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

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### ABSTRACT

Established wisdom in the Indian society has always been backward to the new thoughts of western society which is evidently reflected by the discrimination that the same-sex couples and live-in couples have faced so far. Based on the past scholarly articles and the analysis of the relevant sections of the legislatures, this research paper attempts to critically analyse the adoption regulation legislatures concerning the Queer community; and showcases the evolutionary adoption laws of Live-in couples which may act as an example for changes in adoption laws for Queer community's equal rights. The Queer community has not been granted all civil rights for a long time now, for which they are unable to raise their voice. The paper attempts to use several cases as a catalyst to support the argument and analyse distinct adoption gateways available in the society and their limitations. The conservative school of thought has to be furnished with the new thoughts of equality among all classes, religion, individuals, etc. with regards to the adoption rights because the current stand of the society and law is violative of fundamental rights of Queer community under Article 14<sup>1</sup>, 15<sup>2</sup>, and 21<sup>3</sup> of the Indian Constitution<sup>4</sup>. The paper showcases the importance of equal adoption rights along with the impact of absence as well as presence of equal rights. It also gives suggestions which may solve grant all classes equal rights. This change in thoughts would further benefit India to meet the international standards.

**Keywords:** Live-in Couples, Queer, Adoption, Equality, Same-Sex Marriage.

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<sup>1</sup> THE CONSTITUTION OF INDIA, 1950, ART. 14

<sup>2</sup> THE CONSTITUTION OF INDIA, 1950, ART. 15

<sup>3</sup> THE CONSTITUTION OF INDIA, 1950, ART. 21

<sup>4</sup> Gaurav Balpande, *A Case for Adoption Rights for LGBTQ Community in India*, 4 INT'L J.L. MGMT. & HUMAN 1162, 1162 (2021).

## I. INTRODUCTION

‘Adoption’ is a process by which a child is permanently separated from their biological parents and has become the lawful child of the adoptive parents with all the rights, privileges, and responsibilities that are attached to a biological child.<sup>5</sup> LGBTQIA+ community stands for the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual individuals, and other sexual identities which is denoted by ‘+’ in the acronym. These other identities may include Two-Spirit or Pan-indigenous American identity<sup>6</sup>, who have come together to embrace their sexuality and individuality. Historically, this community has faced social discrimination and legal ignorance<sup>7</sup> however, with Indian society clutching in the western culture and opening up to accept homosexuality, in the year 2018, the Supreme Court of India in the **Navtej Singh Johar v. Union of India** case<sup>8</sup> legalized homosexuality by quashing the parts of Section 377, IPC 1860.<sup>9</sup> <sup>10</sup> This LGBTQIA+ acronym represents the spirit of inclusivity by recognizing all different sexual orientation and identities and it represents that these individuals gain social representation in the society as a whole. Similarly, back in the day, Live-In relationships were considered to be unethical and socially immoral because they challenged the traditional social norms of marriage, romantic relationships, and sexuality. Live-in relationships were then legally recognized and granted rights similar to married couples in the year 2013 under the **Indra Sarma v. V.K.V. Sarma**<sup>11</sup> case where Indra Sarma started a live-in relationship with V.K.V. Sarma who was a married man. They continued to be in the relation for 18 years and the man even started a company in Indra’s name, however, took over later. Man refused to maintain and financially support Indra and so, she filed under Protection of Women from Domestic Violence Act, 2005, where the court found the live-in relationship to be a marriage like relation only after satisfying certain conditions<sup>12</sup> which means that they are eligible to be adoptive parents. The essential point is to eliminate the violation of fundamental rights of the LGBTQIA+ community and realize the importance of adoption rights of the LGBTQIA+

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<sup>5</sup> THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, §2(2).

