

ADOPTION BY SAME-SEX COUPLES: AN ANALYSIS OF THE VIABILITY OF
INTERCOUNTRY ADOPTION

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ABSTRACT

Adoption is one of the oldest social institutions. Nevertheless, adoption often raises a lot of emotive issues. Marriage is often considered as a gold standard for adoption. Marriage and other related rights of such couples are still not recognised in many countries, including India. Heterosexual couples face limited legal obstacles while adopting. At the same time, same-sex couples face a differential treatment in the adoption process. The right to family of same-sex couples is often denied on the basis of the 'best interest of child' principle. There is a presumption in most countries that homosexuality is a disease or an ideology that might cause some kind of harm to the society. In a country like India the role of religion in determining such rights of same-sex couples needs to be verified. The parental capacity should not be measured in terms of an individual's sexual orientation. The scientific basis for this segregation on the basis of sexual orientation needs to be substantiated. Within the sphere of adoption, intercountry adoption is a highly contested arena. The intercountry adoption of children from global south to global north is a well-established practice. There is a polarised debate that revolves around the practice of intercountry adoption. This paper will focus on an analysis of the issues related to intercountry adoption by same-sex couples. This paper will also highlight the critical and compelling issues related to the implementation of the Hague convention.

Keywords: *Adoption, Hague Convention, intercountry adoption, same-sex couples, right to family*

1. Introduction

The adoption of children by same-sex couples has been a topic of extensive debate over the past few years. Many countries across the globe have recognised the adoption rights of same-sex couples. At the same time sizable number of countries do not recognise this right. Access to

adoption of such couples is primarily denied on the basis of their marital status and sexual orientation. Marriage is considered as the 'gold standard' for any couple seeking adoption. This discrimination faced by same-sex couples can be considered as a blatant violation of their right to family, which is a globally recognised right of any individual. There are different forms of adoption practices like step-child adoption, joint adoption and intercountry adoption. But substantial discrimination is faced mostly by same-sex couples. Heterosexual adoption is considered as the norm and same-sex adoption, a taboo.

India is still far away from eradication of such discrimination on the basis of sexual orientation but there is a shimmer of hope. The decriminalisation of homosexuality is the first step of many to come. The road towards legal acceptance is tricky as right to family in India is largely governed by personal laws that rely on religion, but not impossible. Is religion a major factor for this discrimination that exists in India? This is an issue that needs to be verified.

Within the sphere of adoption, intercountry adoption is a highly contested arena.¹ The intercountry adoption of children from global south to global north is a well-established practice. There is a polarised debate that revolves around the practice of intercountry adoption. India being a ratified member of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (hereinafter referred to as the Hague Adoption Convention) indicates that acceptance of same sex couples and intercountry adoption will follow once domestically accepted, allowed and protected by law. If the adoption process for the young, stable, financially secure couples, adoption is difficult, the problems only increase exponentially for same-sex couples. If there is a place that can be called next to impossible, it is that of same sex couples looking to adopt children.

The major objectives sought to be achieved using this study are as follows:

- To verify if the sexual orientation of individuals has an impact on their parental capacity or not;
- To analyse whether religion has a major impact on the way in which homosexuality is viewed in India;

¹ INTERCOUNTRY ADOPTION POLICIES: PRACTICES AND OUTCOMES 255-311 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

- To analyse if a separate law is required to recognise the right to family of same-sex couples in India;
- To analyse if intercountry adoption is a viable mechanism for same-sex couples seeking adoption;

2. Literature Review

The available literature like journal articles and certain relevant chapters of book are reviewed for the purpose of identifying gaps or grey areas.

Narrain and Bhan² in their latest edition has produced a volume of theories, readings and personal narratives. The book becomes relevant in this decade because of the growing acceptance and recognition of sexual minorities. Relevant rhetorical questions are posed against the heterosexual norm in the society. It does an exemplary job of including a rich collection of queer voices. But if there is one motive that holds this collection together it is the united resistance against 'compulsory imposition of heterosexuality'. The different sections of the book can be seen as a war cry against the heteronormative norm. The book can be considered as a narrative and thus there is a lack of policy reforms that are suggested. From a legal perspective the work might not be fully relevant but it is definitely a compelling work that portrays real life issues of these sexual minorities.

To understand the legal scenario post decriminalisation of Section 377, the researcher referred several authoritative journal articles. As part of this research, a collection of essays on the same sex marriages and several LGBT rights caught the attention of the researcher. **Narrain and Gupta**³ portrays multiple perspectives on the history of queer life and law in India. Particularly, Chapter IV of this collection focusses on the importance of reforming family law in order to accommodate same-sex couples, especially queer women. But the essays seemed to be filled with a lot of academic jargon and slightly meandered from the core theme of the collection. Also, the essays that focused on reformation of personal laws did not offer clear policy recommendations at the end. Thus, the researcher had to rely on other available resources to reach a conclusion.

