

Denied Dreams: The Struggle for Same-Sex Couples Adoption Rights in India

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Abstract

In the landscape of India's evolving legal framework concerning LGBTQ+ rights, recent years have seen significant progress towards equality and acceptance. However, the journey towards full integration of LGBTQ+ individuals into society remains fraught with challenges, particularly in the realm of adoption rights for same-sex couples. This article navigates through the legislative landscape of India, discussing the present standing of same-sex relationships, breaking barriers in adoption laws, and examining global advances in adoption rights. Despite recent setbacks, such as the Supreme Court's refusal to legalize same-sex marriages, the resilience of the LGBTQ+ community persists. This article emphasizes the urgent need for legislative clarity and comprehensive anti-discrimination measures to ensure the protection and recognition of LGBTQ+ rights in India. As the fight for equality continues, the unwavering determination of activists reflects a hopeful future where love knows no bounds, and all relationships are celebrated and protected.

Keywords: LGBTQ+, Adoption, Same-Sex relationships

Introduction

In the landscape of India's evolving legal framework concerning LGBTQ+ rights, recent years have witnessed significant progress towards equality and acceptance. From landmark Supreme Court verdicts to ongoing battles for societal recognition, the journey of the LGBTQ+ community in India has been marked by both triumphs and challenges. Despite comprising a substantial population of 2.5 million individuals, this vibrant community continues to grapple with systemic barriers that hinder their full integration into society.³

At the heart of this struggle lies the quest for equal rights, including the right to form families through adoption. The fight for adoption rights for same-sex couples is indicative of the broader battle for recognition and acceptance of LGBTQ+ individuals in India.⁴ The *National Legal Services Authority v. Union of India*⁵ stands as a testament to this quest, as it sought to dismantle traditional gender binaries and secure legal recognition for individuals transcending societal norms. This pivotal judgment marked a

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³ BBC News, India has 2.5m gays, government tells supreme court, BBC News (Mar. 14, 2012), available at <https://www.bbc.com/news/world-asia-india-17363200>.

⁴ Shrishti Patla, Prejudice Faced by Homosexual Couples During Adoption in India, Jus Corpus Law Journal (2022).

⁵ AIR 2014 SC 1863.

significant milestone in the fight for gender minority rights, laying the foundation for future legal reforms and societal shifts.⁶

Similarly, the historic ruling in *Navtej Singh Johar v. Union of India & Others*⁷ reverberated across the nation, striking down the Section 377 of the Indian Penal Code. This landmark decision not only invalidated a law that criminalized consensual same-sex acts but also reaffirmed the inherent human rights enshrined in the Indian Constitution. By emphasizing principles of equality, dignity, and privacy, the Supreme Court delivered a resounding message of inclusion and affirmation for all citizens, regardless of sexual orientation.

However, amidst these victories, the struggle for full equality persists, casting a shadow over the aspirations of same-sex couples seeking to build families through adoption. The recent judgment by the Supreme Court's five-judge constitution bench on marriage equality and same-sex adoption case has ignited debates about the complexities surrounding LGBTQ+ rights in India.⁸ While recognizing the challenges faced by same-sex couples due to discrimination, the court emphasized the importance of legislative interventions to address these disparities, marking a pivotal moment in the ongoing discourse surrounding LGBTQ+ rights.⁹

As conversations evolve and disagreements arise, it is essential to delve into the intricacies of the obstacles faced by same-sex couples in their pursuit of adoption rights. From legal complexities to societal attitudes, the journey towards inclusivity and acceptance is riddled with obstacles that demand careful consideration and concerted action. In exploring these themes, we unravel the intricacies of a struggle marked by denied dreams and enduring resilience, shedding light on the path forward for LGBTQ+ rights in India.

Legislative Landscape: Navigating the Path to Inclusion

The understanding of gender identity has undergone a significant evolution over time, reflecting shifts in societal attitudes and scholarly perspectives. Before delving into the legislative landscape surrounding gender inclusion, it's essential to recognize the historical context that shaped prevailing beliefs regarding gender and identity. From limited discussions before the 1950s, which linked gender closely with one's assigned sex at birth, to the transformative period spanning the 1960s to the 1980s, characterized by pioneering research and advocacy efforts, the journey of understanding gender identity has been dynamic and significant.¹⁰ This evolution has been discussed under the following heads:

Early Perspectives on Gender Identity

Before the 1950s, discussions surrounding gender and gender identity were relatively sparse, with prevailing beliefs suggesting that an individual's gender was inherently linked to their assigned sex at birth. Psychologists like Kagan and Money supported this perspective, emphasizing the role of societal norms in shaping gender roles and identities.

However, the exploration of gender identity underwent a profound transformation between the 1960s and

⁶ Bhawna, Challenges in the Existing Legal Framework and Future Trends on Adoption of Children by Third Gender and Same Sex Couples With Special Reference to India, 1 Dharmashastra National Law University Law Review 69-70 (2022).

⁷ AIR 2018 SC 4321.

⁸ Supriyo @ Supriya Chakraborty v. Union Of India, W.P.(C) No. 1011/2022.

⁹ Vaibhav Tiwari, 'No right for queer couples to jointly adopt': SC in same-sex marriage verdict, Hindustan Times (Oct. 17, 2023), available at <https://www.hindustantimes.com>.

¹⁰ Aditya Verma & Mehul Narayan Dubey, Under the Rainbow: Navigating the Socio- Legal Landscape of Lgbtq+ Community, 2 International Journal for Legal Research & Analysis 7 (2024).

