

**IN THE SUPREME COURT OF INDIA
CIVIL WRIT JURISDICTION
I.A. No. _____ of 2023**

IN

WRIT PETITION (C) No. 1011/2022

IN THE MATTER OF:

Supriyo @ Supriya Chakraborty

... Petitioners

VERSUS

Union of India

... Respondent

AND IN THE MATTER OF:

**The Delhi Commission for Protection
Of Child Rights**

... Applicant/Intervenor

**AN APPLICATION FOR INTERVENTION ON BEHALF OF THE
APPLICANT**

PAPER BOOK
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ADVOCATE FOR THE APPLICANT/INTERVENOR: ABHISHEK MANCHANDA

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To,

THE HON'BLE CHIEF JUSTICE
AND HIS COMPANION JUDGES
OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF THE APPLICANT
ABOVE NAMED:

MOST RESPECTFULLY SHOWETH:

1. The Applicant/Intervenor has filed the present Application for intervening in the captioned matter, along with the accompanying batch of writ petitions and public interest litigation petitions. These petitions seek recognition for same-sex marriages under various statutory enactments such as the Special Marriage Act, the Foreign Marriage Act, the Hindu Marriage Act, and others, and certain ancillary and related reliefs.
2. Vide its order dated 13.03.2023 in the captioned matter, this Hon'ble Court referred the matter for adjudication to a Constitution Bench, and set the matter for final hearing commencing on April 18, 2023.
3. It was brought to the Applicant/Intervenor's attention that during the oral hearing on 13.03.2023, certain questions were raised relating to the potential impact of the legalisation of same-sex marriages on issues around adoption rights. The Applicant/Intervenor is filing the present application with the limited remit of deploying its professional

expertise to assist this Hon'ble Court insofar as its adjudication on the question of same-sex marriages has an impact upon the rights of children.

Role and position of the intervenor vis-à-vis the controversy at hand

4. The Applicant/Intervenor is a statutory body constituted under the Commissions for Protection of Child Rights Act, 2005 to monitor the implementation of, and check violations against, the rights of children, within the NCT of Delhi.
5. In particular, the Applicant was established under Section 17 of the Commission for Protection of Child Rights Act, 2005 [**“the Act”**]. The Applicant has been statutorily entrusted with various tasks pertaining to protection of child rights and it is the statutory authority of the Government of NCT of Delhi on matters of child rights. The Applicant is represented herein by its authorised representative Mr. Anurag Kundu, Chairperson, Delhi Commission for Protection of Child Rights.
6. The Applicant was established with, *inter alia*, the following objectives:

- i. Protection of children from exploitation, abuse, labour, trafficking, and violence;
 - ii. Protection of children from sexual offences;
 - iii. Protection of children from child marriage;
 - iv. Protection of rights of children with special needs;
 - v. Protection of children from substance abuse;
 - vi. Enforcement of legal protections for children in case they commit offences and the necessary safeguards associated therein; etc.

7. The Applicant/Intervener's interest in this matter arises from the fact that the rights of same-sex couples to marry and constitute a family has a direct bearing upon the rights of children who may become members of such families.

8. In particular, in India, adoption laws are governed by the following:
 - a. The Hindu Adoption & Maintenance Act 1956;
 - b. Guardianship and Wards Act 1890; and,
 - c. The Juvenile Justice (Care and Protection of Children) Act 2015.

9. It is submitted that the aforesaid statutes, and the impact of the legalisation of same sex marriage upon the rights of children, as set out in these statutes, will be required to be considered by this Hon'ble Court in order to arrive at a conclusion in the present case.
10. That the officials working under the Applicant Commission have a total of 15 years of collective experience in dealing with issues pertaining child rights under the aforesaid statutes, therefore, it is submitted that the Applicant will be able to assist this Hon'ble Court to adjudicate upon these issues.
11. In this application, the Applicant addresses the following issues: (a) concerns around the psychological impact upon children being brought up in same-sex households; (b) concerns around the impact of the legalisation of same-sex marriage upon the statutory framework discussed above; (c) the importance of the recognition of same-sex marriage upon the ability of children to grow up in a non-discriminatory environment in general; (d) the jurisprudence of other constitutional courts; and (e) possible guidelines that this Hon'ble Court may consider issuing.

