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## Adapting to the Idea of Adoption Rights for Queer Couples

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*The judgment of the Supreme Court in the case of Supriyo @ Supriya Chakraborty v the Union of India has become a topic of great judicial discussions around the country. The discussions have been primarily focused on the right of marriage between queer couples. However, another equally important issue that the judgment has dealt with but is not being discussed with the same noise is the way the apex court denied the right of adoption to queer couples and the reasoning given for such a stance of the court. The right of adoption is mutually exclusive of the right of marriage as can be seen from the laws of adoption within the country where unmarried citizens are eligible for adoption and act as single parents under the rules of the CARA & the Juvenile Justice Act, 2015. Thus, the reasoning of the court based on the sections of the adoption laws does not make up a significant reason for the denial of the right to queer couples who could be in stable relationships for the given period as required by the rules but cannot marry due to the legal constraints on the nature of their relationship. The article discusses the need for adoption rights for queer couples not just from the perspective of the queer community and their quest for equality in society but also for the children in numerous orphanages and adoption centers, eligible for adoption but aren't able to find parents.*

**Keywords:** *right of adoption, queer couples, right of marriage, orphanages.*

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## INTRODUCTION

The recent judgment by the constitutional bench of the supreme court, in the case of *Supriyo v Union of India*<sup>1</sup>, has refused to recognize the right of the queer community to adopt, attracting displeasure from the queer community from around the country as well as the world and from their advocates. While the petition and the issues primarily focused upon the petitioners asking for the 'right to marriage' for queer couples under the 'Special Marriage Act'<sup>2</sup>, 'the Hindu Marriage Act'<sup>3</sup> and 'the Foreign Marriage Act'<sup>4</sup>, which the judges deftly sidelined from having a say on the topic and unanimously held that it was instead a responsibility for the legislature to enact the law regarding the issue, it also provided the apex court's stance on the right of adoption by queer couples. The same judgment, given by a 3-2 majority also held that the adoption right is granted to the queer community in the same way as it had been granted earlier to two citizens who haven't married, then the possibility of them being together and cohabiting can't be ruled out, and such an event would lead to them making a de facto family unit even when these couples cannot legally make up a family, making the entire proposition of the laws for not allowing marital rights to queer couple moot.

In the given context of the issue, CJI observed, that the present adoption rules and framework only allow heterosexual couples to adopt a child. For the unmarried population, adoption is only allowed at an individual level, which is not only discriminatory towards unmarried couples but is completely prohibitory for queer couples who don't even have the option to get married unable to marry their partners, which makes them completely unable to ever become parents of a child. The CJI further added, that the ability to take care of a child is by no means related to the sexuality of an individual,<sup>5</sup> and excluding queer couples from adopting creates an

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<sup>1</sup> *Supriyo @ Supriya Chakraborty v Union of India* WP (C) No 1011/2022

<sup>2</sup> Special Marriage Act 1954

<sup>3</sup> Hindu Marriage Act 1955

<sup>4</sup> Foreign Marriage Act 1959

<sup>5</sup> Deni Mazrekaj et al., 'School Outcomes of Children Raised by Same-Sex Parents: Evidence from Administrative Panel Data' (2029) 85(5) *American Sociological Review* 830-856 <<https://doi.org/10.1177/0003122420957249>> accessed 20 February 2024

unhealthy stereotype that only heterosexual couples can be good parents<sup>6</sup>. The CJI further stated that the CARA by its powers had exceeded its jurisdiction in this regard<sup>7</sup>. Justice Kaul also had a concurrent opinion regarding the issue. The judgments delivered in the cases each provide reasoning for the support and opposition of the views of the judges which all center around the collective views of the sides, i.e. either as the majority or the minority.