1980s, marking a departure from earlier notions that predominantly tied gender to one's biological sex at birth. During this pivotal period, influential psychologists such as Richard Green, Robert Stoller, Harry Benjamin, and Sandra Bem emerged as key figures in reshaping our understanding of gender and its complexities.¹¹

Sandra Bem's work emphasized the detrimental impact of societal pressure to conform to traditional gender roles, highlighting its contribution to social inequality. Meanwhile, Benjamin, Stoller, and Green advocated for perspectives attributing gender identity incongruence more to biological factors than psychological ones. Their research paved the way for the establishment of gender identity clinics and advancements in gender-related medical and surgical procedures, offering insights into the complex interplay between biology and individual identity.

Moreover, their collective efforts underscored the importance of societal acceptance and freedom from assumptions and expectations in facilitating healthy identity development. By recognizing the multifaceted nature of gender identity and challenging binary conceptions, these psychologists paved the way for greater inclusivity and understanding within society.¹²

Impact of Colonial-Era Legislation

In India, the legacy of British colonial rule left a profound impact on legislative frameworks, particularly concerning discrimination based on identity. The roots of discrimination against transgender persons in India can be traced back to colonial-era laws such as the Criminal Tribes Act of 1873.¹³ Under this Act, transgender individuals were referred to by the highly stigmatizing and pejorative term 'eunuchs'. They were compelled to register with local authorities and faced various restrictions, including being barred from assuming guardianship of minors, executing gifts or wills, or adopting sons. Further, they were prohibited from appearing 'dressed or ornamented like a woman' in public spaces and engaging in activities such as dancing or playing music. Although the Criminal Tribes Act was repealed in 1949, similar language and measures persisted in other laws aimed at controlling and surveilling transgender individuals.¹⁴

For example, the Telangana Eunuchs Act, which was passed in 1919 and was previously referred to as the Andhra Pradesh (Telangana Area) Eunuchs Act 1329F, corresponds to the section concerning 'eunuchs' found in the Criminal Tribes Act.¹⁵ Under Section 4 of this Act, transgender individuals could be arrested without a warrant for dressing as women or performing in public places.¹⁶ Similarly, the Karnataka Police Act of 1963 included provisions in Section 36A that imposed surveillance and presumed criminality on

¹¹ Substance Abuse and Mental Health Services Administration, Top Health Issues for LGBT Populations Information & Resource Kit. HHS Publication No. (SMA) 12-4684. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2012, available at [LGBT Health Kit](#).

¹² Ibid

¹³ The term "Criminal Tribes Act (CTA)" refers to a series of colonial-era laws enacted in India during British rule, beginning in the 1870s. These laws collectively criminalized specific communities by labeling them as habitual criminals.

¹⁴ Jayna Kothari, Section 377 and Beyond A New Era for Transgender Equality?, available at <https://clpr.org.in/>

¹⁵ The Telangana High Court recently, in the case of **V. Vasanta Mogli v. State of Telangana & Others (2023)**, reported in LiveLaw (Tel) 24, declared the Telangana Eunuchs Act, 1329 Fasli, unconstitutional and ultra vires the Constitution of India. The court noted that the legislation violated the human rights of the third gender community.

¹⁶ **Section 4:** "4. Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with Imprisonment for a term which may extend to two years or with fine or with both".

'eunuchs'.¹⁷ These laws not only criminalized transgender identities but also restricted their freedom of expression and participation in public life, bearing striking resemblance to municipal ordinances in the United States from the 1850s onward. These ordinances prohibited individuals from appearing in public "in attire not belonging to his or her sex."¹⁸ Characterized by their inflexibility and derogatory nature, these laws perpetuated societal stigma and exclusion.

Legal Battles for LGBTQ+ Rights in India

The real legal battle for LGBTQ+ rights in India gained momentum in 2001 when the Naz Foundation filed a petition challenging the constitutionality of Section 377 in the Delhi High Court. This marked a significant turning point, as it was the first concerted legal effort to challenge the discriminatory law. However, at that time, the LGBTQ+ community was still grappling with the idea of using litigation as a strategy, with concerns about its effectiveness and potential backlash.

Despite initial challenges, the Naz Foundation's petition gained traction, with support from various organizations and activists. In 2009, the Delhi High Court passed a landmark judgment in *Naz Foundation v. Govt. of NCT*,¹⁹ reading down Section 377 and declaring it unconstitutional. This judgment was celebrated as a victory for LGBTQ+ rights and sparked hope for progress.

However, this celebration was short-lived, as the Supreme Court overturned the Delhi High Court judgment in *Suresh Koushal v. Union of India in 2013*,²⁰ stating that it was for Parliament to decide on the decriminalization of homosexuality. Section 377 of the Indian Penal Code, which criminalized homosexuality, was reinstated, leaving LGBTQ+ individuals vulnerable to discrimination, harassment, and persecution. This setback highlighted the limitations of relying solely on the judiciary for social change and underscored the need for broader societal acceptance and legislative reform.

Despite this setback, the LGBTQ+ community continued to mobilize and advocate for their rights. Transgender individuals, in particular, faced disproportionate marginalization and violence, highlighting the urgent need for legal recognition and protection. The turning point came with the *National Legal Services Authority v. Union of India (NALSA) judgment in 2014*.²¹ The Supreme Court ruled that transgender persons have the constitutional right to self-identify their gender identity, regardless of medical reassignment, and affirmed their right to express their chosen gender identity. This ruling marked a pivotal moment in recognizing the rights of LGBTQ+ individuals in India and affirmed their right to life, dignity, and autonomy. This landmark decision not only affirmed the fundamental rights of transgender individuals but also acknowledged the violence and discrimination they face on a daily basis, laying the groundwork for a more inclusive and equitable society.

The verdict of the Supreme Court heralded a new era of inclusivity and respect for diversity. By acknowledging the existence of a 'third gender', the judiciary affirmed the rights and identities of hijras

¹⁷ **Section 36A.** Power to regulate eunuchs.- The Commissioner, may, in order to prevent or suppress or control undesirable activities of eunuchs, in the area under his charge, by notification in the official Gazette, make orders for,- (a) preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offenses or any other offenses or abetting the commission of such offenses, (b) filing objections by aggrieved eunuchs to the inclusion of his name in the register and for removal of his name from the register for reasons to be recorded in writing; (c) prohibiting a registered eunuch from doing such activities as may be stated in the order. (d) any other matter he may consider necessary.

