
ADOPTION RIGHTS OF SAME-SEX COUPLES

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ABSTRACT

The formal creation of a parent-child bond occurs through adoption. The Juvenile Justice (Care and Protection of youngsters) Act, 2015 Section 2(2) describes the process in India by which youngsters in need of a family become the child of a married couple or a single parent. Our nation's adoption culture is shaped by a variety of social beliefs as well as a lack of concern, decency, equity, and consideration for the abandoned and orphaned children up for adoption. On the other hand, a same-sex marriage is an institution that unites a man and a woman. Only recently have a few homosexual weddings been approved, and society is progressively growing more permissive. The case of *Navtej Singh V. Union of India*, in which the Supreme Court invalidated Section 377 of the IPC, reflects this development. Opponents of same-sex adoption contend that children raised by LGBT parents suffer as a result. However, studies have consistently shown that same-sex couples are just as qualified and skilled to be parents as their heterosexual counterparts. Additionally, studies reveal that these adopted children are cognitively healthy and normal in comparison to children raised by heterosexual parents. In 2019, the Supreme Court denied a review petition that sought to legalise marriage and adoption for members of the LGBTQ+ community. In this instance, the court believed that issues involving delicate relationships—such as marriage, divorce, adoption, maintenance, etc.—should be handled carefully. must be in line with national acceptability and societal ideals in these domains, which is debatable when it comes to homosexuality. The ruling of the Apex Court allows gay couples to live a dignified and private life, but it restricts this freedom to the fundamental right to companionship rather than marriage. This is only applicable if the relationship is consensual, devoid of coercion or deception of any kind, and does not violate any partner's fundamental rights.

Keywords: Adoption, Same-sex couple, Adoption law, parenthood

Introduction

Pope Francis is known for asserting that "homosexual people have a right to be in a family." They have a right to live in a family because they are God's children. It is not appropriate to expel or make unhappy somebody for it. Gay couples (man and man) and lesbian couples (woman and woman) are accepted as same-sex partnerships. These are individuals who are drawn to others of the same gender. They were viewed as distinct from themselves by society. They handle them with disrespect. They feel embarrassed to talk honestly about these subjects. Their eyes and behaviours convey more information than their words. The homosexual group is viewed as untouchable by society. They consider this to be an illusion or a form of illness. Society may occasionally believe in ghosts, but they will not accept homosexual concerns. Voting rights are restricted for individuals who identify as homosexual. It bothers them to stroll hand in hand in public. They occasionally don't get accepted by society as responsible citizens. The severity of these rigorous therapies is increasing daily. Today's generation is unaware of their genuine interests precisely because our previous generation was not open-minded and completely aware. Many kids are confused about their own sentiments as a result of all of this. Teens are so afraid of society's judgement that they don't even feel comfortable sharing it with anyone. Adoption rights for same-sex couples are rapidly declining in India. The prevailing belief in society is that parents of the same gender cannot adequately raise their child. Many schools still refuse to accept students whose parents identify as homosexual. A lot of Bollywood films are made to raise awareness and educate people about these groups.

Bollywood film "Adhura," which starred the late actor Irfan Khan, is one example. The first gay film in Hindi was scheduled for release in 1995, but due to protests against the film and the belief that homosexuality was a sin at the time, the censor board was forced to finally ban the movie. People started to warm up to this community much earlier—in 1995. Society at the time was ignorant of these truths. Thankfully, people are becoming more accepting of homosexuality as time goes on. Actors and actresses are encouraging same-sex couples to come out and take part in the March for Rights. Numerous occasions are arranged to advance these communities. Seattle Pride will be observed on January 15, 2023.

On this beautiful day, people of this community all around the world show their presence to world. They come up with their own new motto and quotes to inspire the teenage who are still doubting their own existence in this cruel world. The feelings towards same sex is very

natural. Even in ancient times, there are still some proofs of the survivals of Homosexual people. There are many more evidence of Homosexual sculptures which shows the significance of homosexuality in earlier Indian traces. In today's era, now courts are also somehow accepting the same-sex couple in some ways but still the society are not accepting them. Society is criticizing their existence, and due to all these accusations, teenagers are committing suicide.