## PRESENT SCENARIO OF ADOPTION RIGHTS

In India, there are no explicit constitutional provisions that deal with the rights of same-sex couples about the adoption of a child, and adoption processes are governed by the provisions of personal laws, like the Hindu Adoption and Maintenance Act, of 1956. However, courts opine that these provisions generally do not include couples from the LGBTQ community, even though it may not be written within the statutes. When discussed from the purview of the rules of the CARA and specifically the Juvenile Justice Act; the couples from the queer communities have faced hindrances in getting the right to adopt children through these statutes, too.

The constitution of India guarantees its citizens equal treatment by the fundamental rights it provides to all citizens of the country, which include the right to equality<sup>8</sup> and the right to life and personal liberty<sup>9</sup> in the constitution.<sup>10</sup> The provisions prohibit discrimination based on 'sex, which includes the sexual orientation of the person'. In the case of adoption rights, it is quite blatant regarding how such discrimination is targeted towards couples from the queer community. This form of discrimination is prohibited as discrimination based on the sexual orientation of an individual was held in the judgment of *Navtej Singh Johar v Union of India*,

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<sup>6</sup> D. Paul Sullins, 'Child Attention-Deficit Hyperactivity Disorder (ADHD) in same-sex parent families in the United States: Prevalence and Comorbidities' (2015) 6(10) <<https://doi.org/10.9734/BJMMR/2015/15897>> accessed 19 October 2023

<sup>7</sup> *Supriyo @ Supriya Chakraborty v Union of India* WP (C) No 1011/2022

<sup>8</sup> Constitution of India 1950, art 14

<sup>9</sup> Constitution of India 1950, art 21

<sup>10</sup> 'Right to Privacy Judgment: SC Says Sexual Orientation Essential Attribute of Privacy and Must Be Protected' *The Indian Express* (24 August 2017) <<https://indianexpress.com/article/india/right-to-privacy-judgment-supreme-court-says-sexual-orientation-essential-attribute-of-privacy-and-must-be-protected-4811358/#:~:text=The%20Supreme%20Court%20further%20held,protected%20on%20an%20even%20platform.>>> accessed 19 October 2023

2018<sup>11</sup>. The “right to equality” states, “all individuals are equal in the eyes of law and are entitled to the protection provided by law”. This means that any form of unfairness, inequity, or prejudice based on sexual orientation or gender identity, including but not limited to the cases of adoption, would be unconstitutional.

In practice though, discrimination based on sexual orientation is prevalent in the legal framework of the country latently. One of the most glaring examples of this is seen in the case of adoption regulations within the country. As mentioned above, the cases of adoption in India are regulated by CARA (Central Adoption Resource Authority)<sup>12</sup>, which surprisingly allows unmarried people to adopt children in a single and solitary capacity, but not queer couples to do so jointly, following the provisions of Adoption regulations, 2022<sup>13</sup> and the Juvenile Justice Act, 2015<sup>14</sup>. This prevalence propagates the idea that a single person is capable of raising a child on their own while a couple of the same gender isn’t, latently spreading the idea that people from the queer community are in some way less than other people in society. The eligibility criteria for prospective adoptive parents under the act require a couple to have been in at a minimum of 2 years of stable marital relationship. Thus, queer and same-sex couples are essentially denied the right to ever have a child, as they cannot even marry each other.

Furthermore, the right to dignity that has been interpreted as part of the right to life and personal liberty under the provisions of the constitution is violated by such discrimination towards the queer community.

## COMPARING THE SITUATION WITH INTERNATIONAL STANDARDS

Several foreign countries have been referenced in the argument against the decision of the court. However, such comparison brings out the differences between social practices and contexts of the cases change with regards to the country in question. The most prominent among such countries is the US. It is generally used to show how the US courts granted the right of adoption

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<sup>11</sup> *Navtej Singh Johar v Union of India* WP (Crl) No 76/2016

<sup>12</sup> ‘Central Adoption Resource Authority; ministry of Women & Child Development government of India’ (CARA) <<https://cara.wcd.gov.in/>> accessed 20 October 2023

