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Research Article

Issues On Becoming Gay Parents Through Surrogacy: Loopholes in Surrogacy Law In India

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Abstract

Decriminalising homosexuality by challenging the provision under section 377 of the Indian Penal Code has changed the nation towards acceptance of their relationship, but the change is not absolute. While considering LGBTQ+ relationships we have come up with list of questions regarding their Personal Laws like marriage, Adoption, maintenance, custody, surrogacy and so on. All these laws are hushed when it comes to LGBTQ+ communities. This article is going to focus on Gay men parenting through the process of surrogacy as an alternative for adoption. Surrogacy is the only way for the gay persons or the LGBTQ+ people to become parent and form a family that develops a biogenetic connection. The study has adopted both qualitative & quantitative way of data collection where the estimated sample size is approximately 35 respondents selected from random samplings technic. Case studies in between the year 2021-2023 were taken into consideration. The Indian surrogacy laws does not give provisions for the LGBTQ+ Persons or LGBTQ+ couples parenting through the process of surrogacy neither through Adoption.

Key Words: Adoption, Family, Gay, LGBTQ+, Parenting, Surrogacy

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INTRODUCTION

'Victory is yet to be achieved'. Homosexuality in India is no long a crime but the silence in the legal response to marriage, adoption, surrogacy etc. cringe the nation. In present scenario, Indian society stepping back towards acceptance of the non-Conventional families or LGBTQ+ communities or homosexual relationship, considering its existence

in the ancient history. While raising a child, he/she has been taught to get married to an opposite gender, irrespective of his/her sexuality. Despite that, homosexuality was decriminalised in September 2018 in the verdict of *Navtej Singh Johar v. Union of India* (AIR 2018 SC 4321) concluding section 377 of the Indian Penal Code infringing the fundamental rights guaranteeing equality and dignity under the Indian

Constitution. Civil union is the foremost towards acceptance of homosexual partners in the society and the pathway to reach the legal rights in totality. But the struggle lies here, what if the marriage laws among the homosexual partners are not legalised. Can the gay live-in couples or the gay committed couples go for adoption, or can the surrogacy arrangement be the substitute for adoption? There has been increasing numbers of gay fathers in countries outside India who became parents through the process of surrogacy or planning such process. If we see the struggle in India, gay couples are far from achieving this as the laws relating to surrogacy is quiet.

Concept of Surrogacy

Surrogacy is the only option to become biological parents for those who cannot conceive naturally. Understanding the concept of 'Surrogacy' - is a process or a reproductive practice which involves the third party (the surrogate mother) under a contract to 'rent her womb' for carrying the child of the intending parent(s) (Naik, 2018). The word 'Surrogacy' originates from the Latin term '*Surrogatus*', means '*Substitute*', i.e., acting in place of another. In other word, Surrogacy is an Assisted Reproductive Technique (ART) (Gupta, 2019). According to Medical dictionary, it is a method of reproduction where a woman carries a child using her own eggs, for another individual or couple (Mishra, 2015). Happens in a situation or some situations where the mothers are paid, that is the situation in which a mother carry a child or agrees to carry a child not biologically related, conceived through in-vitro fertilisation (IVF) or gestational surrogacy, for another couple or individual.

Operational Procedure

In the process of Surrogacy, the egg of a woman (Mostly Wife and husband are involved in cases where wife is unable to conceived biologically or cases where in the interest of both the spouses, the wife doesn't want to conceive or carry a child or wishes to have baby via Surrogacy) with the sperm of a sperm donor is fertilised through medical procedures to make an embryo. Further the embryo is entrenched into the uterus of the woman agreeing to carry the child or say it as Surrogate mother and eventually give birth to the child (Mishra, 2015). The intending parents entrust the surrogate mother with raising the child and provide with all financial assistance during the pregnancy and even after the successful delivery, as well as the financial compensation that is specified in the contractual document made between the two parties. The commissioning parents and the surrogate mother are given thorough explanations of all the many perspectives, such as pregnancy failure, repeated pregnancies, and deformed children, etc.

