

# Adoption Rights of Same-Sex Couple

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## ABSTRACT

This research paper critically analyse the adoption rights of same sex couple (LGBTQ+ community) in India. It discusses the provisions of adoption laws in India, highlighting how the legislations are discriminatory in nature and existing laws are not capable of the adoption. This paper also argues that the existing laws violate the fundamental rights of LGBTQ+ community.

It also discusses about the juvenile justice (CARA) act. Drawing on legal analysis and scholarly insights from “Panchal (2020), Meena et al. (2019), Bhaskar et al. (2012), and Burleson (2009)”, the paper explores the legal impediments faced by the LGBTQ community in exercising their adoption rights. This study delves into the significant implications of recent legal changes in India, particularly the decriminalization of homosexuality and the non-recognition of same-sex marriage, on the legal acknowledgment and safeguarding of adoption rights for same-sex couples. However, the non-recognition of same-sex marriage introduces significant legal obstacles to joint adoption for same-sex couples, as many adoption laws and policies give preference to married couples. This lack of recognition also results in discriminatory practices in some adoption agencies or authorities, further complicating the adoption process for same-sex couples.

The conclusion calls for legislative or judicial action to ensure equal adoption rights for LGBTQ couples and individuals in India, aligning with principles of constitutional morality and the best interest of the child. In conclusion, while there is still a long way to go, the evolving landscape of adoption rights for same-sex couples in India offers hope for a future where all individuals, regardless of their sexual orientation, can experience the joy of parenthood.

**Keywords:** adoption, same-sex couple, LGBTQ+ community, JJ act, CARA, etc.

## CHAPTER I: INTRODUCTION

In recent times, there are various opinions and discussions regarding adoption rights of homosexual couple are being highlighted and gaining significance in the societal attitude and family structure in our country. In India, adoption rights for homosexual couple has a significant value because of its interrelation between cultural perceptions, social norms, and legal framework. Even with the progressive strides towards LGBTQ+ community rights in particular with the decriminalization of homosexuality in the year of 2019, the topic of adoption rights for homosexual couple are underrated and being neglected.

This research paper deals with intricate design of adoption rights of homosexual couple in India, oriented towards social and legal aspect, this study strives to provide a critical viewpoint of the challenges and opportunities faced in India.

## RESEARCH OBJECTIVES

1. To critically evaluate the adoption rights of homosexual couple in India.

2. To evaluate the legal frame framework and judicial interpretation regarding the adoption rights of homosexual couple in India adoption rights of homosexual couple in India.
3. To analyse the challenges and opportunities in the existing adoption polies of India.

### **RESEARCH QUESTIONS**

1. What are legal provisions in India related to adoption of homosexual couple under the acts such as Juvenile Justice (Care and Protection of Children) Act and Hindu Adoption and Maintenance Act?
2. What are various challenges and barriers faced by homosexual couple while adopting a child in India?
3. What are specific constitutional principles, judicial precedents and policies in India regarding adoption rights of homosexual couple in India?
4. What are implications of recent legislative developments (such as decriminalization of homosexuality in India and Non recognition of same-sex marriage in India) for the legal recognition and protection of adoption rights for homosexual couple in India?

### **RESEARCH HYPOTHESES**

The legal provisions and framework which governs adoption by homosexual couple in India is ambiguous, inconsistency, lacuna leading to the challenges in the enforcement and implementation of the adoption rights. Whereas, Indian judicial system has displayed a progressive growth in interpreting adoption rights be granted to the same sex couple, thereby affirming the constitutional rights of LGBTQ+ community to have a family. Also the legal intent behind adoption rights are aiming towards being non-discriminatory in nature and formulating progressive policies to protect and recognize LGBTQ+ rights.

### **RESEARCH METHODOLOGY**

The research methodology adopted in this paper is purely doctrinal in nature. Doctrinal research, also known as library-based research, is a distinctive method of conducting legal research that involves the study and analysis of existing legal provisions, case laws, and scholarly works. This methodology is well-suited for examining the theoretical and conceptual aspects of law and for providing a systematic exposition of legal doctrines and principles. The primary sources relied upon in doctrinal research include statutory materials, judicial precedents, and authoritative texts, while secondary sources such as commentaries, articles and legal digests are also consulted. The research process involves the identification, collection, and critical analysis of these sources to draw logical conclusions and offer insights into the legal issues under investigation. Through doctrinal research, this paper seeks to provide a comprehensive and coherent understanding of the legal framework governing the subject matter at hand.

## **CHAPTER II: LITERATURE REVIEW**

### **SAME-SEX COUPLES AND ADOPTION RIGHTS IN INDIA**

By- KISHOR KUMAR PANCHAL

The issue of homosexual couple adoption rights in India has granted significant attention in recent years due to discriminatory nature and legal issues faced by this community in adoption. This literature review aims to synthesize the4 exiting research to provide a comprehensive understanding of the same topic with potential solutions.

