

From Marriage to Family: Examining Adoption, Surrogacy, and Custody Rights of Same Sex Couples in India

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Abstract

This article analyzes the same-sex couples' legal hurdles in India in the areas of adoption, surrogacy, and rights of custody. In spite of decriminalization of homosexuality in *Navtej Singh Johar v. Union of India* (2018), Indian family law still deprives LGBTQ+ individuals of equal access to family building. The Juvenile Justice Act, Surrogacy (Regulation) Act, and ART (Regulation) Act all support heteronormative assumptions that do not allow for the adoption of children by same sex couples together or access to reproductive technologies. Moreover, no legal certainty is available for custody and guardianship rights over children to same sex parents.

Based on constitutional ideals, international human rights norms, and comparative juridical models, this article argues that the existing legislative exclusions contravene the right to equality, dignity, and family life. The study also examines the psychosocial effects of such exclusions on LGBTQ+ families and highlights the imperatives for holistic legal reform. Finally, it concludes with policy recommendations for enhancing legal recognition and social acceptance of diverse family formations in India.

Keywords: *Same Sex Couples; Adoption Rights; Surrogacy Laws; Child Custody; LGBTQ+ Family Rights in India.*

1. Introduction

The legal landscape of LGBTQ+ rights in India has seen significant strides in the last ten years, most recently in the landmark *Navtej Singh Johar v. Union of India* (2018), where the Supreme Court noted acts of consensual homosexuality as decriminalized. The ruling was welcomed as a milestone on India's path towards sexual minority equality. Yet although the judgment resolved the question of criminality, it did not confer any meaningful legal rights within family law. Marriage, adoption, surrogacy, and custody are core spheres of family life that are far beyond the jurisdictions of same sex couples in India by virtue of gaps in legislation and heteronormative attitudes.

Wherever homosexual marriage or civil unions have been made legal in the world, family creation legal rights are an automatic byproduct. In India, however, this process has been delayed by legal tardiness as well as society's melodramatic resistance. Now, personal laws of marriage and familial relations among religious groups like the "Hindu Marriage Act, 1955; the Special Marriage Act, 1954; and other personal statutes" do not grant recognition to same sex relationships. Gay couples are thus not allowed to adopt together or use surrogacy services, with gay partners' rights over children born to or brought up by them being notoriously unclear.

Against this backdrop, this article seeks to analyze how Indian adoption law, surrogacy law, and child custody law still exclude gay couples despite constitutional guarantees of equality and dignity. It also attempts to examine the implications of such exclusion on the legal rights of LGBTQ+ individuals and children on both domestic law and comparative foreign practice grounds. By an examination of the current legislative traditions, judicial bias, and societal attitudes, the research here intends to contribute to the ongoing debate in India on the recognition of several types of family.

2. Review of Literature

There has been a large body of work in India during the past few years regarding the wider issues of LGBTQ+ rights, constitutional morality, and anti-discrimination law. Writers such as Arvind Narrain (2013), Gautam Bhatia (2019), and Danish Sheikh (2018) have penned articles on the constitutional dimension of the *Navtej Johar* judgment and its potential to revolutionize Indian family law. Narrain (2020) points out that real equality occurs in the expansion of rights in a

positive direction, particularly in such areas as marriage, adoption, and motherhood, which continue to be rooted in heteronormative assumptions.

Legal critique by Satheesan and Pillai (2021) accuses the Hindu Marriage Act and Special Marriage Act of using binary and gendered language, which ostracizes same sex weddings. Likewise, Krishnan (2022) explores how the Surrogacy (Regulation) Act, 2021 and ART (Regulation) Act, 2021 clearly restrict eligibility to married heterosexual couples, so institutionalizing exclusion of LGBTQ+ individuals from assisted reproductive technologies.

Internationally, considerable evidence indicates how access to marriage and parenting rights promotes the psychological well-being of LGBTQ+ families. Studies from Canada (Rayside, 2008), South Africa (Judge, 2015), and the U.S. (Eskridge, 2013) suggest that legal recognition of same sex parenthood leads to more stable family situations and improved child wellbeing. The Yogyakarta Principles on the Application of International Human Rights Law in respect to Sexual Orientation and Gender Identity (2006) also call for non-discriminatory access to family formation.