<sup>6</sup> Kendra Cherry, *What Does LGBTQIA+ Mean?*, VERYWELL MIND, Jun. 02, 2023, <https://www.verywellmind.com/what-does-lgbtq-mean-5069804>

<sup>7</sup> Rachit Sharma, *Rights of LGBTQ in India and the Struggle for Social Acceptance*, 4 INT’L J.L. MGMT. & HUMAN 18, (2021) <https://www.ijlmh.com/paper/rights-of-lgbtq-in-india-and-the-struggle-for-societal-acceptance/>

<sup>8</sup> Navtej Singh Johar v. Union of India, AIR (2018) SC 4321.

<sup>9</sup> THE INDIAN PENAL CODE, 1860, §377.

<sup>10</sup> *Supra* Note 4.

<sup>11</sup> 2013 (14) SC 448

<sup>12</sup> Indra Sarma v. V.K.V. Sarma, AIR (2014) SC 309.

community as the orphaned children are better off in a family with same-sex couple than in an orphanage. The paper's main focus is to bring forth the importance of adoption rights to LGBTQIA+ community and to slash down the violations of fundamental rights of the community and showcasing the obstructions and suggesting several ways to overcome them.

## II. LEGAL GATEWAYS TO ADOPTION AND HINDRANCES

Adoption in India is regulated by two major legislations- The **Hindu Adoptions and Maintenance Act, 1956**<sup>13</sup> and **The Juvenile Justice Act, 2015**<sup>14</sup>. The HAMA 1956<sup>15</sup> has its jurisdiction according to Section 2, only over the people who are Hindus, Sikhs, Buddhists, and Jains, and is narrow in its execution. The legislation gives the eligibility criteria for adoption under Sections 7<sup>16</sup> and 8<sup>17</sup>, read with Section 11<sup>18</sup>. As per Sections 7<sup>19</sup> and 8<sup>20</sup>, they allow 'husband' and 'wife' to adopt and it seems to be gender-specific which means that they don't recognize same-sex couples.<sup>21</sup> Had the sections mentioned individuals or couples, instead of the specific terms 'husband' and 'wife', they could have been interpreted in favour of the LGBTQIA+ community as same-sex couples would come under the purview of the word 'couple' and become prospective adoptive parents.

**The Juvenile Justice Act, 2015** has been developed progressively to involve all individuals and not discriminate against anyone based on their caste, creed, religion, etc. JJ Act was enacted to ensure that there is no bar to adoption with respect to race, caste, religion etc. and to provide a uniform code for adoption. It has widened the scope of adoption as a dedicated code called **Adoption Regulations, 2022**<sup>22</sup> by **Central Adoption Resource Authority (CARA)** was brought about. CARA, Central Adoption Resource Authority which is a statutory body and regulates the adoption of Indian children in-country and inter-country. The eligibility criteria for adoption under the legislation (Adoption Regulations, 2022) is enshrined under Section 5<sup>23</sup>.

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<sup>13</sup> THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956.

<sup>14</sup> THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015.

<sup>15</sup> *Supra* Note 13.

<sup>16</sup> THE HINDU ADOPTION AND MAINTENANCE ACT, 1956, §7.

<sup>17</sup> THE HINDU ADOPTION AND MAINTENANCE ACT, 1956, §8.

<sup>18</sup> THE HINDU ADOPTION AND MAINTENANCE ACT, 1956, §11

<sup>19</sup> *Supra* Note 16.

<sup>20</sup> *Supra* Note 17.

<sup>21</sup> Gaurav Balpande, *A Case for Adoption Rights for LGBTQ Community in India*, 4 INT'L J.L. MGMT. & HUMAN 1162, 1165 (2021).

<sup>22</sup> ADOPTION REGULATIONS, 2022

<sup>23</sup> ADOPTION REGULATIONS, 2022, §5.

