

CHALLENGES IN THE EXISTING LEGAL FRAMEWORK AND FUTURE TRENDS ON ADOPTION OF CHILDREN BY THIRD GENDER AND SAME SEX COUPLES WITH SPECIAL REFERENCE TO INDIA

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ABSTRACT

The Indian Supreme Court has upheld the transgender persons' right to decide their self-identified gender and directed the Centre and State Governments to grant legal recognition of their gender identity such as male, female or as third gender (NALSA v. UoI (2014)). Recognising those persons as third gender and providing them with respect and place in the society will include matters pertaining to adoption by them. Presently, the adoption laws accounts for adoptions by either a male or a female. There is no provision for third-sex adoptions rendering a legal vacuum. Also, the Supreme Court in the case of Navtej Singh Johar v. UoI (2018) decriminalised consensual sex among adults including homosexual sex. These developments in judicial decisions will result in the right to family being conferred to the rainbow group. Right to family will include the right to have children which becomes all the more relevant for this group as persons belonging to these groups may not have children by natural procreation. Therefore, they should be allowed to qualify in the prospective adoptive parent eligibility as per the laws. This article will analyse the two above mentioned SC judgments and the existing adoption laws. The challenges will be identified and possible solutions discussed. Also, position in some foreign jurisdictions shall be looked into.

Keywords: Children, Adoption, Third gender, same sex relationship.

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I. INTRODUCTION

In India, there is no uniform law of adoption which may be applicable to all communities irrespective of their religious affiliation. The institution of adoption has continued to receive attention more particularly among the Hindus who always considered it as a means of salvation. Since the practices of adoption differed among the various communities and therefore the Parliament soon after independence thought to codify the personal law of Hindus. As a sequel to these efforts, the Hindu Adoption and Maintenance Act, 1956 was enacted. The law came into force on December 21 of the same year. The new enactment has overhauled the old shastric law and has made it more simple, consistent and coherent. The present legislation governs all adoptions which may be made after the coming into force of this law. The areas which have been left untouched by this new legislation are covered under the old shastric law. However, for communities other than Hindus, the field continued to be occupied by the Guardian and Wards Act, 1890.

As both these legislations belong to an old era, a lot have changed since then. The statute governing adoption among Hindus is an Act of 1956, which implies that more than six decades have passed since passing of this Act. At the same time, the Guardian and Wards Act which governs the communities other than Hindus, is more than a century old. India has witnessed various changes pertaining to the family relations during this period. Subsequently, a lot has changed when it comes to the legal regime as well. For example, the divorce rate has increased, live-in relationships getting a legal backing, recognition of rights of third gender, legalising same-sex relationships etc. The area which has been highlighted in this research article is the implications that arise out of two Supreme Court decisions viz. *NALSA v. UoI* and *Navtej Singh Johar v. UoI* with respect to the adoption of children. These decisions have resulted in the recognition of rights of third gender and legalisation of same-sex relationships respectively. Through this paper, the motivation is to address the challenges in the existing legal framework pertaining to the adoption of children by third gender and same sex couples. It covers the eligibility of prospective adoptive parents.

A. Research Question

To identify the challenges in the existing legal framework pertaining to the adoption of children by third gender and same sex couples.

B. Objective

1. To study the existing adoption laws in India.
2. To analyse the SC judgment in case of *NALSA v. UoI* and *Navtej Singh Johar v. UoI*.

3. To identify current challenges and future trends with respect to adoption of children by same sex and third gender.
4. To study foreign laws in order to find solutions for the challenges.

C. Study Design

This article is based on the descriptive method of research. Therefore, secondary sources have been given more importance and are relied upon. The secondary sources include the articles published in research journals, working papers, thesis and books. E-sources have also been referred.

