

**WHY ADOPTION RIGHTS ARE NOT PROVIDED TO SAME-SEX
COUPLE: UNRAVELLING THE SOCIAL STIGMA AND LEGAL
IMPEDIMENTS IN INDIA**

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ABSTRACT

Despite the claims of India being a diverse country and Indians preaching “Unity in Diversity”, the meaning of the term “diversity” is often misinterpreted and is forgotten that it is actually exhaustive. Oxford dictionary defines this term ‘diversity’: “The practice or quality of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc.” this means extending the same treatment to people of LGBTQ+ community, whether in right to equality or in right to adoption.

*Adoption in India is mainly governed under Juvenile Justice Act of 2015, Adoption Regulations of 2017, and the guidelines framed by Central Adoption Resource Authority. But societal notions around adoption have grown to deny these rights to same-sex couples by taking support of various arguments, which the authors explain and refute **in Part I** of the paper. After establishing support for adoption rights to homosexual couples, **in Part II**, the authors explore the legal framework which has been (mis)interpreted by the SC in **Supriya** judgement to deny such rights and has been the main reason of firing up the debate related to this topic. The authors try to read various legislations in a way to establish that laws in fact, do not explicitly take away such rights from people of LGBTQ+ community. Moving on **to Part III** of the paper, the authors try to establish justifications for these rights by drawing support from international humanitarian law and theories of renowned jurists like Dworkin and Fuller.*

*After all this, the authors try to put forth certain recommendations to make laws inclusive so that even after progressive steps like **Navtej Singh Johar** and decriminalization of section 377 of IPC, judgements like **Supriyo** do not continue to curtail the rights of homosexuals and keep them out of the realm of Indian society.*

Keywords: LGBTQ+, adoption rights, family, marriage, Juvenile Justice Act of 2015

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INTRODUCTION

‘Family’ is constituted when relations of marriage, blood or adoption unite a group of persons, who constitute a separate household, and interact as per their social status. Even though decriminalization of Sec 377 of IPC was heralded as a breakthrough, India has not been able to accept the concept of homosexuality, let alone providing the members of LGBTQ+ community with rights of forming a family through marriage and adoption. The stigma related to “same-sex love” is so deep rooted that it defies all human rights. Despite a very progressive step undertaken in the case of *Navtej Johar* by stating that, “*Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity,*”¹ fundamental rights of homosexuals are violated on a daily basis, and a fight for acceptance in the society is a move in progress.²

This fight often pertains to rights of people of LGBTQ+ community to get married and adopt a child. Now because the first right has not been granted, homosexuals, as a live-in couple, are also barred from adopting a child, by using varied interpretations of law. These interpretations are flawed, and impinge upon the fundamental rights, and the inherent inviolable rights of these couples.

Therefore, an attempt has been made today to deconstruct the beliefs shaping the opposition, and to analyse the various laws governing adoption again, so as to re-open the chapter of rights of LGBTQ+ community again which was closed in 2018 and then opened in 2023 only to be burned down. “Since marriage-based families have been the foundation of the social order that is conditioned to discard the idea of same-sex couples’ right to found a family, a need has arisen to dismantle these ideal expectations, and prove, that parenting is not related to sexual orientations of the parents.”

PART I - DECONSTRUCTING THE MISCONCEIVED NOTIONS

There is a plethora of arguments advanced to deny the adoption rights to same-sex couples and these include, providing them religious backing, hiding behind the curtain of child

¹ Navtej Singh Johar v. Union of India [(2018) 10 SCC 1].

² Rhythm Kalra, “How Far Are We From Granting Adoption Rights for Same-sex Couples in India”, *Law octopus* Aug. 13, 2021, available at: https://www.lawctopus.com/academike/adoption-rights-for-same-sex-couples/#_ftn2.

development which is contended to be determined by parents' sexual identity, or arguing that families of homosexuals are not stable and hence, not suitable to raise a child. However, such reasons have been deconstructed over the years through research and studies.

a. Religious Beliefs shaping the resistance

Religious beliefs are prime factors shaping public acceptance of concepts related to same-sex couples, such as marriage and adoption. The most ardent opposition to adoption by gay and lesbian parents comes from those who are more religious, or fundamentally conservative.³ According to conservative Christians, homosexuality is a chosen deviance from the natural order prescribed by God, and that such acts are condemned by the Bible. This leads to a belief that granting same adoption rights to homosexual couples would endanger the society and the beliefs on which it is established. A fear persists that children growing up with lesbian or gay parents will turn out to be homosexuals themselves, degrading family structures.

