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# Acknowledgements

We would like to thank Gowthaman Ranganathan (lawyer) for his inputs on this project, Shankar Narayanan (former Senior Resident Fellow, Vidhi Centre for Legal Policy) for peer reviewing the Chapter on ‘Violence’, and Karan Vohra for designing the cover and for being a design consultant on this project. We would also like to thank Gabriella Calleja (Head of the LGBTIQ Unit, Human Rights and Integration Directorate, Malta), Dr. Richie Gupta (MBBS, DA, MS (General Surgery), M.Ch (Plastic Surgery), Fortis Hospital), Dr. Ranjita Biswas (consultant psychiatrist), Pawan Dhall (Social Researcher on Gender and Sexuality and Founding Trustee, Varta Trust), Saptarshi Mandal (Assistant Professor, Jindal Global Law School) and Nitika Khaitan for their inputs, and Vidhi interns Karan Tripathi, Padma Venkataraman, Pranay Modi, Abhijeet Rawaley, Mugdha Mohapatra and Pallavi Khatri for their assistance with research.

We would also like to thank Danish Sheikh (Assistant Professor, Jindal Global Law School) for his inputs at the stage of inception of this project.

We would specifically like to acknowledge the decades of resistance, conversations and literature

produced by the LGBT+ rights movement on the issue of LGBT+ inclusion in India’s laws. This project seeks to be a resource which adds to the already existing expansive work on the issue of legal inclusion of LGBT+ persons. This is a work in progress and we look forward to inputs and critique from various groups and community members. We hope to facilitate conversations around this draft and improve it on the basis of these inputs and conversations.

Finally, this Project would not have been possible without the generosity and support of the Tata Education and Development Trusts.

Errors, if any, in the Report, are the authors’ alone.

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## Authors

Akshat Agarwal, Diksha Sanyal and Namrata Mukherjee are Research Fellows at the Vidhi Centre for Legal Policy.

# Note

The Vidhi Centre for Legal Policy ('Vidhi') organised a consultation with some members of the LGBT+ community and persons working on gender and sexuality rights issues on the final two chapters of "Queering the law: Making Indian Laws LGBT+ inclusive" i.e. "Family" and "Employment". The consultation took place on the 25<sup>th</sup> of May, 2019 at Vidhi's office in New Delhi and was attended by: Rituparna Borah, Pramada Menon, Saptarshi Mandal, Aparna Mittal, Simran Shaikh, Pawan Dhall, Amrita Sarkar, Grace Banu, Sowmya T, Jamal Siddiqui, Swetha Sudhakar, Prabha Nagaraj and Jaya Sharma. It was moderated by Gowthaman Ranganathan.

A draft version of this Chapter was shared with the attendees and an open-ended discussion was carried out on the basis of the same. The discussions and issues raised at the consultation are reflected in the sections on "Issues for Consideration" and the "Summary of Consultation" of this chapter. They have also been incorporated into the main text of the Chapter where possible.

We would like to thank everyone who attended the consultation for taking out the time to read the draft reports, sharing their valuable insights and raising critical issues that require consideration for LGBT+ inclusion in our laws.

We would also like to emphasise the importance of reading this report in light of the issues discussed at the consultation.

Finally, we would like to thank Vidhi interns Avani Airan and Cheta Sheth for rapporteuring.

The image features a minimalist abstract design. A thick black diagonal band runs from the top left towards the middle right. Below it, a thick pink diagonal band runs from the middle left towards the bottom right. The two bands overlap, creating a white zigzag pattern along their intersection. The text 'Queering the La' is written in white on the black band.

# Queering the La



# Law: Making Indian Laws LGBT+ Inclusive

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# A. Introduction

The body of family law governs institutions which regulate our most intimate personal choices. Family law governs significant personal relationships which have a bearing on the ways in which caretaking responsibilities, entitlements, benefits and obligations are distributed. Yet, like most laws, the body of family law privileges opposite gender, monogamous, conjugal relationships. Therefore, persons who identify outside the binary are immediately excluded from a range of civil rights such as marriage, divorce, inheritance, custody and adoption. Further, these laws operate on the presumption that the gender assigned at birth is constant throughout the course of one's life. Therefore, legal rights of persons who transition from one gender to another remain uncertain. Those relationships and intimacies that do not fall under this rubric are invisibilised in the law.

With the Supreme Court's pronouncements first in *NALSA vs. Union of India*<sup>1</sup> ('NALSA')

and more recently in *Navtej Johar vs. Union of India*<sup>2</sup> ('Navtej Johar'), some of these exclusions can now be potentially challenged against the robust framework of equality and non-discrimination that has been recognised. Justice Chandrachud in his judgement in *Navtej Johar* observed emphatically that the manner in which individuals choose to exercise intimacy was beyond the legitimate interests of the state. Though a right to intimacy for all was recognised, the judgment stopped short of directing the state to facilitate recognition of such alternate forms of unions either through marriage or otherwise.<sup>3</sup> This judgment came after the landmark *Justice K.S. Puttaswamy vs. Union of India* ('Puttaswamy')<sup>4</sup> ruling which recognised privacy as a fundamental right. In *Puttaswamy*, the right to sexual intimacy was seen as a core component of the right to privacy.<sup>5</sup> This emanated not simply from the right to be 'let alone' in the privacy of their homes but rather, from a more robust understanding of personal autonomy.<sup>6</sup> This has also been

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<sup>1</sup> (2014) 5 SCC 438.

<sup>2</sup> 2 (2018) 10 SCC 1.

<sup>3</sup> For instance, Justice Dipak Misra in a very obfuscating paragraph in the *Navtej Johar* judgment recognised that while there is a right to a 'union' under Article 21 and marriage is a union, in the context of this case, did not mean 'union' to be marriage. Rather, union in the context of the queer community meant a basic right for companionship, thus falling short of specifying the scope of rights that traditionally flows from marriage (para 168).

<sup>4</sup> (2017) 10 SCC 1.

<sup>5</sup> *Ibid*, para 157.

<sup>6</sup> *Ibid*, para 113. This is also emphasised in *Navtej Johar* judgment which reads as, "... 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.



underscored in *Shafin Jahan vs. Asokan K.M* ('*Hadiya's Case*')<sup>7</sup> which underscored the right to make intimate decisions about one's relationships.<sup>8</sup>

At the outset, it is important to clarify that family laws can be broadly categorised as secular and personal laws. While secular laws apply to all citizens regardless of religion, personal laws derive their sanction from religion and differ for each religious community. However, both categories of family laws recognise only opposite gender relationships and are restricted to the binary of male and female.

Previous attempts by the state to enact a Uniform Civil Code ('UCC') in place of community-specific personal laws have met with deep resistance since it is perceived as interference with religious beliefs.<sup>9</sup> There is a fear amongst many religious communities that 'reformatory' tools such as the UCC are a way for the Hindu majority to restrict the freedom

of religion for religious minorities.<sup>10</sup> Recognising this, the Law Commission in August 2018 rejected the UCC as a recommendation.<sup>11</sup>

While the Law Commission may have recommended certain changes in personal laws to bring about greater equality between men and women in personal laws we feel that doing so for the purpose of LGBT+ inclusion is beyond the scope of this Project. Such reforms, in our opinion, must arise from within communities themselves rather than being top-down. For example, the Bharatiya Muslim Mahila Andolan, a rights-based civil society organisation that works specifically on the rights of Muslim women, was at the forefront of the movement for the abolition of triple talaq and also a petitioner in the triple talaq case before the Supreme Court.<sup>12</sup> Similarly, in the LGBT+ rights space, initiatives such as the Queer Muslim Project are confronting the double bind of Islamophobia and homophobia

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*The absolute right of an individual to choose a life partner is not in the least affected by matters of faith...Social approval for intimate personal decisions is not the basis for recognising them".*

<sup>7</sup> *Shafin Jahan vs. Asokan K.M*, 2018 16 SCC 368.

