
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

ADOPTION RIGHTS OF HOMOSEXUAL COUPLES- Vrinda Bagaria¹**Introduction**

India, a country of rich cultural traditions and diverse values, is slowly moving towards broader recognition of rights for the LGBTQ+ community. However, when it comes to same-sex couples adopting children, the path is muddled and fraught with legal controversy. Adoption, in essence, is a legal process that establishes a permanent parent-child relationship between people who are not biologically related.² The historic judgment in *Navtej Singh Johar v. Union of India*³ was a revolutionary step towards equality for same-sex couples in India, striking down Section 377 of the Indian Penal Code, which criminalised consensual same-sex sexual acts. While this was a significant legal victory, it did not fully address the broader issue of civil rights for same-sex couples, including the right to adopt children. The social and legal arena for same-sex adoption remains in a sea of complexity and challenges. Even with a huge victory where homosexuality has been legalised in the country, discrimination and stigma against same-sex couples continue to arise in terms of family formation. Existing adoption laws in India are primarily designed for heterosexual couples, and their applicability to same-sex couples remains a subject of debate and legal uncertainty. This paper argues that same-sex couples should have equal adoption rights based on principles of equality, non-discrimination, and the child's best interests.

Legal Framework and Gaps

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² 'Can Homosexual Couples Adopt in India?' (*Legal Service India - Law, Lawyers and Legal Resources*) <<https://www.legalserviceindia.com/legal/article-10416-can-homosexual-couples-adopt-in-india-.html>> accessed 12 October 2024

³*Navtej Singh Johar v Union of India* (2018) AIR 2018 SC (CRI)

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The two fundamental laws regulating adoption in India are the Hindu Adoption and Maintenance Act (HAMA), 1956, and the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act). These laws provide a framework for the procedure and eligibility for adoption but do not significantly state whether same-sex couples can adopt.

Under the Hindu Adoption and Maintenance Act, 1956 (HAMA), which governs Hinduism, Buddhism, Jainism, and Sikhism, joint adoption can only take place by married heterosexual couples or individuals. Provisions like S.7, which provides for a male Hindu to adopt with the consent of his wife⁴, and S.8, allowing a female Hindu to adopt with the husband's consent, provided that the structure of the family is a heterosexual marriage.⁵ This fact excludes any option for the adoption of a child through joint efforts by same-sex couples under this Act.

The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ) is more progressive. It is a gender-neutral law that provides both men and women opportunities to adopt, irrespective of marital status. S.57 of the JJ Act lays down the criteria for adoption, such as the prospective adoptive parent being physically, mentally, and financially able.⁶ S.58 allows everyone other than married, like single females or divorced individuals, to adopt.⁷ This law, however, does not expressly state whether two persons of the same sex are allowed to adopt jointly, and this silence on the issue remains a ground for discriminatory practice. Adoption agencies, again influenced by societal stigma and no more than the lack of explicit legal recognition for same-sex relationships, often turn down the adoption applications of gay couples.

Under the JJ Act, the Central Adoption Resource Authority (CARA) regulates adoptions in India. Still, CARA has not yet issued any specific guidelines or provisions concerning the eligibility of same-sex couples to adopt. Such silence on the part of CARA further complicates matters since adoption agencies are left to either subjective or self-interest interpretations of the law depending solely on their policies or preconceived notions. Whereas LGBTQ+ persons may

⁴ Hindu Adoption and Maintenance Act (HAMA), 1956, S.7

⁵ Hindu Adoption and Maintenance Act (HAMA), 1956, S.8

⁵ Hindu Adoption and Maintenance Act (HAMA), 1956, S.8

⁶ Juvenile Justice (Care and Protection of Children) Act, 2015, S.57

⁷ Juvenile Justice (Care and Protection of Children) Act, 2015, S.58

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be allowed to adopt as single parents, joint adoption by same-sex couples has remained a contentious issue.

Principle of Equality, Societal Stigma, and the best interest of the child

The argument for equal adoption rights for same-sex couples, just like heterosexual couples do, is grounded in principles of equality, non-discrimination, and prioritising the child's best interests.

