because there would be no bride. In the case of *Abhijit Iyer Mitra v UOI*,<sup>10</sup> the question of whether homosexuals can marry each other or not, was considered by the Delhi High Court, where it was contented, that marriage can be solemnized only between biological man and biological woman, and that the institution of marriage is an interest of state at large and not merely on the basis that whether two individuals can exercise their right of choice or not. Further it also contented that there is no codified or uncodified law that allows the practice of same sex marriage, but it is important to take into consideration that if this matter is considered to be taken as state interest at large, it shall violate their "freedom to choose" under Article 21 of the Indian Constitution which deals with Protection of life and personal liberty. Having agreeing on the fact that institution of marriage is a state interest at large, but the concerned parties are the individuals seeking to get married, and they should not be deprived of their "freedom to Choose" whatsoever, and this concept of, Freedom to Choose was recognized in the case of *In Re: Indian Woman says gang-raped on orders of village court* published in business and Financial News dated 23.01.2014.<sup>11</sup>

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<sup>9</sup>Arun Kumar and Anr. v The Inspector General of Registration and Ors, W.P. (MD) No. 4125 of 2019 and W.M.P. (MD) No. 3220 of 2019.

<sup>10</sup> *Abhijit Iyer Mitra v UOI*, W.P. (C), 6371/2020.

<sup>11</sup> *In Re: Indian Woman says gang-raped on orders of village court* published in business and Financial News dated 23.01.2014, *Suo Moto W.P (CrI) No. 24 of 2014*.

In the case of *Shafin Jahan v. Asokan K M*,<sup>12</sup> the Supreme Court upheld that, right to marry a person of his/ her own choice, also comes under the ambit of Article 21 of the Indian Constitution.<sup>13</sup> It should be emphasised on the fact that the terms “Gender” and “Sex” are not identical, where Gender is a psychological sex which includes one’s emotions, psychology, one’s own self, or what they are identified as, and on the other hand, sex is referring to one’s biological sex, be it a male or a female. The Supreme Court in the *NALSA v. UOI*<sup>14</sup> said that the term “sex” includes the term “gender” as well. The court further made it clear that gender need not refer to biological characteristics but rather be referred to as an “innate perception of one’s gender”.<sup>15</sup>

### CHAPTER 3

#### CONCEPT OF ADOPTION IN THE EYES OF HINDU LAW.

Predominantly adoption was considered as a sacramental act. There have been many controversies not just among writers but also among judges as to when to concept of adoption is considered, the secular motive shall predominate or the religious motive predominates. In the case of *Inder Singh v Kartar Singh*,<sup>16</sup> it was observed that some judges still insist that the objective of adoption is two folded; first being, to secure the performance of one’s funeral rites and second being, to preserve the continuation of one’s ancestry. There were many rules relating to adoption in Ancient Hindu law that could only be supported by the fact that adoption was a sacred act. For example, the following rules could only be supported on this basis: The adopted son must resemble a son (saunaka): This prohibited the adoption of orphans and illegitimate children; no one could have more than one adopted son; no one could adopt a child whose mother could not marry while she was a maiden; thus, a daughter's son or a sister's son was not allowed to be adopted because one could not marry one's sister or daughter. The same reason appears to be behind the rule that when a widow adopted a son, it

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<sup>12</sup> *Shafin Jahan v. Asokan K M and Ors*, CrI Appeal no. 366 of 2018.

<sup>13</sup> Article 21 of the Constitution of India, 1949.

<sup>14</sup> *National Legal Service Authority (NALSA) v. UOI*, AIR 2014 SC 1863.

<sup>15</sup> Tanish Arora, Can the Hindu Marriage Act be interpreted to allow same-sex marriages?, THE LEAFLET, Article, May 17, 2022, <https://theleaflet.in/can-the-hindu-marriage-act-be-interpreted-to-allow-same-sex-marriages/>.

<sup>16</sup> *Inder Singh v Kartar Singh*, 1966 Punj 258.



was always considered adoption to her deceased husband. This principle is in charge of the Doctrine of “Relating Back”.<sup>17</sup>

The “Doctrine of Relating Back” is the principle that a later act is deemed by law to have occurred earlier. In practise, in certain scenarios, the current act of the party will be related back to an earlier time in order to determine the cause of action. The Hindu Adoptions and Maintenance Act, 1956, has clearly separated all religious and sacramental aspects of adoption and has made adoption a secular institution and secular act, so much so that religious ceremonies are no longer required for adoptions.

