

# BREAKING BARRIERS : The Legal and Social Dimensions of Adoption by Same-Sex Couples in India

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## Abstract

The evolving discourse on LGBTQIA+ rights in India has brought the contentious issue of adoption by same-sex couples to the forefront of socio-legal debate. Despite the decriminalization of homosexuality in 2018, same-sex couples continue to face systemic exclusion from the legal framework governing adoption. This paper critically examines the multifaceted legal and social challenges encountered by same-sex couples in India seeking to adopt children. By analyzing statutory provisions such as the Hindu Adoption and Maintenance Act, 1956, the Juvenile Justice (Care and Protection of Children) Act, 2015, and the Special Marriage Act, 1954, the study underscores the inadequacies of existing laws that fail to recognize non-heteronormative family structures. The paper concludes by advocating for comprehensive legal reform, increased public awareness, and the creation of inclusive policy frameworks. The research highlights that granting adoption rights to same-sex couples is not merely a legal imperative but a moral and social necessity to uphold the best interests of the child and the fundamental rights of LGBTQIA+ individuals.

**Keywords:** Same-Sex Adoption, LGBTQIA+ Rights in India, Adoption Law, Legal Discrimination, Family Law Reform.

## Introduction

In recent years, same sex marriage has been recognized at the national level in the US and Australia, while equal marriage rights have been granted in a growing number of European countries (Scherman et al., 2020). However, in spite of efforts made by LGBT advocates and the pressure of international human rights treaties to reform discriminatory marriage laws, same-sex marriage is still illegal in many parts of the world including Asia, Africa, Middle East. As a result, same-sex couples' access to adoption varies widely around the globe. In four states in Australia a same-sex couples could apply for adoption after being in a registered relationship for two years; another six states had laws containing inconsistencies, in some, laws were ambiguous and the legal standing of gay couples remained uncertain; in others, LGBT people were totally excluded from adoption. Adoption by gay and lesbian couples is legally permitted in three provinces. In many parts of the world both adoption and sexual minority rights were either in their infancy or not recognized at all.

## Historical Context of Adoption in India

The notion that adoption is an inferior way to create a family has negatively influenced the development of adoption law in a manner parallel to the debt of social shame that surrounded single motherhood prior to its modern-day acceptance. This shame has its roots in the ancient adoptions that cast adopted children as inferiors under this religious system. The influence of these ancient adoptions on modern law is undeniable. As recently as the 1960s, the stigma accompanying a history of illegitimacy dictated that an adopted child's history be erased by sealing both the birth and the final adoption record. This disdain for illegitimacy and adoption appears to be identical in all relevant legal systems to ancient adoptions. It is this disgrace that informs the modern common law's failure to develop and thus expand adoption as a means of creating a family

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(Irene Hanan, 2010).

Even today, in an era of “out-of-wedlock” births, gay marriage, and inconsistent statutory language on adoption rights, many people still react with incredulity that a child could be adopted by something less than opposite-gender parents. It is this societal perception that has supplied legislative inertia against the expansion of adoption law in most states and all countries. Changing societal views of race relations, sexual “normalcy,” and the inevitability of social progress must take root in order for extensive change to occur. Today’s deferral of adoption will not be tomorrow’s problem (Tasker & Bellamy, 2019). The reality today is that in India many areas of law treat same-gender couples as inferior human beings who cannot make a family, be intimate with each other, care for an elderly parent, or fall under a network of rights and obligations with respect to property.

### **Legal Framework Governing Adoption**

In the past, adoptions were granted only to charitable or public institutions or to persons unable to support their children. In the 1970s, restrictions on private adoptions loosened further concerning the need for parental consent. The legislature made it possible for adoption by a single person. The Hindu Adoption and Maintenance Act, 1956, made it available to Hindus, Buddhists, Jains, and Sikhs. An adopted child must be a Hindu, Buddhist, Jain, or Sikh, or become one under this Act. Adoption under this Act requires that the adopter be a male Hindu, a female Hindu, or by a husband and wife jointly and have the capacity to adopt (14 years older than the adopted child) and that adoption be valid in law and without any hindered prohibitions of a lawful marriage in this Act. Hindus and Muslims follow customary laws, so they cannot adopt a child if the person intended to adopt is a couple. Customary law cannot be registered, nor does the State have a record of the validity of such adoption (Scherman et al., 2020). The Adoption of Children Act, 1961 governs adoption and maintenance in Christian families, a male or female of a marriageable age as per religion customary law has the power to adopt.