¹⁸ Susan Stryker, *Transgender History* (2nd ed. 2017).

¹⁹ 2009 (4) AIR BOM R 58

²⁰ (2014) 1 SCC 1.

²¹ (2014) 5 SCC 438.

and transgender persons, granting them the legal recognition they had long been denied. Building on the momentum generated by NALSA, subsequent judgments further cemented the rights of sexual and gender minorities in India. The *K.S Puttaswamy v. Union of India*²² judgment in 2017 affirmed the constitutional right to privacy as intrinsic to the right to life, equality, and fundamental freedoms. Importantly, the court extended this right to encompass intimate relations of one's choice, explicitly including sexual orientation and gender identity within the ambit of privacy protections. This pivotal ruling set the stage for a reevaluation of discriminatory laws, including Section 377 of the Indian Penal Code.²³ In 2018, the Supreme Court delivered a historic verdict in *Navtej Johar v. Union of India*,²⁴ unanimously striking down Section 377 of the Indian Penal Code as unconstitutional. This decision marked the culmination of years of advocacy and legal battles, affirming the rights of LGBTQ+ individuals to dignity, equality, and non-discrimination under the law.

One of the most significant aspects of the Navtej Johar judgment was its elaboration on the right against non-discrimination on the basis of sex, as guaranteed in Article 15 of the Indian Constitution. The Court held that discrimination based on gender identity and sexual orientation falls under the purview of Article 15, challenging societal norms and stereotypes that perpetuate discrimination and violence against LGBTQ+ individuals.

In navigating the legislative landscape towards inclusion, India has witnessed a profound evolution in its understanding of gender identity and sexual orientation rights. From colonial-era laws perpetuating discrimination to landmark judgments affirming constitutional protections, the journey reflects a growing recognition of the inherent dignity and equality of LGBTQ+ individuals. Despite legal setbacks, advocacy efforts have propelled significant strides towards a more inclusive society.

Present Standing of Same-Sex Relationships in India

In a landmark decision on October 17, 2023, the Supreme Court of India rendered a verdict in *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*,²⁵ addressing issues such as adoption by LGBTQ+ couples and same-sex marriage. By a majority of 3:2, the five-judge bench led by Chief Justice of India D Y Chandrachud delivered a nuanced judgment on a series of petitions seeking legal sanction for same-sex marriage and adoption. While the Chief Justice and Justice Sanjay Kishan Kaul deemed certain guidelines of the Central Adoption Resource Authority (CARA) as unconstitutional, Justices S Ravindra Bhat, Hima Kohli, and P S Narasimha took a differing stance, upholding the regulations. Some of the key aspects concerning same-sex marriage included in the ruling are as follows

²² (2017) 10 SCC 1.

²³ **Section 377. Unnatural offenses:** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section. In Navtej Singh Johar v. Union of India 2018, the apex Court read down Section 377 of the IPC criminalizing "unnatural sex" as being unconstitutional. The Court upheld the right to equal citizenship of all members of the LGBTQ community in India. Thus, it read down Section 377 to exclude consensual sexual relationships between adults, whether between same-sex individuals or otherwise. The Court decided that Section 377 constituted a violation of the right to dignity, privacy and sexual autonomy under Article 21, freedom of expression under Article 19, the right to equality under Article 14, and nondiscrimination under Article 15 of the Constitution. Section 377 will continue to apply to non-consensual sexual activity against adults, sexual acts against minors and bestiality.

²⁴ AIR 2018 SC(CRI) 1169,

²⁵ 2023 INSC 920

Marriage as a Fundamental Right?

One of the central themes of the judgment was the question of whether marriage is considered a fundamental right under the Indian Constitution. While the Court unanimously concluded that marriage itself is not a fundamental right, the majority opinion emphasized that transgender individuals are permitted to marry in accordance with existing laws and personal customs. This acknowledgment reflects an important recognition of the rights of transgender individuals within the institution of marriage.

Right of Civil Unions

The verdict also addressed the question of whether LGBTQ+ couples have the right to enter civil unions with legal recognition and associated benefits. The majority opinion asserted that while LGBTQ+ couples are entitled to form relationships based on their own choices, they do not possess the right to enter civil unions with the aim of marriage. This decision underscores the limitations of judicial intervention in matters of legislative policy, emphasizing the role of the state in ensuring access to rights established in prior judgments.

Chief Justice Chandrachud, however, offered a dissenting view that called for a more expansive interpretation of constitutional rights. He argued that the ability to form a union is inherent in fundamental freedoms such as freedom of speech, expression, and conscience, as enshrined in Articles 19, 21, and 25 of the Indian Constitution. Chandrachud emphasized that the right to form unions is essential for self-growth and understanding the essence of humanity. Furthermore, he emphasized the need for state acknowledgment and legal recognition of LGBTQ+ relationships to ensure equal access to resources and services. His dissent challenged traditional notions of marriage and underscored the judiciary's role in safeguarding fundamental rights for all individuals, regardless of sexual orientation.

Exclusion of Queer Couples from the Special Marriage Act

The judgment raised significant concerns regarding the exclusion of queer couples from the Special Marriage Act (SMA). While the majority opinion justified this exclusion based on historical intent, Chief Justice Chandrachud dissented, suggesting alternative avenues for inclusivity without compromising legislative objectives.

The "reasonable categorization test" serves as a fundamental approach in evaluating the legality of statutes concerning equality. It requires a discernible distinction and a logical connection between the distinction and the objective of law. Applying this test to the SMA's exclusion of queer couples reveals a lack of logical connection to the statute's objective of facilitating marriages across diverse backgrounds.

