

LGBT COMMUNITY AND THEIR RIGHT TO PROCREATE IN INDIA

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Abstract:

The paper seeks to find the right of LGBT couples to procreate in India, when they cannot naturally conceive a baby. It further mentions the different ways by which a LGBT couple can have a child. The text also explores the legality of existing laws by which LGBT couples are prohibited to excess their right even after it has been recognized by various Supreme Court judgments and international conventions.

“Sometimes when you pick up your child you can feel the map of your own bones beneath your hands, or smell the scent of your skin in the nape of his neck. This is the most extraordinary thing about motherhood – finding a piece of yourself separate and apart that all the same you could not live without.” — Jodi Picoult

INTRODUCTION:

By far, having a baby is the best thing that has ever happened to an individual and one wouldn't trade it for the world. A parent is helplessly and hopelessly in love with his child, and would fight and die for them. But the question is, Is this pleasure of being parent available to only man-woman couples or every human that exists have right to have this joy? Unfortunately, traditional methods aren't available to LGBT couples to grow their families. Welcome to the 'Brave New World' where reproduction is not just a man-woman thing. A world where sexual intercourse is not a prerequisite to conception and the right to create babies, to reproduce, to procreate has evolved through various methods.

HAVING A BABY:

Human reproduction is any form of sexual reproduction resulting in human fertilization. It typically involves sexual intercourse between a man and a woman. During sexual intercourse, the interaction between the male and female reproductive systems results in fertilization of the woman's ovum by the man's sperm. When LGBT community members are trying to become parents, traditional man-woman sexual intercourse can seem like an end to their family-building dreams. However, just because you can't conceive naturally doesn't mean that you can't become parents. With the development in science and technology the concept is not limited to sexual intercourse between male and female. We live in an age when the obsession with having a child has reached a fever pitch. Single men and women, and couples gay and straight, have more options than ever before—and they're taking advantage of every single one of them. Following options are available to LGTB Community:

1. Assisted Reproductive Technology:

Assisted reproductive technology (ART) are medical procedures used primarily to address infertility. With ART, the process of sexual intercourse is bypassed and fertilization of the oocytes occurs in the laboratory environment. One of the popular options for LGBT community members to have children is through assisted reproductive technology (ART). These processes allow at least one member of an LGBT couple to be directly genetically related to a child, which is the main reason why many LGBT couples choose this route. This can be done in 2 ways.

a. Egg, Sperm Or Embryo Donation And In Vitro Fertilization(IVF):

In all LGBT assisted reproduction cases, a gamete donation is needed, whether it's an egg for a single man or male couple, sperm for a lesbian woman or couple, or an embryo for anyone who can't create a viable embryo on their own. Fortunately, there are many options when it comes to finding sperm, egg or embryo donations in the country today. Lesbian couples can obtain a sperm or embryo donation, complete the in vitro fertilization or intrauterine insemination process, and then carry their pregnancy to term in their own uterus (if medically able). However, gay male couples cannot complete this process without a surrogate. Therefore, in many cases, the options for gay men to have children are a combination of several ART techniques.

b. Surrogacy:

For many gay men and for lesbian couples who cannot carry their own child, surrogacy is the only way they can have a genetically related child of their own. Fortunately, the surrogacy options for gay couples are numerous: There are many surrogacy clinics who embrace LGBT individuals and their parenthood dreams and, when LGBT couples work in the right state, they can protect their parental rights just as well as any intended parents who are both genetically related to a baby born via surrogacy. For most people, surrogacy goes like this: An embryo is created through IVF using one intended parents' sperm or egg and a donated gamete. The embryo is then transferred to the uterus of the surrogate where, once it successfully implants, the baby will develop until the surrogate gives birth. Then LGBT couple will be able to take their baby home after delivery and have the family they had always dreamt of.

2. Adoption

Adoption means a legal process that allows someone to become the parent of a child, even though the parent and child are not related by blood. But in every other way, adoptive parents are the child's parents. If a genetic relationship isn't as important to LGBT couple when it comes to your LGBT parenting options, they might want to consider adoption. There are many wonderful children around the country and the world waiting for a loving, supportive home, and there are plenty of LGBT-friendly agencies who are happy to match LGBT couple with the perfect child for their family.