### **Legal Recognition of Same-Sex Relationships**

India's progressive social reforms, in addition to the need for thriving adoption legislation, have resulted in a global conversation on the rights of the LGBTQIA+ community and issues regarding the legality of same-sex marriages. It is currently a challenge in many nations where same-sex marriages are unrecognized, including India, Nepal, Pakistan,

Russia, Sri Lanka, and Bangladesh, to name a few. The criminalization of Article 377 of the Indian Penal Code of 1860, which bans sexual activity against the order of nature, is one of the main obstacles preventing same-sex couples from officially marrying or sharing legal rights and duties. As a result, partners face restrictions in various spheres of life, including healthcare and property rights. Marriage certificates are issued to heterosexual couples in India as public documents, enabling them to avail government schemes, insurance benefits, and succession, inheritance, and taxation rights.

### **Case Studies of Same-Sex Couples**

The emergence of straight, gay, or lesbian couples as potential adoptive parents has sparked widespread social debate and discussion of this form of family expansion. There is debate and discussion about the potential effects on children’s social development as a result of being reared by single-sex couples. Opponents argue that children adopted by gay or lesbian couples are predisposed to social maladjustments or disorders due to their upbringing outside traditional family units. Proponents argue that the parent/guardian figure is more mythical than biological, and all minors need as much parental love and care as is attainable, regardless of the sexual orientation or identity of the parents. This study aims to answer the question: how do New Zealand lawyers and social workers perceive children being (or likely to be) adopted by gay male couples or lesbian couples? Meanwhile, this research addresses the questions: how does the literature on gay/lesbian parenting in general coalesce? And how does this literature with specific reference to New Zealand?

### **Impact of Adoption on Children**

A critical component in determining the eligibility of a couple to adopt a child is the child's best interests. No form of adoption should be legally referred to as "other" or "superior," nor should it embody stereotyped parental models. The evidence base has widened around the equality of outcomes for children adopted by same-sex parents relative to those raised by heterosexual ones (Tasker & Bellamy, 2019). Overall, children's psychological adjustment, family relationships, and openness about adoption services have been largely studied in samples with equal gender ratios and age-matched heterosexual control families. Children's greater understanding of their adoption and its variables, including knowing even their father's identity and knowing that he was either a donor as in open lesbian families or a heterosexual or bisexual man in heterosexual families, has been

independently linked to fewer adjustment problems at ages four to six. To this end, an in-depth research program involving a longitudinal follow-up of a large sample of families living in social contexts different from those covered by earlier studies is being planned for the coming decade.

### **Future Directions for Policy and Reform**

In India, there is a disparity of legal rights for children adopted by heterosexual and same-sex couples. Adoption of children by married heterosexual couples is legally recognized, whereas adoption by same-sex couples is currently not recognized by law. Due to the lack of rights for same-sex couples to adopt, these families often exist as single parents in the eyes of the law, creating issues of legal custodianship for children (Scherman et al., 2020). In the absence of caring adults with equal rights, these families tend to live with fear that a divorce, otherwise commonplace, can tear them apart, with no single parent receiving custody, and thus raising the children as orphans. The non-homosexual partner often lacks any legal rights in these cases (Tasker & Bellamy, 2019).

India is a signatory to the UN Convention on the Rights of the Child but while favoring children to have two parents or adult guardians, it adds that at least one parent must be Indian. The inter-country adoption pact with the Hague is limiting for Indian applicants, all of whom are heterosexual couples. Children adopted in India are not eligible for citizenship on the basis of their adoption, dissenting from other nations and from the recommendations of the Law Commission of India. Domestic adoptions, too, are fraught with legal problems, with no minimum age for children to adopt. Socially, adoption in India is often arranged through contacts and personal networks. However, same-sex couples are excluded from such networks. Adoption cannot be seen in isolation, and is more than just a question of legality. The refusal of the right to adopt is also a refusal of public visibility, cultural recognition, and social regard.