In terms of adoption, Indian scholars such as Mendiratta (2021) emphasize the limits of the Juvenile Justice (Care and Protection of Children) Act, 2015, which theoretically enables individual adoption by LGBTQ+ individuals but restricts joint adoption by couples owing to lack of marital recognition. Case studies by the Naz Foundation and Vidhi Centre for Legal Policy (2023) demonstrate that LGBTQ+ applicants encounter systematic prejudice at many levels—from adoption agency to the judiciary.

Literature on custody rights in India remains scant, while papers by Patel (2022) and studies by the Centre for Law and Policy Research imply that the Indian judiciary has yet to substantially address custody conflicts involving same sex couples. Most existing choices rely back on conventional "best interest of the child" principles, without addressing the reality of LGBTQ+ parenting.

In short, while the research progressively exposes the discriminatory impacts of contemporary Indian family law, there remains a pressing need for thorough legal and empirical studies concentrating on how same sex couples navigate the systems of adoption, surrogacy, and custody. This research intends to contribute to increasing the body of work.

3. Objectives and Research Questions

3.1. Objectives

This study seeks to achieve the following objectives:

1. To analyze the legal barriers faced by same sex couples in adopting children in India.
2. To evaluate the restrictions imposed by Indian surrogacy and ART laws on same sex couples.
3. To explore the legal status of custody and guardianship rights for same sex parents in India.
4. To identify potential legal reforms and policy recommendations that would promote equal family rights for same sex couples in India.

3.2. Research Questions

1. What are the current legal frameworks governing adoption, surrogacy, and custody in India, and how do they apply to same sex couples?
2. What legal and practical challenges do same sex couples face when attempting to form families through adoption, surrogacy, or co-parenting?
3. How have Indian courts and policymakers addressed (or failed to address) the family rights of same sex couples in recent years?
4. What international legal models can India adopt to better protect the family rights of LGBTQ+ individuals?
5. How do legal exclusions impact the lived experiences of LGBTQ+ families in India, particularly in relation to the welfare and security of children?

4. Discussion

4.1 Legal Frameworks and Exclusions

The Indian legal system has long favored heteronormative concepts of family, founded in both personal religious rules and colonial legal frameworks. Despite the positive trend represented by the Supreme Court's ruling in *Navtej Singh Johar v. Union of India* (2018), legal systems governing adoption, surrogacy, and custody continue to systematically exclude same sex couples.

4.1.1. Adoption Law

The fundamental legislation regulating adoption in India is the “Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act), read along with the Adoption Regulations published by the Central Adoption Resource Authority (CARA).” The JJ Act officially enables “single or married” persons to adopt, without any clear bar against LGBTQ+ individuals. However, CARA standards and their interpretation by adoption agencies implicitly imply heterosexuality in circumstances of married couples and joint adoptions.

Currently, same sex couples are not recognized as legal spouses under Indian law, hence banning them from jointly adopting a kid. An isolated LGBTQ+ individual can become an adoptive parent as a single parent, but this is laden with logistical issues. Most adoption agencies either directly discriminate against openly LGBTQ+ applicants or impose stringent additional qualifications. Furthermore, in the case of the two partners adopting individually, the other partner has no legal rights in relation to the child, which can cause long-term issues around custody, inheritance, and parental responsibility.

The absence of explicit legal principle on this issue further adds to the problem. In *Shabnam Hashmi v. Union of India* (2014), the Supreme Court recognized the right to adopt as part of human freedom but did not touch upon the issue of LGBTQ+ individuals. Secondly, India does not have a comprehensive anti-discrimination act in the private sector, and adoption centers have complete liberty in rejecting applications based on sexual orientation.

4.1.2. Surrogacy and ART

The situation is far more restricted in the area of assisted reproductive technology. The Surrogacy (Regulation) Act, 2021 restricts surrogacy to “an intending couple,” a heterosexual married couple. The ART (Regulation) Act 2021 imposes similar restrictions on access to sperm banks and fertility clinics.

In providing heteronormativity to legal concepts of family making via surrogacy and ART, these Acts constitutionally exclude divorced couples, unmarried partners, unmarried individuals, and same sex couples. The parliamentary intention, expressed in terms of debates, was one of “protecting traditional family values” an argument which pays no heed to the reality of LGBTQ+ families and contemporary family structures.

