

Same Sex Parenting And Children In Indian Households: Consequences, Comparisons, And Recommendations

Manush Ashok Dadlani*

ABSTRACT:

It has been 5 years since the decriminalization of Homosexuality has happened in India and the people from the 61 other sexual orientations have come out as Lesbians, Gays, Bisexuals, Transgenders, Queer, Intersex, Asexual and other forms of sexual orientation. This has provided a free space for gender diverse communities to work and normalize their orientation in normal day to day lives and make them a part of mainstream. Although there has been a history of resistance between the society and the LGBT+'s for their existence in the society. Regardless of discrimination and being seen as a taboo labelling stereotypical social norm still being in existence, People, thankfully have started normalizing it as any other socially accepted form of a relationship which is helpful in making the society more inclusive. The decriminalization debate has now been furthered by asking for legalization and legal recognition of the same by giving rights and recognition to same sex marriage. The litigation has reached to the courtrooms of The Hon'ble Supreme Court of India and shows potential to get the rights, especially after the judgment of Navtej Singh Johar (2018). The next step, the legalization after, would surely be the formation of a family. But what implications, would the parenting by a same sex couple have on the child(ren), the couple, and the society. The article here, tries to investigate the consequences and then recommends steps to achieve a just and equitable society and a better world for living for individuals of all kinds so that the society becomes more structurally functional rather than reflecting a conflict between the mainstream structure of the society and the people who are not or generally not accepted as a part of mainstream structure of the society.

Keywords: *Homosexuality, Marriage, Parenting, Children, Implications.*

INTRODUCTION

Humans, as normally said, are social animals, unlike other animals, what makes us different is not just society but the power and adaptability to change it and change with it too. Things once considered to be unsafe or dangerous now form an integral part of the machinery, of course in a changed and modified version. For instance, Thunder and Electric energy. This also applies to society as it is described as an organic institution. Hence as the development occurs, the body modifies and the organs and their operations expand, but instead of elimination of the expanded portion, we accept it as our own and include it as a part of the whole. Similarly, with the advancement of society, diversification happens, and differences are created. But it is equally important to keep accepting them and

being all inclusive. Homosexuality and Homosexuals are one such community that faced a hard resistance from various theologies, societies and moralities and was denied existence and place in the mainstream of society. This was pushed to such an extent that it became a totem or symbol of Taboo, Sin and Impurity in sexuality and intimacy. Mid 20th century medical science treated it as a disorder or a "sociopathic personality disturbance." This was debunked by Evelyn Hooker, who, in his research, mentioned that the research describing Homosexuality a disorder was a false correlation drawn, based on flawed selection of the Homosexual samples who already suffered any mental illness. In India, Homosexuality finds its place way back in the ancient eras and scriptures such as Kamasutra and Artha Shastra.

Artha Shastra did not heavily criminalize the act of homosexuality but issued a mere fine or a fast for a day. However, with the rule of Mughal, especially during Aurangzeb's rule, Fatwa e Alamgiri prescribed heavy penalty and criticized the Homosexuality and subsequently, with the Colonization, the law criminalized Homosexuality under Sec. 377 of the Indian Penal Code, 1860 as an offence of unnatural sex. This provision was challenged first in the Delhi High Court in Naz Foundation v. Govt. Of Delhi (2009) where the court struck down homosexuality as an offence under Sec. 377 IPC. The Supreme Court of India in the case of Suresh Kumar Koushal v. Naz Foundation. (2013) overturned the judgment of Delhi High Court and reinstated Homosexuality as an offence

*Research Scholar, Gujarat National Law University

under Sec.377 IPC. This was finally challenged in Navtej Singh Johar v. Union of India (2018), and it was held that Homosexuality is not an offence and putting it under Sec. 377 is unconstitutional. Currently the Supreme court is hearing the plea for legalization of same sex marriage. Thus, it becomes important to talk about the family structure and parenting of the children of those same sex couple. How it is going to affect the children, The couple and how does the society react to the same? The article envisages answering these questions and provides viable solutions for potential problems.