<sup>8</sup> *Ibid*, para 19.

<sup>9</sup> Nivedita Menon, 'A Uniform Civil Code in India: State of the Debate in 2014', *Feminist Debates*, Vol. 40, Issue 2, 2014, pp 480, 481.

<sup>10</sup> *Ibid*.

<sup>11</sup> Law Commission of India, Consultation Paper on Reform of Family Law, 31st August, 2018, available at <<http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf>> (last accessed on November 11, 2018); Scroll, 'Muslim women rights group urges Centre, Opposition to ensure passage of triple talaq bill' available at <<https://scroll.in/latest/866191/muslim-women-rights-group-urges-centre-opposition-to-ensure-passage-of-triple-talaq-bill>> (last accessed on February 12, 2019).

that an LGBT+ Muslim person faces,<sup>12</sup> indicating that these conversations have started. Nonetheless, the Law Commission missed out on an important opportunity to point out how family laws—whether personal or secular—continue to be exclusionary of LGBT+ persons specifically by not recognising a range of other intimate, personal relationships. In July 2018, some queer-feminist LBT activists and individuals submitted comments to the Law Commission regarding the need to reform family laws to make them LGBT+ inclusive.<sup>13</sup> However, the Law Commission’s report did not pay adequate attention to the dilemmas raised by these groups.

consultation have also been highlighted in this chapter.

This chapter seeks to highlight not only how family laws in India fall short of the goal of formal equality enunciated in judgments such as *NALSA* and *Navtej Johar* but also issues that may need deliberation for the purpose of LGBT+ inclusion beyond formal equality. Based on the insights that arose from the consultation organised for this chapter, many of the views and dilemmas expressed at the

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<sup>12</sup> Christina George, ‘Queer and Islam: There’s No Conflict, A Delhi Project, Set to Tell You’, Indian Express, August 4th, 2018, available at <<https://indianexpress.com/article/india/the-queer-muslim-project-delhi-rafiul-alom-rehman-homophobia-islamophobia-5288514/>> (last access on 11th November, 2018; *See also*, Meghana Wunnava, ‘The Queer Muslim Project: An Inclusive Online Space to Share Experiences, Voice Doubts’, The News Minute, May 1st, 2018, available at <<https://www.thenewsminute.com/article/queer-muslim-project-inclusive-online-space-share-experiences-voice-doubts-80518>>, last accessed on 11th November, 2018.

<sup>13</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 10th, 2018, available on Orinam at <<http://orinam.net/lci-response-lbt-2018/>>, last accessed on 26th March, 2019. In the past, some legal feminist advocacy groups made efforts to conceptualise a rights framework recognising women’s rights within non-normative intimate relationships. *See*, Partners in Law and Development, ‘Rights in Intimate Relationship: Towards an Inclusive and Just Framework of Women’s Rights and the Family’, A Resource Book, 2010.

# B. The **Laws**

## Assessed and

## Context

One of the key insights that emerged from the consultation was the fact that before thinking about law reform in the arena of family law, it was important to define the key visions and values that the LGBT+ community would want to retain within the law. Some of these values entailed looking at marriage as a relationship of economic and emotional dependency; valuing sexual pleasure within marriage and adopting the language of choice which can be used to recognise queer narratives within the law.<sup>14</sup>

Further, some who attended the consultation also highlighted the importance of developing a nuanced critique of not only marriage but also the very meaning of family within the law.<sup>15</sup> For instance, reforms for LGBT+ inclusion cannot be complete without the law recognising ‘families of choice’.<sup>16</sup> While thinking of inclusion, attempts should also be made to ensure flexibility of the legal regime such that even those who choose to

opt out of traditional familial structures are not unfairly disadvantaged or discriminated by the law.

In this section, we keep these values in mind as we assess the commonly applicable laws that govern marriage, divorce, maintenance, custody and inheritance and the problems that arise in amending these laws in light of the *NALSA* and *Navtej Johar*. A list of such relevant laws that may have to be amended to bring about LGBT+ inclusion is provided in Annexure ‘A’.

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<sup>14</sup> Consultation dated 25<sup>th</sup> May, 2019, *see* Summary of Consultation.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

# I. Marriage and Divorce

Heterosexual marriage and families arising from such marriages are viewed as a socially desirable yet deeply contested institution. While it provides one way of pooling collective financial and emotional resources, and a conducive environment to bring up children, it has also been an institution that perpetuates violence against women and has kept them from realising their full potential as human beings due to the gendered division of labour.<sup>17</sup> Given that marriage across the world has traditionally been seen as a union between a biological man and biological woman, it excludes all those identities and relationships that do not fit into its neat boundaries. For instance, in its current form, marriage excludes the possibility of unions between people who are of the same gender as well as those who do not identify within the gender binary. Another associated complication is the fact that currently, there is no law in India that addresses the legal obligations and rights of an individual post-gender transition. *NALSA* has held that medical intervention is not required for a person to choose their gender. Though there is no law that lays down the procedure and the legal implications of changing one's gender identity,

transgender persons have managed to get their identity documents changed to reflect their gender identity by following certain bureaucratic procedures.<sup>18</sup> However, the rights of such a person, if they are in a marriage, is unclear. For instance, does the marriage and other rights associated with it become annulled if one of the partners undergoes gender transition? These are some of the questions for which the existing legal regime offers no answers.

During the consultation, the issue of same-gender marriage was brought up. This is because marriage provides certain material benefits and protections that are otherwise not available. Two issues were highlighted as central to the community—inheritance of property by the spouse/partner and intimate partner violence.<sup>19</sup> Such issues were at the core of why the recognition of same-sex marriage is becoming a growing demand within the LGBT+ community. The demand for recognising same-gender relationships within the law is not new and has

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<sup>17</sup> Nancy Levit and Robert R.M Verchick, 'Marriage and Family, A Primer: Feminist Legal Theory', New York University Press (2nd edn., 2016), page 174.

<sup>18</sup> Vidhi Centre for Legal Policy, 'The Law isn't Straight: A Queer Person's Guide to Accessing Rights', available at <<https://vidhilegalpolicy.in/reports/2018/2/12/the-law-isnt-straight-a-queer-persons-guide-to-accessing-rights>> (last accessed on November 13, 2018); *See also*, International Commission of Jurists, 'Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity', February, 2017, available at <<https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>> (last accessed on November 14, 2018) pages 28-32.

