

September 2021

**HAPPY TOGETHER:  
Law & Policy  
Concerns of  
LGBTQI Persons  
and Relationships  
in India**

## Policy Brief

### HAPPY TOGETHER: Law & Policy Concerns of LGBTQI Persons and Relationships in India

September 2021

The Centre for Health Equity, Law & Policy is a research, knowledge production and advocacy forum, which works on law & policy issues related to health, embedding its work in the right to health as envisaged within India's constitutional framework and her international commitments.

## Authors

Suraj Sanap, Vivek Divan, Unmukt Gera

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## Contact Information

[contact@c-help.org](mailto:contact@c-help.org)

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Centre for Health Equity, Law & Policy

Indian Law Society

Law College Road

Pune 411004

Maharashtra, India

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*This document is dedicated to the memory of Saleem Kidwai - authentic, inclusive, generous, and dignified queer hero and friend*

## INTRODUCTION

The legal recognition of queer relationships is situated in the inter-connected and indivisible struggle for social and economic rights and civil and political rights of the queer community. The legal recognition of relationships directly regulates access to a range of rights in matters of healthcare, partner benefits, housing, property rights, maintenance, guardianship and adoption, among others.

Given this, the Centre for Health Equity, Law & Policy believes that any intervention that seeks legal recognition must be fundamentally rooted in a vision to secure access to social and economic rights on an equitable basis for all members of the queer community. Indeed, the idea of social justice must be a guiding principle in this enquiry. Such a vantage allows for challenging assumptions relating to access to rights on the basis of relationship status, and arguing for universalization of rights irrespective of such status, wherever appropriate.

Discourses related to justice and law have evinced vital notions to grapple with inequality and inequity. Ideas of recognition, representation and redistribution offer lessons in developing a unified response to demands for formal equality in law with economic justice. In law, Transformative Constitutionalism provides a critical understanding of the role of law, combining the traditional approach to equality and non-discrimination with the realization of social and economic rights.

This paper has been written and prepared with these underpinnings in mind. It is aimed at informing queer communities, and fostering discussion and collaboration on pathways forward in seeking law and policy reform that empowers queer people in their ability to access a multitude of social and economic rights. Long-lasting queer struggles for decriminalization succeeded due to vast collective efforts that were brought to bear on Indian courts. Indeed, the discursive nature of these efforts were in themselves crucial moments of community empowerment and solidarity. C-HELP hopes that the perspectives shared in this paper precipitate inclusive critical thinking for further queer emancipation.

## 1. ENGAGEMENT WITH LAW

### 1.1 Objectives of this Policy Brief

- 1.1.1 The three decades-long legal effort to overturn the *de facto* criminalization of homosexuality in India, beginning with the *AIDS Bhedbhav Virodhi Andolan's (ABVA)* writ petition before the Delhi High Court in 1994,<sup>1</sup> to the participatory community-led effort<sup>2</sup> leading to the seminal decision of the Delhi High Court in *Naz Foundation v Government of NCT of Delhi*,<sup>3</sup> concluded in 2018 with *Navtej Singh Johar & Ors. v Union of India ('Navtej')*.<sup>4</sup> A 5-judge bench of the Supreme Court of India in *Navtej* declared the criminalization of sex between consenting adults in private under Section 377 of The Indian Penal Code, 1860 (Section 377, IPC) as violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution, and held that lesbian, gay, bisexual and transgender persons are entitled to equality before law and freedom from discrimination on basis of sexual orientation and gender identity.
- 1.1.2 During this period, the Supreme Court also issued its landmark decision in 2014 in *National Legal Services Authority v Union of India (NALSA)*,<sup>5</sup> recognizing transgender persons' right to self-determination of gender identity, and directed the central and state governments to grant legal recognition to their gender identity as male, female or transgender (including third gender or *hijra*). The court further issued multiple directions to these governments under Articles 14, 15(4), 16(4), 19 and 21 of the Constitution, particularly on protection of social and economic rights of transgender persons, including providing reservation in public employment and education by classifying transgender persons as socially and educationally backward class (SEBC) of citizens, and targeted healthcare services, among others.
- 1.1.3 Trans\*,<sup>6</sup> intersex and gender non-binary individuals and communities across the country have led the path in engaging with law for an equal

<sup>1</sup>*AIDS Bhedbhav Virodhi Andolan v Union of India & Ors.*, Writ Petition No. 1784/1994

<sup>2</sup>*Sabse Badtar – Teen So Sattattar!*: Queer Mobilizing in India Against Anti-Sodomy Law, Vivek Divan, Sex Politics, Trends and Tensions in the 21<sup>st</sup> Century, Contextual Undercurrents - Volume 2, April 2019, available at <https://sxpolitics.org/trendsandtensions/uploads/capitulos/7-india.pdf>

<sup>3</sup> (2009) 160 DLT 277

<sup>4</sup> (2018) 10 SCC 1

<sup>5</sup> (2014) 5 SCC 438

<sup>6</sup> The term *trans\** refers to all persons whose own sense of their gender does not match the gender assigned to them at birth. Spelt with an asterisk, *trans\** is an umbrella term coined within gender studies to refer to all non-cisgender gender identities including transsexual, transvestite, genderqueer, genderfluid, genderless, agender, non-gendered, third-gender, two-spirit, bigender, MTF (male to female), FTM (female to male), transman, transwoman, other, man-

and fairer distribution of State resources, goods and services. These efforts have particularly focused on implementation of NALSA's directives to the central and state governments,<sup>7</sup> enforcing reservation in public employment and education,<sup>8</sup> contesting elections to public office,<sup>9</sup> access to employment<sup>10</sup> and education,<sup>11</sup> freedom from discrimination in access to healthcare on basis of intersex status,<sup>12</sup> access to food security<sup>13</sup> and shelter homes,<sup>14</sup> in addition to mounting constitutional challenges against criminalization under various police laws which expressly target *hijra* communities.<sup>15</sup>

1.1.4 The legislative process of enacting the *Transgender Persons (Protection of Rights) Act, 2019* ('Trans Act') also saw extensive community engagement and substantive critique of the proposed law's provisions.<sup>16</sup> At present, the Act is facing multiple challenges from the trans community before the Supreme Court<sup>17</sup> and the Karnataka High Court<sup>18</sup> for fundamentally eroding the progressive law declared in NALSA on the right to self-determination of gender identity and failure in guaranteeing reservation in public employment and education, among other grounds.

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identified person assigned gender female at birth, woman-identified person assigned gender male at birth, and others; *infra* at 40

<sup>7</sup>*Reshma Prasad v Union of India & Ors.*, Writ Petition No. 13861 of 2015 disposed of by Patna High Court by final order dated 18.09.2017; *Queerala v State of Kerala*, Writ Petition 20056 of 2018 disposed of by final order dated 09.01.2018

<sup>8</sup>*Grace Banu v Chief Secretary, Government of Tamil Nadu*, 2016 SCC Online Mad 15973; *S. Tharika Banu v Secretary to Govt., Health & Family Welfare Department*, 2017 SCC Online Mad 10220; *Rano & Ors. v State of Uttarakhand*, Writ Petition No. 1794 of 2018 disposed of by final order dated 28.09.2018; *Veera Yadav v Chief Secy., Govt. of Bihar*, Civil Writ Jurisdiction Case No. 5627/2020, by order dated 18.01.2021; *Mx Sumana Pramanik v Union of India*, WPA 9187/2020, by order dated 01.02.2021; *Sangama and Nisha Gulur v State of Karnataka*, Writ Petition No. 8511 of 2020, *Mx. Sumana Pramanik v Union of India & Ors.*, final order dated 02.02.2021 in WPA No. 9187 of 2020

<sup>9</sup>*Sangeeta Hijra v State of Bihar*, 2017 SCC Online Pat 1040, *Anjali Sanjana Jaan v State of Maharashtra*, Writ Petition No. 104 of 2021, disposed of by final order dated 02.01.2021

<sup>10</sup>*Faizan Siddiqui v Sashastra Seema Bal*, (2011) 124 DRJ 542; *Jackline Mary v Superintendent of Police*, 2014 SCC Online Mad 987; *T. Thanusu v Secretary to Govt. of Tamil Nadu*, (2014) 6 Mad LJ 93; *Atri Kar v Union of India*, 2017 SCC Online Cal 3196; *G. Nagalakshmi v Director General of Police, State of Tamil Nadu*, (2014) 7 Mad LJ 452; *K. Annapoornam v Secretary to Govt., Personnel and Administrative Reforms Department*, 2016 SCC Online Mad 15928; *K. Prithika Yashini v Chairman, Tamil Nadu Uniformed Services Recruitment Board*, 2016 (4) LW 594; *Ganga Kumari v State of Rajasthan*, Writ Petition No. 14006 of 2016, disposed of by Rajasthan High Court by final order dated 13.11.2017; *Tamil Nadu Uniformed Services Recruitment Board v Aradhana*, Writ Appeal No. 330 of 2018 disposed of by final order dated 22.02.2018; *S. Mithra v Secretary to Govt.*, 2019 SCC Online Mad 8617; *Shanavi Ponnusmy v Ministry of Civil Aviation*, Writ Petition 1033 of 2017 (sub-judice), *Hina Haneefa @ Muhammed Ashif Ali v State of Kerala*, final judgment dated 15.03.2021 in WP(C) No. 23404/2020 (appealed)

<sup>11</sup>*Mx. Alia Sk v State of West Bengal*, Writ Petition No. 21587 of 2019, interim order dated 27.11.2019

<sup>12</sup>*Arunkumar and Another v Inspector General of Registration and Others*, (2019) 4 Mad LJ 503

<sup>13</sup>*Ashish Kumar Mishra v Bharat Sarkar Through Sachiv Khadya and Prasanskarn Mantralay*, AIR 2015 All 124

<sup>14</sup>*All Assam Transgender Association v State of Assam and others*, PIL No. 24/2021 (sub-judice)

<sup>15</sup>*Karnataka Sexual Minorities Forum v State of Karnataka*, Writ Petition No. 1397 of 2015 disposed of by Karnataka High Court by final order dated 06.02.2017. *Vyjayanti Vasanta Mogli & Ors. v State of Telangana*, Writ Petition No. 44 of 2018, by interim order dated 18.09.2019 stayed the enforcement of The Telangana Eunuchs Act, 1329F

<sup>16</sup>Sampoorna Working Group Statement on Transgender Persons (Protection of Rights) Bill, 2019. Available at: <https://sampoornaindiablog.wordpress.com/2019/07/19/spwg-statement-on-transgender-persons-protection-of-rights-bill-2019/>

<sup>17</sup>*Rachana Mudraboyina v Union of India*, Writ Petition No. 281 of 2020; *Swati Bidhan Buruah v Union of India*, Writ Petition No. 51 of 2020; *Grace Banu & Ors. v Union of India*, Writ Petition No. 406 of 2020

<sup>18</sup>*Ondede v Union of India*, WP No. 11679 of 2020

- 1.1.5 In April 2019, the Madras High Court in *Arunkumar and Anr. v Inspector General of Registration & Ors.*<sup>19</sup> declared the expression ‘bride’ in section 5 of the *Hindu Marriage Act, 1956* to mean and include a transwoman and an intersex person identifying as a woman, thereby interpreting the law to allow solemnization of marriages involving trans persons.
- 1.1.6 Courts are also positively engaging with legal claims with respect to media representation of queer sexuality<sup>20</sup> and non-discrimination in public employment on basis of sexual orientation.<sup>21</sup>
- 1.1.7 At present, the High Courts of Kerala and Delhi are dealing with the question of ‘marriage equality’ under the existing legal framework of marriage laws in India. The first writ petition was filed before the Kerala High Court in January 2020 by a gay couple, seeking recognition under the *Special Marriage Act, 1954*.<sup>22</sup> Four additional petitions are pending before the Delhi High Court, by (i) four Hindu individuals who filed in September 2020, seeking inclusion under the *Hindu Marriage Act, 1955*<sup>23</sup> (ii) a couple involving two women who filed in October 2020, seeking recognition under the *Special Marriage Act, 1954*<sup>24</sup> (iii) a gay couple who also filed in October 2020, one of whom being an Overseas Citizen of India, solemnized their marriage as per US law in Washington, D.C. and seek recognition in India under the *Foreign Marriage Act, 1969*<sup>25</sup> and (iv) by four individuals who filed in February 2021 and seek recognition of same sex marriages under the *Special Marriage Act, 1954*.<sup>26</sup>
- 1.1.8 One critique of the legal process of the constitutional challenge to the anti-sodomy law has been of having the unintended consequence of transforming a broad range of the queer community’s socio-legal vulnerabilities into a single-issue struggle.<sup>27</sup> It has been argued that the fight against the *de facto* criminalization of homosexuality overshadowed the disproportionate impact of police laws and the criminalization of begging and sex work on working class and Dalit

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<sup>19</sup>*Id* at 12

<sup>20</sup>*Indrajeet Ghorpade v Union of India and Anr.* interim order dated 23.03.2021 in WP(C) 3865/2021

<sup>21</sup>*Pramod Kumar Sharma v State of Uttar Pradesh and 2 others*, final order dated 02.02.2021 in Writ-A No. 8399 of 2020

<sup>22</sup> Copy of the petition available at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-369544.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-369544.pdf)

<sup>23</sup>*Abhijit Iyer Mitra v Union of India*, WP (C) No. 6371/2020

<sup>24</sup>*Dr. Kavita Arora & Anr. v Union of India Anr.*, WP (C) No. 7692/2020

<sup>25</sup>*Vaibhav Jain & Anr. v Union of India & Anr.*, WP (C) No. 7657/2020

<sup>26</sup>*Udit Sood & Ors. v Union of India and Anr.*, WP(C) 2574/2021

<sup>27</sup> The End of Criminality? The Synecdochic Symbolism of Section 377, Aniruddha Dutta, NUJS Review, 13 NUJS L. Rev 3 (2020)

queer communities. These communities experience vulnerabilities based on caste and class in law, in addition to sexual orientation and gender identity.

- 1.1.9 In this context, an engagement on the legal recognition of queer relationships from the prism of Transformative Constitutionalism may offer advantages, making the realization of social and economic rights central to the aim for equality and non-discrimination. Such an understanding is reflected in claims for recognition and redistribution through which formal equality for queer relationships must also embrace redress of socio-economic injustice irrespective of relationship/marital status.<sup>28</sup> This strategy suggests that seeking legal recognition of queer relationships in isolation may provide a limited remedy for protection of rights of the queer community, unless it is also accompanied by demands of socio-economic justice, particularly for those in the community who may prioritize other struggles. A pursuit of formal equality claims like ‘marriage equality’ may be merely symbolic in remedying historical injustices, in a context of gross disparities in material wellbeing of a vast majority of the queer community.
- 1.1.10 In fact, participants in the community consultation organized by the Centre for Health Equity, Law & Policy voiced support for the strategy outlined in this paper of delinking the claim social and economic rights from marital status. Community activists and lawyers who provide legal aid and support services for queer people in crisis asserted that legal recognition of relationships *per se* does not serve as a one-stop solution, and as a community we must focus on mitigating the vulnerability of queer people on basis of gender, caste, class and disability by committing efforts and resources for support services like shelter homes, adequate housing, mental healthcare, employment opportunities, legal aid and other services.<sup>29</sup>
- 1.1.11 The objective of this paper is to present issues which arise in relation to the legal recognition of queer relationships, and to suggest a response to access social and economic rights, irrespective of relationship/marital status. It is shared with the hope of provoking dialogue within the queer community, to foster engagement in informing legal processes and creating change that is representative of the community’s diverse needs and demands in relation to the recognition of queer relationships. In

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<sup>28</sup> Fraser, Nancy (1998). ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation’, Discussion Papers, Research Unit: Organization and Employment FS | 98-108, WZB Berlin Social Science Centre

<sup>29</sup> The authors have on file a copy of the minutes of the virtual community consultation dated 13 February 2021 organized by C-HELP.

doing so, the paper builds on the writings and interventions of queer<sup>30</sup> activists in India over the decades in conceptually challenging the State's interest in limiting access to a variety of social and economic rights reserved exclusively to persons in marital relationships which are defined by underlying assumptions of binary of gender, heterosexuality, monogamy and conjugality.

1.1.12 The paper is divided into three sections. The *first* section examines the historical engagement of communities with law in articulating a position on legal recognition of queer relationships. The *second* section identifies a body of Indian law governing social and economic rights arising in areas of healthcare, housing, maintenance, inheritance, guardianship, adoption, partner benefits etc. which are available to persons on basis of marital status. This body of law is analysed in the backdrop of a robust framework of evolving jurisprudence on gender, sexuality, equality and anti-discrimination law in India, for making such rights inclusive and accessible to the queer community irrespective of marital status. The *third* section analyses strategies in seeking legal recognition for achieving the stated objectives.

## 1.2 Demands for Recognition

1.2.1 As a starting point, it bears well to note whether the queer community has articulated a demand for legal recognition of relationships, the nature of the demand and the plurality of relationships.

1.2.2 As early as 1991, AIDS Bhedbhav Virodhi Andolan (ABVA) expressed its political goal in protection of rights of gay men, lesbian women and other 'sexual minorities' like *hijras* under Indian laws on marriage, inheritance, adoption and others. Beyond seeking decriminalization, ABVA was careful to note the lack of consensus in the queer community on the desirability of 'marriage equality' in its seminal report on the status of homosexuality in India.<sup>31</sup>

1.2.3 The report draws on anecdotes of lesbian couples' desire to seek recognition of their relationships in law. Lesbian women frequently cited vulnerability to suicide as a consequence of inadequate access to

<sup>30</sup> The term *queer* is used as an inclusive term that refers to persons who question norms of gender and sexuality in behaviour, identity and/or expression.

<sup>31</sup> Less than Gay, A Citizens' Report on the Status of Homosexuality in India, AIDS Bhedbhav Virodhi Andolan (AIDS Anti-Discrimination Movement), New Delhi (1991) @ pgs. 4-6.

mental healthcare services due to non-recognition in law, on dissolution of relationships.<sup>32</sup> The lack of recognition of lesbian relationships was also cited as an aggravating factor for families pressuring lesbian women to marry men, leaving former partners without an adequate remedy and in debilitating circumstances of insecurity.<sup>33</sup> In this backdrop, lesbian women suggested that legal recognition may offer protection to the social and economic interdependence of organizing their chosen families.<sup>34</sup>

1.2.4 Gay, bisexual and queer men repeatedly cited non-recognition of relationships in law as the cause of social and economic precariousness of life as single persons. Additionally, queer men also reported engaging in sex work for survival due to violence and disownment by families.<sup>35</sup>

1.2.5 ABVA questioned the centrality of conjugality to the idea of marriage under family laws in India, and demanded legal recognition for families of friends who do not engage in sex and choose to live together, to secure protection of their social and economic rights.<sup>36</sup> In its Charter of Demands, ABVA recommended amendments to the *Special Marriage Act, 1954* to include lesbian, gay, bisexual, trans and intersex persons to access a range of benefits, including the rights to adopt children, execute a partner's will, inheritance etc. Alternatively, it recommended legal recognition of *maitri karar* (friendship agreement)<sup>37</sup> between single persons as a valid way of organizing family life of queer individuals.<sup>38</sup> Although now considered to be unlawful in Gujarat, *maitri karar* agreements once provided an opportunity for formalizing relationships, exercising agency and securing greater economic support for lesbian women within and outside Gujarat.<sup>39</sup> Despite questions on its validity, lesbian couples continue to rely on such arrangements in the absence of any recognition of their relationships before law.<sup>40</sup>

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<sup>32</sup>*Ibid*, pgs. 6-7, 10

<sup>33</sup>*Id* at 31, pg. 9

<sup>34</sup>*Id* at 31, pg. 12

<sup>35</sup>*Id* at 31, pgs. 10-11

<sup>36</sup>*Id* at 31, pg. 51

<sup>37</sup> The Gujarat High Court has declared *maitri karar* (friendship agreements) to be void *ab initio* in *Minaxi Zaverbhai Jethva v State of Gujarat*, (2000) 41 (2) GLR 1336. This declaration arose in the specific context of married men entering in live-in relationships with women to evade the prohibition against bigamy under the *Hindu Marriage Act, 1955* in Gujarat.