Research Methodology And Scope:

The Researcher has used doctrinal data from the past literature, previous medical research reports available on the govt. Websites and has drafted article descriptively with a recommendatory note. The research is limited to Indian context while taking data from other countries hence the proposed model might not be applicable to other societies. The researcher argues that the equal rights if given to homosexuals with regards to parenting subject to certain legislative rules, the structural conflict that is currently going on between the mainstream society and the homosexual rights groups can be resolved and they can be made a part of the structure of the mainstream.

Research Objectives:

The researcher aims to analyze the current situation of LGBTQ+ demanding legal status to their marriages through a social legal lens and anticipates the aftereffects that children raised by homosexual have and how society reacted to them where homosexual parenting has been allowed. This research might help people in the legal and policy-making

field produce a viable solution for the current issue regarding rights of the Homosexuals.

Theoretical Background: Structural Functional Theory:

“According to structural-functional theory, commonly known as functionalism, society is seen as a system made up of interconnected components that is intended to suit the social and biological requirements of the people who live in it. Herbert Spencer (1820–1903), a biologist and philosopher from England, recognized parallels between society and the human body in his writings, which eventually gave rise to functionalism. He made the case that in the same way the body's numerous organs cooperate to keep its systems running, so too do society's various components (Spencer 1898). Spencer was referring to the social structures, or ways of thinking and acting that serve to address social needs, such as the government, family, healthcare system, religion, and the economics.

Structural Conflict Theory:

“According to conflict theory, society is a struggle over scarce resources. This viewpoint is a macro-level strategy that is most frequently associated with the works of the German sociologist and political philosopher Karl Marx (1818–1883). According to Marx, society is comprised of two classes—the bourgeoisie (capitalists) and the proletariat or the working class, who compete for socioeconomic, material, and political resources like housing and food, employment, education, and free time. Max Weber agreed with some of Marx's main ideas, but also believed that in addition to economical or materials inequalities, there were inequalities of political power and social structure that

caused conflict. Weber noted that distinct groups were affected else grounded on education, race, and gender, and that people's responses to inequality were moderated by class differences and rates of social mobility, as well as by comprehensions about the legality of those in power.”

Same Sex Marriage: Introduction:

Recently, after the decriminalization of homosexuality, homosexuals have asked for equal rights and representation of their relationship by giving them legal recognition. In short, the homosexuals have now reached to the courts for legalization of same-sex marriage and recognizing it as a valid legal relation under Special Marriages Act, 1954. The Question further arises that even after decriminalization and legal permission to live together, why there has been such an uproar and a constant pressing demand for legalization marriage?

Historical Background:

Unlike the heteronormative marital institution, the homosexual union, as a marital institution came much later. Before that, there was a lack of awareness and sensitivity towards homosexuality. The concept first came into picture when AIDS Bhedbhav Virodhi Andolan released a 70-page report on how homosexuals suffer and are harassed by the hands of police officials. The court case was first filed by Naz foundation in 2001 in the form of a Public Interest Litigation in Delhi High Court to decriminalize the act of homosexuality and remove it from Section. 377 IPC, the petition was first dismissed in 2004 by Delhi HC but subsequent to review petition filed by the petitioner, in 2009, the division bench of Delhi HC struck down

homosexuality as an offence under 377. Suresh Kumar Kaushal, a Delhi based astrologer, challenged this judgment in the Supreme Court and the Supreme Court overturned the Delhi HC Judgment in 2013 in the case of Suresh Kumar Koushal v. Naz foundation (2013). After 3 years of this judgment, Navtej Singh Johar filed a writ petition in 2016 before the Supreme Court where the 5-judge bench unanimously upheld the decision to decriminalize homosexuality and remove it from IPC Section 377. The question for marital rights came much later when petitions were filed in High courts of different states, demanding legal recognition and homosexual marital rights. The Supreme court decided to club all the petitions and hear it together, in the case of *Supriyo@Supriya Chakraborty v. Union of India*.

Why so much emphasis on marriage?

