



ADOPTION RIGHTS OF SEXUAL MINORITIES

By Arya A. R, Haritha C. V and Shani Varghese

From Department of Law, Central University of Kerala, Thiruvalla Campus

‘He is my son’; No he is mine’. Hearing both the women, the King said, ‘Divide the living child into two, and give half to one and half to the other’.

This was the decision held by the King Solomon to find the real mother of the child, in an incident where two women were fighting over a child. Hearing the King’s decision, one woman started crying and requested the King not to cut the child but give it to the other woman. Thus the King gave the child to the woman who requested him not to cut the child as he identified her as the real mother. Though this is a story which sets out King’s wisdom, such disputes have become a reality in modern times. The problem of childlessness is in fact having a great impact on the life of the couples. After the failure of going through all the available medical procedures of having a child, option of child adoption arises.

Adoption is the act of lawfully assuming the parental rights and responsibilities of a child under the age of 18 years. The legally adopted parents are having the same rights and responsibilities as that of the child’s natural parents. Adoption can be traced out from ancient times itself. It was there for more than 4000 years, since the Bablylonian

code of Hammurabi in 2285 B.C. Earliest known adoption can be found out in the Bible, which describes adoption of Moses by the Pharaoh’s daughter. Adoption is also mentioned in the Hindu Laws of Manu.

The institution of adoption is a dynamic concept which is influenced by the changes in the society. The concept of adoption, its past and how it is now perceived in the society depends on certain social, economic and political factors. Each country has its own adoption laws which helped the childlessness couples and individuals to fulfill their desire to have a child of their own. In the present scenario, the sexual minorities in our society are facing certain problems because of this mechanism. Though LGBT communities are tied together with homogeneity, they are diverse. Each letter constitutes a wide range of people of different identities, races, ethnicities and socio economic status. What sticks them together as social and sexual minorities are their common experience of discrimination, the tussle of living at the juncture of different cultural backgrounds and trying to be a part of each.

This paper identifies various political and societal factors that deny LGBT population’s right to adoption and to have a family while examining ways to mitigate the discriminatory policies and practices they face in India comparing with other countries.

ADOPTION BY SEXUAL MINORITIES

Adoption by sexual minorities generally means the adoption of children by [lesbian](#), [gay](#), [bisexual](#) and



[transgender](#) (LGBT) people. This includes joint adoption by [same-sex couples](#), adoption by one partner of same-sex couples and adoption by a single LGBT person. Joint adoption by same-sex couples is legal in many countries and in some sub-national territories. Even though same-sex relationships is not a new concept and have existed throughout history, adoption of children by them is still relatively a new concept¹. Adoption rights of LGBT community cannot be traced out from constitutions and statutes, but they are often determined with judicial decisions.

Great injustice has been felt with the LGBT community regarding marriage and adoption. This community faces many social and economic injustice related with their adoption rights. Even in this modern world the likeliness of accepting adoption of children by LGBT individuals is rare than that of an opposite-sex couples. There are still procedures and practices that can obstruct adoption by them. It is important, for discrimination and prejudice to be eliminated from LGBT adoption decisions. It is necessary to recognize the social and economic issues involved in LGBT adoption and advocate for change on macro, mezzo and micro².

A study shows that if a same-sex couple appears too deviant from gender norms, they are less likely to be approved to adopt³. Ross

¹ ["The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children". American Academy of Pediatrics.](#) Retrieved 9TH November 2018.

² Kristen Roberts. 'The LGBT Population and the Fight for Adoption Rights' *The College at Brockport*, krobe3@brockport.edu 3 (2016)

³ Id

et al. writes, "Lesbians (and by extension, gay men) must present themselves as similar to, or indeed the same as, heterosexual applicants... lesbian couples were also evaluated more favorably if they complied with traditional gender role stereotypes about care giving (one partner would participate in paid work while the other stayed at home with the child)" (2008). Therefore, even if an agency does not noticeably show favoritism towards heterosexual couples, the influence of societal norms may still be present in their decisions. Although gender and family norms are different than they were in the past, the idea of a traditional and nuclear family seem to be hard to let go of in our society⁴.