These legislative obstacles are against the *Navtej Johar* ethos and international human rights norms. The Yogyakarta Principles reiterate that sexual orientation cannot be a basis for denial of reproductive rights. Furthermore, refusal to grant surrogacy and ART to LGBTQ+ populations is also contrary to the human rights obligations of India under the International Covenant on Civil and Political Rights (ICCPR) which protects the right to establish a family.

4.1.3. Custody and Guardianship

Indian family law is mostly quiet on the topic of custody and parental rights for same sex couples. In the lack of marital registration, one spouse in a same sex relationship has no automatic rights over the children of the other partner whether biological or adoptive.

The Guardians and Wards Act, 1890 permits any individual to seek guardianship of a young child. However, courts have usually understood “parent” in a heteronormative sense. In custody conflicts between heterosexual couples, courts utilize the “best interest of the child” criterion, but there are few examples applying this criterion to LGBTQ+ parents.

In India's first prominent same sex custody case, *S. Sushma v. Commissioner of Police* (2021), the Madras High Court affirmed the ability of same sex couples to live and co parent but came short of giving formal parental status. Without explicit statutory safeguards, same sex couples raising children remain in a dangerous position, open to meddling by biological relatives or the state.

4.2 Impact on Same Sex Couples

The legal prohibition of same sex couples from surrogacy, adoption, and parent status has far-reaching consequences on their ability to form stable, legitimated families. These bans place children and parents in a situation of legal limbo, subjecting them to risks not run by heterosexual couples.

For example, in the context of unshared adoption, a child will possess one legal parent. If the legal parent passes away, the child may be removed from their non legal parent. Similarly, absent recognition of the two parties involved in surrogacy, legal status of the child could be contested, and inheritance, guardianship, and citizenship are impacted.

Apart from legal problems, same sex families lacking formal parental status suffer the psychological impact on children brought up by same sex parents. Global research has established that children thrive in same sex families with stable legal status for both parents. Their absence in India forces some LGBTQ+ families into legal obscurity, which causes anxiety and social exclusion. And denial of family formation rights also reinforces stigma for LGBTQ+ persons in society. If the law sends out a message to the extent that their families are not so real, it lends legitimacy to discrimination in other areas such as education, healthcare, and housing.

4.3 Comparative and International Perspectives

Comparative analysis finds India lagging behind a number of countries in their advancement of same sex family rights. The Canadian, Dutch, South African, and a number of U.S. and Latin American authorities are noteworthy illustrations.

Same-sex marriage has been legalized in Canada under the Civil Marriage Act of 2005, thus granting such couples full marital rights such as joint adoption and parental status. Gender-neutral surrogacy laws also exist in Canada and provide LGBTQ+ persons and couples equal access to ART interventions.

South Africa, in its new post-apartheid constitution, legalizes same-sex marriages and discrimination against LGBTQ+ individuals in adoption and custody as illegal. South African courts have consistently ruled that "the best interest of the child" should not be interpreted in a manner that is discriminatory against LGBTQ+ parents.

The European Court of Human Rights has held in a number of cases (*X and Others v. Austria*, 2013) that restricting the right of adoption to gay and lesbian couples violates the right to family life under Article 8 of the European Convention on Human Rights. They emphasize the importance of expanding equal family rights to LGBTQ+ individuals not only as a human rights issue but also as a child welfare and social inclusion policy.

4.4 Socio Cultural Dimensions

Apart from the legal front, social attitudes toward LGBTQ+ families in India are still undecided. While city culture has grown to be more tolerant, hard-core prejudices rule huge chunks of the country. Public debate tends to reduce LGBTQ+ rights to a narrow theme of privacy and personal autonomy, and not in terms of the validity of same sex families.

Portrayals of the LGBTQ+ by the media are slowly shifting but continue to present same-sex relationships as fleeting or abnormal, reinforcing family invalidity stereotypes. Furthermore, limited sensitization of law practitioners, judges, and bureaucrats adds to institutional bias.

Organization-led LGBTQ+ activism has been instrumental in combating such prejudices. Naz Foundation, Sweekar - The Rainbow Parents, and Queerala have raised awareness regarding same sex families and the human cost of exclusion under law. Testimonies of LGBTQ+ parents reveal the strength of these families despite legal barriers.