Under Hindu Adoptions and Maintenance Act, 1956, there can no longer be two types of adoptions namely, secular and sacramental; all the adoptions after 1956, are purely secular and valid, and must strictly obey to the requirements of the Act. It is a different matter that a Hindu may still adhere to old notions while exercising his right to adoption, such as not adopting a daughter’s son or sister’s son; he may still not adopt a daughter, but this should not detract from the essentially secular nature of adoption.

According to Section 15 of the Hindu Adoption and Maintenance Act, 1956,<sup>18</sup> which says adoption once made is final and irrevocable, further states that, an adoption that has been legally completed cannot be revoked by the adopter, natural parents, or anyone else, and the same was discussed in the case of *Nand v. Bhupindra*.<sup>19</sup>

An adopted child cannot renounce his or her adoptive parents and return to the family of his or her birth. This means that, if a person adopts a child, he or she can never get rid of the child. Adopted children cannot be placed for adoption. Once an adoption has been completed in accordance with the law, it cannot be cancelled, nor can the adopted child, adoptive parents, or natural parents destroy the adopted child’s rights.<sup>20</sup>

The law on adoption maybe classified under the following heads.

- a) Who may take in adoption,
- b) Who may give in adoption,
- c) Who may be taken in adoption,

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<sup>17</sup> *Srinivas v. Narayan*, 1954 SC 379; *Naidu v. Naidu*, 1970 SC 1673; *Motilal v Sardar Mal*, 1976; *Vijay v State*, 1989 J&K 10.

<sup>18</sup> Section 15 of Hindu Adoption and Maintenance Act, 1956.

<sup>19</sup> *Nand v. Bhupindra*, 1966 Cal 181; *Gopal v. Kampta*, 1972 MP 193.

<sup>20</sup> *Gulkarin v. Prahlad*, 1968 Raj 51; *Gopal v. Kampta*, 1972 MP 193.



- d) Formalities of adoption,
- e) Results and effects of adoption.

While talking about the concept of adoption, Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (“JJ Act”)<sup>21</sup> states, an adoption means the process by which the adopted child is permanently separated from his biological parents and becomes the lawful child of the adoptive parents, with all the rights, privileges, and responsibilities that are attached to a biological child.

### **CHAPTER 3.1.**

#### **CONCEPT OF ADOPTION AMONG SEXUAL MINORITIES.**

The Hindu Adoptions and Maintenance Act, 1956, also known as the HAMA, and the Juvenile Justice Act also known as JJ Act, governs the concept of adoption in India. Adoption is permissible under HAMA for Hindus, Buddhists, Jains, Sikhs, and other religions that are governed by the Hindu Law. Sections 7 and 8 of the HAMA<sup>22</sup> contains the words “husband” and “wife” to describe the capacity for adoption, implying that the act does not recognise adoption by same-sex couples. Furthermore, the capacity for adoption is explained for Hindu males and Hindu females, hence, making some space for ambiguity regarding the application of such laws to Third Genders.

The Juvenile Justice Act makes adoption available to anyone, regardless of religion, with the criteria set by the Central Adoption Resource Authority also known as CARA. CARA is the Ministry of Women and Child Development and is considered the apex controlling body with respect to adoption matters, and has also drafted the Adoption Regulations, (AR), 2017, which lays out the rules and guidelines for the country’s adoption programmes.

Prospective adoptive parents also known as PAP’s eligibility is addressed under Section 57 of the Juvenile Justice Act and Regulation 5 of AR. No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship, and because same-sex marriages are not yet recognised in India, same-sex couples cannot establish two years of stable marital relationship, making them ineligible to be PAPs.

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<sup>21</sup> Section 2 (2) of Juvenile Justice Act, 2015.

<sup>22</sup> Section 7 of Hindu Marriage and Adoption Act, 1956; Section 8 of Hindu Marriage and Adoption Act, 1956.