The prevailing viewpoint contends that the SMA does not violate constitutional principles, as it aims to enable marriages between individuals from diverse social backgrounds. However, this argument falls short in addressing the exclusion of queer couples. Discrimination based on sexual orientation undermines the constitutional guarantees of equality. Thus, the SMA's exclusion of queer couples raises significant concerns regarding discrimination and constitutional validity.

Further, the majority opinion highlights the challenges in interpreting and reforming the SMA. Substituting terms like 'spouse' for 'wife' and 'husband' presents significant legal implications, touching upon various areas of law such as succession, adoption, and domestic violence laws. Moreover, engaging in such interpretation risks overstepping judicial authority, as it delves into legislative territory.

However, Chief Justice Chandrachud's dissent emphasizes the need for judicial intervention to rectify constitutional deficiencies, acknowledging the delicate balance between upholding legislative intent and

ensuring equality.

Chief Justice Chandrachud proposes two potential avenues for addressing constitutional deficiencies within the SMA: nullifying pertinent sections or interpreting and amending language across multiple statutes. Nullification risks eroding the progressive intent of the legislation, while interpretation and amendment encroach upon legislative authority. However, both avenues underscore the need for proactive measures to ensure the inclusivity and constitutionality of marriage laws.

In light of these considerations, it becomes imperative to reassess the SMA to ensure alignment with constitutional principles of equality and non-discrimination. This may involve amending the language of the statute to explicitly include queer couples or striking down discriminatory provisions while preserving its overarching purpose. Legislative action may also be necessary to address broader legal ramifications stemming from such reforms, including succession, adoption, and domestic violence laws.

In the next part of this analysis, we will delve deeper into the court's stance on adoption by LGBTQ+ couples and its implications for family law and societal norms.

Breaking Barriers: The Call for Inclusive Adoption Laws in India

In India, the concept of family holds profound significance, deeply ingrained in the cultural fabric as the cornerstone of society. Families are seen as the bedrock of support, nurturing strong bonds and providing the foundation for the proper care and upbringing of children. However, despite the profound value placed on family, adoption laws in India present a complex and outdated landscape, particularly when it comes to the rights of LGBTQ+ couples to adopt.²⁶

The essence of family extends beyond biological ties, encompassing love, care, and support. However, the current legal framework fails to acknowledge this reality, maintaining barriers that impede LGBTQ+ couples from providing nurturing environments for children in need.²⁷ Traditionally, adoption in India has been governed by personal laws associated with different religions, resulting in a lack of uniformity in its application.²⁸ This fragmented approach has obstructed the ability of LGBTQ+ couples to exercise their right to adopt, perpetuating discrimination based on sexual orientation.

The question of whether sexual orientation should be a determining factor in one's eligibility to adopt is a complex and deeply contentious issue. Despite numerous studies unequivocally demonstrating that children raised by same-sex couples thrive just as well as those raised by heterosexual couples, societal prejudices persist, dictating adoption policies and perpetuating discrimination against LGBTQ+ individuals.²⁹

The crux of the matter lies in assessing the ability of prospective parents, regardless of sexual orientation, to provide a nurturing environment that fosters a child's holistic development. Education, emotional support, and love are fundamental components of a nurturing home, qualities that are not exclusive to any

²⁶ Samridhi Mishra, Case for Allowing Adoption for Same-Sex Couples, *Jus Corpus Law Journal* (2023).

²⁷ Riya Gupta & Rishika Bagaria, Embracing Same-Sex Nuptial Ceremony, *4 International Journal of Law Management & Humanities* (2021).

²⁸ Neha Bhowmik, Concept of Adoption- Historical Perspective of Adoption in India, *1 Nyaayshastra Law Review* (2021).

²⁹ Helena Campos Refosco & Martha Maria Guida Fernandes, Same-Sex Parents and Their Children: Brazilian Case Law and Same-Sex Parents and Their Children: Brazilian Case Law and Insights From Psychoanalysis Insights From Psychoanalysis, *23 William & Mary Journal of Race, Gender, and Social Justice* (2017), available at: <https://scholarship.law>. See also Deni Mazrekaj et al., School Outcomes of Children Raised by Same-Sex Parents: Evidence From Administrative Panel Data, *85 American Sociological Review* (2020), available at: <https://www.researchgate.net/> see also, HM Bos et al., Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings From the National Survey of Children's Health, *37 Journal of Developmental & Behavioral Pediatrics* (2016), available at <https://pubmed.ncbi>.

particular sexual orientation. Denying same-sex couples the right to adopt solely based on their sexual orientation not only perpetuates discrimination but also deprives children of the opportunity to thrive in a loving and supportive family environment.

Furthermore, the absence of legal recognition and adoption rights for LGBTQ+ couples perpetuates the cycle of orphaned and abandoned children in India. The staggering statistics of orphaned children underscore the urgent need for inclusive adoption policies that prioritize the best interests of the child above societal prejudices.³⁰ According to UNICEF, there were over a million orphaned and abandoned children in India in 2020. Yet, the archaic adoption laws continue to deny these children the warmth and security of a loving family, solely due to societal prejudices.³¹

It is imperative to challenge these prejudices and embrace the reality that parenting transcends gender. Allowing LGBTQ+ couples to adopt not only provides loving homes for children in need but also promotes inclusivity and equality in Indian society. By reforming adoption laws to reflect the diverse nature of modern families, India can take a significant step towards ensuring that every child has the opportunity to grow up in a supportive and nurturing environment, regardless of their parents' sexual orientation.

The disparity in treatment between homosexual and heterosexual couples raises profound questions about equality and acceptance. Are homosexual couples not capable of providing a loving and supportive home? Are they not entitled to the same rights and acceptance as their heterosexual counterparts? The reluctance of the legal landscape in India to acknowledge the parenting rights of LGBTQ+ individuals only serves to marginalize and exclude them from the institution of family.