It is important to address the root causes for the social and economic injustices surrounding LGBT individuals and couples. Our society is very heterocentric, meaning that heterosexuality is fully accepted and practiced in our norms, traditions, behaviors and feelings (Appleby, 2011). This means that any deviant behavior, or same-sex desire, caused a feeling of unease in some people. This feeling of homophobia goes beyond the fear of LGBT people and toward the hatred or discrimination of them. Although there are still many social and economic problems surrounding the LGBT community, there are people, groups and organizations that are fighting for LGBT rights every day⁵.

Adoption of children by LGBT people is an issue of active debate. Supporters of LGBT adoption suggest that many children are in

⁴ Id

⁵ Id at 10



need of homes and claim that since parenting ability is unrelated to sexual orientation, the law should allow them to adopt children⁶. Opponents, on the other hand, suggest that the alleged greater prevalence of depression, drug use, promiscuity and suicide among homosexuals (and alleged greater prevalence of domestic violence) might affect children⁷ or that the absence of male and female role models during a child's development could cause maladjustment⁸.

The following arguments are made in support of adoption by LGBT parents:

- The right of a child to have a family, guardians or people who can take care of their wellbeing⁹.
- Human rights – child's and parent's right to have a family life¹⁰.
- There are little or no differences between children raised by same-sex or straight couples¹¹. For that reason, sexual orientation of the parents has no

relevance when it comes to raising a child¹².

- Evidence confirming that, despite the claims of those opposed to LGBT+ parenting, same-sex couples can provide good conditions to raise a child.
- For the children, adoption is a better alternative to orphanage.
- Less formalities for step-parents in everyday life, as well as the situation of a death of a biological parent of a child¹³.
- In some countries single LGBT people can adopt, therefore banning LGBT parenting (especially adoption) is artificial.
- Because they actively choose and had to work hard to be parents, LGBT parents can be more motivated, involved, and committed than some heterosexual parents.
- Children that grow up in LGBT households are more sympathetic to differences and more likely to believe in equality for all.
- Children raised in same-sex households are proven to be more open minded about different lifestyles and relationships than children who are raised in traditional opposite-sex households.
- Children of gay parents report they felt less hindered by gender stereotypes than

⁶ Charlotte Patterson, et. al, "Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health", pg. 2 retrieved on 9th October 2018

⁷ William Satetan, *Adopting Premises*, Slate, 7 February 2002. Retrieved on 9th October 2018

⁸ Gordon Moyes. "*Gordon Moyes*". 26 February 2009. Retrieved 9 October 2018

⁹ Mark Joseph Stern (1 August 2014). "*Conservatives want to keep gay couples from adopting or fostering kids*". *Slate Magazine*. Retrieved 9 October 2018

¹⁰ "*What are children's rights?*". Retrieved 9 October 2018

¹¹ "*Why Gay Parents May Be the Best Parents*". LiveScience.com. 15 January 2012. Retrieved 9th Oct 2018

¹² "*Homoseksualni rodzice – wywiad z psychologiem*" [Homosexual parents - interview with a psychologist] (in Polish). Retrieved 8 October 2018

¹³ Marks, Loren (2012). "*Same-sex parenting and children's outcomes: A closer examination of the American psychological association's brief on lesbian and gay parenting*". Social Science Research. 41 (4): 735–751



they might have been if raised in a heterosexual household.

- There is a shortage of adoptive parents. A loving adoptive family — gay or straight — is better than the foster care system.
- Same-sex relationships have been proven to be more stable than many heterosexual relationships, providing a better example of a healthy relationship for the child involved.
- If having parents of the same gender is disadvantageous to children in any way, it has nothing to do with their parent's gender and everything to do with society's reaction to the family.
- Affection and nurturing qualities are more common with peers amongst children who have been raised in same-sex households, in comparison to children who grew up in heterosexual households.
- Children with gay adoptive parents are more apt to think outside of the societal box.
- Because gay parents have likely had to face difficulties and discrimination in their lives, they are usually better able to appreciate when their child has his or her own problems.
- Gay parents will naturally be more open minded when it comes to accepting their child's lifestyle choices.
- Children raised in same-sex households may have a better ability to overcome huge obstacles, stand firm in the face of adversity, and make decisions based on emotion and love rather than firm facts¹⁴.