Yet without favorable legal endorsement, social acceptance is precarious. Through the message that same sex families should be accorded as much respect and protection as other families, legal reform can lead to wider cultural change as history elsewhere has demonstrated.

5. Conclusion

This study illustrates how despite the constitutional victory of *Navtej Singh Johar v. Union of India* (2018), Indian family making regimes remain fundamentally heteronormative and institutionally exclusionary for LGBTQ+ persons. It is incredibly challenging for same-sex couples to adopt children, access surrogacy and ART services, and gain custody or guardian rights. Juvenile Justice Act and CARA suggestions are ambiguous, whereas Surrogacy and ART Acts explicitly

exclude LGBTQ+ members from the right to assisted reproduction. Family courts also do not have explicit jurisprudence on same sex parents' custody rights of custody, leaving the majority of LGBTQ+ families in a law gray area.

These exceptions are not merely contrary to constitutional visions of equality, dignity, and liberty, but also violate India's international human rights obligations. The consequences for same-sex couples are grave, as many are forced to conceal or deny their family life, and children and parents are put into legal risk and social vulnerability.

Comparative practice in Canada, South Africa, and Europe shows that inclusive family laws based on the best interests of the child maximize societal acceptance and enhance legal protection for LGBTQ+ families. In India, legislative reform is long overdue. Acceptance of same sex marriage would provide a fundamental legal basis to family rights, but related reform must address adoption, surrogacy, and custody regimes as well. Explicit anti-discrimination legislation and gender-neutral family law must be passed to guarantee that every family, based on the sexual orientation of their parents, is treated equally under the law.

Lastly, there has to be judicial sensitization and public education as well as legal reform so that courts, agencies, and society can move toward actually embracing the diversity of Indian families. Follow-up studies also need to try to explore the lives of LGBTQ+ parents and children on a day-to-day basis, offering an empirical agenda for ongoing policy making.

References:

Books and Articles:

- Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Yoda Press (2013).
- Arvind Narrain, "Beyond Navtej: The Next Battle for Family Rights", *EPW* (2020) 55(49) Economic and Political Weekly 15.
- Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts*, HarperCollins (2019).
- Danish Sheikh, "Reading Suresh: Complicity and Queer Movement in India", (2018) 10 NUJS Law Review 247.
- Satheesan and Pillai, "Marriage Equality and Indian Law: Between Progress and Prejudice," (2021) 4(2) Indian Journal of Constitutional Law 79.
- Krishnan, S., "Surrogacy Law in India: Heteronormativity and the Exclusion of LGBTQ+ People," (2022) 36(1) Child and Family Law Quarterly 59.
- Rayside, D., *Queer Inclusions, Continental Divisions: Public Recognition of Sexual Diversity in Canada and the United States*, University of Toronto Press (2008).
- Judge, M., *Blackwashing Homophobia: Violence and the Politics of Sexuality, Gender and Race*, Routledge (2015).
- Eskridge, W. N., *Marriage Equality: From Outlaws to In Laws*, Yale University Press (2013).
- Mendiratta, R., "The Right to Adopt: Legal and Practical Challenges for LGBTQ Individuals in India," (2021) 12(1) Indian Journal of Family Law 45.
- Naz Foundation (India) Trust & Vidhi Centre for Legal Policy, *Breaking the Silence: Adoption Rights for LGBTQ Families in India* (2023).
- Patel, V., "Parenting Rights of Same Sex Couples: An Indian Perspective," (2022) 8(3) Journal of Indian Law & Society 101.
- Centre for Law and Policy Research, *Report on LGBTQ+ Families and Custody Rights in India* (2023).

Cases:

- *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
- *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1.
- *S. Sushma v. Commissioner of Police*, WP No. 7284/2021, Madras High Court (2021).
- *X and Others v. Austria*, App No. 19010/07, European Court of Human Rights (2013).

International Instruments:

- The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2006).
- International Covenant on Civil and Political Rights, 1966.
- Universal Declaration of Human Rights, 1948.

Acts and Regulations:

- Juvenile Justice (Care and Protection of Children) Act, 2015.
- Adoption Regulations, Central Adoption Resource Authority (CARA), 2017.
- Surrogacy (Regulation) Act, 2021.
- Assisted Reproductive Technology (Regulation) Act, 2021.
- Guardians and Wards Act, 1890.
- Hindu Marriage Act, 1955.
- Special Marriage Act, 1954.