The influence of religious practices and beliefs on the institution of marriage and other related rights is rather significant. Thus, it was important to verify the impact of religion on the

² BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 10-58 (Arvind Narrain & Gautam Bhan eds., 2020).

³ LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 323-378 (Arvind Narrain & Alok Gupta eds., 2011).

discrimination faced by same-sex couples in India. **Anand and Ukil**⁴ discussed the several approaches that could be undertaken in order to legalise same sex marriages and related rights under the Hindu Marriage Act, 1955 in their paper. They have also recognised the difficulty of such an endeavour. They conclude by stating the success of such an endeavour is unclear and legislative solutions are still the best way to address the challenges faced by the LGBT+ community in India. But, the theme of the paper appeared to be rather narrow and the possible legislative solutions were not discussed authoritatively.

Farr, Forsell and Patterson⁵ conducted an empirical study in order to verify the impact of sexual orientation of an individual on parental capacity. Their study analysed development of adopted children in 106 families headed by 27 lesbian, 29 gay, and 50 heterosexual couples. Their study has strongly challenged the argument that a child requires one male and one female parent to attain proper development. The authors through this analysis established that there is no association between sexual orientation of parents and child development. The study also established that parents from the same gender can be excellent parents. One of the significant limitations of this study is in the fact the study is geographically limited to USA and particularly white households. The authors have not ventured into the diverse experiences in non-white households outside USA.

One of the most important developments in the sphere of adoption is the enactment of the Hague Convention. The primary purpose of this convention was the regulation of intercountry adoption. **Schupp-Star**⁶ in her paper comments on the significant shortcomings of the convention. Specifically, the ambiguity regarding the status of same-sex couples as prospective parents. This ambiguity of position is thoroughly verified in the paper. But the author has not provided any concrete solutions that would facilitate adoption by same-sex couples under this convention.

WORDS SPEAK

⁴ Aaranya Anand & Soumya Shankar Ukil, *Validity of same sex marriage under the Hindu Marriage Act, 1955: The way forward*, 2 (1) Lex Forti Legal Journal 6 (2020).

⁵ Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?* 14 APPL. DEV. SCI. 164, 164-78 (2010).

⁶ Rachael M. Schupp-Star, *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: The Need for a Uniform Standard for Intercountry Adoption by Homosexuals*, 11 ROGER WILLIAMS UNIV. LAW REV. 139, 139-170 (2011).

On the other hand, Hillis⁷ focuses on the impact of the Hague Adoption Convention on those traditionally disfavoured as adoptive parents. The author has traced the evolution of intercountry adoption with coherence. The core theme of this paper is the feasibility of this mechanism of adoption for same-sex couples. After a thorough analysis the author has come to the conclusion the convention currently does very little to encourage adoption by gay and lesbian couples. The author concludes by giving certain recommendations that would make this adoption process more inclusive. But the paper considers USA as the epicentre of all these debates and therefore the diverse scenario in other countries is given less importance.

Gibbons and Rotabi⁸ in this volume offer a collection of essays that probes into the inadequacies in the existing intercountry adoption practices, ambiguities in international conventions, operation of legal mechanisms and the political instability in many source countries. A value-based analysis of the process is provided by these essays. Specifically, Part V of this book focuses on best practices that might be implemented, measures to be taken to prevent breakdown of this mechanism and future practices to be adopted. Unlike the other literatures reviewed, this book has analysed the diverse perspectives that exist in countries other than USA, particularly countries in the global south. But no specific discussion is available on the adoption rights of sexual minorities. The discussion revolves primarily around the adoption rights of heterosexual couples.

Fronek and Cuthbert⁹ considers the future of intercountry adoption as a paradigm shift. According to the authors the current international framework governing adoptions is a legal mechanism. The authors suggest that a socioecological approach should be adopted because the current legal and welfare frameworks have inherent limitations. These instruments fail to address the inequalities that exist within the adoption process. The authors conclude by stating that a collaborative approach that includes academics, legal practitioners, policy makers etc is required to properly address these inequalities.

3. Research Methodology

⁷ Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?* 6 INDIANA J. GLOB. LEG. STUD. 237, 237-256 (1998).

⁸ INTERCOUNTRY ADOPTION POLICIES: PRACTICES, AND OUTCOMES 255-311 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

⁹ Patricia Fronek & Denise Cuthbert, *The future of inter-country adoption: A paradigm shift for this century*, 21 INT. J. SOC. WELFARE. 215 (2012).