<sup>19</sup> *Ibid.*

existed in India since the late nineties. The Forum against Oppression of Women<sup>20</sup> took up this question as part of the women's rights movement. It advocated for broadening the concept of marriage to include same-gender relationships by defining marriage as a "*registered companionship contract between consenting adults of any sex above the age of 21 years without any prohibited degrees*".<sup>21</sup> Further, it recommended simplified procedures, a set of rights and obligations for married couples and the recognition of no-fault divorce as the norm.<sup>22</sup>

However, after two decades of struggle, it was only in 2018 that *Navtej Johar* partially opened the door for the recognition of same-gender relationships. Gradually, after this judgment, courts are beginning to recognise same-gender relationships. In Kerala, recently, the Court recognised the right of a same-gender couple to live together.<sup>23</sup> In Tamil Nadu, the Madurai bench of the Madras High Court held that

marriage between a biological man and a transwoman was valid under the Hindu Marriage Act, 1956.<sup>24</sup> However, beyond recognising the legitimacy of same-gender relationships, persons in such relationships may not be treated equally under the law. Further, there is little clarity as to how the law would treat this claim if either one of the partners identified outside the binary of male/female, for instance as 'transgender'. This is a stark reminder that the road from decriminalisation to same gender marriage and equality can be a long, arduous struggle. This is especially borne out by the fact that the while government did not oppose section 377, it is set to oppose same-gender marriage in India.<sup>25</sup> Some have suggested that one simple way to amend laws like the Special Marriage Act, 1954<sup>26</sup> (SMA), is to make its language gender neutral such that it can apply easily to all couples regardless of gender. This would also entail harmonising the state-specific marriage registration laws to specifically recognise same-

<sup>20</sup> Forum Against Oppression of Women, 'Visions of Gender Just Realities', *Humjinsi: A Resource Book on Lesbian, Gay & Bisexual Rights in India*, page 83-88.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Indian Express News Service, 'Kerala Witness First Transgender Marriage', *Indian Express*, May 11, 2018, available at <<https://indianexpress.com/article/india/kerala-witnesses-first-transgender-marriage-5172148/>> (last accessed on November 11, 2018).

<sup>24</sup> The court held that a transwoman could be considered as a 'bride' under the Hindu Marriage Act, 1956; Scroll Staff, 'Madras High Court Orders Authorities to Register a Marriage Between a Man and a Transwoman', *Scroll.in*, April 23, 2019, available at <<https://scroll.in/latest/921058/madras-high-court-orders-authorities-to-register-a-marriage-between-a-man-transwoman>> (last accessed on April 24, 2019).

<sup>25</sup> HT Correspondent, 'After historic Section 377 verdict, govt set to oppose same-sex marriage', *The Hindustan Times*, September 8, 2018, available at <<https://www.hindustantimes.com/india-news/after-historic-section-377-verdict-govt-set-to-oppose-same-sex-marriage/story-usQCblH8uawdZZQ8hueupL.html>> (last accessed on 11th November, 2018).

<sup>26</sup> Thomas John, 'Liberating Marriage', in *Law Like Love: Queer Perspectives on Law*, Arvind Narrain and Alok Gupta (eds.), Yoda Press (2011); *See also*, Pervez Mody, 'Love and the Law: Love-Marriage in Delhi', *Modern Asian Studies*, Vol. 36, Issue 1, February, 2002.

gender relationships. However, even where provisions are amended to use gender-neutral language, certain concepts within the law are premised on an understanding of a cisgender male and a cisgender female being in a conjugal relationship. For instance, under all marriage laws, a marriage can be annulled if it has not been 'consummated'.<sup>27</sup> The importance of consummation as penovaginal intercourse within marriage is the essence of heterosexual unions.<sup>28</sup> Where the marriage has not been consummated due to impotency or willfully, it can become a ground for declaring the marriage voidable and therefore, annulled. This understanding of consummation as a prerequisite to a valid marriage is problematic at two levels. First, it is patently discriminatory to same-gender partners and may be discriminatory to persons with intersex variations as well as transgender partners because of how consummation has been traditionally understood. Second, it delegitimises other forms of intimacy which may not be premised on sexual coupling but could be based on companionship or other non-conjugal, caregiving relationships which

may nonetheless have the functional attributes of economic and emotional interdependency.<sup>29</sup>

Further, marriage laws continue to be deeply patriarchal as illustrated through the provision on restitution of conjugal rights.<sup>30</sup> A petition for restitution can be filed by either party and is a way for a spouse to gain back the society of their partner should they have left the matrimonial household. Such a provision has been critiqued for its refusal to respect the decisional autonomy of parties<sup>31</sup> and at present has been constitutionally challenged for violating the decisional and sexual autonomy of women which is a fundamental component of her right to privacy.<sup>32</sup>

Another issue arises vis-a-vis the provision on prohibited relationships which is present in the SMA which has largely been borrowed from the Hindu law on marriage. Under the SMA, certain relationships are prohibited. For instance, a man cannot enter into a marriage with his mother, and a woman cannot enter into a marriage with her father. The Schedule at the end of the SMA lists the various prohibited relationships.<sup>33</sup> However,

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<sup>27</sup> Section 12, The Hindu Marriage Act, 1955; Section 25, Special Marriage Act, 1954.

<sup>28</sup> Ruthann Robson, 'Reinscribing Normality?' in *Transgender Rights*, Paisley Currah, Richard M Juang and Shannon Price Minter (eds.), University of Minnesota Press.

<sup>29</sup> Brenda Cossman and Bruce Ryder, 'Beyond Beyond Conjuality', *Canadian Journal of Family Law*, Vol. 30(2), 2017.

<sup>30</sup> Section 9, Hindu Marriage Act, 1955; Section 22 Special Marriage Act, 1954; Section 36 Parsi Marriage and Divorce Act, 1936.

<sup>31</sup> Flavia Agnes, 'Family Laws and Constitutional Claims', Vol. 1, Oxford University Press (2011), page 24-26; Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – II: Privacy, the Individual, and the Public/Private Divide', *Indian Constitutional Law and Philosophy*, August 28, 2017, available at <<https://indconlawphil.wordpress.com/2017/08/28/the-supreme-courts-right-to-privacy-judgment-ii-privacy-the-individual-and-the-publicprivate-divide/>> (last accessed on June 15, 2019).

<sup>32</sup> Shruti Mahajan, 'Supreme Court Issues Notice to Centre in Plea Challenging Restitution of Conjugal Rights Provisions', *Bar and Bench*, March 16th, 2019, available at <<https://barandbench.com/supreme-court-notice-validity-of-restitution- conjugal-rights/>> (last accessed on March 20, 2019).

<sup>33</sup> Part I and Part II, Schedule I of the Special Marriage Act, 1954.

the prohibited relationships are different for men and women, thereby making it particularly challenging to amend it to include LGBT+ marriages. This is because prohibited relationships continue to be premised on the binary of male and female, thereby leaving it unclear what relationships will be prohibited in case of transgender persons, particularly those who do not identify within the binary of male and female. A problematic provision in the SMA in particular concerns the 30-day notice period. Under the SMA, when a marriage is intended to be solemnised the parties to the marriage are required to “give notice” by announcing their intention to marry. The Marriage Officer of the district where either of the parties resides will publish such notice in a conspicuous location in her office, and any person may thereafter object to such marriage within a period of 30 days. While the grounds on which such objection can be made are listed in the Act and are limited, they are broad enough to permit for abuse by the objecting party. In the case of LGBT+ partners, this provision is particularly vulnerable to abuse in light of the social prejudice against LGBT+ relationships.<sup>34</sup>

Finally, the problem doesn't merely lie in the wording of the act but also judicial interpretations of concepts such as cruelty, adultery and desertion which are common grounds of divorce in all marriage laws. Though these concepts apply equally to both genders, because of differing social expectations for men and women, the interpretation of these concepts is gendered.<sup>35</sup> There is little clarity on how power imbalances arising from gender dynamics within the family will be understood in the case of marriages between transgender persons or same-gendered couples. For instance, how would cruelty as a ground for divorce be understood in the case of a marriage between a transman and a transwoman? The non-recognition of no-fault divorce in India (other than divorce by mutual consent) exacerbates the problem. Further, non-consummation of marriage as has been traditionally understood can lead to certain marriages involving transgender persons being invalidated.<sup>36</sup> The SMA & Parsi Marriage and Divorce Act, 1936 also allow a wife to claim divorce from a district court if her husband has been convicted of sodomy or other unnatural offences.<sup>37</sup> Post *Navtej Johar*, the existence of such

<sup>34</sup> Sumati Murthy (Rumi) and Sunil Mohan, ‘*Crisis Intervention by Lesbians*’, and Priyadarshini Thangarajah and Ponni Arasu, ‘Queer Women and the Law in India’ in *Law Like Love: Queer Perspectives on Law*, Arvind Narrain and Alok Gupta (eds.), Yoda Press (2011); Sappho For Equality, ‘Vio-Map: Documenting and Mapping Violence and Rights Violation Taking Place in Lives of Sexually Marginalized Women to Chart out Effective Advocacy Strategies’, 2011, available at <<http://www.sapphokolkata.in/wp-content/themes/responsive/core/images/Vio-Map%20Report.pdf>> (last accessed on November 14, 2018).