The discriminatory nature of India's adoption laws, particularly with regard to the LGBTQ community, has been brought to light by a number of studies and legal analyses. Citing constitutional principles of

equality and non-discrimination, Kishor Kumar Panchal's research (2020) highlights the significance of equal adoption rights for LGBTQ individuals and couples. According to Panchal, it is against the Indian Constitution's Articles 14, 15, and 21 to deny someone the right to adopt a child because of their sexual orientation or gender identity. And in a similar vein, Meena et al. (2019) explores the historical development of adoption laws in India, identifying the causes of discriminatory behaviours and emphasizing the necessity of legislative changes. They draw attention to the obstacles that the Juvenile Justice (Care and Protection of Children) Act of 2015 and the Hindu Adoption and Maintenance Act of 1956 present for LGBTQ people. The study emphasizes the significance of supporting inclusive adoption practices and identifying what is in the child's best interest. Furthermore, Bhaskar et al.'s research discusses international perspectives from jurisdictions like the US, South Africa, and the UK. Burleson (2009) and (2012) offer progressive perspectives on LGBTQ adoption rights. India should reevaluate its adoption laws in light of these other nations' legislative actions and court rulings that place a high value on equality and non-discrimination.

In conclusion this literature review highlights the urgent need for legal reforms and provisions to ensure equal adoption rights for LGBTQ+ community. By looking into the root cause of discriminatory practise and to promote awareness to provide inductive environment for child adoption for same sex couple.<sup>1</sup>

## **THE LGBT POPULATION AND THE FIGHT FOR ADOPTION RIGHTS**

**By: KRISTEN ROBERTS**

This text discusses the social and economic injustices faced by LGBT individuals in the United States, particularly in the context of child adoption. Despite the legalization of same-sex marriage in the U.S., discrimination persists in adoption cases. The text highlights that the concept of LGBT adoption is relatively new, with the first known case occurring in the 1970s.

The author discusses the Supreme Court's decision in 2015 to legalize same-sex marriage across the U.S., but notes that issues such as adoption still present challenges for the LGBT community. Some states, like Alabama, Mississippi, and Texas, have laws that create obstacles for LGBT adoption. The text also presents case studies, such as a lesbian couple in Michigan who fought for adoption rights for their four children, and a male couple in Washington, D.C. who faced difficulties in their adoption process. These cases highlight the social and economic injustices faced by LGBT couples in the adoption process. The author further discusses the different forms of LGBT adoption, such as joint adoption by a same-sex couple, second parent adoption, and adoption by a single LGBT individual. The text emphasizes the need to eliminate discrimination and prejudice from LGBT adoption decisions.

The text concludes by discussing inter-country adoption, which has become popular among LGBT couples in the U.S. Despite the complexities of this process, it has increased due to decreasing safety and health issues, and a lack of birth control in some foreign countries. The author advocates for the full legalization and elimination of prejudice in LGBT adoption across all states.<sup>2</sup>

## **ADOPTION RIGHTS OF LIVE-IN AND SAME-SEX COUPLES**

**By: DIVYANSH JAIN**

This text discusses the adoption rights of the LGBTQIA+ community and live-in couples in India. The

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<sup>1</sup> Kumar Panchal, Same sex Couples Adoption rights in India, *SSRN Electronic Journal*, 2020

<sup>2</sup> Roberts, Kristen, "The LGBT Population and the Fight for Adoption Rights", The College at Brockport: State University of New York, 2016.

author begins by defining adoption and the LGBTQIA+ community, and highlights the historical discrimination faced by this community.

The Supreme Court of India legalized homosexuality in 2018, but same-sex marriage is not yet recognized, which affects adoption rights. The author then discusses the two major legislations regulating adoption in India - The Hindu Adoptions and Maintenance Act, 1956 (HAMA) and The Juvenile Justice Act, 2015. HAMA, which applies only to Hindus, Sikhs, Buddhists, and Jains, allows only 'husband' and 'wife' to adopt, excluding same-sex couples. The Juvenile Justice Act, on the other hand, is more inclusive but requires a marital status of at least 2 years for prospective adoptive couples, indirectly excluding the LGBTQIA+ community and live-in couples. The author also discusses the case of Indra Sarma v. V.K.V. Sarma, where live-in relationships were recognized as marriage-like, granting those similar rights. However, this does not apply to same-sex couples as same-sex marriage is not legal in India.