The legislation is perceived to be wider in scope but, there exists to be a disappointment in Section 5, particularly in Clause 3 of the section<sup>24</sup>. It states that the prospective adoptive couple must have a marital status of at least 2 years. The section uses the word ‘couple’ which can be interpreted broadly and in favour of the Queer community and live-in couples with regards to adoption because, the word ‘couple’ does not mandate the gender to be male or female unlike in the Hindu Adoptions and Maintenance Act which requires a male and female as prospective adoptive parents. However, the problem lies in the marital status as a requirement. This indirectly closes the gates of adoption to the LGBTQIA+ community and Live-in couples, though, homosexuality is legally recognized but, marriage of the same-sex couple is not legally recognized. Similarly, in the case with Live-in couples, because live-in relationships are not considered to be legal marriages, they are not entitled to the adoption rights directly. However, there exists to be a sigh of relief by the above-cited case of Indra Sarma v. V.K.V. Sarma which laid down the guidelines for a live-in relationship to qualify as a marriage like relationship and avail the rights similar to that granted to a legal marriage which certainly is not the case with the same-sex couple. Also, the guidelines laid down in the above-mentioned case are gender-neutral because as per the Para 55 of the case, Section 2(f), Domestic Violence Act does not mention any gender specificity and thus, reiterating the need to bring changes in the adoption legislation to remove the above-mentioned problems or rather obstacles and allow the adoption rights to the Queer community. As we observe that the same-sex couples can thus, be seen to be in live-in relationships which are marriage like in nature but, as same-sex marriage is not legal in India, this creates a conflict between the judgement of the case and the legislature.

### III. ADOPTION RIGHTS OF LIVE-IN COUPLES

Adoption rights have come as a boon to parenthood and as well as to the abandoned, orphaned, or surrendered children as it helps couples, who are unable to have their own children, to have loving homes with children. Adoption rights to Live-in couples were earlier not allowed because Live-in relationships were seen as ‘**Walk-in and Walk-out**’<sup>25</sup> relationships implying them to be unstable and not fit for the children because of the disturbing environment created. The same reason was cited by the CARA via a circular in 2018 which considered the Live-in

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<sup>24</sup> ADOPTION REGULATIONS, 2022, §5(3).

<sup>25</sup> Deepshree Chauhan & Anshul Agrawal, *Security of Live-in Relationship*, 4 INT'L J.L. MGMT. & HUMAN, 122, 128 (2021).

couples ineligible to adopt a child.<sup>26</sup> However, the authority withdrew its decision<sup>27</sup> and allowed adoption rights to Live-in couples but, on a case-to-case basis<sup>28</sup>. The application by the Live-in couples was subject to review based on several factors such as Time period of relation, Shared household, Intention of parties, Public Socialization, etc. These factors, in other words, meant the relationship in the nature of marriage as per the case **D. Velusamy v. D. Patchaiammal**<sup>29</sup>. In this case, facts being irrelevant to the ratio decidendi being used in the paper, where the court considered the common law marriage requirements as the factors for a relationship to be marriage-like relationship. The above statements show the transition of live-in couples from being socially disregarded to being socially and legally recognized like married couples and are considered for being adoptive parents, depicting the evolution of adoption laws of live-in couples. This transition is in relation to the focus of the paper, that the queer community can also be granted adoption rights through the similar pathway where such factors are reviewed and also, other factors can be introduced which must not be paradoxical to the motive of the laws. However, for this to happen, same-sex marriage has to be legalized which is a legal issue still to be addressed.

#### IV. SOCIETAL BACKLASH TO LGBTQIA+ COMMUNITY

When it comes to the adoption rights to the LGBTQIA+ community, they have been struggling to attain their adoption rights and are not allowed rights due to several reasons. One of the reasons is a pre-conceived notion that this community is engaged in socially immoral professions which would create an unhealthy environment for children.<sup>30</sup> This notion was earlier just a perception of society but, it has been embedded in such a way that they are denied dignified work which ultimately leaves them with no resort but, to work in unethical professions. Also, in this so-called 'Progressive' society homosexuality is still stigmatized in many parts. People are reluctant to include homosexuality as a part of society in many parts of India, as a consequence of which the Queer community is suppressed and unable to gain their civil rights and that the idea of giving them adoption rights which is center of the paper is also

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<sup>26</sup> Central Adoption Resource Authority, *Registration of cases of single PAPs having a live in partner in a long time relationship and not married*, CARA-ICA012/3/2017 (Issued on May 31, 2018).