These beliefs have been deconstructed by various reports and studies. The "*American Civil Liberties Union*" undertook research that emphasized no evidence recommending that the LGBTQ+ community is less fit than heterosexual parents to raise a child, and that parenting is solely determined by the ability of the parents in question to take good care of the child in consideration.⁴ Another study confirmed that a child's sexual orientation is not determined by the sexual identity of the same-sex parents.⁵ On the contrary, it has been clarified that children nurtured in such families are likely to fight more passionately for the grant of equal rights to all, helping to make a difference.⁶

³ Samuel L. Perry & Andrew L. Whitehead, "Religion and public opinion toward same-sex relations, marriage, and adoption: Does the type of practice matter?" 55(3) *JSSR*, 637-651 (2016), available at:

https://www.jstor.org/stable/pdf/26651601.pdf?refreqid=fastly-default%3A8b3ad3d74deea6162557391b5aeb4467&ab_segments=&origin=&initiator=&acceptTC=1.

⁴ Marina Everri, "The Psychology of Children with Same-sex parents", *LSE* Nov. 28, 2016, available at: <https://blogs.lse.ac.uk/psychologylse/2016/11/28/the-psychology-of-children-with-same-sex-parents/>; Aditi Aggarwal, "Religious Beliefs about adoption by LGBT Couples", *Ipleaders* Sept. 22, 2021, available at:

https://blog.ipleaders.in/religious-beliefs-about-adoption-by-lgbt-couples/#Religious_anatomy_regarding_adoption_by_LGBT_couple_

⁵ *Ibid.*

⁶ Lytle, M.C., Foley, P.F. & Aster, A.M, "Adult children of gay and lesbian parents: Religion and the parent-child relationship", 41(4) *TCP* 530-567 (2013); Goldberg, A.E., "(How) does it make a difference? Perspectives of adults with lesbian, gay, and bisexual parents" 77(4) *AJO* 550-562 (2007); *supra* note 4.

b. Sexual Orientation of Parents doesn't determine Development of Child

An argument that resurfaces to deny adoption rights to same-sex couples is that child development, and in turn the child's relationships are influenced by parents' sexual orientation. Thus, it argues that for the overall healthy growth of a child, he/she must be raised by parents of each gender: male and female.⁷ This transforms into the “*best interest of the child*” argument. As per the definition in JuvJus Act, “*best interest of child means that the basis for any decision taken regarding the child should be to ensure fulfillment of his basic rights and needs, identity, social well-being, and physical, emotional and intellectual development.*”⁸ Moreover, Article 3 of the CoRoC provides that “*best interests of the child shall be a primary consideration in all actions concerning children.*”⁹

NCPChR pleaded before the SC that such adoption is highly violative of the welfare and interests of the children.¹⁰ It is based on the premise that children with parents of the same gender belong to an “*inferior family*” and face psychological impacts on their minds due to the absence of either gender as a parent.¹¹ It went on to the extent of stating that giving children in adoption to same-sex couples would be equivalent to putting their lives in danger; their personality development would be hindered as there would be no proper exposure to traditional gender roles.¹² The reasoning put forth reflects a patriarchal mind set advocated throughout Indian society which considers that certain established gender roles have to be taken up by men or women: men have been handed down the script that perfectly describes the ‘*masculine traits*’ and the ‘*feminine traits*’ and this script conditions them to reject the feminine. The imposition of the requirement that the adopting parents need to be a heterosexual couple is a tool to keep the script going on from one generation to another. This notion persists as the patriarchal nature is deeply established in all pockets of the world not allowing research to be undertaken on the development of adopted children of homosexual

⁷ Patterson, C.J., “Children of lesbian and gay parents”, 63(5) *CD*.1025-1042 (1992), available at: <https://www.jstor.org/stable/20183123>; Lakshmisusheela Ramchandran, Adoption Rights of Same-Sex Couples in India, Law Essentials (Apr. 3, 2022), <https://lawessential.com/miscellaneous/f/adoption-rights-of-same-sex-couples-in-india?blogcategory=Miscellaneous>.

⁸ Juvenile Justice (Care and Protection of Children) Act, S. 2(9) (2015).

⁹ Convention on the Rights of the Child, 1989, art. 3, available at: <https://www.refworld.org/legal/agreements/unga/1989/en/18815> [accessed 24 March 2024]; SAVITRI GOONESEKERE, CHILDREN, LAW AND JUSTICE: A SOUTH ASIAN PERSPECTIVE (1st edn. 1997); Shubhangi Komal, “Child Marriage: Barring the Rights of Child Bride” 9 SCC OnLine CNLU LJ 70 (2020).

¹⁰ Amit Anand Choudhary, “Adoption by same-sex couple should not be allowed: NCPChR to SC” *The Times of India*, Apr. 18, 2023, available at: <https://timesofindia.indiatimes.com/india/adoption-by-same-sex-couple-should-not-be-allowed-ncpcr-to-sc/articleshow/99567635.cms>.