The text concludes by emphasizing the importance of adoption rights for the LGBTQIA+ community and live-in couples, and the need to eliminate violations of their fundamental rights. The author suggests changes in adoption legislation to remove obstacles and allow adoption rights for the LGBTQIA+ community. The paper aims to highlight the importance of adoption rights for the LGBTQIA+ community, showcase the obstructions they face, and suggest ways to overcome them.<sup>3</sup>

## **LEGAL STATUS OF ADOPTION BY SAME SEX COUPLES IN INDIA AND AROUND THE WORLD: A CRITICAL ANALYSIS**

**By: SHRADDHA VEMULA**

This text discusses the adoption rights of same-sex couples in India and around the world. It notes that while 27 countries and numerous territories allow same-sex couples to adopt together, and five other countries allow some form of stepchild adoption, these rights are often determined by court decisions rather than constitutions or statutes.

In India, despite the decriminalization of Section 377 in 2018, same-sex couples continue to struggle for basic rights like marriage and adoption. While the law permits adoption by single parents within the LGBTQIA+ community, it prohibits adoption by same-sex couples together. The text discusses three key legislations governing adoption in India: The Central Adoption Resource Authority (CARA), The Hindu Adoptions and Maintenance Act, 1956 (HAMA), and The Adoption Regulation, 2017. CARA is the primary organization for all kinds of child adoption practices, both domestic and global. HAMA regulates the judicial procedure for Hindu adults to adopt children and their lawful obligation to support various family members. The Adoption Regulation, 2017, is stricter than HAMA and allows single men and women to adopt only if they meet certain criteria.

The text concludes by emphasizing that Indian laws violate articles 14, 15, and 21 of the constitution, which provide for equality before the law, prohibit discrimination, and protect the right to life and personal liberty, respectively. The author argues that same-sex couples should be allowed to adopt, given that they cannot conceive naturally and that every individual has the right to family. The text also highlights the social stigma faced by the LGBTQIA+ community, which discourages authorities from allowing them to adopt children.<sup>4</sup>

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<sup>3</sup> Divyansh Jain, ADOPTION RIGHTS OF LIVE-IN AND SAME-SEX COUPLES, Volume IV Issue I | ISSN: 2583-0538.

<sup>4</sup> Shraddha Vemula, Legal Status Of Adoption By Same Sex Couples In India And around The World: A Critical Analysis, International Journal Of Advanced Legal Research, ISSN: 2582-7340 Volume 3 Issue 1 2022

## **LGBTQ+ COMMUNITY'S RIGHT TO MARRIAGE AND ADOPTION: NEED FOR LEGISLATIVE REFORMS**

**By: AARUSHI TOMAR**

This text discusses the concept of gender identity and the rights of the LGBTQIA+ community, particularly in the context of marriage and adoption in India. The author begins by defining gender identity and highlights the discrimination faced by the LGBTQIA+ community. The Supreme Court of India decriminalized homosexuality in 2018, but same-sex marriage is not yet recognized, which affects their rights.

The author then discusses the importance of legal recognition of same-sex marriages. Without legal recognition, same-sex couples cannot enjoy the legal protections and benefits that heterosexual couples do. This lack of recognition goes against the fundamental principles of equality and protection against discrimination based on gender. The text also discusses the role of the state in marital relations and the importance of official marriage certification. In Hindu marriages, if the rituals are not performed according to the rules, the marriage may be deemed null and void. Despite completing all the necessary steps and ceremonies for marriage, same-sex couples have been unable to receive official recognition.

The author concludes by emphasizing the need for legal recognition of same-sex partnerships similar to heterosexual unions. This recognition is necessary to eliminate the prejudice faced by those in long-term committed relationships. The text advocates for changes in the law to ensure equality and avoid discrimination based on gender identities.<sup>5</sup>

## **SAME-SEX COUPLES ADOPTION RIGHTS IN INDIA**

**By: THE AMICUS QRIAE**

This text discusses the struggles and discrimination faced by same-sex couples, particularly in India. It highlights societal attitudes towards homosexuality, the legal challenges faced by same-sex couples, and the importance of recognizing their rights, including the right to adopt children.

The author begins by quoting Pope Francis, emphasizing that homosexual people have a right to be in a family. The text discusses societal prejudices against homosexuality, often treating it as a disease or an illusion. It highlights the societal and legal challenges faced by same-sex couples, including voting rights, public acceptance, and the right to adopt children. The text also discusses the landmark judgment of the Supreme Court in *Navtej Singh Johar v Union of India*, which decriminalized homosexuality but did not address the civil rights of same-sex couples, including the right to adopt children. The author argues that societal attitudes and legal restrictions prevent same-sex couples from adopting children, contributing to their marginalization. The text further discusses the portrayal of homosexuality in Bollywood movies and societal events like Seattle Pride day, which aim to raise awareness and acceptance of homosexuality. It also discusses the harsh realities faced by homosexuals, including societal rejection, workplace harassment, and the denial of basic rights.

