

Same Sex Couples And Adoption Rights: Current Status In India

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"While adoption does not undo the past, adopting a child, and more specifically an older child, gives an adoptive family the privilege of writing the parts of the child's story that have not yet been written."

-Caitlin Snyder, Caitlin Snyder works as the Director of Marketing and Outreach for MLU Adoptions.

ABSTRACT

In the current study, the researchers attempted to emphasize the widespread discrimination and pigeonholing of same-sex couples when it comes to custody and adoption. The Indian Constitution's preamble declares India to be a secular, socialist, and democratic republic in which every citizen has the right to live with dignity and privacy. However, the same sex couples encounter obstacles and problems when it comes to adoption, custody, and surrogacy. In India, the Juvenile Justice (Care and Protection of Children) Act, 2015, and the Hindu Adoption and Maintenance Act, 1956, govern the adoption rights and procedures. However, in the case of adoption by same-sex couples, these rules appear to fall short and are discriminatory of Article 14 of the constitution, which guarantees equality before the law or equal protection of the laws within the territory of India for all people. Whereas the rest of the world has been legalizing same-sex marriages since the early 2000s, India is still struggling to embrace and harmonize the diverse population's sexual preferences and gender identities. This research paper highlights and advocates the importance of educating individuals to encourage acceptance of same-sex marriages, which can eventually benefit children by providing them with an opportunity to grow up in a protected and nurtured environment.

KEYWORDS: *Same Sex Couples, Adoption By Homosexual Couples, Legalisation Of Adoption, LGBTQ+, queer community rights, homosexual marriages*

INTRODUCTION:

The term "adoption" comes from the Latin word "adoptio" (ad-optio), with the meaning "to choose". The Cambridge dictionary defines adoption as "the act of legally taking a child to be cared for as your own." It is the establishment of a bond between a parent and a child through the legal process. Such regulations and procedures are outlined in India's Hindu Adoption and Maintenance Act of 1956 and the Juvenile Justice (Care and Protection) Act of 2015. Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 defines adoption as "the process by 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." These rules define who is legally capable of adopting a child and state that only

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single persons, including those who identify as LGBTQ+, and married couples can adopt a child. And the country's major family laws, including the Hindu Marriage Act of 1955, the Muslim Personal Law (Shariat) Application Act of 1937, and other personal laws affecting diverse religious and ethical groups, recognize marriage as a heterosexual institution.

Adoption between same-sex couples continues to be prohibited in India. Only heterosexual couples are eligible for adoption in India. According to the Juvenile Justice (Care and Protection of Children) Act, 2015, which governs the adoption procedure, a "married man and woman" who have cohabitated for at least two years are deemed a "couple".

Until the early 2000s, same-sex marriages were illegal throughout the world. However, the world has steadily shifted and shown acceptance for same-sex marriages, with 35 nations legalizing same-sex marriages, the most recent being Nepal in June 2023. Being an equal citizen of the country and paying equal taxes, a person's sexual preference and choice shouldn't serve as grounds to deny them equal adoption rights. Although the Supreme Court of India's 2018 ruling in the case of *Navtej Singh Johar Vs. Union Of India* unanimously struck down Section 377 of the Indian Penal Code, 1860, and decriminalized same-sex relations between consenting adults, it did not re-evaluate and reconsider the legal concept of marriage.

LEGAL ASPECTS:

In India, adoption rights are governed by the Hindu Adoption and Maintenance Act of 1956, the Juvenile Justice (Care and Protection) Act of 2015, and the Adoption Guidelines of 2015. These adoption regulations are discriminatory against heterosexual couples. Such couples are only eligible to adopt a child through the Central Adoption Research Authority (CARA). Because same-sex couples are not legally recognized as adoptive parents, they are prohibited from adopting.

Article 14 of the Indian Constitution guarantees equal legal treatment, while still allowing for disparities based on outer attributes that are rationally relevant to the desired objective. The opportunity to adopt is one of the LGBTQ+ community's fundamental and constitutional rights, according to the Supreme Court's decision in *Navtej Singh Johar v. Union of India*. The court found no significant distinction between same-sex partners and those in opposite-sex relationships.

According to Articles 14 and 15 of the Constitution, it would be discriminatory to deny same-sex couples the right to adopt based on their sexual orientation.