This study is designed as a quantitative study aiming to understand the views on parental capacity of same-sex couples and the impact of religion on the family rights of such couples in India. Among different quantitative methods the author adopted the survey method. The sample primarily consisted of academicians, doctors and students. The survey was conducted using a structured questionnaire (Google forms).

4. Limitation of study

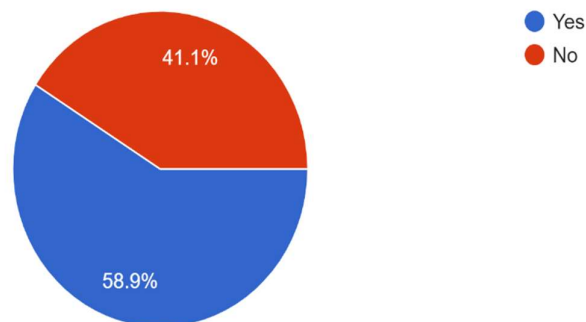
The study focuses on adoption rights of same-sex couples. The issues related to family rights of other members of the LGBTQ+ community are not analysed. The inability to obtain the views of stakeholders like Central Adoption Resource Authority (CARA), other governmental agencies and members of the LGBTQ+ community is another limitation of this study. The survey is limited to India. Issues related to intercountry adoption are not addressed through the survey. This issue is addressed on the basis of existing literature only. The survey included mostly heterosexual individuals and chances of bias in the result cannot be ruled out.

5. Results

Following is a question-by-question analysis of the responses received through the structured questionnaire circulated via google forms. The sample size is 95.

Do you believe that homosexuality is a choice?

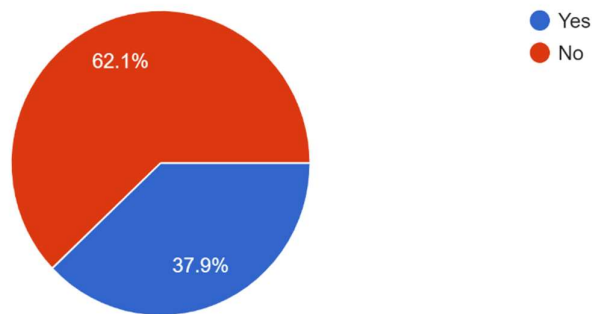
95 responses



This chart indicates that **58.9%** of the sample believes that homosexuality is an anomalous choice. There is plethora of research that have established that homosexuality is a sexual orientation, not a choice or lifestyle.

Do you believe that sexual orientation of an individual has an impact on parental capacity?

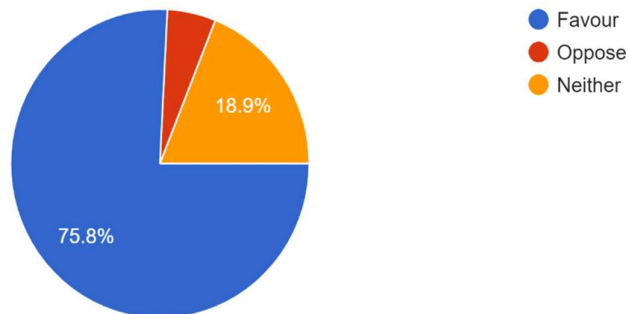
95 responses



62.1% opined that the sexual orientation of an individual has no impact on their parental capacity. The sample consisted of academicians and doctors. This data indicates that the argument that the sexual orientation of parents has negative implications on a child's development is futile.

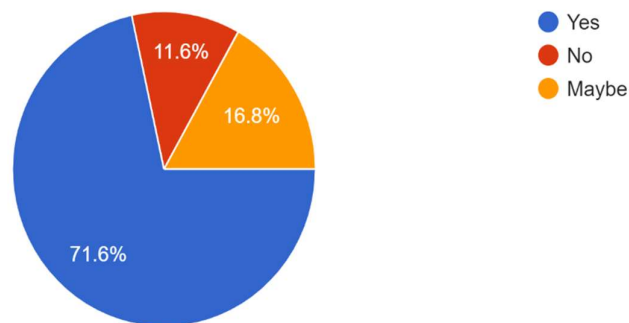
Do you favor or oppose adoption of children by same-sex couples?

95 responses



75.8% of the sample favored adoption by same-sex couples. Merely, 5.3% opposed such adoptions. 18.9% took a neutral approach. Some even commented that they are not concerned about adoption practices at all as they are married and have children. This is not an issue pertaining to them.

