
Marriage Equality and Inclusive Parenthood: A New Era of Human Rights

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Abstract

The LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer) community in India is still Dreams of marriage. December 28 is a Human Rights Day, commemorating the 1948 ratification of the Universal Declaration of Human rights (UDHR). LGBTQ adoption from a single parent is permitted by HAMA. However, adoption by a single parent has a number of legal ramifications. The other spouse in a same-sex relationship is essentially deprived of all legal rights over the child when a single parent adopts a child because the single parent is legally obligated to provide for the child's needs. The adoption regulations violate the Indian Constitution and are discriminatory against same-sex couples

Keywords: *LGBTQ, UDHR, Adoption, Homosexual, Heterosexual, HAMA, CARA.*

Introduction

The act of establishing a legal bond between a parent and kid via a social and legal procedure is known as adoption. According to section 2(2) of the Juvenile justice (care and protection of children Act, 2015 "Adoption means the process through 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"¹. A child's life is significantly impacted by the adoption procedure. Thus, the child's welfare serves as the primary adoption criterion. Adoptions should only take place when it is in the best interests of the child, as is also widely acknowledged.

In the landmark ruling in *Navtej Singh Johar v. Union of India*, the Supreme Court ruled that the old harsh law of section 377 IPC, which forbids same-sex couples from engaging in sexual activity and violates their fundamental rights, was unconstitutional. However, the court failed to take into account the civil rights of same-sex couples who wish to adopt children in order to start a family.² The term "homosex" refers to couples who are attracted to each other, such as lesbians (women and women) and gay men and men. These relationships can be romantic or homosocial and close. As CJI Dipak Mishra stated in the *Navtej* ruling, it's not just sexuality as society believes; it's one's love or emotional affection that binds two people together. As citizens, they have the same rights as everyone else, but laws like adoption are discriminatory.

This kind of homosexual relationship is not new to our pluralistic society; it has existed since ancient times, as evidenced by the erotic temple sculptures in Tanjore, Khajuraho, and Konark that show gay people. It is also mentioned in ancient texts like *Kamasutra*, and some mediaeval texts provide proof that it existed prior to the precolonial era.³

Laws and barriers to LGBTQ adoption rights in India

The year 2018 saw the establishment of a new gay event in Navtej Johor judgements. Although the Supreme Court decriminalised this discriminatory element, the festival is still lacking essential or fundamental rights, and the real question is whether we are making progress on it or if it is merely providing them empty books with no content. The rights of same-sex couples have been acknowledged by the judiciary, but this recognition is only in theory and not in practice since social stigma prevents people from exercising their rights, and not all rights, such as those related to adoption and family, are recognised. Furthermore, they will still be unable to exercise their rights even if they are acknowledged.

The Juvenile Justice (Care and Protection of Children) Act of 2015 and the Hindu Adoption and Maintenance Act of 1956 govern adoption in India.

Hindu Adoptions and Maintenance Act, of 1956

The HAMA's Sections 7 and 8 address Hindu men's and women's ability to adopt. HAMA's usage of the terms "husband" and "wife" in sections 7 and 8 suggests that same-sex adoption is not recognised under the Act. Additionally, the Act makes no mention of the "Third gender" adoption right. A cursory reading of the act also makes it evident that gender is viewed in binary terms: HAMA allows LGBTQ adoption from a single parent. However, adoption by a single parent has a number of legal ramifications.⁴

In a way, a single parent who adopts a child would be legally obligated to provide for the child's needs, depriving the other spouse of any legal claim to the child in a same-sex relationship. Thus, it is demonstrated that the HAMA's adoption provisions are discriminatory and that they highlight the LGBT community's adoption rights.

The Juvenile justice (care and protection of children) Act,2015

It gives everyone, regardless of religion, the right to be adopted. Section 68(c) of the JJ Act of 2015 and the central adoption resource authority CARA structured the adoption regulations of 2017, which included provisions, rules, and comprehensive recommendations for adoption or LED. The Ministry of Women and Child Development oversees the CARA body in adoption-related affairs. The eligibility of potential adoptive parents is covered by Section 57 of the JJ Act and Regulation 5 of the Adaps and Regulations. One of the prerequisites is that no child should be adopted by a couple unless they have been married for at least two years.⁵

Surrogacy Bill

According to the bill's section 2, a couple is defined as a legally married man and woman. Since there is currently no law allowing homosexual marriages and LGBTQ members must be community or consistent in their general identity, it is not possible for the same six couples to have a child together. This suggests that getting married is a requirement in order to obtain the surrogacy eligibility certificate completely. Such a meal of their simple rice is a severe injustice to the nation's sexual minority.

The Transgender Persons(Protection of right)Act,2019

The Indian parliament passed this act to protect community rights, but it has shortcomings and gaps as well because it ignores the community's rights to marriage, adoption, and parenting⁶.

Review of the Literature

More recent research has extended this framework to analyse households that differ by sexual orientation and general composition. Gary Becker's seminal work on the economics of the household (Becker and Lewis, 1973; Becker and Lewis, 1981, 1991) started the former study of how differences in constraints and changes in incentives faced by individuals could be used to provide deep insights into family organisation and structure. A new body of research has emerged that examines how these restrictions affect the family outcomes of sexual minorities differently and their associated aftereffects. This research is based on observations that lesbian and gay women face different legal, social, and biological constants than heterosexual couples.