The author concludes by emphasizing the need for legal recognition of same-sex couples' right to adopt. They argue that adoption can help decrease child labour, child assault, and suicide among young people. The text advocates for changes in the law to ensure equality and avoid discrimination based on sexual orientation. The research paper aims to provide a deep and descriptive analysis of these issues.<sup>6</sup>

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<sup>5</sup> Aarushi Tomar, *Lgbtq+ Community's Right To Marriage And Adoption: Need For Legislative Reforms*, Issn: 2582-7677.

<sup>6</sup> The Amicus Qriae, *Same-Sex-Couples-Adoption-Rights-In-India*, 2023.

## **A LEGAL STUDY ON ISSUES FACED BY LGBTQ DURING ADOPTION: IN RESPECT TO HUMAN RIGHTS AND ADOPTION LAWS IN INDIA**

**By: JURIS CENTER**

This text discusses the legal and societal challenges faced by the LGBT community in India, particularly in relation to adoption rights. While single LGBT individuals are not officially prohibited from adopting, adoption by same-sex couples remains prohibited. This prohibition is based on their sexual orientation, which has no bearing on their capacity or quality as potential parents.

The text discusses the Juvenile Justice (Care and Protection of Children) Act of 2015, which defines adoption as the formal and informal process of establishing a parent-child relationship. However, social prejudices and disregard for children's wellbeing have influenced adoption practices in India. The text also discusses the Hindu Adoption and Maintenance Act, 1956, and the Juvenile Justice Act, 2015, both of which stipulate that an adoptive couple must be heterosexual and married. This means that one partner in a non-heterosexual relationship is denied legal recognition as an adoptive parent when one partner adopts a child on their own.

The author highlights the constitutional provisions available for the LGBTQ community, including the right to equality, the right against discrimination, the right to personal liberty, and the right against exploitation. However, these rights are not explicitly stated in the context of adoption for same-sex couples. The text concludes by emphasizing the challenges faced by same-sex parents, including the requirement of two years of marital stability for adoption, which same-sex couples cannot demonstrate as same-sex marriages are not yet recognized in India. The social stigma associated with these relationships also deters the government from approving adoption for such families. The author advocates for changes in the law to ensure equality and avoid discrimination based on sexual orientation. The LGBTQ+ community has been fighting for their rights for a long time now. They have been discriminated against and treated as outcasts in society. However, they have not given up and continue to fight for their rights. One of the rights that they are fighting for is the right to adopt children. In many countries, same-sex couples are not allowed to adopt children. This is a clear violation of their rights. Everyone has the right to start a family and raise children. Denying this right to same-sex couples is unjust and discriminatory. It is high time that we change our laws and allow same-sex couples to adopt children. They are just as capable of raising children as heterosexual couples. There is no reason why they should be denied this right. It is important that we fight for the rights of the LGBTQ+ community and ensure that they are treated equally in all aspects of life. We must stand up against discrimination and fight for equality for all. I agree that it's crucial to ensure equal rights for all individuals, including those in the LGBTQ+ community. The right to start a family, including through adoption, is indeed a fundamental aspect of personal life. It's important to note that the ability to provide a loving and nurturing environment for a child does not depend on one's sexual orientation.

In many parts of the world, progress is being made towards recognizing and protecting the rights of LGBTQ+ individuals, including the right to adopt. However, in some countries, legal and societal barriers still exist. Advocacy and education are key to overcoming these barriers and promoting understanding and acceptance.

Laws and policies must reflect the principle of equality and non-discrimination, and it's encouraging to see ongoing efforts around the world to ensure this.<sup>7</sup>

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<sup>7</sup> Juris Centre, -Legal-Study-On-Issues-Faced-By-Lgbtq-During-Adoption-In-Respect-To-Human-Rights-And-Adoption-Laws-In-India, 2023.

## **ADOPTION RIGHTS OF SAME-SEX COUPLES IN INDIA**

**By: REST THE CASE**

The text discusses the legal status of adoption by same-sex couples in India and globally. In India, adoption is regulated by the Juvenile Justice (Care and Protection of Children) Act, 2015, which does not currently allow adoption by same-sex couples. The Central Adoption Resource Authority (CARA), the primary organization responsible for overseeing adoptions in India, only allows heterosexual married couples to adopt.

Despite the decriminalization of homosexuality in 2018, same-sex couples in India continue to face challenges in asserting their rights, including the right to adopt<sup>124</sup>. The Indian Constitution guarantees fundamental rights to all citizens, including the right to equality and the right to life and personal liberty. However, there are no explicit constitutional provisions on the rights of same-sex couples regarding adoption. Globally, adoption by same-sex couples is legal in 39 countries<sup>5</sup>. However, same-sex couples are still deprived of adoption rights in several foreign countries. Some countries, including those in the European Union, the U.S., and South Africa, have passed progressive laws regarding the adoption rights of same-sex couples<sup>6</sup>. In contrast, even the United Kingdom, which once criminalized homosexuality in India, has legalized joint adoption by same-sex couples.