Hindu Adoption and Maintenance Act

India passed the Hindu Adoptions and Maintenance Act in 1956. It sets down the legal requirements for Hindu adults who wish to adopt a child and their need to provide for a varied family. Sections 7 and 8(c) of the HAMA, however, state that such authorization will not be necessary in cases where the spouse is mad, has given up on life, or has abandoned their children. In a similar vein, single individuals are allowed to adopt a child as long as they are of legal age and sound mind.

As per the provisions of Section 2(1) of the Act, the term "Hindu" encompasses not only adherents of Hinduism but also individuals who profess Buddhism, Jains, Sikhism, Virashaiva, Lingayat, and membership in the Arya Samaj. The Hindu concept also includes devotees of Brahmo and Prarthana. In actuality, everyone who resides in India and is not a Christian, Muslim, Parsi, or Jew is subject to the Hindu Adoption and Maintenance Act. Sections 7 and 8 of the HAMA contain the terms "spouse" and "wife," which suggest that same-sex adoption is not recognised by the Act. Moreover, the adoption process is clarified for Hindu men and Hindu women, but there is ambiguity over the application of these rules to third-gender couples.

ADOPTION BY SAME-SEX COUPLES IN INDIA

Same-sex marriages are not acknowledged in India, and as a result, these couples are not eligible to jointly adopt children. This shows that they are still not treated equally by the law, as seen by Indian laws. Same-sex couples are not allowed to adopt because the child cannot grow up in a subpar household. This is another argument. Nevertheless, articles 14, 15, and 21 of the constitution are broken by the aforementioned statutes. Because the government formally accepts a gender other than male and female, as stipulated by Article 14 of the constitution, they should be treated equally under the law and permitted to adopt. Though gender-based discrimination is prohibited by Article 15, it begs the question of why homosexual couples aren't allowed to adopt yet men and women are allowed to do the same. It is important to

highlight that the authorities are discouraged from placing children for adoption with same-sex couples by the social stigma that permeates the community. The idea that same-sex couples have no choice but to adopt since they are unable to conceive naturally is another topic of discussion. Since LGBTQ+ issues are officially recognised, homosexual partners should be allowed to marry, adopt children, and establish a family just like any other pair. After all, everyone has the right to a family. Same-sex adoptions are now illegal in India because marriage and the permission of both spouses are requirements for adoption. In other words, government estimates place the number of LGBTQIA+ people living in India at 2,500,000. The community has long been the focus of bias, discrimination, and harassment despite its size and strength. Same-sex couples cannot adopt in India, however LGBTQ+ individuals can. In a same-sex relationship, one partner may adopt and raise a child on their own, but the other partner is not permitted to be that child's parent. According to a research carried out by an international charity for vulnerable and orphaned children, there are already twenty million orphans in our country; in the next two years, that number could rise to twenty-four million. The primary problem here is that, despite constitutional authorization of a partnership between a biological female and a biological male, no uncoded law or codified formal law recognises or accepts same-sex marriage. This is because marriage is inherently based on long-standing belief systems, ritual practices, activities, ethnic ethos, and social norms.

Indian constitution and same-sex adoption

Article 14 states that everyone has the right to be treated equally under the law. It permits differentiations between different groups of people, but it also requires that these divisions be based on observable differences and make sense in respect to the goal being sought. In the case of *Navtej Singh Johar v. UOI*, the Supreme Court held that there is no appreciable distinction between individuals who partake in "carnal intercourse outside the order of nature" and those who partake in "natural" intercourse.

Navtej Singh Johar v. Union of India established that the LGBTQ+ community is entitled to all fundamental and constitutional rights. Legal precedents that unequivocally assert the LGBTQ+ community's entitlement to the same fundamental rights as the general public mean that the law cannot forbid certain individuals from adopting because of their gender identity. In summary, this means that everyone should be able to choose to be married if the constitution maintains equality, regardless of whether other persons of the same sex also choose to get

married.