LITERATURE REVIEW

Verifying the literatures, the book on LGBT Parent families: Innovations in Research and Implications for practice gives a brief description on the transition of homosexual parents from post-heterosexual separation

or divorce and focuses on the similarities and dissimilarities among heterosexual parenting and homosexual parenting (Abbie E. Goldberg). Another paper explaining the experimental testimony from Britain to exhibit the general role of homo-negativity while giving first choice for surrogacy. The author through the empirical research holds onto a pre-registered test to design self-regulating and collective effects of homo-negativity and para-social (celebrity) contact on assistance for commercial gestational surrogacy (Turnbull-Dugarte, 2022). The results say that the desire for becoming parents among the gay men without developing a 'procreative consciousness' due to sexual and fertility related actions unlike the heterosexual men is increasingly more in numbers. The research says that the lack of knowledge and awareness of the possibilities of gay men surrogacy parenting has emerged over time through surrogacy agency, media, peers, and relationship partners (Murphy, 2013). The article on Gay men's experiences of surrogacy clinics in India has given much emphasis on offshore commercial surrogacy arrangements, but it concluded with applicability for clinics that offer onshore surrogacy giving preference to intended gay parents while making decision before conception and extend assistance after birth. Further this article interviewed 12 gay men who had entered into surrogacy agreement in India. Through the qualitative data analysis, it resulted in both positive and negative experiences for gay men parenting via surrogacy arrangement (Riggs et. al.)

It has been observed in many literatures that the process of surrogacy arrangement is more in numbers among the gay men in comparison to lesbians. The empirical findings report 60 per-cent of all agencies in US has taken into head of LGBT persons in last decade. Mostly the lesbian persons stepped out of the conventional families or heterosexual relations and heading to adoption, surrogacy leading the way for becoming biological parents (Arlene Star Lev). The factors have overshadowed the sociological arena such as first, who is to be counted as family and how/whether varying definitions of family include households consisting of LGBT people. Secondly the biological, social, and legal impediments those affect formation of family for this population. Third, the problems faced by the youth brought up by lesbian or gay parents. And finally, the family equations, their bonding, and dissolution of relationship between same-sex couple and transgender partner households. (Mignon et. al.). The authors concluded with certain future suggestions for the sociological study of LGBT sexuality and families. Further from research, three themes emerged from the qualitative study and sectional analysis. The first is that gay fathers are deserving parents and deserve to have children. Second, the narrow line between surrogacy's advantages and forms of exploitation. Third, the dangers that gay fathers are ready to accept in exchange for the rewards of having a child. This research reports that Australian gay families struggle with the social attitudes towards them and the imbalance behaviour with the recognition of their

families and desire of having children. Further, the findings of this research highlight the need for change in the social attitudes and change in Australia surrogacy Legislation (Prout, 2021). Interviewing the lawyers, fertility specialists, surrogates, agents, and others who involved themselves in gestational care markets in India and the United States where both the countries trace their roots of Law from British colonialism, the author efforts his understanding to why the surrogacy industry in the United States is more developed contract norms that are more surrogate- protective than the surrogacy industry in India, concluding the key reason as the shadow of the legislation and the common law in the gestational care markets in the United States is darker and wider in comparison to all over states in India (Kalantry, 2018).

METHODOLOGY

The study is doctrinal and empirical in nature. The empirical research survey based on random sampling by forming questionnaires. The information gathered is based on secondary data in the form of legal evidence, particularly the primary and secondary legal documentation. The legal materials were gathered through research in libraries and online sources. Both statutory and comparative methodologies are used in this normative legal research. The United States, Australia, and India are compared. For comparison research, relevant laws from the USA, Australia, and India have been examined.

GAY MEN PARENTHOOD THROUGH THE PROCESS SURROGACY

Parenthood is one's personal choice that is not connected with sexual orientation. The nation has no provision for homosexual marriages yet the desire of parenting or raising children among gay men is not different from that of heterosexual couples which is increasing in numbers among committed gay couples or gay live-in couples (Bergman, 2010). The law in India gives provisions to the single male and female for becoming parents through adoption or foster care nonetheless surrogacy laws are untouched in relation to single parents as well as homosexual persons.