Marriage is a social institution of its own kind. Marriage has distinctive traits as a social institution, including its potential to provide socio-legal protection and rights and cultural legitimacy. Hence, Homosexuals see it as an effective remedy to fight for and achieve equity and legitimization. The rights such as inheritance¹, adoption, insurance rights are available to a heterosexual married couple who have their marriage legally recognized. Also, after the HIV/AIDS crisis of America, where the connotations were negatively levied on the Homosexuals and it was classified as a homosexual epidemic because most of the affected were from the same background hence it was not easy for them to get legal help like spousal, medical and estate benefits which were equally available to the Heterosexuals

because of the legal recognition their relationship had. Hence, it becomes important that to access publicly available remedies, one needs valid legal recognition. Therefore, there has been a rising demand for legalization of same sex marriage. The Same sex couples argue and believe that this legalization will remedy and solve a huge spectrum of problems as marriage as an institution and its recognition become globally accepted. Furthermore, giving legal recognition to a relation under the umbrella of marriage, a universally accepted social institution.

Arguments put forth by the State:

The Union in its arguments, refused to recognize marriage of homosexuals. It also put forth that the spirit of marriage lies in its tradition where it is described as a union between a biological male and biological female and validation of homosexual marriages would strike at the root of the traditional values of marriage. Centre in its arguments also submitted that Marriage and Family, as social institutions play a vital role in the society and play a significant role in upbringing and nurturing of children and hence should not be construed such that it defeats or comes in the contradiction of society's morality and ethos. It also argued that the marriages in India take place under the personal marital laws or Special Marriages Act, 1954 or Foreign Marriages Act, 1969 and that the legislative understanding in the marriage laws of India is purely heterosexual. Marriage is a holy union of man and woman involving beliefs of religion, culture, customs, ethos, and societal values and change in those values can only be brought by parliament as it is the representative of the society. The change by admitting

homosexual marriages would be violative of the religious personal & statutory laws resulting in chaos.

Analysis

Society is a set of people who live and persist together in constant social interaction. People here are governed by values, norms and a certain set of accepted rules and ways to live and stay in society. The state has been putting forth these arguments by keeping values of Heteronormativity as the center of marital laws. The State, hence, is holding back to the values and resisting the value change adopted by a part of the society by placing the values of customs, religions, and traditions on a higher pedestal than the constitutional values of equality & social justice enshrined in the Preamble and Article 14, 19 & 21 of Part III of the Constitution. This phenomenon where one value is kept on a higher pedestal than the other is called the Value Conflict. The Supreme Court in the *KS Puttaswamy v Union of India* (2017), held that Liberty guaranteed in Article 21 of the constitution is inviolable and cannot be taken away by the State. Also, Article 14 talks about equality before law and equal protection of law. The denial of legal recognition to homosexual marriages would result in deprivation of their insurance, inheritance & adoption rights. Hence, they would be deprived of equal protection of law solely based on their sexual orientation which is an unreasonable classification amounting to discrimination under Article 15(1) of the Constitution which prohibits the discrimination by the state solely based on religion, race, caste, sex, place of birth or any of them. Further, these restrictions of non-recognition also violate the Fundamental right of freedom of expression and choice

adults to choose anyone and marry as guaranteed by the Supreme Court in the case of *Shakti Vahini v. Union of India*

Conclusion

The Analysis shows that, the act of state of putting restrictions on the legal recognition of same sex marriages creates a value conflict in the society which in turn results in the denial and deprivation of Fundamental rights of the homosexual couples. The restrictions further do not sit in accordance with the golden triangle of the Fundamental rights I.e., Article. 14, 19 & 21 and hence should be struck down and legal recognition needs to be given as certain rights of the deprived community stand dependent upon the legal status & recognition of their relationship

Parenting & Adoption: Why Parenting Becomes Such An Important Relation?