¹¹ *Supra* note 7.

¹² *Supra* note 11.

couples: only analysis of heterosexual married couples has been ever talked about, strengthening what the world already knows about the gender roles. All of this culminates in the misrepresentation of the research conducted.¹³

However, assumptions and arguments advocating for such best interest are deconstructed by studies: an article by *American Psychologist* in 1999 contended that gender is not the scale to test successful parenting and there is no need for mothers or fathers either, for the development of children, and that any gender configuration could be successful parents. This threatened the patriarchal understanding of many societies which could not digest the finding that the position of fathers in a family had become expendable.¹⁴ Whatever research has been conducted considering scenarios when two females parent or when two males parent, does not support the conjecture that a child needs a mother and a father to grow and two mothers or two fathers could endanger their lives. “*Lamb’s Authoritative Analogy*” concludes that “*very little about parent’s gender seems to be distinctly important.*”¹⁵ Even the studies in 2015-17 conclude that children nurtured by same-sex couples tend to adopt a flexible perspective of the assigned gender roles, and fare just well in terms of social relations.¹⁶ To do justice to the scientific evidence gathered, it would be logical to say that, “*compared to all other family forms, families headed by (at least) two committed, compatible parents are generally best for children*”.¹⁷

PART II - LEGAL ANALYSIS AND DRAWING SUPPORT FROM OUR LAWS

In the recent case of *Supriyo vs. Union of India*, the issue of adoption rights for same-sex couples was dealt with, recognizing the various disadvantages suffered by the queer community, denying articulation of the said disadvantages as constitutional and legal violations, and providing substantial relief. This judgement followed when the apex court

¹³ Biblarz, T.J. & Stacey, J, “How does the gender of parents matter?” 72(1) *JMF* 3-22 (2010), Available at: <https://www.jstor.org/stable/27752550>.

¹⁴ *Ibid.*

¹⁵ Cobb, L.A., “Fatherneed: why father care is as essential as mother care for your child” 50(2) *FR* 196 (2001); *supra* note 14.

¹⁶ Fedewa, A. L., Black, W. W., & Ahn, S, “Children and adolescents with same-gender parents: A meta-analytic approach in assessing outcomes” 11(1) *JGLBTFS* 1-34 (2015); Farr, R. H., Forsell, S. L., & Patterson, C. J., “Parenting and child development in adoptive families: Does parental sexual orientation matter?” 21(2) *ADS* 86-94 (2017).

¹⁷ *Supra* note 13.

refused to grant legal acceptance for marriages among non-heterosexual couples.¹⁸ In the 21st century when advocacy for the LGBTQ+ Community's rights is increasing, the current adoption legislation worded to exclude same-sex couples from their ambit, fall short in various aspects:

a. Regulation 5(3): beyond the Scope of JuvJus Act.

Section 3 of the JuvJus Act provides the basic tenets for the administration of the Act.¹⁹ It comprises the overall objective of “*the best interest*” of the children and facilitating their growth,²⁰ and the eligibility factor given in Section 57 furthers the same. Additionally, the need for consent of “*both the spouses*” ensures that the child gets the consideration and care of the two spouses, and is not given to such adoptive parents where either one doesn't want the role of parenting. Furthermore, the condition disallowing the adoption of a female child to a “*single male*” is in the interest of the State to protect her from “*child sexual abuse*”. Thus it can be concluded that the condition provided under Section 57 by the State has been to enhance the well-being of the child. Section 57(2) doesn't mandate that only partners in a marriage are permitted to adopt. It only stipulates that if there is a couple in a married alliance, then the willingness of both partners to adopt must be there. This clarifies that for adoption, marriage is not a statutory restriction. Regulation 5(2) stipulates that all individuals, married or not are allowed to adopt. The condition in clause (a) providing that in case of a married couple in question, the consent of both is necessary, doesn't in essence mandate marriage for adoption: it emphasizes the same as Section 57(2).

Nevertheless, Regulation 5(3) prevents couples out of marriage from adopting. They allow individuals to adopt singularly and not together as a couple due to the requirement of a “*stable marital relationship*” of 2 years for couples.²¹ Although Section 57 bestows the authority to provide for additional stipulations to CAREAu, the said considerations should not go beyond the ambit of “*legislative policy*”. All the general provisions and Section 57 of the Act have the “*best interest of the child*” at the core and don't necessarily prevent unmarried partners from adoption as the same cannot be conclusively proved to be against the “best interest of the children” (**Part I**). Thus CAREAu can be said to have gone beyond the ambit

¹⁸ Supriyo vs. Union of India, W.P.(C) No. 1011/2022.