**A. ON THE PSYCHOLOGICAL IMPACT UPON
CHILDREN**

12.It is submitted that from a psychological point of view, multiple studies on same-sex parenting have demonstrated that same sex couples can be good parents, or not, in the same manner that heterosexual parents can be a good parent or not. The same sex couples do not have any advantage or disadvantage with respect to being good or poor at parenting when compared to heterosexual couples. The relevant aspects in determining whether a couple can be good at parenting or not are, instead, the capacity for caring and the quality of the relationship between parent and child. A copy of a research paper titled “*Same-Sex Parents and Their Children: Brazilian Case Law and Insights from Psychoanalysis Insights from Psychoanalysis*” is annexed herewith and marked as **Annexure A – 1** [Page Nos. 40 to 50].

13.Since Netherland’s legalisation of same-sex marriages in the year 2000, more than 34 countries have legalised same-sex marriages either through legislations or through Court decisions. It is submitted that at present more than 50 countries allow same-sex couples to legally adopt children, wherein, Israel and Lebanon are the only Asian

countries that allow adoption for same-sex couples; in addition, there are 22 European and 16 American nations that allow the same.

14. It is submitted that, in this context, there is no evidence or empirical data to show that same-sex couples are unfit to be parents or that psychosocial development among children of same-sex couples is compromised relative to that among offspring of heterosexual parents. In fact, a study on same-sex parents and their children titled “*Lesbian & Gay Parenting*” by the *American Psychological Association* concluded that home environments provided by same-sex parents are no different from those provided by heterosexual parents, to support and enable children's psychosocial growth. A copy of the research paper titled “*Lesbian & Gay Parenting*” by the *American Psychological Association*” is annexed herewith and marked as **Annexure A – 2 [Page No. 51 to 133]**.

15. A 2021 Australian study presented at the University of Queensland was conducted by analysing the administrative data from several population registers from the Netherlands from 2006-2018. The unique feature of the sample data was that it included complete population coverage, reliable identification of same-sex-parented

families, a large number of children in same-sex-parented families, a large number of children in same-sex-parented families, multiple objective and verifiable educational outcomes, and detailed measures of family dynamics over children's entire life courses. It was found that:

- a. In socio-political environments characterised by high levels of legislative or public support; children raised by same-sex couples achieved at least as well as children in heterosexual parents.
- b. Children living in same-sex-parented families experienced no educational disadvantage relative to children living in different-sex-parented families.

A copy of the study titled "*Academic Achievement of Children in Same- and Different-Sex-Parented Families: A Population-Level Analysis of Linked Administrative Data from the Netherlands*" is annexed herewith and marked as **Annexure A** **-3** [Page Nos. 134 to 159].

16. Another recent study in 2020 published in the *American Sociological Review*, analysed the academic outcomes of children raised by same-

sex parents based on data derived from Netherlands, where same-sex marriages were formalised in the year 2001 itself, and found that:

- a. The academic results of children indicated that children raised by same-sex parents from birth outperformed children with heterosexual parents by *0.139* standard deviations on the academic tests.
- b. Children raised by same sex parents from birth are 4.8 percentage points more likely to graduate than children with different-sex parents.
- c. Supports the hypothesis that given the time-consuming and costly procedures for same-sex couples to obtain children, same-sex parents typically have higher socioeconomic status, resulting in better academic outcomes.

17. Brazil is a close example of a nation that has a similar multi-ethnic, multi-religious population, which encompasses diverse regions and cultures to that of India. Homosexuality was decriminalised in Brazil way back in 1830 itself and same-sex marriages were legalised in 2013. Though adoption by same sex couples in Brazil started much earlier in 1995 itself, however, in 2011, adoption by same sex couples

was legalised when the Brazilian Supreme Court affirmed the constitutional legitimacy of same sex marriage in terms of the “family unit”, a legal category that carries with it access to rights in Brazilian civil and family law, in effect legalising adoption of children by same-sex couples. In a recent 2022 study, it has been found by researchers that due to prior adoptions of children by same-sex couples and the delay in legal recognition of same-sex marriage became a weakness of such families when it came to issues of health, education and other responsibilities towards children adopted by same-sex couples as up till 2011, only one parent had legal right towards the children. The lack of legal recognition of same-sex marriage in Brazil also created problems during separation of such couples such as when the non-legally recognized caregiver/parent may not have the right to guardianship and/or visitation. A copy of the research paper titled “*Same-sex parenting in Brazil and Portugal: An integrative review*” is annexed herewith and marked as **Annexure A – 4** [Page Nos. 160 to 180].