<sup>38</sup>*Id* at 31, pgs. 68-69

<sup>39</sup>Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family, Partners for Law in Development (2010), at pgs. 61-72

<sup>40</sup>Same-sex couples in India are using a Gujarati practice to get 'married', Omkar Khandekar, Livemint, 05.10.2020

- 1.2.6 In 1999, feminist, lesbian, bisexual and trans women's collectives, Stree Sangam (today known as Lesbians and Bisexuals in Action – LABIA) and *Forum Against Oppression of Women*, broadly articulated a three-fold demand: (i) decriminalization, (ii) anti-discrimination and (iii) domestic partnership rights.<sup>41</sup>
- 1.2.7 The collectives articulated a need for legal recognition of diverse forms of queer families – single parent families, domestic partnerships, multiple adult related (not merely conjugal) families etc.<sup>42</sup> The demand for recognition of such families is rooted in the vision of a gender-just framework of law, and particularly seeks to conceptually broaden the idea of a family to include groups of heterosexual as well as queer individuals who share domestic arrangements outside of marriage, which may not be compulsorily defined by conjugality.<sup>43</sup>
- 1.2.8 The need for recognition in law of diverse forms of queer families is fundamentally premised in the demand for the array of social and economic rights which are otherwise reserved for persons on the basis of marital status: economic rights and obligations of partners, joint taxation, joint insurance, social benefits such as old age pensions, single parent benefits, debt/mortgage loans, common ownership of property, inheritance, 'next of kin' privileges in situations of a partner becoming terminally ill, death-benefits, childcare entitlements, custody of children, adoption, access to assisted reproductive technologies and immigration rights for bi-national relationships.<sup>44</sup>
- 1.2.9 In 2013, a study documenting experiences of queer persons assigned gender female at birth (PAGFB) by LABIA recommended legal recognition of civil partnerships as a demand from the State, as a step to remedy historical marginalization of such communities and grant access to equal rights that married heterosexual couples enjoy, such as property rights, right to joint bank account, right to make medical decisions for partners and the right to nominate partners as beneficiaries in wills.<sup>45</sup>
- 1.2.10 In 2018, queer, feminist, lesbian, bisexual and trans\* (LBT) activists responded to a consultation process by the Law Commission of India

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<sup>41</sup>Humjinsi, A Resource Book on Lesbian, Gay and Bisexual Rights in India, Edited and Compiled by Bina Fernandez, India Centre for Human Rights and Law (1999)

<sup>42</sup>*Ibid*, pg. 8

<sup>43</sup>*Id* at 41, pg. 83-88

<sup>44</sup>*Id* at 41, pg. 16-19, 66-72

<sup>45</sup> Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Identities, A Study by LABIA – A Queer Feminist LBT Collective (April 2013)

on the adoption of a Uniform Civil Code (UCC), by recommending recognition and inclusion of queer families in diverse forms irrespective of marital or conjugal status, and demanded gender neutrality in adoption and succession laws particularly. They additionally recommended issuance of guidelines for nomination of 'legal representatives' beyond conjugal or familial lines for taking decisions on behalf of incapacitated partners in matters of living arrangements, custody of minor children, nomination of legal heirs, end-of-life care etc., as protections in law against interference or violence by natal families for exercising choices with respect to the aforesaid matters.<sup>46</sup>

1.2.11 In early 2019, Sampoorna (a collective of trans, intersex and gender non-binary individuals) published a manifesto of rights, seeking principally the recognition in law of the vast spectrum of gender identities and expressions<sup>47</sup> to allow such persons to truly reflect their numbers in census figures, for policy and budgetary advocacy with the State. The collective aims to engage with the State on rights of trans, intersex and gender non-binary persons to marriage, inheritance, reproductive rights, adoption and other laws,<sup>48</sup> and views the conception of 'family' only on basis of relations by blood, marriage or adoption under the *Transgender Persons (Protection of Rights) Act, 2019* as exclusion of *hijra gharanas*/households.<sup>49</sup>

1.2.12 At a consultation on reform of family laws in India aimed at inclusion of LGBT+ individuals, queer, feminist and LBT activists proffered an idea of marriage as a relationship of economic and emotional interdependence, demanded expansive interpretation of 'family' under law to include families of choice like non-conjugal kinship networks like *hijra gharanas*, and principally advocated that legal reform must not structurally disadvantage queer individuals who do not seek recognition in law as per traditional family arrangements.<sup>50</sup>

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<sup>46</sup>Chayanika Shah, Minakshi Sanyal, Maya Sharma, Rituparna Borah, Rumi Harish, Deepti Sharma and Jaya Sharma, Response to Law Commission on Uniform Civil Code (July 2018); Available at: <http://orinam.net/lci-response-lbt-2018/>

<sup>47</sup> Trans\*, intersex and gender non-binary persons go by cultural, geographical and historical nomenclatures. Some trans feminine identities and expression are: thirunangai, mangalmukhi, aravani, hijra, kothi, kinnar, jogappa, shiv shakti, persons of trans feminine experience. Some trans masculine identities and expressions are: thirunambi, gandabasaka, babu, bhैया, persons of trans masculine experience. There are non-binarian and gender non-binary identities and expressions that do not conform to any of the aforesaid; *Infra* at 42

<sup>48</sup> A Manifesto for Rights of Trans, Intersex and Gender Non-Binary Persons, Sampoorna (2019); Available at: <https://sampoornaindiablog.wordpress.com/2019/02/25/a-manifesto-for-rights-of-trans-intersex-gender-non-binary-indians/>

<sup>49</sup>*Id* at 16

<sup>50</sup> Making Indian Laws LGBT+ Inclusive, Vidhi Centre for Legal Policy (2019)

1.2.13 The activists further recommended borrowing from the experience of inter-caste marriages and the social security measures adopted by Tamil Nadu to remedy the historical marginalization of scheduled caste communities.<sup>51</sup>

1.2.14 The history of the queer community's engagement with law therefore bears out a clearly articulated desire for seeking legal recognition of a diversity of relationships and kinship networks that are premised on care-giving and economic interdependence of parties, and which defy assimilation in models of the binary of gender and compulsory heterosexuality, monogamy and conjugality.<sup>52</sup>

### 1.3 Seeking Judicial Remedies

1.3.1 Queer persons who faced violent resistance to their relationships from natal families or third parties approached High Courts for protection even before 2009, when the Delhi High Court for the first time declared Section 377, IPC to be unconstitutional. However, as the law *de facto* criminalized homosexuality up to this moment, the vast majority of legal records relating to protection cases of queer persons between the period 1947 to 2009 do not authentically represent the gender identity or sexual orientation of parties before the courts.<sup>53</sup> At the time, openly identifying as gay or lesbian and being in an intimate relationship risked exposure to prosecution under the anti-sodomy law. This invisibilization of queerness and the inability to articulate one's relationship status before courts presented challenges in many cases, manifesting in courts preferring to direct queer persons (adult or adolescent) to reside with natal families and refusing to exercise their jurisdiction.

1.3.2 Despite the Supreme Court's progressive ruling in *NALSA* which granted legal recognition to self-determination of gender identity for transgender persons and *Navtej* which overturned the *de facto* criminalization of homosexuality, queer individuals continue to face challenges in accessing justice. The lack of clarity in law on the validity of queer relationships and rights of partners compounds the

<sup>51</sup>*Ibid*, pgs. 33-34

<sup>52</sup>Compulsory heterosexuality is the idea that heterosexuality is the natural state of sexuality, and deviation from this norm is seen as unfavourable and punished by society and law. The ideas of compulsory monogamy and conjugality are founded on similar assumptions, and social as well as legal institutions reward or punish people for compliance or deviance from such norms likewise. See: Rich, Adrienne. "Compulsory Heterosexuality and Lesbian Existence." *Signs*, Vol. 5, No. 4, 1980, pp. 631-660.

<sup>53</sup>Ponni Arasu and Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) *Indian Journal of Gender Studies* 413 (2012)

vulnerability of queer individuals to arbitrary interference and violations by natal families and third parties. At present, queer couples typically approach High Courts under the jurisdiction of Article 226 of the Constitution (Power of the High Court to Issue Certain Writs) or Section 482 of the *Criminal Procedure Code, 1973* (Saving of Inherent Powers of the High Court) and seek protection and remedies.

- 1.3.3 In October 2018 (a month after *Navtej*), the Madras High Court granted police protection to a man and his trans partner when the man's family and persons belonging to a 'political outfit' harassed and threatened the couple.<sup>54</sup> The court cited jurisprudence on protection granted routinely to inter-caste and inter-religious couples<sup>55</sup> and held that marriage with transgender persons and resistance by families deserves similar response in law.
- 1.3.4 Again, in October 2018 the Delhi High Court passed a detailed order granting police protection to two women who received violent threats from family members on basis of their relationship status, and sought departmental action against a police officer who did not co-operate with the women's request for assistance and threatened to file a frivolous criminal case against them.<sup>56</sup>
- 1.3.5 In January 2019, the Calcutta High Court entertained a writ petition by a lesbian woman who sought her partner's release from unlawful detention by her family. However, when produced before the Court, the detained woman stated that she chose to live with her mother, and the matter was consequently disposed of.<sup>57</sup>
- 1.3.6 In April 2019, the Delhi High Court granted police protection to two women who cohabited together in a live-in relationship, against threats of violence from their families who did not approve of the relationship.<sup>58</sup>
- 1.3.7 In July 2019, the Delhi High Court refused to entertain a writ of habeas corpus by a trans man to seek the release of his partner from the unlawful detention by her paternal relatives, as the woman subsequently chose to live with her parents.<sup>59</sup>

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<sup>54</sup>*Mansur Rahman v Superintendent of Police*, 2018 SCC Online Mad 3250.

<sup>55</sup>*Lata Singh v State of Uttar Pradesh*, (2006) 5 SCC 475

<sup>56</sup>*Sadhana Sinsinwar and Another v State & Ors.*, WP (CrI) No. 3005 of 2018 disposed of by final order dated 01.10.2018

<sup>57</sup>*S.S.G v State of West Bengal*, Writ Petition No. 23120(W) of 2018, disposed of by final order dated 29.01.2019

<sup>58</sup>*Bhawna and Others v State and Others*, WP (CrI) No. 1075 of 2019, order dt. 12.04.2019

<sup>59</sup>*Monu Rajput v State*, 2019 SCC Online Del 9154

- 1.3.8 In June 2020, the Uttarakhand High Court entertained a writ of habeas corpus by a woman against her female partner's complaints of illegal detention by family members. Initially, the detinue expressed a desire to live with her partner who filed the petition and confirmed the allegations of detention against her will. However, on a subsequent hearing, the detinue completely recanted her earlier statement before the Court, and chose to live with her family.<sup>60</sup>
- 1.3.9 In July 2020, the Punjab & Haryana High Court granted police protection to two women who approached the Court for relief against threats of violence by their families, by affirming the view that the women deserved protection of life and liberty under Article 21 of the Constitution irrespective of the validity of the relationship in law.<sup>61</sup>
- 1.3.10 In November 2020, the Allahabad High Court granted police protection to a lesbian couple in a live-in relationship who apprehended violence from family members and others.<sup>62</sup>
- 1.3.11 In December 2020, a petition by a gay man for release of his partner who was abducted by his family, failed before the Karnataka High Court when the partner declared that he was living voluntarily with his family to the Court.<sup>63</sup>
- 1.3.12 In January 2021, the Allahabad High Court again granted police protection to a lesbian couple apprehending violence from family members.<sup>64</sup>
- 1.3.13 In June 2021, the Madras High Court issued a direction to the police that when investigating missing persons complaints filed by families of queer persons, once it has recorded a statement of the concerned individual/couple to the effect that they are consenting adults who voluntarily choose to live together or leave the natal home, the police must immediately close the matter and not harass them further.<sup>65</sup> After a consultation with the queer community, who helped the judge gain a holistic understanding of sex, gender and sexuality, the court traversed beyond the immediate case by providing relief to the lesbian couple,

<sup>60</sup>*Madhu Bala v State of Uttarakhand and Others*, 2020 SCC Online Utt 276

<sup>61</sup> *Paramjit Kaur and Another v State of Punjab and Others*, CRWP no. 5042/2020 disposed of by final order dated 20.07.2020

<sup>62</sup>*Sultana Mirza and Another v State of Uttar Pradesh*, Writ Petition (C) 17394/2020, disposed of by order dated 02.11.2020

<sup>63</sup>*Raunak Roy v State of Karnataka*, WP (C) 85 of 2020, disposed of by final order dated 14.12.2020

<sup>64</sup>*Poonam Rani and Another v State of UP and 5 others*, Writ (C) No. 1213 of 2021 disposed of by final order dated 20.01.2021

<sup>65</sup>*Sushma and Seema v Commissioner of Police*, final judgment dated 07.06.2021 in WP No. 7284/2021

and invoked its writ jurisdiction to deliver complete justice by issuing directives to various public authorities in the state of Tamil Nadu as well as central government authorities for protecting the social and economic rights of LGBTQIA+ persons, including taking steps for prohibition of ‘conversion therapy’ and taking disciplinary action against healthcare professionals who provide such unscientific and harmful services.

1.3.14 In July 2021, the Delhi High Court granted police protection and safe harbour to a runaway queer couple who apprehended violent resistance from their family (*Dhanak*).<sup>66</sup> More pertinently, the court directed the government to provide access to shelter homes to the queer couple by expanding the scope of existing support services meant to serve and protect inter-religious and inter-caste couples as mandated by the Supreme Court.<sup>67</sup>

1.3.15 High Courts across the country have made laudable efforts in protecting the ‘right to choice’<sup>68</sup> of inter-caste and inter-religious couples, and extending this jurisdiction to queer couples for safeguarding the right to life and liberty. However, a review of the reported cases reveals that this process is fraught with challenges for queer individuals, as they are compelled to negotiate exercising their choices against threats to personal safety and economic security by natal families. The legal strategy of approaching High Courts on an ad-hoc basis often provides limited relief in terms of prevention of imminent threat to life. It does not provide an adequate remedy in law for protecting queer persons in relationships, as is also borne out by experiences in exercise of choice and autonomy in the women’s movement.<sup>69</sup>

1.3.16 *Dhanak* foregrounds the observations of the *Navtej* bench that struggles of the queer community are located within a larger history of various forms of struggles against social subordination in India.<sup>70</sup> The resistance against the “order of nature” is therefore not limited to liberating queer love and sexuality, but also demands the dismantling of limits imposed by gender, caste, class, religion, and community for guaranteeing everyone’s freedom to choose partners. As queer

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<sup>66</sup>*Dhanak of Humanity and others v. State of NCT and another*, WP (Crl) No. 1321/2021 disposed of by final order dated 23.07.2021

<sup>67</sup>*Shakti Vahini v. Union of India and others*, (2018) 7 SCC 192

<sup>68</sup>*Dr. Sanghamitra Acharya v NCT of Delhi*, 2018 SCC Online Del 8450, para. 66-70

<sup>69</sup> *Women’s Right to Choose If, When and Whom to Marry*, Association for Advocacy and Legal Initiatives (AALI), Lucknow (2003), pgs. 6-8

<sup>70</sup>*Id* at 4, paragraph 385

affirmative support service providers attested during C-HELP's community consultation, runaway queer couples' struggles are far from over despite favourable court orders. Beyond respecting and offering protection to the rights of queer persons to choose a partner, the State must ensure fulfilment of such rights by facilitating access to essential support services in order for runaway couples to survive the economic, social and cultural barriers stacked against them – access to shelter homes, adequate housing, mental healthcare services, employment opportunities, legal aid and other services.<sup>71</sup>

1.3.17 It is conceivable that legal recognition of relationships can mitigate the impact of, if not eliminate wholly, arbitrary interference and violence by natal families and third parties. As the experience of inter-caste couples bears out,<sup>72</sup> the State may provide social security entitlements to remedy the vulnerabilities of couples belonging to historically marginalized communities, such as the *Dr. Ambedkar Scheme for Social Integration through Inter-Caste Marriages* in Tamil Nadu for marriages among Scheduled Caste communities. As a matter of course, a legal claim for recognition of queer relationships must be accompanied by community organizing, advocacy and social campaigns to enhance space for queer persons in society.

## 2. LEGAL DEVELOPMENTS

### 2.1 Transformative Constitutionalism

2.1.1 The evolution of equality and non-discrimination law under the Constitution can be traced from its beginnings as a 'formal equality' approach transitioning into 'substantive equality'. The interface between civil and political rights with social and economic rights has been crucial to this development. Civil and political rights (right to equality, freedom of speech, right to life) are contained in the Part III (Fundamental Rights) of the Constitution, which are enforceable by persons approaching a Constitutional court. On the other hand, social and economic rights (distributive justice, promotion of economic interests of weaker sections) are contained in Part IV (Directive Principles of State Policy), which are declared to be unenforceable by

<sup>71</sup>In the matter of queer relationships – court approval vs. social approval, Diksha Sanyal, August 24, 2021: <https://vartagensex.org/insight/2021/08/in-the-matter-of-queer-relationships-court-approval-vs-social-disapproval/>

<sup>72</sup>*Id* at 12

courts. However, these principles inform and guide governance and the legislative process.

- 2.1.2 A formal equality approach adopted by the Supreme Court in the first two decades of adoption of the Constitution focussed on interpretation and enforcement of civil and political rights of individuals. However, a 1975 case on reservations in promotions for Scheduled Caste and Scheduled Tribe candidates in public employment transformed the Supreme Court's understanding of equality and non-discrimination law. The court defended the constitutional validity of the reservation policy by declaring that the fundamental right to equality of opportunity in public employment (Article 16 in Part III) for groups marginalized on basis of caste must be read harmoniously with the State's obligations to take special measures for promotion of economic interests of weaker sections of society (Article 46 in Part IV).<sup>73</sup> This articulation of substantive equality combined the law's commitment to protect civil and political rights of individuals with the struggle to realize social and economic rights of marginalized communities, thereby, unleashing the radical potential of the Constitution.
- 2.1.3 This practice of interpretation and application of the law is popularly referred to as Transformative Constitutionalism today.<sup>74</sup> In further developing this concept in *Navtej*, the Supreme Court significantly identifies the realization of social and economic rights of persons belonging to disadvantaged groups to be capable of leading a life of dignity, freedom and equality as central to the process of transforming society (para 99).
- 2.1.4 The court borrows largely from the Constitutional Court of South Africa, and is deeply aware that an approach of formal equality will entrench existing inequalities. The court locates our Constitution in a history of systematic discrimination entrenched by a legal order of dominant caste and class formations, which can only be eliminated by positive obligations on the State (paras 99-105). The process of interpreting the Constitution must recognize this history of transition from a society based on division, injustice and exclusion to one of democratic values, social justice and fundamental human rights (para 105).
- 2.1.5 Transformative Constitutionalism, therefore, presents a united aim at realization of civil and political rights (freedom from discrimination) as

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<sup>73</sup>*State of Kerala v NM Thomas*, (1976) 2 SCC 310

<sup>74</sup>*Id* at 4, para. 95

well as social and economic rights (equality of opportunity) simultaneously.<sup>75</sup> In other words, recognition *and* redistribution find articulation in law as Transformative Constitutionalism. It is through such a lens that we propose to approach the legal framework as well as the question of recognition of queer relationships and the issues presented therein, to re-imagine the possibilities of transforming queer lives.