A human being's inalienable freedom to marry whoever they want and start a family is protected by Article 21 of the Indian constitution. The court in *Shafin Jahan v. Asokan K.M. and ors* observed that society was going through a significant period of transition. Even religious issues would not significantly affect the unbreakable core of seclusion that safeguards marriage-related intimacy.

It has also been established that Article 21 of the Indian Constitution fundamentally protects the right to marry whoever one chooses and the right to begin a family. The Bombay High Court ruled in *Payal Sharinee v. Vinayak Pathak* that adopting a child is a fundamental part of the right to life guaranteed by article 21 of the Indian Constitution. The right to life protects the rights of parents who want to start a family as well as the rights of children who require care and protection.

Denying the LGBTQ+ people this freedom would be a breach of their right to equality because it has been shown that there are no discernible differences.

Countries that have legalised same-sex adoption

Fifty-five nations, have legalized same sex adoption, 128 countries are in the process of doing so, 44 countries deem same sex adoption illegal.

The Indian courts have cited the well-known *Obergefell v. Hodges*[10] ruling of the US Supreme Court in a number of cases, including *Navtej Singh Johar v. the Union of India*[11], *Arunkumar and Others Versus Inspector General of Registration*[12], *Justice K S Puttaswamy (Retd.) and Another Versus Union of India and Others*[13], and *Shayara Bano v. Union of India*[14].

In addition to being a significant case that led to some of India's most innovative rulings, it also set a precedent. It was this lawsuit that made same-sex adoption and marriage legal in the United States. But even though Indian courts have used it as a precedent on many areas of universal rights law, including the right to privacy, dignity, and the freedom to marry whomever you choose, same-sex adoption and marriage have not yet been made legal.

Adoption rights in India

In India, there are two main legislations that govern adoption, the Hindu Adoption and Maintenance Act, 1956^[4] (herein after referred to as HAMA) and The Juvenile Justice (Care and Protection of Children) Act, 2000^[5] (herein after referred to as JJ Act)

Any male who practices Hinduism (including Buddhist, Jain, or Sikh) and who is at least eighteen years old, in good mental health, and eligible to adopt a son or daughter. If the man in question is still married at the time of the adoption, he can only proceed with the approval of his spouse—that is, unless the court has determined that she is incapable of giving consent—in that case.

Any Hindu woman, regardless of her religious background (Buddhist, Jain, or Sikh), has the right to adopt a son or daughter if she is single, or if she is married but her spouse has passed away, filed for divorce, or been declared legally incapable by a judge. This somewhat restricts women's rights to adoption as well.

HAMA does not permit same-sex adoption, even if it permits adoption by single parents.

In order to adopt under the HAMA Act, a couple must be

1. Differing in gender
2. The Hindus
3. Having a sound mind

Under the JJ Act,

- It is possible for a couple or a single parent to adopt a child who has been turned over, an orphan, or an abandoned child.
- The prospective adoptive parents need to be in good bodily and mental health and be completely equipped to raise the adopted child.
- In married couples, the consent of both spouses is required.

- Adopting a girl child is not allowed for unmarried man.
- It is not possible for a couple to become parents until they have been in a stable and happy marriage for a minimum of two years.
- A minimum age difference of 25 years should exist between the adoptive child and the parents.

A homosexual couple cannot adopt since all laws pertaining to adoption and surrogacy view marriage as a requirement for adoption in cases involving couples. Furthermore, the laws do not take gender into account. Marrying and adopting children is a fundamental human right that should not be reserved for heterosexuals. It should be offered to all people. Even after publicly recognising the LGBTQ+ community, India continues to enforce discriminatory laws that prevent members of the group from starting families. This violates the Indian Constitution's Article 19 in addition to Articles 14 and 15.

Pros And Cons Of Homosexual Adoption

Adoption by gay couples has generated discussion all over the world. Some contend that it gives needy children loving homes, while others counter that it is not in the child's best interests. Adoption of homosexuals has a number of benefits and drawbacks in the Indian context.