II. EXISTING ADOPTION LAWS

Hindu Adoption and Maintenance Act, 1956

This legislation governs the adoption undertaken by Hindus, including the Jains, Sikhs and Buddhists. A Muslim, Christian, Parsi, Jew or any member of a scheduled tribe governed by their customary law cannot adopt under this legislation.¹

The legislation demands that the person interested in adopting a child must be capable to adopt. The same has been mentioned in Section 6 which provides that, “*Requisites of a valid adoption.—No adoption shall be valid unless— (i) the person adopting has the capacity, and also the right, to take in adoption;*”

As far as the eligibility of prospective adoptive parents is concerned, Section 7 provides for that, which says, “*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 word or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.*”

This means, in case a Hindu male (including a male who is a Buddhist, Jain or Sikh by religion) wishes to adopt a son or a daughter; he can do so if he is of sound mind and not a minor. When that Hindu male has a living spouse at the time of adoption of the child, the consent of his wife is must for such adoption. Exception to this is the situation where the

¹ The Hindu Adoptions and Maintenance Act, 1956, S. 2, No. 78, Acts of Parliament, 1956 (India).

wife is not competent to give her consent i.e., the court has declared her to incompetent for such consent.

The important fact to be noted here is that only a Hindu, Buddhist, Jain or Sikh husband above the age of 18 can adopt under this legislation and that too only with the consent of his living wife. Husband here is the adopter and the wife will be a mere consentor.

Likewise, for a female Hindu to adopt, the relevant provision is, Section 8 which says, “*Capacity of a female Hindu to take in adoption. —Any female Hindu—*

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or 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, has the capacity to take a son or daughter in adoption.”

This refers to that a single female can adopt irrespective of the fact that she is unmarried, divorcee or a widow.

Section 11 (i) and (ii), provides that a single parent or married couple are not permitted to adopt more than one child of the same sex. According to section 11 (iii) and (iv), whenever there is an adoption of a daughter by a male then the adoptive father should be at least twenty-one years older than the child. Likewise, in case of adoption of a son by a female then the adoptive mother should be at least twenty-one years older than the child. Also, the child to be adopted must not have completed the age of fifteen years as per Section 10(iv).

Guardian and Wards Act, 1890

The Guardian and Wards Act, 1890, is not an adoption law. The reason attributed for this is that it does not give rise to a parent-child relationship. It applies to foreign citizens, NRIs, and those Indian nationals who are Muslims, Parsis, Christians or Jews. Under this legislation, the person who adopts becomes merely the guardian of the child until she reaches 18 years of age. In case of guardianship under this Act, child’s interest cannot be ensured as there is no proper eligibility check and follow-up. The child and the guardian do not possess any legal rights and responsibilities towards each other as soon as the child attains majority (18years).

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

There is also a Juvenile Justice Act of 2015, a part of which deals with adoption of children. This is a secular Act in the sense that it allows anyone irrespective of one's religion to adopt a child.² Section 56(3) of this Act provides for that nothing in this Act shall apply to adoption under Hindu Adoption and Maintenance Act, 1956. This legislation even allows inter-country adoptions which must be done as per the provisions of this legislation and the Adoption Regulations framed by the Authority.³ According to section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, "*adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to biological child*". Under this legislation, a child can be adopted if s/he has not attained the age of 18 years.⁴ This act is applicable only for adoption of an orphan, abandoned and surrendered children.⁵ These orphan, abandoned and surrendered children must be declared legally free for adoption by the Child Welfare Committee.⁶ For adoption of Children of relatives as defined under section 2(52) can be adopted by an in-country parent⁷ and an inter-country parent.⁸

As per Section 57 and Regulation 5 of Adoption Regulation, 2017, the following are the essential conditions to be fulfilled prior to becoming an adoptive parent:

- A couple or a single parent can adopt.
- A single male is not eligible to adopt a girl child.⁹
- Minimum 2 years stable marital relationship is mandatory.
- Those with 3 or more children shall not be eligible to adopt a normal orphaned, abandoned or surrendered (OAS) child.

² The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 58(1), No. 2 of 2016, Acts of Parliament, 2015 (India).

³ The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 56(4), No. 2 of 2016, Acts of Parliament, 2015 (India).

⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 2(12), No. 2 of 2016, Acts of Parliament, 2015 (India).

⁵ The Hindu Adoptions and Maintenance Act, 1956, s. 56(1), No. 78, Acts of Parliament, 1956 (India). See also Reg. 4(a), Adoption Regulations, 2017 (India).

