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HETERONORMATIVITY IN INDIAN ADOPTION LAWS: A BARRIER TO LGBTQ+ PARENTING - A CRITICAL ANALYSIS

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ABSTRACT

In this paper we look at how Indian adoption laws are based on structural heteronormativity and the impact they have on creating significant (but indirect) barriers to LGBTQ+ persons becoming parents. In addition to looking at structural issues with the adoption regulatory framework in India (including marital presumptions, institutional discretion regarding adoption and the use of child welfare standards), we will discuss how these exclusionary practices exist in Indian law despite the fact that sexual minorities have been given constitutional protections under the Indian Constitution. The evolution of such protections has resulted in developments in legal/judicial practices since 2018 under the Navtej Singh Johar v Union of India (2018) decision. We argue that based on the above, LGBTQ+ persons are placed at a disadvantage when seeking to adopt children in India.¹ Employing a combined doctrinal and comparative methodology, this article analyses Indian statutes, administrative guidelines, and case law to demonstrate how facially neutral criteria—notably marital status, conjugal stability, and the spousal requirement for joint adoption—function as proxies for heteronormative bias.² It finds that discrimination against LGBTQ+ persons through such criteria constitutes a violation of the constitutional guarantees of equality under Articles 14, 15, and 21,³ and is unjustifiable in light of the comparative international evidence regarding the welfare of children raised in diverse family forms. The article concludes with a series of concrete legislative, institutional, and policy reforms directed at aligning Indian adoption law with the demands of constitutional morality.

KEYWORDS: Heteronormativity; LGBTQ+ Parenting; Adoption Law; India; Equality; CARA; Constitutional Morality; Article 14; Article 15; Article 21; Comparative Family Law; Child Welfare.

¹ Human Rights Watch, 'India: LGBT Rights' (2021).

² CARA, 'Adoption Regulations' (2022).

³ Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019).

RESEARCH QUESTIONS

This article is guided by the following research questions:

1. In what ways does the existing statutory and regulatory framework governing adoption in India—particularly the Hindu Adoption and Maintenance Act 1956 and the Juvenile Justice (Care and Protection of Children) Act 2015 as implemented through the CARA Adoption 1. Do regulations 2022 reflect and entrench heteronormative assumptions that systematically exclude LGBTQ+ individuals and couples from equal access to adoption?
2. Is the use of marital status as a criterion for eligibility for joint adoption indirect discrimination on the basis of sexual orientation and gender identity, in violation of the constitutionally protected rights of equality, non-discrimination, and dignity in Articles 14, 15 and 21 of the Constitution of India?
3. What does existing empirical evidence on child development outcomes in LGBTQ+headed families suggest about the validity of child welfare-based justifications for excluding LGBTQ+ couples from joint adoption eligibility?
4. How have similar jurisdictions to India — in the United States, United Kingdom and South Africa — adopted reforms to their adoption laws to include LGBTQ+ couples? What can India learn from these comparative jurisdictions?
5. To bring Indian adoption law into line with the principles contained in the post-2017 jurisprudence of the Supreme Court of India concerning constitutional morality, what legislative, regulatory, and institutional reforms are required?

RESEARCH OBJECTIVES

1. To apply the principles of equality, non-discrimination and decisional autonomy — articulated through the decisions of *Navtej Singh v Union of India* (2018), *KS Puttaswamy v Union of India* (2017) and *Supriyo @ Supriya Chakraborty v Union of India* (2023) — to determine the constitutionality of using marital status as a criterion for adoption eligibility.
2. To examine empirical studies that explore the potential outcomes of LGBTQ+ parenting and evaluate whether the child welfare rationale used to justify heteronormative eligibility criteria has been substantiated by empirical evidence.
3. To conduct a structured comparative analysis of adoption law reforms in the United States, the United Kingdom and South Africa; in order to identify models and

mechanisms of adoption law reform that can be adapted for application in the Indian context.

4. To provide clear and constitutionally based recommendations for legislative reform, regulatory reform and institutional reform that will create an inclusive, capacity-based adoption framework that complies with the nature of constitutional morality in India.

I. INTRODUCTION

Indian family law and therefore the law of adoption are based on a model of a nuclear heterosexual married couple as the typical family form. This model serves as a rule for all other types of families. Adoption law does not just describe the ideal family type; it also establishes the rules for how non-typical family forms are treated by the law. Adoption law (both statutory and administrative) is based on the idea of the 'stable family' (a concept which includes very traditional and normative assumptions about heterosexuality). The constitutional changes post 2014 that protect the privacy and dignity of people and decriminalise same-sex relationships have not led to changes in the laws related to adoption. As a result, there exists an inconsistency within the legal system; whereas sexual minorities are constitutionally recognised as having rights, they do not have the legislative or the administrative method available to them to access one of their most significant rights (parenting). The LGBTQ+ population is a heterogeneous group based on sexual orientation and gender identity that is different from the heterosexual and cisgender definition of family. The Supreme Court of India has officially recognised the fact that a person has dignity, and a right to make choices, as inherent to each and every Indian, including sexual minorities. It has ruled that constitutional morality, rather than popular morality, should guide the interpretation and application of India's fundamental rights. Despite this, the legal framework governing adoption has not been able to adapt to this constitutional shift, and therefore still treats marriage as a requirement for joint adoption eligibility, creating a systematic impediment that makes it impossible for same-sex couples to adopt together. The thesis of this article is that Indian adoption law is, by its terms and structure, neutral, but is in fact underpinned with a heteronormative bias as evidenced by the treatment of marriage as a criterion for eligibility and as a basis for exercising discretion. This form of indirect discrimination cannot be justified under Article 14 of the Constitution, which prohibits arbitrary classification,⁴ nor under Article 15, which proscribes discrimination on the ground of sex—a term that, on the authority of *Navtej Singh Johar*, encompasses sexual