<sup>13</sup> Adoption Regulations 2022, s 5

<sup>14</sup> Juvenile Justice Act 2015, s 57

to queer couples on their own and did not depend upon the decision of the congress<sup>15</sup>. However, this argument does not work in the context of India because unlike the US the binding effect of the Supreme Court of India is not the same as the binding effects of the decisions of the Supreme Court of the US. Therefore, the decisions of the Supreme Court will not have the same effect in the country as in the US. This doesn't mean that the court isn't capable or shouldn't take such a decision, however, historically, whenever the Supreme Court of India has tried to make such a decision, it has faced consequential opposition from the legislature in the form of amendments to negate such decision, creating friction between the two pillars of the state. Thus, the decision in the present case makes up a smoother plan of action for the same and ensures that the finality of any decision taken in this regard has longevity.

The stance of the court stays within the social definition of 'family' within the context of the Indian citizens. The reasoning provided evidences the same. The popular conscience of the people towards the judgment emerges from the generalization of religious beliefs, particularly the queer community's open disdain towards the ideas of the Hindu religious teachings. However, the submissions of the petitioners in the court itself should paint the clearest picture that the truth is far from it, and yet the masses believe that orthodox religious ideologies are what stop the court from granting them such a right. Moreover, the court's decision emerges from the supposed consequential irregularities that might arise in law, and not the beliefs of the people. In addition, the court opined that adoption rights would also include within the ambit of eligible parents, persons who are transgender.

When the said arguments are checked in the cases concerning other countries it is quite evident that religion and fundamental rights are mutually exclusive before the court of law.

The US recently allowed the adoption of children by same-sex couples, which was followed by numerous protests and opposition by the sects of churches within the country especially in

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<sup>15</sup> 'What to Know About the History of Same-Sex Adoption' (*Considering Adoption*)  
<<https://consideringadoption.com/adopting/can-same-sex-couples-adopt/history-of-same-sex-adoption/>>  
accessed 15 February 2024

Texas. Yet, the right of adoption remained. In fact, with the decision US joined the ranks of 38 countries across the globe that provide the said right to their citizens.<sup>16</sup>

Surprisingly, though Christianity patently opposes the idea of homosexuality much less the idea of adoption by same-sex couples, 22 of the 38 countries allowing same-sex couples to adopt are from Europe, which is also home to the Vatican<sup>17</sup>.

This shows that the court's inference of what constitutes a family within the country has to do with the standards of the society and not with the propagated ideologies. In other words, the extension of the right is concerned only with the consequent legal contradictions which would rise from it rather than a case of pleasing the people or subservient to any ideologies

Similarly, the court's reasoning for not granting the said right to avoid the people from the LGBTQ+ forming de facto family units against the law is not completely right. The formation of families in marriage becomes relevant in the case of property rights, succession, etc. While proof of marriage becomes essential for the correct assessment in these cases, adoption doesn't play such a role within the context of the law.

Moreover, specific laws for inheritance by the adopted child from either or both of the parents can be enacted to solve the issue as it is done in countries like Germany. Thus, the contention made against the granting of the said right does not stand without cracks in the logic. The situation would be similar to the laws enacted for couples within a live-in relationship setup. Therefore, the legal consequences of the granting of the right being challenging cannot be held as the sole reason for the judgment.

## NEED FOR THE RIGHT IN FOCUS

The need for adoption is critical for numerous children in the country who are either orphaned, abandoned, or given up by their biological parents due to various reasons such as poverty,

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<sup>16</sup> 'LGBT International Adoption: Is it Possible?' (*Considering Adoption*, 22 February 2023)  
<<https://consideringadoption.com/adopting/can-same-sex-couples-adopt/international-gay-adoption/>>  
accessed 16 February 2024

<sup>17</sup> *Ibid*

illness, or other hardships that make them incapable of taking care of their child. For such children, adoption provides a pathway toward a future of love, care, and a permanent home. As the protector of an individual's interest and as a thinker for the betterment of those who cannot think for themselves, the judiciary must ensure that all such children have access to a stable and nurturing family environment, but most importantly, it is a duty to provide them a chance to develop to their full potential. As held by the Supreme Court previously, the best interest of the child is paramount in adoption cases. The court particularly, emphasizes the adoption process to be guided by the well-being and welfare of the child<sup>18</sup>.