<sup>35</sup> See, for instance, *Narendra vs. K. Meena* (2016) 9 SCC 455 where the Supreme Court held that forcing the husband to separate from his parents by having a separate accommodation, amounts to cruelty.

<sup>36</sup> Sneha Aggarwal, ‘Delhi Man Alleges He was Misled by In-Laws to Marry a Transgender’, *India Today*, January 24th, 2016, available at <<https://www.indiatoday.in/mail-today/story/man-says-he-was-bowled-a-gender-googly-305242-2016-01-24>> (last accessed on November 14, 2018).

<sup>37</sup> Section 27(1-A), Special Marriage Act, 1954; Section 32(d), Parsi Divorce and Marriage Act, 1936.

grounds is problematic and points towards the need for re-thinking the grounds of divorce.

During the consultation, some differences of opinion were expressed regarding the extent to which the SMA would need to be amended to make it amenable for recognising same-sex marriage especially with regard to provisions on consummation, restitution of conjugal rights and given the judicial interpretations of concepts such as adultery and cruelty. While some pointed out that such provisions were generally problematic and did not specifically hinder queer intimacy, others felt that while trying to 'queer' marriage, it was important to pursue a more inclusive politics by rejecting such provisions within the law since they were upheld by patriarchal underpinnings even if they are equally applicable to same-gender spouses.<sup>38</sup>

In fact, not rejecting such heteronormative ideas and notions of marriage embedded in the law, are the reasons why the LGBT+ movement has been critiqued for its undue focus on marriage equality. Instead of exploring ways in which law can be restructured to ensure recognition, autonomy and relational equality between diverse forms of relationships whether conjugal or non-conjugal,<sup>39</sup> the law is assimilationist given its fixation with the preservation of 'family laws' and 'social stability'.<sup>40</sup> Insisting on marriage for everybody some claim, can potentially 'constrain' and 'render invisible' relationships that do not fit into the mainstream ideas of love and relationships.<sup>41</sup>

Further, making marriage equality the goal of this movement would mean perpetuating a politics of

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<sup>38</sup> Consultation dated 25<sup>th</sup> May, 2019, *see* Summary of Consultation.

<sup>39</sup> Law Commission of Canada, 'Beyond Conjuality: Recognising and Supporting Close, Personal Adult Relationships', 2001; Parliament of Tasmania, Joint Standing Committee on Community Development, 'The Legal Recognition of Significant Personal Relationships', 2001. Most countries have traditionally relied on relationship status to regulate the ways of rights and responsibilities are distributed in cases of caregiving, compensation for economic and emotional injuries among other things. Some countries such as Canada and Tasmania considered this dilemma in 2001. Canada for instance in the report titled *Beyond Conjuality*, re-assessed the ways in which relationships have been regulated by the law. It noted the existing diversity of relationships in society and considered the ways in which the law could realise legitimate state objectives without unnecessary regulation of personal relationships. Instead of recommending that certain forms of relationship be recognised under the law, it tried to fundamentally rethink the ways in which states have relied on relational status in allocating rights and responsibilities. It developed a four-pronged test to determine how laws should regulate a range of close, adult personal relationships under the law. It stressed on the importance of recognising the functional attributes of a relationship (such as economic and emotional interdependency) rather than conjuality. In Tasmania too, the Standing Committee recognised that Tasmanian law, by recognising only heterosexual relationships do not consider other significant personal relationships which leads to hardships and inequity. It considered various options for bridging the equality gap for same-sex couples and non-traditional relationships. One option considered was a system of registration that would allow individuals to gain legal recognition through the registration of their relationship.

<sup>40</sup> Ratna Kapur, 'There's a Problem with the LGBT-Rights Movement- It's Limiting Freedom', *The Conversation*, September 17, 2018, available at <<https://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>> (last accessed on March 20, 2019).

<sup>41</sup> As cited in *Transgender Rights*, Paisley Currah, Richard M. Juang and Shannon Price Minter (eds.), University of Minnesota Press (1st edn., 2006).



recognition and respectability based on invisibilising other forms of expressing intimacy.<sup>42</sup>

Fraser characterises such measures as a politics of recognition which offer remedies that are ‘affirmative’ rather than ‘transformative’. This is because it tries to remedy inequitable outcomes “*without disturbing the underlying social structures that generate them*”.<sup>43</sup> In contrast, transformative strategies are radical in their potential since they focus not only cosmetically correcting unjust outcomes but rather restructure the underlying framework.

The solution therefore, may lie not so much in amending these laws to ‘add and stir’ LGBT+ persons. Rather, it may lie in radically re-imagining family laws for everybody. Some scholars such as Martha Fineman have recommended the abolition of marriage as a legal category all together.<sup>44</sup> As early as 2001, Canada recommended that conjugality as a legal category be decentered as a way to regulate close, personal, adult relationships. One illustration of how this may be realised is the *Relationships Act*, 2003, that was enacted by Tasmania. It allows individuals to enter into registered partnerships as either a “significant relationship”<sup>45</sup> or a “caring relationship”<sup>46</sup>.

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Martha Albertson Fineman, ‘Why Marriage’, Emory University School of Law, Legal Studies Research Paper, Paper No. 12-204.

<sup>45</sup> Section 4, Relationship Act 2003 reads as-

*For the purposes of this Act, a significant relationship is a relationship between two adult persons -*

*(a) who have a relationship as a couple; and*

*(b) who are not married to one another or related by family.*

*(2) If a significant relationship is registered under Part 2, proof of registration is proof of the relationship.*

*(3) If a significant relationship is not registered under Part 2, in determining whether two persons are in a significant relationship, all the circumstances of the relationship are to be taken into account, including such of the following matter as may*

*be relevant in a particular case:*

*(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 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;*

*the reputation and public aspects of the relationship.*

<sup>46</sup> Section 5, Relationship Act, 2003- Caring relationships are defined as-

*(1) For the purposes of this Act, a caring relationship is a relationship other than a marriage or significant relationship between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care.*

*(2) For the purposes of subsection (1), a caring relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care -*

*(a) for fee or payment in the nature of wages; or*

However, in most countries reforms have been enacted via the enactment of Civil Partnership Laws. By recognising relationships between same-gender couples, Civil Partnerships gives rise to certain legal obligations between them. Generally, since this is a civil union, it embodies greater flexibility as an institution. For instance, the Civil Partnership Act, 2004 in the United Kingdom does not require 'consummation' as a prerequisite for the validity of the marriage.<sup>47</sup> Similarly in Canada, same-sex marriages have been legalised since 2005<sup>48</sup> and in South Africa since 2006.<sup>49</sup> In France under the *pacte civil de solidarité*, or PACS any two individuals can enter into a system of obligations and co-dependence on their own

terms.<sup>50</sup> Such unions allow partners to file joint tax returns and share insurance policies and other such similar benefits.<sup>51</sup> A sexual relationship or cohabitation is not integral or a prerequisite to enter into such a union. Entering and exiting such unions also follows a simple process.<sup>52</sup> Thus, although all rights available to a couple may not be available to those entering into a PACS, this system is nonetheless gaining popularity, especially among heterosexual couples.