JUDICIAL ASPECTS:

The Delhi High Court issued a landmark verdict in 2009 that decriminalized homosexuality and struck down Section 377 of the IPC of 1860. The Supreme Court reversed the Delhi High Court's decision in *Suresh Kumar Koushal Vs. NAZ Foundation* in 2013, noting that only parliament has the jurisdiction to decriminalise homosexuality.

In *Shivya and Aditya Vs. The State*, the Bombay High Court allowed a gay couple to adopt a child in 2016. The adoption agency denied the long-term couple's application to adopt a child. The pair contended that since homosexual adoption is not prohibited in India, they should have been allowed to adopt. The Bombay High Court upheld their lawsuit, stating that the adoption agency's decision was arbitrary and prejudicial. The legality of homosexual adoption remains debatable, despite the fact that this case did not provide a clear precedent. Despite the outcome of the aforementioned case, adoption organizations and authorities continue to utilize their discretion to reject applications from homosexual couples. This has made it incredibly tough for homosexual couples interested to adopt a child in India.

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In 2017, the Ministry of Women and Child Development issued proposed adoption legislation that exclusively addressed adoption by heterosexual couples and said nothing about LGBT couples. Because there is no well-defined legal framework, adoption agencies and officials can treat homosexual couples unfairly during the adoption process, even though the current legislative framework does not explicitly prohibit same-sex adoption.

Furthermore, as previously stated, the 2018 ruling in the case of *Navtej Singh Johar Vs. Union Of India* appeared promising and indicated a liberal and dynamic approach to same-sex couples, but the 2023 Supreme Court judgment in *Supriyo a.k.a Supriya Chakraborty & Abhay Dang v. Union of India thr. its Secretary, Ministry of Law and Justice & other connected cases*, demonstrated the apex court's hesitant approach in this regard. It refused to grant legal recognition to same-sex marriages under the Special Marriage Act of 1954, arguing that it was the responsibility of Parliament to enact laws, and the Supreme Court could only interpret them. It emphasised that marriage is not a fundamental right, but it did request that the Centre to establish a committee to address the concerns of same-sex couples without delving into the subject of legalising such marriages.

However, Hon'ble CJI D.Y. Chandrachud observed that, "The law cannot make assumptions about good and bad parenting, and it perpetuates the stereotype that only heterosexuals can be good parents." The Regulation 5(3) of the Central Adoption Resource Authority (CARA), a government institution under the Union Ministry of Women and Child Development that sets the standards for adopting children in India, discriminates against partners in unconventional unions. The CARA regulation 5(3), which states that 'No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption', violates the rights of the queer community and thus violates Art. 15 of the Indian Constitution."

He went on to say that "a queer person can only adopt in an individual capacity. This reinforces the discrimination against the queer community. There is no evidence on file to show that only a married heterosexual couple can offer stability for a child."

Hon'ble CJI D.Y. Chandrachud, joined by Justice S.K. Kaul, stated that same-sex couples and unmarried couples should be granted adoption rights, and that CARA had exceeded the scope of its authority.

The other three judges, Ravindra Bhat, Hima Kohli, and P.S. Narasimha, did not agree with them.

The 2017 Supreme Court decision in the case of Justice *K. S. Puttaswamy Vs. Union of India*, in which the Court recognized the right to privacy as a basic right, could be cited as a starting point for recognizing the rights of same-sex couples. The decision emphasized that family, marriage, childbearing, and sexual orientation are all essential components of an individual's dignity.

On July 10th, 2024, the petitions seeking the review of the 2023 Supreme Court verdict in the case of *Supriyo a.k.a Supriya Chakraborty & Abhay Dang v. Union of India thr. its Secretary, Ministry of Law and Justice & other connected cases* declining legal recognition of the same sex marriage were scheduled to be heard in chambers by a five-judge bench comprising the Hon'ble Chief Justice of India DY Chandrachud, Justices Sanjiv Khanna, Hima Kohli, and B.V. Nagarathna. Along with many others, one of the review petitions was filed against the SC ruling on October 17, 2023, by advocates Karuna Nundy and Ruchira Goel, along with many others.

However, the hearing was deferred after Justice Sanjiv Khanna, a member of the newly formed five-judge bench, recused himself due to personal issues.