18.A 2022 study published in the *International Journal of Environmental Research* investigating the well-being of children with same-sex

parents concluded that there are no differences among children with same-sex and different-sex parents regarding psychological, behavioural and emotional outcomes.

19. In sum, therefore, it is respectfully submitted that the sexual orientation of a child's parents - and whether the child is brought up by a heterosexual couple or a homosexual couple - has no bearing upon their emotional development or psychosocial growth.

B. ON THE LEGAL FRAMEWORK

20. It is respectfully submitted that the impact of the legalisation of same-sex marriages upon gendered language used in other statutes - some of which have been flagged above - do not present any serious concern.

21. Gendered vocabulary in our statutes broadly falls into one of three categories:

I. *The Conventional Gender Binary*

22. The conventional vocabulary in our language and legislation is binary.

Language follows prevailing ideologies and morality. While some of our laws such as since-struck-down S. 377 of the IPC, 1860 were

borrowed from a homophobic English legal system, many other are simply worded based a pre-conceived binary notion of gender, without necessarily ascribing different rights or liabilities based on gender.

23. For instance, in the Hindu Adoption and Maintenance Act, 1956, Chapter II, while the provisions employ gendered terms, the provisions *per se* are perfectly gender-neutral in substance and no grave violence would be caused thereto by their application to same-sex marriages, in the same manner that this Hon'ble Court might read the SMA to legalise same-sex marriages.

7. Capacity of a male Hindu to take in adoption.— Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation.—If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso. 1

[8. Capacity of a female Hindu to take in adoption.—Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that,

if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.]

II. *Heightened Protection to Women in Heterosexual Marriages*

24. Secondly, our Legislature has been alive to the gender-specific disadvantages faced by women in a traditional and largely patriarchal society such as ours, and has from time-to-time enacted certain legislative safeguards, usually to tackle certain social vices. Examples include legislation such as the Domestic Violence Act, 2005, Dowry Prohibition Act 1961 etc. and certain provisions of the Hindu Marriage Act, 1956, the Special Marriage Act, 1954 and the Indian Divorce Act, 1869, granting certain special grounds for divorce exclusively to women.

25. However, the same does not come in the way of granting recognition to same-sex marriages. While those grounds would remain relevant in heterosexual marriages, they may be inapplicable to homosexual marriages in their present form or may simply not be required in homosexual marriages.

26. Similarly, keeping in view the dominant financial position of males in our traditional families and society, certain obligations have been imposed exclusively upon them. Examples include the liability to maintain wife cast upon the husband by virtue of S 125 CrPC, 1973. These social-welfare provisions may accordingly require to be read down to make them gender-neutral in order to cater to same-sex marriages.

27. Indeed, in homosexual marriages, the social reality of a dominant sex and a vulnerable sex may not necessarily arise. Though issues of domestic violence may exist, and so may need for maintenance, custody etc. to either spouse, the laws may require a gender-neutral approach. But this should not be a matter of concern as this is rather a matter of relief that the power-equation between the spouses is less likely to be tilted to either side.

III. *Other Situations*

28. In certain other legislation, roles have been ascribed as per the gender of the person/spouse. For instance, the Hindu Minority and Guardianship Act, 1956 defines natural guardians of a minor thus:

6. *Natural guardians of a Hindu minor.*—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are— (a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother; (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father; (c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section— (a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.—In this section, the expressions “father” and “mother” do not include a step-father and a step-mother.

7. *Natural guardianship of adopted son.*—The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

29. However, this Hon'ble Court in *Githa Hariharan and anr. vs Reserve Bank of India and anr.* [(1999) 2 SCC 228] has already watered down the gendered rigours of this provision to some extent. The relevant paragraphs of the said judgement are extracted below:

25. In our opinion the word `after' shall have to be given a meaning which would sub-serve the need of the situation viz., welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declaring it to be a void, we do feel it expedient to record that the word `after' does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as `in the absence of` - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word `after' as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation viz. welfare of the child.