The issue becomes more acute when discussed from the context of queer children, who are often abandoned by their families and have to fend for themselves unless they get taken in by NGOs. The children even in orphanages across the country, have to face constant bullying, are ridiculed, and even face physical, mental, and sexual abuse in such institutions<sup>19</sup>. Even with the presence of the Garima Greh scheme, the ground reality is far from being a pretty picture. Especially with the absence of govt. funding for their sustenance, the shelters provided by the scheme do not have the required resources to fulfill their aims to make provisions to shield Transgender persons and bestow them with basic services of shelter, food, medical care, and recreational facilities. The requirement of funding becomes even more important in the case of queer children who often receive bullying from society and need professional therapy to cope.

The reason adoption becomes important at this juncture is that parents from the queer community who have had to face similar challenges in their own life have a better potential to understand the struggles and challenges of the children in need. This, however, is just from the perspective of the child in question. From the perspective of the couples adopting, the right of adoption should be the same for all couples, i.e. queer couples shouldn't be restricted to only adopting queer children.

## CONCLUSION

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<sup>18</sup> *L K Pandey v Union of India* AIR 1987 SC 232

<sup>19</sup> *Re Exploitation of Children in Orphanages in State of Tamil Nadu v Union of India* WP No 103/2007

The 2014 judgment by the apex court in the case of *NALSA v Union of India* recognized individuals of the transgender community as a third gender<sup>20</sup> and later in the *Navtej Singh Johar* case, held that they should be granted every fundamental right under the constitution which are granted other individuals of the country<sup>21</sup>. It also provided directions to the govt. to take steps to ensure the welfare and inclusion of all transgender persons into society.

Paradoxically, 9 years later, the same court refused to recognize adoption rights for the transgender community. The laws today allow a child to be raised in society either as an orphan or by a single unmarried parent in the country who may not provide them with enough care as two parents but not by a homosexual or transgender couple, even when the orphan population in the country is rising each day. According to a recent study conducted by the international charity for orphaned and abandoned children, India is currently the home to 30 million orphans, a number that has been rising since 2016<sup>22</sup>.

The condition of most orphanages in the country is abysmal, to say the least. Most of these organizations find it extremely hard to provide even the most basic amenities to children in their care<sup>23</sup>. The *NALSA*<sup>24</sup> and *Navtej*<sup>25</sup> judgments were held as the heralds of an age of acceptance for the queer community, but without the court backing up the directions provided in those judgments in subsequent matters of rights such as this; those directions would shrink down as just empty promises. The adoption right for queer couples is a necessity for the not just the queer community but for the society as a whole. This could become the catalyst for further judgements that would help achieve the aims of the judiciary to recognize and help the queer community as a part of modern Indian society. Thus, denying same-sex couples to adopt isn't just denying

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<sup>20</sup> *National Legal Ser. Auth. v Union of India & Ors* AIR 2014 SC 1863

<sup>21</sup> *Navtej Singh Johar v Union of India* WP (CrI) No 76/2016

<sup>22</sup> 'The Situation of Orphans in India' (*The Borgen Project*, 13 March 2023) <<https://borgenproject.org/orphans-in-india/>> accessed 20 October 2023

<sup>23</sup> Abhinesh Singh and T V Sekher, 'Orphans and their living arrangement in Indian households: Understanding their educational and nutritional status' (2021) 121 *Children and Youth Services Review* <<https://doi.org/10.1016/j.childyouth.2020.105868>> accessed 20 October 2023

<sup>24</sup> *National Legal Ser. Auth. v Union of India & Ors* AIR 2014 SC 1863

<sup>25</sup> *Navtej Singh Johar v Union of India* WP (CrI) No 76/2016



them equal rights but is also denying the children in need, the hope for a better future, as well as the chance for society to change for the better.