The text concludes by emphasizing the need for more inclusive adoption laws that promote equality and provide a supportive environment for children, regardless of their parents' sexual orientation.<sup>8</sup>

## **NEED OF ADOPTION RIGHTS FOR LGBTQ+ COUPLES**

**By: JURIS CENTRE**

India's LGBTQ+ community has made significant strides towards legal equality, with landmark cases like *Navtej Johar v. Union of India* decriminalizing homosexuality. However, social stigma and the lack of same-sex marriage and adoption rights remain hurdles.

Granting adoption rights would promote equality and offer a loving home to children in need, while fulfilling the wish of LGBTQ+ couples to build families. Arguments for this include upholding constitutional rights, prioritizing the child's well-being, and creating a more inclusive society.

Challenges include societal disapproval, religious and cultural barriers, and the concept of a "traditional" family. Addressing these issues involves advocating for civil unions, legal recognition for same-sex couples, and promoting education and acceptance.

In essence, allowing LGBTQ+ couples to adopt isn't just about legal changes; it's about ensuring basic human rights, fostering inclusivity, and building a society that values diversity and equality for everyone.<sup>9</sup>

## **LEGAL GUIDE TO ADOPTION FOR SAME-SEX COUPLES IN INDIA**

**By: VISHAL SAHANI**

Adopting as a same-sex couple in India can be complex. This guide explains the challenges and legal situation for LGBTQ+ individuals who want to adopt. While the law doesn't allow joint adoption by same-sex couples yet, single people, regardless of sexual orientation, can still adopt. The guide covers who can adopt, legal safeguards, the adoption process, and what to consider after adoption. It also answers common questions about the Central Adoption Resource Authority (CARA), rights of non-adoptive partners, international adoption, societal views, and available support.

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<sup>8</sup> Restthecase, *Adoption-Rights-Of-Same-Sex-Couples-In-India* 2023

<sup>9</sup> Juris Centre, *Need of Adoption Rights For LGBTQ+ Couples*, 2023

Even with legal obstacles and social stigma, the guide stresses that with good legal guidance, careful planning, and determination, same-sex couples can navigate adoption and build happy families.<sup>10</sup>

### **CHAPETR III: WHAT ARE LEGAL PROVISIONS IN INDIA RELATED TO ADOPTION OF HOMOSEXUAL COUPLE UNDER THE ACTS SUCH AS JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT AND HINDU ADOPTION AND MAINTENANCE ACT, 1956?**

The legal framework in respect of adoption rights for homosexual couple in India is shaped by various legal statutes and judicial pronouncement. In this chapter we aim to analyse all the legal provisions related to adoptions rights under juvenile justice act (CARA).

#### **JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2015**

This act is an important legislation to govern child welfare and protection of India. However this act do not explicitly mentions the adoption by same sex couple. Section 2(2) status of relationship legitimately changed to rights of child regarding adoption. Section 57 states the new category of parents who can adopt such as adoptive parents shall be financially stable, mentally and physically fit and sound. A single parent cannot adopt also a single male may not adopt.

Section 41 Eligibility of adoptive parents and Section 42 procedure for adoptions, selection of prospective adoptive parents are mentioned in Section 43, for are dealt in chapter 8 in of this act. Grant for adoption which provides the process of granting the adoption orders by the authorities' and issuing legal recognition to that adoption. Section 46 mentions Post-Adoption follow up process and support services for the adopted children. Section 80 states punitive measures for adoption without following prescribed procedures which can be up to three years and fine."

Adoption is a process through which a relation of parent-child is built through legal and social process. But according to this act only biological set of parents or a single parent (according to the conditions mentioned under this act) can adopt. However, the legislation do not have any provision and fails to provide any civil rights of homosexual couple who wants to adopt. According to section 57 of the CARA act it defines the eligibility of the prospective adoptive parent ("PAPs"). It also states that "No kid shall be placed in adoption to a couple unless they have had at least two years of solid marital relationship" as one of the requirement. Therefore, as India do not any legal provision that recognizes the same sex marriage so consequently the homosexual couple cannot establish a two-year stable marital status hence, it makes them ineligible to adopt. In the case of *Laxmi Kant Pandey V. Union of India*, the court observed that "every child has the right to a family", so this right was interpreted as right to be adopted. Article 39(f), government formulate policies to ensure that children has opportunities to have a healthy and dignified family. In *Indian Hotel and catering association and Anr V. Maharashtra*, it stated that "depriving of child to be adopted by the LGBTQ+ community is equivalent to depriving him/her of their rights. In the recent case on the same sex marriage the judgement were in not favour of same sex marriage but *J. Kaul and CJI. Chandrachur* passed minor judgements regarding adoption by same sex couple. Consequently held to struck down the CARA regulations to enable the adoptions. CJI also mentioned that CARA regulations are discriminative in nature as it infringes article 15 of the constitution "that forbids

<sup>10</sup> Vishal Sahani, legal guide to Adoption for Same-Sex in India



discrimination on grounds only of religion, race, caste, gender, or place of birth". They also held section 5(3) of CARA to be unconstitutional.