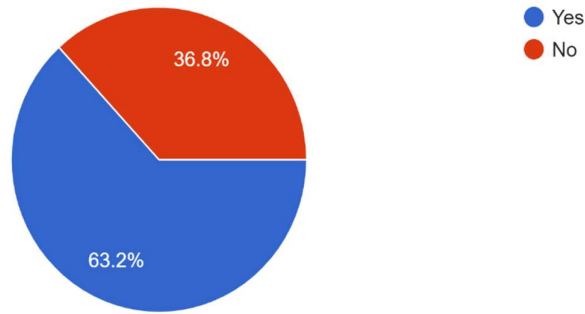
Do you think religion has too much of an effect on how people view homosexuality in our country?
95 responses



This is was a controversial question in the questionnaire. Even then, **71.6%** agreed that different religions have a negative impact on views on homosexuality. **11.6%** opined that religion had no impact. **16.8%** took a neutral approach and stated that they did not want to comment due to the controversial nature of the issue.

Should there be a separate body of law that recognizes the right to family of same-sex couples in our country?

95 responses



A whopping **63.2%** favoured the introduction of a separate body of law recognizing family rights of same-sex couples. This indicates that majority of the sample were aware of the inequalities faced by them and deems it fit to have a special body of law.

6. Conclusion

Sexual orientation and right to family debate

It was surprising to note that majority of the sample that consisted of doctors, academicians and students (particularly law students) still consider homosexuality to be a choice. The fact that it is the sexual orientation of a person is often not well acknowledged. Some even consider it to be a lifestyle. Some among the interviewees also went ahead and commented that homosexuality is just a hormonal imbalance that needs to be treated medically. This mentality is one of the driving factors for the discrimination faced by homosexual couples.

Plethora of research has established that children raised by same-sex parents develop in ways that are similar to the children raised by heterosexual parents.¹⁰ Even though majority of the sample opined that homosexuality was a choice, they opined that this sexual orientation cannot have an

¹⁰ Rachel H. Farr et.al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter*, 14 APPL. DEV. SCI. 164, 164-78 (2010), Judith Stacey and Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* 66 AM.SOCIOL.REV. 159, 159-79 (2001), Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20 (2003).

influence on parental capacity. This was rather contradictory. Majority also favored adoption by same-sex couples.

As indicated by the data, majority of the sample opined that religion has too much influence on how homosexuality is viewed in India. Regardless of their views on homosexuality, many ardent devotees look into both sacred texts and tradition for direction on this issue. However, the authenticity of various traditions or scriptures and the correctness of their translations and interpretations are disputed. Still many use religion as a tool for discrimination. The predominance of religion in personal law matters is a major deterrent for recognition of same-sex rights in India.

As indicated in the previous section 63.2% opined that there should be a separate law governing right to family of same-sex couples. But law reforms to ensure marriage equality of same sex couples should be undertaken only after a thorough process of democratic debate. This debate should be inclusive of members of the LGBT community. Amendment of personal laws seems like a far-fetched option. Thus, despite the impending public outcry a separate legislative instrument recognising same sex marriage and adoption rights may be enacted gradually in India.

Intercountry adoption under the Hague Convention

The Hague convention though on a righteous path to ensure that same-sex couples can adopt children from other countries, does not do much in terms of facilitating such adoption.¹¹ The wordings in the convention are vague and open to local interpretation, the “best interests of the child” can be interpreted and abused by the countries that do not allow same sex couple adoption.¹² The lack of Uniform adoptive parent eligibility which renders the countries the main role of the decider when it comes to selection of potential adoptive parents.¹³ The contracting countries laws prevail when the convention fails to override such laws and legislations that hamper inter-country adoption for same sex couples.¹⁴ With such an ambitious goal, the means obtained by the convention lack the ability to achieve it.

¹¹ Rachael M. Schupp-Star, *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: The Need for a Uniform Standard for Intercountry Adoption by Homosexuals*, 11 ROGER WILLIAMS UNIV. LAW REV. 139, 139-170 (2011).

¹² *Id.*

¹³ Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?* 6 INDIANA J. GLOB. LEG. STUD. 237, 237-256 (1998).

¹⁴ *Id.*

Another potential problem for same sex couples looking to adopt is inherent in the 'public policy' exception provided to the convention in blanket recognition.¹⁵ Since the Hague Convention does not mention under what grounds and circumstances a country can refuse a potential adoption, this would lead to additional step of verification as well as scrutiny.

Thus, an overall analysis of the Hague convention indicates that intercountry adoption cannot be considered as a viable mechanism of adoption for same-sex couples until adoptions by same-sex couples are recognised domestically. Otherwise, this whole process would be cumbersome and ultimately useless for such couples.

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