¹⁴ 'Lifelong Adoption Advantages' available at www.lifelongadoptions.com

INTERNATIONAL SCENARIO ON ADOPTION RIGHTS OF SEXUAL MINORITIES

Adoption of children by sexual minorities in almost every country is still at sprouting stage. But in some countries adoption by same-sex couples have legalized. Also countries such as Estonia, Italy, [Slovenia](#) and [Switzerland](#) permit step-child adoption in which the partner in a [relationship](#) can adopt the natural and the adopted child of his or her partner.

SOUTH AFRICA

South Africa is the only African country to legalize joint adoption by same-sex couples. The decision of the Constitutional Court in the case of *Du Toit v. Minister of Welfare and Population Development*¹⁵ led to the amendment of the Child Care Act, 1983 to permit both joint adoption and step-parent adoption by "permanent same-sex life partners". The Child Care Act, 1983 was then replaced by the Children's Act, 2005, which permits joint adoption by "partners in a permanent domestic life-partnership", whether same- or opposite-sex, and stepparent adoption by a person who is the "permanent domestic life-partner" of the child's current parent¹⁶. Thus since 2006, same-sex marriage has been legal in South Africa, and is equivalent to opposite-sex marriage for all purposes, which includes adoption.

UNITED STATES

¹⁵ 2002 ZACC 20

¹⁶ Lynley Donnelly (2008). ["A Media Guide to the Children's Act 38 of 2005"](#). Centre for Child Law; Media Monitoring Project. P. 40. Retrieved 8 October 2018



Adoption laws in United States were widely different in every state before the rulings of Supreme Court of United States. Some states permitted full adoption rights to same-sex couples, while some others prohibited it entirely or partially by permitting the partner in a same-sex relationship to adopt the biological child of the other partner.

All bans on same-sex marriage were struck down by the Supreme Court in US only on June 26, 2015¹⁷ and ordered all states of US to treat same-sex couples equally to opposite-sex couples in the issuance of birth certificates.¹⁸ Thus adoption by same-sex couples became legal in all fifty states.

GERMANY

In Germany, same-sex marriage has been legal since 1 October 2017. In 2005, same-sex step child adoption became legal and was expanded in 2013 to permit one partner in a same-sex relationship to adopt a child already adopted by their partner.¹⁹

AUSTRALIA

In Australia, since April 2018, same-sex adoption is legal in all its states and territories.

NEW ZEALAND

In Newzealand, same-sex marriage and joint adoption of same-sex couples were legalized through the Marriage (Definition of

Marriage) Amendment Act, 2013 which came into force on 19 August 2013. Thus at present in Newzealand, there are no barriers prohibiting an LGBT individual from adoption, except that a male individual cannot adopt a female child.

INDIAN PERSPECTIVE ON THE ADOPTION RIGHTS OF SEXUAL MINORITIES

In India there are many social and economic injustices that surround the adoption of children by lesbian, gay, bisexual and transgender (LGBT) individuals. Same-sex relationships have existed throughout the history of India, however the adoption of children by one or more LGBT person is relatively a new concept in our country. There are no specific legislations for the same, but by holding upon the two landmark judgments by Supreme Court of India which recognized transgender as third gender²⁰ and which decriminalized homosexuality²¹, chances for enabling such rights is not too far.

