



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Case for Allowing Adoption for Same-Sex Couples

Samriddhi Mishra^a

^aNational Law University, Odisha, India

Received 19 June 2023; Accepted 14 July 2023; Published 17 July 2023

In India same-sex couples are still not allowed to adopt. They face many barriers from law to social stigma. India has a large population of orphans that require care. Even though there is no conclusive proof that same-sex couples cannot be good parents and several studies suggest that same-sex couples are as good as any other parents, they are still not allowed to adopt in India. The notion that same-sex couples do not form a normal family and cannot provide a stable family is based on assumptions without backing evidence. There is a need for acceptance that same-sex couples can become a loving family for children and a family defined by traditional gender roles is not the only type of acceptable family. There is a need for reform in the legislature and social thinking of what constitutes a family. This article argues that if same-sex couples can provide the necessities to a child then their sexual orientation should not be enough grounds to deny them this right.

Keywords: *same-sex couple, adoption, lgbtq.*

INTRODUCTION

“Mankind owes to the child the best it has to give.”

Children are the future of this world and their elders have a responsibility of providing them with the best life possible. The child should have access to the best education and a healthy, safe, and secure environment for its best well-rounded development. It is important that as a team we ensure that children have the best possible mental, physical, and emotional development.

Parents are responsible for ensuring they provide their children with the best possible resources. Unfortunately, some children have to grow up in the absence of their parents. These children are subjected to fate without the warmth of a family. Adoption is a ray of hope in the life of these children to grow up in a family of which they are part where they are cared for and where they feel they can belong. The state has a responsibility toward these children to find them the best prospective parents who can care for them and can ensure that the child is raised in a safe environment.

The Supreme Court has held that “Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family.”¹ In case the child is unable to grow in his own family then, “next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents.”² Thus a child has a right to a loving family. Adoption is a way to fill the void of the family for children who are denied that because of some reason. The adoption process should be guided by the best interests of children. Can we say that the best adoptive parents for children are only a mother and a father? Is family defined by gender roles the best option for the child? The author believes the answer is no.

In a recent case, a same-sex couple approached the supreme court to allow them to adopt a child. Same-sex couples can still not adopt in India. Everybody can have a different set of morality and principles but can those different principles be argued to deny someone’s right? It is time that same-sex couples are allowed to adopt in India.

WORRYING CONDITION OF ORPHANS IN INDIA

India has more than 30 million orphaned and abandoned children or over 4% of the country's young. Numbers only increased after the pandemic.³ The fact that less than 5,00,000 of the 30 million children without a legal guardian or caretaker were in institutionalized care is even more

¹ *Laxmi Kant Pandey v Union of India* (1987) AIR 232

² *Ibid*

³ David Keenan, ‘THE SITUATION OF ORPHANS IN INDIA’ (*The Borgen Project*, 13 March 2023)

<<https://borgenproject.org/orphans-in-india/>> accessed 13 June 2023

concerning.⁴ In India, the number of orphan children up for adoption is already a minute percentage of the children that need care and even the children up for adoption are adopted in very low numbers. As per Central Adoption Resource Authority in 2021-2022 (April 21 to March 22), 299 intra-country adoptions took place and 414 inter-country adoptions took place. The number of adoption is constantly low than 5000.⁵ These numbers are very low for a country that has such a large population of orphans. This condition of orphans is very worrying and urgent steps need to be taken to increase adoption and provide more care to these children.

ADOPTION LAW IN INDIA

The legislation that guides adoption in India is the Hindu Adoption and Maintenance Act 1956 (HAMA), the Adoption Regulation Act 2017 and the Juvenile Justice (Care and Protection of Children) Act, 2015. HAMA governs adoption by Hindus, Buddhists, Jain and Sikhs. It uses gender-specific language with the terms ‘husband’ and ‘wife’ and allows single individuals to adopt. Adoption Regulations 2017 is similar to HAMA, unmarried men and women can provide necessities to adopt. Women can adopt a child of any gender but men cannot adopt a girl child. Section 57 of the JJ Act outlines the suitability of Prospective Adoptive Parents (often known as PAPs). According to one of the laws, “no child shall be placed in adoption to a couple unless they have had at least two years of a solid marital relationship.” Since same-sex marriages are prohibited in India, same-sex couples cannot form a two-year stable marital relationship and are therefore unable to serve as PAPs.⁶ The law as of now does not recognize same-sex marriage and adoption rights of homosexuals as a couple.