The argument for allowing same-sex couples to adopt is rooted in the fundamental principle of the best interests of the child. Denying prospective parents the right to adopt based solely on their sexual orientation not only perpetuates discrimination but also robs children of the chance to thrive in a supportive and nurturing family environment. Family dynamics vary widely, and the paramount consideration in adoption decisions should always be the well-being of the child.³²

The legal hurdles faced by LGBTQ+ individuals seeking to adopt in India are formidable, with outdated adoption laws reflecting entrenched societal prejudices. Despite landmark judgments emphasizing fundamental rights, adoption regulations remain stagnant, hindering progress towards inclusivity and equality. It is imperative to challenge these prejudices and update adoption laws to embrace the diversity of modern families, ensuring that all children have the opportunity to thrive in loving and supportive environments.

Present adoption laws in India which act as impediments for same-sex couples or LGBTQ+ individuals seeking to adopt children are follows;

Hindu Adoption and Maintenance Act, 1956

The Hindu Adoption and Maintenance Act, 1956, forms the legal framework governing adoption within the Hindu community, including Jains, Sikhs, and Buddhists. However, it's important to note that individuals from other religious communities, such as Muslims, Christians, Parsis, Jews, or members of

³⁰ David Keenan, THE SITUATION OF ORPHANS IN INDIA, The Borgen Project (Mar. 13, 2023), available at: <https://borgenproject.org/orphans-in-india/>.

³¹ Vaishnavi Kaushik, A discussion on the adoption and marriage rights of LGBTQ + community? 2018 verdict is not the end of issues facing the LGBTQ+ community., The Daily Guardian (Jan. 28, 2021), <https://theguardian.com>.

³² Dhairyam Mamtara, LGBT Acceptance and Adoption in India, 4 Indian Journal of Law and Legal Research (2022).

scheduled tribes governed by their customary law, cannot adopt under this legislation.³³

Section 6 of the Act lays down the prerequisites for a valid adoption, emphasizing that the adopting person must have the capacity and the right to adopt. This provision ensures that only individuals who are capable of fulfilling the responsibilities of adoption can proceed with the process.³⁴

Regarding the eligibility for adoption under the Act, Section 7 outlines the capacity of a male Hindu to adopt. It states that any male Hindu who is of sound mind and not a minor has the capacity to adopt a son or daughter. However, if the male Hindu has a living wife, her consent is mandatory for the adoption unless she has renounced the world, ceased to be a Hindu, or been declared of unsound mind by a competent court.³⁵

Similarly, Section 8 outlines the capacity of a female Hindu to adopt, stipulating that any female Hindu who is of sound mind and not a minor is eligible to adopt a son or daughter. However, if she is married and her husband is alive, she cannot adopt a child without his consent, unless the husband has renounced the world, ceased to be a Hindu, or has been declared legally incompetent by a competent court.³⁶

Section 11 further regulates adoption dynamics, prohibiting single parents or married couples from adopting more than one child of the same sex. Further, it mandates an age gap of at least twenty-one years between the adoptive parent and the child in cases of adoption of a daughter by a male or adoption of a son by a female. Furthermore, the child to be adopted must not have completed fifteen years of age as per Section 10, ensuring that adoption occurs at a stage conducive to the child's welfare and development.³⁷

The Hindu Adoption and Maintenance Act, 1956 (HAMA), while intended to regulate adoption within Hindu communities, has inadvertently excluded LGBTQ individuals and couples from its purview. Sections 7 and 8 explicitly refer to "husband" and "wife," implying that only heterosexual couples are eligible to adopt under HAMA. This binary understanding of gender not only overlooks the existence of LGBTQ families but also denies them the fundamental right to adopt.

³³ See Section 2 of the Hindu Adoption and Maintenance Act, 1956

³⁴ **Section 6. Requisites of a valid adoption:** No adoption shall be valid unless

- the person adopting has the capacity, and also the right, to take in adoption;
- the person giving in adoption has the capacity to do so;
- the person adopted is capable of being taken in adoption; and
- the adoption is made in compliance with the other conditions mentioned in this Chapter.

³⁵ **Section 7 Capacity of a male Hindu to take in adoption:** Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption: Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Explanation: If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

³⁶ **Section 8. Capacity of a female Hindu to take in adoption:** Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

³⁷ **Section 10. Persons who may be adopted:** No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:

- he or she is a Hindu;
- he or she has not already been adopted;
- he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
- he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

Furthermore, while HAMA permits single-parent adoption, the legal implications differ significantly. Single parents, including LGBTQ individuals, face unique challenges and legal obligations, often requiring them to navigate complex legal processes and societal biases alone. Further, HAMA fails to address the complexities arising from sex-reassignment surgery, further marginalizing transgender individuals seeking to adopt.

These discriminatory provisions within HAMA pose significant legal impediments for LGBTQ couples and individuals, hindering their ability to pursue adoption and build families.

Juvenile Justice (Care and Protection of Children) Act, 2015

The Juvenile Justice Act of 2015 constitutes a significant piece of legislation addressing adoption practices, particularly concerning the welfare and protection of children. Distinguished by its secular nature, this Act extends adoption opportunities to individuals irrespective of their religious affiliation.

Section 56(3) of the Juvenile Justice Act explicitly exempts adoption procedures governed by the Hindu Adoption and Maintenance Act, 1956, ensuring that both acts operate independently within their respective spheres.³⁸ Moreover, the Juvenile Justice Act facilitates inter-country adoptions, subject to compliance with its provisions and adoption regulations established by the governing authority.

Central to the Juvenile Justice Act is its definition of adoption, emphasizing the permanent transfer of parental rights from biological parents to adoptive parents.³⁹ Adoption under this legislation confers upon the adoptive child all the rights, privileges, and responsibilities inherent to a biological child. Moreover, adoption is restricted to children below the age of 18 years, ensuring their welfare and protection under the law.