26. In that view of the matter question of ascribing the literal meaning to the word `after' in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation in our view ought to be avoided.

30. Consequently, though the provision still contains expressly gendered tones, the same can be read down to accommodate the context of same-sex marriages, if not generally.

31. Under Muslim Law, on the other hand, guardianship is covered by uncodified personal law and the same accords express primacy to the father and paternal male relatives of a child in guardianship. However,

the Guardians and Wards Act, 1890 may be resorted to, to seek appointment of guardians through court on a case-to-case basis irrespective of religion of spouses.

32. Furthermore, with respect to succession, in the Hindu Succession Act, 1956, the legislative amendments as well as judicial pronouncements have already progressively altered the personal law to make it more and more gender-equal. While certain differences in succession by/through a man and a woman in a family still exist which usually flow from patrilineal structure of our families, these provisions may again be conveniently read down to cater to succession-rights arising out of same-sex marriages. It must also be borne in mind that the State is already under legal obligations under the Transgender Persons Act, 2019 and *National Legal Services Authority* judgement, supra, to ensure non-discrimination against transgender individuals in matters including succession and these mandates have already warranted deviation from the literal interpretation of these laws.

33. Succession under Muslim Law is again determined by uncodified personal laws which is based on binary notion of gender and is gender-specific. However, if the marriage has been registered under Special

Marriage Act, 1954, succession is governed by Indian Succession Act, 1925. This rule applies uniformly for marriages registered under the Act, except where both the parties are Hindu, Sikh, Buddhist or Jain.

34. Other than the above, it is respectfully submitted that many laws, particularly touching upon the familial rights of children, have adopted a progressive and gender-neutral approach. For instance, in the Juvenile Justice (Care and Protection) Act, 2015, the provisions relating to adoption are contained in Chapter VIII. The said chapter opens with a gender-neutral Section 57, which is reproduced here:

Eligibility of prospective adoptive parents.

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority.

35. Even the provision on maintenance under Section 20 of the Hindu Adoption and Maintenance Act, 1956 is worded in largely gender-neutral terms and no legal hurdle is likely to arise therein if children are to be maintained by same-sex parents.

20. Maintenance of children and aged parents.—(1) Subject to the provisions of this section a Hindu is bound, during his or her life-time, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents. (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor. (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation.—In this section “parent” includes a childless step-mother.

36. It is respectfully submitted that legislation ought to keep pace with social evolution and the evolution of legal principles. We cannot become frozen in time, nor can we allow mere vocabulary of existing legislation to hinder the realisation of fundamental rights. Legislation is not an end but a means towards achievement of human and fundamental Rights. Consequently, legislative vocabulary must rather follow than direct the course of the development of rights. As observed

by Mr A. K. Sikri, J in his concurring opinion in *National Legal Services Authority vs. Union of India & ors.* (AIR 2014 SC 1863):

119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play more pre-dominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

37. Further, in the same judgement, Mr. S Radhakrishnan, J has rightly highlighted and addressed the general limitation of our existing statutes in recognizing non-binary genders in the following words:

75. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett principle of "Biological Test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to

marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.

76. Article 14 has used the expression “person” and the Article 15 has used the expression “citizen” and “sex” so also Article 16. Article 19 has also used the expression “citizen”. Article 21 has used the expression “person”. All these expressions, which are “gender neutral” evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one’s personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

77. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community (Emphasis supplied)

38. Further, Mr. A. K. Sikri, J in his concurring opinion in the same judgement, has rightly stated:

87. There is thus a universal recognition that human rights are rights that “belong” to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right- grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not granted by people nor can they be taken away by them.

39. It is respectfully submitted that this Hon’ble Court has already shown the way ahead through its judgement in *National Legal Services Authority, supra*, for recognition of a third gender. If exceptions to literal interpretation/application can be carved for the intersex/transgender individuals, there is no hurdle in widening the bracket of those exceptions for the entire spectrum. In the *National Legal Services Authority, supra* and the ensuing Transgender Persons (Protection of Rights) Act, 2019 a duty has been cast upon the State not to discriminate. If this duty can be effectively imposed for transgender/intersex individuals, the argument of complexities and challenges in adapting the gender-specific legislations to accommodate same sex marriages, and the rights of adoption and succession that flow therefrom, does not hold.