⁴ Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019).

orientation⁵—and is further inconsistent with the guarantee of dignity and decisional autonomy enshrined in Article 21.⁶ This article proceeds in eight further parts. Part two conceptualize heteronormativity and its relationship to legal construction of parenthood. Part three surveys the principal legislative frameworks governing adoption in India. Part four analyses the explicit and implicit dimension of LGBTQ+ exclusion in the adoption system. Part Five of this paper will provide an overview of the different international policies surrounding adoption. Part Six will focus on how courts and advocates for children worldwide have been actively engaged in advocating for children internationally analyses the explicit and implicit dimensions of LGBTQ+ exclusion in the adoption system. Finally, in Part Seven, we will provide concrete recommendations to improve adoption policy worldwide. Part Eight will summarize conclusion of this paper.

Conceptualizing Heteronormative and Parenthood

2.1 Defining Heteronormativity

Judith Butler, an expert in Gender Performativity and who has made significant contributions to the field of Gender Studies, has stated that heteronormativity operates as an ideology because it includes a set of compulsory gender norms that are characterised as having no origin in law or politics and therefore not open to challenge. In effect, heteronormativity has greater ideological power than an explicit prohibition; it is not simply a matter of having a specific piece of legislation designed to repress them—rather, the cumulative experience of many state and nonstate institutions produces and reproduces the idea of heterosexuality as the normative reference point for evaluating every form of family. Therefore, from within the critical legal perspective, the law's heteronormative adoption jurisdiction cannot be understood by simply striking out provisions that discriminate; there can be no change without a complete overhaul of the normative framework that determines the eligibility and suitability of applicants for adoption; and best interest determinations. Heteronormativity in Indian law can be examined through three mechanisms: the creation of a legally recognised family based on heterosexual marriage; the basis of family formation being biological reproduction; and the deployment of administrative discretion (in home studies and other placement options) to enforce heteronormative views of what is in the best interests of children while being presented as neutral professional decisions. As Adrienne Rich stated, what is represented as natural/choice is really a social institution imposed upon people through legal/social means.

⁵ Navtej Singh Johar (n 6).

⁶ KS Puttaswamy v Union of India (2017) 10 SCC 1.

2.2 Parenthood Beyond Heteronormative Structures

The law typically recognizes parenthood as a two-parent married couple: a man and a woman with children conceived biologically. This view no longer reflects how families are being formed within society. Many families created by LGBTQ+ people and couples are no longer based upon biology or marriage; rather, they include children conceived through adoption, surrogacy, and/or assisted reproductive technology, along with newly defined co-parenting arrangements. The newly defined family units represent varying degrees of commitment, care, and interdependence, rather than being defined solely by biology and marriage. The law does not recognize many forms of family created through love and commitment, which reinforces heteronormativity and continues to exclude those whose families do not comply with traditional views..

The empirical literature on child welfare outcomes in LGBTQ+ households provides a critically important perspective that is frequently elided in legal and policy debates.⁷ Stacey and Biblarz's landmark meta-analysis of forty-nine studies concluded that children raised by same-sex parents did not differ significantly from those raised by heterosexual parents on measures of cognitive development, social development, psychological adjustment, or behavioural outcomes.⁸ The American Psychological Association has categorically concluded that the sexual orientation of parents is not, in itself, a determinant of child welfare outcomes.⁹ Patterson's extensive review of the literature similarly found no credible empirical basis for the assumption that children require a parent of each sex in order to develop optimally.¹⁰

These empirical findings are of direct constitutional significance. If the welfare of the child is the paramount consideration in adoption law—as it is under Indian law¹¹ and in every comparative jurisdiction examined in this article¹²—then a framework that excludes LGBTQ+ parents on the basis of status rather than demonstrated capacity cannot claim child welfare as its justification. The heteronormative family ideal is not only empirically unsubstantiated but also constitutionally suspect, because it subordinates actual child welfare to the perpetuation of a normative ideal that serves interests other than those of the child.¹³

⁷ American Psychological Association, 'Lesbian and Gay Parenting' (2019).

⁸ Judith Stacey and Timothy Biblarz, '(How) Does the Sexual Orientation of Parents Matter?' (2001).

⁹ American Psychological Association (n 4).

¹⁰ Charlotte J Patterson, 'Children of Lesbian and Gay Parents' (2009).

¹¹ Juvenile Justice (Care and Protection of Children) Act 2015.

¹² Obergefell v Hodges 576 US 644 (2015).

¹³ Martha Nussbaum, *From Disgust to Humanity* (OUP 2010).

III. LEGAL FRAMEWORKS GOVERNING ADOPTION IN INDIA

3.1 The Hindu Adoption and Maintenance Act, 1956

Hindu Adoption and Maintenance Act (HAMA) 1956 is one of the two laws regulating adoption in India for society. It regulates the adoption of Hindus, Buddhists, Jains and Sikhs through the application of Hindu personal law. According to the HAMA provisions set out at sections 7 and 8, a Hindu man or woman of sound mind and aged over 18 years can adopt as long he or she does so with the consent of her husband if she is a married woman; and if she is a married man the adoption may only be effected after his wife has died, he has left the world, he is no longer a Hindu or the court has declared him to be of unsound mind.