Researching the impact of homosexual marriage limitations on adoption necessitates a deeper comprehension of the want for children in same-sex households, which has historically made adoption a particularly alluring route to motherhood due to biological constraints of homosexual couples.⁷ The homosexual couples submit adoption applications at a rate that is almost three times higher than that of heterosexual couples. According to Goldberg and Conron (2018), children of same-sex couples are over seven times more likely to be adaptable than children of different-sex couple

Nations where homosexual marriage is legal ⁸

Countries	Percentage %
Asia - Pacific	8.8
Latin American Caribbean	26.5
North America	5.9
Sub-Saharan Africa	2.9
Europe	55.9

Views on homosexual marriage's legalisation in India in 2023 ⁹

Characteristics	Share of respondents
Strongly oppose	31%
Somewhat oppose	12%
Somewhat favor	25%
Strongly favor	28%

Analysis in comparison to other jurisdictions

While most countries, including the United States, South Africa, and even the United Kingdom, have legalised same-sex adoption, which led to harsh laws in India, we are still in a snail patch and have not changed or recognised homosexual couples' rights as equal citizens. In other countries, same-sex couples are denied their rights. The HAMA and JJ Acts, for example, did not acknowledge homosexual couples' adoption rights; yet, they make no reference of a single homosexual being being unable to adopt a child; rather, they permit adoption by a single individual regardless of gender or sexual orientation. Supported by the Labour Party, which passed laws outlawing discrimination based on sexual orientation and ultimately led to the Equality Act 2010²⁴, England and Wales passed the Adoption and Children Act 2000²³ that allowed same-sex unmarried couples to adopt children. Therefore, India ought to change the same through the legislation or political parties should incorporate such concerns into their manifestos instead of focussing on caste politics and religion, and should consider the viewpoints of the minority without regard to the majority's religious beliefs.¹⁰

Number of nations that, as of 2024, have made homosexuality a crime ¹¹

Characteristics	Jurisdiction
criminalize private, consensual, homosexual activity	64
Criminalize private, consensual activity between women using law against lesbianism, sexual relations with the person of homosexual and gross indecency	40
Jurisdiction in which the death penalty is imposed or at least a possibility for private, consensual homosexual activity	12
Jurisdictions criminalize the gender identity and /or expression of transgender people, using so called "cross dressing", "impersonation", and "disguise" laws	14

Adoption is not a gender issue; rather, it is a child rights issue. If the kid's welfare is at stake, then other forms of discrimination are absurd, since many children are abandoned or in foster care. Although South Africa, commonly referred to as a rainbow nation, was formerly a part of the United Kingdom, like India, and is a common law nation that supported the rights of gays, 72% of its citizens still believe that same-sex cohabitation is immoral.²⁵ In 1994, South Africa ratified its preamble, which outlines everyone's rights. The Bill of Rights guaranteed everyone certain unalienable rights, such as freedom, liberty, and dignity. *Minsters of Home Affairs V. Fourie*¹² was decided by the South African Constitutional Court.

Conclusion

As Indian citizens, homosexual couples are entitled to equal rights in the political, social, and economic spheres. Given that our nation is democratic, secular, socialistic, and republican, all of its citizens are treated equally, regardless of their gender or sexual orientation. The Supreme Court of India's ruling in *Navtej Singh v. Union of India*³⁹ makes it abundantly evident that section 377 violates Article 14 of the Indian Constitution because it is completely arbitrary, ambiguous, and has an illegal purpose. Section 377 is decriminalised, and this also applies to adoption laws that discriminate against same-sex couples. Article 21 and the Yogyakarta principle uphold the right to self-identity.

By passing the Mental Healthcare Act, 2017, Justice Nariman clarifies parliamentary legislative understanding by defining mental illness and dispelling common misconceptions about same-sex couples. For example, most people believe that children adopted by same-sex couples have unhealthy mental and physical development. Similar to the *K.S. Puttaswamy*⁴⁰ case, it was decided that the constitution guarantees every Indian person the right to privacy and dignity, including the freedom to choose their own level of intimacy and lifestyle.

According to Justice Chandrachud, laws shouldn't be made based on moral principles that are against the constitution, and the rights of same-sex couples are restricted by social structures including caste, gender, class, religion, and community. These groups are not exclusive to same-sex couples; they are prohibited for all couples. Since marriage is a social norm and not all citizens adhere to it, the adoption laws are discriminatory because they do not meet the classification test of Article 14 of the constitution. This is because the laws specifically mention that only married couples and single people are eligible to adopt; if married couples can adopt, why not unmarried or homosexual couples?.

Article 21 upholds the freedom to live one's life as one pleases, regardless of what society deems "un-disturbing." Instead of being based on ideas of majoritarianism, our constitution was created with the goal of creating an inclusive society that respects people's diversity. Laws that discriminate against same-sex couples have been repealed in peaceful and developed countries, and joint adoption of children by both partners is now permitted by both laws and court rulings. After that, it is up to the people to decide whether or not to be married. The government should change the adoption rules in India for same-sex couples and ensure that the LGBT community has equal rights in all areas.