The Act primarily focuses on facilitating the adoption of orphaned⁴⁰, abandoned⁴¹, or surrendered children⁴², who must be declared legally free for adoption by the Child Welfare Committee. Further, it provides provisions for the adoption of children by relatives, both within the country and internationally, broadening the scope of adoption possibilities.

Central to the administration of adoption under the Act is the Central Adoption Resource Authority (CARA). Established to oversee both domestic and intercountry adoption processes, CARA functions as the overarching authority, ensuring adherence to regulations and guidelines governing adoption practices

Eligibility criteria for Prospective Adoptive Parents

Section 57, along with the Adoption Regulations of 2022, outlines these qualifications for prospective adoptive parents.⁴³ Prospective adoptive parents must meet several qualifications to be considered eligible to adopt. These are as follows:

³⁸ **Section 56(3)**: Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956).

³⁹ **Section 2(2)** “adoption” means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

⁴⁰ **Section 2(42)** “orphan” means a child, (i) who is without biological or adoptive parents or legal guardian; or (ii) whose legal guardian is not willing to take, or capable of taking care of the child.

⁴¹ **Section 2(1)** “abandoned child” means a child deserted by his biological or adoptive parents or guardians, who has been declared as abandoned by the Committee after due inquiry.

⁴² **Section 2(60)** “surrendered child” means a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee.

⁴³ Adoption Regulations 2022, available at <https://cara.wcd.gov.in/>

- Prospective adoptive parents must be physically fit, financially stable, mentally alert, and deeply committed to providing a child with a nurturing upbringing.
- In the case of a married couple, both spouses must consent to the adoption.
- Single or divorced individuals may also adopt, provided they meet the necessary criteria outlined in the adoption regulations established by the Authority.
- Single males are ineligible to adopt female children.
- Any additional criteria specified in the adoption regulations set forth by the Authority must also be met.

Furthermore, the regulation mandates a minimum two-year stable marital relationship for prospective adoptive parents for the adopted child.⁴⁴ Additionally, individuals with three or more children are deemed ineligible to adopt orphaned, abandoned, or surrendered children, prioritizing the equitable distribution of resources and attention within families.

The eligibility and suitability of prospective adoptive parents are evaluated through a Home Study conducted by the Specialized Adoption Agency (SAA). This comprehensive assessment seeks to ascertain the prospective parents' capacity to provide a loving and supportive environment for the adopted child, thereby safeguarding their well-being and best interests.

While single-parent adoption is permissible under the Act, the regulations surrounding adoption forms and terminology reflect a bias towards heterosexual couples, thereby marginalizing same-sex couples. Further, the absence of explicit provisions for third-gender adoption further perpetuates uncertainty and exclusion within the adoption process.

In summary, the current adoption laws in India, while aiming to safeguard the best interests of the child, often fall short in embracing the diverse familial structures of modern society. The regulations outlined in Section 57 and the Adoption Regulations of 2022 provide a framework for eligibility criteria for prospective adoptive parents. However, the exclusionary nature of certain provisions, particularly regarding LGBTQ+ individuals and couples, highlights the urgent need for reform to ensure inclusivity and equality within the adoption process.

Transitioning from these challenges, it is essential to explore advances in adoption rights for same-sex couples from a global perspective. By examining the progress made in other countries towards inclusive adoption laws, we can gain insights into potential reforms and initiatives that could promote equality and acceptance in India's adoption landscape. Let us delve into how other nations have addressed the rights of same-sex couples in adoption, shedding light on potential pathways for reform and progress in India.

Advances in Adoption Rights for Same-Sex Couples: A Global Perspective

The fight for equality and inclusion in adoption rights for same-sex couples has been a journey marked by significant legal battles and social progress across the globe. From landmark court decisions to legislative reforms, countries around the world have made progress towards recognizing the rights of LGBTQ+ individuals to build families through adoption. Here, we examine the progress made in several countries, highlighting the evolution of same-sex adoption rights on a global scale.

Denmark

In 1989, Denmark became the first country to allow same-sex couples to register as domestic partners,

⁴⁴ **Regulation 5(3):** 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.

marking a significant milestone in LGBTQ+ rights. Building upon this foundation, legislation passed in 2010 granted gay couples in registered partnerships the right to adopt children.⁴⁵ Presently, same-sex couples in Denmark have the opportunity to jointly apply for adoption. Recently, a milestone was reached when a gay male couple became the first LGBTQ couple to adopt an international child, specifically a nine-month-old girl from Africa.⁴⁶

United Kingdom

Initially, legislation in the UK did not afford equal treatment to homosexual couples, as it restricted adoption rights to married couples and individuals seeking to adopt as single parents. However, a significant change occurred with the enactment of the Adoption and Children Act in November 2002. This legislation marked a pivotal moment as it allowed unmarried couples, including same-sex couples, to apply for joint adoption in England and Wales.⁴⁷ Subsequently, the UK government took further steps by making sexual orientation discrimination unlawful through the Equality Act of 2010. Supporters of adoption in Parliament emphasized that this move wasn't solely about "gay rights" but rather aimed at providing stable and loving homes for as many children as possible, rather than leaving them without care.

New Zealand

In New Zealand, a landmark decision by Judge McHardy in the Auckland Central Family Court interpreted the term "spouse" in the Adoption Act of 1955 to include same-sex de facto couples for joint adoption application purposes. This decision was hailed as historic and ground-breaking, laying the groundwork for further progress in adoption rights. Subsequent amendments to the Adoption Act in 2013 reflected changes to the Marriage Act of 1955, allowing same-sex couples to marry and apply jointly to adopt a child.⁴⁸ New Zealand's legal reforms demonstrate a commitment to inclusivity and equality, ensuring that all couples, regardless of sexual orientation, have the opportunity to provide loving and stable homes for children in need.