HAMA's structure creates a clear hierarchy among the members of the family through the imposed heterosexuality. The entire system created by HAMA operates by creating the married heterosexual male as the typical parent in the adoption process. The spousal consent requirement not only ensures that only married couples can adopt jointly but also assumes that the only possible legally acknowledged family unit is a husband and wife..³⁷ A same-sex couple has no legal standing under the HAMA, and there is no interpretive pathway through which such a couple could jointly adopt, since the Act's definitional framework does not contemplate a family unit constituted by two persons of the same sex.¹⁴

The HAMA has been criticised by feminist legal scholars for perpetuating gender hierarchies even within the heterosexual family, and these critiques apply with amplified force in the context of sexual minorities, for whom the Act provides no recognition whatsoever. The judicial response to HAMA-based adoption disputes has, on the whole, been conservative, with courts confining themselves to the Acts textual provisions and declining to engage in the kind of creative interpretation that might extend its ambit to non-traditional families.¹⁵

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

The *Juvenile Justice (Care and Protection of Children) Act 2015* (JJ Act) represents the second, and in the present context more significant, regime governing adoption in India¹⁶. The JJ Act applies to all individuals without regard to their religion compared to the HAMA, and the JJ Act relies on the Central Adoption Resource Authority (CARA) and the Specialized Adoption Agency (SAA) to help with the administration of the Act and adoption proceedings. Section 57(3) of the JJ Act states that married couples can adopt only if the couple's marriage has lasted

¹⁴ Supriyo v Union of India (2023) SCC OnLine SC.

¹⁵ Law Commission of India, 'Reform of Family Law' (2018). Juvenile Justice (Care and Protection of Children) Act 2015.

for the two years preceding the adoption and has been stable for two years. Section 57(4) of the JJ Act states that an adoptive single person can adopt if certain conditions are met by the adoptive single person. The CARA Adoption Regulations 2022 are primarily used to assist CARA with the administration of the JJ Act.¹⁶ Regulation 5(3) limits joint adoption to 'spouses', thereby confining this category to legally married couples.¹⁷ The Regulations do not contain any provision that explicitly excludes LGBTQ+ persons, but the structural effect of requiring joint adoptive parents to be 'spouses' is to confine joint adoption to those whose relationship is recognised under Indian marriage law— which does not include same-sex couples.¹⁷ This is the paradigmatic instance of facially neutral legislation that is functionally discriminatory. Individual adoption by LGBTQ+ persons is a different matter. The JJ Act does not explicitly prohibit a gay or lesbian individual from adopting as a single parent, and such adoption appears technically permissible under the current framework. However, the practical barriers are substantial: home study assessments may expose an applicant's sexual orientation to scrutiny; the lack of any anti-discrimination provision means that an applicant has no statutory protection against adverse decisions motivated by prejudice;¹⁸ and the absence of legal recognition of the prospective parent's relationship means that, upon adoption, the child would have only one legal parent, even where two committed caregivers will in fact raise the child.¹⁹

3.3 Intersectional Analysis of Personal Laws and Adoption

The fragmentation of Indian family law along religious lines compounds the exclusionary effects of heteronormativity for LGBTQ+ persons subject to multiple axes of marginalisation. Muslim, Christian, and Parsi personal laws do not recognise adoption at all; the institution of guardianship is used instead, without the full legal consequences of adoptive parenthood. The result is that the only secular adoption pathway available to LGBTQ+ persons across all religious communities is the JJ Act, and that pathway, as demonstrated above, contains structural barriers to joint adoption that fall disproportionately on same-sex couples.

Intersectional analysis reveals that the burden of heteronormative exclusion is not borne equally within the LGBTQ+ community.²⁰ Transgender persons face compounded barriers: notwithstanding the formal recognition of transgender identity in *National Legal Services*

¹⁶ CARA Adoption Regulations 2022, reg 5(3).

¹⁷ *Supriyo v Union of India* (2023) SCC OnLine SC.

¹⁸ Human Rights Watch, 'India: LGBT Rights' (2021).

¹⁹ Nancy Polikoff, *Beyond (Straight and Gay) Marriage* (Beacon Press 2008).

²⁰ Martha Nussbaum, *From Disgust to Humanity* (OUP 2010).

Authority v Union of India (2014),²¹ the regulatory framework for adoption has not been updated to reflect the legal implications of that recognition.⁵⁰ A transgender person who has legally changed their gender faces uncertainty about whether they satisfy the gendered eligibility criteria in the HAMA or the CARA Regulations, and no administrative guidance exists to resolve this uncertainty, reflecting the system's assumption that potential adoptive parents are invariably cisgender.

3.4 Judicial Interpretations and Key Case Laws 3.4.1 *Shabnam Hashmi v Union of India* (2014)

In *Shabnam Hashmi v Union of India* (2014),²² the Supreme Court was confronted with the question of whether the right to adopt, and the right to be adopted, constituted a fundamental right under Part III of the Constitution. The Court held, per Sathasivam CJ, that the JJ Act's adoption provisions created a secular enabling right, available to persons of all faiths and overriding any inconsistent provision of personal law, but that adoption did not rise to the level of a fundamental right.²³ The Court's characterisation of adoption as a secular, enabling right lays an important doctrinal foundation for arguing that the adoption framework must be consistent with constitutional equality guarantees.

The Court's emphasis on the paramount importance of the child's welfare in adoption decisions provides important raw material for a constitutional argument that eligibility criteria in conflict with the equality provisions of the Constitution cannot stand.²⁵ The Court did not address the question of LGBTQ+ adoption, and its silence on this point reflects the limited scope of the challenge before it, rather than any considered judicial position on the constitutional permissibility of excluding same-sex couples.