Firstly, the Indian Constitution ensures equality before the law through Articles 14 and 15.⁸ and explicitly prohibits discrimination based on religion, race, caste, sex, or place of birth⁹. Denying same-sex couples the right to adopt goes against these constitutional principles. By preventing LGBTQ+ individuals from forming families through adoption, the law unfairly discriminates against them, implying they are less worthy than heterosexual couples. This exclusion fosters a baseless belief that same-sex couples are incapable of providing a loving and stable environment for children despite evidence that suggests otherwise. The *Navtej Singh Johar* judgment, which decriminalised consensual same-sex relationships, was a mandatory step towards recognising the dignity and equal rights of LGBTQ+ individuals. However, it did not fully address civil rights like marriage and adoption, which are crucial for achieving true equality for same-sex couples. By not granting adoption rights to these individuals, the state continues to marginalise same-sex families and denies children in need of adoption the chance to find loving homes. This exclusion not only discriminates against same-sex couples but also undermines the state's constitutional commitment to equality and non-discrimination.

Secondly, it is argued that allowing same-sex couples to adopt aligns with the fundamental principle of adoption—prioritising the best interests of the child. Section 2(9) of the JJ Act describes the “best interest of the child” as the basis for any decision taken regarding the child, which should ensure the fulfilment of the child's fundamental rights and needs, identity, social well-being, and physical, emotional, and intellectual development¹⁰. The Supreme Court of

⁸ “The Constitution of India” art.14

⁹ “The Constitution of India” art.15

¹⁰ Juvenile Justice (Care and Protection of Children) Act, 2015, S.2(9)

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India, in *L.K. Pandey v. Union of India* (1984), highlighted that the child's welfare should be the primary focus in adoption matters¹¹. Research, including studies from the American Psychological Association (APA), shows that children raised by same-sex parents perform just as well emotionally, academically, and socially as those raised by heterosexual parents¹². The critical factors in a child's upbringing are the love, care, and stability provided by their parents rather than their sexual orientation.

India is currently facing a significant orphan crisis, with millions of children in foster care or orphanages, many of whom are waiting for adoption. According to the Ministry of Women and Child Development, there are over 30 million orphaned and abandoned children in India, yet only a tiny number are adopted each year.¹³ Denying same-sex couples the right to adopt not only perpetuates inequality but also limits the number of potential adoptive parents, depriving many children of the chance to grow up in a loving family environment. Therefore, it is argued that refusing same-sex couples to adopt harms not only those individuals seeking to create families but also the children who miss out on the opportunity for a stable, nurturing home.

Thirdly, India is increasingly recognising a broader definition of family, which strengthens the case for same-sex adoption. In the *Deepika Singh v. Central Administrative Tribunal* (2022) case, the Supreme Court broadened the definition of family to encompass non-traditional arrangements, including unmarried partnerships and same-sex relationships¹⁴. While the ruling did not specifically tackle adoption, it set a precedent for future legal arguments advocating for the rights of same-sex couples to adopt by acknowledging that families can take many forms. It can be argued that this expansive view of family should naturally include same-sex couples wishing to adopt. Similarly, in *Shafin Jahan v. Asokan K.M.* (2018), the Supreme Court upheld the right to personal autonomy in choosing one's partner, emphasising that this right extends to significant life choices like family planning¹⁵. Although this case did not directly address

¹¹*L.K. Pandey v Union of India*, 1987 AIR 469

¹² 'Lesbian and Gay Parenting: Theoretical and Conceptual Examinations' (*American Psychological Association*) <<https://www.apa.org/pi/lgbt/resources/parenting>> accessed 13 October 2024

¹³ Jahic N, 'The Situation of Orphans in India' (*The Borgen Project*, 9 March 2023) <<https://borgenproject.org/orphans-in-india/>> accessed 12 October 2024

¹⁴*Deepika Singh v Central Administrative Tribunal* (2022) C.A. No 5308/2022

¹⁵*Shafin Jahan v Asokan K.M.* (2018) CrI.A.366/2018.

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LGBTQ+ rights, its focus on personal liberty is highly relevant to the discussion on same-sex adoption. Just as individuals have the freedom to choose their partners, they should also have the right to create families through adoption, regardless of sexual orientation. Couples deserve the same family rights as heterosexual couples. These cases collectively suggest that family structures in India are changing, and the law needs to adapt to this evolving reality.