United States

In the United States, individual liberty has long been a fundamental constitutional value. However, discrimination against same-sex couples persisted for years, denying them the privileges enjoyed by heterosexual couples. The American judicial system played a pivotal role in eradicating such discrimination. In a landmark case, the Supreme Court ruled that the Fourteenth Amendment requires states to license and recognize marriages between two people of the same sex, affirming the right to equality for LGBTQ+ individuals.⁴⁹ Further, court decisions, such as *De Boer v. Snyder*, have paved the way for same-sex adoption rights across all fifty states, challenging discriminatory state laws. These rulings not only legalized same-sex marriage but also paved the way for same-sex adoption nationwide,

⁴⁵ PinkNews Staff Writer, Gay couples in Denmark now allowed to adopt, PinkNews (May 5, 2010), available at <https://www.thepinknews.com>.

⁴⁶ Same-sex Danish couple finalise first overseas adoption, IceNews - Daily News | News in the Nordics (July 30, 2014), available at <https://www.icenews.is/>.

⁴⁷ 2002: Same-sex couples free to adopt with the Adoption and Children Act, (May 22, 2019), available at <https://www.stonewall.org.uk/>

⁴⁸ Stewart Dalley, Adoption Law Change for Same-Sex De Facto Couples, National library of New Zealand Catalog (2016).

⁴⁹ Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

challenging discriminatory laws and societal prejudices.⁵⁰

France

In 2013, the French parliament passed a bill legalizing gay marriage and adoption for same-sex couples. This legislation was signed into law by then French President Francois Hollande, making France the 14th country to grant gay and lesbian couples the right to marry. Despite passing both the National Assembly and the Senate in April, Hollande's signature on the bill was delayed due to a court challenge brought by the conservative opposition party, the Union for a Popular Movement (UMP). However, the bill was ultimately declared constitutional by France's highest court, The Constitutional Council, on May 17, 2013. Hollande and his Socialist Party in both houses of parliament championed the legislation, which not only legalized same-sex marriage but also allowed gay and lesbian couples to adopt children, a provision that sparked outrage among French Catholic leaders.⁵¹

Scotland and Northern Ireland

In Scotland, the Adoption and Children (Scotland) Act of 2007 allowed same-sex couples to adopt children together, signaling a progressive shift towards recognizing diverse family structures.⁵² Similarly, legislative reforms in Northern Ireland in 2013 extended adoption rights to same-sex couples, aligning with evolving societal attitudes and promoting inclusivity in family law across the nation.

Spain

In 2005, Spain made history by becoming the fourth country globally to grant same-sex couples the same rights as married heterosexual couples. A landmark ruling granted married gay couples equal inheritance rights and the ability to adopt children. Further, in the event of divorce, same-sex couples were afforded the same rights as married heterosexual couples.⁵³ Spain's progressive stance on LGBTQ+ rights sets an example for other nations, highlighting the importance of recognizing and protecting the rights of all individuals, regardless of sexual orientation.

Belgium

Belgium is regarded as one of the most liberal countries in terms of LGBTQ+ rights, having decriminalized same-sex marriage in 2003 and legalized same-sex adoption in 2006. However, despite these legal provisions, many obstacles persist. Even eleven years after the legislation granting same-sex couples the right to adopt was passed, the rate of adoptions remains low, indicating ongoing challenges and societal barriers that need to be addressed.⁵⁴

Canada

The LGBTQ community in Canada has endured numerous challenges over the years, prompting significant strides in legal acceptance by the state. Since 1965, when Everett Klippert faced detention for

⁵⁰ 973 F. Supp. 2d 757 (E.D. Mich. 2014)

⁵¹ David Masci, Same-Sex Marriage Around the World, Pew Research Center (Oct. 28, 2019), available at <https://www.pewresearch.org/>

⁵² The Adoption and Children (Scotland) Act, 2007, S. 29.

⁵³ Spain legalises gay marriage, The Guardian (June 30, 2005), available at <https://www.theguardian.com>.

⁵⁴ 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 (2022).

publicly disclosing his homosexuality, Canada has made substantial progress in LGBTQ rights. Today, same-sex marriages are legally recognized nationwide, with the federal government endorsing these unions. The preamble of the Civil Marriage Act of 2005 explicitly acknowledges same-sex marriages, symbolizing a pivotal moment in Canadian history.⁵⁵

Adoption rights for same-sex parents vary across provinces. However, same-sex couples are legally entitled to adopt in Canada. Prior to 1995, joint adoption by same-sex parents was not permitted. Ontario led the way by legalizing adoption by same-sex couples, aligning with the Civil Marriage Act of 2005 to grant them equal parental rights. Subsequently, other provinces, including Alberta, British Columbia, and Nova Scotia, followed suit, ensuring legal adoption rights for same-sex parents.

Despite these advancements, challenges persist, particularly concerning international adoptions. Many countries have yet to legalize adoption by same-sex parents, posing hurdles for Canadian same-sex couples seeking to adopt children from abroad. Nonetheless, Canada's commitment to equality and inclusivity continues to drive progress in LGBTQ rights, fostering a more equitable society for all.⁵⁶

Overall, the global landscape for same-sex adoption rights is evolving, with countries taking diverse approaches to promote equality and inclusivity in family law. As legal frameworks continue to adapt and societal attitudes shift, the fight for equal adoption rights for all couples remains a crucial aspect of the ongoing struggle for LGBTQ+ rights worldwide.