3.4.2 *Navtej Singh Johar v Union of India* (2018)

Navtej Singh Johar v Union of India (2018)²⁷ represents the most consequential judicial pronouncement on LGBTQ+ rights in Indian constitutional history. The five-judge Constitution Bench, in reading down section 377 of the *Indian Penal Code 1860* insofar as it criminalised consensual adult same-sex intimacy, affirmed a series of doctrinal propositions that have direct bearing on the adoption law question.⁵⁵ First, the Court held that sexual

²¹ National Legal Services Authority v Union of India (2014) 5 SCC 438. ⁵⁰ CARA Adoption Regulations 2022.

²² Shabnam Hashmi v Union of India (2014) 4 SCC 1. ²⁵ Shabnam Hashmi (n 1).

²³ Juvenile Justice (Care and Protection of Children) Act 2015.²⁷ Navtej Singh Johar v Union of India (2018) 10 SCC 1. ⁵⁵ Navtej Singh Johar (n 1).

orientation is a natural and immutable attribute of personal identity, entitled to the full protection of Article 21. Second, Chandrachud J's concurring opinion emphasised the constitutional centrality of decisional autonomy—the right to make fundamental personal choices free from state interference—as a component of the right to life and personal liberty. Third, the Court unequivocally held that the concept of constitutional morality must prevail over popular morality in the adjudication of fundamental rights claims.

The doctrinal implications of *Navtej Singh Johar* for adoption law are significant. If sexual orientation is a protected attribute under Article 21, and if decisional autonomy encompasses the right to choose one's family structure,²⁴ then a legal regime that denies LGBTQ+ persons the opportunity to jointly parent an adopted child requires compelling constitutional justification.²⁵ The Court's emphasis on the indivisibility of dignity means that the protection of LGBTQ+ identity cannot be confined to the bedroom; it must extend to the family home. To recognise sexual orientation as a constitutionally protected attribute while simultaneously tolerating a legal framework that systematically disadvantages persons on the basis of that attribute in the domain of family formation would be to acknowledge a right with one hand and withdraw it with the other.

3.4.3 *Supriyo @ Supriya Chakraborty v Union of India (2023)*

The Supreme Court's judgment in *Supriyo @ Supriya Chakraborty v Union of India (2023)*²⁶ fivejudge bench was asked to recognise a fundamental right to same-sex marriage. By a 3-2 majority, the Court declined to do so, holding that there is no fundamental right to marry under the Indian Constitution, and that any extension of marriage rights to same-sex couples is a matter for legislative determination. The majority further held that the interpretation of the *Special Marriage Act 1954*²⁷ so as to include same-sex couples was not warranted by the Act's text, purpose, or legislative history.

On the specific question of adoption rights for LGBTQ+ persons, the majority declined to strike down the CARA Regulations' requirement that joint adoptive parents be spouses²⁸, reasoning that the question of whether same-sex couples should be permitted to adopt is inextricably linked to the question of marriage equality—a question the Court had already declined to resolve. This reasoning is, with respect, unsatisfying. The question of adoption eligibility is analytically

²⁴ Navtej Singh Johar (n 1).

²⁵ Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019).

²⁶ *Supriyo @ Supriya Chakraborty v Union of India (2023)* SCC OnLine SC.

²⁷ *Special Marriage Act 1954*.

²⁸ CARA Adoption Regulations 2022, reg 5(3).

distinct from the question of marriage equality: the former concerns the interests of the child and the capacity of prospective parents, while the latter concerns the civil status of the couple's relationship. A legislature or court could provide for joint adoption by unmarried couples—whether same-sex or opposite-sex—without recognising any form of marital union, and several jurisdictions have done exactly this.²⁹

Justice Bhat's partial dissent in *Supriyo* is of considerable doctrinal importance.³⁴ Bhat J held that the denial of adoption rights to same-sex couples constituted a violation of Articles 14 and 21. His Lordship reasoned that the classification of prospective adoptive parents on the basis of marital status—which is a proxy for sexual orientation given the unavailability of same-sex marriage—is not rationally connected to any legitimate state objective, and that the child welfare rationale advanced by the Union of India is contradicted by the substantial body of empirical evidence demonstrating that sexual orientation does not determine parenting capacity. While Bhat J's dissent does not have the force of binding authority, it provides a detailed constitutional road map for future litigation and articulates the strongest judicial statement yet on the constitutional necessity of inclusive adoption law.

IV. IMPACT OF HETERONORMATIVITY ON LGBTQ+ PARENTING IN INDIA

4.1 Explicit and Implicit Exclusion

The ways that LGBTQ+ individuals are excluded from gaining access to the full benefits of adoption in India occur on two distinct levels of operation: explicit and implicit. The explicit level of exclusion can be seen through Regulation 5(3) of the CARA Adoption Regulations 2022 which states that both parents must be 'spouses' and therefore categorically excludes same-sex couples from the ability to adopt a child as a joint couple. This is an example of the indirect discrimination identified by Khaitan, wherein one has a facially neutral law that happens to disproportionately impact a protected class of individuals since only heterosexual couples can legally marry in India. This rule does not contain a definition of ineligibility that includes people who identify as LGBTQ+, but effectively precludes all same-sex couples from adopting jointly despite their respective ability to parent individually. The implicit exclusion is more diffuse and, in many respects, more insidious, because it operates through the exercise of administrative and professional judgment at multiple points in the adoption process. Home study assessments, which constitute the primary gatekeeping mechanism in the adoption

²⁹ Nancy Polikoff, *Beyond (Straight and Gay) Marriage* (Beacon Press 2008). ³⁴ *Supriyo* (n 6).

system, are conducted by social workers employed by Specialised Adoption Agencies⁶⁷. While the CARA Regulations specify certain criteria to be considered— financial capacity, physical health, mental health, domestic stability—they do not preclude inquiries into sexual orientation,³⁰ and they provide no anti-discrimination guarantee that would prevent an adverse assessment motivated by the assessor's personal or religious beliefs about LGBTQ+ persons. This structural vulnerability is compounded by the absence of any legal obligation on adoption agencies to train their staff in LGBTQ+ inclusive practice, and by the absence of any appeals mechanism specifically designed to address discrimination on grounds of sexual orientation in the adoption process.