## 2.2 Gender, Sexuality and Constitutional Law

2.2.1 In recent years, the Supreme Court has dealt with a range of constitutional matters of gender and sexuality, particularly, gender-based discrimination in employment, legal recognition of self-determination of gender identity for transgender persons, constitutional recognition of right to privacy, the decriminalization of homosexuality and adultery. In times to come, the jurisprudence emerging from these cases will inform the relationship between constitutional law and emerging issues related to gender and sexuality, including legal recognition of queer relationships.

2.2.2 In establishing a standard of strict scrutiny for laws rooted in sex stereotypes in *Anuj Garg & Ors. v Hotel Association of India & Ors.*,<sup>76</sup> the Supreme Court held that:

- i. A law, although constitutional when enacted, can be held to be unconstitutional in view of changed situations with the passage of time (paras 7-8);
- ii. The anti-stereotyping principle is firmly rooted in the prohibition under Article 15 of the Constitution (paras 41-44);
- iii. A strict scrutiny test should be employed when assessing the implications of legislations which are ostensibly aimed at providing 'protective discrimination'. Legislation should not only be assessed on its proposed aims but rather on implications and effects (para 46).

2.2.3 In granting legal recognition to self-determination of gender identity in *NALSA*, the court held that:

<sup>75</sup>*Id* at 4, para. 104. See: *Albertyn & Goldblatt, Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. HUM. RTS. 248 (1998)

<sup>76</sup> (2008) 3 SCC 1

- i. No person shall be forced to undergo any medical procedure, including sex re-assignment surgery, sterilization or hormone replacement therapy, as a requirement for legal recognition of gender identity (paras 22, 135);
- ii. Yogyakarta Principles must be recognized and followed in India as they are consistent with the fundamental rights under the Constitution (paras 57-60);
- iii. Discrimination on grounds of sexual orientation and gender identity violates equality before law under Article 14 of the Constitution (para 62);
- iv. The Constitution makers included a guarantee against discrimination on grounds of sex to prevent direct or indirect discrimination on basis of failure to conform with stereotypical notions of gender. Therefore, Articles 15 and 16 prohibit discrimination on basis of 'gender identity' (paras 63, 66);
- v. Gender identity is at the core of one's identity, and therefore gender expression and presentation are protected under Article 19(1)(a) of the Constitution on basis of values of privacy, autonomy and personal integrity (para 72);
- vi. Self-determination of gender identity is an integral part of personal autonomy and falls in the realm of liberty guaranteed under Article 21 of the Constitution (para 75);
- vii. Non-recognition of identity of *hijras* and transgender persons in legislations which are coded in the binary of male/female gender denies them equal protection of law (para 81);
- viii. Discrimination on basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying equality before law (para 83).

2.2.4 In recognizing privacy as a fundamental right under Part III of the Constitution in *J. KS Puttaswamy (retd.) & Ors. v Union of India*,<sup>77</sup> the Court held that:

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<sup>77</sup> (2017) 10 SCC 1

- i. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty under Article 21 of the Constitution (para 320).
- ii. *NALSA* informs that the right to privacy is interlinked to the protection of gender identity under Article 15 of the Constitution. The intersection of Articles 15 and 21 locates a constitutional right to privacy as an expression of individual autonomy, dignity and identity (para 96);
- iii. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of their life. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture (para 323);
- iv. An invasion of the right to privacy must meet the requirements of -
  - a. *legality*, which postulates the existence of a law;
  - b. *need*, defined in terms of a legitimate aim; and
  - c. *proportionality*, which ensures a rational nexus between the objects and the means adopted to achieve them (para 325)

2.2.5 In critiquing its earlier decision in *Suresh Kumar Koushal*<sup>78</sup> for its failure to deal with the privacy-dignity claims of LGBT persons in a manner consistent with the rights-based framework under the Constitution, the *Puttaswamy* court made the following observation in context of protections of rights on basis of sexual orientation:

*“The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their existence from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason*

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<sup>78</sup> (2014) 1 SCC 1

*that their views, beliefs or way of life does not accord with the “mainstream”. Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties.” (para 144)*

2.2.6 In declaring principles of law governing the ‘right to choice’ which is beyond the role of the State or society, in *Shafin Jahan v Asokan K.M.*<sup>79</sup> the Supreme Court held that:

- i. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith (para 89);
- ii. Neither the State nor the law can dictate the choice of partners or limit the free ability of every person to decide on the matters. They form the essence of personal liberty under the Constitution...Our choices are respected because they are ours. Social approval for personal intimate decisions is not the basis of recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences (para89);
- iii. The Constitution protects the ability of each individual to pursue a way of life or faith to which he or she seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners (para 91);

2.2.7 In decriminalizing homosexuality in *Navtej*, the Supreme Court held that:

- i. In assessing a claim of violation of the guarantee of equality under Article 14, a Court must focus its analysis on the

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<sup>79</sup> 2018 SCC Online SC 343

substantive core of liberty and equality, rather than the traditional test of reasonable classification (whether classification made by a law has a rational nexus with the object to be achieved) (para 380);

- ii. Under Article 15, that a ground of discrimination is rooted in sex and in other considerations (*sex plus*) can no longer be accepted by the intersectional understanding of how discrimination operates, which does not operate in isolation of other identities, especially from the socio-political and economic contexts (paras 389, 394);
- iii. A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds of sex under Article 15(1), is to be assessed not by the objects of the State in enacting it, but by the effect the provision has on affected individuals and their fundamental rights (para 394);
- iv. Constitutional morality requires the Court to act as a counter-majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe (para 499);

2.2.8 In challenging the foundations of anti-sodomy laws through a lens of gender, the Court observed that:

*“Section 377 criminalizes behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles.*

*...One cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles...*

*...Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender...The effort to end discrimination against gays*

*should be understood as a necessary part of the larger effort to end the inequality of the sexes*

*Relationships that tend to undermine the male/female divide are inherently required for the maintenance of a socially imposed gender inequality...By attacking these gender roles, members of the affected community, in their move to build communities and relationships premised on care and reciprocity challenge the idea that relationships, and by extension society, must be divided along hierarchal sexual roles in order to function.” (paras 397-400)*

2.2.9 In decriminalizing adultery in *Joseph Shine v Union of India*,<sup>80</sup> the Supreme Court re-shaped the discourse on the ‘sanctity of marriage’, noting that adultery laws are typically rooted in the historical inequality of the sexes and are inadvertently concerned with establishing property interests through compulsory monogamy and conjugality (paras 169, 180).

2.2.10 The court’s analysis on viewing adultery as a constitutionally protected choice is particularly instructive. The court considers international scholarship to pose the question: *if the argument that adultery, though unconventional, is an act related to marriage and family relationships and therefore fundamentally private is accepted, then it deserves equal protection in law.*<sup>81</sup> The mere fact that adultery is considered unconventional in society does not justify depriving it of privacy protection. The freedom of making choices also encompasses the freedom of making an “unpopular” choice. The court’s recognition and keen engagement with the complexity and diversity of marriages and relationships where parties either commit to sexual exclusivity, or “joyfully dispense with monogamy”, appears prescient of the court’s willingness to move beyond merely the question of decriminalization on the matter.

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<sup>80</sup> (2019) 3 SCC 39

<sup>81</sup>*Ibid*, paras. 152-157. See: Martin J. Siegal, ‘For Better or For Worse: Adultery, Crime and the Constitution’, *Journal of Family Law*, Vol. 30, (1991) 45. In arguing for constitutional protection to adultery, this work, not incidentally, relies on a body of jurisprudence on matters of gender and sexuality, demonstrating the complex web of inter-linkages between social, economic and legal issues: *restrictive maternity leave policies, right to divorce for poor women, housing regulations which narrowly define family units for lawful cohabitation, anti-miscegenation laws which prohibit inter-racial marriage, access to sexual and reproductive health service and criminalization of homosexuality*, among others.

2.2.11 It is an open question whether the court will respond with the same robust analysis in rejecting stereotypes on queer sexuality and gender expression (*Anuj Garg*), defend minority “views, beliefs or way of life” (*Puttaswamy*), foreclose the role of the State or society (*Shafin Jahan*), foreground the “larger effort to end the inequality of the sexes” (*Navtej*) and question the validity of the State’s interest in linking property rights to compulsory monogamy and conjugality (*Joseph Shine*), when presented with a claim of legal recognition of relationships in diverse forms as conceptualized by the queer community.

## 2.3 Evolving Jurisprudence on Indirect Discrimination or Disparate Impact of Facially Neutral Laws

2.3.1 Courts are increasingly engaging in analysis of State action or laws which may be facially neutral at inception, but have disproportionately and adversely impacted vulnerable communities in their application. This inquiry has been on the basis that such State action or laws violate the guarantee of equality in Article 14 and freedom from discrimination in Article 15 of the Constitution. Such an approach has the potential to transform the standard of judicial review courts can be expected to undertake in matters of legal recognition of queer relationships and access to consequential social and economic rights, especially as courts are crafting legal precedent to remedy historical marginalization.

2.3.2 The most striking development is the decision of the Delhi High Court in *Madhu & Anr. v Northern Railways & Ors.*,<sup>82</sup> where the court dealt with the claim of a wife and daughter to benefits under employment regulations of the husband/father’s medical policy covered by the State employer (Northern Railways). The court declared the regulations to be merely facilitative and procedural, and family members and dependant relatives as entitled to the benefits irrespective of nomination by the principal beneficiary/employee (para 12). However, the court did not limit itself to the immediate legal dispute at hand.

2.3.3 It prefaced its analysis on ‘indirect discrimination’ with the following observations:

*“This Court must also keep in mind that the Appellants, under the Constitution, fall within a particular group, i.e.,*

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<sup>82</sup> 2018 SCC Online Del 6660

*that of “women”. The Constitution in Articles 15 and 16 recognizes the principle that certain groups have been historically disadvantaged and that post the enactment of the Constitution, actions of the State that discrimination against women (not falling within the exceptions of Article 15(4) and Article 16(4)) are constitutionally untenable. Thus, while affirmative action to secure interests of women is allowed, the Constitution, irreproachably, does not permit discrimination against women...*

*Since the actions of Northern Railways result in denial of benefits and rights to this special class, it must be closely examined to see if the actions, or their effect, are discriminatory. The Northern Railways contends that the appellants are not denied the medical card because they are women, but rather because their husband and father had not made the requisite declaration. However, this explanation is not enough. It is not sufficient to say that the reasoning of Northern Railways did not intentionally discriminate against the appellants because they were women. Law does not operate in a vacuum, and the reasoning and consequent decision of the Northern Railways must be examined in the social context it operates and the effects that it creates in the real world. Even a facially-neutral decision can have disproportionate impact on a constitutionally-protected class.” (paras 16 – 17).*

- 2.3.4 On this note, the court examined international legal developments on indirect discrimination. It referred to Council of Europe Directive (2000/78/EC, dated 27 February 2000) which defines the concept of ‘indirect discrimination’ as:

*“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular*

*disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”*

2.3.5 The court noted a European Court of Justice case which held that employment regulations that require one to be a full-time employee for 15 years before securing pension was discriminatory against women, as women were far more likely than men to take up part-time work to take care of family and children.<sup>83</sup>

2.3.6 The court further noted a Canadian Supreme Court decision which defined the principle of ‘disparate impact’ as:

*“any distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society”<sup>84</sup>*

2.3.7 The Canadian Supreme Court advanced this concept in another case:

*“...there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.*

*...An employment rule honestly made for sound economic or business reasons, equally applicable to all whom it is*

<sup>83</sup>*Bilka-Kaufhaus GmbH v Weber von Hartz*, (1986) ECR 1607

<sup>84</sup>*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143. The *HIV/AIDS (Prevention and Control) Act, 2017* incorporates a similar definition on discrimination, which is borrowed from *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* in South Africa

*intended to apply may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.”<sup>85</sup>*

2.3.8 The Constitutional Court of South Africa made analogous observations on indirect discrimination:

*“The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.*

*In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken.”<sup>86</sup>*

2.3.9 In a matter of aptitude tests as a condition for recruitment, the US Supreme Court held that although the same test was administered to all candidates, as African American applicants had long received sub-standard education due to segregated schools, the employer’s recruitment policy had a disparate impact on African American persons by excluding them from employment sources.<sup>87</sup>

2.3.10 In *Madhu* the Delhi High Court, foregrounding this analysis, held that Northern Railways’ denial of the medical benefits to the Appellants had a disproportionate impact on the class of women. The court’s decision proceeds on the analysis that as a large majority of dependants are

<sup>85</sup>*Ontario Human Rights Commission and O’Malley v Simpsons-Sears Ltd.*, [1985] 2 SCR 536

<sup>86</sup>*City Council of Pretoria v Walker Case*, CCT 8/97

<sup>87</sup>*Griggs v Duke Power Co.*, 401 US 424 (1971)

likely to be women and children, the Railway authorities place such women and children at risk of being denied medical services by mandating the employee to make a declaration for this purpose. The ultimate effect of such decision-making has a disparate impact on women as a class by perpetuating the historic denial of agency that women have faced in India (paras 29 – 30).

2.3.11 The Delhi High Court applied similar analysis in *Inspector (Mahila) Ravina v Union of India & Ors.*,<sup>88</sup> ruling that regulations governing seniority in public employment which indiscriminately apply same standards to male and female employees violate Articles 14, 15(1), 16(2) and 21 of the Constitution, in so far as they do not accommodate the ability of female employees who are pregnant to comply with such regulations. It added that a lack of an express plea of pregnancy-based discrimination does not in any way stop a court from doing complete justice to protect Constitutional rights. This analysis also indicates the contours of the obligation of Constitutional courts in undertaking similar analysis for indirect discrimination on basis of religion, race, caste, sex or place of birth under Article 15, when presented with challenges to facially neutral State action or laws, even when such pleas may not be formally adopted by Petitioners.

2.3.12 The *Navtej* court applied the test laid down in *Madhu* in its impact-analysis to hold that even though section 377, IPC criminalized oral and anal sex in equal application to everyone, these acts are closely associated with homosexuals, therefore, the law was violative of Article 15(1) as it placed a systemic pattern of disadvantage, exclusion and indignity on the LGBTQ community.<sup>89</sup>

2.3.13 In *Lt. Col. Nitisha v. Union of India*,<sup>90</sup> the Supreme Court has issued a path-breaking decision on indirect discrimination or disparate impact of facially neutral laws. At the heart of such analysis is the idea of substantive equality, whose foundational principles are stated by the court as follows:

*“First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing*

<sup>88</sup> Writ Petition (Civil) No. 4525/2014 disposed of by final order and judgment dated 06.08.2015

<sup>89</sup> *Id* at 4, paras. 395-396

<sup>90</sup> 2021 SCC Online SC 261

*stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension.” (para 56)*

- 2.3.14 The duty of a constitutional court in responding to a claim of indirect discrimination requires it to assess if a facially neutral provision, criteria or practice ('PCP') has an adverse and disproportionate impact on a vulnerable group. The court has to examine whether such legal provisions have the effect of reinforcing, perpetuating or exacerbating disadvantage, which can be in the shape of social, economic or political exclusion, psychological or physical harm, and must be viewed in the backdrop of any systemic or historical disadvantages faced by the claimants.
- 2.3.15 The respondent bears the burden to justify the alleged acts as valid by demonstrating that such PCP serves a legitimate objective and cannot be substituted by less discriminatory alternatives. Only by exercising such heightened scrutiny and exploring alternatives can a court ensure that the full potential of the doctrine of indirect discrimination is realized.
- 2.3.16 In order to remedy systemic discrimination, the responsibility of constitutional courts when confronted with such legal challenges is not limited to the negative duty of striking down the discriminatory PCP and compensating the aggrieved for the harm, but also a positive duty to develop adequate reliefs and remedies that facilitate social redistribution by providing for entitlements that aim to negate the scope of future harm (para 90). For instance, a claim of systemic discrimination at the workplace by a particular group can be remedied by an employment equity programme. In doing so, it counters the systemic discrimination, allows the previously excluded group to counter attitudinal stereotyping by allowing them to prove their ability at the workplace and ensures placement of a critical mass of the previously excluded group which has the effect of empowering them to reshape institutional policies.

2.3.17 While granting relief in *Milun Saryajani & Ors. v Pune Municipal Commissioner & Ors.*,<sup>91</sup> a public interest litigation (PIL) by women's rights groups on seeking improved access to public toilets and sanitation facilities in public spaces across Maharashtra, the Bombay High Court engaged in analysis on the gendered impact of lack of public sanitation facilities. However, it stopped short of a formal declaration under Article 15 in this case. Even so, the court's analysis merits attention, as it reveals a court's duty to unpack layers of social, economic and legal discrimination and injustice.

2.3.18 The Bombay High Court noted that while access to public toilets affects everybody, it impacts women uniquely. Women already have far fewer public services available to them than men in public spaces. Women often combine childcare and home-maker responsibilities, in addition to professional labour, which result in travel needs that are qualitatively different to men's work and travel. This, therefore, necessitates improved access to public toilets and sanitation facilities. Access to public toilets is felt even more acutely due to menstrual healthcare needs of women, in addition to the fact that women comprise a large proportion of primary caregivers for the elderly, persons with disabilities and children, which increases their burden of making supplementary visits to a restroom (paras 45-46).

2.3.19 In *Jeeja Ghosh v Union of India*,<sup>92</sup> a PIL by disability rights activists seeking inclusivity and improved access to public spaces and travel, the Supreme Court issued directions to make public travel inclusive of needs of persons with disability. The court emphasized the following legal principle to redress claims of discrimination by historically marginalized groups:

*"Equality not only implies preventing discrimination (for example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying systematic discrimination against groups in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation."* (paras 40 – 43)

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<sup>91</sup> 2015 SCC Online Bom 6256

<sup>92</sup> (2016) 7 SCC 761

2.3.20 The High Court of Allahabad adopted similar analysis in *Ashish Kumar Mishra v Bharat Sarkar through Sachiv Khadya & Prasanskarn Mantralay*,<sup>93</sup> on the issue of rights of transgender persons under the *National Food Security Act, 2013*. It noted that preventing discrimination in all walks of life is one facet of the right of transgender persons to live with dignity. However, as impoverishment and marginalization are endemic to the lives of transgender persons, the law must travel beyond non-discrimination by recognizing an affirmative obligation of the State to provide access to social security.

2.3.21 The cases discussed in the aforesaid section are also illustrations of courts practicing transformative constitutionalism. In *Madhu, Ravina, Nitisha* and *Milun Saryajani*, the courts were principally faced with questions of protection of social and economic rights (healthcare, employment and sanitation facilities, respectively), where it advanced an equality and anti-discrimination analysis on basis of sex to inform State action, law and policy. On the other hand, in *Jeeja Ghosh* and *Ashish Kumar Mishra*, the courts provided an integrated approach to equality and non-discrimination on the basis of health status and gender identity, respectively, firmly committing to realization of social and economic rights by granting relief in terms of mandating accessibility of public spaces and to food security. These cases provide compelling guidance for courts to remedy the historical exclusion of queer individuals.