Reason for Opting Surrogacy

Above discussion on types of surrogacies, it is understood that gestational surrogacy is the process that can be opt by the gay men to become parents. Gestational surrogacy is been considered to the means of family constructions among both heterosexual and homosexual persons, especially outside the nation, this concept has been rapid rise and acceptance at ease (Turnbull-Dugarte, 2022) Gestational surrogacy is also known as In-vitro fertilisation(IVF), where the an intended mother's (the egg donor) ovum is fertilised in a laboratory with a intended father's sperm using IVF and the embryo is transferred to the surrogate mother's womb (Bergman et. al., 2010). Here, the surrogate mother is not genetically related to the child. Just only the surrogate mother carries the baby in her womb and handed over to the intended parents after delivery.

Consequently, when we are discussing about gay parenting or two gay couple parenting, a single gay person can opt for both traditional and gestational surrogacy but in case of gay couple the only option is gestational surrogacy where both the gay partners use their sperms for fertilisation in a laboratory and the resulting embryo is further transferred to the surrogate mother (Tuazon-McCheyne, 2010). [What takes place in traditional surrogacy arrangement is that the surrogate mother uses her egg and is inseminated with one of the gay father's semen. Whereas, in case of gestational or IVF surrogacy, the surrogate mother is implanted with an embryo that has been donated by another woman (the egg donor) and has been fertilised by one of the gay father's sperm]

From the review of literature, it is noted that the empirical research on gay fathers parenting through surrogacy arrangement has not been on record in India (Riggs et. al., 2015), Nevertheless, empirical research was conducted in USA, where 40 fathers who were in gay relationships became parents through the process of surrogacy arrangement. It is also noted from interview that the gay fathers faced issues relating to surrogacy arrangement which are to somewhat similar and different from heterosexual couples. The research finds that becoming parents caused gay men to alter their ambitions, placing a greater emphasis on their family than on their work (Riggs et. al., 2015). This is different from the findings of numerous research on heterosexual men, who frequently continue working the same or longer hours after having children, according to Bergman et al. maximum males in the research also mentioned that having children brought them closer to their extended relatives, and that this was a valuable source of support. Tuazon Mc Cheyne's study of seven Australian couples having children owing to offshore surrogacy in USA, revealed that a strong support from family network was elemental to achieve successful results for families created through surrogacy, lends credence to this conclusion.

The Surrogate Mother

While choosing the surrogate mother, mostly people give preference to their relatives or choose surrogate in the family. Basically, high preference is Traditional surrogacy through altruistic surrogacy process in case of heterosexual couples. Some heterosexual couples also choose Gestational surrogacy through altruistic surrogacy process. This case isn't different in case of homosexual persons or homosexual couples. But in most of the literature review says that in case of gay couples, the preference is gestational surrogacy through altruistic surrogacy process. According to research on gay fathers, a crucial requirement for a surrogate mother is her ability to care for the child until birth while without remaining physically close to the infant (Lev, 2006) Also, while choosing the surrogate mother, gay couple give importance to women to whom then have known or anyone from distant family or relatives which would be further easier for them to deal with the post-delivery consequence.

THE SOCIETY AND THE LEGISLATIVE PROVISION: THE LOOPHOLES

Parenthood is normal but society only consider it normal when it is confined to heterosexual keeping homosexual out of the box. The society has already set the boundaries of normal and not normal people where homosexuals are in the box of 'not normal'. The tussle of homosexuals has a long route in India. You can just say, it's the beginning. These so called 'not normal' people had to fight a long battle to decriminalise their relationship in our nation, yet the relationship is far-away from getting a legal provision for civil union under the Personal Laws. When society has tagged these people inside the four walls of 'beyond Indian culture', accepting homosexual marriage is going to be a tough task. Child, parenting, custody, and surrogacy is far flung.

Legislative Provision in India

▪ The 228th Law Commission Report

In 2002, commercial surrogacy was legalised in India which led to massive growth in commercialising surrogacy in several commercial firms. this also further open on to guiding and assisting foreign tourists for Indian surrogate mother or guided to rent an Indian woman's womb for becoming parents. This arrangement was exploitative in nature. Poverty is the major reason behind surrogacy service in India.