4.2 Practical Challenges in Adoption for LGBTQ+ Persons

There are several different barriers to the adoption of LGBTQ+ individuals in India that are interrelated and compounding in their impact. One of the most significant barriers is the lack of recognition for same-sex couples as legal parents in India. One individual adopting a child will only be legally recognized as the legal parent of the child he/she/they has adopted by virtue of the fact that same-sex marriages are not recognized by Indian law. The second individual who has adopted the child with the first individual has no legal rights to the child; therefore, the child will have only one legal parent. As a consequence, decisions regarding inheritance, custody (in the event that the first individual who adopted the child dies or becomes incapacitated) and making medical decisions for the child will be made solely by the first individual, and the second individual will have no legal recourse to challenge the decisions made by the first individual. This lack of legal protection puts both the child and the LGBTQ+ family unit in a precarious position, and it is directly attributable to the continued refusal on the part of the Indian government to allow joint adoptions by same-sex couples. Second, LGBTQ+ prospective adoptive parents face the practical dilemma of disclosure. Any prospective adoptive parent who is in a same-sex relationship must decide, in completing adoption application forms and engaging with home study assessors, whether to disclose the existence and nature of that relationship. Disclosure may result in adverse assessment,⁷⁰ whether overt or covert; non-disclosure, on the other hand, may result in the placing of a child in a household arrangement that has not been properly assessed. There is no administrative guidance on this question, and the absence of such guidance is itself a reflection of the system's failure to contemplate the existence of LGBTQ+ adoptive parents.

³⁰ Human Rights Watch, 'India: LGBT Rights' (2021).

Third, the bureaucratic processes of the adoption system are structured around assumptions of heterosexual family formation that make them inherently alienating for LGBTQ+ applicants. Application forms that provide for 'husband' and 'wife' rather than 'parent 1' and 'parent 2'; home study protocols that inquire into 'marital relationship stability' as a proxy for parenting capacity; and placement committees that evaluate applications against an implicit standard of the ideal heterosexual family all combine to create an institutional environment that is structurally hostile to LGBTQ+ applicants, even in the absence of explicit discriminatory intent.

4.3 Psychosocial Impact on LGBTQ+ Prospective Parents

In addition to the various legal and bureaucratic barriers to the adoption process, the exclusion of LGBTQ+ individuals from adoption systems has serious psychosocial ramifications. Evidence gathered within an Indian Framework suggests that people identifying as LGBTQ+ who experience institutionalised discrimination when creating families have high levels of psychological distress, including anxiety or depression, and experience a phenomenon referred to by psychologists as "minority stress" which is due to systemic and continuous marginalisation or stigmatisation.

Familial creation holds additional significance for members of the LGBTQ+ community in that the creation of a legal family represents not only an emotional desire, but also a large component of their identity as individuals as well as social acceptance. According to K. Weston's anthropological research on LGBTQ+ kinship, the existence of "chosen families" provides LGBTQ+ individuals with a means of asserting their social existence while creating groups that resist the marginalising influences of heteronormative social structures. When the law does not recognise these families, it sends a social message of exclusion and perpetuates their subordinate social status, which leads to significant harm. Children whose chances of adoption by qualified LGBTQ+ parents are rejected experience psychosocial repercussions by being denied being cared for by LGBTQ+ persons. Every qualifying prospective adoptive parent rejected from being part of the adoption system based on their sexual orientation represents a lost chance for an adopted child who needs a permanent family.⁷³ With so many children currently in institutional care in India waiting for adoption placements, and with numerous studies that demonstrate the negative effects of prolonged institutional care on children's development, removing a qualifying type of prospective parent from the pool of available adopters has both direct and measurable effects on child welfare.

V. COMPARATIVE ANALYSIS OF INTERNATIONAL ADOPTION LAWS

5.1 Global Trends in LGBTQ+ Inclusive Adoption Policies

In the last 30 years, the global trend in Adoption Law Reform has been a strong movement away from eligibility criteria based on status to frameworks that assess capacity. This shift is influenced by the increasing use of international human rights standards, most notably the UN Convention on the Rights of the Child 1989, which requires decision-makers to make the best interest of the child the primary consideration when making decisions regarding children, and by the significant accumulation of empirical evidence that the capacity to parent is not based on sexual orientation or on the structure of one's family. By 2024, more than 30 jurisdictions around the world allow same-sex couples to jointly adopt children, which is indicative of a strong and accelerating trend.

5.2 The United States: From Prohibition to Constitutional Mandate

The history of Adoption Law in America shows how powerful a tool litigation can be for making changes to laws, especially when it comes to granting legal rights to LGBTQ+ parents. Prior to the Supreme Court decision, *Obergefell v Hodges* (2015), a same-sex couple in one state may have had completely different Adoption Rights than a same-sex couple in another state. The U.S. Supreme Court decision in *Obergefell* that granted a same-sex couple the Constitutional Right to Marry gave these couples the same rights to jointly adopt as a husband and wife do. Thus, the issue of whether or not a same-sex married couple had a right to jointly adopt their children has more or less been decided by the U.S. Supreme Court.

