

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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PREVALENCE OF HETERONORMITIVITY IN THE CONCEPTION OF FAMILY IN INDIA

Authored by-Ifrac Barge

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Word Count- 2487

Introduction

The traditional take on family is one that revolves around biological relations. The basic concept of family is established on kinship connections between individuals through marriage or through lines of descent that connect blood relatives. The normative definition of marriage is the sexual union between two heterosexual individuals and the same defines family relationships. However, with time, the definition of a family has widened, and it includes non-normative forms of family such as same-sex families, stepfamilies, single-parent families, etc. This paper examines the impact of the scope of the definition of family on various non-traditional families. The paper is divided into three sections for this purpose, the first part looks at same-sex couples and their legal struggle for being recognised as a family. The second part analyses the difficulties faced by Transgender Persons and looks at the heteronormativity of The Transgender Persons (Protection of Rights) Bill, 2019 and the Surrogacy Regulation Bill, 2019. The last part of the paper highlights the legal status of live-in relationships in India and the reinforcement of the heteronormative concept of family through the same.

Same-Sex Relationships In The Inception Of Family In India

Every non-queer Indian person has the legal freedom to choose which family law would apply to them based on their community or religion. The codified marriage acts have not explicitly defined marriage as a heterosexual union nor do these acts explicitly forbid same-sex marriages. However, the Indian laws have "heteronormative underpinnings" and have typically been understood to exclude same-sex partnerships.¹ For instance, Section 377 criminalised anyone who willfully engages in sexual intercourse against the natural order with any man, woman, or animal with facing life imprisonment or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to pay a fine². However, in July 2009, in the landmark judgement of *Naz Foundation v. Govt. of NCT(National Capital Territory) of Delhi*,³ the Delhi high court bench led by Chief justice Ajit Prakash Shah and

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¹Ananya Srivastava, 'Homosexuality vs same-sex marriages: India's one step forward, two steps backwards', First Post (India, 26 October 2021) last accessed 31st Oct,2021. <https://www.firstpost.com/india/homosexuality-vs-same-sex-marriages-centres-one-step-forward-two-steps-backwards-10087221.html>

² The Indian Penal Code, s377.

³ *Naaz Foundation v Government of NCT of New Delhi and Others*, WP[C] No. 7455/2001.

Justice S Muralidhar decided to strike down section 377, claiming that it violates the Indian Constitution's fundamental rights to life, liberty, and equality of the LGBTQ community. In December 2013, the Supreme Court overturned this decision of the Delhi high court on the basis that section 377 of the IPC “does not suffer from the vice unconstitutionality and the declaration made by the division bench of the high court is legally unsustainable” in the judgement of *Suresh Kumar Koushal v. Naz Foundation*⁴. After all the struggle to legalize homosexuality in India the Supreme court scrapped Section 377 in the Navtej Singh case stating that it infringed on constitutional rights to privacy, freedom of expression, equality, human dignity, and protection from discrimination. The Court reasoned that discrimination based on sexual orientation violated the right to equality, that criminalising consensual sex between adults in private violated the right to privacy, that sexual orientation is an inherent part of self-identity and that denying it would be a violation of the right to life, and that fundamental rights cannot be denied on the basis that they only affect a minority of the population. However, even after this victory same-sex marriage could not be legalised in India. In a recent petition by *Abhijeet Iyer Mitra v. Union of India* (and other connected petitions)⁵ the petitioners argued that The Citizenship Act of 1955, Section 7A(1)(d), makes no distinction between heterosexual, same-sex, or queer spouses and It states that a 'person who is married to an Overseas Citizen of India and has been married for two years should be declared eligible to apply for an OCI card as a spouse. However, Solicitor General Tushar Mehta, representing the Central Government, argued that "spouse" refers to both husband and wife, and "marriage" is a term associated with heterosexual couples and thus there is no need to file a specific reply with respect to the Citizenship Act. The SG further claimed that there is a misconception of Petitioners regarding the case of *Navtej Singh Johar v. Union of India*,⁶ which decriminalized homosexual acts between adults in private. He said, "The issue here is whether marriage is permissible between homosexual couples. Your Lordships have to decide that. There is some misconception regarding the Navtej Singh Johar case. It merely decriminalizes...It does not talk about marriage. Earlier, the Centre had filed an affidavit opposing the pleas. It had said, "there is a "legitimate state interest" in limiting recognition of marriage to persons of the opposite sex only", and that the institution of marriage is not merely a concept relegated to the domain of

⁴ *Suresh Kumar Koushal v. Naz Foundation* Civil Appeal No. 10972 OF 2013.