INTERNATIONAL PERSPECTIVE ON RIGHT TO PROCREATE

The right to parenthood has been recognized in international law through various covenants and declarations. According to Universal Declaration of Human Rights, 1948¹, men and women of full age, without limitation due to race, nationality or religion, have the right to marry and to found a family². Thus, what can be inferred is that, the right to procreate, in furtherance of, the right to establish a family is a basic human right, having a universal application. According to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950³, Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right⁴. The 1994, Cairo Program of Action, categorically states, in regards to the right to procreate, as follows: "Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to all to make decision concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community."

INDIAN JUDICIAL RECOGNITION OF REPRODUCTIVE RIGHTS AS FUNDAMENTAL RIGHTS:

The right to procreation and reproductive autonomy has been recognized as a fundamental right in India. The Supreme Court of India and several state high courts have made important strides in recognizing the denial of reproductive rights as violations of fundamental and human rights. The Supreme Court in *Justice K.S. Puttaswamy (Retd.) Vs. Union of India*⁵ consisting of 9 judge bench held that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India. The Court held that privacy postulates the reservation of a private space for an individual, described as the right to be let alone, as a concept founded on autonomy of the individual. In this way, right to privacy has been treated as a postulate of human dignity itself. While defining so, the Court also remarked as under: "Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognizes an inviolable right to determine how freedom shall be exercised..."

The nine-judge bench did not explicitly mention surrogacy, but it affirmed existing privacy jurisprudence, which has recognized personal decisions about birth and babies as being part of reproductive autonomy. However SC in *Baby Manji Yamada v Union of India*⁶ have explicitly recognized surrogacy as a method of reproduction, thus clearly bringing it within the reproductive aspect of privacy rights.

In *Suchita Srivastava v Chandigarh Administration*⁷ the Supreme Court observed that there is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.

SURROGACY LAWS IN INDIA

The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple. The Bill would ban commercial surrogacy and allow only close relatives to act as surrogates to infertile couples for "ethical altruistic" reasons.

The Bill prevents same sex couples from having surrogate children even though there is a credible scientific research to show that same sex parents are as good as heterosexual parents, thus it violates the Article 14 of the Constitution⁸. *Article 14 of the*

¹ See: The Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>, Visited on: 20-04- 2019

² Article 16 of Universal Declaration of Human Rights, 1948

³ See: The Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>, Visited on: 20-04-2019

⁴ Article 12 of Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

⁵ (2017) 10 SCC 1

⁶ [2008] INSC 1656

⁷ (2009) 9 SCC 1

⁸ Article 14 Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

Constitution guarantees 'equality before the law and equal protection of laws to all persons'. Article 21 guarantees 'protection of life and personal liberty of all persons'⁹.

Restricting conditional surrogacy to hetro-sexual couples and disqualifying others on the basis of sexual orientation, does not appear to pass the test of equality and there is no connection with the intended objectives of the proposed legislation.

Why is access to surrogacy limited to hetro-sexual couples? When same sex couples are recognized under the law, why not permit them to form a family? Necessitating marriage will also lead to psychological stress between couples who desire to have a child, and surrogate parenthood is premised on the notion of providing the opportunity of parenthood to everyone incapable or unwilling to have a child naturally. The restriction on single parents is unjustified too, because in many cases, single parents have successfully nurtured children.

Right to Privacy Violated: The Bill also violates the *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*¹⁰, judgement of the Supreme Court where right to privacy was added in the list of fundamental rights guaranteed by the Constitution.

Violation of Right to Reproduce: The eligibility condition under the Bill amounts to unreasonable restriction on the reproductive rights of a married Indian couple, violative of Article 21 of the constitution. In *Suchita Srivastava v. Chandigarh Administration*¹¹, the Supreme Court equated the right to make a choice in relation to reproduction with personal liberty under Article 21 and clarified that such right includes within it the 'privacy, dignity and bodily integrity' of the woman and further stated that 'taken to its logical conclusion, reproductive rights includes a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children'.