## 2.4 Making Social and Economic Rights Inclusive

2.4.1 Marital status not only denotes legal recognition of a relationship, but it also regulates access to a range of rights and obligations on parties in matters of marriage, divorce, maintenance, guardianship, adoption, healthcare benefits, property rights, housing, and partner benefits among others. Additionally, marital status exclusively limits the access to such rights; a review of ‘relationships in the nature of marriage’ in the context of heterosexual unmarried relationships shows that the law prioritizes compulsory marriage, with barely any exceptions. The body of law on these social and economic rights, a mix of secular and personal law based on religion, is coded in doctrinal assumptions of a binary of gender, heterosexuality, monogamy and conjugality. As a

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<sup>93</sup> (2015) 4 All LJ 339

result, the law systemically excludes single persons and queer relationships and their social, economic and legal concerns.

- 2.4.2 Queer voices have critiqued how prioritizing marriage and family to be the site of claiming rights *privatizes* access to benefits between parties to such relationships, and diverts attention away from the State's fundamental role in providing social security as a right.<sup>94</sup> Therefore, a legal strategy rooted in transformative constitutionalism may not limit itself merely to *equality* of marital status, but rather advocate for protection of basic rights of single, divorced, widowed persons and queer persons in diverse kinship networks *irrespective* of marital status. Such a process must also address the heightened marginalization and exclusion of working class and Dalit, queer communities who may prioritize struggles of re-distribution, and include their social, economic and legal concerns as integral to this process.<sup>95</sup>

## I. HEALTHCARE

- 2.4.3 The ability of a caregiver to grant consent in emergency situations (terminal or otherwise) where a person lacks the capacity to give consent to general healthcare, is denied to queer relationships as healthcare institutions typically recognize only close relatives or family members. This impairs the ability of queer persons to make their partners a part of medical consultations and related decision-making processes.
- 2.4.4 In 2018, the Supreme Court in *Common Cause v Union of India and Anr.*<sup>96</sup> declared that an adult with capacity to consent has the fundamental right to self-determination and autonomy to refuse medical treatment, even at risk of dying. In this regard, an Advance Directive by a terminally ill person, or a person in a vegetative state (the executor), for withdrawing medical treatment is entitled to be followed by a treating physician under Article 21 of the Constitution. The court prescribed guidelines to facilitate the process of implementing Advance Directives, and outlined the role of *guardians, close relatives or family members* of the executor in giving effect to the Advance Directive (paras 198 – 201).

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<sup>94</sup> Against Equality: Queer Critiques of Gay Marriage, Edited by Ryan Conrad & Introduction by Yasmin Nair

<sup>95</sup> Re-Cast(e)ing Navtej Singh v. Union of India, Gee Imaan Semmalar, NUJS Law Review, 13 NUJS L. Rev. 3 (2020)

<sup>96</sup> (2018) 5 SCC 1

- 2.4.5 The *Mental Healthcare Act, 2017* presents another example which grants a person the right to make an Advance Directive to specify the manner of care and treatment they choose to receive for a mental illness. Section 14 of the Act, which provides for the appointment of nominated representatives in this context, allows for persons in addition to ‘relatives’ to be appointed as such. This provision of law may allow queer individuals to nominate their partners, friends, or any other person in addition to relatives as their nominated representatives to make decisions in the best interests of their mental healthcare in the event the queer individual does not have capacity to do so. However, this provision is limited to the context of mental healthcare only.
- 2.4.6 In a series of cases, and most recently in *Rajni Hariom Sharma v Union of India and Anr.*,<sup>97</sup> the Bombay High Court declared and appointed a wife as the guardian of her husband in a comatose condition, for managing the estate as well as taking healthcare decisions in the best interests of the husband and the family. Therefore, queer individuals are likely to be excluded from appointing their partners, friends, or any other persons from acting on their behalf in relation to general or emergency healthcare, as the law declared by *Common Cause and Rajni Hariom Sharma* prioritize family members or close relatives on the basis of marriage or blood.
- 2.4.7 Additionally, the array of challenges to realize the highest attainable standard of physical and mental health of the queer community demonstrates the need for integrating legal recognition of queer relationships with a demand to progressively realize the fundamental right to health for everyone regardless of gender identity, sexual orientation or marital status.
- 2.4.8 As stated earlier, *NALSA* recognized the right to self-determination of gender identity of trans persons, and directed the central and state governments to grant legal recognition as male, female or transgender (including third gender). It further declared that any insistence on sex re-assignment surgery is illegal and immoral. However, the two-step process for legal recognition under the *Transgender Persons (Protection of Rights) Act, 2019*<sup>98</sup> is patently violative of the right to self-determination of gender identity in so far as it compels trans persons who identify in the male/female binary to undergo surgery for legal recognition, and also violates their right to bodily integrity and

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<sup>97</sup> 2020 SCC Online Bom 880

<sup>98</sup> Sections 4-7, *Transgender Persons (Protection of Rights) Act, 2019*

personal autonomy. Such anachronistic legal developments threaten to undermine the decision of the Madras High Court in *Arun Kumar* (which held that a trans or intersex woman is legally a woman on the basis of self-determination), and potentially deprive trans and intersex persons the right to solemnize a marriage unless they undergo medical interventions.

2.4.9 There are also health issues that are of critical importance to queer people and communities, irrespective of the queer person's relationship status. Indeed, the fulfilment of queer people's health rights can empower them to realize their civil and political rights, including the right to form intimate relationships.

2.4.10 HIV/AIDS continues to disproportionately impact high risk groups – sex workers, trans persons and men who have sex with men.<sup>99</sup> In a batch of petitions challenging the exclusion of persons living with HIV (PLHIV) from access to healthcare in early 2000s, the Supreme Court declared universal access to HIV/AIDS-related treatment as a fundamental right under Articles 14 and 21 of the Constitution.<sup>100</sup> These communities engaged in advocacy to seek a public health law to remedy their social and economic exclusion,<sup>101</sup> which resulted in the enactment of the *HIV/AIDS (Prevention and Control) Act, 2017* (HIV Act).

2.4.11 The decreasing budgetary allocations for targeted interventions coupled with the inability of the National AIDS Control Organization (NACO) in addressing increasing prevalence of new HIV infections through sexualized drug-use ('chemsex'), presents a serious concern in rolling back the gains in controlling the epidemic by collectivizing the communities and relying on harm reduction programmes.<sup>102</sup> The *HIV Act* requires the State to provide anti-retroviral medication to PLHIV "as far as possible", a phrase that was not included in the draft Bill that was submitted to the government based on extensive community consultations. This phrasing has caused concern among PLHIV networks and HIV-related organisations that the State may renege from its constitutional commitment to ensure the right to health.<sup>103</sup> The criticism stems from the concern that anti-discrimination measures are grossly inadequate unless they are accompanied by the State's

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<sup>99</sup> India HIV Estimates 2019 Report, National AIDS Control Organization, Ministry of Health and Family Welfare, Government of India @ pgs. 15-17

<sup>100</sup> Order dated 16.12.2010 in *Sankalp Rehabilitation Trust v Union of India*, Writ Petition (C) 512/1999

<sup>101</sup> The HIV/AIDS Bill, 2007: Positive Dialogue, Lawyers Collective HIV/AIDS Unit (July 2007)

<sup>102</sup> Chemsex and the failure of new HIV prevention strategies in India, Cornelis Rijneveld, 31 August 2020, Caravan

<sup>103</sup> Section 14 of the HIV Act

commitment of economic resources to life-saving medicines and treatment.<sup>104</sup>

2.4.12 The COVID-19 pandemic has demonstrated how those already living in marginality have their vulnerabilities amplified due to pre-existing socio-economic factors. Trans persons, including trans sex workers, experience heightened risk to COVID -19 due to the co-morbidity of risk of HIV/AIDS and inadequate access to public healthcare due to lockdown restrictions. The lack of State action in providing access to trans-affirmative health services and affordable housing has also precipitated a mental health crisis for trans, intersex and gender non-conforming communities as many are confined in hostile and violent environments with natal families.<sup>105</sup>

2.4.13 The *Transgender Persons (Protection of Rights) Act, 2019* requires appropriate governments to take measures to provide sex re-assignment surgery and hormone therapy as part of public healthcare,<sup>106</sup> and review existing medical curriculum and research for healthcare workers to address trans-specific health concerns.<sup>107</sup> In September 2021, on a plea by a community-based organization, the Kerala High Court directed the Under-Graduate Medical Education Board (New Delhi) to review existing medical curricula and research to address healthcare concerns of lesbian, gay, bisexual and transgender individuals.<sup>108</sup>

2.4.14 A blanket exclusion of transgender persons, men who have sex with men, female sex workers and persons who use drugs from being eligible blood donors under the Guidelines on Blood Donor Selection and Blood Donor Referral, 2017 issued by the National Transfusion Council and NACO denies them equality of opportunity to participate in society and deprives them of the right to life with dignity. The guidelines revealed their real and imminent consequences amidst the COVID-19 pandemic, as despite increased demand for blood and plasma for patient care, those excluded were deprived of the opportunity to donate such life-saving resources to family and friends in emergency situations.

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<sup>104</sup> Loophole in HIV/AIDS Bill passed by Rajya Sabha draws criticism from patients, health experts, Menaka Rao and Priyanka Vora, Mar 22 2017, *Scroll.in*

<sup>105</sup> Vikramaditya Sahai, Aj Agrawal and Almas Shaikh, 'Exclusion Amplified: Covid-19 and the Transgender Community', (CLPR, Bangalore, 2020)

<sup>106</sup> Rule 10 read with Annexure II of the *Transgender Persons (Protection of Rights) Rules, 2020*

<sup>107</sup> Section 15, *Transgender Persons (Protection of Rights) Act, 2019*

<sup>108</sup> *Queerythm v National Medical Commission and Ors.*, WP(C) No. 18210 of 2021, disposed of by final order dated 07.09.2021

At present, the Supreme Court is hearing a constitutional challenge to the guidelines as being arbitrary, unscientific and discriminatory.<sup>109</sup>

2.4.15 Despite official position statements from healthcare professionals of apex medical bodies condemning ‘conversion therapy’,<sup>110</sup> the practice continues unabated and has dire consequences for queer persons’ health, life and liberty for merely expressing their sexuality or self-determined gender identity. A community-based organization has filed a writ petition before the Kerala High Court to declare such unscientific and harmful medical practices to be unlawful.<sup>111</sup>

2.4.16 The strengthening of sexual and reproductive health rights of queer persons deserves special attention. A recent review of the status of sexual and reproductive health services in the country reveals that most public and private healthcare services by design respond to healthcare needs only of married, heterosexual women and are therefore exclusionary of concerns of single and queer women. The Rashtriya Kishore Swasthya Karyakram (RKSK) and Adolescent Reproductive and Sexual Health (ARSH) programmes under the mandate of the National Health Mission are also reported to be lacking in providing safe and equal access to sexual and reproductive health services for lesbian, gay, bisexual, transgender and gender non-conforming adolescents. The protocols on medico-legal care by the Ministry of Health for survivors of gender-based violence (including queer and intersex persons) are largely not enforced across the country.<sup>112</sup>

2.4.17 On a representation by trans and intersex medical practitioners, community members and organizations, the Delhi Commission on Protection of Child Rights (DCPCR) issued an advisory to the Government of NCT of Delhi to ban medically unnecessary, sex-selective surgeries on intersex infants and children, except in life-threatening cases.<sup>113</sup> The DCPCR also advised the state Health and Family Welfare Department and the Social Welfare Department to constitute committees, to examine the matter and submit an action taken report while ensuring adequate representation of the intersex

<sup>109</sup> *Thangjam Santa Singh @ Santa Khurai v Union of India and Ors.*, WP(C) No. 275/2021

<sup>110</sup> Official Statement of Indian Association of Clinical Psychologists regarding ‘conversion therapy’ and approach towards lesbian, gay, bisexual and transgender persons, No. IACP/Office/Position Statement/02, dated 21 May 2020; Position Statement of Indian Psychiatric Society regarding LGBTQ, Ref: IPS/HGS/20-22/0311, dated 11.06.2020

<sup>111</sup> *Queerala v State of Kerala and Ors.*, Writ Petition (Civil) No. 21202/2020

<sup>112</sup> Country Assessment of Human Rights in context of Sexual and Reproductive Health Rights, A study undertaken for National Human Rights Commission, Report 2018 by SAMA Resource Group for Women and Health, Partners for Law in Development

<sup>113</sup> Delhi Commission for Protection of Child Rights, No.F/DCPCR/20-21/Health & Nutrition/Project File-VIII/1329495, dated 13.01.2021

community. At present, a PIL filed by the same representatives is pending before the Delhi High Court on the matter, seeking directions to the Government of NCT of Delhi to act on the DCPCR's advisory.<sup>114</sup> Apart from Tamil Nadu and NCT of Delhi, there exist no similar national or state-level laws or policy guidance for medical practitioners.

## II. MAINTENANCE

2.4.18 The provision of maintenance to dependants in relationships emerges from the marital status of the parties under various laws which typically cover the wife and children, like the *Muslim Women (Protection of Rights upon Divorce) Act, 1986*. The *Hindu Marriage Act, 1955* contains a gender-neutral provision on seeking maintenance as well as alimony from the spouse,<sup>115</sup> which has allowed grant of benefits to husbands who do not have an independent source of income or are incapable of maintaining themselves, based on the principle of equity between parties to a marriage.<sup>116</sup> Maintenance at the least includes a legal obligation to provide food, clothing, residence, education, medical attendance and treatment.<sup>117</sup>

2.4.19 The doctrine of *presumption of marriage* was evolved by courts in cases which required determination of true legal heirs of persons who cohabit as an unmarried couple, generally in matters relating to maintenance or succession to property.

2.4.20 The well-established rule of law, first declared by the Privy Council<sup>118</sup> and applied by the Supreme Court<sup>119</sup> today, is that a man and a woman cohabiting under the same roof for a number of years, gives rise to a rebuttable presumption of marriage, i.e., they live as husband and wife (and children born to them are not 'illegitimate').

2.4.21 Section 125 (Order for maintenance of wives, children and parents) of the *Criminal Procedure Code, 1973* ('CrPC') provides for maintenance to dependants related by marriage, birth or adoption in a family. The

<sup>114</sup>*Srishti Madurai Educational Research Foundation v Govt. Of NCT of Delhi and Ors.*, WP(C) No. 8967/2021

<sup>115</sup> Sections 24-25 of *Hindu Marriage Act, 1955*

<sup>116</sup>*Rani Sethi v Sunil Sethi*, 179 (2011) DLT 414

<sup>117</sup> Section 3(b) of *Hindu Adoptions and Maintenance Act, 1956*; section 2(b) of the *Maintenance and Welfare of Parents and Senior Citizens Act, 2007*

<sup>118</sup>*A. Dinohamy v W.L. Blahamy*, AIR 1927 P.C. 185

<sup>119</sup>*Bharatha Matha v R. Vijaya Renganathan* (2010) 11 SCC 483

traditional judicial interpretation of this section has been limited in scope and application to legally wedded wives.<sup>120</sup> However, more recently, courts have purposively interpreted the law to also provide benefits to women who are in relationships with married men, without knowledge of the prior marriage.<sup>121</sup> Additionally, courts have relied on the doctrine of presumption of marriage to routinely grant economic rights to women in non-marital relationships with men by expansively interpreting this provision of law.<sup>122</sup>

2.4.22 Courts have supported such incrementally progressive interpretation by relying on the object of the law under section 125, CrPC—the prevention of destitution of women and children. The law serves the interests of securing social and economic justice for women and children, as reflected in the Constitution’s articulation of special provisions for women in Article 15(3) and the Directive Principle under Article 39.<sup>123</sup>

2.4.23 The *Protection of Women from Domestic Violence Act, 2005* (‘DV Act’) was enacted “to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family”.<sup>124</sup> The DV Act defines ‘aggrieved persons’ in section 2(a) as:

“any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;”

2.4.24 A few key definitions in the DV Act are noteworthy. ‘Domestic relationship’ in section 2(f) is defined as:

“a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;”

<sup>120</sup>*Smt. Yamunabai Anantrao Adhav A v Ranantrao Shivram Adhav* 1988 AIR SC 644; *Savitaben Somabhai Bhatia v State of Gujarat*, Appeal (crl.) 399 of 2005

<sup>121</sup>*Badshah v Urmila Badshah Godse* (2014) 1 SCC 188

<sup>122</sup>*Chanmuniya v Virendra Kumar Singh Kushwaha* (2011) 1 SCC 141; *Kamala & Ors. v M.R. Mohan Kumar* (2019) 11 SCC 491

<sup>123</sup>*Capt. Ramesh Chander Kaushal v Veena Kaushal* AIR (1978) SC 1807

<sup>124</sup> Preamble of the DV Act

2.4.25 The DV Act defines a ‘Respondent’ in section 2(q) as:

*“any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:*

*Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;”*

2.4.26 Further, ‘shared household’ in section 2(s) is defined as a household where the woman has lived in a domestic relationship with the Respondent, and includes a household in respect of which either the woman or the Respondent, singly or jointly, have any right, interest, title or equity.

2.4.27 The DV Act provides remedies to an aggrieved woman against a broad range of ‘economic abuse’<sup>125</sup> by the Respondent.

2.4.28 In *D. Velusamy v D. Patchaiammal*,<sup>126</sup> the Supreme Court interpreted ‘a relationship in nature of marriage’ to mean that parties must fulfil the following requirements:

- i. Be of legal age to marry;
- ii. Be otherwise qualified to enter into a legal marriage, including being unmarried;
- iii. Be voluntarily cohabiting; and
- iv. Hold themselves out to the world as being akin to spouses for a significant period of time.

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<sup>125</sup>Section 3(*Domestic violence*) defines ‘economic abuse’ as:

*“(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rent related to the shared household and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.”*

<sup>126</sup>(2010) 10 SCC 469, para. 31

2.4.29 While this ruling was issued in 2010, in 2013 the Supreme Court further clarified the expression to be governed by following guiding principles In *Indra Sarma v VK Sarma*:<sup>127</sup>

- i. *Duration of period of relationship*: means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation;
- ii. *Shared Household*;
- iii. *Pooling of Resources and Financial arrangements*: supporting each other, or any one of them, financially, sharing bank accounts, acquiring immoveable properties in joint names or in the name of the woman, long-term investments in business, shares in separate and joint names, so as to have a long-standing relationship;
- iv. *Domestic arrangements*: entrusting responsibility, especially on woman, to run the home, do household activities like cleaning, cooking, maintaining or upkeeping the house, etc., is an indication in the nature of marriage;
- v. *Sexual relationship*: sex not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.;
- vi. *Children*: having children and sharing the responsibility for bringing up and supporting them is a strong indication of a relationship in the nature of marriage;
- vii. *Socialization in public*: and holding out to the public and socializing with friends, relations and others, as husband and wife; and
- viii. *Intention and conduct of the parties*: common intention of parties as to what their relationship involves, and as to their roles and responsibilities.

2.4.30 The courts have applied the aforesaid tests under the DV Act to exclude and deny protection to women who *knowingly* enter into relationships with married men from any benefits under the DV Act, ostensibly on a sanctimonious rationale of penalizing adulterous relationships. In both

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<sup>127</sup> (2013) 15 SCC 755, para. 56

cases, the courts were fully cognizant of the disproportionate impact of the social and economic harm caused to women by such exclusions in law. However, they recommended a Parliamentary amendment to clarify the expression ‘*relationships in the nature of marriage*’ to cure any defects.