The 228th report of Law Commission of India has suggested for prohibition commercial surrogacy by acknowledging altruistic surrogacy through proper legislation (228th Report, 2009, Law Commission of India). The report recommended few important points viz. there should be a surrogacy agreement with all the required document and details like the approval of the surrogate mother or of her family members including the medical expenses till the delivery of the child. Such expenses shall be for the medical purpose and the contract shall not be done for commercial purpose. The report includes financial agreements for the child in case of death of intended parents or separation of the couple. The contract should also cover the life insurance of the surrogate mother. It is mentioned that the genetic connection between the child and intended parents will remain if one of the intended parents among the two would be the donor which will avoid child abuse or help in reduction of child abuse observed in many cases. The birth certificate of the child should mention the name of the intended parents being imprinted, and the legal custody of the surrogate child will be there with the intended parents (Mishra, 2015). Further in 2005, the Indian Council of Medical Research (ICMR), released certain directives for regulating the surrogacy arrangement, in which it says the surrogate mother would be entitled for financial compensation for her service provided to the intended couple & the concern amount would be decided by the intended couples and the surrogate mother. The guideline also stated that the surrogate mother must relinquish all parents right and prohibited to donate her own eggs for surrogacy.

▪ Loopholes in Surrogacy (Regulation) Act, 2021

If it doesn't infringe on the rights of others, the basic right to choose the mode of parenthood must be supreme and unalienable. Even if it is acknowledged that adoption is a superior alternative and ought to be promoted because it has its own benefits, the ban shouldn't be imposed by outlawing forms of assisted reproductive technology. Even though it is not illegal if commercial surrogacy is carried out in accordance with the Assisted Reproductive Technologies (Regulation) Act, 2021. The Act prohibits the surrogacy rights of unmarried couples and couples in live-in relationships. The Apex Court has determined that live-in relationships have become the norm in modern society. That is not an offence. These couple offspring are likewise recognised by the law as being legitimate. The female partner in a relationship has the same rights as a married spouse. Even after all of this, live-in parents and unmarried couples are still denied the ability to become surrogates (Naik, 2018). The main concern for denying the surrogacy rights is the child custody in case of separation in live-in relationships. If that is the fact then, the first concern for the custody of the child should be during the death of one of partner in case of marriage relationship. The reason (if any) for denying the surrogacy rights is completely unjustified.

Similarly, the Act prohibits surrogacy rights for the homosexual person. The matter of concern in this case is minuscule difference which is, raising the child/upbringing of the child with two fathers or two mothers than the custody of child in question. As in India, homosexuality is still a controversial matter and a whispering gossip. Nevertheless, the society believes it to be 'not normal' people and something beyond Indian culture, even after in the year 2018, the Apex Court of the nation declared section 377 of IPC as unconstitutional and infringement of fundamental right under Article 21 of the Constitution of India. Hence, acceptance of homosexual people is still a bigger task in Indian society.

The Hon'ble CJI, D Y Chandrachud mentioned a statement that the 'sexual orientation of a candidate has nothing to do with the ability of the constitutional entitlement of the candidate to assume a high constitutional office of a High Court Judge'. This statement though, have mentioned in a context while speaking against the government role in stopping an openly gay lawyer from becoming a High Court Judge. Similarly, while elucidating the above statement by the Hon'ble CJI, sexual orientation of a person has nothing to do with parenting or raising a child. It is the society that holds the preconceive notion. Opposing to the so-called society's view towards homosexual, the best example is the most recent case of the Kerala transgender couple pregnancy through the process of surrogacy. The couple Ziya Palav and Zahad planned to have their own biological baby through surrogacy arrangement and delivered a baby boy successfully in February 2023. Zahad is the one who conceived and was carrying the baby in his womb. Zahad was female by birth identifies to be male and Ziya Palav was a male identifies himself as a female. Both went into gender transition. Zahad's ovaries and uterus were not removed after the gender transition and as because the couple

wanted to have a biological baby, they stopped the hormone therapy as per their doctor's instructions. After, the successful delivery of the child, Zahad's family accepted the couple. In fact, there are non-listed cases of single gay fathers in our country which are neither in the knowledge of any media nor news. Henceforth, parenting through surrogacy arrangement for gay fathers or homosexuals or any single person is not open, but it is not banned under the surrogacy law neither a punishable offence. We can say that the Surrogacy (Regulation) Act, 2021 is completely a bias and unfavourable law which is only confined to heterosexual couples. This law has been made looking to society's so-called norms which is entirely unjustified and unreasonable because sexual orientation of a person is not something related to the Indian tradition or culture. They are not 'not normal' people, rather society and law are being homonormative while discriminating them from rest all.