But at the end as the bench decided and it was 3:2 majority judgement it held that same sex couples cannot adopt under CARA and the legal status of it prevails.<sup>11</sup>

#### HINDU ADOPTION AND MAINTENANCE ACT, 1956

The Hindu adoption and maintenance act provides a legal framework for adoption in India but do not explicitly address adoption by the LGBTQ+ community. However, throughout the years of judicial interpretations and landmark case laws, courts have focused and emphasized principles of equality, non-discrimination, and the best interest of the children, paving the way for greater inclusivity in adoption rights for the same sex couples.

Section 3 of this act which states the capacity of a Hindu male to adopt, this act grants males to a son or daughter in adoption, subject to certain conditions such as age difference, income and previous child, etc. Section 4 extends the adoption rights to female Hindus only, allowing them to adopt under specific situations and formalities.<sup>12</sup>

#### **CHAPTER IV: WHAT ARE VARIOUS CHALLENGES AND BARRIERS FACED BY HOMOSEXUAL COUPLE WHILE ADOPTING A CHILD IN INDIA?**

Heterosexual couple in India faces a lot of challenges during adoption of a child and those challenges and barriers multiplies when it is regarding homosexual couple or same-sex couple. These challenges arises in form of legal, cultural and societal factors which creates more hurdles in the adoption process in India.

The primary challenge is the legal framework itself which often restricts the adoption by the homosexual couple. Legislations such as the Hindu Adoption and Maintenance Act and the juvenile justice act does not explicitly allow homosexual couples to adopt in India. These legislation do not have a single provision which will allow the homosexual couples to adopt leading it to ambiguity and exclusion as well as discriminatory in nature.

The next colossal barrier is marital status of the couple trying to adopt in India. As homosexual or same-sex marriage is still not legalize in India. Many adoption laws in India has a pre-requisites such as age gap and having a married status for a certain period. Hence it becomes a barrier for homosexual couple in India while adopting.

Social stigma is yet another difficulty faced by LGBTQ+ community in India. Homosexual couple has to face a social stigma of discrimination in the society as it leads to various adoption agencies build a prejudice and biased attitude towards the couple who wants to adopt the child.

Similarly the lack of awareness and support from various adopting agencies and legal entities to understand the basics of unique need and rights of homosexual couple leads to passing of misinformation, prejudice and reluctance to facilitate the adoption for homosexual couple.

Complex Adoption process and Financial and economic barriers, agreed that these two aspect of the adoption in India plays an important role in ensuring safety and security if a child but on the other hand it acts as a barrier for the homosexual couple. For example, the adoption process is couples to say the least and bureaucratic in nature, extensive documentation is required, background checks which are generally biased towards homosexual couple and various legal procedures. Homosexual couple encounters additional hurdles due to the lack of traditional marriage competence during these processes, leading the

<sup>11</sup> Juvenile Protection Act (CARA), 2015

<sup>12</sup> Hindu Adoption and Maintenance Act, 1956

adoption process to be delayed and denials. Additionally, financial situation does not help the adoption process at all. The social stigma revolving around the homosexual couple leads to discrimination and limited access to the financial resources hence making them a target and declining the changes of adoption in India.

The lack of Legal Protection towards LGBTQ+ community in India creates yet another barrier for homosexual couple to adopt in India. Despite legal advancements in recognition of LGBTQ+ community, there are lacunae present in the existing legal system such as acceptance and legalizing same-sex marriage, adoptive rights for homosexual couples etc.

## **CHAPTER V: WHAT ARE SPECIFIC CONSTITUTIONAL PRINCIPLES, JUDICIAL PRECEDENTS AND POLICIES IN INDIA REGARDING ADOPTION RIGHTS OF HOMOSEXUAL COUPLE IN INDIA?**

The Constitutional principles, judicial precedents and various policies regarding adoption rights for homosexual couples has shown a gradual shift in the recent times in the aspect such as inclusivity, non-discrimination, and societal acceptance of diversified family structure. Although challenges and barriers still persists the perpetual legal and societal developments indicates that there has been a growth in recognizing the rights of LGBTQ+ community in the on article of adoption rights in India. We can see the gradual change through various case laws, interpretation of fundamental rights and policies.