2.4.31 These judicial tests rest on a stereotypical norm of marital relationships, in as much as many marriages may fail to qualify the mandatory requirements governing ‘*relationships in the nature of marriage*’, if subject to similar scrutiny. Approaching the issue in this manner may be problematic if it prioritizes a model of what close adult relationships *look like*, instead of focusing the enquiry on what such relationships *do*. A more reliable test to protect rights of parties may focus on requirements of *shared household/co-habitation, duration of the relationship, economic and interdependence and caregiving*, and allow flexibility in application of the standards subject to the rights claimed. A mandatory requirement of conjugality (existence of a sexual relationship or child rearing) does not furnish a valid basis for determination of rights, as the diversity and complexity of close adult relationships and organizing families defy such classification across jurisdictions.<sup>128</sup>

2.4.32 In 2016 the Supreme Court in *Hiral P. Harsora and Ors. v Kusum Narottamdas Harsora and Ors.*<sup>129</sup> struck down the words ‘adult male’ from the definition of ‘Respondent’ in section 2(q) of the DV Act, thereby making the Respondent gender-neutral in application, and permitting in law a woman to be made a primary Respondent in a complaint of domestic violence.

2.4.33 More recently in August 2020, the High Court of Orissa in *Chinmayee Jena @ Sonu Krishna Jena v State of Odisha & Ors*<sup>130</sup> declared the DV Act to be applicable to a couple involving a trans man and a woman by holding, “*The lady shall have all the rights of a woman as enshrined under the DV Act*”, having considered developments in law in *NALSA* and *Navtej*, in particular.

2.4.34 The developments in *Harsora* and *Chinmayee Jena*, read together with declarations of law made in the cases on gender and sexuality discussed in the previous section, require *Sarma* to be re-visited to the

<sup>128</sup>Cossmann, Brenda, and Bruce Ryder. “What is Marriage-Like Like? The Irrelevance of Conjugality” *Canadian Journal of Family Law* 18.2 (2001): 269:236

<sup>129</sup> (2016) 10 SCC 165

<sup>130</sup> Writ Petition No. 57 of 2020, disposed of by final order dated 24.08.2020

extent it held that the DV Act does not recognize same-sex partners (gay and lesbian relationships) as well as polyamorous relationships (paras 38.5, 39, 58). If the stated aim of the law on maintenance (general law as well as DV Act) is to protect social and economic rights of women under the Constitution, there is no legitimate rationale to exclude non-normative relationships.

2.4.35 *Harsora* and *Chinmayee Jena* raise the question whether the expression ‘a relationship in the nature of marriage’ under the DV Act may now apply to queer relationships involving LBT women. Such legal recognition will directly impact the ability of LBT women in relationships to secure the right to reside in a shared household irrespective of legal title or beneficial interest (Sections 17, 19), protection from domestic violence (Section 3 read with Section 18), maintenance and other monetary relief (Section 20) and compensation for domestic violence (Section 22) under the DV Act.

2.4.36 The *Sarma* test, however, may subject non-normative relationships and families to a higher degree of scrutiny and lead to exclusions. Further, mandatory requirements that a couple hold themselves out to the world as akin to spouses may even be detrimental to queer relationships who may be subject to social harms and discriminatory treatment as a result of such disclosures.

2.4.37 Notably, in 2018, the Law Commission of India expressed interest to engage with the queer community on a proposal for legal recognition through a civil partnership model, which may grant equal access to benefits like maintenance and others.<sup>131</sup>

### III. SOCIAL SECURITY

2.4.38 The framework of maintenance law discussed up until now, however, is limited to relational claims for economic security. Queer individuals who are single, divorced or widowed/bereaved do not have access to a surplus of economic resources which may provide basic necessities like healthcare, food security, housing and education, solely on basis of marital status. Moreover, working class queer communities who perform street-based labour for survival may discover that legal recognition has not altered their material realities.

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<sup>131</sup> Law Commission of India Consultation Paper on Reform of Family Law (August 2018), pgs. 33-34

2.4.39 As discussed in the preceding section, the rationale of the law on maintenance is to alleviate poverty. Surely, such a legitimate State interest cannot make economic security contingent on marital status. Therefore, demands for equality may be accompanied with a progressive agenda for strengthening social security to protect rights of queer persons irrespective of marital status, so that the law may truly have a transformative impact on the lives of marginalized. This can proceed by integrating queer persons' concerns in the framework of labour rights, as well as strengthening existing laws and policies which confer rights on queer persons and other marginalized groups.

2.4.40 The Second National Commission on Labour (2002) recommended granting social security and all labour rights protections to sex workers as self-employed workers.<sup>132</sup> However, sex workers do not find express coverage under definitions of self-employed workers<sup>133</sup> or unorganized sector workers<sup>134</sup> under the *Code on Social Security (2020)*<sup>135</sup> enacted pursuant to the Commission's recommendations. The Code subsumes the *Unorganized Worker's Social Security Act, 2008* and *Employee State Insurance Act, 1948* – a premier social security law – which for the first time provided for unemployment insurance<sup>136</sup> under various policies between 2005-2020. Such social security policies typically provide access to benefits related to health, disability, old age protection, housing, childcare, and education among others.

2.4.41 Pension schemes under the National Social Assistance Programme typically focus on older populations in organized sectors of work, persons living with disabilities and the widowed for alleviation of poverty. However, social movements are collectivizing the vast majority of unorganized sector workers excluded from such social security measures, and seek to include other disadvantaged groups like sex workers, trans persons and persons living with HIV, whose particular vulnerabilities go beyond age as they are historically marginalized from the world of work.<sup>137</sup> Single women (destitute, divorced, separated,

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<sup>132</sup> Report of The Second National Commission on Labour (2002); Available at: <https://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf>

<sup>133</sup> Section 2(75) of Social Security Code, 2020

<sup>134</sup> Section 2(86) of Social Security Code, 2020

<sup>135</sup> Trade unions have been critical of the subsumption of over 29 labour laws under the 4 labour codes passed by Parliament in 2019-2020, claiming that this has diluted social security and pushed anti-labour reforms. See: New Labour Codes and their Loopholes, EPW Editorial, Vol. 55, Issue No. 40, 03 Oct 2020; Labour Laws Perform a Redistributive Function. Diluting Them Has Serious Consequences, Rashmi Venkatesan, The Wire, 29/Sept/2020; Why the new labour codes leave India's workers even more precariously poised than before, Working People's Charter, Scroll.in, Sept 23 2020

<sup>136</sup> Rajiv Gandhi Shramik Kalyan Yojana (ESIC, 2005); Atal Beemit Vyakti Kalyan Yojana (ESIC, 2018)

<sup>137</sup> Summary Report of 8 States Study on Implementation of National Social Assistance Programme, Tata Institute of Social Sciences and Pension Parishad (February 2015)

never married, female headed households etc.) also present a case for inclusion, to redress the feminization of poverty.

2.4.42 The HIV Act requires the central and state governments to take measures to facilitate access to existing welfare schemes for PLHIV and their families, as well as frame welfare schemes to expressly address their social and economic needs – which may provide relief to trans people, sex workers, ‘men who have sex with men’ and queer people living with HIV.<sup>138</sup>

2.4.43 The recently enacted *Transgender Persons (Protection of Rights) Act, 2019* requires the appropriate government to take steps to facilitate access to existing welfare schemes for trans persons, as well as frame welfare schemes to expressly address their social and economic needs.<sup>139</sup> The Rules issued under the Act clarify that appropriate governments must specifically focus framing of welfare measures on providing access to healthcare, education, housing, food security, pension, employment and inclusion in financial services.<sup>140</sup>

#### IV. PROPERTY RIGHTS

2.4.44 The manner of distribution of a person’s property on death occurs through two routes in law:

- (i) Testamentary succession, i.e., by a will, which is primarily governed by the *Indian Succession Act, 1925* (‘ISA’) for all communities (except Muslims), and
- (ii) Intestate succession (in absence of a will), governed by a mix of community-specific laws, customs as well as the ISA.

2.4.45 The *Hindu Succession Act, 1956* applies to intestate succession of property for Hindus. Parsis and Muslims are governed by customary law; the *Muslim Personal Law (Shariat) Application Act, 1937* codifies the same for the Muslim community. While the ISA uniformly prioritizes the legal heir’s nearness in relation to the deceased person (by marriage, birth or adoption), the community-specific laws adopt different schemes of succession for male and female heirs (by marriage, birth or adoption).<sup>141</sup> Additionally, sections 21 and 21A of the *Special Marriage Act, 1954* state that any persons (except Hindus) solemnizing

<sup>138</sup> Section 15 of the HIV Act

<sup>139</sup> Sections 8 and 14 of the Trans Act

<sup>140</sup> Rule 10 read with Annexure II of the *Transgender Persons (Protection of Rights) Rules, 2020*

<sup>141</sup> *Id* at 50, pgs.24-25

and registering a marriage under the law shall be governed by the ISA for purposes of succession to property.

2.4.46 In a rare case, *Vidhyadhari and Others v Sukhrana Bai and Others*,<sup>142</sup> the Supreme Court applied succession laws beyond marital status by granting a succession certificate for receiving pension, insurance, provident fund and other death benefits of the deceased to the woman he cohabited with over 20 years and raised four children with, against a competing claim by the legally wedded wife (although protecting her share in proportion to all legal heirs). The court clarified that the 'de facto wife' does not qualify as a legal heir under law and only holds the estate of the deceased in trust for the legal heirs recognized in law (the children and the legally wedded wife). However, as the deceased had nominated her for the said benefits, the de facto wife could legally file an application for issuance of a succession certificate under Section 372, ISA – which requires a person to state '*the right in which the petitioner claims*'. Such developments of law can positively impact the recognition of queer relationships in the nature of marriage (live-in relationships) and questions of access to economic rights like pension, insurance, provident fund and other death benefits arising from them, as the legal conception of family and marital relationships expands to accommodate 'de facto partners'.

2.4.47 LBT collectives have responded to exclusion in succession laws with calls for gender equality and recognition of diverse families, for the real and imminent consequences it bears particularly on the social and economic lives of trans persons in law.<sup>143</sup>

2.4.48 In *Sweety v General Public*,<sup>144</sup> the Himachal Pradesh High Court in 2016 gave a decision on the legal principles governing the succession to property as per the *kinnar* custom of *Guru-Chela parampara*. The court held the Appellant, whose name was reflected on the ration card, bank account etc. of the deceased trans person as their *Guru*, to be the legal heir for succession to the property of the deceased. The court specifically declared that there was no presumption on application of the *Hindu Succession Act, 1956* merely on the basis of the (religious) community-specific name of the deceased trans person, particularly, when the Appellant successfully led evidence to prove the relationship was governed by the *Guru-Chela parampara* (paras 12-14). An earlier

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<sup>142</sup> (2008) 2 SCC 238, paras. 11-15

<sup>143</sup> *Id* at 46

<sup>144</sup> AIR 2016 HP 148

decision by the Madhya Pradesh High Court in 1989 upheld the legal validity of succession of property as per the *Guru-Chela* custom, and declared it as not opposed to public policy.<sup>145</sup> These cases signal a significant recognition of non-conjugal kinships in law such as *hijra gharanas*/ households, as well as access to economic rights under diverse family systems.

2.4.49 Trans persons who may be governed by the ISA or community-specific laws on intestate succession may find the requirement for devolution of property to relations by marriage, birth or adoption exclusionary as these systems may not inform how trans persons organize families and domestic arrangements, and therefore, to this extent, provisions of the ISA and the community-specific laws may constitute indirect discrimination on basis of gender identity (*Madhu, Navtej, Nitisha*).

2.4.50 In a recent legislative development, Uttar Pradesh amended the definition of ‘family’ in August 2020 under the *Uttar Pradesh Revenue Code, 2006* to include ‘third gender’ persons (as partners as well as children) for succession to agricultural land.<sup>146</sup>

## V. HOUSING

2.4.51 Queer persons lack security of tenure and are vulnerable to forced evictions as tenancy laws across India, such as those in Delhi, Karnataka and Punjab are embedded in the notion that rental housing is eligible for use by the leaseholder and family members related by marriage, birth or adoption.<sup>147</sup>

2.4.52 In addition to foregrounding a hetero-normative construct of ‘family’ under tenancy laws, states like Maharashtra,<sup>148</sup> West Bengal<sup>149</sup> and Tamil Nadu<sup>150</sup> and the union territory of Puducherry<sup>151</sup> require morality clauses in lease agreements.

2.4.53 Additionally, Chhattisgarh, Goa and the union territory of Daman & Diu permit landlords to evict tenants deemed to be a ‘social nuisance’, which

<sup>145</sup> *Ilyas v Badsha alias Kamla* AIR 1990 MP 334

<sup>146</sup> *UP Revenue Code (Amendment) Act, 2020* on recommendations of Sixth Report of State Law Commission on Transgender Rights in Agricultural Land in UP (March 2019)

<sup>147</sup> *Living with Dignity: Sexual Orientation and Gender Identity-based Human Rights Violations in Housing, Work and Public Spaces in India*, International Commission of Jurists (June 2019), pg. 59. See also: *Tripura Building (Lease and Rent Control) Act, 1975* and *Arunachal Pradesh Building (Lease, Rent and Eviction) Control Act, 2014*

<sup>148</sup> Section 16(1)(c) of the *Maharashtra Rent Control Act, 1999*

<sup>149</sup> Section 12(1)(e) of the *West Bengal Premises Rent Control (Temporary Provisions) Act, 1950*

<sup>150</sup> Section 21(2)(d) of *Tamil Nadu Regulation of Rights and Responsibilities of Landlords and Tenants Act, 2017*

<sup>151</sup> Section 10(2)(iv), *The Puducherry Buildings (Lease and Rent Control) Act, 1969*

is expressly defined as engaging in prostitution etc.<sup>152</sup> Transgender persons often face challenges to access affordable housing, and tenancy laws profiling tenants on basis of actual or perceived participation in sex work compound transgender persons' vulnerability to violations of the right to adequate housing.<sup>153</sup> It is arguable that landlords may not lawfully deny rental accommodation to transgender persons based on their actual or perceived engagement in sex work. The argument that such rejection occurs on the basis of 'sex *plus* alleged commission of offence(s)' grounds, and is therefore not discriminatory on ground *only of sex*, flies in the face of *Navtej's* analysis of intersectional discrimination which would locate transgender persons' engagement in sex work as a socio-economic outcome of the historical disadvantage on basis of sex. Such practices may arguably constitute indirect discrimination on basis of gender identity under Article 15 as per *Madhu, Nitisha* and *NALSA*, since the impact of denial of housing to transgender persons on basis of engagement in sex work perpetuates their social and economic marginalization as a class.

2.4.54 State-level Co-operative Society laws that govern home ownership are no different. These laws often allow any two persons who may not be related to each other to jointly buy a flat and be designated as member and associate/joint member. However, most laws state that the associate member is not granted any shares in the ownership of the flat. In case of death of the member, the flat is transferred in the title of the legal heirs of the deceased member.<sup>154</sup>

2.4.55 The *Real Estate (Regulation and Development) Act, 2016* ('RERA') was enacted to regulate the real estate sector and for protection of consumer rights. RERA requires a promoter (builder, developer as well as a co-operative housing society) to apply for the registration of every real estate project to the Real Estate Regulatory Authority under the Act;<sup>155</sup> failure to comply with/violation of conditions of registration merits a revocation of registration (Section 7). State-level RERA Rules in Rajasthan, Madhya Pradesh and Haryana expressly require the promoter to submit a declaration as part of the said registration procedure, stating that the promoter shall not discriminate against any allottee on basis of caste, religion, language, region, 'sex' or 'marital

<sup>152</sup> Section 2(13) read with Section 12(2), Schedule 2, Item 11(d) and Schedule 4, Item 10 of *Chhattisgarh Rent Control Act, 2011*; Section 22(2)(d) of the *Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968*

<sup>153</sup>*Id* at 147, pgs. 51-52

<sup>154</sup>*Id* at 41, *Civil Laws Affecting Gay men and Lesbians*, pgs. 66-72

<sup>155</sup>Section 4 of RERA

status'<sup>156</sup> with respect to allotment of any apartment, plot or building. Other states like Tamil Nadu, Uttar Pradesh, Karnataka, Delhi and West Bengal require a general declaration with respect to anti-discrimination without specifying any grounds.

2.4.56 The position that Constitutional remedies for violations of fundamental rights, particularly under Articles 15 (*non-discrimination in access to public spaces*), 17 (*abolition of untouchability*), 19 (*freedom to practice profession*), 21 (*life and liberty*) and 23 (*forced labour*) can be claimed against State as well as non-State parties (private persons and entities) is uncontroversial now.<sup>157</sup>

2.4.57 Access to housing also implicates the fairness of transfer of property regulations. Queer people intending to transfer wholly owned immoveable property to their partners will come up against the financial burden of paying higher stamp duty compared to heterosexual married couples.<sup>158</sup> If queer people choose to transfer wholly owned immoveable property to their partners by a gift deed, they are liable to pay 5% stamp duty on the market value of the property, compared to 3% stamp duty for heterosexual married couples who choose to execute the same transaction. Even though this difference may appear nominal, it sets the wrong precedent in law and society for unreasonable and discriminatory treatment on basis of marital status, sexual orientation and gender identity. The disparity is harsher in context of transfer of a residential flat, where heterosexual married couples are liable to pay a nominal stamp duty fee of only INR 200, whereas a queer couple will be liable to pay 5% stamp duty on the market value of the residential flat due to lack of legal recognition of the relationship,<sup>159</sup> which can be prohibitively expensive and interfere with private and intimate aspects of organizing family for queer people.

2.4.58 There are two approaches to this dilemma; *firstly*, such regulations can be a basis to challenge constitutional validity of marriage laws which do not recognize queer relationships, which in turn imposes an unequal financial burden on queer people. *Secondly*, in order to de-link marital status from claiming fundamental social and economic rights, the constitutional validity of the regulations can be challenged *per se* for setting uniform liabilities irrespective of marital status, thereby allowing

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<sup>156</sup>Rajasthan Real Estate (Regulation and Development) Rules, 2017

<sup>157</sup>*Id* at 68

<sup>158</sup>Authors have on file a copy of the record and legal advice tendered in a case involving a gay couple with similar facts.

<sup>159</sup>Article 34 of Schedule I, Maharashtra Stamp Act, 1958

partners in long-term cohabitation who do not choose marriage (queer or heterosexual) the autonomy to execute similar transactions.

2.4.59 Among the urban poor, laws governing land rights in slums / informal settlements also grant interest, right or title to a person and anyone related by marriage or birth. However, in case of a household headed by a single person, the interest, right or title is to be recorded in the person's name.<sup>160</sup>

2.4.60 The Scheme for Shelters for Urban Homeless (SUH) provides access to social security measures with respect to healthcare, food security, water, sanitation, childcare, education, livelihood and linkages to affordable housing for persons who do not have a house (rental or self-owned) and live and sleep in public spaces or any place unfit for human habitation.<sup>161</sup> Homeless shelters provide targeted services for addressing needs of dependent children, aged, persons living with disabilities or mental illnesses and single women, and act as the first step in realizing the right to adequate housing for everyone by creating linkages to working men/women's hostels and social housing. However, at present, the Scheme does not recognize the vulnerability of queer persons to homelessness and address this concern.