⁶ The Hindu Adoptions and Maintenance Act, 1956, s. 38, No. 78, Acts of Parliament, 1956 (India) and Regulation 6 & 7, Adoption Regulations, 2017 (India).

⁷ The Hindu Adoptions and Maintenance Act, 1956, s. 56(2), No. 78, Acts of Parliament, 1956 (India) and Reg. 51, Adoption Regulations, 2017 (India).

⁸ The Hindu Adoptions and Maintenance Act, 1956, s. 60, No. 78, Acts of Parliament, 1956 (India) and Reg. 53 & 54, Adoption Regulations, 2017 (India).

⁹ The Hindu Adoptions and Maintenance Act, 1956, s. 57(4), No. 78, Acts of Parliament, 1956 (India).

The eligibility and suitability of prospective adoptive parents are ascertained through a Home Study by the Specialized Adoption Agency (SAA).¹⁰

III. CURRENT CHANGES AND ATTITUDES TOWARDS THIRD GENDER

This section of the research article shall discuss the two relevant and related judgments given by the Supreme Court which have a bearing on the title of the article.

In the year 2014, the Supreme Court gave a landmark judgment in the case of National Legal Services Authority v. Union of India¹¹. This case was filed by the National Legal Services Authority of India (NALSA) for legal recognition of people who fall outside the male/female gender binary, including those who identify as “third gender”. As per the existing scenario, gender of a person is assigned at birth which determines his or her rights with respect to marriage, adoption, inheritance, succession, taxation and welfare. As there is no legislation protecting transgender people, they face discrimination in different walks of life. The Supreme Court emphasised upon the rights as provided by the Constitution, and referred the international instruments which are relevant in this regard. It reiterated that though the Articles 14, 15, 16, 19 and 21 do not exclude Hijras/Transgenders from its ambit, Indian laws perceive the paradigm of binary genders of male and female, based on ones biological sex. Non-acknowledgement of the identity of Hijras/Transgenders in the various laws denies them equal protection of law and they are exposed to face wide-spread discrimination.

The Supreme Court mentioned about the International Covenant on Civil and Political Rights (ICCPR), and the related provisions as Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading treatment), Article 16 (recognition before the law), and Article 17 (right to private and family life).

The SC also referred the Universal Declaration of Human Rights (UDHR) and its Article 6 which provides for right to life. It was observed that despite the fact that UDHR came into existence in the year 1948, the inherent dignity, equality, respect and rights of all human beings throughout the world, the transgender are denied basic human rights. This has occurred due to the underlying presumption that law must aim and target discrimination based on sex (i.e., whether a person is

¹⁰ The Hindu Adoptions and Maintenance Act, 1956, s. 58(2), No. 78, Acts of Parliament, 1956 (India) and Reg. 9(13), Adoption Regulations, 2017 (India).

¹¹ AIR 2014 SC 1863

anatomically male or female), and not on gender (i.e., whether a person has qualities that society consider masculine or feminine).¹² Therefore, it can be deduced that the law has failed to distinguish sex from gender and differentiation from sex discrimination.

The court also referred Article 2 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Articles 11(discrimination in employment) and 24 (commitment of State parties) of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 8 (right to respect for private and family life) and 14 (non-discrimination) of Convention for Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights), and Articles 31 and 32 (Interpretation of International Conventions) of Vienna Convention on the Law of Treaties.

The court also discussed various Yogyakarta Principles, the relevant ones are mentioned below:

Principle 1: Universal enjoyment of human rights

This principle emphasises on the fact that all human beings are born free and equal in dignity and rights. At the same time, a person irrespective of his/her sexual orientation and gender identities is qualified to the full enjoyment of all human rights.