Legislative Provision in U.S.A and Australia

• Surrogacy regulation in U.S.A

Across the previous few decades, there has been a substantial change in the surrogacy laws in the US. Surrogacy is not regulated by the federal government in the United States, unlike many other nations, but rather by the individual states. One of the most complete surrogacy laws in the country is perhaps the Child Parent Security Act (CPSA). More than just legalising gestational surrogacy contracts, it also specifies what should be in them. The most crucial part of it is a 'surrogates' bill of rights' that defends surrogate (Kalantry, 2022). The Child Parent Security Act (the CPSA) was introduced in 2012 by Assembly Member Amy Paulin (D-Scarsdale) and Senator Brad Hoylman in the Senate (D-Manhattan, 27th District). It is an extensive piece of legislation that addresses the parentage of all children created through third-party reproduction. It also offers procedures for determining the legal parentage of children conceived using assisted reproductive technology. The key provision of CPSA provides: - (I) Recognition of Compensated Gestational Surrogacy Agreements Only, (II)Mandatory Contract Provisions, (III)Judgment of Parentage, (IV)The Rights of the Surrogate, (V)Requirements to be a Surrogate.

Before CPSA, the surrogacy regulation differs from in states of U.S. Like, intended parents have high levels of protection in eight states and the district of Columbia. All parents, including same-sex couples, are allowed to use surrogacy in certain states, and pre-birth orders are given, allowing both intended parents to be listed on the birth certificate. While surrogacy contracts are

binding in the other 31 'green light' states, it might be harder to get pre-birth orders and there might be limitations for same-sex couples. Surrogacy is carried out in three states where there is no clear legislation or established legal precedent against it. Surrogacy is still carried out even though the parties are aware that their contracts are illegal and unenforceable in two states where surrogacy is legal. Gestational surrogacy is legal in Virginia; however, the intended parents must be married or single, and pay for the surrogate is typically only allowed for housing and other reasonable expenses. Paid surrogacy is expressly forbidden in three of the country's most restricted states, and it is even illegal in one of them. People are unlikely to use surrogates from outside their own states in only these restrictive states.

• Surrogacy Regulation in Australia

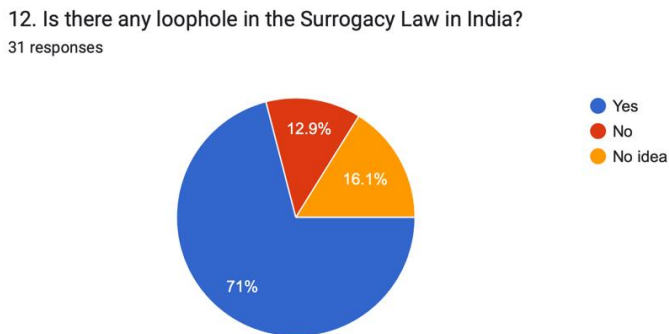
Over the course of 25 years, Australian surrogacy regulations have undergone a stunning about-turn. Surrogacy has emerged from the shadows; it is no longer an exploitative and intrinsically risky business that imperils the stability and naturalness of family life. Instead, it has been recast as a unique but inevitable antique of modern living, a valid last-ditch treatment for infertility that will be accepted if it is carried out appropriately (Millbak, 2012). Surrogacy access of same-sex couples and single people and mandating genetic connection of the child to intended parents was the prime discussion in Australian Parliament.