The right to adopt is an intrinsic part of LGBT rights, especially in a nation like India where LGBT relationships are not lawfully recognized. The free exercise of the right to adopt is an essential component of achieving equality under Article 14 and the right to life and to live with dignity under Article 21 of the Constitution of India. No law presently exists that makes adoption unlawful for non-heterosexual parents; because of this ambiguity same-sex couples and individuals are effectively

rendered invisible and unable to negotiate their wrestling with familial desires through formal channels.

### **Proposed Legal Reforms**

Like in any other country where same-sex relationship has recently been recognised, the issue of adoption by same-sex couples in India has emerged as a trending topic among advocates and activists. There are two types of adoption laws in India: the Hindu Adoption and Maintenance Act, 1956 (HAMA) and the Juvenile Justice Act, 2015 (JJ Act). Given the cultural context, the question of why same-sex adoptive couples is still not treated at par with different-sex adoptive couples (with the same-sex partners of a biological parent), and the question of why there is no recognition of adoption by same-sex partners as a family unit raises both legal and social implications. This transformative social justice issue can be approached from both legal and social scientific angles. The issue of adoption by same-sex couples has been dealt with concerning the HAMA. HAMA is also referred to as the Hindu Adoption Act or the Adoption Law, which has been the paradigm reading on adoption and the exclusion of same-sex couples from its purview. Five case laws have been illustrated concerning the juvenile adoption that enabled single and hetero-parenting as a family unit while excluding same-sex couples. Both the HAMA and the JJ Act authenticate adoption, but a tacit allowance of adoption by a single individual, a biological parent, or a couple leads to multiple implications to be read between those two acts that explicitly exclude the recognition of same-sex couples as a family unit.

The discussion of the rights of a person in an intimate relationship has been limited to the recognition of that relationship. There have been only a handful of attempts in exploring the rights of the family unit of two or more intimate partners. Right to adopt of the family unit of same-sex partners extends debates on the immovable rights of a family unit like the right to cohabit, the rights of intimacy, family welfare, right to procreate, and the recently recognised reproductive rights. The text of the Constitution and the provisions of HAMA and the JJ Act of adoption highlight that, in either text, there is no mention of non-hetero-normative sexual relations. Inclusion is a policy predicated on the choice of a family unit with the genetic, sexual, and parenting industrialisation by heterosexual couples only. Adoption as a notion of illegitimacy stands rooted in the offspring of reproductive labour relation. The

significance of parenting by the same-sex couple in a kinship arrangement has yet to be explored (Scherman et al., 2020).

Journal articles concerning the heterosexuality of parenting have not been subjected to critique and resistance during the birth and care of such an illegitimate offspring. Parenting has also remained exclusive to women, with this being taboo. The language of academia concerning either understanding adoption or oathed by heterosexuality prevents the unmitigated reception of the language of the law in the Indian adoption process in terms of age, marital status, and single parenting by other-than-hetero-normative sexual relations. The absence of a representation of non-heterosexuality also creates a lacuna on issues of complex amour-propre women partnering with women by culture, by religion, or by history. In fact, the recognition of illegitimacy prevents access to the law and the window to articulate the method to redress it. Thus, answering the questions of legal and social implicatedness articulate the rights to queer time and reproduction that trump hegemonic time and genetic legacies.

### **Role of Public Awareness Campaigns**

Today's status quo of LGBTQ+ issues in adopting/surrogacy in India is stained with inequalities and systemic oppression fueled by hegemonic normative order ( (Scherman et al., 2020) ). Here the legal dimension encompasses closely-sealed bureaucratic policies, eligibility, rights of biological/surrogate/foster parents, child's right to know origin, provisions for anyone wanting to become a legal guardian, and provisions for dispute resolution. The social dimension encompasses acceptance, societal hurdles of negotiation, disapproval, alienation, biases on competency as a parent, stigma based on relationships, child safety threats with regard to sexual abuse/exploitation and legitimacy, findings of children inquiring about origins, and gap in maturity of supportive parents ( Tasker & Bellamy, 2019) ).