40. The mere inability to identify binary gender in a marriage does not by itself necessarily result in frustration of all legislations that create gender-specific rights or impose gender-specific duties in personal or marriage laws or are merely worded in gendered terms. It is not as though the entire artifice of gender-specific laws would crumble by the recognition of non-binary gender identities and their inclusion into the folds of marriage and family laws. To hold the opposite would be a rejection/negation of the *National Legal Services Authority, supra* and the Transgender Persons Act. It must further be appreciated that much water has flown down the bridge ever since the enactment of these laws. For instance, the recognition of third gender rights in *National Legal Services Authority, supra* has already paved the way for adjustments in the binary gender-based language of laws. Let us for instance consider the rules governing guardianship of a son and a daughter in these provisions. Since the *National Legal Services Authority, supra* and the Transgender Persons Act, 2019 have already paved the way for recognition of a third gender and for non-discriminatory treatment towards them, suitable adjustments have to be made in these provisions to conform them with these developments.

Thus, in-roads have already been carved into the existing provisions of law in so far as they recognize only the binary form of gender.

41. In sum, therefore, it is respectfully submitted that when it comes to questions of adoption and succession, and the rights of children under the existing legal framework, the legalisation of same-sex marriage is no cause for concern; existing legislative language can accommodate same sex marriages, and ensure that the same rights that accrue to children in the context of heterosexual marriages, also accrue in the context of same-sex marriages.

C. On the Impact on Children in General

42. It is established that sexual orientation develops at least as early as adolescence; even though age of consent remains 18 and age of marriage at 18 and 21; A meta-analysis of 30 studies on sexual orientation and identity development, titled “*Sexual Orientation Identity Development Milestones Among Lesbian, Gay, Bisexual, and Queer People: A Systematic Review and Meta-Analysis*” published in the Journal titled “*Frontiers in Psychology*” (Citation: Front. Psychol., 21 October 2021 Sec. *Gender, Sex and Sexualities*; Volume 12 – 2021;

<https://www.frontiersin.org/articles/10.3389/fpsyg.2021.753954/full>)

concluded that sexual orientation develops around the age of 13.

43. In a socio-legal environment where individuals having homosexual orientations do not enjoy basic legal rights at par with their heterosexual counterparts, adolescents who develop homosexual orientations may develop adverse psychological complexes and low self-esteem and suffer from other mental health issues.

44. Further, unless equal rights are accorded to homosexuals, their acceptance, assimilation and legitimacy will remain under troubled waters. This again is bound to have its bearing upon adolescents. A research on psychological impact upon LGBT population in legally less favorable US State of Ohio, titled "*The Impact of Stigma and Discrimination against LGBT People in Ohio*" undertaken by Williams Institute, UCLA School of Law (<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-OH-Nov-2019.pdf>) showed how homosexual adolescents were twice as likely to face bullying and harassment at school than their heterosexual counterparts. It is noteworthy that homosexual marriages are legal throughout the United States by virtue

of the U.S. Supreme Court's 2015 judgement in *Obergefell v. Hodges*. However, the State of Ohio has refrained from enacting anti-discrimination laws.

45. Every individual in a society, children and adults alike, and the society as a whole grows and benefits from a more just and rights-centric order. John Rawls, the celebrated American philosopher enunciated the idea of justice as fairness, based on principles of justice which all or most individuals would subscribe to, in a hypothetical situation wherein they would be acting under "a veil of ignorance", unaware of their position in society, preferences, etc and hence totally uninfluenced by the same. From this hypothetical exercise, the first principle of justice to emerge would be that each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all. Applying this analogy to the question of rights of homosexuals, it can be safely stated that the Rawlsian theory of justice favours equal rights for homosexual individuals, since under the veil of ignorance, individuals not being aware of their own sexual orientation, would

clearly make a choice of equal liberties for individuals across all sexual orientations.