State and territorial laws in Australia regulate surrogacy. The Queensland Parliament, Tasmanian Government, 2012, and Victorian Law Reform Commission have revised their respective States' surrogacy laws (Prout, 2021). All Australian jurisdictions except the Northern Territory (because there are no surrogacy laws) allow the use of altruistic surrogacy, as commercial surrogacy is forbidden throughout the country. Gay couples are permitted to employ altruistic surrogacy in all Australian States and Territories, except for Western Australia and the Northern Territory. With a potential prison penalty of three years, the Australian Capital Territory, New South Wales, and Queensland continue to outlaw taking part in international commercial surrogacy (Australian Government Department of Home Affairs, 2020). Notwithstanding this, the research says many Australian intended parents from these States still travel abroad for commercial surrogacy; there are 500+ births a year that are the result of foreign surrogacy agreements established by Australian parents.

FINDINGS

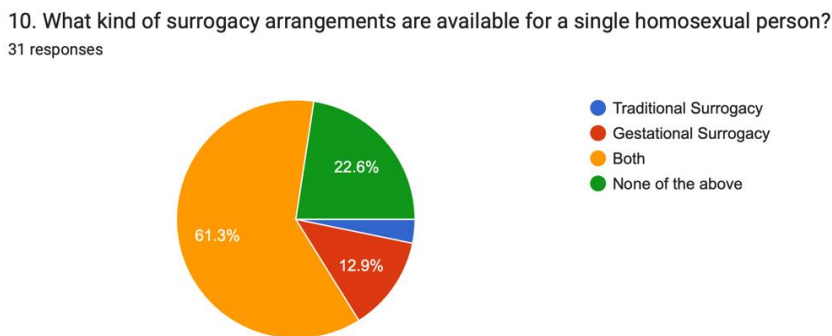
The data collected from questionnaire of 20 by random sampling analysis of total 32 people, the result shows below: -

Figure 1: - Loophole in Surrogacy Law.



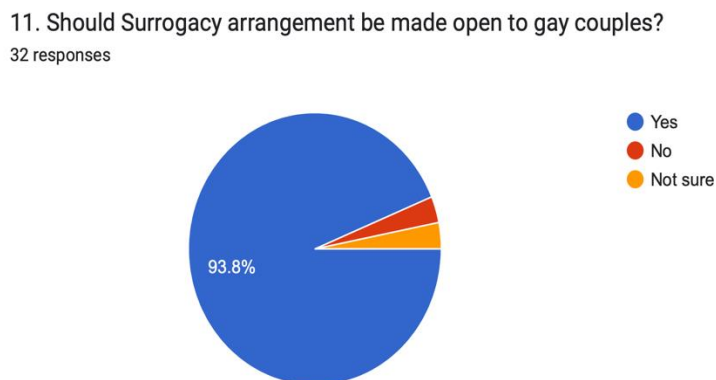
From, the above figure, the result shows that 71 per-cent out of total, find the loophole in the Surrogacy (Regulation) Act, 2021. 16.1 per-cent fall under the categories of having no knowledge about the law. 12.9 per-cent did not find any flaws in the law.

Figure 2: - Surrogacy arrangements for single homosexual person



From, the above figure, total 61.3 per-cent agrees to both Traditional and Gestational Surrogacy arrangement that should be available to a single homosexual person. Whereas 12.9 per-cent agrees to Gestational surrogacy arrangement and 22.6 per-cent doesn't agree to any of these two. Rest 3.2 per-cent of people agrees to Traditional surrogacy arrangement.

Figure 3: - Surrogacy Arrangement to Gay couples.

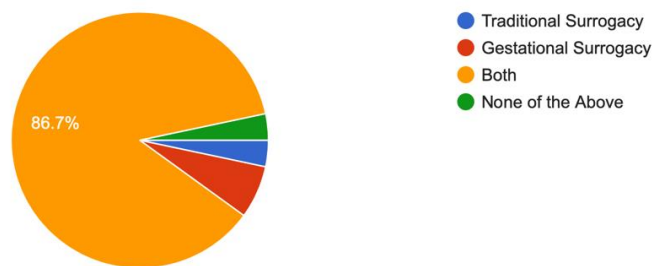


From, the above figure, the result shows 93.8 per-cent of people agrees that surrogacy arrangement shall be open for gay couples under the Surrogacy (Regulation) Act, 2021.

Figure 4: - Surrogacy arrangement for Gay Couples.