¹⁹ Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 02 of 2016), s. 3.

²⁰ Gaurav Jain v. Union of India [(1997) 8 SCC 114]; Karan v. State of M.P. [(2023) 5 SCC 504]; Barun Chandra Thakur v. Bholu [2022 SCC OnLine SC 870]; Shilpa Mittal v. State (NCT of Delhi) [(2020) 2 SCC 787].

²¹ *Ibid*; Adoption Regulations, 2022, Reg. 5(3).

of its power by providing for an added stipulation by Regulation 5(3), which is not in confluence with the objective of Section 57.

Moreover, in line with this, it has to be realized that the “*best interest of the child*” cannot stand in clinical isolation from other human rights, and hence the ruling of *South Africa’s Const. Court* denying unmarried same-sex couples to adopt jointly just because of their sexual orientation when they are otherwise perfectly suitable to do so, runs contrary to the child’s best interest and parents’ dignity,²² defeats the claim that adopted children’s best interest is not fulfilled with same-sex parents.²³

b. Regulation 5(3): Contravening Article 14.

Regulation 5(3) has categorised couples into unmarried and married partners for matters concerning adoption. Article 14 provides for reasonable classification when:

- The categorisation is based on “*intelligible differentia*” differentiating the individuals of one category, from the ones left out; and
- The differentia possesses “*a rational nexus*” to the intention aimed to be undertaken.²⁴

The AdReg has applied marriage as a benchmark to categorise couples. There exists an “*intelligible differentia*” as it distinguishes married couples from unmarried ones easily. Nevertheless, the differentia doesn’t possess “*a rational nexus*” with the motive aimed to be achieved by the Regulations of CAREAu: preserve the interests of the children. This is due to the inclusion of the word “*stable*” in Regulation 5(3) which doesn’t have a clear implication.²⁵ Getting the child adopted into a stable home is certainly in furtherance of the child’s well-being, but it’s not clear if the Regulation provides for a legal fiction that mandates all married couples to be in that relationship for 2 years to make a stable relationship, or if there exist certain conditions apart from those provided in Regulation 5(1) (which is concerning “*the mental, emotional and physical development of the children*”) to categorize a married relationship as a “*stable relationship*”.²⁶ To support that this differentia

²² Du Tiot and Another v. Minister of Welfare and Population Development and Others [(CCT40/01) [2002] ZACC 20].

²³ Swagata Raha, “Why LGBTQIA+ couples should be allowed to adopt?”, *TIE*, Apr. 20, 2023 09:28 AM), available at: <https://indianexpress.com/article/opinion/columns/why-lgbtqia-couples-should-be-allowed-to-adopt-8565664/>.

²⁴ The Constitution of India, art. 14.

²⁵ Supriyo vs. Union of India, W.P.(C) No. 1011/2022.

²⁶ *Supra* note 21, reg. 5(1).

has no nexus to the aim of the JuvJus Act, there exists no data or figures to back the claim that stability can only be achieved in marital relationships. It cannot be accepted that marriage provides stability because it is regulated by law. This stability relies on numerous indices: household efforts, the creation of a safe home, a good work-life balance, and a home wherein mental or physical trauma is not inflicted upon the family members.²⁷ There is no “single form” of a stable home. Hence, this additional qualification of “*stable relationship*” renders the differentia not intelligible.

Moreover, under Section 58(2), a “*Specialised Adoption Agency*” formulates a “*home study report*” of the “*prospective adoptive parents*” (PAPs), who if deemed capable, are accorded a child. Further, as per Section 58(5), the welfare and development of the child shall be accounted for post-adoption by assessing PAPs and their ability to tend to a child, and any sections of concern attached to the same.²⁸ This extends to heterosexual and homosexual partners the same. The assessment ought not to consider the couple’s “*sexual orientation*”. Thus, the AdReg and CArAu circulars are violative of Article 14 of the Constitution.

c. Regulation 5(3) and CArAu-Circular: Contravening Article 15.

An although apparent neutral **Regulation 5(3)** discriminates against non-heterosexual relationships. The additional condition of “*stable relationship*” while impacting a heterosexual individual’s capacity for adoption, also unreasonably and discriminately impacts non-heterosexual individuals, as there is no “*legal recognition*” provided by the State to relationships of non-heterosexual individuals, in the way of marriage.²⁹ Consecutively, unmarried heterosexual partners who want to adopt would then have to solemnize a marriage to fulfil the eligibility criteria but this right is not at their disposal. Analysing Regulation 5(3), it is realized that this categorisation disadvantages the non-heterosexual community as these people, even if in a union can only adopt individually.³⁰

Article 15, based on identity, prevents discrimination.³¹ It includes a “*more substantial effects-based approach*” in the light of the “*non-discrimination essence*.”³² The test is if the

²⁷ *Supra* note 20.