ARGUMENTS AGAINST ADOPTION BY SAME-SEX COUPLES

The National Commission for Protection of Child Rights (NCPCR) opposes adoption by gay couples and submitted an intervention application to Supreme Court, claiming that doing so

⁴ *Ibid*

⁵ ‘Adoption Statistics’ (Central Adoption Resource Authority Ministry of Women & Child Development Government of India) <https://cara.nic.in/resource/adoption_Statistics.html> accessed 13 June 2023

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

would be 'akin to endangering children' and that adoption by same-sex couples is 'premature' at this point in India.⁷

According to the application, allowing same-sex couples to raise children while they are having issues that would be equivalent to exposing the children to the struggle just for experimentation, and doing so is not in the interest of children since they have a right to a secure upbringing. Adoption takes place in a similar socio-cultural environment which is not possible in the scenario of homosexual couples, according to the NCPCR's application. The NCPCR argues in the intervention application that the petition filed in *Amburi Roy vs Union of India* (which has been listed and will be heard concurrently with the marriage equality petitions) asking for the declaration of a few provisions of the Adoption Regulations 2022 as against constitution has and not connected to the matter being considered by the Constitution Bench, namely the recognition of marriage equality.⁸

By Regulation 5(2)(c), a single man is not permitted to adopt a female kid.⁹ Regulation 5(3) stipulates that only a couple with at least two years of stable marriage may adopt a child except adoptions by relatives or stepparents.¹⁰ NCPCR also argued that international conventions do not mandate adoption by same-sex couples. The body argued that legislation as present in India does not allow same-sex couples to adopt. In addition to highlighting limitations in law, NCPCR argued that laws in India are not framed to be inclusive of the LGBTQ community.¹¹

The NCPCR maintained that a child's development depends on having two biologically married parents. The stance that there is no difference between homosexual and heterosexual parents when it comes to parenting is incorrect. A study was referred by the NCPCR for this. NCPCR also argued that children adopted by the same-sex couple will be at higher risk of sexually transmitted diseases as they are transmitted by body fluids that also includes saliva. Another

⁷ Gursimaran Kaur Bakshi, 'National and Delhi Commissions for Protection of Child Rights on opposing sides on adoption by same-sex couples' (*Leaflet*, 17 April 2023) <<https://theleaflet.in/national-and-delhi-commissions-for-protection-of-child-rights-on-opposing-sides-on-adoption-by-same-sex-couples/>> accessed 13 June 2023

⁸ *Ibid*

⁹ Adoption Regulations 2017, s 5(2)(c)

¹⁰ Adoption Regulations 2017, s 5(3)

¹¹ Gursimaran Kaur Bakshi (n 7)

defense offered by the NCPCR was that a kid with same-sex parents will not be introduced to a lot of gender roles.¹²

REBUTTING THE ARGUMENTS

Among all the arguments raised above it is true that the current legislative framework is not designed in a manner that allows adoption by same-sex couples but, the petitioner approached the court because the current laws were insufficient. The current law is not adequate for addressing many problems faced by the LGBTQ community and the law should be reformed to address those problems. Just because the law right now doesn't allow adoption doesn't mean it shouldn't. there is a pressing need for reform in the current adoption that will not only allow same-sex couples to adopt but will make the adoption process less difficult and more efficient in general. The lack of framework should be a reason for re-examination with changing times and the introduction of a new framework and not the denial of the basic right to individuals.

The second position is that adoption takes place in similar socio-cultural environments and is not possible in scenario of homosexual couples which is also a biased argument towards the LGBTQ community. What constitutes a 'socio-cultural' environment is an important question, if a child from a poor background is adopted by a rich parent or a child is adopted by a person from of different state or even cases in which Indian children are adopted by people of different nationalities, do these scenario does not constitute a change of 'socio-cultural' environment. Is merely because the child will know a community while growing up a reason enough to deny someone one's right?

The third argument by NCPCR that two biologically married parents are essential for a child is also opposed by various studies that show that children raised by same-sex parents are not inferior to children raised by different-sex parents in any significant respect. The two studies cited by NCPCR are by the same person, the studies cited by the NCPCR conducted by Dr. Sullius were debunked.¹³ The person conducting the study is accused of pseudo-science, being

¹² *Ibid*

¹³ Emma Green, 'Using 'Pseudoscience' to Undermine Same-Sex Parents' (*The Atlantic*, 19 February 2015) <<https://www.theatlantic.com/politics/archive/2015/02/using-pseudoscience-to-undermine-same-sex-parents/385604/>> accessed 13 June 2023

a homophobe and joining an LGBTQ hate group.¹⁴ The credibility of these studies is under question. NCPRC chose to ignore the number of studies that show that children suffer no harm when raised by same-sex parents.