15. What kind of Surrogacy arrangement should be made available for gay couples?

30 responses

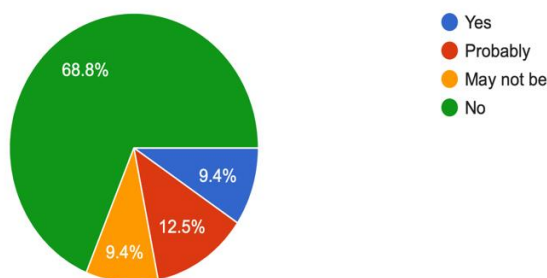


From, the above figure, 86.7 per-cent out of total agrees to both Traditional and Gestational Surrogacy arrangement should be available for gay couple. 6.7 per-cent agrees only to Gestational Surrogacy. 3.3 per-cent find Traditional Surrogacy should be process available.

Figure 5: - Reaction of the society for having two Gay fathers and Lesbian Mothers.

19. Do you think having two gay fathers or lesbian mothers will affect the society at large?

32 responses



From, the above figure, the result shows that only 9.4 per-cent of people feel that society would be or may be normal towards having two Gay fathers and Lesbian mothers 68.8 per-cent people feel that society will be affected by two Gay fathers or two Lesbian mothers. Rest feels the probability of affecting the society at large.

The random sampling of 32 people includes 70 per-cent of female and 30 per-cent of male, falling 30 per-cent under the age group 18-30 and 70 per-cent under the age group of 31-50. The report shows that 90.6 per-cent believes that parenting of a child / raising a child is not confined to only heterosexual persons. Majority of responses has come from people working in private sectors and utmost are aware of the legal rights. From the data collected, it results that surrogacy law should be open to the homosexual where single gay or a couple in a relationship. So, as the LGBTQ+ persons should be given provision under the Surrogacy (Regulation) Act, 2021 to form a family of their own and surrogacy is the way to have their own biological child. Out of 32 responses, 62.5 per-cent of people feel the positive reactions of the society towards the children of homosexual parents and such parenting will not affect the upbringing of the child says about 59.4 per-cent have the clarity in

regards the same. Most of them have agreed that homosexual parenting is not beyond Indian culture. The findings also conclude with an answer that recognition homosexual marriage is the way towards acceptance of homosexual parenting in India.

SUGGESTIONS AND CONCLUSION

Parenting is not only confined to heterosexual or the conventional families. Raising children or parenthood is one's personal choice. Homosexual parenting is not a different Phenomenon, it is as similar as heterosexual families. Though the Laws in India regards to homosexuals are unfavourable, nevertheless decriminalising homosexual relationships in India in the year 2018 has been a response to a long struggle battle which can be considered as a step towards acceptance. When the relationship is legalized, the homosexual couples or the partners can give a thought of becoming parents and raising children whether by adoption or surrogacy. The law of adoption indirectly gives the provisions to single men regardless their sexual orientation for parenting through adoption. But if we see, surrogacy law in India is hushed when it comes to person's sexual orientation specially when it is male or female couples and surrogacy substitute adoption to form a

biological connection. My suggestion to the process is that putting such kind parenting by gay fathers, in clause of 'beyond Indian culture', the first thing need to be clarified is that what is the definition of 'culture'. As we know culture is the custom that prevails in a particular area, community/caste, or religion. Where the custom comes from? Is it what written in any mythology of different religion or just a human made so called rules. Homosexuality is natural. Some people discover it at the initial stage of life or some at their mid age of life. When we have come up to decriminalizing homosexual relations, we need to think beyond that, keeping the notion of 'beyond Indian culture' and 'not normal people' in the edge. The more we explore, the best we fall into clarity. Further, I would like to suggest, from the empirical research of my paper maximum response is for acceptance of gay men surrogacy and parenting especially gestational surrogacy arrangement through altruistic surrogacy process. The positive response in the research and the comparative study with two nations i.e., U.S.A and Australia, shows that it's time to transform the society and such transformation can only be possible by amending the surrogacy law in India.

From the research, it is to be noted that increase in numbers for becoming gay fathers in different countries including India, I conclude that its measure to include the Homosexual persons under Surrogacy (Regulation) Act 2021. The more the provisions will be flexible, the acceptance of homosexual persons in our society will be additional.

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CODE AVAILABLE : Not Applicable

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