²⁸ *Supra* note 8, s. 58.

²⁹ Lt. Col. Nitisha v. Union of India [2021 SCC OnLine SC 261].

³⁰ Gaurav Jain v. Union of India [(1997) 8 SCC 114]; Karan v. State of M.P. [(2023) 5 SCC 504]; Barun Chandra Thakur v. Bholu [2022 SCC OnLine SC 870]; Shilpa Mittal v. State (NCT of Delhi) [(2020) 2 SCC 787].

³¹ The Constitution of India, art. 14.

³² Navtej Singh Johar vs. Union of India (2017) 9 SCC 1.

law discriminates amongst individuals in effect based on the identities mentioned, and there exists no justifying reason, then State interests cannot be a touchstone to allow it.³³ When the Court is evaluating the law in question, it must also assess if the said law is a “*protective provision*” intended to attain the promise of “*substantive equality*”.

In *NM Thomas*, it was held that protective laws are not an exception to “*the anti-discrimination law*” but promote equality, of which “*anti-discrimination*” is a part.³⁴ During the above-mentioned test, assessment is required to determine whether the law is protective, and if it can be concluded that the law discriminated against relying on “*protected identities*”, even when they are sexual identities, the same cannot be accepted in the light of state interest.³⁵ The Court in *Navtej Johar* confirmed that “*sexual orientation is covered under Article 15(1)*.” This was said because homosexual relations threaten the traditional binary relations, and denial of adoption rights based on sexual orientation leads to “*discrimination based on stereotypical understanding of the role of sex, which is prohibited under Article 15*.”³⁶ An assumption in law, stating on the basis of sexuality that only heterosexual couples can be good parents is no different than saying that parents of a certain castes or class are better parents, and this is prohibited under Article 15.³⁷

CAReAu-circular came out with a condition: a single PAP in “*a live-in relationship*” will be disallowed from adopting a child. This aligned with Regulation 5(3) of AdReg which provides that a child ought to be given to “*a stable family*”, and a single PAP in “*a live-in relationship*” cannot be deemed stable.³⁸

Regulation 5(1) provides general requirements for PAPs: to be mentally, and physically capable, not be a convicted felon, and must not be suffering from a terminal illness. These conditions are uniformly valid for couples and individuals.³⁹ The other provisions of Regulation 5 like the condition of a stable relationship, consent of the two partners, or the bar on males adopting a female child (Regulation 5(2)(c)), are couple-specific or individual-specific conditions respectively. Therefore, the added stipulation provided by CAReAu,

³³ *Ibid.*

³⁴ *State of Kerala v. NM Thomas* (1976) SCC 2 310.

³⁵ *Ibid.*

³⁶ *Navtej Singh Johar vs. Union of India* (2017) 9 SCC 1.

³⁷ *Id at 15.*

³⁸ *Gaurav Jain v. Union of India* [(1997) 8 SCC 114]; *Karan v. State of M.P.* [(2023) 5 SCC 504]; *Barun Chandra Thakur v. Bholu* [2022 SCC OnLine SC 870]; *Shilpa Mittal v. State (NCT of Delhi)* [(2020) 2 SCC 787].

³⁹ *Supra* note 26.

regarding an individual adopting individually must be compatible with provisions of Regulations 5(1) and 5(2)(c) and the JuvJus Act, but this is not happening.

Unmarried partners are prevented from adoption by AdReg. The added condition provided under the CAREAu-circular would also impact a heterosexual individual's capacity for adoption, but it would unreasonably and discriminately impact non-heterosexual individuals. The reasoning being the State has not provided "*legal recognition*" to the relationships of non-heterosexual individuals, in the way of marriage.⁴⁰ Consecutively, unmarried heterosexual partners who want to adopt, have the alternative of solemnising a marriage to fulfil the eligibility condition related to adoption, but since same-sex marriages are not legalized, this choice is not at the disposal of homosexual couples.⁴¹ The CAREAu-Circular in reference to this, forces a non-heterosexual individual to choose: either to fulfil their wish to adopt or their freedom to form a union with whoever they love. This exclusion reinstates the difficulties already suffered by the queer group. Thus, the CAREAu-Circular, which differentiates based on sexual identities, contravenes Constitution's Article 15.

d. HAMA: Potential to be Gender-Neutral?