On 15th April 2014, the Supreme Court of India declared that socially and economically backward transgender people is entitled to reservations in education and jobs, and also directed Union and State government to frame welfare schemes for them.²² The Court ruled that transgender people have their fundamental constitutional

¹⁷ *James Obergefell v. Richard Hodges* (135 S. Ct. 2584; 192 L. Ed. 2d 609)

¹⁸ *Marisa N. Pavan v. Nathaniel Smith* (137 S. Ct. 2075 (2017))

¹⁹ [Reuters"German court expands adoption rights of gay couples".](#) . 19 February 2013. Retrieved 8 October 2018

²⁰ *National Legal Services Authority v. Union of India*. [(2014) 5 SCC 438]

²¹ *Navtej Singh Johar v. Union of India* ((2018) 1 SCC 791)

²² ["Supreme Court's Third Gender Status to Transgenders is a landmark".](#) IANS. news.biharprabha.com. Retrieved 9 October 2018.



right to change their gender without any sort of surgery, and directed the Government to ensure equal treatment for them. The Court also held that the Indian Constitution mandates the recognition of a third gender on official documents.²³ On the basis of this landmark decision the *Transgender Persons (Protection of Rights) Bill, 2016*, which was initially introduced to Parliament in August 2016, was re-introduced to Parliament in late 2017²⁴. Some transgender activists have opposed the bill because it does not address issues such as marriage, adoption and divorce for transgender people.

On 6th September 2018, the Supreme Court of India decriminalised homosexuality by declaring [Section 377 of the Indian Penal Code](#) unconstitutional. The Court unanimously ruled that individual autonomy, intimacy, and identity are protected fundamental rights. Furthermore, it ruled that any discrimination on the basis of sexual orientation is a violation of the Indian Constitution:²⁵ Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the

basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression²⁶. The Supreme Court also directed the Government to take all measures to properly broadcast the fact that homosexuality is not a criminal offence, to create public awareness and eliminate the stigma members of the LGBT community face, and to give the police force periodic training to sensitise them about the issue.²⁷

It was the first step towards guaranteeing the full range of fundamental rights to LGBTI persons in India and boost efforts to eliminate stigma and discrimination against LGBTI persons in all areas of social, economic, cultural and political activity, thereby ensuring a truly inclusive society. Even though the judgment was historic, same-sex couples still have an uphill task ahead of them. While the verdict has now opened the doors for several changes to be introduced to marriage, adoption and inheritance laws for same-sex couples, it does not automatically translate into a seamless transition to equality for the lesbian gay bisexual transgender queer (LBGTQ) community. The government now needs to act on this and frame laws to allow same-sex marriages or adoption by LBGTQ couples. Although the onus is on the government to formulate legislation permitting LBGTQ couples to marry, adopt and inherit their spouse's property, this verdict lays down the legal basis for the formulation of such legislation. At the same time, individuals who face discrimination

²³ Manoj. K. Jha *Transgenders right in India..* Retrieved from <http://iasscore.in/national-issues/transgender-rights-in-india> on 9 october 2018

²⁴ Abraham, Rohan (30 November 2017). "[All you need to know about the Transgender Persons Bill, 2016](#)". The Hindu

²⁵ Misra, Dipak. "[Navtej Singh Johar and Ors. vs Union Of India Ministry Of Law and Justice](#)" . p. 160. Retrieved 8th October 2018

²⁶ "[Supreme Court decriminalises Section 377: All you need to know](#)". The Times of India. accessed on 9th October 2018

²⁷ "[India's top court decriminalizes gay sex in landmark ruling](#)". CNN. Accesed on 9th October 2018



because of their sexual orientation can now mount a challenge in a court of law. Legal experts have urged the Government to pass legislation reflecting the decision, and frame laws to allow same-sex marriage, adoption by same-sex couples and inheritance rights.²⁸ However, as for marriage or adoption, if there are any pending petitions, they can be considered on the basis of this verdict. There are currently several same-sex marriage petitions pending with the courts.²⁹

Gowri Sawant, a Transgender women and a social activist living in Mumbai adopted a girl child Gayatri by saving her from trafficked in to the sex industry in Kolkata, after the young girl's natural mother who was a sex worker, died of AIDS. A recent advertisement by *Vicks* tells her story, and how she destroyed the idea that transgender people can't be parents.