Principle 2: Rights to equality and non-discrimination

The principle says that everyone is entitled to enjoy all human rights irrespective of their sexual orientation or gender identity without any discrimination. All are qualified to equality before the law and the equal protection of the law. These rights are meant to be enjoyed in absence of discrimination, irrespective of the fact whether or not the enjoyment of another human right is also affected. It says that the law will restrict any such discrimination and guarantee to all people equal and effective protection against any such discrimination. Discrimination based on sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment

¹² Katherine M. Franke, The Central Mistake of Sex Discrimination Law: the Disaggregation of Sex from Gender, 144 U.Pa.Rev.1,3 (1995).

or exercise, on an equal basis, of all human rights and fundamental freedoms.

Principle 3: Right to recognition before the law

This principle provides for that every human possess the right to be recognised at all places in eyes of law. People of different sexual orientations and gender identities will possess and enjoy legal personality and capacity during the various aspects of their life. Every individual's self-characterized sexual orientation and gender identity is essential to their personality and is quite possibly the most fundamental part of self-determination, dignity and freedom. No status, like marriage or parenthood, may be invoked so as to create hurdles in legal recognition of an individual's gender identity. Nobody will be exposed to a situation in which there will be need to hide, stifle or deny their sexual orientation and gender identity.

Principle 6: Right to privacy

All persons, irrespective of their sexual orientation or gender identity, possess the right to privacy. This right is enjoyed without any arbitrary or unlawful interference, including with regard to their family, home or correspondence. It also extends to protection of their reputation and honour. This right includes the option to disclose or not to disclose one's sexual orientation or gender identity. Another important aspect of this right includes the decisions and choices about consensual sexual relations with others.

The UNDP India, 2010 has also given various recommendations; the relevant ones are reiterated here:

- Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to Hijras/TGs are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.
- Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a persons sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party

and to give due respect to other non-binding International Conventions and principles.

- Getting legitimate acknowledgment and maintaining a strategic distance from ambiguities in the current methods that issue personality reports to Hijras/TGs are needed as they are associated with essential social equality like admittance to wellbeing and public administrations, option to cast a ballot, option to challenge decisions, right to schooling, legacy rights, and marriage and youngster selection.
- Indian Law, all in all, just perceives the worldview of paired sexual orientations of male and female, in view of a people sex allocated by birth, which grants sex framework, including the law identifying with marriage, reception, legacy, progression and tax assessment and government assistance enactments. Shockingly we have no enactment in this nation managing the privileges of transsexual local area. Because of the shortfall of appropriate enactment ensuring the privileges of the individuals from the transsexual local area, they are confronting segregation in different territories and consequently the need to follow the International Conventions to which India is a gathering and to give due regard to other non-restricting International Conventions and standards.

In the case of *Navtej Singh Johar v. Union of India & Others*, decided by SC on 6 September, 2018, the following was held:

Section 377, IPC does not define the offence of carnal intercourse against the order of nature. The interpretation of this provision will include the sexual acts between consenting adults, indulged privately, and consequently criminalise them. The offence of carnal intercourse against the order of nature has not been defined in Section 377. The judgment mentions that sexual orientation is something which is unable to be changed as it is an inherent trait of a person and is not governed or changed at the person's will. Having intimate sexual relations with a person of same sex is the result of their personal choice and depicts their autonomy and self determination.

The court held that persons belonging to the LGBT community are as much citizens of the country as others are and likewise they are too entitled to have the fundamental rights under Articles 14, 15, 19 and 21 guaranteed to them. The application of Section 377, IPC criminalising the sexual acts of two consenting adults deny the LGBT community the right to equality as provided under Article 14. It also exposes the

community to discrimination as opposed to what is provided under Article 15. The right to live a life with dignity and privacy as contemplated by Article 21 is also infringed as a result of Section 377. The indispensable element to be ensured is that the consent must be a free one and not such which is caused by force, coercion or any duress.

The Constitution is an organic instrument which is dynamic in nature and keeps on changing with changing times. The courts are bound by the constitutional values and not the public opinion. They are supposed to act in such manners that result in their alignment towards the constitution and no other thing. The essential goal of a constitutional democracy is to bring about positive and progressive changes in the society. The interpretation of legal provisions must be in consonance of the changing times. Constitutional morality focuses on equal treatment of heterogeneity. Even in cases where the heterogeneity is exhibited by even a single citizen of the country. As if that does not happen, it will render the growth towards retrograde.