<sup>27</sup> Central Adoption Resource Authority, *Reconsideration of decision to allow Single PAPs in live-in relationship*, CARA-ICA012/3/2017 (Issued on Oct 11, 2018).

<sup>28</sup> Jagriti Chandra, *Live-In Partners Can Adopt Now*, THE HINDU, Sept 21, 2018, <https://www.thehindu.com/news/national/live-in-partners-can-adopt-now/article25010051.ece>.

<sup>29</sup> *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469.

<sup>30</sup> Pratyush Jha & Tannishtha Chatterjee, *LGBTQ Rights in India: An Insight into the Provisions of Marriage, Adoptions & Challenges*, 4 INT'L J.L. MGMT. & HUMAN, 2921, 2928 (2021).

being ignored. Other reason being due to the social and cultural discrimination faced by them, they are less likely to be employed in a decent-paying job. This causes low-income level and eventually, the economic factor as a measure of adoption rights bar them from being granted a child because adopting a child means consenting to overall betterment of the child and fulfilling the necessities of the child which requires decent income. If the adoptive parents are not financially sound and the child suffers, then, there is no point of granting adoption because the point of adoption is to have a better future for the child.

On the other hand, the queer community has also been supported by the Courts. For instance, in the case of **NALSA v. Union of India**<sup>31</sup>, the SC held that not recognizing this community is violative of Articles 14, 15, 16, and 21 of the Indian Constitution. Through this case, the people of this community were now regarded as ‘third gender’<sup>32</sup> and considered to be educationally and socially backward. Also, in the case of **K.S. Puttaswamy v. Union of India**<sup>33</sup>, where the court held that the fundamental rights to queer community because of their small number should not be given rather, they should be granted rights because of hostile treatment. These two judgements bring us closer to the intent of the paper that the rights of queer community such as adoption rights must be granted and protected and that they must be treated as an equal individual and not with hostility. This means that the queer community has also been recognized and given certain rights but, in this case more harm is done than good due to the societal actions.

## V. POTENTIAL SOLUTIONS FOR LGBTQIA+ COMMUNITY

Adoption rights must be granted to the LGBTQIA+ community because of a few reasons. Firstly, it creates a loving home for the children if the same due diligence is done in the process of adoption by authorities as in case of the straight couples. If a child is kept in a healthy environment with a same-sex couple, it is better for the child’s future than the child being in an orphanage. Also, the fact that there is need of only male and female parental figures for the adopted child seems to be irrational because as stated earlier, there is a need for safe and loving home for the adopted child which the same-sex couple is capable of providing to the adopted child. According to a US based adoption agency, 21% of the total same-sex couples in US have

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<sup>31</sup> NALSA v. Union of India, (2014) INSC 275.

<sup>32</sup> Ibid.

<sup>33</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

adopted children versus the opposite sex couple accounting for 10%. It is even said that the same sex couples are more likely to adopt transracially than the opposite sex couples.<sup>34</sup> Some studies demonstrate that same-sex couples are even more capable dealing with diverse children and children with special needs than heterosexual couples. LGBT individuals are more willing than heterosexuals to adopt children with serious physical, emotional and behavioural issues. They also are more willing to adopt older children rather than babies and various races opposed to just their race.<sup>35</sup> Fortunately, children with LGBT parents have been examined to be more open to diversity. When growing up around LGBT parents, children proved to be more accepting and friendly with their peers (American Civil Liberties Union). Adoption has been drastically increased after same-sex couples have been adopting and will continue to increase if the same-sex couple adoption rights are widely accepted.<sup>36</sup> Secondly, granting adoption rights to the LGBTQIA+ would promote equality and India would also meet the international standards like the United Kingdom in 2002 gave adoption rights to same-sex couples under **Adoption and Children Act, 2002**.<sup>37</sup> India must alter such an orthodox mindset and mend the legislations to grant adoption rights to the LGBTQIA+ community.