A perusal of different systems across the world depicts the plethora of approaches one could take to pursue legal reform. Any such campaign

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(b) under an employment relationship between the persons; or

(c) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

- (3) For the purpose of subsection (2)(a), a fee does not include a carer allowance or carer payment under the Social Security Act and 1991 of the Commonwealth made to a party to a caring relationship in respect of care provided by that party to the other party to the relationship.
- (4) If a caring relationship is registered under Part 2, proof of registration is proof of the relationship.
- (5) If a caring relationship is not registered under Part 2, in determining whether two persons are in a caring relationship, all the circumstances of the relationship are to be taken into account including such of the following matters as may be relevant in a particular case:
- (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;

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

<sup>47</sup> Equality and Human Rights Commission, 'The Marriage (Same Sex) Couples Act, 2013: The Equality and Human Rights Implications for Marriage and the Law in England and Wales', available at, [https://www.equalityhumanrights.com/sites/default/files/gd.13.103-1\\_marriage\\_and\\_the\\_law\\_24-03-14.pdf](https://www.equalityhumanrights.com/sites/default/files/gd.13.103-1_marriage_and_the_law_24-03-14.pdf) (last accessed on March 21, 2019).

<sup>48</sup> Civil Marriage Act, 2005 available at <<https://laws-lois.justice.gc.ca/eng/acts/c-31.5/page-1.html>>

<sup>49</sup> Civil Union Act, 2006, available at <[http://www.saflii.org/za/legis/num\\_act/cua2006139.pdf](http://www.saflii.org/za/legis/num_act/cua2006139.pdf)>.

<sup>50</sup> Scott Sayare, 'In France, Civil Unions Gain Favour over Marriage', New York Times, December 15, 2010, available at <<https://www.nytimes.com/2010/12/16/world/europe/16france.html>> (last accessed on June 15, 2019).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

however, must be multi-faceted and aim to provide recognition and protection to persons who are in various forms of emotionally and financially interdependent relationships. Enacting civil partnership laws maybe one way of recognising certain forms of intimacy. However, it still leaves the law under-inclusive given the diversity of personal, intimate relationships. One reform that was suggested by some members during the consultation was being able to designate a person (not necessarily their blood relatives) as their ‘legal heir’ who would have the authority to execute certain decisions on their behalf. It was felt that nomination for inheritance and other basic services should not be restricted to romantic relationships. One model worth exploring is that of ‘Advance Directives’ within the Mental Healthcare Act, 2017.<sup>53</sup> Another issue that the members of the consultation felt was important was to reach a consensus on developing a queer perspective on the uniform civil code.<sup>54</sup>

Regardless of the problematic nature of marriage, it continues to be an important part of our culture and has been represented as an ideal institution in

which people fulfil their need for commitment, dependency and belonging. Since marriage enjoys a certain hierarchy and predominance in personal laws and is seen by many communities, as a sacred duty, it is unlikely to be abolished. Denying the right of marriage to same-gender couples and gender non-conforming persons is violative of Article 14 of the Constitution since it would mean meting out differential treatment to homosexual and heterosexual partners. Excluding one class of citizens from the advantages, status and dignity that marriage bestows may fall foul of the Constitution specifically in context of judgements such as *NALSA* and *Navtej Johar*. Thus the challenge lies in rethinking reform to the body of family law in a way to ensure that relational equality exists for all relationships. For such an exercise, democratic deliberation, particularly within the queer community is essential.

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<sup>53</sup> Consultation dated 25<sup>th</sup> May, 2019, see Summary of Consultation.

<sup>54</sup> *Ibid.*

## II. Maintenance

Maintenance is typically claimed by the wife for herself and her children from the husband when the marriage disintegrates or the couple decides to judicially separate under various matrimonial statutes. Such a provision was instituted in recognition of the economic dependency that arose for women in marriages.

Provisions on maintenance are gendered in as much as the ‘husband’ is expected to provide alimony to the ‘wife’ during the court proceedings and after divorce. Section 37 of the SMA, for instance, puts the onus of maintenance of the ‘wife’ on the ‘husband’ after a divorce or judicial separation. Such an automatic presumption that a husband ought to maintain a wife is difficult to sustain today. First, since maintenance is recognised as a right that arises from marriage or in some cases, heterosexual cohabitation, it completely excludes non-binary gender identities who may be in a relationship, from its ambit. Second, the law is cis-gendered in as much it fails to envision a situation where one of the spouses in

a marriage decides to identify as a different gender from the one assigned at birth. Finally, the wording of the law recognises only heterosexual partners thus excluding same-gender partners from within its ambit.

Further, the law gives the court the power to modify the order of maintenance on the application of the husband if the wife had either re-married or was not “*leading a chaste life*”. Similar provisions exist in Section 125 of the CrPC.<sup>55</sup> Such wording is rooted in patriarchal beliefs and perpetuates problematic notions regarding a woman’s sexual purity.

Interestingly, it is the Hindu Marriage Act, which has gender-neutral provisions for the maintenance of both the wife and the husband.<sup>56</sup> This is unlike the SMA and Section 125 of Code of Criminal Procedure, 1973. Though the judiciary maintains flexibility in approach while deciding the quantum of maintenance, it has a differential approach towards awarding maintenance to husbands. There is a greater presumption that men must be able to support themselves and can ask for maintenance from the wife in only exceptional

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<sup>55</sup> Section 125(4) and Section 125(5), Code of Criminal Procedure, 1973.

<sup>56</sup> Section 24, Hindu Marriage Act, 1955.

cases<sup>57</sup> though this approach is not uniform across High Courts.<sup>58</sup>

At the consultation, it was recommended that dependency within the family needed to be rethought. It was felt that the law needs to place dependence and care-giving at the heart of regulating relationships. In this context, accounting for the value of domestic labour is particularly important while dissolving a relationship.<sup>59</sup>

Another law that provides for maintenance, is the Protection of Women Against Domestic Violence Act, 2005 ('PWDVA') which provides maintenance to women living in a shared household in a domestic relationship. Thus not just wives, but also sisters, mothers or any other female relative or a woman living in an informal relationship can approach the court for a wide range of reliefs. Even though 'informal relationships' under the PWDVA are understood as being between a man and a woman, the courts have nonetheless tried to identify elements within

such informal relationships which give rise to maintenance obligations borrowing from foreign jurisdictions. Thus, where there is cohabitation for a long period of time and the society recognised their relationship as marriage, a presumption would arise that they are legally wedded. However, even the provisions of PWDVA are only applicable to opposite gender persons who are cohabiting.

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<sup>57</sup> In a Bombay High Court decision, the court held that though under Section 24 of the Hindu Marriage Act, 1955, husbands could claim maintenance from their wives, if they could prove before the court that they had either a physical or mental disability and thus could not earn their livelihood. For instance, in *Nivya K.M vs. Shivaprasad N.K.*, (OP (FC) 26 Of 2015) the court held that if a husband is capable of getting a private job, he cannot claim maintenance from the wife. It made it clear that a husband maintaining his wife is not the usual course of action and could be allowed in exceptional instances only. In doing so, the court displayed its anxiety saying that if maintenance claimed by the husband was not treated as an exceptional circumstance, it would encourage an attitude of idleness in husbands and would be tempted to depend on the wives for their livelihood. However, this is not a uniform approach taken by all high courts.