2.4.61 The *Model Tenancy Act, 2019* ('MTA') issued by the Ministry of Housing and Urban Affairs for states to adopt, is aimed at promoting an inclusive tenancy market, particularly for migrants, formal and informal sector workers, professionals, students and the urban poor. The MTA, however, lacks a focus on social housing for the most socially and economically marginalized communities, as it does not provide hostels, collective housing arrangements and community land trusts. Additionally, it also suggests that states adopt morality clauses in tenancy agreements, while lacking any anti-discrimination provision for protection on basis of caste, religion, place of birth, sexual orientation, gender identity or marital status.<sup>162</sup>

2.4.62 The provisions of the *Transgender Persons (Protection of Rights,) Act 2019* on 'rehabilitation centres' for any trans person separated from family has been challenged as violating the rights to personal autonomy and to live with human dignity.<sup>163</sup> A rights-based approach on

<sup>160</sup> Section 2(f) and (j) read with section 3(4) of the *Odisha Land Rights to Slum Dwellers Act, 2017*

<sup>161</sup> Scheme of Shelters for Urban Homeless, Revised Operational Guidelines (2018), Deendayal Antyodaya Yojana – National Urban Livelihoods Mission, Ministry of Housing and Urban Affairs, Government of India

<sup>162</sup> Housing and Land Rights Network Comments on Draft Model Tenancy Act (August 2019)

<sup>163</sup> *Id* at 17

affordable housing can be addressed under the said Act and Rules that oblige the appropriate governments to frame welfare schemes on affordable housing, shelters and community centres for at risk trans persons to provide access to food security, mental healthcare and sanitation.<sup>164</sup>

**2.4.63** An irreconcilable dichotomy exists in the State's response to homelessness – instead of enabling the right to affordable housing, at present anti-beggary laws that *de facto* criminalize homelessness are enforced. Such laws are currently in force in 25 states and union territories through legislation or executive orders, and their enforcement traps the poor, including many trans persons, in a revolving door between prison and the street.

2.4.64 The High Courts of Delhi<sup>165</sup> and Jammu & Kashmir<sup>166</sup> have struck down local anti-beggary laws as violative of Articles 14, 19(1)(a) and (d) and 21 of the Constitution, on the basis that such laws essentially punish the status of poverty or homelessness *per se*. In both cases, courts were largely driven to decriminalize begging by a nuanced exploration of the intersection of law, economy and crime. The courts observed that begging is inextricably linked to poverty, landlessness and caste-based discrimination, and it is the State's responsibility to remedy such inequalities through redistribution of wealth, social security, and public services. The courts concluded that the State's failure in remedying such inequalities calls for treating the issue of begging through an economic/destitution model, not a penal model.

2.4.65 Sex workers also lack security of tenure and are vulnerable to forced evictions in law. Sex work *per se* is not a criminal offence, however, under the *Immoral Traffic (Prevention) Act, 1956* ('ITPA') consensual adult sex workers are conflated in law with victims of human trafficking. ITPA criminalizes running a brothel from home, and violations are met with evictions without appeal.<sup>167</sup> The law therefore prevents sex workers from working safely and also traps them in a revolving door between *de facto* detention and the street. The decriminalization of begging and homelessness may offer lessons for a legal strategy to shift the focus from a penal to an economic model. Moreover, the essential component of economic analysis to the evolving legal theories of indirect discrimination (*Madhu, Nitisha*) as well as intersectional

<sup>164</sup>*Id* at 140

<sup>165</sup>*Harsh Mander & Anr. v Union of India & Ors.* AIR 2018 Del 188

<sup>166</sup>*Suhail Rashid Bhat v State of Jammu and Kashmir* 2019 SCC Online J&K 869

<sup>167</sup>Section 3 read with sections 7 and 18 of ITPA

discrimination (*Navtej*) may compel revisiting the criminalization of sex work through a lens of gender, caste and class to protect rights of sex workers within a framework of labour rights as informal sector workers.

## VI. GUARDIANSHIP, ADOPTION & ASSISTED REPRODUCTIVE TECHNOLOGY

2.4.66 Guardianship refers to the collective of rights and obligations an adult exercises with respect to the personhood and property of a minor in law. The notion of custody of the minor is closely linked to this, as under ordinary circumstances it is the natural guardian (mother, father) of the child who possesses custody. These relationships are governed under the *Guardians and Wards Act, 1890* which is applicable irrespective of religion, while the *Hindu Minority and Guardianship Act, 1956* applies to Hindus specifically.

2.4.67 Both laws originally prioritized the father as the natural guardian of a minor, to the exclusion of the mother. In *Gita Hariharan v Union of India*,<sup>168</sup> the Supreme Court interpreted the Hindu law to state that “*in absence of the father*” the mother can be the natural guardian of the child. The secular law was amended in 2010 to provide for equal guardianship of a minor to the mother as well as the father.<sup>169</sup>

2.4.68 The *Hindu Adoption and Maintenance Act, 1956* (‘HAMA’) is the only community-specific law which expressly recognizes adoption in law, and governs the field on maintenance, rights and responsibilities that are attached to adopted children. In laying conditions for a valid adoption, the law provides that the person adopting must have the ‘*capacity*’ and the ‘*right*’, to seek adoption.<sup>170</sup>

2.4.69 The law clarifies that both Hindu men and women, irrespective of marital status, who are of sound mind and of the age of majority, possess the *capacity* in law to seek adoption.<sup>171</sup>

2.4.70 The Central Adoption Resource Agency (‘CARA’), constituted as a result of Supreme Court’s directions<sup>172</sup> on adoption and the *Juvenile Justice (Care and Protection) Act, 2015* (‘JJ Act’) provide access to

<sup>168</sup> (1999) 2 SCC 228

<sup>169</sup> *Personal Laws (Amendment) Act, 2010*

<sup>170</sup> Section 6 of *Hindu Adoption and Maintenance Act, 1956*

<sup>171</sup> Sections 7-8 of *Hindu Adoption and Maintenance Act, 1956*

<sup>172</sup> *Lakshmi Kant Pandey v Union of India* (1984) 2 SCC 244

adoption for Christian, Muslim and Parsi communities, as clarified in *Shabnam Hashmi v Union of India*.<sup>173</sup>

2.4.71 In terms of eligibility criteria, the JJ Act provides that prospective adoptive parents must be physically fit, financially sound, mentally alert and highly motivated for providing a good upbringing to a child. Single or divorced persons can adopt,<sup>174</sup> subject to fulfilment of additional requirements under the CARA Regulations.<sup>175</sup>

2.4.72 The CARA Regulations state that the ‘best interests of the child’ shall be a fundamental principle governing any adoption placement.<sup>176</sup> Any prospective adoptive parents, irrespective of ‘marital status’, can adopt a child. However, no child shall be given in adoption to a ‘couple’ unless they have at least two years of stable ‘marital relationship’.<sup>177</sup> While these regulations may implicitly permit single queer individuals to adopt, they explicitly disqualify relationships in the nature of marriage (live-in relationships), whether queer or heterosexual couples, from eligibility to adopt.

2.4.73 The *Assisted Reproductive Technology (Regulation) Bill, 2020* (‘ART Bill’) is being considered by Parliament at present, aimed at regulating assisted reproductive technology services and those offering such services. The ART Bill defines a “commissioning couple” as an “infertile married couple” who seeks ART services,<sup>178</sup> and “infertility” is understood as the inability to conceive after one year of unprotected sexual intercourse or due to other proven medical condition preventing a couple from conception.<sup>179</sup> Single women are granted access to ART services under the proposed law.<sup>180</sup>

2.4.74 Additionally, the *Surrogacy (Regulation) Bill, 2020* is also being considered by Parliament for the regulation of the practice of surrogacy. This Bill defines an “intending couple” to mean a legally married Indian man and woman above the legal age of marriage, who are certified to be infertile and who intend to become parents through surrogacy.<sup>181</sup> It shares the same conceptual definition on “infertility” as the ART Bill.

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<sup>173</sup> (2014) 4 SCC 1

<sup>174</sup> Section 57, *Juvenile Justice (Care and Protection) Act, 2015*

<sup>175</sup> *Adoption Regulations, 2017*

<sup>176</sup> *Ibid*, Regulation 3(a)

<sup>177</sup> *Id* at 175, Regulation 5

<sup>178</sup> Section 2(1)(g) of ART Bill

<sup>179</sup> Section 2(1)(m) of ART Bill

<sup>180</sup> Section 21 of ART Bill

<sup>181</sup> Section 2(g) read with (r) of Surrogacy Bill

This Bill seeks to prohibit commercial surrogacy<sup>182</sup> and permit only altruistic surrogacy.<sup>183</sup> After passing in the Lok Sabha, the Rajya Sabha Select Committee recommended widening the scope of intending parents to include single women who were formerly married and subsequently divorced or widowed.<sup>184</sup> The report is silent on single men and queer persons altogether.

2.4.75 The *Surrogacy Bill* is criticized by feminist and public health groups for limiting the scope of women who can serve as surrogates on basis of a ‘close relation’ to the intending couple, for perpetuating vulnerability and harm against women in already pre-existing patriarchal and exploitative families,<sup>185</sup> and excluding queer persons who intend to become parents through surrogacy.<sup>186</sup> The clinical definition of infertility under both the *ART* and *Surrogacy Bills* proceeds on a hetero-normative stereotype of sex and child-bearing as married, heterosexual persons engaging in vaginal-penile intercourse (*Anuj Garg*). As a result, they are discriminatory (*Madhu, Navtej, Nitisha*), excluding as they do access to ART and surrogacy services to intending parents who may be ‘socially infertile’,<sup>187</sup> such as single persons, and queer people in relationships who may not participate in this specific sexual activity out of choice and/or identity.

2.4.76 Crucially in this regard, the Yogyakarta Principles<sup>188</sup> are fully domesticated for application under Indian law. This position has been re-affirmed by *Navtej*.<sup>189</sup> Article 24 of Yogyakarta Principles specifically requires States to adopt all legislative, administrative or other measures to ensure:

- i. The right to found a family, including through access to adoption or assisted reproductive technology, without discrimination on basis of sexual orientation or gender identity;
- ii. Such laws and policies shall recognize the diversity of family forms, including those not defined by descent or marriage, and

<sup>182</sup>Section 3(ii) read with Sections 35, 37 of Surrogacy Bill

<sup>183</sup>Section 4(ii)(b) of Surrogacy Bill

<sup>184</sup>Rajya Sabha Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019

<sup>185</sup>The Surrogacy (Regulation) Bill, 2016: Analysis and Suggested Changes: SAMA Resource Group for Women and Health

<sup>186</sup>How Can Families Be Imagined Beyond Kinship and Marriage? Arijeet Ghosh, Disha Sanyal, *Economic & Political Weekly*, Vol. 54, Issue No. 45 (November 2019)

<sup>187</sup>Expanding the Clinical Definition of Infertility to include Socially Infertile Individuals and Couples, Weei Lo and Lisa Campo-Engelstein, *Reproductive Ethics II* (2018)

<sup>188</sup>The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007)

<sup>189</sup>*Id* at 4, paras. 338-342

no family or any of its members may be subjected to discrimination on basis of sexual orientation or gender identity with regard to family-related social welfare and other public benefits;

- iii. In matters concerning children, courts of law, administrative authorities or legislative bodies must apply the standard of ‘best interests of the child’ as the primary consideration, and sexual orientation or gender identity of a child or any family member may not be considered incompatible with such best interests;
- iv. Recognition of same-sex marriages or registered partnerships, and any entitlement, privilege, obligation or benefit available to different-sex marriage or unmarried or registered partners is equally available to same-sex married or registered partners.

2.4.77 In 2017, the Yogyakarta Principles were revised<sup>190</sup> on account of developments in the understanding of law’s intersection with sexuality, gender identity and sex characteristics to further provide that States shall ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics, with respect to the right to found a family under Article 24. Therefore, as per India’s binding obligations under international human rights law, queer individuals and relationships have an equal right to parenthood by adoption and assisted reproductive technologies (including surrogacy), regardless of marital status.

2.4.78 The Parliamentary Standing Committee Report on a previous 2016 version of the *Surrogacy Bill*,<sup>191</sup> discouraged the prohibition of commercial surrogacy and recommended provision of adequate compensation in recognition of limited economic opportunities available for women from socially and economically marginalized backgrounds who engage in surrogacy. The Committee also noted the response by feminist groups that compelling women to undergo altruistic surrogacy without any compensation or benefits may violate the protection against forced labour in Article 23 of the Constitution.

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<sup>190</sup> Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, Adopted on 10<sup>th</sup> November 2017, Geneva

<sup>191</sup> Report No. 102, Department-Related Parliamentary Standing Committee on Health and Family Welfare, The Surrogacy (Regulation) Bill, 2016 (August 2017)

- 2.4.79 A total prohibition on commercial surrogacy, ostensibly for prevention of exploitation of poor women who engage in surrogacy, misses the woods for the trees. The experiences of surrogates inform the need for adequate safeguards in law to protect health and economic security under a regulatory model; using a carceral model to prohibit the activity *per se* is predicted to intensify vulnerabilities of already socially and economically marginalized women who engage in surrogacy by driving them to engage in sex work for survival.<sup>192</sup>
- 2.4.80 Legal policy concerns on the role of women in surrogacy parallel with sex work, with respect to fair compensation for reproductive labour and balancing the right to bodily integrity with addressing exploitative working conditions. Dalit feminist politics requires an intersectional engagement with vulnerabilities of caste, class and gender in order to mitigate harm, and protecting the already diminished sources of livelihoods available to marginalized women who disproportionately participate in such work.<sup>193</sup>
- 2.4.81 Both queer and Dalit feminist engagement with assisted reproductive technologies caution against perpetuation of a ‘reproductive caste system’, which contrasts policies that punish child bearing of poor Dalit women and families with the high-tech fertility industry that promotes child bearing by affluent upper caste women and families.<sup>194</sup> As recent figures indicate that nearly 30% of surrogacy services in India were commissioned by single parents or queer persons prior to the stricter regulations,<sup>195</sup> an effort to challenge such inequalities can begin by shifting the focus from a framework limited to *reproductive rights* of the intending/commissioning couple, to a framework on *reproductive justice* for women in surrogacy and securing their social and economic rights in law, for an equitable contractual relationship.
- 2.4.82 An analysis which focuses on the impact of criminalization of commercial surrogacy on the social and economic lives of marginalized women, who often resort to it in absence of alternative economic opportunities (*Madhu, Navtej, Nitisha*) may provide valuable insights on the constitutional validity of a prohibitionist policy. The government’s

<sup>192</sup> Report of a Study to Understand the Legal Rights and Challenges of Surrogates from Mumbai and New Delhi, submitted to NHRC by Dr. P.M. Arathi, Asst. Professor, Council for Social Development, New Delhi (2018), pgs. 27-29, 51-52, 99-105

<sup>193</sup> Dalit Feminist Voices on Reproductive Rights and Reproductive Justice, Johanna Gondoian, Suruchi Thapar-Bjorkert, Mohan Rao, *Economic & Political Weekly*, Vol. 55, Issue No. 40, (October 2020)

<sup>194</sup> *New Intimacies, Old Desires, Law, Culture and Queer Politics in Neoliberal Times*, Edited by Oishik Sircar and Dipika Jain, Zubaan (2017); Chapter 13, *Polymorphous Reproductivity and the Critique of Futurity, Towards a Queer Legal Analytic for Fertility Law*, Stu Marvel, pgs. 386-402

<sup>195</sup> *Id* at 193, pg. 2

proposal of altruistic surrogacy proceeds on stereotypical notions of women voluntarily performing caregiving, domestic labour and compulsory reproduction, even as the ban on commercial surrogacy is offered as a ‘protective discrimination’ measure (*Anuj Garg*). The policy of prohibition may constitute a disproportionate response to the stated objective of addressing exploitation of poor women, which may otherwise be addressed under a regulatory model that grants women increased bargaining power with respect to private and economic choices (*Puttaswamy*).

## VII. PARTNER BENEFITS IN LABOUR LAWS

2.4.83 The *Employee’s Compensation Act, 1923* provides for payment of compensation to workmen and their dependents in case of injury, accident (including occupational diseases) or death at the workplace or in course of employment. Section 2(5) defines ‘dependents’ to include only persons related by marriage, birth or adoption.

2.4.84 The *Employee’s Provident Funds and Miscellaneous Provisions Act, 1952* governs three employee welfare schemes:

- i. The Employees' Provident Funds Scheme 1952 (EPF)
- ii. The Employees' Pension Scheme 1995 (EPS)
- iii. The Employees' Deposit Linked Insurance Scheme 1976 (EDLI)

2.4.85 EPS defines ‘family’ as including the spouse and children for the purposes of benefits to the family in the event of the employee’s death. If the employee has no ‘family’, they are permitted to nominate a person to receive the pension benefits on their death. However, this nomination will become void if the employee subsequently acquires family.<sup>196</sup> Additionally, the Employee’s Family Pension Scheme, 1971 operates on the same premise.

2.4.86 Under EPF, employees are entitled to claim a provident fund in case of retirement, resignation or termination. They can also nominate a person who can receive the provident fund in case of their death, which is required by regulations to exclusively cover ‘family’ by marriage, birth or adoption. The EPF regulations permit employees not having any family to nominate “any other person”. However, in the event the

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<sup>196</sup> Regulation 2(vii) read with Regulation 16 of The Employee’s Pension Scheme, 1995

employee acquires family, the said nomination would become invalid.<sup>197</sup> Employees and the family receive benefits such as economic support for home construction, higher education, marriage, sickness benefits etc.<sup>198</sup> EDLI automatically converts the nomination under EPF to ‘family’ for grant of benefits under this scheme.<sup>199</sup>

2.4.87 The entire spectrum of civil law on benefits accruing from retirement, sickness or death in course of employment, including gratuity and medical benefits under the *Employee’s State Insurance Act, 1948* and insurance policies are similarly premised on the ‘family’.<sup>200</sup>

2.4.88 The National Family Benefit Scheme under the *Unorganized Worker’s Social Security Act, 2008* (now subsumed under the *Code on Social Security, 2020*) grants lumpsum assistance to a bereaved household living below poverty line in case of death of the ‘primary breadwinner’. A ‘household’ includes a spouse, minor children, unmarried daughters and dependant parents. In case of death of an unmarried adult, a ‘household’ includes minor brothers/sisters and dependant parents.<sup>201</sup>

2.4.89 In terms of employment-related protections for sexual and reproductive health rights and services, the *Maternity Benefit Act, 1961* provides social security and reasonable accommodation to women at the workplace, whether they give birth, adopt or commission surrogacy.<sup>202</sup>

2.4.90 The *Code on Social Security, 2020* consolidates the law on social security for workers in the organized as well as unorganized sectors. It conceptually borrows the hetero-normative definitions of ‘dependants’<sup>203</sup> and the ‘family’<sup>204</sup> from earlier legislations it seeks to replace.

2.4.91 However, courts have afforded expansive interpretation to laws governing the area of employment benefits to families in favour of intended beneficiaries (the employee), on the basis that they are instruments of social welfare policies of the State. Such a legal approach is essential as employment benefits often provide access to

<sup>197</sup> Regulation 2(g) read with Regulation 61 of the Employee’s Provident Funds Scheme, 1952

<sup>198</sup> Employee’s Provident Fund Organization, Ministry of Labour & Employment, Government of India; Available at: [https://www.epfindia.gov.in/site\\_en/AboutEPFO.php](https://www.epfindia.gov.in/site_en/AboutEPFO.php)

<sup>199</sup> Regulation 23 of the Employee’s Deposit Linked Insurance Scheme

<sup>200</sup> *Id* at 154, pgs. 68-71

<sup>201</sup> National Social Assistance Programme Guidelines (2014), Ministry of Rural Development, Government of India

<sup>202</sup> Sections 5-13 of the *Maternity Benefit Act, 1961*

<sup>203</sup> Section 2(24) of the *Code on Social Security, 2020*

<sup>204</sup> Section 2(33) of the *Code on Social Security, 2020*

affordable life-saving medicines and treatment for the insured person and the family.<sup>205</sup>

2.4.92 In March 2021, a single judge bench of the Madras High Court opined that after the death of the former legally wedded wife, a live-in partner or a 'second wife' (where personal law of parties does not permit bigamous marriages) of the husband attains the status of wife in law based on the doctrine of presumption of marriage, and therefore, is entitled to succeed to the husband's partner benefits like pension on his demise.<sup>206</sup> The judge based his reasoning in the recognition of 'relationships in the nature of marriage' under the DV Act and the law's focus on protection of social and economic rights of women. However, instead of issuing a verdict, the judge referred the matter to a larger bench of the High Court due to conflicting judgments on the same, in the interests of declaring an authoritative position of law on the matter. When viewed in the backdrop of developments in constitutional law in areas of sexual orientation, gender identity and anti-discrimination law, such decisions signal the reasonable probability for legal recognition of queer relationships in the nature of marriage (live-in relationships) and protection of economic rights arising from them.