One way is to progressively walk on the path on which the Live-in couples were granted adoption rights as per the D. Velusamy case.<sup>38</sup> Considering the current conceived status of the LGBTQIA+ community, the first step of the legislature can be to grant adoption rights on a case-to-case basis which may involve monitoring the factors similar to which are monitored in the Live-in couples' adoption case.

Another way can be legally recognizing same-sex marriage, as a result of which same-sex couples can become eligible adoptive parents under the Adoption Regulations, 2017 which mandates at least 2 years of marital status.<sup>39</sup> Another reason to legalize same-sex marriage is that in August 2022, The Supreme Court of India passed a landmark judgement which allowed the same-sex couples to cohabit as live-in couples.<sup>40</sup> This judgement would strengthen the

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<sup>34</sup> Lifelong Adoptions, LGBT Adoption Statistics, Lifelong Adoptions, Sept, 2022, <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics>

<sup>35</sup> Ross, L., Epstein, R., Goldfinger, C., Steele, L., Anderson, S., & Strike, C. (2008). Lesbian and queer mothers navigating the adoption system: The impacts on mental health. *Health Sociology Review*, 17(3), 254-266.

<sup>36</sup> *Supra* Note 34.

<sup>37</sup> Danni Scott, *Ground-Breaking Moments in LGBTQIA+ History That Changed Britain*, MIRROR, Feb. 21, 2023, <https://www.mirror.co.uk/news/uk-news/ground-breaking-moments-LGBTQIA+-history-29270640>.

<sup>38</sup> *Supra* Note 29.

<sup>39</sup> *Supra* Note 22.

<sup>40</sup> Deepika Singh v. Central Administrative Tribunal, (2022) SCC OnLine SC 1088.

community's adoption rights as they can have a live-in relationship which is marriage like in nature as per fulfillment of the requirements enshrined under the D. Velusamy case<sup>41</sup>, which might help them adopting a child by the procedure through which live-in couples can adopt.

One of the other ways in which the **Deepika Singh v. Central Administrative Tribunal**,<sup>42</sup> may help is only when the CARA guidelines are amended in such a way that they do not require a marital status of at least 2 years but, they require a stable relation of at least 2 years to adopt a child which rules out the mandatory provision of marriage. This is because the problem lies with the marital status of the LGBTQIA+ community and this way the 'marriage-like live-in relations' of same-sex couples would also not create a barrier to the adoption rights of the community.

## VI. CONCLUSION

The same-sex couples deserve equal rights in all spheres such as socially, economically, and legally. The society and judiciary of India have to be more inclusive of all the communities in the country. Considering the current scenario and condition of the Queer community in India, it is the right time for the Indian Parliament and courts to bring revolutionary changes in the adoption legislations. The courts can grant adoption rights to same-sex couples on the same lines on which live-in couples were granted. The same-sex marriage if legalized shall solve several societal issues and as well as legal issues as it would bring more availability of rights to the queer community and the adoption rights problem shall be served. The judiciary can legalize same-sex marriage; and the adoption legislations can be amended in the sense that they become broader and include Queer community. India could also bring a uniform codified legislation for equal adoption rights for every individual because better the adoption rights, better the future of the orphaned, surrendered, and abandoned children is. Granting adoption rights shall give Queer community their equal rights under Article 14<sup>43</sup>; they shall no more be discriminated based on gender which is violative under Article 15<sup>44</sup>; and be granted the right to family which fulfills right to life under Article 21<sup>45</sup>.

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<sup>41</sup> *Supra* Note 29.

<sup>42</sup> *Supra* Note 40.

<sup>43</sup> *Supra* Note 1.

<sup>44</sup> *Supra* Note 2.

<sup>45</sup> *Supra* Note 3.