<sup>58</sup> The Delhi High Court in its decision in *Rani Sethi vs. Sunil Sethi* (179 (2011) DLT 414) did not rely on such gender stereotypes and held that purpose of Section 24 was to support any spouse without an independent income and here 'support' was not to be construed to mean bare existence but rather maintenance was to be tantamount to the standard of living in matrimonial home. Making this observation, the Delhi High Court directed the wife to maintain the husband.

<sup>59</sup> *Ibid.*

# III. Guardianship and Adoption

## 1. Guardianship

Guardianship refers to the collective bundle of rights and obligations that an adult has over the personhood and property of a minor. Custody and guardianship are closely linked in as much as custody is generally claimed by the natural guardian of the child. These claims are located within two statutes- the Guardians and Wards, 1890 (GWA) which is commonly applicable to all citizens and the Hindu Minority and Guardianship Act, 1956 (HMGA) that is specifically applicable to Hindus. However, the judicial principles that have evolved on guardianship and custody are applicable to both laws.

Initially only the father was recognised as the natural guardian and he had a superior, undisputed right over the child even where he was unconcerned with the child's welfare.<sup>60</sup> A mother's right to guardianship on the other hand is determined by Section 6 of the Hindu Minority and Guardianship Act, 1956 which stated that it is "the father, and after him, the mother" who is the guardian of a boy or an unmarried girl. This section invited controversy since it became a hurdle in many instances where despite the father not providing for the child financially, materially

or emotionally, he was still considered to be the guardian. In *Gita Hariharan v. Union of India*<sup>61</sup>, the Supreme Court read down the meaning of section 6 to mean that 'after' does not only mean after the lifetime of, but could also mean 'in the absence of'.<sup>62</sup> This would allow the mother to be a guardian in many situations where the father is not in charge of the affairs of the minor or his day-to-day care. In 2010 Parliament amended the GWA to provide equal guardianship status to both the mother and father.<sup>63</sup> Currently, the principle of "best interests of the child" is the primary consideration for deciding custody and is flexible to incorporate any fact situation to ensure that custody is given to those who display care and concern for the child and to ensure that the child has access to a familiar environment.<sup>64</sup>

Though the language of the law is gender neutral, it nonetheless operates within the gender binary and draws on gendered and heteronormative presumptions of the father being the natural economic provider and the mother being the natural caretaker of the child. Thus, a transgender parent complicates this simple binary equation,

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<sup>60</sup> Flavia Agnes, 'Family Law: Marriage, Divorce and Matrimonial Litigation', Vol. II, Oxford University Press (2011), page 246.

<sup>61</sup> (1999) 2 SCC 228.

<sup>62</sup> *Ibid*, para 10.

<sup>63</sup> Personal Laws (Amendment) Act, 2010.

<sup>64</sup> Flavia Agnes, "Family Law: Marriage, Divorce and Matrimonial Litigation", Volume II, Oxford University Press, 2011, page 255.

especially the impact that gender transition can have on the child.<sup>65</sup>

Further, since the law has only recognised a heteronormative family, issues of same-gender couples in case of guardianship have not been deliberated upon by courts. In recent times, courts have undertaken a more flexible approach to granting guardianship. For instance, in 2015, the Supreme Court recognised that even an unwed mother can be recognised as the legal guardian of

her child and does not have to disclose the biological father's name.<sup>66</sup>

In order to bring the law in case of guardianship in compliance with *NALSA* and *Navtej Johar*, the language of the law should go beyond the binary such that all individuals, regardless of gender, and the structure of their relationship, are able to become guardians. In times to come, development in this area of law will however, depend on how the term 'best interests of the child' is interpreted by courts in the context of gender non-conforming persons. Further, same-gender relationships should be accorded the same rights that opposite gender couples enjoy for guardianship.

## 2. Adoption

Adoption is governed by a mix of personal and secular laws. Adoption for Hindus is governed by the Hindu Adoption and Maintenance Act, 1956 (HAMA). This is the only personal law that recognises adoption. The personal laws of Muslims, Parsis and Christians do not explicitly recognise adoption. They, however, can become guardians under the GWA. A secular law that all citizens can adopt under irrespective of their religion is the Juvenile Justice (Care and

Protection of Children) Act, 2015 ('JJ Act') read along with the Adoption Regulations, 2017 framed by the Central Adoption Resource Authority (CARA).

As per the HAMA, both a single Hindu man and woman can adopt a child if they are not a minor and are of sound mind.<sup>67</sup> Further, both a married Hindu man and woman can adopt a child

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<sup>65</sup> Seema Choudhary, 'Two Shades of Grey', Livemint, December 5, 2014, available at <<https://www.livemint.com/Leisure/pZ1rSusqj8ub50NdGJTQmO/Adoption-Two-shades-of-grey.html>> (last accessed on March 22, 2019).

<sup>66</sup> *ABC v. NCT Delhi*, (2015) 10 SCC 1.

<sup>67</sup> Section 7 & Section 8, Hindu Adoptions and Maintenance Act, 1956.

provided they have the consent of their partners unless one of them has renounced the world, has become of unsound mind or changed their religion.<sup>68</sup> Even single men and women can adopt under this law.<sup>69</sup>

The Adoption Regulations, 2017 have stringent eligibility criteria for adopting a child. Both single men and women can adopt as long as they are mentally and emotionally stable, financially capable and do not have any life-threatening condition.<sup>70</sup> However, single men cannot currently adopt a girl child.<sup>71</sup> This is unlike the HAMA where a single man can adopt a girl child provided there is an age gap of twenty years between the two. A similar restriction does not apply to women with regard to male children under the Adoption Regulations, 2017. In both these laws, the status of single persons identifying as gender non-conforming or transgender is not recognised. Further, as per Schedule VI of the Adoption Regulations, 2017 the form for prospective parents recognises only 'male' and 'female' genders. Thus, under the current wording of the act, it is doubtful whether a person identifying as a transman will be able to adopt a single girl child. Further, the law also does not clarify the status of individuals who may adopt a child as a woman but thereafter decide to undergo a sex change operation or change their

legal gender. This lacuna in the law excludes many individuals from adopting a child.

Further, as per Regulation 5(3) of the Adoption Regulation, 2017, only a couple who has had a stable marital relationship for two years is eligible to adopt. Even under HAMA, where a couple decides to adopt, the implicit assumption is that it is a heterosexual couple as is evident from the use of words such as 'wife' and 'husband'. Since marriage is currently recognised only between men and women, it excludes same-gender couples. One essential feature that was highlighted during the consultation was the need to think of the inclusion of LGBT+ persons not just horizontally but also vertically. For instance, in adoption, both the identity of the person adopting and the identity of the person being adopted is important. While there is some discussion on who can adopt, there is little conversation on who can be adopted. In this context, it is important to think of the legal framework for recognising an age by which a child can self-determine their gender identity.<sup>72</sup>

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<sup>68</sup> This was not the case until the enactment of the Personal Laws Amendment (Act), 2010 that gave a Hindu married woman the same rights of adoption as a Hindu man.

<sup>69</sup> Section 7 & Section 8, Hindu Adoptions and Maintenance Act, 1956.

<sup>70</sup> Regulation 5(2), Adoption Regulations, 2017.

<sup>71</sup> *Ibid.*

<sup>72</sup> Consultation dated 25<sup>th</sup> May, 2019, *see* Summary of Consultation.