Supreme Court's Verdict: A Setback for LGBTQ Rights

The recent decision by the Supreme Court of India regarding the right of adoption for queer couples has sparked intense debate and conversation across the nation.⁵⁷ Led by Chief Justice of India D Y Chandrachud, a five-judge bench delivered a nuanced judgment on petitions seeking legal recognition for same-sex marriage and related issues.⁵⁸

This judgment, consisting of four opinions, underscores the divergence of perspectives on same-sex adoption. While all opinions acknowledge the importance of queer rights, they provide limited solutions for achieving substantive equality.⁵⁹ Notably, the affirmation that transgender individuals have the right to marry under existing marriage laws is considered a significant but insufficient step toward addressing broader issues of discrimination and exclusion faced by the LGBTQ+ community.

At the crux of the ruling is Regulation 5(3) of CARA, which mandates that a child cannot be placed for adoption with a couple unless they have maintained a stable marital relationship for at least two years, with exceptions for relative or step-parent adoption. The impact of this regulation was further highlighted in 2022 when CARA issued an Office Memorandum, aligning with Regulation 5(3) of the Adoption Regulations, to declare that single prospective adoptive parents in live-in relationships are ineligible to adopt a child. This decision disproportionately affects non-heterosexual couples, as legal recognition of marriage is not extended to them, effectively forcing individuals from the queer community to choose between adoption and partnership.

⁵⁵ Civil Marriage Act (S.C. 2005, c.33), available at <https://laws-lois.justice.ca/>.

⁵⁶ What Are The Legal Rights For Same Sex Parents In Canada?, Prowse Chowne LLP, available at <https://prowsechowne.com/>.

⁵⁷ Supriyo @ Supriya Chakraborty & Anr. vs. Union of India, W.P.(C) No. 1011/2022

⁵⁸ Ashish Tripathi, By 3:2 majority, SC refuses right of adoption to queer couples, (Oct. 18, 2023), available at <https://www.deccanherald.com/>.

⁵⁹ Vineet Bhalla, Explainer: Why the Supreme Court refused to legalise same-sex marriages, (Oct. 18, 2023), available at <https://scroll.in/article>

Chief Justice Chandrachud emphasized the lack of evidence supporting the claim that only married heterosexual couples can provide stability to a child, advocating for pluralistic values enshrined in the Constitution. He also criticized the assumption perpetuated by the regulations that only heterosexuals are fit to be parents, challenging this stereotype as prohibited by Article 15 of the Constitution and advocating for a more inclusive approach to parenting.

Furthermore, as per the Adoption Regulations, unmarried couples are barred from jointly adopting a child. However, the additional criteria outlined in the CARA Circular disproportionately affect non-heterosexual couples, as they are not granted legal recognition of marriage. Consequently, individuals from the queer community are compelled to make a choice between adoption and partnership, further marginalizing them and contravening Article 15 of the Constitution.

The majority opinion emphasized that while the Juvenile Justice Act (JJ Act) and CARA regulations allow adoption by single individuals or married couples, queer couples, not recognized as married couples, are rendered ineligible for adoption under the current regulations. Chief Justice Chandrachud and Justice Sanjay Kishan Kaul deemed certain CARA guidelines unconstitutional.

Chief Justice Chandrachud argued that these regulations are legally flawed, advocating for the right of all unmarried couples, including queer ones, to adopt. He also highlighted the potential plight of adopted children in queer households if the sole adopter were to pass away, leaving them effectively parentless. Despite having another parental figure in the guardian's partner, legal recognition issues could result in the child becoming a ward of the guardian's blood relatives, contradicting the core principle of the JJ Act to prioritize the child's best interests. He urged legislative and executive bodies to amend existing frameworks to prevent discrimination against queer couples in adoption.

Looking ahead, the decision raises crucial questions about the future of adoption rights for queer couples in India. Legislative reforms may be necessary to accommodate changing family structures, ensuring the protection and welfare of children in non-traditional households. Further, addressing social and cultural barriers that hinder LGBTQ+ individuals from fully exercising their rights as parents is crucial, promoting awareness and acceptance of diverse family structures.

The LGBTQ+ community in India now stands at a crossroads, facing disappointment after the recent Supreme Court ruling on same-sex marriage. While acknowledging the progress made in recent years, the community remains resolute in its pursuit of true equality and acceptance. The recent setback serves as a reminder that the journey for equal rights is ongoing, necessitating continued advocacy, education, and awareness until every individual in the country can live and love freely.

A Message of Resilience: The Unyielding Fight Continues

The recent Supreme Court verdict in India, refusing to legalize same-sex marriages, has sparked renewed conversations about equality and recognition for the LGBTQ+ community. While the ruling represents a setback, it also serves as a catalyst for resilience and determination within the community. Despite the disappointment, activists and individuals are committed to continuing the fight for equality, as evidenced by their unwavering resolve in the face of adversity.⁶⁰

The gesture of resistance exemplifies the enduring spirit of the LGBTQ+ community, underscoring their refusal to accept discrimination and marginalization. It serves as a powerful reminder that the fight for LGBTQ+ rights is far from over and that love, resilience, and solidarity will prevail despite the challenges

⁶⁰ Asmita Pant, Deeply shattered and disappointed: LGBTQ community reacts to Supreme Court's verdict on same-sex marriage, (Oct. 21, 2023), available at, <https://www.cnbtv18.com>.

ahead. The message of resilience echoed by activists and individuals alike reaffirms the community's unwavering commitment to continue pushing for meaningful change and recognition, not only in the realm of marriage equality but also in broader efforts to combat discrimination and promote inclusion. As the journey towards full equality and acceptance continues, the LGBTQ+ community remains dedicated in their unyielding determination to create a more just and equitable society for all.

Moving forward, the path toward full equality may be complex, but the resolve of advocates remains resolute. The Supreme Court's decision underscores the urgent need for legislative clarity and comprehensive anti-discrimination measures to ensure the protection and recognition of LGBTQ+ rights in India. As the struggle for equality persists, there is hope for a future where love knows no bounds, and all relationships are celebrated and protected, reflecting the values of justice and dignity for all individuals, regardless of sexual orientation or gender identity.