IV. CHALLENGES

The present legal regime provides for adoption only by a male or female. The same does not mention anywhere about adoption by persons belonging to third sex. This highlights the legal vacuum that remains to be filled by the legislature. The need for same is urgent as after the recognition of third gender and their right against discrimination, their rights pertaining to family life cannot be denied for too long.

As the apex court has broken the binary construct of man and woman based on the gender, resorting to the same outdated binary gender construct will not serve the upcoming times where the rights pertaining to family life cannot be denied without discriminating the persons belonging to the LGBT community and other rainbow groups.

Though the laws permit adoption by a single parent, there exist certain restrictions. The existing laws do not allow a girl child to be adopted by a single male. The underlying cause for this is the possibility of abuse including sexual abuse of that adopted girl child. If one goes by this reasoning, it cannot be denied that the same can happen in cases of adoption of a girl child by another female, especially in times when the adopting female can have a sexual orientation towards females. Also, the idea behind keeping at least a 21years gap in cases of adoption by opposite sex was to avoid sexual abuse. There have been many cases involving sexual abuse of children by persons of different age groups rendering the 21 years age gap futile.

The law demands that the live-in couples and couples who have been married for under two years are not allowed to adopt a child. This

criterion is to ensure that there remains minimal possibility of the splitting up of the couples. This two year period in no way can deny the possibility involving the splitting of a couple at a later stage of their relationship, especially in the age where the preferences of each spouse can change and differ at any point of their life.

V. INTERNATIONAL LAW FOR AFORESAID CHALLENGES

In the year 2006, a group of international human rights experts met in Yogyakarta, Indonesia in order to frame certain principles pertaining to the sexual orientation and gender identity. This happened due to the documented patterns of abuse. This meeting resulted in the Yogyakarta Principles which are considered as a guide to human rights for all. In the year 2017, the experts came up with a supplementing document which is known as the Yogyakarta Principles Plus 10 that lists additional principles and obligations to be followed by States with regard to the transgender persons. These principles deal with the right to equal treatment, work, healthcare, forming a family for the advancement of transgender people. Principle 24, right to found a family, of the Yogyakarta Principles provides that the State shall ensure that:

- The sexual orientation, gender identity, gender expression or sex characteristics of their parents, guardians, or other family members will not result in discrimination, violence or other harm to the children;
- Children upon birth be issued birth certificates mentioning the self-defined gender identity of the parents;
- Enable access to methods to preserve fertility, such as the preservation of gametes and tissues for any person without discrimination on grounds of sexual orientation, gender identity, gender expression, or sex characteristics, including before hormonal treatment or surgeries;
- Ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics.

The model prevalent in Argentina comprise of a system where a choice based approach is undertaken which is devoid of any psychiatric evaluations, screening, evidentiary proof of transgender-ism or court-based petitions for determining gender expression. Also, people there can opt for free transformative surgeries and medical assistance if they wish to change their assigned gender. The changed names and self determined

gender of persons are legally recognised. The Argentinian model has a drawback in the form that it does not cater to the needs of those transgender persons who do not conform to any of the two binary genders.

The same has been very well addressed in the Australian model as there is the right of self determination with regard to the gender identification. Persons there can choose any gender out of ‘male’, ‘female’ and ‘X’, where ‘X’ refers to the indeterminate gender which complies with the wide range of possible gender identities. The system there also protects the privacy of persons identified with gender, ‘X’, by considering their record relating to gender identity and change of gender as confidential.

As far as Central and Eastern Europe states are concerned, no state allows same-sex marriage.¹³ Out of all the Central and Eastern Europe states, three states viz. Croatia, Hungary and Slovenia provide the same-sex couples an opportunity to get into registered partnerships which resembles the rights in case of marriage.¹⁴ When it comes to the opportunity regarding the adoption of a child by same-sex couples, no Central and Eastern Europe state allows the same. The exception here is the state of Slovenia which allows full second (step) parent adoption of a child by the same-sex partner of the child’s parent.¹⁵ This scenario depicts the areas which remain underdeveloped with respect to the family life matters in lives of same-sex couples.