⁵ *Abhijeet Iyer Mitra v. Union of India*, WP [C] No. 6371/2020 & CM Appl. No. 22554/2020.

⁶ *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

privacy of an individual. The affidavit further stated “ The acceptance of the institution of marriage between two individuals of the same gender is neither recognized nor accepted in any uncodified personal laws or any codified statutory laws”,⁷ The final hearing on this case will be heard on 30th November 2021. The battle for legalizing same-sex marriage is been going on for years and unfortunately, the LGBTQ community has only faced disappointment. A same-sex couple has to face severe financial, emotional and mental consequences as a result of the denial of marriage rights. Certain legal benefits such as succession, maintenance, and pension rights that are available to married couples are not available to same-sex couples. Economic benefits from laws like the Employment Provident Fund Scheme, 1952 and Workmen’s Compensation Act, 1923 are given only to those related by blood or marriage.²² After the Central Adoption Resource Authority (CARA) issued guidelines for adoption, single persons and unmarried couples have found it increasingly difficult to adopt.⁸ Since same-sex couples cannot enter the sphere of normative family in India unlike the heterosexual couples they remain deprived of certain legal and governments polices that use marriage and family relationships as a condition for a wide range of benefits.

Legislations: A Tool To Reinforce Heteronormativity In India

The transgender community has to face multiple problems in Indian society including social, economic, political and legal. The foremost social problem arises in their families. They are subjected to verbal and physical abuse by their family members. trans genders add subjected to discrimination by the family as well as the larger society due to their sexuality and gender identity. Even in the 21st century the trance community still has to face considerable stigma and remain outcasted by society their problems. Transgender people are frequently denied medical treatment and admission to hospitals. Even doctors are uninformed on how to care for transgender people.⁹

⁷ Akshita Saxena, ‘Marriage Permissible Only Between Biological Man & Woman; Navtej Johar Case Doesn’t Recognize Same-Sex Marriage: Centre Tells Delhi High Court’, Live Law (India, 25 October 2021) last accessed 31st October, 2021.

<https://www.livelaw.in/news-updates/same-sex-marriage-delhi-high-court-centre-says-marriage-between-biological-man-and-woman-only-184235>

⁸ Nayantara Ravichandran, ‘Legal Recognition Of Same-Sex Relationships In India’, Manupatra <https://docs.manupatra.in/newline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf> last accessed 31st October, 2021.

⁹ Yashika, and Sarita, ‘A Light on the Socio-Economic Status of the Transgenders’ (2020), <https://www.ijlmh.com/a-light-on-the-socio-economic-status-of-the-transgenders/> last accessed 31st October, 2021.

Harassment and aggression, including physical assaults on EMTs, act as a disincentive to receiving competent medical care¹⁰. Discrimination in the workplace has resulted in unemployment and poverty as a result of refusal to hire, harassment, and privacy violations.