Public campaigns can counter sexual/social stigma of queer families plus 3 ways to raise acceptance and alter perceptions in favour of queer families through 3 campaigns. Campaigns on education, visibility, and legitimacy of queer families that address sexual/social stigma can be envisaged. Speaking to a heterosexual audience, these campaigns would help begin and widen acceptance. First and foremost, it is pertinent to view queer families that have managed to survive within the parameters of hegemonic norms. Further, within their living situations, their choice of a family

structure, i.e. a childless intimacy instead of a conventional family structure, must not be viewed as aberrant to a normative family.

Within India's puritanical fabric, queer couples too, with the 7½-CS-layered structural constraints, are obliged to continue their families and bear children. As a means to choose a sex-responsible family, adoption/surrogacy is viewed in relation to bio-legitimacy. Hence, radicalising queer families as deviant to their parent/surrogate personas suffices to de-legitimise their family status. Hence, campaigns on the legitimacy of queer families within family studies must be undertaken. Research on queer families existing in other countries must be consulted, and relationships of social conditions and parenting/child adjustment against heteronormative parenting practices must be mapped to queer parenting practices in Urdu and brought to diverse media, including newspaper and television.

There should be a national agency responsible for queer family research to encourage and simplify the way through and provide every kind of support. The legal provision of child safety in any endeavour must foster legitimacy. Study findings must be publicised to expand the discourse across regional and academic barriers. Relevant discourses on the safety and understanding of adopting/surrogacy procedures must be brought to major platforms. Adoption by queer couples, proposals for surrogacy by queer couples, and representations in youth concerns must be greenlighted.

### **Conclusion**

As has become abundantly clear, lesbian, gay, bisexual, and transgender (LGBT) lives and families are complex—continuously re-formed and re-imagined—and intersecting in varied ways in a globalized world. Today's challenges, as well as the research agenda, are emerging from the lived realities of normative family formations refracted through the multifaceted relationships between culture, ethnicity, class, sexuality, and, more recently, globalization (Tasker & Bellamy, 2019). Behind the seemingly coherent and united LGBT movements are fissures and contestations around race, ethnicity, nationality, morality, religion, and organizing strategies and tactics.

As the growing body of work illustrated, understanding LGBT lives and families requires seriously engaging with their particular cultural (including race, ethnicity, and religion), historical, and socio-political locations (Scherman et al., 2020). In

addition, scholars need to look beyond the West and Western paradigms to consider how LGBT lives and politics are lived, shaped, and represented in the Global South and East, and how such lived realities renarrate and remap existing analytical categories and concepts. Further, in the domain of family, it is critical to take a relational approach and see how different kinds of families are tied to variegated privileges and disparities, how power operates within and among LGBT families, and how the questions of family enable further insights into what it means to be queer in culturally specific and geopolitically sensitive contexts. In a word, there is a need to keep breaking barriers (either analytical or geographical)—not only in terms of scholarly subfields, but also between academia and activism—and listen to and amplify the voices of LGBT lives and families far removed from one's own.

Human rights—for the poor, the homeless, the crazy, the sick, the dying, the unseen, the unrecognizable—happen only when these bodies center their own lives and for a time reclaim the world. By focusing on the oppression of queer citizens—as is often the case in liberal democracies—the debt owed to the disenfranchised poor heterosexual, oft-forgotten single mothers, the sick elderly, and stray animals is obscured. The problem of the forgotten grows larger still when culture, rather than law or rights, becomes the locus of activism. In the struggle over recognition, norms also get contested, diverted, and subverted (and sometimes, ironically, reinforced). Queer cultural politics in China is remapped as a shifting struggle between civil society activism, mediated projection, and state regulation amid the tensions of a rising capitalist state wrestling with globalization.

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