SOCIAL ASPECTS:

India is a heterogeneous country with diverse religious beliefs, philosophies, and practices, diverse views and customs, but a shared sense of oneness is one of its distinct features. Nonetheless,

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people are connected by shared beliefs that they hold fiercely and refuse to change. Same-sex weddings and adoption by such partners are examples of such taboo subjects. The conservative nature of society discriminates against LGBTQ+ individuals and ruthlessly denies them the fundamental right to live with dignity, marry, and adopt. These couples experience trauma and isolation as a result of the stigma associated with such marriages in our society. The negative behaviour of a person in a society can have a negative impact on others' views, particularly in religious or political contexts creating taboos or feelings of hostility in people's thoughts.

Social conservatism in India frequently leads to prejudice and hostility against LGBTQ+ people. This social stigma can take many forms, including verbal harassment, assault with violence, and exclusion from society. LGBTQ+ people in India endure prejudice and violence in society, especially from their own families, communities, and employers. Transgender people endure multiple forms of inequalities, including restricted opportunities in educational institutions, job opportunities, medical care, and accommodation.

Attraction is a natural process. An individual cannot control his feelings of attraction to the same sex. And penalizing such persons with societal sanctions for merely exercising their fundamental right to exist and choose a spouse based on their sexual orientation is harsh. Families in India rarely support same-sex relationships. One can easily anticipate the hostility that such couples would experience if they decided to adopt a kid. The stigma against same-sex couples leads to discrimination and denies them the opportunity to marry and adopt children.

The adoption process has a significant impact on a child's life. Thus, the welfare of the adoptive child is of paramount importance. It must be in the best interests of the child. According to Section 2 (9) of the Juvenile Justice Act of 2015, any decision made regarding the child must be based on the child's best interests in order to ensure the fulfillment of his basic rights and requirements, identity, social well-being, and physical, emotional, and intellectual development. However, unless homosexual couples are granted legal standing in the society, they will be unable to build such lovely and nurturing homes capable of raising a child to its full potential.

As a result, they are denied rights that heterosexual couples take for granted. The right to adoption is one practical option that allows same-sex couples to start a family and have children.

There is no research or data to show that children raised by same-sex couples are deprived in some way when compared to their heterosexual counterparts. According to study, children raised by same-sex parents perform equally well in terms of sociological, emotional, and mental development as children raised by heterosexual parents. There is no evidence to suggest that children raised by homosexual parents are more likely to become gay or lesbian. Their parents, family members, and friends serve as excellent role models for them. Parenting is an individual experience for each couple, with no set of principles that apply universally. As a result, each child requires parenting that is tailored to his or her specific requirements and behavioural patterns. Denying same-sex couples' adoption rights diminishes the chances of many children finding a safe home and deprives them of the opportunity to be raised by loving adoptive parents. This denial of rights cannot be justified as being in the best interests of the children.

CONCLUSION

There is a need to employ a neutral approach while deciding on the rights of same-sex couples. When it comes to the dignity and well-being of this segment of our society, the orthodox and dogmatic religious system of the community cannot be taken into account. The legal system ought to protect the homosexual couples by granting them equal rights as the rest of the population. Sexual preferences and gender orientation are deeply personal to every individual, and this privacy must be safeguarded through laws, rules, and regulations. Efforts must be made to raise public awareness and educate our culture about LGBTQ+ concerns. Future generations will be more vocal

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and demanding of their rights. As a result, our legal system must be dynamic and responsive to the demands of the LGBT community, accepting them as they are rather than attempting to fit them into our society's pigeonholed norms.

Some of the considerations in support of same-sex adoption include a child's right to a family; parents' have the right to have a family life; the capacity of same-sex spouses to provide favourable conditions for raising a kid; and adoption as a more effective alternative to orphanages for children.

The 2023 SC judgment is an excellent example of how our judiciary is attempting to promote new era of social norms alongside age-old conventional beliefs and cultural values. The institution of marriage has evolved over time to reflect evolving circumstances. The concept of marriage and family ought to expand and evolve to meet the changing requirements of society. The global movement in acceptance of same-sex couples should be discussed and incorporated into our legal system.

The LGBTQ community is an integral part of our country, just like the rest of the population. They cannot be denied their social, political, or economic rights. According to Articles 14, 15, 19, and 21 of the Indian Constitution, the right to marry and form a family is a fundamental human right. In a similar vein is the right to adopt a kid. The current laws lag and fall short in giving the same-sex couples with this opportunity. Equality in adoption rights would encourage and facilitate adoption, giving many orphaned children the opportunity to live and grow up in loving family environments and stable homes. The child's best interests should be prioritized, and decisions should be made accordingly. And therefore, same-sex weddings should be legalised, and such couples should have same custody and adoption rights as heterosexual couples.

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