2.4.93 In December 2020, the Government of India released a draft Science, Technology and Innovation Policy (STIP) which proposes that members of the LGBTQ+ community may be entitled to spousal benefits (including retirement benefits) to any partner irrespective of gender, to redress the inequitable participation of marginalized communities in science, technology, engineering and mathematics.<sup>207</sup>

2.4.94 Access to partner benefits under the law presumes access to employment opportunities for queer persons. Although the matter is of tangential relevance to this paper, a brief observation is merited. Queer persons are systematically discriminated in the world of work at every stage – recruitment, working conditions and job security.<sup>208</sup> The *Transgender Persons (Protection of Rights) Act, 2019* rolls back the promise of reservations in public education and employment as declared by the Supreme Court in *NALSA*. As discussed in the opening section, trans communities are at the forefront of litigating and advocating for reservations. The recent victory of Karnataka-based

<sup>205</sup>*Baby Devananda (through her mother) v Employees State Insurance Corporation*, 2017 SCC Online Del 12779

<sup>206</sup>*Malarkodi @ Malar v Chief Internal Audit Officer and Ors.*, order dated 09.03.2021 in WP No. 5706 of 2021

<sup>207</sup>Draft Science, Technology and Innovation Policy, Ministry of Science and Technology, Government of India, December 2020

<sup>208</sup>*Id* at 147 pgs. 65-103

trans communities in achieving 1% horizontal reservation across SC/ST, OBC (other backward classes), MBC (most backward classes) and open categories in civil services through a PIL<sup>209</sup> is clearly instructive of the struggles and demands of the community. A legal strategy of claiming rights for the queer community must focus on the fundamental right to equality of opportunity irrespective of sexual orientation, gender identity or inter-sex status.

2.4.95 Another supplementary observation related to access to employment for queer persons that must be noted here is a worrying trend of pitting the trans community's claims to social and economic rights against women's rights and entitlements in conflicting terms. A 2015 Calcutta High Court decision dismissed a trans woman's petition against wrongful denial of employment as an Accredited Social Health Activist (ASHA) worker on the ground that the post is 'gender specific' and only married, divorced or widowed women are eligible for the post.<sup>210</sup> In 2016, the Madras High Court delivered an affirmative verdict in a matter involving a trans woman's claim to a post for the Sub-Inspector of Police (Woman) based on self-identification and defended the regulations for the same. However, the court was faced with a disqualified candidate's contention that women deserved special treatment in law related to public employment compared to the trans community, which was rejected by the court as it was deemed irrelevant for the matter before it.<sup>211</sup> As recently as 2021, the Kerala High Court issued a progressive decision in directing the National Cadet Corps (NCC) to provide equal opportunity in training for the armed forces for the trans community.<sup>212</sup> Again, the court was faced with insidious contentions by the respondents that trans women have an 'unfair competitive advantage' compared to women due to 'biological differences' and sharing common living spaces and proximity during training will be a 'violation of privacy and dignity' of women cadets. The matter is on appeal, and it is an open question as to how the Supreme Court will respond to such contentions and decide the matter.

2.4.96 The pitting of trans community claims to social and economic rights against women's rights and entitlements, or even projecting trans women as a threat to women's safety and wellbeing, is a false narrative of contestation of social, economic and political justice between two

<sup>209</sup> Notification No. DPAR 179 SRR 2020, dated 06.07.2021 passed by Government of Karnataka in response to orders passed in *Sangama and Anr. v State by its Chief Secretary and others*, WP No. 8511/2020(GM-PIL)

<sup>210</sup> *Sumita Kumari v State of West Bengal and Ors.*, final order dated 01.07.2015 in WP 8911 of 2015

<sup>211</sup> *K. Annapoornam v Secy. to the Government, Personnel and Administrative Reforms Dept.*, 2016 SCC Online Mad 15928

<sup>212</sup> *Hina Haneefa v State of Kerala and Ors.*, final judgment dated 15.03.2021 in WP(C) No. 23404 of 2020 (A)

vulnerable groups. Recently, in *S. Vanitha v. Deputy Commissioner*,<sup>213</sup> the Supreme Court articulated a framework to respond to competing legal claims by parties who belong to different vulnerable groups. In an appeal arising from eviction proceedings filed by a married woman's in-laws, the court declared that the competing provisions relating to 'right to residence' in the DV Act and the *Maintenance and Welfare of Parents and Senior Citizens Act, 2007* are to be harmoniously interpreted to give relief in the facts and circumstances of each case, as both special laws seek to protect rights of vulnerable groups (women and senior citizens respectively). The takeaway is that in an appropriate case involving a dispute between parties, senior citizens' right to residence under the 2007 Act does not automatically override women's right to residence under the 2005 Act merely because the former contains a non-obstante clause and was enacted later in time. The court overturned the lower court orders which ordered the woman's eviction, and directed the lower court to reconcile the woman's right to residence with the senior citizen's corresponding right. A practice of transformative constitutionalism acknowledges that legal strategies and social movements for queer rights are not in conflict with women's rights or other vulnerable groups. Rather, it is the state's constitutional duty to meet demands of gender justice on equitable terms for all.

2.4.97 The realization of the vast range of social and economic rights, as discussed in this sub-section, is complex. Access to justice under the law on domestic violence can be inclusive for all queer persons if 'relationships in the nature of marriage' are re-imagined to go beyond hetero-normative ideas of compulsory monogamy and conjugality. The equality of access to assisted reproductive technologies by queer persons requires engagement from a lens of reproductive justice, to strike a balance between rights of commissioning parents and rights of marginalized women who disproportionately perform this reproductive labour. A framework of property and inheritance rights which recognizes equality of queer persons also needs to be inclusive of *hijra gharanas* customs of succession of property. Apart from ensuring non-discrimination in housing and tenancy laws, social housing and redressing criminalization also need to be prioritized. And, in addition to relational claims of maintenance and partner benefits, demands for social security and access to healthcare can truly benefit all queer persons irrespective of marital status.

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<sup>213</sup> 2020 SCC Online SC 1023

### 3. ALTERNATIVE INTERVENTIONS IN LAW

#### 3.1 Direct Inclusion under the Existing Legal Framework

3.1.1 Voices in the queer community have articulated divergent views on the strategy of seeking legal recognition of relationships to seek access to social and economic rights. They can be broadly identified as: (i) legislative amendments/constitutional challenge to existing marriage and other personal law to seek direct inclusion, or (ii) demanding separate law(s) to govern rights and obligations of parties, as pre-existing laws governing ‘hetero-relational realities’ are steeped in inequality on several levels.<sup>214</sup> The first part of this concluding section focuses on the proposal to seek direct inclusion under existing the legal framework of marriage laws in India. The second part focuses on the demand for separate law(s), based on principles of inclusion and diversity of queer relationships, and what shape it may take. The third and final part analyses inclusion in social and economic rights on a case-by-case basis, under an anti-discrimination law framework.

3.1.2 The *Special Marriage Act, 1954* (‘SMA’) is the only civil law which governs the solemnization and registration of marriage in India, irrespective of caste or religion. The primary community-specific laws on marriage and divorce are:

- i. *Parsi Marriage and Divorce Act, 1936*
- ii. *Indian Christian Marriage Act, 1872* and *Indian Divorce Act, 1869*
- iii. *Muslim Personal Law (Shariat) Application Act, 1937* and *Dissolution of Muslim Marriages Act, 1939*, and
- iv. *Hindu Marriage Act, 1956*

3.1.3 While no statutory definition of ‘marriage’ exists under any of the aforesaid laws, based on conditions of a valid marriage, grounds of seeking divorce or annulment and judicial interpretation over time, a set of doctrinal principles have emerged based on which a legal ‘marriage’ is reified under Indian law, both civil and as well as the personal/religious laws:

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<sup>214</sup>*Id* at 41, pg. 17-19, 72

- i. *Heterosexuality*: All laws explicitly or implicitly recognize a union between a ‘male/bridegroom’ and ‘female/bride’;<sup>215</sup>
- ii. *Monogamy*: All laws prescribe the act of a spouse ‘committing adultery’ or ‘bigamy’ as a ground for seeking divorce or annulment;<sup>216</sup>
- iii. *Conjugal*ity: All laws prescribe ‘impotence’ or ‘non-consummation’ of marriage as a ground for seeking divorce or annulment.<sup>217</sup>

3.1.4 Although the Madras High Court in *Arunkumar* uncontroversially applied constitutional law developments in *NALSA* to progressively interpret provisions of the *Hindu Marriage Act, 1955*, institutionally, the judiciary’s engagement on applicability of constitutional law in Part III (Fundamental Rights) to matters arising from personal law, custom or usage, is more complex as there is no well-established judicial test applied in such cases.

3.1.5 Historically, courts have dealt with personal laws, customs or usages which particularly govern marriage and divorce, succession, adoption, maintenance, guardianship, tenancy rights of women in tribal communities and other issues in context of their apparent conflict with constitutional law. The range of the court’s response can be broadly classified as follows:

- i. Family law is Personal Law, and not covered by the definition of ‘laws’ in Article 13 of the Constitution – thereby exempting family law as a class as beyond the scope of constitutional scrutiny
- ii. Family law is covered by the definition of ‘laws’ in Article 13 of the Constitution and amenable to constitutional scrutiny; however, the court found the impugned law to be constitutionally valid
- iii. The court is convinced that the impugned law is *prima facie* discriminatory, but did not declare it to be unconstitutional.

<sup>215</sup> Section 4 of SMA; Section 3 of the Parsi law; Section 4 of the Christian law; Sections 5 and 7 of the Hindu law; Chapter 11: Marriage (Nikah), Mulla on Mohammedan Law, 2008.

<sup>216</sup> Sections 27, 35 and 41 of SMA; Sections 4-5 and 32 of the Parsi law; Sections 10-11 of the Christian 1869 law; Sections 12 and 17 of the Hindu law; Section 2 of the Muslim 1939 law (Muslim personal law *permits* marriage with a second wife at the time of subsistence of the first marriage; however, Courts have declared that polygamy is not an ‘essential religious practice’, and therefore, not entitled for protection under Article 25 of the Constitution: *Khursheed Ahmad Khan v State of Uttar Pradesh and Others*, (2015) 8 SCC 439)

<sup>217</sup> Sections 24-25 of SMA; Sections 30-32 of the Parsi law; Sections 10 and 18 of the Christian 1869 law; Sections 12-13 of the Hindu law; Section 2 of the Muslim 1939 law

However, the impugned law is interpreted in a manner to save it from a charge of unconstitutionality

- iv. The court is convinced that the impugned law is discriminatory; however, it did not grant relief by observing that the remedy lay with the Legislature amending the said law
- v. The court declared an impugned law unconstitutional as violating guarantees in Part III of the Constitution.<sup>218</sup>

3.1.6 In 2019 in *Kantaru Rajuveeru (Sabarimala review) v Indian Young Lawyers Association and Others*,<sup>219</sup> the Supreme Court made a reference to a 7-judge bench, seeking an authoritative interpretation of the guarantee of freedom of religion in Article 25 of the Constitution and its interface with Part III of the Constitution, and has framed the following issues and questions for the proposed bench, among others:

- i. The interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III of the Constitution, particularly Article 14
- ii. What is the sweep of the expression “public order, morality and health” occurring in Article 25 of the Constitution?
- iii. The expression “morality” or “constitutional morality” has not been defined in the Constitution. Is it overarching morality in reference to the Preamble, or limited to religious beliefs or faith? There is a need to delineate the contours of the expression, lest it become subjective
- iv. Whether the “essential religious practice” of a religious denomination, or even a section thereof is afforded constitutional protection under Article 226 of the Constitution (para 5)

3.1.7 The intention of the court is to evolve judicial policy for an authoritative interpretation of constitutional law on this subject, and it is probable the law declared by this Constitution Bench will potentially impact and govern the field of law affecting the broad spectrum of family law, personal law, custom and usage for a foreseeable future.

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<sup>218</sup> Constitutionality of Family Laws in India, An Insight into the Challenges and the Response of the Judiciary, Dr. Poonam Saxena, Associate Professor, Faculty of Law, University of Delhi

<sup>219</sup> (2020) 2 SCC 1

- 3.1.8 However, the challenge in pursuing strategies which only seek formal equality is they risk exacerbating economic injustice as well as internal misrecognitions. Such reforms may have the unintended consequences of conferring recognition at the expense of high costs which are disproportionately borne by women.<sup>220</sup> A claim for direct inclusion under the existing legal framework, apart from demanding conformity with underlying assumptions of compulsory monogamy and conjugality with harsh social, economic and penal consequences in the course of divorce or annulment proceedings, reproduces the patent inequalities in laws governing ‘hetero-relational realities’ to queer individuals and relationships.
- 3.1.9 For instance, where a party to a proposed marriage already has an existing spouse in law (bigamy), such a subsequent marriage is *null and void*, i.e., not legally valid and recognized in law. In case of ‘adultery’, the law permits the ‘adulterer or adulteress’ to be made a co-respondent in divorce proceedings. A woman may forfeit any claim to maintenance if proven she is living an ‘unchaste or adulterous life’ during the period of separation or pending divorce proceedings.<sup>221</sup> The lack of a sexual relationship with the spouse can lead to a judicial finding of ‘cruelty’ in divorce or annulment proceedings, even as courts overlook the question of consent in marital sex.<sup>222</sup>
- 3.1.10 Trans, intersex and non-binary persons have demanded the criminalization of marital rape in sexual assault laws, as many from the community are forced into marriage and sexually abused by spouses.<sup>223</sup> Exception 2 to section 375 (Rape) of the *IPC* reads: “*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape*”.<sup>224</sup> The Delhi High Court is presently dealing with a constitutional challenge to this provision in a batch of writ petitions filed by women’s rights groups,<sup>225</sup> seeking criminalization of marital rape. Across the country, High Courts are already applying gender-specific laws to provide a remedy against gender-based violence to queer and trans persons in cases of sexual harassment—whether under Section 354A of the *IPC*,<sup>226</sup> the *Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act*,

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<sup>220</sup>*Id* at 28

<sup>221</sup> Section 40 of the Parsi law; Section 37 of SMA; Section 25 of the Hindu law, Section 125, CrPC

<sup>222</sup> What do Judges in India think about Marital Sex? Economic & Political Weekly, Saptarshi Mandal, Vol. 52, Issue No. 52 (January 2018)

<sup>223</sup>*Id* at 48

<sup>224</sup> Exception 2 to Section 375, IPC after declaration of law in *Independent Thought v Union of India*, (2017) 10 SCC 800

<sup>225</sup> *RIT Foundation v Union of India*, Writ Petition (C) 284 of 2015 and others.

<sup>226</sup> *Anamika v Union of India*, Writ Petition No. 2537 of 2018 disposed of by Delhi High Court by final order dated 17.12.2018

2013<sup>227</sup> or state-level laws such as the *Tamil Nadu Prohibition of Harassment of Women Act, 2002*<sup>228</sup> – rape<sup>229</sup> and domestic violence.<sup>230</sup>

3.1.11 Conjugal rights are central to the idea of marriage, evidenced by the law and court's power to enforce it. The provision of restitution of conjugal rights,<sup>231</sup> facially gender-neutral, grants a spouse the right to seek a judicial order to direct the separated spouse to cohabit and participate in sexual relations as an essential obligation of marriage; failure of compliance by the separated spouse grants the 'aggrieved' spouse a ground to seek divorce. The violence of this legal remedy was articulated in 1983 in *T. Sareetha v T. Venkata Subbaiah*,<sup>232</sup> when the Andhra Pradesh High Court struck down section 9 (*Restitution of Conjugal Right*) of the *Hindu Marriage Act, 1955* as savage, barbarous and unconstitutional by declaring:

*"...the purpose of a decree of restitution of conjugal rights in the past as it is in the present remains the same, which is to coerce through the judicial process the unwilling party to have sex against that person's consent and free will with the decree-holder. There can be no doubt that a decree of restitution of conjugal rights thus enforced, offends the inviolability of the body and the mind, subjected to the decree, and offends the integrity of such a person and invades the material privacy and domestic intimacies of such a person."* (para 17)

3.1.12 The court added that the provision disproportionately impacted sexual and reproductive health rights of women, as it could lead to unwanted pregnancies, and therefore violated the guarantee of the equality before law in Article 14 of the Constitution. The court further held the provision as violative of Article 21 as it deprived women of sexual autonomy, right to privacy and human dignity, and authorized excessive State interference by granting it the power to decide on intimate and private matters on behalf of an unwilling woman. However, this landmark decision was short-lived as the Supreme Court effectively overruled it.<sup>233</sup> At present, the Supreme Court is dealing with a batch of writ

<sup>227</sup>*Dr. Malabika Bhattacharjee v Internal Complaints Committee, Vivekananda College and others*, WPA 9141 of 2020, by order dated 27.11.2020

<sup>228</sup>*M. Srinivasan v State through Inspector of Police and Anr.*, 2020 SCC Online Mad 6311

<sup>229</sup>*X v State of Uttarakhand*, AIR 2019 Utt 138

<sup>230</sup>*Id* at 130

<sup>231</sup> Sections 22, 23, 27 of SMA; Sections 32A, 36 of the Parsi law; Sections 9, 13 of the Hindu law; Sections 18, 32 of the Christian 1869 law; Section 2 of the Muslim 1939 law

<sup>232</sup> 1983 (2) APLJ H.C. 37

<sup>233</sup>*Smt. Saroj Rani v Sudarshan Kumar Chadha*, (1984) 4 SCC 90

petitions that pose a constitutional challenge to provisions on restitution of conjugal rights under the SMA and the *Hindu Marriage Act, 1955*.<sup>234</sup>

3.1.13 The SMA mandates parties who wish to marry to submit a notice for such purpose to be filed with the District Marriage Officer at least 30 days prior to the marriage, which is “open for inspection” for “any person” to file “objections to the marriage”. If objections are made, the Marriage Officer is directed to not solemnize the marriage until he has inquired into the said objections.<sup>235</sup> This practice has led to an epidemic of abuse by hostile families and vigilante groups who “inspect” such public records to intimidate, commit violence and negate the right of inter-caste and inter-faith couples to marry under the SMA on constitutionally antithetical grounds of notions of purity and pollution associated with caste, and so-called ‘love-jihad’.<sup>236</sup>

3.1.14 In January 2021, the Allahabad High Court declared mandatory publication of notice under SMA to be unconstitutional as it violates the fundamental right to privacy of inter-faith and inter-caste couples, and exposes them to interference and harm by State and non-State actors.<sup>237</sup> At present, the Supreme Court<sup>238</sup> and Delhi High Court<sup>239</sup> have issued notice in matters raising a constitutional challenge to this legal procedure under SMA, on grounds of violation of the right to privacy, personal autonomy and freedom from violence for inter-caste and inter-faith couples.