Families are essentially the pillars of society. Family structures serve as the cradle for the people who come to a society's population. In other words, families are responsible for raising children into grown-ups who will form society. Our society, like each of us, is told and created by our surroundings. Therefore, it may be more delicate to impact and change from single circumstances; nevertheless, society is a fluid thing that can be told for good or bad. Families are vital to society because they serve as the base upon which society is created. The values of imbibed in the families today reflect on the society in the future. This is on a more social and a larger level but when we talk of families at an individual level, For an Individual, the parenting helps one develop one's own kins and so that they perpetuate their own families, and one is

surrounded by one's own people. In the context of homosexuals, it becomes important for them to have children as their own as for them, the concept of family and children is individual but equally socially symbolic in nature as it reflects equality between hetero parents and breaks down the conventional form of establishments of family as a Heterosexual parent couple with their Offspring. Therefore, parenting becomes or will become a crucial component of the Homosexual marriage and family institutions. It is also believed that Homosexual couples with children value marriage differently because they are more effective at promoting the legal and social context and importance of marriage rather than monist and individualistic meanings, contributing to a greater understanding of the implications of not having access to marital right. The Indian context of this is much more amplified as in India is a collectivistic society and often puts a lot of emphasis on loyalty and interdependence among the members of the family. It is also seen that the Joint family culture is more welcoming towards different sets of beliefs, opinions and is more flexible as they are already akin with living under a same roof but with different sets of minds. Hence, the researcher aims to analyze Clause 5(3) of the Adoption Guidelines, 2022 by Central Adoption Resource Authority challenged in *Amburi Roy v. Union of India* and currently clubbed with other petitions for same sex marriage.

Arguments by NCPCR:

The National Commission for Protection of Child Rights (NCPCR) had submitted to the Supreme court an intervention petition that it opposes to give the adoption rights to homosexual

couples. Adoption happens in a "similar socio-cultural environment," which is "not possible" in the "scenario" of homosexuals, according to the NCPCR application. The NCPCR has said that the child's health, safety, and education are of the utmost priority whenever deciding on adoption. Relevant research reveals that a kid adopted by same-sex couples is impacted in socio-psychological ways. The NCPCR cited the study in "Emotional problems Among Children with Same-sex Parents: Difference by Definition" stated children living with both biological parents who were married had the lowest risk of emotional difficulties. "Family research on two biological, married, and cohabiting parents has broadly demonstrated that both marital status and biological parentage are integral to children's well-being," according to the application.

Analyzing The Effects of Same Sex Parenting:

The Theoretical studies although suggest that according to specialization, it is essential to have parents from both the genders I.e., heterosexual parents as the specialization idea implies that children may require a parent of each gender since parents' parenting techniques differ. Different gender parents teach different skills to the child. Furthermore, the kin selection theory proposes that, owing to evolution and the economic, physical, and mental expenses of having children, parents practice discriminatory parenting and prioritize biological offspring. Therefore, it will be safe to assume that at least one of the Homosexual parents would not be biological parent of the child as the adoption by homosexual couple is still not possible in India. Hence, one of the parents will not be willing to invest in the

child and finally the theory of discrimination suggests that the Homosexual parents might experience stressors from society. The Social behavior showed a larger problem instead of the gender of the parents which rarely had any negative implications or negative deficiency, or difference spotted between the children raised by the Homosexual and Heterosexual parents. Infact the results were quite the opposite of what the majority theories predicted. The research showed that the children raised by lesbian couples did not experience any negative implications of “fatherlessness” and despite of the prejudice faced the children grew and developed equally fine like their peers. Moreover, the tests further conducted that the “fatherless” children raised by the lesbian couples found themselves more secure and attached and encountered lesser behavioral problems. A study also found that children raised by the lesbian couple view their parents more available and approachable and were more likely to discuss emotional problems easily but equivocally the children raised by them dealt with more behavioral and attention related problems, a teacher reported in Belgium². Another more probable conclusion was that such children were taunted about their family more frequently, although this reflects social rejection of their parents' orientation of sexuality rather than their gender. Studies frequently show that children with lesbian parent's face homophobia from their colleagues, but they depend and differ on whether these children are teased more overall or if the teasing concentrates on their parents' orientation of sexuality. A study conducted in the US found that boys and girls raised by a lesbian homosexual couple were