46. Furthermore, non-recognition of same-sex marriages holds certain repercussions for the child of a homosexual person. The said person shall be the only *de jure* parent and guardian of his or her child. While the child may actually be under joint custody and maintenance of two persons consisting of a homosexual couple performing equal duties, only one of the persons would have *de jure* authority and rights. This could have psychological and emotional consequences not only for the affected *de facto* guardian but also for the child who may be left with reduced choice in case of a rift or separation between his *de facto* guardians. By depriving the legal status to homosexual marriages, the State is thus denying the legal security of dual parenthood and guardianship to the child. The child would thus be deprived of a legally recognized family. The same would also have consequences for intestate succession.

47. Thus, by denying a homosexual individual a right to marry, the State is inadvertently permanently denying to his or her child a right to a family in the true legal sense of the term.

D. Judgments of Other Constitutional Courts

48. It is respectfully submitted that constitutional courts around the world have had occasion to consider the issue of adoption, as a right that flows from the right to same-sex marriages. Constitutional courts have agreed that there exists no good ground to deny adoption rights on grounds of sexual orientation, and that to do so would constitute unlawful discrimination.

49. In **National Coalition for Gay and Lesbian Equality vs Minister of Home Affairs 2000 (1) BCLR 39**, the Constitutional Court of South Africa noted that:

... nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other than strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child.

50. This principle was echoed subsequently in **Du Toit vs Minister of Welfare and Population Department, 2002 (10) BCLR 1006**, where the Constitutional Court stressed on the right to adopt for same sex couples as a means of guaranteeing social and familial stability.

51. In **Obergefell vs Hodges, 576 U.S. 644 (2015)**, the landmark United States judgment that legalised same-sex marriage, the Supreme Court of the United States also noted that:

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples ... Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents ... This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

52. U.S. state courts have reached similar conclusions. In **Florida Department vs Adoption of X.X.G., 45 So. 3d 79**, the constitutionality of the denial of adoption rights to a same-sex couple was squarely at issue before the Florida Court of Appeal. The Court of Appeal affirmed the judgement of the district court, and held that the denial of the right to adoption on grounds of sexual orientation was illegal. The Court examined, at some length, the State's argument that it was in the best interests of the child to restrict adoption to heterosexual couples. It noted:

The quality and breadth of research available, as well as the results of the studies performed about gay parenting and children of gay parents, is robust and has provided the basis for a consensus in the field. Many well renowned, regarded and respected professionals have [produced] methodologically sound longitudinal and cross-sectional studies into hundreds of reports. Some of the longitudinal studies have tracked children for six, ten and fourteen years. The starting ages of the children in the longitudinal studies has varied from birth, six to ten years old and followed them throughout childhood, adolescence and into adulthood. The studies and reports are published in many well respected peer reviewed journals including the Journal of Child Development, the Journal of Family Psychology, the Journal of Child Psychology, and the Journal of Child Psychiatry. Each of the studies and hundreds of reports also withstood the rigorous peer review process and were tested statistically, rationally and methodologically by seasoned professionals prior to publication.

In addition to the volume, the body of research is broad; comparing children raised by lesbian couples to children raised by married heterosexual couples; children raised by lesbian parents from birth to children raised by heterosexual married couples from birth; children raised by single homosexuals to children raised by single heterosexuals; and children adopted by homosexual parents to those raised by homosexual

biological parents, to name a few. These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children. These conclusions have been accepted, adopted and ratified by the American Psychological Association, the American Psychiatry Association, the American Pediatric Association, the American Academy of Pediatrics, the Child Welfare League of America and the National Association of Social Workers. As a result, based on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption.

53. In **Salguiero Da Silva Mouta vs Portugal (Application No. 33290/96)**, the European Court of Human Rights held that the denial of parental responsibility to a divorced father on the basis that he was homosexual violated the right to family life. The Court rejected, in particular, the Portuguese court's finding that "the child should live in ... a traditional Portuguese family", and that "children should not grow up in the shadow of abnormal situations." The ECHR found these observations to be in breach of the European Charter's non-discrimination guarantee. In the specific context of adoption, in **E.B. vs France (Application No. 43546/02)**, the Grand Chamber of the

European Court of Human Rights reversed its own prior jurisprudence on the issue, and held that the denial adoption on grounds of sexual orientation was unlawful and discriminatory: “*Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8*” [i.e., the right to family life].