Furthermore, the sociocultural stigma associated with such relationships discourages officials from giving children in adoption to such couples. The aforementioned acts are no doubt in violation of Articles 14, 15, and 21 of the Indian Constitution. Article 14 guarantees to every Indian citizen the right to equality before the law and equal protection under the law. It is a fundamental right that is part of the basic structure of the Constitution. Article 14 seeks to eliminate arbitrariness in state action because any arbitrary action must necessarily imply a rejection of equality. Discrimination between married and unmarried couples for adoption clearly fails the classification test and is arbitrary because the classification is unjust, unfair, and unreasonable.

Furthermore, there is no rational nexus that can be achieved by discriminating between same-sex and different-sex couples merely based on their sexual orientation because there is absolutely no evidence to demonstrate that same-sex couples are in any way inferior in parental involvement as compared to different-sex couples.

In fact, according to research, having LBTQIA+ parents have no effect on a child's education, and children raised by same-sex parents perform better in both elementary and secondary school.

Article 15 prohibits discrimination on the basis of “sex,” which includes discrimination on the basis on sexual orientation, as established in the case of National Legal Services Authority v. Union of India.<sup>23</sup> As a result, the right of adoption of same-sex couples is protected under Article 15 because they cannot be discriminated merely based on their sexual orientation and must also be granted adoption rights like heterosexual couples. According to the case of K.S Puttaswamy v UOI,<sup>24</sup> Article 21 protects life and individual liberty, which includes the right to live with dignity. The court also referred to a Canadian case in Navtej Singh v UOI<sup>25</sup> case, which stated that human dignity is negatively affected when unfair treatment is clearly laid out based on personal attributes, or circumstances that do not relate to individual needs, capabilities, or merits.<sup>26</sup>

It was also determined that the Minority groups has the same human, fundamental, and constitutional rights as other citizens, because these rights are innate natural and human

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<sup>23</sup> National Legal Service Authority (NALSA) v. UOI, AIR 2014 SC 1863.

<sup>24</sup> K.S Puttaswamy v UOI, 2017 10 SCC 1.

<sup>25</sup> Navtej Singh Johar v. UOI AIR 2018 SC 4321.

<sup>26</sup> Shubhangi Singh, Adoption by same-sex couples in India: A right long due, IRALR, Article, January 13, 2021, <https://www.iralr.in/post/adoption-by-same-sex-couples-in-india-a-right-long-overdue>.

rights, and that the members of the community should not be treated as second-class citizens under the guise of social morality. Adoption by same-sex couples is denied, which diminishes the dignity of people in the community because it is based on their sexual orientation, which in fact has nothing to do with their potential or recognition and as potential parents. Adoption by same-sex couples has already been permitted in countries such as Spain, Belgium, etc. Back in 2018, India decriminalised homosexuality, and the rights of LGBTQIA+ people were only lately recognised. It must be noted that, both acts that establish adoption came into effect at a time when homosexuality was still illegal, and because the position has now been officially changed, there is a requirement for the sudden realisation of the community's rights, and treatment equivalent to that of the heterosexual segment of society. Governments must support awareness - raising programmes in order to dispel myths and social and cultural taboos associated with the members of the community and their way of life and relationship issues. The Navtej Singh Johar decision was a significant step towards improving the community's position within the society, but much more work remains to be done by both the judicial system and the legislature. The state should not only decriminalise same-sex marriages, but it should also alter existing laws to allow same-sex couples to adopt legally.

## CONCLUSION

Through the content of this paper, it can be clearly seen that as there is no much awareness among the people of other community, the judiciary is also lacking in giving its decision and making new laws relating to the third genders of the country. To meet the needs of the LGBTQIA+ community, the law must broaden the concept of institution of marriage to include all gender and sexual identities. It is time for India to change its marriage laws and to allow marriage between consenting adults regardless of sexual orientation, gender, or sex. Adoption law in India is governed by personal laws, but there are also secular laws that safeguards this right to people. However, neither of these laws provides right to homosexual couples to adopt a child, because the 'best interest' of the child becomes the primary concern when dealing with the concept such as adoption. The sexual orientation of the couple should not bother adoption agencies as long as it does not have a negative impact on the child's development. As a result, this is an area that must now be addressed, and the judiciary or legislature must issue an order or direction, or pass legislation, to acknowledge the right of homosexual couples.