The jurisprudential approach adopted by American courts in adoption cases involving LGBTQ+ parents is instructive. Courts have consistently held that the 'best interests of the child' standard must be applied on an individualised basis, with reference to the demonstrated capacity of the specific prospective parents rather than on the basis of generalisations about the parenting abilities of classes of persons defined by their sexual orientation. This approach repudiates the heteronormative assumption that a heterosexual couple is inherently better suited to parenthood than a same-sex couple, and substitutes an empirically grounded assessment of individual capacity. The implication for Indian law is that a child-welfare-based justification for excluding LGBTQ+ parents from the adoption system requires empirical substantiation that, on the available evidence, cannot be provided.

5.3 The United Kingdom: Inclusive Law and Structured Assessment

The United Kingdom's adoption law provides for joint adoption by same-sex couples through

a progressive series of legislative reforms. The *Adoption and Children Act 2002*³¹ was amended to permit adoption by unmarried couples, including same-sex couples; the *Civil Partnership Act 2004*³² extended adoption rights to civil partners; and the *Marriage (Same Sex Couples) Act 2013*³³ completed the equalisation by permitting same-sex married couples to adopt on precisely the same terms as heterosexual married couples. The guiding principle throughout is that the welfare of the child is the paramount consideration, assessed by reference to specified statutory criteria rather than the family structure of the prospective adopters.

The UK model is notable for the combination of inclusive eligibility criteria with structured, professionally conducted assessment processes. Adoption agencies are required to apply the same assessment framework to all prospective adopters, irrespective of sexual orientation, and the *Equality Act 2010* provides express protection against discrimination in the provision of adoption services.³⁴ This combination of legislative inclusivity and institutional antidiscrimination protections provides a model for reform that India might adapt to its own legal and social context.

5.4 South Africa: Constitutional Equality as the Foundation of Family Law

South Africa's constitutional framework provides the most robust international model for the integration of LGBTQ+ rights into family law. The *Constitution of the Republic of South Africa 1996* expressly prohibits unfair discrimination on grounds inter alia of sexual orientation in section 9(3),³⁵ making South Africa one of very few jurisdictions in which the constitutional text itself provides explicit protection for sexual minorities. This constitutional foundation has been given concrete effect through a series of landmark judgments by the Constitutional Court. In *Du Toit v Minister for Welfare and Population Development* (2002),³⁶ the Constitutional Court unanimously struck down the statutory requirement that only married persons could adopt jointly, holding that the provision unfairly discriminated against same-sex permanent life partners on grounds of sexual orientation. O'Regan and Sachs JJ reasoned that the denial of joint adoption rights to same-sex couples caused real and significant harm to the children who would benefit from adoption by committed same-sex couples, and to the couples themselves, and that no countervailing benefit could justify this harm.

³¹ Adoption and Children Act 2002 (UK).

³² Civil Partnership Act 2004 (UK).

³³ Marriage (Same Sex Couples) Act 2013 (UK).

³⁴ Equality Act 2010 (UK).

³⁵ Constitution of the Republic of South Africa 1996, s 9(3).

³⁶ *Du Toit v Minister for Welfare and Population Development* 2002 (10) BCLR 1006 (CC)

In *Minister of Home Affairs v Fourie* (2005),³⁷ the Constitutional Court recognised the right of same-sex couples to have their permanent unions solemnised, and directed Parliament to cure the constitutional defect within one year. This judgment led directly to the *Civil Union Act 2006*,⁸⁵ which extended the right to marry to same-sex couples. The sequencing is instructive: South Africa's Constitutional Court used the constitutional prohibition of discrimination as the foundation for progressively extending family rights to same-sex couples, with each judgment building on and extending the constitutional logic of the previous ones.

5.5 Lessons for India

The comparative analysis yields several specific lessons for Indian adoption law reform. First, the experience of the United States, the United Kingdom, and South Africa demonstrates that the use of marital status as a proxy for parenting capacity produces both over-inclusivity and underinclusivity. A capacity-based assessment framework, applied consistently and without discriminatory assumptions, is a more accurate and constitutional basis for adoption eligibility determinations.

Second, all three comparative jurisdictions have found it necessary to supplement inclusive eligibility criteria with explicit anti-discrimination protections applicable to the administration of adoption services. The absence of such protections in the Indian adoption regulatory framework means that LGBTQ+ applicants are dependent on the good faith of individual social workers and placement committees, with no legal recourse if that good faith is not forthcoming. Third, and most fundamentally, the comparative evidence refutes the welfare-based justification for excluding LGBTQ+ parents: in every jurisdiction that has opened adoption to same-sex couples, there is no evidence of adverse child welfare outcomes attributable to the reform.

VI. ADVOCACY, JUDICIAL ACTIVISM, AND ONGOING LEGAL DEVELOPMENTS

6.1 The Role of Civil Society and NGOs

Civil society organisations have played a pivotal role in advancing LGBTQ+ rights in India, including in the specific context of family law and adoption.³⁸ Organisations such as the Naz Foundation—the original petitioner in the litigation that eventually produced *Navtej Singh*

³⁷ *Minister of Home Affairs v Fourie* 2005 (1) SA 524 (CC). ⁸⁵ *Civil Union Act 2006* (South Africa).

³⁸ Human Rights Watch, 'India: LGBT Rights' (2021).