Since their gender identities are not recognised, transgender students are sometimes denied admission to educational institutions. In India, there is no formal acknowledgement of transgender education.¹¹ Identity documents are required to exercise basic civil rights such as the right to vote, the right to an education, the right to inherit, the right to health and public services, and so on. Hiring biases, on-the-job discrimination, wage disparities, a lack of legal resources, inability to access documents, and denied benefits all impede trans people's employment opportunities¹². Previously, the hijra community was unable to hold public office due to harassment. However, under the Transgender Person Protection Act of 2017, they are now able to do so, and anyone who refuses to allow them to do so will face a fine or imprisonment.¹³ There are multiple other problems that the trans community continues to face even after the introduction of laws to protect them. On 5th August 2019, The Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2019. This Bill is another step forward in maintaining the idea of family as a heteronormative one and excluding other non-normative forms of a family from the definition. The Transgender Persons (Protection of Rights) Bill, 2019 highlights the heteronormative concept of the family in Section 2 (c) wherein it defines family as a " means a group of people related by blood or marriage or by adoption made in accordance with the law."¹⁴ The bill by defining the family relationship as one based on marriage restricts the transgender community from entering the domain family as they do not identify as "man" or "women" and as discussed above as of now individuals belonging to the same sex can not have a legal marriage in India. By being excluded from the family relationship the transgender people remain deprived of several other legal rights given to the citizens of India. Moreover, under Section 3 the bill further states that if the parent or any immediate family of transgender people is unable to take care of them, then the person can take shelter in a rehabilitation centre.¹⁵

¹⁰ Malavika Rajkumar, 'The Challenges faced by Transpersons in India' (2018), <https://medium.com/one-future/the-challenges-faced-by-transpersons-in-india-fa46575ca14d> last accessed 31st October, 2021.

¹¹ Yashika(n9).

¹² Malvika(n10).

¹³ Yashika(n9).

¹⁴ The Transgender Persons (Protection of Rights) Bill, 2019, s2(c).

¹⁵ The Transgender Persons (Protection of Rights) Bill, 2019, s3.

This implies to get the trans person has the option of either continuing living with their blood relatives who as discussed above subject them to violence and abuse or are forced to take shelter in rehabilitation homes. Moreover, the bill also fails to recognise the prevalence of families by choice such as the guru – chela relationships amongst the trans community. The non-biological forms of kinship formed by trans people include the gurus or mothers who had the family and undertake economic and social responsibilities. The hijra households also include the chela or the children of gurus. ¹⁶The Transgender Persons (Protection of Rights) Bill, 2019 has been challenged by *Grace Banu Ganeshan & Ors. v. Union of India & Anr* ¹⁷ claiming that various sections of the bill violate the fundamental rights of the citizen including section 12 (3) which denies the trans persons the choice to live in an alternative arrangement. ¹⁸Thus, the transgender community cannot form a family of their own and also have to face rejection from their natal families. Another step taken by the state in reinforcing the family definition with a heterosexual underpinning is the surrogacy regulation bill, 2019. Section 2 (g) explicitly defines a couple as a legally married Indian man and woman above the age of 21 years and 18 years respectively. ¹⁹The Bill only includes a heteronormative couple as eligible for surrogacy. Thus, making surrogacy illegal for live-in couples, same-sex couples, transgender couples, single men and single women. Section 2 (g) read with Section 4 (iii) (c)], also clearly states that the heteronormative couple should be married for a period of 5 years and have no child of their own²⁰. Despite the existence of diverse families, the state continues to reinforce the idea of family as a heteronormative one and threatens the alternative family structure of the transgender community.

Legal Status Of Live-In Relationship In India

The “Live in relationship” is an arrangement in which two people live together in a sexual relationship without being married. This can be defined as another form of chosen family wherein the individuals are not associated through marriage. The individuals in this arrangement enjoy the same emotional, economic, intimate, conjugal relationship with their partner.

¹⁶ Arijeet Ghosh, Diksha Sannal, ‘How Can Families be Imagined Beyond Kinship and Marriage?’ (2019), <https://www.epw.in/engage/article/how-can-families-be-imagined-beyond-kinship-and-marriage> last accessed 31st October, 2021.

¹⁷ *Grace Banu Ganeshan & Ors. v. Union of India & Anr vs. Union of India & Anr.* (2020).

¹⁸ The Transgender Persons (Protection of Rights) Bill, 2019, s12(3).

¹⁹ *Ibid*, s2(g).

²⁰ *Ibid*, s2(g), s4(iii)(c).