Parliamentary Assembly of Council of Europe adopted two recommendations in the year 2000 pertaining to the homosexuals. The recommendations called the member states to:

- to include sexual orientation among the prohibited grounds for discrimination in their national legislation;¹⁶
- to adopt legislation which makes provision for registered partnerships;¹⁷

During the deliberations, there were contrasting and opposing views with regard to the issues pertaining to the adoption of children and provision of assisted procreation by the same-sex couples. Consequently, the same

¹³ Estonia allows same-sex couples to register domestically a same-sex marriage validly contracted abroad. See *Orlandi v Italy* (App. Nos 26431/12 and three others), judgment of 14 December 2017 at [113].

¹⁴ Czech Republic and Estonia offer same-sex couples the opportunity to enter into registered partnerships with limited rights.

¹⁵ ILGA-Europe, *Rainbow Europe Index 2018*, (2018) https://www.ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf. (last visited June 10, 2022).

¹⁶ Recommendation 1474 (2000) at [11.3.a].

¹⁷ Recommendation 1474 (2000) at [11.3.i].

could not find place in the draft text of the recommendation. The major reasons for such opposition included the faith-based beliefs and to reach a consensus, right of adoption by same-sex couples was omitted.¹⁸

Regarding the same issue, during the Assembly debates in the year 2018, Resolution 2239 was discussed. During which two earlier Resolutions viz. Resolution 2048 (2015) on discrimination against transgender people in Europe and Resolution 2191 (2017) on promoting the human rights of and eliminating discrimination against intersex people, as well as the recommendations made in this field by the Council of Europe Commissioner for Human Rights and numerous treaty bodies of the United Nations were discussed. The Assembly urged the member States to “*protect the rights of parents and children in rainbow families, without discrimination based on sexual orientation or gender identity, and accordingly:*

4.5.1. in line with the case law of the European Court of Human Rights, ensure that all rights regarding parental authority, adoption by single parents and simple or second-parent adoption are granted without discrimination on the grounds of sexual orientation or gender identity;

4.5.2. provide for joint adoption by same-sex couples, without discrimination on the grounds of sexual orientation;

4.5.3. extend automatic co-parent recognition to the same-sex partner of the parent who has given birth in all cases where this would be extended to a mother's male spouse;

4.5.4. where single women are granted access to medically assisted procreation, ensure that such access is granted without discrimination on the grounds of sexual orientation or gender identity;

4.5.5. where unmarried heterosexual couples are granted access to medically assisted procreation, ensure that such access is granted to same-sex couples;”¹⁹

Goal 2048 (2015) on oppression transsexual individuals in Europe and Resolution 2191 (2017) on advancing the basic liberties of and dispensing with victimization intersex individuals, just as the proposals made in this field by the Council of Europe Commissioner for Human Rights and various arrangement assemblages of the United Nations were examined. The Assembly asked the part States to "ensure the privileges of guardians and kids in rainbow families, without separation dependent on sexual direction or sex character, and appropriately:

¹⁸ Mr Solonari, see Council of Europe, Fourth Part of the 2000 Ordinary Session of the Parliamentary Assembly, 27th Sitting (26 September 2000).

¹⁹ Recommendation 2239, 4.5 (2018).

4.5.1. in accordance with the case law of the European Court of Human Rights, guarantee that all rights in regards to parental power, appropriation by single guardians and basic or second-parent reception are allowed without segregation on the grounds of sexual direction or sex personality;

4.5.2. accommodate joint selection by same-sex couples, without segregation on the grounds of sexual direction;

4.5.3. stretch out programmed co-parent acknowledgment to the equivalent sex accomplice of the parent who has conceived an offspring altogether situations where this would be reached out to a mother's male life partner;

4.5.4. where single ladies are allowed admittance to therapeutically helped reproduction, guarantee that such access is conceded without segregation on the grounds of sexual direction or sex personality;

4.5.5. where unmarried hetero couples are allowed admittance to therapeutically helped reproduction, guarantee that such access is conceded to same-sex couples;