Lastly, the argument for equal adoption rights for same-sex couples must confront societal and religious conservatism, which often obstructs LGBTQ+ rights in India. It is argued that while ancient Indian texts like the Kama Sutra recognised same-sex relationships, colonial laws, particularly Section 377 of the IPC, imposed Victorian moral standards that criminalised homosexuality and marginalised non-heteronormative relationships.¹⁶ Even after the decriminalisation of homosexuality in 2018, same-sex couples in India continue to face considerable societal pushback, with many LGBTQ+ individuals experiencing family rejection, social isolation, and mental health issues. Legal obstacles worsen these challenges, as same-sex couples are still denied the right to marry or adopt, further pushing them towards marginalisation. Discrimination in areas like employment, education, and healthcare restricts opportunities for LGBTQ+ individuals, while negative media portrayals perpetuate harmful stereotypes. To address these issues, Indian society must move past conservative views rooted in outdated cultural and religious beliefs. While respecting religious and cultural diversity is essential, these should not be used as justifications for denying fundamental human rights. As public sentiment increasingly supports LGBTQ+ rights, advocacy and awareness initiatives can help create a more inclusive society. India must take the next essential step following the decriminalisation of homosexuality by granting same-sex couples the same civil rights, including the right to adopt children. Denying this right on religious or cultural grounds contradicts the principles of equality and justice enshrined in the Indian Constitution.

Conclusion

¹⁶ Panchal KK and National Law University, Delhi, “Same-Sex Couples Adoptions Rights in India” [2020] SSRN Electronic Journal 1 <<https://www.researchgate.net/publication/341698669>>

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The rights to adopt conferred upon the same-sex couple raise complex issues involving legal, social, and ethical dimensions. After all, granting adoption rights to same-sex couples is more than just legal fairness has a resonance with the very fundamental principles of equality and non-discrimination enshrined in the Indian Constitution. The landmark ruling of *Navtej Singh Johar v. Union of India*, which decriminalised consensual same-sex relations, is an essential step toward bringing dignity and rights to the LGBTQ+ individual. Still, the lack of adoption rights pushes same-sex families to the periphery, meaning that many children do not receive proper care. The solution here is by amending the existing acts like the Juvenile Justice Act and the Hindu Adoption and Maintenance Act to make adoption possible for couples in a same-sex partnership. Easy-to-follow legislation guidelines would ensure that ambiguity would not creep back, and there shall be, instead, a framework that provides equal rights for all couples despite the sexual orientation of the couple. These reforms should be approached in coordination with lawmakers, LGBTQ+ advocacy groups, and child welfare organisations; hence, such a bill should note the importance of having an inclusive family structure.

One other key area that can help mould societal attitudes toward same-sex adoption would be public awareness campaigns. In so doing, there should be an implementation of education campaigns, showing parent capabilities of same-sex couples and making it evident that children brought up in such homes develop as well as their counterparts being brought up by heterosexual parents. When we engage the community through workshops, seminars, and personal stories, people will finally make sense of different types of families and move beyond closed-minded thinking.

In adoption cases, judicial intervention persists as the saviour of the principles of equality and the child's best interest. The courts must embrace a more expansive view of the law prevailing today because the above judgments laid down the same progressive foundation. Future legal battle lines could be gained with the judicial momentum of *Deepika Singh v. Central Administrative Tribunal* and *Shafin Jahan v. Asokan K.M.* Most importantly; there needs to be support and assistance for LGBTQ+ individuals and families over time. Providing hotlines, counselling, and legal assistance to same-sex couples who may wish to adopt could give these families the leverage to deal with the law today. In this way, society can spur the process of

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adopting and living in an approximate equality environment. With all this and more that can be added, the overall conclusion drawn for this issue is that same-sex couples should indeed achieve equal adoption rights in India. By amending existing legislation, making the public aware of such needs, encouraging judicial activism, and providing a solid support system, India will undoubtedly be able to make its way toward inclusivity and justice. The legal right of lesbian couples as equal adoptive parents will ensure the principles of equality and non-discrimination while also upholding the lives of many children in need of loving homes. India has to step into understanding a more open and progressive outlook on family so that every child has a chance to grow up to become a healthy and confident individual.



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