more accommodating of gender fluidity among colleagues. In UK research 12-year-old boys raised by mother (lesbian or heterosexual) did not vary from kids reared by a mother and father on masculine measures but scored more than usual on feminine measures. Being reared without a male parent therefore did not impair masculine development, but rather permitted males to acquire more gender flexibility. This was true for sons of lesbians and single heterosexual moms, indicating a connection with gender of the parent rather than their sexual inclination. Hence this showed that children and parents in their personal capacity or as a family do not create a bad implication of each other's lives. The responses of researchers that show behavioral problems are a response to perceived prejudice or discriminatory social behavior. Given the high time investing and costly processes involved in bearing and rearing of children, research has consistently demonstrated that Homosexual parents possess a better socioeconomic status (e.g., higher levels of income and education) than different-sex parents. Furthermore, Homosexual couples may be strongly driven to become families and may take extra initiatives, such as extensive family plan. In other words, hefty child-fostering expenditures may deter the less serious homosexual couples from having children. Moreover, In the Indian context, the Juvenile Justice Act, Prevention of cruelty to children act 1986, POCSO Act for sexual abuse and relevant sections of the Indian Penal Code provide for easy protection of children from abusive households. Hence, there should be a scope and homosexuals should also be able to adopt children subject to the guidelines

made by the Central Adoption Resource Authority (CARA). Laws should now be made consistent with the current changing time and with due examinations and tests, the Homosexuals should also get equal chance of parenting and having a family just like a normal heterosexual couple has in the India Households. Surrogacy should be well scrutinized, and it should be the duty of the adopting parents ensuring that the surrogate mothers should also be kept healthy in the due course of gestation and post-delivery. Same-sex families have issues comparable to other families, but they also face different kind of worries, similar as whether their child may be bullied because of their atypical family life setting. There are several measures one can, as a member of society, take to assist children of the Homosexual parents with this, similar as pointing out the special facets of your family life. We should also talk about prejudice being encountered by them and help them suppose why people joke or bully others, while admitting that this is not respectable conduct and that they have done nothing wrong to earn to be treated this way. Social sensitization is an equally key factor as the behavior and attitude of the homosexuals and their children depends upon the society's perception and attitude towards them. An inclusive society might be able to raise children who are inclusive and respectful towards other people's gender fluidity and sexual orientation. It equally becomes important that legislature, judiciary, and the executive, the three main organs should be sensitive towards the Homosexuals and their children. Hence, laws protecting the rights of such people should be made considering that they form a part of society and should be part of the

structural functional society and not into conflict with its structure. The Mental health and dignity of the individuals and their children at public places, Schools, Washrooms and Religious places should be also prioritized and there should be an effort to reduce the phobic and insensitive behavior towards them. Significant problems that same-sex parent families frequently discuss in counselling include Families with lesbian and homosexual parents may worry about prejudice in child custody and parenting decisions. The other parent of the children and the courts may use a parent's minority sexuality and/or gender identification status to restrict or reject custody in custody battles. The same-sex parents can experience the same array of co-parenting and family dynamic challenges as heterosexual parents, plus the added complications of prejudice, stereotypes, and presumptions. Hence, when the Homosexual marriage rights are given, they should be drafted on the foundations of Equality and should aim at elimination of the second and third form of inequality as prescribed by Max Weber. I.e., elimination of inequality based on social honor and inequality based on power. There should be equal dignity and power given to the Homosexuals, and they should not be treated in an inferior manner or considered granted just because their sexual orientation is different from society's dominant class.

Conclusion

The Adoption rights given to the Homosexuals, can help make society a more inclusive place. Parenting rights should be given to them subject to scrutiny of the children's health and rights. The CARA & post adoption care

units should keep a periodic regular check of the Adopted children till the child achieves the age of puberty and becomes major to take the life decisions. For Instances, A caretaker and a child doctor and a counsellor should be assigned by CARA for the scrutiny of the adopted child till the age of 12. The visits should be regular and a minimum limit of 2 visits per month should be mandated when the team would come to inspect the child's health and his/her living conditions and check whether the parents are complying with the CARA guidelines. The parents should be enrolled in sensitization programs that can be scheduled on monthly basis where they are supposed to fill in declaration forms to show their compliance with the CARA guidelines and attach the proofs of declaration of no objection by the team of caretakers and doctors assigned. Both abovementioned policies shall be compulsory till the child reaches the age of 12. Post that, the parents will be required to come to the sensitization and declaration programs Bi- Monthly for the age group 12-16 & then Biennially when the child is in the 16-18 age group & by the age of 18, at last, the child must sign self-declaration where he does not object to living with the parents. Breach or non-compliance with these procedures would lead to temporary hold of the adoption and custody of the child and may lead to termination of adoption rights. Further, A major change should be to sensitize the children by introduction of proper sex education in curriculum of the secondary school where the children should be made aware of people with different sexual orientations and to treat them with equal respect. According to Linville, Because of the biological