Existing provisions for adoption in India

Rules regarding adoption in India are regulated as per the Hindu Adoption and Maintenance Act, 1956, Juvenile Justice (Care and Protection of Children) Act, 2000 and Guardian and Wards Act of 1890. Under The Hindu Adoption and Maintenance Act, 1956, any male Hindu (including Buddhist, Jain or Sikh by religion) who is of sound mind, not a minor and is eligible to adopt a son or a daughter” and “any female Hindu (including Buddhist, Jaina or Sikh by religion) who is not married, or if married, whose husband is not alive or her marriage

has been dissolved or her husband has been declared incompetent by the court has the capacity to take a son or daughter in adoption”³⁰. In August 2014, while considering amendments to the Juvenile Justice (Care and Protection of Children) Act, 2000, the Union cabinet, decided to obstruct same-sex couples from adoption. After the Central Adoption Resource Authority (CARA) issued strict guidelines for adoption, even single persons and unmarried couples have found it increasingly difficult to adopt³¹. Foreign citizens, NRIs, and those Indian nationals who are Muslims, Parsis, Christians or Jews are subject to the Guardian and Wards Act of 1890.

Thus it is clear from these existing provisions that the laws assume the norms of patrilineal and patrilocal, heterosexual society and within none of these is there any explicit or implicit mention of rights of adoption for the sexual minorities of the country. And this is clear violation of gender equality provided under Articles 14 and 15 of the Constitution of India. The Supreme Court has held that discrimination on the basis of sexual orientation is in violation of Indian Constitution.³² Individuals who face discrimination because of their sexual orientation can now mount a challenge in a

²⁸ Das, Shaswati (7 September 2018). "[Historic verdict holds hope for same-sex marriages, adoption](#)". [Livemint.com](#). accessed on 9th October 2018.

²⁹ *Id*

³⁰ Ss. 7 & 8, The Hindu Adoption and Maintenance Act, 1956

³¹ Nayantara Ravichandran *Legal Recognition of Same-sex Relationships in India* from <http://docs.manupatra.in> accessed on 9th oct 2018

³² Mahapatra, Dhananjay; Choudhary, Amit Anand (7 September 2018). "[SC decriminalises Section 377, calls 2013 ruling 'arbitrary and retrograde'](#)". The Times of India accessed on 9th October 2018



court of law³³. But as long as no specific law on the rights of sexual minorities are made, their rights cannot be protected in a strictly manner. Thus a new legislation on the rights of sexual minorities including adoption rights has to be made and enacted.

CONCLUSION

By holding upon the recent landmark judgments regarding the recognition of LGBT community in India, there is a hope that there is an immense possibility for all LGBT individuals to have equal rights in the near future. However, there is a challenging road ahead and injustices that need to be addressed. Primarily, we as a country need both the LGBT population and all straight allies to advocate for change in their local, state and central governments. Peaceful parades and protests are helpful and make the society realize that LGBT individuals are fighting for their equality in the society. Making local representatives also aware could be very helpful as well. Although most states are progressive and accepting, issues of prejudice and discrimination against sexual minorities are still present throughout the entire country. Also the importance of education on topics such as acceptance and diversity cannot be stressed enough. These issues can be covered in schooling curriculum, from the young age itself. The role of media in representing LGBT individuals and families is also very important.

Our country had taken large steps forward towards the acceptance of diversity, but more needs to be done. Hopefully within the next few years, LGBT adoption policies can

be fully changed for the better. Both individuals in an LGBT relationship should be given complete social and economic justice when it regards to the rights of themselves and their children. However, when such laws come in to place, there will still be issues of prejudice and discrimination that we need to be aware of. Whether legal or not, the LGBT community will continue to face oppression until their fundamental human rights are completely acknowledged by all. As our nation progresses in terms of acceptance of diversity, it is critical that we not only allow, but fight and advocate for the human rights of the LGBT population.

³³ *Supra* 26