The argument that children can face social stigma is not the fault of the individuals trying to adopt. Children are not responsible for prejudices of the society. The children should not be denied a right to a better future and loving family because of the perceptions of society. Our work should be working for acceptance and not marginalization. Because society is not accepting of same-sex marriage and adoption by same-sex parents, humans should not be denied their rights. This is a violation of the fundamental rights of these individuals. This treatment of these individuals violates Articles 14¹⁵, 15¹⁶ and 21¹⁷. They are discriminated against based on their gender, discriminated against before the law and not allowed to live a life of dignity when they are denied the right that is granted to heterosexual couples.

Another argument that children will not be exposed to traditional gender roles is also an exaggeration. The children will not live in a bubble where the only people they will see are their parents. As the adage goes it takes a village to raise a child, our perception of gender roles is not formed only by our parents but the general society, our other relatives, the media and popular culture. Contrary to the position taken by NCPRC the author believes this will give the child a new perspective on gender and will make her understand that it is not a well-defined binary. It is not like the children raised by lesbians will have no male figure in their life and children raised by gays will have no female figure in their life. Traditional gender roles are often harmful to children forcing them to fit a particular mould and the lack of restriction of gender roles allows the better development of a child with the child being more accepting of her gender and emotional expression without trying to fit into a particular gender roles.

¹⁴ 'Anti-LGBT researcher who pushes Harmful Pseudoscience joins Anti-LGBT hate Group' (*SLPC Center*, 15 May 2018) <<https://www.splcenter.org/hatewatch/2018/05/15/anti-lgbt-researcher-who-pushes-harmful-pseudoscience-joins-anti-lgbt-hate-group>> accessed 07 July 2023

¹⁵ Constitution of India 1950, art 14

¹⁶ Constitution of India 1950, art 15

¹⁷ Constitution of India 1950, art 21

A CASE FOR SAME-SEX-COUPLE ADOPTION

Several studies show that there is no difference between children raised by same-sex couples and other parents.¹⁸¹⁹²⁰ Even DCPCR cited various studies in which children of same-sex parent's outperformed different-sex parents. The Indian Psychiatric Association also submitted there is no evidence.²² The studies also show that same-sex couples are more likely to adopt children than go for any other ways like surrogacy or artificial reproductive technologies.²³ The studies also show that homosexual couples are more likely to adopt 'hard-to-place children'.²⁴ Maybe because they know what it is like not to be accepted or the struggle for safe space they more than other couples seek to create space for those who need it more.

The child will have access to all resources that any other child has. The child will have a family and a support system. The criteria for choosing prospective parents should be 'best interests of the child'. to let our homophobia and societal prejudices take away a child's future from her is harmful to the children involved. If the same-sex can parent can provide every necessity a child needs then they should not be denied that based on their sexual orientation. A family can be made of two mothers, two fathers, a single mother or a single father. The chase for the traditional

¹⁸ Helena Campos Refosco and Martha Maria Guida Fernandes, 'Same-Sex Parents and Their Children: Brazilian Case Law and Insights from Psychoanalysis' (2017) 23(2) William & Mary Journal of Race, Gender, and Social Justice <<https://scholarship.law.wm.edu/wmjowl/vol23/iss2/2>> accessed 16 June 2023

¹⁹ Deni Mazrekaj et al., 'School Outcomes of Children Raised by Same-Sex Parents: Evidence from Administrative Panel Data' (2020) 85(5) American Sociological Review <<https://doi.org/10.1177/0003122420957249>> accessed 16 June 2023

²⁰ Shelly Sebens, 'No difference in kids with same-sex, opposite-sex parents –study' (Reuters, 24 June 2015)<<https://www.reuters.com/article/usa-gaymarriage-study-idUSL1N0Z91OO20150623>> accessed 16 June 2023

²¹ Henny M. W. Bod et al., 'Same-sex and different-sex parent households and child health outcomes: Findings from the National Survey of Children's Health' (2016) 37(3) Journal of Developmental & Behavioral Pediatrics <https://journals.lww.com/jrnldb/Abstract/2016/04000/Same_Sex_and_Different_Sex_Parent_Households_and.1.aspx> accessed 16 June 2023

²² 'Psychiatrists back LGBTQA marriage & adoption rights' (The Times of India, 10 April 2023) <<https://timesofindia.indiatimes.com/india/psychiatrists-back-lgbtqa-marriage-adoption-rights/articleshow/99363478.cms?from=mdr>> accessed 16 June 2023

²³ 'Same-sex parents are 7 times more likely to raise adopted and foster children' (School of Law UCLA Williams Institute, 27 October 2020) <<https://williamsinstitute.law.ucla.edu/press/lgbt-parenting-media-alert/>> accessed 16 June 2023

²⁴ Mary O' Hara, 'The LGBT couples adopting 'hard to place' children' (The Guardian, 04 March 2015) <<https://www.theguardian.com/social-care-network/2015/mar/04/the-lgbt-couples-adopting-hard-to-place-children>> accessed 16 June 2023

notion of the family will leave out so many families who are as loving as a family consisting of a mother and a father.