Persons finding it difficult to get their same-sex relationship legally recognised have an option of going through the mechanism provided under the European Convention on Human Rights. Also, LGBT from Central and Eastern Europe can rely upon the European Court of Human Rights' jurisprudence to challenge prohibitions placed on the adoption of a child by the same-sex partner of the child's biological parent. They can also take help of the well recognised principle that "if the reasons advanced for a difference in treatment [are] based solely on the [individual's] sexual orientation, this would amount to discrimination under the Convention".²⁰

Therefore, it can be said that the trend is heading towards a scenario where the persons belonging to the rainbow group are eligible to adopt children legally and enjoy the right to family. The present situation depicts a scenario where there exist provisions allowing adoption by the GLB (gay, lesbian, bisexual) in certain nations. But the situation is not so convenient in case of adoption by transgender persons. In context to the Republic of India, the country lags behind various nations in this regard. India has to relook and transform the age-old adoption laws so that they can effectively deal with the changed times.

VI. FUTURE OF ADOPTION BY THIRD GENDER

²⁰ Kozak v. Poland, 51 E.H.R.R. 16, 92 (2010).

In India, The Transgender Persons (Protection of Rights) Act, 2019 which commenced from 10th January, 2020 defines a trans-person as someone whose gender does not match the one assigned at birth. It prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is. Though this legislation is a step forward, it lacks on various important points. It is silent on the realisation of the right to family life on part of transgender persons.

The Act does not provide for the right to have a legally recognised relationship, and so the right to adoption is still a distant dream. Moreover, the transgender community has various reservations pertaining to certain provisions of this statute.

The Supreme Court has already held that the persons belonging to the LGBT community are entitled to the enjoyment of human rights, equality and non-discrimination. By denying the right to legal recognition of their relationship and the right to have a family will result in disregard to the recognition of the before mentioned rights by the apex court. Also, adoption is one such mechanism which has the potential to provide the LGBT community to enjoy a family life as there can be various constraints for natural procreation or even assisted procreation. Considering that India is not a developed country, there is possibility for monetary obstacles that do not allow the LGBT community to resort to assisted procreation.

As the Supreme Court's decisions depict a scenario where the rights to be enjoyed by the LGBT community and other rainbow groups will not be restricted to merely those provided for in the Act of 2019 but will gradually extend to the right to enjoyment of family life including the right to adoption as well. And the burning issues then will include how the protection of juveniles can be ensured whenever they are adopted by persons belonging to the LGBT group. The fact that a person can have a sexual orientation towards the same sex has rendered the legal provisions based on the reasoning that by not allowing a child of opposite sex to be adopted by a single person have gone for a toss.

VII. CONCLUSION

The laws dealing with adoption provide for certain criteria to check the suitability and eligibility of the prospective adoptive parents. The legislature has put various restrictions pertaining to adoption based on the reasons underlying the protection of the children, who are in fact juveniles, to be adopted. By looking at the changing trends which are being recognised by the Supreme Court in its judgments, there is a need to update the existing laws to meet up the new trends. It is concluded that the existing legal framework is not sufficient to deal with adoption of children by the persons of the rainbow group. It is proposed that there should be an evaluation on a case-by-case basis rather than having fixed provisions which decreases the probability of a person belonging to the LGBT community from having an adopted child thereby proving a hindrance to the enjoyment of their right to family life. The progress and well being of the child in the adoptive family shall be followed-up and ascertained, truly, in the manner as provided in the adoption regulations framed by the Authority.²¹ The post adoption follow up of the adoptive family must be done for two years in true sense as provided by the legislature, that too in both the cases of in-country and inter-country adoption by the Specialized Adoption Agency (SAA) and the Authorised Foreign Adoption Agency (AFAA) respectively.²² As the public morality is not in consonance with the changing trends, there must be efforts made in this regard to normalize these issues by spreading the awareness about the same. The required changes must be reflected in the statutory provisions made by the legislature and the actions of the executive.

²¹ The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 58(5), No. 2 of 2016, Acts of Parliament, 2015 (India).

²² Regulations 13 and 19, Adoption Regulations, 2017 (India).