## IV. Property

The laws dealing with succession in India are not uniform. Every religion prescribes its own rules of succession and inheritance. With respect to separate property, Hindus are governed by the Hindu Succession Act, 1956 ('HSA'). Similarly, Parsis and Muslims have their own customary laws. British rule saw the entry of Christian communities. This led to the enactment of the Indian Succession Act in 1865 which was re-enacted in 1925.<sup>73</sup> In 1872, this law was made applicable to all Indians who married under the Special Marriage Act, 1872 and to the property of the children of such marriage. This Act was later replaced by the SMA in 1954. However, later the SMA was amended in 1976 to include Section 21A. This amendment provided that the Indian Succession Act, 1925 would not apply to children of couples married under the SMA who were Hindu, Buddhist, Sikh or Jain.<sup>74</sup>

One of the biggest differences between this law and personal laws is that unlike personal laws, women are not at a differential position when it comes to inheritance rights. In this act, a uniform scheme is provided irrespective of the gender of the intestate. Further, succession is determined in terms of the nearness in relation to the deceased. Therefore, the surviving spouse and lineal descendants are made primary heirs, regardless of blood relations. This is quite different from the HSA and Muslim

customary laws that provide different schemes of succession for male and female intestates.

Since gender difference is irrelevant and inheritance happens on the basis of nearness in relation to the deceased, if the language of the law is made completely gender neutral, it should be able to include transgender persons within its ambit. Further, under this law, even if a person changes their gender, they would be at no significant disadvantage since the devolution of property under this act does not depend on gender. However, to the extent that the implicit understanding of marriage within this act is only a heterosexual partner, it discriminates against partners who are not of the opposite genders. For this, such relationships will have to first be recognised under the law.

One interesting development under the law of succession and inheritance has been the recognition of guru-chela relationships in the devolution of property. In 2016, the Himachal Pradesh High Court in *Sweetie (Eunuch) vs. General Public*<sup>75</sup> followed the guru-chela parampara of the hijra community to recognise the appellant (Sweetie) as the 'guru' and therefore the legal heir of her deceased chela's property. In this case, the religion of the deceased was not known. The lower court had assumed the religion to be Hinduism based on the name and on this basis, decided that the devolution of property

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<sup>73</sup> Flavia Agnes, 'Family Law: Family Law and Constitutional Claims', Vol. I, Oxford University Press (2011), pages 73-75.

<sup>74</sup> Section 21A, Special Marriage Act, 1954.

<sup>75</sup> AIR 2016 HP 148.

would take place as per the provisions of the HSA. However, the Himachal Pradesh High Court overturned this ruling to give recognition to the guru-chela relationship. This is in line with an earlier 1990 decision of the Madhya Pradesh High Court where despite knowledge of the religion of the parties, the court held that the customs of the hijra community would prevent a person from within the community to will away property outside it. This is an interesting development and one that needs further exploration.<sup>76</sup> The legal recognition of Hijra families has long been a demand post *NALSA* and found some acknowledgement in the Private Member's bill that was released in 2014. However, subsequent versions of this bill have failed to recognise this community as a familial unit. This was also stressed upon during the consultation.<sup>77</sup>

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<sup>76</sup> *Ilyas and Others vs. Badshah, alias Lamla*, AIR 1990 MP 334 as cited in Mayur Suresh, 'Possession is 9/10ths of the Body', in *Law Like Love: Queer Perspectives on Law*, Arvind Narrain and Alok Gupta (eds.), Yoda Press (2011), page 382-384.

<sup>77</sup> Consultation dated 25<sup>th</sup> May, 2019, *see* Summary of Consultation.

## V. **Violence Within Natal Families Against LGBT+ Persons**

One of the issues pointed out by queer, feminist, LBT activists and individuals writing to the Law Commission in July 2018 was the nature of systemised violence faced by gender non-conforming persons within their natal families. In their letter, they highlighted instances of physical, mental, sexual abuse that such persons often undergo when they assert their choices and identity.<sup>78</sup> In addition, they also face issues of abandonment and neglect, disinheritance from property.<sup>79</sup> Currently, there is no law that can address such issues and instances of violence in a domestic household beyond the strict sanction of criminal law. Under criminal law, the scope of remedies is limited. The only law that comes closest to addressing power differentials within the family living in a domestic household, through civil law remedies, is the Protection

of Women Against Domestic Violence Act, 2005 ('PWDVA'). However, this law was framed to address the violence experienced by women specifically<sup>80</sup> and as a consequence, does not necessarily address the kind of violence faced by all categories of gender non-conforming persons. Further, given that married women are the greatest users of this act, the law has also been interpreted largely from their lens. As of 2016, the Supreme Court struck down Section 2(q) of the law which defined respondents under the PWDVA. Earlier, respondents under this law could only be male persons within the family and his/their relatives. However, in a bid to make the gender neutral, the Supreme Court deleted the words 'adult male' from the provision which effectively means that any person, regardless of their gender, can be a perpetrator of violence against women.<sup>81</sup> However, this decision has been critiqued for

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<sup>78</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 10, 2018, available at <<http://orinam.net/lci-response-lbt-2018/>> (last accessed on March 26, 2019).

<sup>79</sup> *Ibid.*

<sup>80</sup> Indira Jaising, 'Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence', *Economic and Political Weekly*, Vol. XLIV, No. 44 October 31, 2009.

<sup>81</sup> *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165; Prior to this judgment, Section 2(q) of the Protection of Women Against Domestic Violence Act, 2005 read as: "*respondent*" means 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."

interpreting the PWDVA out of context and thereby diluting its impact.<sup>82</sup> While a legitimate criticism, it does expose the lacunae in the law to address instances of violence faced by gender non-conforming persons living in a domestic household with their natal families. For instance, can a transman or a transwoman seek compensation, protection orders or residence orders against their family members, including female family members for the daily violence, emotional and physical abuse that they might be facing at home?<sup>83</sup> Another issue that remains unaddressed is the lack of laws that protects against intimate partner violence within LGBT+ couples. Post decriminalisation of the LGBT+ community under Section 377 of the Indian Penal Code, 1860, there is no legal recognition of relationships between persons from such communities. As a consequence, there are also no laws protecting such persons

from instances of violence that might arise in the context of their relationships. Here again, the law that comes closest to recognising relationships outside the traditional mould of the heterosexual married family, is the PWDVA since it recognises live-in relationships.<sup>84</sup> However, PWDVA recognises live-ins only between ‘men’ and ‘women’. Further, in order to be recognised under the law, ‘live-in’ relationships must be as ‘marriage-like’ as possible.<sup>85</sup> This could exclude live-in relationships between LGBT+ queer persons. The consultation highlighted that recognising live-in relationships between same-gendered couples could be a way to start more nuanced conversations on safeguarding basic rights of LGBT+ persons in relationships. This could thereafter become a basis for recognition of other rights.<sup>86</sup> Whether reform should be envisaged in the form of a separate law or through amendments to existing laws needs to be

<sup>82</sup> Aparna Chandra, ‘Women As Respondents Under The Domestic Violence Act: Critiquing The SC Decision in Harsora v. Harsora’, Live Law, October 14, 2016, available at <<https://www.livelaw.in/women-respondents-domestic-violence-act-critiquing-sc-decision-harsora-v-harsora/>> (last accessed on March 26, 2019).

<sup>83</sup> Sappho For Equality, ‘Vio-Map: Documenting and Mapping Violence and Rights Violation Taking Place in the Life of Sexually Marginalized Women to Chart out Effective Advocacy Strategies’, 2011, available at <<http://www.sapphokolkata.in/wp-content/themes/responsive/core/images/Vio-Map%20Report.pdf>>.