*Johar*³⁹—Lawyers Collective, the Alternative Law Forum, and numerous regional LGBTQ+ advocacy groups have combined strategic litigation, law reform advocacy, public education, and the provision of legal aid to pursue a comprehensive agenda of LGBTQ+ equality. In the specific context of adoption, civil society organisations have identified and documented the practical barriers faced by LGBTQ+ prospective adoptive parents, conducted communitybased research on the experiences of LGBTQ+ families, and made representations to CARA and to parliamentary committees recommending the reform of adoption eligibility criteria. The Vidhi Centre for Legal Policy and the Centre for Law and Policy Research have both published detailed analyses of the heteronormative assumptions embedded in the CARA Regulations, providing the empirical foundation for constitutional challenges.

6.2 Landmark Judgments and Their Constitutional Significance

The evolution of judicial decision-making regarding LGBTQ+ rights has been marked by significant advances and setbacks. The Delhi High Court's judgment in *Naz Foundation v Government of NCT of Delhi* (2009) was the first significant judicial acknowledgment of the constitutional rights of sexual minorities. The judgment was subsequently overturned by the Supreme Court in *Suresh Kumar Koushal v Naz Foundation* (2014) before being finally reinstated and expanded by *Navtej Singh Johar* (2018). This pattern demonstrates an inconsistency between the principle of judicial activism for constitutional morality and that of judicial restraint in deference to legislative authority.

The ruling in *KS Puttaswamy v Union of India* (2017) issued by the Supreme Court has particular importance for the issue of adoption laws. The Court recognized that decisional autonomy in family and intimate relationships is to be treated as a fundamental right pursuant to Article 21. Chandrachud J's opinion in *Puttaswamy* explicitly addresses the right to choose one's family structure as a component of the constitutional right to privacy, laying the doctrinal groundwork for the argument that the denial of adoption rights to LGBTQ+ persons constitutes an interference with a constitutionally protected interest.

6.3 Ongoing Legal Developments

Following the *Supriyo* judgment of 2023, the question of LGBTQ+ adoption rights remains legally unresolved. The Supreme Court's direction to the Union of India to constitute a committee to examine issues related to LGBTQ+ couples, including in the context of

³⁹ *Naz Foundation v Govt of NCT of Delhi* (2009) 160 DLT 277.

adoption,⁴⁰ has produced no concrete legislative or regulatory outcome at the time of writing. Several high courts have cases pending before them in which LGBTQ+ individuals or couples have challenged adverse adoption-related decisions, and these cases may provide the vehicle for more detailed constitutional examination. The question of adoption by transgender persons also remains particularly acute. Following *NALSA v Union of India* (2014)⁹² and the enactment of the *Transgender Persons (Protection of Rights) Act 2019*,⁹³ transgender persons have formal legal recognition of their gender identity, but the adoption regulatory framework has not been updated to provide guidance on how transgender persons satisfy the gendered eligibility criteria in the HAMA and the CARA Regulations. The lack of regulation means there is no defined way to adopt as an LGBTQ+ parent; this is also visible through how there isn't any useable law created yet to assist with LGBTQ+ adoption in India. This lack of regulation represents a broader inability for the Indian adoption system to proceed in accordance with constitutional changes within the LGBTQ+ community.

6.4 Media, Public Discourse, and the Social Construction of LGBTQ+ Parenthood

The legal battles over LGBTQ+ adoption rights are situated within a broader landscape of public discourse in which the representation of LGBTQ+ families in the media and in public debate plays an important role in shaping both social attitudes and political will for legal reform. The increasing visibility of LGBTQ+ families in Indian popular culture, the growing body of academic research on LGBTQ+ parenting, and the advocacy efforts of civil society organisations have all contributed to a gradual, if uneven, shift in public attitudes towards LGBTQ+ parenthood. However, this shift has been contested by religious and social conservative groups, who have mobilised the language of child welfare, traditional family values, and cultural sovereignty to resist the extension of adoption rights to LGBTQ+ persons. The invocation of child welfare in this context is better understood as a post hoc rationalisation for a position whose actual motivation is the preservation of heteronormative family structures. The empirical evidence, as reviewed in Part II of this article, does not support the child welfare case against LGBTQ+ adoption.

⁴⁰ Supriyo @ Supriya Chakraborty v Union of India (2023) SCC OnLine SC ⁹² National Legal Services Authority v Union of India (2014) 5 SCC 438. ⁹³ Transgender Persons (Protection of Rights) Act 2019.

VII. POLICY RECOMMENDATIONS

7.1 Legislative Reforms

The most fundamental legislative reform required is the amendment of the CARA Adoption Regulations 2022⁴¹ to replace the current requirement that joint adoptive parents be 'spouses' with a requirement that joint adoptive parents be persons in a committed domestic relationship, however formalised. This amendment would open joint adoption to unmarried opposite-sex couples and to same-sex couples, while maintaining the requirement of relational stability that the current 'spousal' criterion is, at least in part, designed to ensure. This reform does not require prior action on marriage equality; it requires only a recognition that the relevant measure of parenting capacity is the nature and stability of the prospective parents' relationship rather than its legal status. The JJ Act itself should be amended to include an express anti-discrimination provision prohibiting discrimination in the adoption process on grounds of sexual orientation and gender identity. Such a provision, modelled on section 9(3) of the South African Constitution⁴² or the relevant provisions of the UK *Equality Act 2010*,⁴³ would provide a legislative basis for challenging discriminatory decisions by adoption agencies and placement committees, and would put beyond doubt the impermissibility of adverse adoption decisions motivated by anti LGBTQ+ prejudice. The amendment should be accompanied by a provision creating an effective remedy for LGBTQ+ persons who experience discrimination in the adoption process.