HAMA comes picture when any Hindu female or male want to adopt, either individually or as a couple, and in the latter case, consent of both spouses is necessary. A progressive stance was taken by the SC in *Deepika Singh case* where it tried to establish gender-neutrality of HAMA by stating that "*familial relationships may take the form of domestic, unmarried partnerships or queer relationships*", and stressed the importance of providing such families equal protection under law.⁴² But it is not surprising that since the act was formulated back in 1955, words like *husband* and *wife* have been included in Section 7 and 8 making the act inclined to heterosexuals' adoption rights. While a silver lining might appear in these actions as LGBTQ+ community can adopt individually,⁴³ it impinges upon their rights as a couple, as then one partner would have to give up their adoption rights. HAMA has failed to be dynamic and hence is rendered incapable of handling the complexities that come from taking members of LGBTQ+ community into necessary consideration.⁴⁴

⁴⁰ Supriyo vs. Union of India, W.P.(C) No. 1011/2022.

⁴¹ *Ibid.*

⁴² Deepika Singh v. Central Administrative Tribunal [2022 SCC OnLine SC 1088]; *supra* note 29.

⁴³ Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), s. 7-8.

⁴⁴ Gaurav Balpande, "A Case for Adoption Rights for LGBTQ Community in India" 4 *IJLMH* 1162, 1164-65 (2021), available at: <https://www.ijlmh.com/wp-content/uploads/A-Case-for-Adoption-Rights-for-LGBTQ-Community-in-India.pdf>.

PART III - DRAWING SUPPORT FROM INTERNATIONAL LAW AND RENOWNED JURISTS' THEORIES

a. International perspective of Adoption Rights by Same-Sex Couples

When denial of adoption rights happens to members of LGBTQ+ community as couples, specifically when they are allowed to adopt as single parents, their dignity is put at stake because then the sole basis of denial is their sexual identity and orientation, which, in reality, has no impact upon the quality of parenting. In InL, adoption is presented as a right to LGBT couples in the following manner:

i. Right of Non-Discrimination

In InL in general, and in InHRL in specific, equality without discrimination is the major principle, and was first considered in UDoHR, and then followed in other treaties and documents like ICoCaPR, ICoEaSR, CoRoC, CoEoDoafAW,⁴⁵ etc.

- UDoHR Article 1: “*Everyone is born free and equal in dignity and rights*”;
- UDoHR Article 2: “*Everyone is entitled to all the rights and freedoms without distinction of race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or any other status.*”⁴⁶
- Same principles have been propounded in Article 2 of ICoCaPR,⁴⁷ and Article 2 of ICoEaSR.⁴⁸

Hence, the member states have to commit to the list of on which discrimination is disallowed, and it works as a tool to ensure fair distribution to people similarly circumstanced, to ensure human rights, and respect to mental and physical differences amongst people.⁴⁹

⁴⁵ Convention on the Elimination of All Forms of Discrimination Against Women, 1979, available at: <https://www.refworld.org/legal/agreements/unga/1979/en/13757>.

⁴⁶ Universal Declaration of Human Rights, 1948, art. 1-2, available at: <https://www.refworld.org/legal/resolution/unga/1948/en/11563>.

⁴⁷ International Covenant on Civil and Political Rights, 1966, art. 2, available at: <https://www.refworld.org/legal/agreements/unga/1966/en/17703>.

⁴⁸ International Covenant on Economic, Social and Cultural Rights, 1966, art. 2, available at: <https://www.refworld.org/legal/agreements/unga/1966/en/33423>.

⁴⁹ Thuong, M.T.H., “Protecting Human Rights to Adoption of Lesbian, Gay, Bisexual and Transgender People (LGBT)-Practice in Some Asian Countries and Vietnam” 5(1) *Int'l JL Mgmt. & Human* 754 (2022), available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0010/3966292/Thuong_Mac-Thi-Hoai.pdf.

This principle, thus extends to encompass LGBTQ+ people providing that they have a right to be treated at par with heterosexual people, and this includes right to live happily and establish a family through adoption with their counterparts. InL recognizes that nurturing children is a need and desire of couples, as well as individuals, which is not determined by their sexual orientation, making homosexual parents similarly circumstanced as heterosexual parents. Thus, based on this principle, grants all people, either as an individual or as a couple, before the law, a full-fledged InHRL to marry, raise a family, and adopt or raise children.

ii. *Right to Marry and establish a Family*

Article 16 of the UDoHR provides to people of full age, rights to get married, form a family without any prohibition based on factors like, religion, sex, etc. Clause 3 emphasizes: “*family is the natural and fundamental cell of society, protected by the state and society,*”⁵⁰ and this finds confirmation in Article 10 of ICoEaSR and Article 23 of ICoCaPR. As per the ComHR, “*the concept of the family can differ in several respects, and therefore it is impossible to give a universal standard definition.*”⁵¹ Moreover, UN’s RoCC provides that family should be considered by “*different family structures, arising from diverse cultural patterns and family relationships forming in society.*”⁵²

Hence, since family cannot be defined uniformly, limiting that concept to only heterosexual couples, by denying adoption rights to homosexual couples as they cannot biologically have children, is in direct contravention of InHRL.

iii. *Child Custody and Conditions of Adoption*

Article 9 of CoRoC provides that “*States Parties shall ensure that children are not separated from their parents against their will, unless the competent authorities subject to judicial review, in accordance with current laws and procedures, decide that such separation is necessary for the best interests of the children.*”⁵³ Moreover, Article 18 of ICoCaPR stipulates in paragraph 4 that “*The States Parties commit to respect the freedom of parents,*

⁵⁰ *Supra* note 46, art. 16.