Adoption rights for homosexual couples in India are ever evolving with the legal framework of specific constitutional principles that put emphasize on the principle of equality, non-discrimination and the rights to personal autonomy.

Right to Equality- article 14 of the Indian Constitution, this fundamental right guarantees equality before law and equal protection of law to all individuals. This forms the cornerstone of arguments advocating for adoption rights, as this principle emphasize that all individuals irrespective of their characteristics and identities and genders, shall be treated equally by the law. Article 14 is invoked to argue against discriminatory practices that deny same-sex couples the rights to adopt. It also allows reasonable classification by the state as long as it is based on intelligible differentia and has a rational nexus. So the current rights for adoption, which barre's the homosexual couples from adopting do not have a rational nexus to the objective of child welfare and child's best interest. Also Judicial institution shall focus on whether the classification i.e. eligibility for adoption is based on reasonable criteria and whether it serves a legitimate state interest without disproportionately impacting the rights of a homosexual couple.<sup>13</sup>

Article 15 states, the prohibition of Discrimination on grounds of religion, race, caste, sex, or place of birth. It protects a person against any discriminatory treatment.<sup>14</sup>

Article 21 that guarantees the right to life and personal liberty to all persons within the territory of India. This article's interpretation also includes the right to family which is considered an integral part of Article 21, which consequently provides parental rights. Judicial institutions have been urged to interpret the concept of parental rights and the concept of family beyond the traditional and orthodox heterosexual norms and include a diversified family structure which shall consist of homosexual couples. This article also emphasises the best interest of a child.<sup>15</sup>

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<sup>13</sup> The Constitution of India

<sup>14</sup> The Constitution of India

<sup>15</sup> The Constitution of India

## CASE ANALYSIS

### Case: Navtej Singh Johar & Ors v. Union of India thr. Secretary ministry of Law and Justice

This case challenged the constitutionality of Section 377 of the Indian Penal Code (IPC), which criminalized consensual homosexual sex.

#### Petitioner Arguments:

- Section 377 violates fundamental rights like dignity, equality, privacy, liberty, and freedom of expression.
- The terms "natural" and "unnatural" are undefined, making the law vague.
- Criminalization discriminates against LGBTQ+ people based on sexual orientation.
- The number of cases under Section 377 is irrelevant to its constitutionality.

#### Respondent Arguments:

- Section 377 protects public morality and prevents the spread of HIV.
- Decriminalization would destroy the family system and cultural heritage.
- The state can restrict certain acts to protect citizens.

#### Judgement:

The Supreme Court overruled its previous judgement and struck down Section 377 in so far as it applies to consensual homosexual sex. The court found Section 377 violated Articles 14, 15, 19, and 21 of the Constitution.

#### Significance:

This landmark judgement is a major victory for LGBTQ+ rights in India, recognizing their right to equality and ending a discriminatory law.<sup>16</sup>

### Case: Multiple petitions seeking recognition of same-sex marriage under the Special Marriage Act (1954)

Petitioners: Same-sex couples (Supriyo Chakraborty & Abhay Dang, Parth Phiroze Merhotra & Uday Raj Anand)

#### Arguments:

- Section 4(c) of the Act, defining marriage between a 'male' and 'female', discriminates against LGBTQ+ couples.
- Denial of marriage rights excludes them from benefits like adoption, surrogacy, and inheritance.
- Non-recognition violates fundamental rights to equality, freedom of expression, and dignity.
- Cites previous judgements (NALSA & Navtej Singh Johar) recognizing LGBTQ+ rights.

#### Court Proceedings:

- Petitions filed in November 2022, challenging constitutionality of Section 4(c).
- Merged with similar petitions against other marriage laws (Hindu Marriage Act, Foreign Marriage Act).
- Supreme Court directed the government to respond in November 2022.
- Petitions from Delhi & Kerala High Courts transferred to Supreme Court in January 2023.
- Three-judge bench referred the case to a five-judge Constitution Bench in March 2023.
- Hearings held in April 2023, with a reserved judgement in May 2023.
- October 2023 Verdict: The five-judge bench unanimously ruled against recognizing same-sex marriage under the Special Marriage Act. It also held that there's no fundamental right to marry.

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<sup>16</sup> 2018 INSC 790

Analysis:

- The petitions aimed to expand marriage rights and equality for LGBTQ+ couples in India.
- While previous judgements recognized gender identity and rights of homosexuals, same-sex marriage remains unrecognized.
- The court's reasoning behind the verdict is not yet available, but it sets a significant precedent for future legal battles on same-sex marriage in India.