54. The Inter-American Court of Human Rights, in **Advisory Opinion No. OC-24/17** specifically held that the concept of a “family” was a capacious one, and did not exclude individuals on grounds of sexual orientation. Including adoption within the gamut of family relations, the Court noted that:

*... there is no doubt that – for example – a single-parent family must be protected in the same way that the grandparents who assume the role of parents of a grandchild. Likewise, adoption is unquestionably a social institution that, in certain circumstances, allows two or more persons who do not know each other to become a family. Also, pursuant to the considerations set out in Chapter VII of this Opinion, a family may also consist of persons with different gender identities and/or sexual orientations. All these models require protection by society and the State because, as mentioned previously (*supra para. 174*), the Convention does not protect a single or*

a specific model of a family.

55. The IACtHR's judgement followed that of the Mexican Supreme Court in 2010, which had held that the definition of "family" was not restricted to one formed by a man and a woman. The Court also noted that same-sex couples ought to have equal rights to adopt, as heterosexual couples and single parents, in compliance with the constitutional principles of equality and non-discrimination, and that the "best interest" of the child lay in having a loving family, regardless of the sexes of the parents.

56. It can therefore be seen that in judgments across countries, continents, and legal systems, Courts have progressively held that there are no good grounds to discriminate with respect to adoption rights, when it comes to same-sex parents. Arguments that the best interests of the child requires a heterosexual couple have been firmly rejected and debunked, and the overwhelming consensus is that once society has progressed to a plane where it is no longer permissible to discriminate on grounds of sexual orientation in the context of relationships and marriage, it *follows* that adoption rights ought also to be extended to same-sex couples on the same terms.

E. Guidelines

57. It is respectfully submitted that on certain issues, society sometimes lags behind the law. Based upon its wide-ranging work with children, the Applicant is concerned that the legalisation of same-sex marriages, and consequently, the granting of adoption rights and the existence of same-sex family units, will require additional safeguards to ensure children do not face any kind of social discrimination in spaces such as schools.

58. The duty to respect, protect, promote, and fulfil fundamental rights includes the duty to anticipate breaches, and to proactively work to address them. The Applicant notes that this was what was done by this Hon'ble Court in *NALSA* (supra), where - in its order - this Hon'ble Court specifically observed that "the Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables." Indeed, this observation was specifically noted by this Hon'ble Court in *Navtej Johar*.

59. In light of the precedent, therefore, the Applicant respectfully submits that this Hon'ble Court may consider, when passing its final order:

- a. Directions to the central and state government to take steps to create public awareness that same-sex family units are as “normal” as heterosexual family units, and - specifically - that children belonging to the former are not “incomplete” in any way;
- b. Directions, specifically, to school boards and educational institutions that this normalisation be proactively undertaken specifically in classroom contexts where issues touching upon same-sex family units are brought up;
- c. Directions to National and State Council for Education Research and Training (N/SCERT) to check - and eliminate - homophobic content in school textbooks;
- d. Directions to National and State Council for Education Research and Training (N/SCERT) to rewrite or re-envisage the passages, caricatures, diagrams and references to family to include more diverse understanding of family and to

homosexual couples as examples within the meaning of the family

- e. Directions to the relevant authorities to create dedicated helplines for children facing stigma or bullying by virtue of belonging to a same-sex family unit;
- f. Directions to the relevant authorities to set aside resources and create infrastructure for counselling and psychological assistance to children suffering from bullying or victimisation on account of belonging to same-sex family units.

PRAYER

In the premises mentioned above, the Petitioner most respectfully and humbly prays that this Hon'ble Court may be pleased to:

- a. Allow the present Application and allow the Applicant to intervene in the present Writ Petition; and,

b. Pass such other Order or Orders as this Hon'ble Court may deem just and proper in the facts and circumstances of the case.

FOR WHICH ACT OF KINDNESS THAT THE APPLICANT SHALL DUTY BOUND EVER PRAY.

Drawn by:

**NISHA TOMAR, GAUTAM BHATIA & ABHISHEK MANCHANDA
ADVOCATES**

Filed by:



**ABHISHEK MANCHANDA
ADVOCATE ON RECORD FOR THE APPLICANT**

Filed on: 03.04.2023

NEW DELHI