⁵¹ General Comment No. 19: *Protection of the Family, the Right to Marriage and Equality of the Spouses*, Human Rights Commission, United Nations Instrument. HRI/GEN/1/Rev.2 (1990), at 2.

⁵² “*Report on the Fifth Session*”, Committee on the Rights of the Child, United Nations Instrument. CREC/C/24, Appendix V.

⁵³ *Supra* note 9, art. 9.

*and legal guardians where applicable, in religious and moral education for their children according to their own will.*⁵⁴

Parents from LGBTQ+ community have complete rights to the custody of their children as they can be separated only when rendered necessary as per the regulations espoused in domestic law. HaCo provides no regulation that can disallow adoption by people of LGBTQ+ community as a couple.⁵⁵ Since adoption depends on the certificate from the competent authority, the only factor to be judged is whether the parents intending to adopt, irrespective of their sexual orientation, are suitable for adoption, and have the ability to cater to the “*best interests of the child*” in consideration, while also complying with other adoption procedures.⁵⁶

b. Jurists and LGBTQ+'s Right to Adoption

Theories of jurists like Lon L. Fuller and Ronald Dworkin can be expanded to encompass adoption rights of homosexual parents.

i. Lon L. Fuller

He is known for introducing the concept of “*inner morality of law*”, which advances that legal system has to comply with moral principles, like justice, fairness, dignity to be legitimate and valid. Since laws are framed by the people, they have to cater to their needs through these principles, and when this doesn't happen, laws become illegitimate and ineffective. And this catering to the needs of the people has to be dynamic in nature, incorporating the rapid social changes an economy undergoes.⁵⁷

In line with his theory, Fuller would argue that denying adoption rights to same-sex couples is arbitrary, and without a rational basis as it runs in contradiction to the principle that laws must apply consistently and uniformly on all subjects: if suitability and ability to provide a lovable environment is the determining criteria for heterosexual couples intending to adopt,

⁵⁴ *Supra* note 47, art. 18.

⁵⁵ Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993, *available at*: <https://www.refworld.org/legal/agreements/hagueprivate/1993/en/32114>.

⁵⁶ *Supra* note 49 at 17.

⁵⁷ Hansi Jain, “A Case for Same-Sex Adoption”, *CJP* Jun. 22, 2023, *available at*: [https://doi.org/10.2307/1338226](https://cjp.org.in/a-case-for-same-sex-adoptions/#:~:text=All%20citizens%20must%20be%20treated,because%20of%20their%20sexual%20orientation; Fuller, Lon L., “Positivism and Fidelity to Law: A Reply to Professor Hart” 71(4) <i>HLR</i> 630–72 (1958), <i>available at</i>: <a href=).

the same should be extended to the same-sex couples too. Not doing this would constitute unjust discrimination violating the moral standards on which Fuller wants the laws to be based. As argued above, the laws in themselves, do not explicitly deny such adoption rights, but their interpretation to align them with the widespread belief that such homes are not suitable for children, destroys the intent of the legislature which established them on the basis of essential moral principles: justice and fairness.

ii. *Ronald Dworkin*

“*Ethical foundations of rights*” finds prominence in theories of Dworkin which emphasize that rights are not simple legal structures, but have a detailed moral foundation. People have certain rights by the virtue of them being a moral individual, and values like fairness, justice, dignity form the basis of these rights. Such rights are inviolable and provide an individual with necessary liberty and an inherent worth. They are not granted by the state and neither do that require any legal acknowledgement, and hence, cannot be taken away by them through a simple law. His concept of “*rights as trumps*” highlight the importance of involving individuals in decision-making concerning them, and rights, with their own distinguishing position, precede other considerations like interests of the majority.⁵⁸

Thus, rights of adoption to same-sex couples would be argued as inherent rights, which cannot be denied by state authorities. Denial of such rights is against the concepts of “*non-discrimination and equality*”, which Dworkin argued for. Right to adoption, according to him, would not require legal backing because there are children who want to be adopted, and parents who want to adopt, and it should not matter if such parents are homosexual or heterosexual because rights as trumps concept does not take sexual orientation of individuals into consideration. Moreover, Dworkin believed that there has to be government neutrality on matters involving personal morality and no imposition of majority interests over the minority comes into picture. Hence, the widespread opinion of not allowing homosexual couples to adopt due to their own religious beliefs or reasons like this would hamper development of child, or turn him into a member of LGBTQ+ community cannot precede the rights and interests of the homosexual parents who can and want to adopt, provided they can provide a stable and lovable environment for the child.