Unresolved Issues:

- The court's justification for denying the fundamental right to marry and same-sex marriage under the Act remains unknown.
- The LGBTQ+ community may continue legal challenges based on the principles of equality and dignity established in prior judgements.
- Whether the legislature will consider amending marriage laws to include same-sex marriage is uncertain.

This case highlights the ongoing fight for LGBTQ+ marriage rights in India. While the verdict is a setback, it doesn't necessarily end the pursuit of marriage equality through legal or legislative means.<sup>17</sup>

## **CHAPTER VI: WHAT ARE THE IMPLICATIONS OF RECENT LEGISLATIVE DEVELOPMENTS (SUCH AS THE DECRIMINALIZATION OF HOMOSEXUALITY IN INDIA AND NON-RECOGNITION OF SAME-SEX MARRIAGE IN INDIA) FOR THE LEGAL RECOGNITION AND PROTECTION OF ADOPTION RIGHTS FOR HOMOSEXUAL COUPLE IN INDIA?**

In recent times, legislative development in India has initiated social and advocacy efforts to achieve legal protection and recognition of adoption rights for homosexual couples. Although challenges and barriers remain, including non-recognition of same-sex marriage, has profound implications for legal recognition and protection of adoption rights for homosexual couples in India.

The implication of decriminalisation of Homosexuality in India has made a significant shift towards recognising the rights and dignity of LGBTQ+ individuals. It has been an upholder of principles of personal equality, privacy, and autonomy before the law. It also fosters a more inclusive and accepting societal attitude towards homosexuality. It brought changes such as increased visibility and legal recognition, even though it does not directly enable or address adoption rights, it does lay down the path for them.

Non-recognition of same-sex marriage implies that it denies homosexual couples the benefits and protection that married heterosexual couples enjoy which also include adoption rights. As specified before, marriage is a pre-requisite as a factor considered in the joint adoption process. Homosexual couples can resort to individual adoption but then it creates legal problems and complexity for homosexual individual for joint adoption if they have a partner.

### **ROADBLOCKS TO ADOPTION**

The lack of legal recognition for same-sex marriage creates significant hurdles. Current adoption regulations primarily allow only married couples to adopt, effectively excluding same-sex couples from the process. The denial of marriage rights can lead to discrimination during the adoption process. This can

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<sup>17</sup> W.P.(C) No. 1011/2022; Diary No. 36593/2022

happen even if a same-sex couple can provide a loving and stable home for a child. Recent legal developments have ignited a surge in activism and advocacy for legal reforms. LGBTQ+ rights groups are pushing for changes that explicitly grant adoption rights to same-sex couples. Legal experts and activists are actively engaged in policy discussions to promote equal rights in adoption, regardless of sexual orientation. This can pave the way for legislative changes in the future. The decriminalization of homosexuality has sparked greater public awareness and dialogue about LGBTQ+ rights, including adoption rights. This can help shift societal attitudes and make same-sex couples a more accepted prospect for adoption. The non-recognition of same-sex marriage has exposed the legal challenges faced by same-sex couples who want to adopt jointly. This could lead to future legal battles focused on obtaining adoption rights based on the principles of equality and non-discrimination established in previous judgements. These developments have fuelled advocacy efforts for legislative reforms. These reforms would ensure legal recognition and protection for the adoption rights of same-sex couples.

## CHAPTER VII: CONCLUSION, SUGGESTIONS & RECOMMENDATIONS

In conclusion, the research topic of adoption rights of homosexual couples in India is complex and multifaceted, touching on legal, ethical and societal aspects. Recent developments in legislation and judicial such as the decriminalization of homosexuality and non-recognition of same-sex marriage, have positive and negative impact for the recognition and protection of adoption rights.

Despite the challenges and barriers there are several recommendations and suggestions that can pay the way for progress. The increased awareness, advocacy efforts, and policy debates spurred by these developments have illuminated the path towards ensuring equal rights and protections for LGBTQ+ individuals and families in the context of adoption. The paramount importance of prioritizing the best interests of the child in adoption decisions has been underscored, emphasizing the need to focus on child welfare rather than the marital status or sexual orientation of the adoptive parents.

In conclusion, while there is still a long way to go, the evolving landscape of adoption rights for same-sex couples in India offers hope for a future where all individuals, regardless of their sexual orientation, can experience the joy of parenthood. As we navigate this journey, it is our collective responsibility to advocate for equality, challenge societal prejudices, and work towards creating a more inclusive and accepting society.

Few suggestions and recommendations:

1. Legislative reforms to include provisions for adoption by homosexual couples for example Juvenile Justice Act (CARA). This will bring a non-discriminative approach and build opportunities.
2. To provide clarity and guidance from various government agencies regarding the adoption process and follow-up procedures to avoid confusion and ambiguity.
3. To promote awareness and sensitization among agencies and the general public.
4. Highlighting the important judgements that upheld these rights.