Giving Needy Children Adoptive Homes - Children in need of care and protection can find loving, secure homes with the support of homosexual couples. They are able to give the youngster the essential attention, instruction, and direction while also creating a nurturing atmosphere.

Taking On the Orphan Child Problem - Adoption of homosexuals can aid in addressing the issue of orphans in India. A UNICEF survey estimates that there are more than 20 million abandoned and orphaned children in India. These children, who would have been left without families otherwise, can find homes thanks to homosexual couples.

Gender Equality - Adoption of homosexuals eliminates prejudice based on sexual orientation and advances gender equality. It acknowledges that gay couples have the same

capacity to love and care for one another as heterosexual couples and that they are entitled to start a family.

Disadvantage

Social Stigma - In India, the topic of homosexual adoption is still frowned upon. Many people think that raising a kid from a homosexual relationship will expose them to prejudice and societal stigma, which could be harmful to the child's mental and emotional health.

Discrimination against the Child - Some claim that children of homosexual couples may experience prejudice and bullying from their classmates, which may have a negative effect on their sense of value and self-esteem.

Absence of a definite legal framework - Due to the absence of a defined legal framework in India, adoption agencies and officials may choose to refuse applications from couples who identify as homosexual.

Adoption barriers for same-sex couples – The Indian laws, which state that a parent's marital status is irrelevant in the adoption process, are confusing. This clause, however, only applies to single people who wish to adopt children; if a couple wishes to adopt a child together, the law requires their marital status and the approval of both spouses. These laws undermine the goal of decriminalising homosexuality by restricting the civil liberties of same-sex couples, while same-sex weddings are illegal in India. Persistent laws such as the Juvenile Justice Act of 2015, the Hindu Adoption and Maintenance Act of 1956, and the Adoption Regulations that prohibit unmarried couples from adopting children are in violation of the fundamental rights enshrined in Articles 14, 15, and 21 of the Indian Constitution.

The adoption laws in India do not pass the Article 14 classification test because they allow for discrimination between married and single couples due to the unfair classification of individuals they produce. Such classification is not capable of achieving any legitimate goals. Equal protection under the law and equality before the law are fundamental principles that are violated by this. The adoption laws violate Article 15's provision of the fundamental right to be free from discrimination. Article 21 of the Constitution guarantees same-sex couples the right to live with dignity and honour. It encompasses the freedom of choice, autonomy, and self-determination for each individual. Marriage is a personal decision, and any regulations that

discriminate against single persons either specifically or collectively, or that are capricious and unfair, are unconstitutional.

Consequences of the legislative shortcomings –

Same-sex unions are forbidden in India, homosexual partners are unable to adopt a kid together. LGBTQ+ couples are still not treated equally in the eyes of the law because it prohibits them from adopting children jointly. Consequently, same-sex couples are prohibited from adopting since it is believed that a child should not grow up in a “lower family”. The paradox lies in the fact that the law permits a child to grow up as an orphan without both parents, as opposed to being raised by transgender and homosexual couples. Although adoption is not permitted for LGBTQIA+ couples, the number of orphans in India is rising daily. An worldwide charity that supports orphans and abandoned children recently released a research estimating that there are currently 20 million orphans in India, and that figure is projected to increase to 24 million by 2021. Most orphanages offer pitifully poor services within the facility. Since prejudice against members of the LBTQ community is focused on their sexual orientations rather than their ability or merit as parents, denying them adoption rights is detrimental to their dignity.

Centre's opposition to same-sex marriage - Same-sex marriage recognition has long been rejected by the Central government. It asserted that Parliament, not the courts, should make the final decision and contended that this type of recognition is a "urban elitist" idea. The government called proponents of marriage equality "urban elites" and said that marriage was an institution restricted to heterosexuals. The reasoning was contested by the Supreme Court, which demanded evidence to support the allegations. In opposition to the government's position, Senior Advocate K V Vishwanathan highlighted the value of inclusivity and equality by presenting the example of a transgender individual requesting recognition of same-sex weddings. During the hearings, the Centre decided to appoint a committee under the direction of the cabinet secretary to investigate giving same-sex couples legal rights even in the absence of a formal marriage certificate. In order to give same-sex couples access to financial security measures including joint bank accounts and provident funds, much as married couples, the Supreme Court requested the issuing of executive instructions.