3.1.15 The recently enacted *Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020* gives State sanction to the persecution of inter-faith couples by declaring conversion for the purposes of marriage as unlawful *per se*.<sup>240</sup> In December 2020, the Allahabad High Court granted protection from arrest to a person charged with offences under the law, declaring that personal autonomy and the right to privacy are

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<sup>234</sup>*Ojaswa Pathak & Anr. v Union of India*, Writ Petition No. 250/2019 and others

<sup>235</sup> Sections 5-8 of SMA

<sup>236</sup>*Id* at 69, pg. 38; Why Does The Secular Indian State Discourage Inter-Religious Marriages? NewsClick, R. Nithya, 15 Nov 2013; Court informers and mohalla spies: How Hindutva groups in North India stop inter-faith marriages, The Scroll, Abhishek Dey, Aug 05 2018; Kerala Government Stops Publishing of Marriage Notices on Website, Sabrang, Sanchita Kadam, 29 July 2020; To Harass Hindu-Muslim Couples, Right wing Activists Are Now Using Their Marriage Documents, The Wire, Shiba Kurian, 20 July 2020; The Autonomy to Choose One’s Partner, Hindustan Times, Namita Bhandare, Sept 19 2020; How the Special Marriage Act is Killing Love, Article 14, Namita Bhandare and Surbhi Karwa, 19.10.2020

<sup>237</sup>*Safiya Sultana through husband Abhishek Kumar Pandey v State of UP*, Habeas Corpus No. 16907 of 2020, disposed of by final order dated 12.01.2021

<sup>238</sup>*Nandini Praveen v Union of India*, Writ Petition No. 983/2020

<sup>239</sup>*Nida Rehman & Anr. v State of NCT & Ors.*, Writ Petition No. 6974/2020

<sup>240</sup>Preamble read with Section 3 of the Ordinance

vital issues at stake.<sup>241</sup>In a separate case, the High Court issued notice to the State of Uttar Pradesh in a constitutional challenge to the ordinance.<sup>242</sup>

3.1.16 The UP law has set off a domino effect with Madhya Pradesh<sup>243</sup> and Gujarat<sup>244</sup> introducing similar laws. Even as the Supreme Court is hearing a batch of petitions challenging the validity of many state anti-conversion laws,<sup>245</sup> these various state legislations are leading to divergence within the judiciary. While one bench of the Allahabad High Court refused to grant protection to three interfaith couples on alleged violation of the law,<sup>246</sup> the Gujarat High Court placed reliance on *Shafin Jahan* and ordered a stay on provisions of the local law which are deemed to criminalize inter-religious marriages per se, until final adjudication of the constitutional challenge.<sup>247</sup>

3.1.17 The constitutional right to personal autonomy not only protects the positive right of persons to make decisions about their lives, to express themselves and choose partners, but also includes the negative right – not to be subjected to arbitrary interference by State as well as non-State actors.<sup>248</sup>

3.1.18 It may bear well for queer individuals seeking direct inclusion under the existing legal framework to consider intervening in strategic litigations like *Kantaru Rajuveeru* which may potentially impact the justiciability of such constitutional challenges. Additionally, community consultations may be crucial in laying challenge to foundational inequalities in law by engaging with issues of restitution of conjugal rights, marital rape and the persecution of minorities deemed to be ‘*against the order of nature*’ on basis of sexual orientation, gender identity, caste or religion.

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<sup>241</sup>*Nadeem v State of Uttar Pradesh and Others*, order dated 18.12.2020 in Criminal Misc. Writ Petition No. 16302 of 2020,

<sup>242</sup>*Ajit Singh Yadav v State of Uttar Pradesh and Others*, PIL No. 1756 of 2020

<sup>243</sup>*Madhya Pradesh Freedom of Religion Ordinance, 2020*; copy available at:

<http://govtpressmp.nic.in/pdf/extra/2021-01-09-Ex-07.pdf>

<sup>244</sup>Gujarat Assembly passes Freedom of Religion Amendment Bill (2021), SCC Online Blog, April 2, 2021:

<https://www.sconline.com/blog/?p=246437>

<sup>245</sup>*Citizens for Justice and Peace v State of Uttar Pradesh and Ors.*, WP (CrI) No. 428/2020

<sup>246</sup>“Marriage illegal”: Allahabad High Court cites non-compliance with UP anti-conversion law to refuse protection to 3 interfaith couples, Bar and Bench, 30 June, 2021: <https://www.barandbench.com/news/litigation/allahabad-high-court-refuses-protection-3-interfaith-couples-non-compliance-up-anti-conversion-law>

<sup>247</sup>*Jamiat Ulama-e-Hind Gujarat v State of Gujarat*, interim order stated 19.08.2021 in R/Special Civil Application No. 10304 of 2021

<sup>248</sup>*Id* at 5, para 75

## 3.2 Challenging Doctrinal Assumptions of Compulsory Heterosexuality, Monogamy & Conjuality in Law

- 3.2.1 As discussed in previous sections, the law is systemically rooted in hetero-normative constructs of ‘family’ and ‘dependants’ which centre on relations by marriage, blood or adoption. However, the lived experience of queer people and communities merit re-visiting the foundational principles underlying the law.
- 3.2.2 The *Transgender Persons (Protection of Rights) Act, 2019* perpetuates this misconception in defining ‘family’ to mean and include a group of persons related by marriage, birth or adoption made in accordance with law,<sup>249</sup> and does not recognize the kinship networks of *hijra* households in law.
- 3.2.3 *Arunkumar* notwithstanding, the position of law remains unclear on the validity of a marriage and rights of parties therein with respect to a married (‘heterosexual’) couple where one party subsequently self-identifies in a gender different from which they identified as at the time of marriage and where the couple choose to live together.
- 3.2.4 LBT collectives propose a legal framework that permits a party to seek a ‘no fault’ divorce on the ground of ‘*irretrievable breakdown of marriage*’,<sup>250</sup> which is currently only available as an extraordinary remedy under the Supreme Court’s powers under Article 142 of the Constitution.<sup>251</sup>
- 3.2.5 As discussed earlier, during its study on the desirability of proposing a Uniform Civil Code (UCC) in 2018, the Law Commission of India expressed interest in consulting the queer community on drafting a ‘civil partnership’ law governing rights and obligations of individuals in relationships. This presents an opportunity to engage with and consult the community and law-makers to conceptualize and demand a separate legal framework that is informed by centring values of care-giving and economic interdependence of parties as foundational to the queer family, and not constrained by demands of conformity to compulsory monogamy and conjuality, as discussed earlier in section 1.2 of this paper.

<sup>249</sup> Section 2(c) of the Trans Act

<sup>250</sup> *Id* at 41, pgs. 86-88

<sup>251</sup> *Munish Kakkar v Nidhi Kakkar* 2019 SCC Online SC 1636

- 3.2.6 Recent reports show that single person households constitute 12.5% of all households in India. Moreover, 7.5% of all households are single parent families, a majority of which approximately 13 million households are headed by women.<sup>252</sup> Additionally, recent academic work on motherhood in India explores non-normative families, primarily by women identifying as queer or lesbian, unwed biological mothers and unmarried friends raising adopted children together.<sup>253</sup> These emerging narratives which are not based on conjugal or romantic bonds further demonstrate the need for re-defining laws governing families and dependency.
- 3.2.7 As the Constitution of India recognizes that the right to privacy includes at its core the preservation of personal intimacies and autonomy of the individual to control vital aspects of their life (*Puttaswamy*), arguably, the law may be reasonably expected to follow by providing recognition of relationships which traverse beyond monogamy and conjugality, and associated rights. *Nitisha* advances this claim more lucidly as it states that a principal tenet in remedying systemic discrimination must not demand conformity as a price of equality; instead, institutions of governance should accommodate difference and aim to achieve structural change. In this regard, it is worthy to examine how other jurisdictions accord legal recognition to non-normative families and protect rights of parties.
- 3.2.8 In a path-breaking report titled *Beyond Conjugality*, the Law Commission of Canada in 2001 studied the diversity of personal adult relationships, and in addition to heterosexual, gay and lesbian conjugal relationships, it identified a substantial minority of non-conjugal households and relationships as worthy of legal recognition and grant of associated rights, involving adults living alone, single parent families or adults living together.<sup>254</sup> Households centred around a conjugal relationship may also include other adults with no conjugal ties to the couple, such as relatives or close friends. The Commission recognized that kinship between unrelated persons could be experienced as equivalent of biological or legal ties, and within gay and lesbian communities, individuals were more likely to form families of friends.
- 3.2.9 The Commission also identified and documented close personal relationships of persons with disabilities with paid or unpaid caregivers

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<sup>252</sup>*Id* at 186

<sup>253</sup>Nandy, Amrita (2017): *Motherhood and Choice: Uncommon Mothers, Childfree Women*, New Delhi: Zubaan

<sup>254</sup> *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, Law Commission of Canada (2001)

including family and friends. In its final recommendations, it concluded that there was no compelling reason for the government to withhold associated rights from non-conjugal households and relationships premised on care-giving and economic interdependence, and proposed recognition in forms like contracts or registered domestic partnerships which may account for caring arrangements, consent to healthcare decisions and support and sharing in property.

- 3.2.10 The *Hawaii Reciprocal Beneficiaries Act, 1997* in the US recognizes relationships of any two individuals who have significant personal, emotional and economic interdependence, and grants equal rights and benefits as those available only to married couples. The law includes friends who do not share a romantic relationship and persons who may be related to one another, to register as reciprocal beneficiaries.<sup>255</sup>
- 3.2.11 The *Vermont Domestic Relations Act, 2000* in USA recognizes persons related by blood or adoption as reciprocal beneficiaries, and grants equal social and economic rights as heterosexual, gay and lesbian conjugal partners or spouses.<sup>256</sup>
- 3.2.12 The *Adult Interdependent Relationships Act, 2002* in the Canadian province of Alberta defines a ‘relationship of interdependence’ as a relationship outside marriage in which any two persons:
- i. share one another’s lives
  - ii. are emotionally committed to one another, and
  - iii. function as an economic and domestic unit.<sup>257</sup>
- 3.2.13 In determining whether two persons function as an economic and domestic unit, it is immaterial whether the persons have a conjugal relationship, as is exclusivity of the relationship.<sup>258</sup> However, there are restrictions with respect to having more than one adult interdependent partner, i.e., absence of monogamy is *per se* not a ground for dissolving the partnership.<sup>259</sup>
- 3.2.14 The *Relationship Act, 2003* in Tasmania (Australia) allows persons to enter into registered partnerships as either a ‘significant relationship’<sup>260</sup>

<sup>255</sup> Hawaii Reciprocal Beneficiaries Act of 1997, Available at: <https://law.justia.com/codes/hawaii/2015/title-31/chapter-572c/>

<sup>256</sup> Chapter 25: Reciprocal Beneficiaries

<sup>257</sup> Section 1(1)(f)

<sup>258</sup> Section 1(2)

<sup>259</sup> Section 5

<sup>260</sup> Section 4 of the Act lays down criteria to identify a *significant relationship* on basis of following ingredients:

or ‘caring relationship’,<sup>261</sup> which are characterized by financial dependency, care-giving and domestic support, and a sexual relationship is immaterial.<sup>262</sup>

3.2.15 The *Civil Partnership Act, 2004* in the UK does not require consummation as an essential condition of a valid relationship.

3.2.16 In 2020, the city of Somerville, Massachusetts (USA) recognized polyamorous relationships in law by passing an ordinance on ‘domestic partnerships’, defined as an entity formed by people who:

- i. are 18 years or older and competent to contract,
- ii. are in a relationship of mutual support, caring and commitment, and intend to remain in this relationship,
- iii. reside together,
- iv. are not married,
- v. are not related by blood, and
- vi. consider themselves to be a family.<sup>263</sup>

3.2.17 The requirement of residence means living together in a common household, where a partner may be temporarily absent, as long as they have the intent to return. A partner may own or maintain an additional residence. The ordinance clarifies that the term ‘family’ shall be interpreted to include domestic partnerships, and persons in domestic

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(a) the duration of the relationship;

(b) the nature and extent of common residence;

(c) whether or not a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(e) the ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the performance of household duties;

(i) the reputation and public aspects of the relationship

<sup>261</sup> Section 5 of the Act lays down criteria to identify a *caring relationship* on basis of following ingredients:

(a) the duration of the relationship;

(b) the nature and extent of common residence;

(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(d) the ownership, use and acquisition of property;

(e) the degree of mutual commitment to a shared life;

(f) the performance of household duties;

(g) the reputation and public aspects of the relationship;

(h) the level of personal care and domestic support provided by one or each of the partners to the other.

<sup>262</sup> *Relationship Act, 2003* (Tasmania); Available at:

<https://www.legislation.tas.gov.au/view/whole/html/asmade/act-2003-044>

<sup>263</sup> City of Somerville, Ordinance No. 2020-16, In City Council: June 25, 2020: An ordinance adding provisions regarding domestic partnerships in the city of Somerville; Available at: [https://library.municode.com/ma/somerville/ordinances/code\\_of\\_ordinances?nodeId=1028806](https://library.municode.com/ma/somerville/ordinances/code_of_ordinances?nodeId=1028806)

partnerships shall have the same rights and privileges afforded to those who are married.

- 3.2.18 This is a non-exhaustive list of laws governing non-normative relationships across jurisdictions. Any proposed consultations with the Law Commission of India may consider the desirability of modelling a separate law based on the legal principles and framework of aforesaid laws, as well as undertaking of an ethnographic study on lived realities of queer communities in India, as performed by the Law Commission of Canada. A model law based on a queer vision may allow the community to “*joyfully dispense*”<sup>264</sup> with compulsory monogamy and conjugality as essential attributes of a marriage and de-stigmatize such relationships.

### 3.3 Anti-Discrimination Legislation

- 3.3.1 Apart from direct inclusion under the existing legal framework or a separate legislation governing queer relationships, another intervention that may be worth exploring is the use of anti-discrimination law to seek specific relief by approaching courts on a case-by-case basis. This may proceed by invoking the evolving jurisprudence on equality and anti-discrimination law by the courts, as already discussed in section 2 of this paper. Accordingly, advocacy for enacting a comprehensive anti-discrimination law may be considered, which addresses all forms of direct and indirect discrimination in public sector as well as the private realm.
- 3.3.2 In light of the developments of constitutional law in the context of sexual orientation and gender identity (*NALSA*, *Puttaswamy*, *Navtej* and *Chinmayee Jena*) and anti-discrimination law (*Madhu/Nitisha*), this legal strategy may address concerns of queer individuals and relationships, whether legally married or relationships in the nature of marriage (live-in relationships), by seeking appropriate relief in terms of recognition and/ or access to social and economic rights as detailed in section 2.4 of this paper. For instance, in cases of exclusion of queer individuals from nominating partners, friends or other persons as representatives to take general or emergency healthcare decisions on their behalf in the event they are incapacitated from doing so (as discussed in paragraphs 2.4.3 – 2.4.6), aggrieved persons may approach a writ court seeking a declaration that their partners, friends or other

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<sup>264</sup>*Id* at 80

persons may be eligible in law to act as representatives, guardians or family members for the said purpose, on the basis of developments in constitutional law as aforesaid. The framework of anti-discrimination law can and should respond to legal concerns of queer individuals, regardless of marital status.

3.3.3 A recent effort at passing such law is the *Anti-Discrimination and Equality Bill, 2016* conceptualized by Dr. Tarunabh Khaitan, legal scholars and members of civil society.<sup>265</sup> The Bill was introduced as a private member's bill before the Lok Sabha on 10 March 2017. However, there has been no progress on the bill till date. The key features of the bill include:

- i. Remedies against boycott and segregation
- ii. Addresses direct and indirect discrimination
- iii. Covers private persons performing public functions under the ambit of the bill
- iv. Any *conduct, rule, regulation, policy, criterion, practice or structure* by State or private persons performing public functions is subject to scrutiny under law
- v. Defines "protected characteristic" to mean *caste, race, ethnicity, descent, sex, gender identity, pregnancy, sexual orientation, religion and belief, tribe, disability, linguistic identity, HIV status, nationality, marital status, food preference, skin tone, place of residence, place of birth, age* or other personal characteristics which are beyond a person's control or constitutes a fundamental choice
- vi. The aforesaid list of protected characteristics is non-exhaustive, i.e., the Equality Commission under the proposed law is empowered to notify *analogous protected characteristics*
- vii. Anti-discrimination duties on appropriate government, local authority and private persons performing public functions to '*diversify*' by adoption of conduct, law, policy, criterion, practice or structure to increase or encourage participation of disadvantaged groups
- viii. Affirmative action

<sup>265</sup> The Anti-Discrimination Bill Project: <https://sites.google.com/site/tarunabh/Home/discrimination-law>

- ix. Provides a civil law framework as the object of the proposed law is to protect and compensate victims, rather than focus on punishing the violator through criminal law which requires stricter standards of proof

3.3.4 The latest development is the Equality Bill, 2021 conceptualized by the Centre for Law and Policy Research.<sup>266</sup> It shares many features of the 2016 Bill, with additions such as providing redress for intersectional discrimination, structural discrimination and embedding the concept of reasonable accommodation for State as well as private persons performing public functions. This second Bill additionally lists 'socio-economic status' as a protected characteristic.

## 4. CONCLUSION

As transformative constitutionalism informs our enquiry of the legal framework as well as the issues presented in seeking legal recognition of queer relationships, we identify the following legal policy issues for community efforts which seek social and economic justice for all queer persons regardless of marital status, among others:

- i. Addressing inequalities of the existing legal framework on marriage, including restitution of conjugal rights, criminalization of marital rape, procedure on publication of notice by parties who intend to marry under the SMA, 'love-jihad'/anti-conversion laws, among others
- ii. Intervention in *Kantaru Rajuveeru* for its potential impact on justiciability of 'marriage equality' under personal laws
- iii. Engaging with the Law Commission of India and other State bodies on the proposal for a 'civil partnership' model of recognition of relationships as defined by queer communities
- iv. Defending *NALSA*, the right to self-determination of gender identity and reservations in education and employment, which are undermined by the *Transgender Persons (Protection of Rights) Act, 2019*
- v. Recommending adoption of an anti-discrimination legislation

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<sup>266</sup> The Equality Bill, 2019: <https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2021-8th-January-2021.pdf>

- vi. Recommending the examination of the *ART Bill, 2020* and *Surrogacy Bill, 2020* through a lens of reproductive justice for safeguarding the rights of women in surrogacy, for an equitable contractual relationship
- vii. Challenging the criminalization of homelessness, begging and sex work
- viii. Universalization of social security to protect rights of queer persons in matters of healthcare, housing, food security, employment, education, unemployment insurance, pension and others, irrespective of relationship/marital status
- ix. Outlawing conversion therapy
- x. Enforcement of Ministry of Health's Protocols on Medico-Legal Care for Survivors of Sexual Violence consistent with healthcare needs of queer and intersex persons
- xi. Strengthening of RKSK, ARSH and healthcare systems to respond to general as well as sexual and reproductive healthcare needs of queer and intersex persons and adolescents
- xii. Comprehensive sexuality education, that imparts information which is appropriate to age and context of queer and intersex adolescents and various population groups
- xiii. Review of medical curriculum and research to include trans-specific healthcare concerns, with guidelines for SRS as per World Professional Association for Transgender Health (WPATH)
- xiv. Universal access to HIV/AIDS related healthcare

The strategy outlined in this paper offers an integrated approach to address a plurality of social, economic and legal policy concerns of diverse sections of queer communities. It is hoped that the issues identified here provoke critical dialogue and community engagement on the legal recognition of queer relationships in India.

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Indian Law Society  
Law College Road  
Pune 411004  
Maharashtra, India  
[www.c-help.org](http://www.c-help.org)  
[contact@c-help.org](mailto:contact@c-help.org)