In the longer term, the Law Commission of India⁴⁴ should undertake a comprehensive review of the adoption provisions of the HAMA with a view to their reform or repeal. The HAMA's patriarchal and heteronormative structure is fundamentally inconsistent with the constitutional values of equality and dignity, and its amendment or replacement by a secular, gender-neutral adoption statute would eliminate one of the principal sources of heteronormative exclusion. The development of a Uniform Adoption Code, applicable to all persons irrespective of religion and founded on the principles of capacity-based assessment and anti-discrimination, would represent the most thoroughgoing realisation of constitutional equality in this domain.

7.2 Institutional Changes

Legislative reform alone is insufficient if the institutional culture of the adoption system

⁴¹ CARA Adoption Regulations 2022.

⁴² Constitution of South Africa 1996, s 9(3).

⁴³ Equality Act 2010 (UK).

⁴⁴ Law Commission of India, 'Reform of Family Law' (2018). ⁵⁰ American Psychological Association (n 13).

remains unreformed. CARA should develop and implement mandatory training programmes for all adoption agency personnel—social workers, assessors, and placement committee members—on LGBTQ+ inclusive practice. Such training should address the empirical evidence on LGBTQ+ parenting outcomes, the constitutional rights of LGBTQ+ persons in the adoption context, and the practical skills required to conduct non-discriminatory home study assessments of LGBTQ+ applicants.⁵⁰

The standard forms and procedures used in the adoption process should be reviewed and reformed to eliminate heteronormative assumptions. Application forms should use genderneutral language throughout; home study protocols should be revised to assess domestic stability and parenting capacity without reference to marital status or sexual orientation; and placement committee guidelines should be updated to reflect the empirical evidence on LGBTQ+ parenting outcomes and to require that decisions be based on demonstrated individual capacity rather than on groupbased assumptions.

7.3 Awareness, Education, and Social Change

Legal and institutional reform must be accompanied by broader social change if it is to be effective. CARA and the Ministry of Women and Child Development should commission and disseminate public information campaigns that accurately represent the evidence on LGBTQ+ parenting outcomes and that challenge the stereotypes and misconceptions that sustain heteronormative bias in the adoption system. Educational programmes at the school, college, and professional training levels should include accurate and affirming content on diverse family forms, preparing future generations for a society in which family diversity is recognised and celebrated rather than stigmatised.

V III. CONCLUSION

This article has sought to demonstrate, through a combination of doctrinal analysis, constitutional argument, and comparative reflection, that the laws governing adoption in India are not neutral as between different family forms but are systematically skewed in favour of heterosexual, married couples to the detriment of LGBTQ+ individuals and families. This heteronormative skew is not primarily the product of explicit legislative exclusion—though such exclusion exists in the form of the 'spousal' requirement for joint adoption⁴⁵—but is embedded in the structural assumptions and administrative practices of a system designed

⁴⁵ CARA Adoption Regulations 2022, reg 5(3).

around the ideal of the heteronormative family. The constitutional case against the heteronormativity of Indian adoption law is strong and, on the basis of the doctrinal developments since *Navtej Singh Johar* (2018)⁴⁶ and *KS Puttaswamy* (2017), growing in persuasive force. The classification of prospective adoptive parents on the basis of marital status—which is a proxy for sexual orientation given the unavailability of same-sex marriage in India—is not rationally connected to any legitimate state objective, fails the constitutional test of reasonable classification under Article 14,⁴⁷ and constitutes indirect discrimination on grounds of sex and sexual orientation in violation of Article 15.⁴⁸ The denial of the right to jointly parent an adopted child interferes with the decisional autonomy and dignity of LGBTQ+ persons in a manner that cannot be justified under Article 21.⁴⁹ The comparative evidence from the United States, the United Kingdom, and South Africa conclusively refutes the child welfare justification for excluding LGBTQ+ parents from the adoption system. Children raised by same-sex and other LGBTQ+ parents have equivalent developmental outcomes to children raised by heterosexual parents; the expansion of adoption eligibility to LGBTQ+ persons increases the pool of qualified prospective adopters available to children in institutional care; and there is no empirical basis for the assumption that a heterosexual married couple is inherently better suited to adoptive parenthood than a committed same-sex couple.

The psychosocial harm visited upon LGBTQ+ individuals by the continued exclusion from legal adoption is significant and corroborated by empirical research.⁵⁰ By denying LGBTQ+ persons the opportunity to legally constitute their families, the state not only infringes their constitutional Rights alone do not address stigma and help maintain the cycle of social exclusion and current rates of chronic minority stress that lead to poor health outcomes in this population Reform is necessary on three levels; legislative change to remove the requirement of "spouse" for joint adoption and include explicit anti-discrimination protections, institutional reform to require that all adoption agencies evaluate all potential parents based on their ability to provide parenting, not based on false assumptions regarding heteronormative parenting, and structural social change through education and discussions in the public that challenge the norm of the family based on heterosexual families. The constitutional requirement for the three levels of reform includes latitude in establishing equality, non-discrimination and dignity,

⁴⁶ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

⁴⁷ Constitution of India, art 14.

⁴⁸ Constitution of India, art 15.

⁴⁹ Constitution of India, art 21.

⁵⁰ Charlotte J Patterson, 'Children of Lesbian and Gay Parents' (2009).

which are fundamental in the Constitution of India. The issue of adoption rights for LGBTQ + parents in India is an issue of what type of society does the Constitution of India envision for its citizens. Does it create a society that values everyone equally or continue the practice of perpetuating a norm that is created without any empirical foundation and violates the Constitution. The answer that the Constitution demands is clear; the challenge is to translate that constitutional answer into legal and institutional reality.

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