The legalisation of same-sex unions exists in 34 nations. Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New

Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America, and Uruguay are these eight countries.

Of these 23, ten came about as a result of court rulings, two came about as a result of court orders, and the remaining 23 countries legalised same-sex unions on a national level. On June 20, 2023, the Estonian parliament approved a measure that will allow same-sex unions and go into force on January 1, 2024.

The need for legislative reform in India pertaining to same-sex adoption - As a result of shifting social norms and increased awareness of the diversity of families, calls to amend the laws governing same-sex adoption are growing. The fundamental tenet of the movement for new legislation is equality. In a democratic society, everyone has to be treated equally, regardless of their sexual orientation. The denial of adoption to same-sex couples due to their sexual orientation constitutes a violation of the anti-discrimination tenets of the Indian Constitution. Allowing same-sex couples to adopt will uphold equality values by ensuring that all individuals have an equal opportunity to establish a family and provide a nurturing environment for their offspring.

In each adoption scenario, the child's welfare and best interests come first. Numerous studies show that children raised by same-sex couples perform on par with children raised by heterosexual couples. For example, the American Psychological Association has stressed that family dynamics and parental behaviour have a higher influence on children's wellness than the sexual preferences of the parents. The ability to adopt is denied to same-sex couples by restricting the pool of potential loving and caring families and ignoring the welfare of countless children who may benefit from adoption.

There is a significant issue with the amount of youngsters in India who need homes. Due to the drawn-out and difficult adoption process, many children spend a significant portion of their childhood in institutional care. Encouraging same-sex couples to adopt would increase the number of potential adoptive parents, increasing the possibility that adoptable youngsters would find loving, caring homes. By providing more options for adoptive parents, the already overburdened adoption system may be relieved and the outcomes for children in need may be enhanced. The social environment is ever-evolving and dynamic. Same-sex adoption is acceptable and aligns with the global movement that respects and acknowledges all types of families. The importance of inclusion and equality is demonstrated by the fact that same-sex

adoption is now permitted in many areas, including several Western countries. Given its rapid economic growth, India need to embrace legal reforms of this nature in order to demonstrate its commitment to human rights and to taking the lead in social progress.

The current legal bans on same-sex adoption in India result in the marginalisation and stigmatisation of same-sex couples. Denying someone the opportunity to adopt perpetuates a sense of unfairness and marginalisation, which is detrimental to their emotional well-being. Adopting same-sex couples will mitigate these negative psychological impacts by restating the worth and dignity of each individual, irrespective of their sexual preference.

Conclusion –

Emotions are not limited to one's gender. Being gay is not a sin. Every person has the right to feel like a parent. People are judged by society in all respects. We are gradually modernising ourselves with the aid of technology. Additionally, AI technologies are becoming more and more prevalent. Then why are people being denigrated based only on their sexual orientation? The government implements numerous policies and plans in an attempt to allay complaints, but this does not alter the viewpoint of the mainstream community. The court in the notable 1984 case of *L.K. Pandey v. UOI* held that the adoption process should not be used to give or earn the wishes of the adoptive parents, but rather should be entirely focused on the wellbeing of the child. The Juvenile Justice Act of 2015 (Protection and Care of Children) regulates the adoption process and states unequivocally that married couples who have been living together for the past two years are eligible to adopt. Thankfully, the Indian Supreme Court recognises the rights of same-sex couples and grants them protection under the Equal Protection Act.

Despite numerous attempts to improve their situation, same-sex couples are still not legally or socially recognised as a pair. If society doesn't drastically alter in this direction, all future efforts will be in vain. Allowing same-sex relationships to engage in sexual activity alone will not elevate them to the same status as heterosexuals; instead, policies like legalising homosexual marriage and granting adoption rights will positively influence the perspectives of future generations.

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