⁵⁸ *Ibid*; Ronald Dworkin, “Taking Rights Seriously”, Harvard University Press, Cambridge, MA (1977).

RECOMMENDATIONS AND WAY FORWARD

In one of the recent developments in the realm of rights of queer and non-heterosexual individuals, the Apex Court has refused to grant validity to same-sex marriages under the SMA, citing non-intervention into Parliament's domain of responsibility to change and evolve laws in line with the evolution of the society. The court in this case had provided that there is no inherent right to marry for queer individuals. Further, the court had also provided a mixed decision on the matter of adoption rights of such couples, finally ruling against them in the light of state interest and "*best interest of the child.*" However, the court had emphasised on the prohibition of discrimination against the non-heterosexual community and to provide them increased access to services, basic needs and ensure their security against harassment. Thus in the light of these developments and the existing position of queer rights in India as of now, the authors would like to provide certain suggestions to better protect queer rights and facilitate their adoption rights further ensuring their well-being and autonomy.

Firstly, the State needs to reconsider the AdReg and the circulars issued therein to reformulate them in consonance with JuvJus Act and the "*best interest of the child*", while preventing discrimination against any category of individuals based on the identities of sexuality and others. *Secondly*, there is a need to recognize the adoption rights of non-heterosexual couples and come up with provisions or separate legislation for the same to separately carve out a space for their rights, and not have them be hampered in the name of state interest or absence of a proper regulatory framework. *Thirdly*, if such legislative interventions are not feasible, an alternative would be to provide legal recognition to same-sex marriages to bring them under the ambit of the couples permitted to adopt under the JuvJus Act, the AdReg, and the circulars. To put it concisely, the '*status quo*' preservation approach is not in the "*best interest*" of either the children in adoption or such queer couples who are wanting to adopt and thus in the well-being of both: an active intervention is required both at the level of the courts and lawmakers of the country.

Moreover, social acceptance for matters related to members of the LGBTQ+ Community has to be knitted because bringing a legal change when social change has crept in is comparatively easier. For this, better utilization has to be done of social media, and campaigns have to be put up to work at initiatives at the ground level. Surveys and research can be conducted and brought to public notice to give a blow to established preconceived notions that child development or a child's sexuality would be influenced by parents' sexual

orientation. Till the time legislation comes into place, policies and regulations have to be brought up with immediate effect to facilitate such adoption for same-sex couples who cannot get married in India till now, because every day, there are a lot of children wanting to be adopted, and lots of homosexual couples, looking to adopt and form a family.

Thus, the Authors have attempted to answer the three research questions posed in the beginning in three parts of the paper: it has been established in *Part I* that religious beliefs are the major drivers of opposing adoption rights to homosexual couples, and this is coupled with a widespread understanding that sexual orientation of such homosexual parents hinders the child development and leads him/her to grow up to be a part of the LGBTQ+ community. However, such conceptions have been disregarded by various studies that consider families of homosexuals as a tool to question the long-established traditional notions of family. *Part II* then answers the second research question by analysing that the laws and regulations related to adoption in place are in direct contravention of the Fundamental Rights in the Constitution guaranteed to be provided to every individual in India by the State. Regulations 5(3) and additional requirements posed by the CAReAu circular go beyond the scope of JuvJus Act and make the adoption impossible for same-sex couples, when this was not the intention of the lawmakers of the JuvJus Act and the constitution-makers. *Part III* then helps prove a case of the Authors and answers the third research question by clarifying that international humanitarian laws coupled with theories formulated by well-known jurists, encompass some basic rights that are granted to every person walking on the planet, and these rights are imbibed in them by them being humans, including homosexual couples' right to form a family through adoption since conceiving a child through biological means for them is difficult. These rights are such that they cannot be taken away by the State since they are not granted by it in the very first place.

The denial, thus, to same-sex couples to adopt a child, strips them of their humanitarian rights while also denying children wanting to be adopted, a safe and lovable home just because the sexual orientation of parents becomes of prime importance to the public and the State. A need is to develop an inclusive and fair society, and bring in reforms, social and legal, to foster respect for all sorts of families, as has been the intention behind various international conventions, and our own Constitution. A need is to question the discrimination which on the face of it perpetuates stereotypical understanding of gender roles, and to embrace everyone as they are, along with their inherent rights.