Whether same-sex couples should be allowed to adopt in India depends on the answer to the question that- whether it is in 'the best interest of the child'. If same-sex couples are allowed to adopt it should be ascertained they are the best substitute for biological parents. The couple should be able to provide the necessities to a child like food, education and an environment that allows the best overall development of the child. These guidelines that apply to heterosexual adoptive parents should also apply to homosexual couples. If the same-sex couple can care for the child and want to provide them with an alternative family they should be allowed to adopt them. Only the sexual orientation of the couple should not be treated as a ground to deny them the right to adoption. This denial of the right to adoption is not only discriminatory towards the members of the LGBTQ family but a more harsh denial of the rights of the child who has every right to grow up in a family that will love her and provide for her.

BARRIERS AGAINST THE ADOPTION BY SAME-SEX COUPLES

There are several barriers that the LGBTQ community faces in their attempt to adopt:

1. There are no legal provisions that allow for adoption by same-sex couples. All provisions that allow couples to adopt are a gendered language that allows only couples who are in a marital relationship to adopt. The law also permits adoption by a single person but not by homosexual couples. The law does not recognize same-sex marriage as a result they are not treated as a couple and cannot have joint custody of the child. The recognition of same-sex marriage is also instrumental in giving them joint rights over children. Legislation needs amendment to allow for adoption by same-sex parents.
2. In addition to law social stigma and homophobia is a major factor against allowing adoption by same-sex couples. India still has a long way to go in treating homosexuals equally to other individuals and giving them an equal amount of rights and protection by law. Even after when homosexuality was decriminalized by the Supreme Court by in 2018, LGBTQ continues to face discrimination by law. The law still does not recognize their right to marry their partner.

The thinking that children require both mother and father, defined roles of mother and father, and the perception that same-sex couples cannot provide stable homes all contribute to social stigma towards adoption by same-sex couples. The social stigma a child can face is also pointed out as a concern.

3. There is still a major section of Indian society that is not ready to accept that same-sex couples can form a stable family. The inability to accept LGBTQ families as normal families is one of the major reasons that same-sex couples are not thought of as suitable families by government agencies. Even though these couples are capable of providing for and taking care of the child they want merely because of their sexual orientation they are considered a bad influence on children and not suitable enough to raise them,

The notion of children as a result of marriage and the notion of marriage as a heterosexual institution all acts as a barrier to adoption by same-sex couples. We still consider a man his wife and their children as a normal and acceptable family unit. The traditional gender roles still define what we consider family.

CONCLUSION

It is high time that the law allows same-sex couples to adopt. We owe this right more to children than we do to couples seeking to adopt them. The children should not be devoid of home because of the homophobia prevalent in Indian society. The guideline laid down by the supreme court and the laws in India do not explicitly discriminate based on sexual orientation but same-sex couples cannot adopt a child as their parents. While adoption authorities have to consider the child's best interests, prospective adoptive parents should be able to provide children with necessities like education, food and a nurturing environment. If these necessities can be provided by same-sex couples they should not be discriminated against only based on their sexual orientation. A child raised by a homosexual couple is also raised in the family. All the arguments that argue along the lines that a child should be brought up by adoptive parents are the next best substitute for its biological parents and argue that a family that has a same-sex couple as a parent is not the best substitute for biological parents fail to give any reasonable justification for the environment. There are no conclusive studies that show that children raised

by same-sex parents are somehow inferior to children raised by different-sex parents in any significant respect. As per the author denial of the adoption right to same-sex couples is based on the assumption that same-sex parents do not constitute a normal family or cannot raise children. It is often based on false information or in worse cases it is an echo of homophobia in the minds of people. India should spoon allow the adoption by same-sex couples and give them joint custody of children. The parliament should introduce legislation containing a framework for adoption by same-sex couples or introduce amendments in the current law that can allow the adoption by same-sex couples.

Some parents want a child and some children are in desperate need of parents. We as a society and state have a responsibility should think of the best for children. We should have no right to deny these children a better life.