barriers faced by homosexuals in conceiving the children, relationships and issues with non-biological parents are frequent in Homosexual parent families. The conduct of the relatives of the same-sex couples with regards to their private relations is commonly different from the heterosexual ones; parenting relationships have the potential to further aggravate and complicate this. For same-sex couples, parenting may be considered as a major step in validating their relationship, or it may be viewed with similar biased and discriminatory perspectives, going to the extent of denial of the parental bond of one parent to the children. For Homosexual parents, it can be particularly difficult to explain marital and relationship status and household composition to school personnel, medical personnel, children's friends, parents, and their own children. Despite of all family connections having tendency to be complex, Homosexual parent families' explanations of family bonds and relations difficult due to the lack of social agreements and acceptance and relevant media examples, prevalent prejudices & stereotypes about these relations in the society, and their fear of discrimination. Homosexual parents' ability to accept and acknowledge their identity, as well as their ability to manage residing in a heteronormative, homophobic, and or prejudiced society, while bringing up their kids in a family unit that is not socially acceptable, may have an impact on their ability to be competent parents. These are the major concerns that our law needs to answer before granting the Homosexuals the right to adopt, parent and foster the children.

References

1. AIR 2018 SC 4321
2. American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders: Mental Disorders" (American Psychological Association, 1952).
3. Hooker, E., "The adjustment of the male overt homosexual", (1957) 21 J Project Tech 18.
4. Mahmood, S. & Semaphore, "How did the Mughals view homosexuality?", History Stack Exchange (1 Oct 1964), <https://history.stackexchange.com/questions/42157/how-did-the-mughals-view-homosexuality> (accessed 20 Mar 2023)
5. 160 Delhi Law Times 277
6. Civil Appeal No. 10972 OF 2013
7. AIR 2018 SC 4321
8. Lumen Learning, "Structural Functional Theory", Introduction to Sociology, <https://courses.lumenlearning.com/wm-introductiontosociology/chapter/structural-functional-theory/> (accessed 26 April 2023).
9. Lumen Learning, "Conflict Theory", Introduction to Sociology, <https://courses.lumenlearning.com/wm-introductiontosociology/chapter/conflict-theory/> (accessed 26 April 2023)
10. W.P.(C) No. 1011/2022
11. Hindu Succession Act, 1956 (Act No. 30 of 1956)
12. The Juvenile Justice (Care And Protection Of Children) Act, 2015 (Act No. 2 of 2016)
13. Married Womens' Property Act, 1874 (Act no. 3 of 1874)
14. Hopkins, J. J., Sorensen, A., & Taylor, V., "Same-Sex Couples, Families, and Marriage: Embracing and Resisting Heteronormativity", (2013) Sociology Compass, Vol. 7 Issue 2.
15. John Macionis, Sociology 97. (Pearson, 17/e, 2018)
16. AIR 2017 SC 4161
17. (2018) 7 SCC 192
18. (Hopkins, Jason J.; Sorensen, Anna; Taylor, Verta, 2013 p. 6.).
19. W.P.(C) No. 000129 of 2023
20. Mazrekaj, D., De Witte, K., & Cabus, S., "School Outcomes of Children Raised by Same-Sex Parents: Evidence from Administrative Panel Data", (2020) 85 Am Sociol Rev 830.
21. Tasker, F., "Lesbian mothers, gay fathers, and their children: a review", (2005) 26 J Dev Behav Pediatr 224.
22. Biblarz, T. J. and Stacey, J., "How Does the Gender of Parents Matter?", (2010) 72 J Marriage Fam 3
23. MacCallum, F., & Golombok, S., "Children raised in fatherless families from infancy: A follow-up of children of lesbian and single heterosexual mothers at early adolescence", (2004) 45 J Child Psychol Psychiatry 1407.
24. Supra.19