ADOPTION LAWS IN INDIA

There are two basic legislations which deal with adoptions in India. Under Indian law adoption is legal coalition between the party willing for adoption and a child, it forms the subject matter of 'personal law' where Hindu, Buddhist, Jain or Sikh by religion can make a legal adoption. In India there is no separate adoption laws for Muslims, Christians and Parsis, so they have to approach court under the Juvenile Justice (Care and Protection of Children) Act, 2015 for legal adoption.

1. *Hindu Adoptions and Maintenance Act, 1956* : Under it following category of people can make adoptions:
 - a. "Any male Hindu (including Buddhist, Jain or Sikh by religion) who is of sound mind, not a minor and is eligible to adopt a son or a daughter". But if such male has living spouse at a time of adoption then he can adopt a child only with a consent of his wife (unless she has been declared incompetent to give her consent by the court).¹²
 - b. "Any female Hindu (including Buddhist, Jain or Sikh by religion) who is not married, or if married, whose husband is not alive or her marriage has been dissolved or her husband has been declared incompetent by the court has the capacity to take a son or daughter in adoption".¹³

Same sex marriages are not legally recognized under Hindu Marriage Act, 1955 that is why LGBT couples cannot adopt as a couple. But they still have option to adopt as an individual.

2. *Juvenile Justice (Care and Protection of Children) Act, 2015:* The Act provides that any Indian citizen of India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialized Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority¹⁴. Act also deals with Eligibility of prospective adoptive parents¹⁵. The adoptive parents should be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him and both partners must consent for the adoption. A single or divorced person can also adopt in accordance with the provisions of adoption regulations framed by the Authority but a single male is not allowed to adopt a girl child.

Many Indian LGBT persons in same-sex relationships have adopted children as single parents, but there is a downside of it i.e. their partners have no legal rights over the child.

RECOGNITION OF RIGHTS OF LGBT COMMUNITY

In April 2104, the Supreme Court in *National Legal Services Authority versus Union of India and others*¹⁶ ushered in the recognition of various civil and political rights of the transgender community. The genesis of this recognition lies in the acknowledgment of equal worth of every person and the right of choice given to an individual which is the inseparable part of human rights.

The Supreme Court in *Navtej Singh Johar & ors. versus Union of India*¹⁷ decriminalized homosexuality and held that the role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial. Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional.

The current proposed Surrogacy and in force adoption laws creates a specific criterion, which is very narrow for commissioning surrogacy and adoption, it would disentitle LGBT couples from using these methods to have their own children. It is violative of

⁹ Article 21- Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁰ *Supra 1*

¹¹ *Supra 3*

¹² Section 7 of Hindu Adoptions and Maintenance Act, 1956

¹³ Section 8 of Hindu Adoptions and Maintenance Act, 1956

¹⁴ Section 58 of Juvenile Justice (Care and Protection of Children) Act, 2015

¹⁵ Section 57 of Juvenile Justice (Care and Protection of Children) Act, 2015

¹⁶ (2014) 5 SCC 438.

¹⁷ (2018) 1 SCC 791

the rights of LGBT persons in every form starting from violation right to equality, right to privacy and right to reproductive autonomy, rights guaranteed by the Supreme Court in their judgment.

CONCLUSIONS

Gift of child is the most precious one for a couple. Those who are deprived of this wonderful gift always feel inferior and frustrated. Surrogacy and Adoption are wonderful gifts that would bring the big smile on their face. LGBT couples cannot naturally procreate babies, their only hope are on these methods. When it is an established principle that the right to reproduction, procreation is an inalienable human right the question which arises is why do divorced and single person form a separate classification who can adopt and not LGBT couples? Further why are only heterosexual married couples allowed to commission surrogacy and not LGBT couples? Especially when live-in relationships have been recognized by our own Supreme Court. The right to procreation and parenthood, is not within the domain of the State, and does not warrant interference of a fundamental right. Further the classifications being made are arbitrary and violative of the most basic of the human rights. The Court might have recognized their rights but clearly attitudes, even among those shaping policy, remain outdated. India is signatory to various international conventions which provides for right to procreate to LGBT community but still no favorable laws are made. According to the Indian Constitution, The state shall endeavor to foster respect for international law and treaty obligations. Once homosexuality was decriminalized, adoption and surrogacy for LGBT couples was seen as the next step. Being eliminated purely on the basis of their sexual orientation smacks off homophobia.