Live-in relationships are legal in India. In cases such as *Indra Sarma v. V.K.V. Sarma*²¹ the Supreme Court has observed that a live-in relationship may be considered immoral by the society but is not illegal and does not amount to any offence under the law. Similar judgments have been given in cases like *Lata Singh v. the State of U.P*²² and *Khushboo vs Kanaimmal*²³ and another when the court stated that s 'Right to life" and is not illegal. Although there is no specific law defining live-in relationships in India the courts have recognized it has a valid marriage in certain cases. One of the landmark cases is *Badri Prasad vs. Dy. Director of Consolidation*²⁴ wherein the supreme court gave legal validity of marriage to a 50-year live-in relationship and justice Krishna Iyer remarked that When partners have cohabited for a long time, there is a strong presumption in favour of wedlock and further added that although the assumption might be rebutted, the person seeking to deprive the relationship of legal origin bears a hard burden. Legitimacy is favoured by the law, whereas bastardy is frowned upon. The presumption of marriage in case long years of live-in relationship was also upheld in the supreme court judgement of the landmark case of *P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi*²⁵ and others. Moreover, in various cases, the female partner is granted rights that a wife is entitled to in a marriage such as property rights, maintenance rights, etc. For instance, In the case of *Chanmuniya vs. Virender Kumar Singh*²⁶, it was held that a man who has lived with a woman for a long period, even if they haven't met the legal requirements for lawful marriage, should be responsible for her maintenance if he abandons her. The court also ruled that a woman in a live-in relationship is entitled to maintenance or remedies under the Protection of Women from Domestic Violence Act, 2005. However, the supreme court stated that according to the Protection of Women from Domestic Violence Act of 2005, not all live-in relationships will amount to marriage. Certain conditions must be met in order to receive such benefits, and this must be proven by evidence. "If a man has a keep" that he finances and uses for sexual purposes or as a servant, it is not regarded a marriage-like arrangement.²⁷

²¹ *Indra Sarma. Vs. VKV Sarma*. 2014 [1] RCR [CrI]; 179. [SC].

²² *Lata Singh v. the State of U.P* [2006] 5 SCC 475.

²³ *Khushboo v. Kanniammal* AIR 2010 SC 3196.

²⁴ *Badri Prasad Vs. Dy. Director of Consolidation & Ors.*, AIR 1978 SC.

²⁵ *Balasubramanyam v/s Suruttayan Alias Andali Padayachi and Others*. Civil Appeal No. 1188 of 1982.

²⁶ *Chanmuniya v. Virendra Kumar Singh Kushwaha*, (2011) 1 SCC 141.

²⁷ Priya Sepaha, 'Live-in Relationships in India: Laws and Challenges' (2021),

[https://www.researchgate.net/publication/351358748 Live-in Relationship in India Laws and Challenge](https://www.researchgate.net/publication/351358748_Live-in_Relationship_in_India_Laws_and_Challenge) last accessed 31st October, 2021.

Although by providing legal recognition to live in relationship and validating it as marriage the state has taken a step forward in expanding the domain of family in India however no legal representation for the LGBTQ couple has once again reinforced the idea of a heteronormative arrangement of family.

Conclusion

To summarise, there is no ideal definition of a family. However, the widely accepted definition of the family involves a group of people who are directly linked by kin connections, the adult members of which assume responsibility for caring for children.²⁸ Even though the Indian law doesn't adopt any particular definition of the family its exclusion of non-normative forms of family and its failure to provide legal recognition to such families serves as evidence of its heteronormative stance on the family. Individuals should have a choice of choosing their family and not be restricted to blood relationships. It is high time that the law recognises the existence of non-normative forms of family including same-sex families, transgender families, single-parent families, etc. Considering same-sex marriage as illegal and illegitimate is just adding to the multiple problems that the LGBTQ community already faces. Moreover, The Transgender Persons (Protection of Rights Bill), 2019 and the Surrogacy Regulation Bill, 2019 drafted for protecting the minorities attempts to control non-conforming identities and non-biological family relations and reinforce the family structure as heteronormative. Even though legalising live-in relationships and validating them as married couples is a positive step towards broadening the family arrangements, we have miles to go because of the exclusion of the LGBTQ community in the eligibility of live-in relationships.

²⁸ Anthony Giddens and Philip.W.Sutton, *Sociology*(7th edn, John Wiley & Sons).