<sup>84</sup> Section 2(f) of the Protection of Women Against Domestic Violence Act, 2005 defines domestic relationship as “means 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** (emphasis mine), adoption or are family members living together as a joint family.”

<sup>85</sup> The phrase ‘relationship in the nature of marriage’ was first interpreted by the Supreme Court in *D. Velusamy v. D. Patchaiaammal*, (2010) 10 SCC 469 which interpreted the meaning ‘relationships in the nature of marriage’ to mean- a) *The couple must hold themselves out to society as being akin to spouses;*(b) *They must be of legal age to marry;* (c) *They must be otherwise qualified to enter into a legal marriage, including being unmarried;*(d) *They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.* In *Indra Sarma vs. V.K.V.Sarma* (2013) 15 SCC 755 the Supreme Court held that same-sex relationships are not recognised as ‘relationships in the nature of marriage’.

<sup>86</sup> Consultation dated 25<sup>th</sup> May, 2019, see Summary of Consultation.

thought through by both the queer and  
feminist communities.

# C. Conclusion

Family laws remain exclusionary because they do not account for gender beyond the binary and the many diverse forms of relationships that exist in a society that may or not be based on conjugality. Since only marriage is recognised as the legitimate way to distribute emotional and financial dependency, this area of law is exclusionary since all other rights of maintenance, adoption, guardianship and custody flow from marriage. Thus, family laws remain underinclusive and do not promote relational equality or dignity of all relationships. The solution may not lie so much in simply adding LGBT+ individuals within the legal framework by changing the wording of the law but would require a more substantial rethink of the ways intimate relationships are recognised and supported by the law.

# Issues for Consideration

- While thinking about regulating familial structures through the law, it is important to create a vision/ template for important values that should be preserved in the legal regulation of adult, personal relationships.
- The regulation of adult, personal relationships within the law entails balancing two fundamental values- certainty and flexibility. Post NALSA and Navtej Johar, there is a need to redefine what constitutes 'family' and 'relationships' in legal terms with some clarity and certainty. At the same time, it is also important to ensure flexibility within such definitions to include lived realities of individuals who do not enter the framework of marriage or civil partnership.
- Some strategies in this regard that need to be thought through in more detail are as follows: Being able to designate a person/ persons (not necessarily blood relatives or those related through marriage) as a 'legal heir' who would have the authority to execute certain decisions on their nominator's behalf. It was felt that nomination for inheritance and other basic services should not be restricted to romantic and familial relationships. One model worth exploring is that of 'Advance Directives' within the Mental Healthcare Act, 2017.
- Re-thinking the ways in which dependency is understood within the law and within families. The law needs to place dependence and care-giving at the heart of regulating relationships. Accounting for the value of domestic labour is particularly important while dissolving a relationship.
- Another strategy might be to reframe how we understand the word 'dependents' within a host of employment laws.
- Recognising live-in relationships between same-gendered couples could be a way to start more nuanced conversations on safeguarding basic rights of LGBT+ persons in relationships. This could become a basis for recognition of other rights.
- It is important to also think about developing a queer perspective on Uniform Civil Code since there is a possibility of its enactment given the political scenario.
- While many within the LGBT+ community want same-gender marriage,

there is a greater need to think of ways in which the material protections and benefits of marriage can be extended to all without it as well.



# Summary of Consultation

The issues raised at the consultation are arranged thematically:

## Essential Values and Visions Integral to Family Law

- Any exercise for rethinking family laws post the NALSA and Navtej Johar must begin by defining a vision and values that the community wants to retain within the law. Some of these pertain to looking at marriage as a relationship of economic and emotional dependency; valuing sexual pleasure within marriage and adopting the language of choice which can be used to recognise queer narratives within the law. Though there was some disagreement about whether a judge's evaluation of sexual pleasure in a marriage would be a violation of privacy, there was some general consensus on the other two values mentioned above.
- While reforming the legal mechanism, the community members emphasised the importance of retaining flexibility within the law such that it doesn't have to be amended repeatedly and is not under-inclusive.

- It was pointed out that while there tends to be greater criticism against same-sex marriages, the critique of 'family' remains under-developed. Post NALSA and Navtej Johar, there is a need to redefine what constitutes 'family' and 'relationships' in legal terms. This will give clarity on issues of intimate partner violence- i.e does it include only heterosexual relationships or can other kinds of relationships come within the ambit of the act? It is important to broaden the understanding of families to include 'families of choice' as well as non-biological kinship networks such as the Hijra families.
- Some suggested that instead of trying to create an overarching mechanism to regulate family law, it might be more worthwhile to pursue strategies that allow for greater flexibility. For instance, surrogacy would be an inclusive way to bridge the gap of the right of a person to have a child in any way they want without aiming for an overarching framework to regulate family law. Such strategies also keep in mind those individuals who may opt to not enter into either marriage or civil partnership frameworks at all. The

## Re-thinking Marriage and Family

law should be flexible to accommodate such lived realities as well.

- In thinking of ways to queer marriage, one must look at problematic provisions such as restitution of conjugal rights and reject them given their patriarchal underpinnings even if they are equally applicable to both spouses. Similarly, instead of rejecting the suggestion for introducing no-fault grounds of divorce for marriage reform to prevent women from being made vulnerable in a marriage, it might be a better strategy to explore how existing provisions such as maintenance can be strengthened to ensure economic stability for the financially weaker party rather than make maintenance requirements contingent on proving a certain ground of divorce.
- While same-sex marriage is a growing demand within the community, legal issues such as intimate partner violence and inheritance of property need to be worked out before such a law is enacted.

### Charting out Legal Options and Strategies

- While thinking of inclusion, it is important to think both horizontally and vertically. For instance, in adoption, the identity of the person adopting and the identity of the person who is being adopted both are important. While there is some discussion on who can adopt, there is little conversation on who can be

adopted. Similarly, in succession, it is not only the identity of the person devolving the property that is important but also the heir, who is defined as male or female.

Both need to be considered to make the entire law more inclusive for the LGBT+ community. For instance, by what age can you allow a child to self-determine their gender identity?

- Some Feminist advocacy groups put forward the suggestion of being able to designate a person (not necessarily their blood relatives) as their 'legal heir' who would have the authority to execute certain decisions on their behalf. It was felt that nomination for inheritance and other basic services should not be restricted to romantic relationships.
- While there is some conversation of violence within natal families, there is little recognition of dependence and caregiving work in such structures. The law needs to place dependence and caregiving at the heart of regulating relationships. Recognition should be given to the fact that marriage is a relationship in which either party is dependent on the other for a number of things. Accounting for the value of domestic labour is particularly important while dissolving a relationship.
- It is also important to speak about inter-caste marriages. In Tamil Nadu, for instance, when people marry in a different

caste, they receive a lot of protections in the form of state-sanctioned support. The need to incorporate such provisions in a more uniform manner was highlighted.

- It was suggested that recognising live-in relationships within the law could act as a precedent to protect individuals against violence and other basic provisions. It could lead to the safeguard of basic rights of LGBT+ persons in relationships which could become the basis for recognition of other rights.
- Another strategy might be to reframe how we understand the word ‘dependents’ within a host of employment laws. Dependents are generally a list of pre-defined relationships based on ties of blood or marriage. It would thus be easier to amend such definitions as opposed to enacting new laws that radically alter ways in which family is defined.

### **Recognising the Limits of the Law**

- The consultation also highlighted that while law reforms are important, it must be remembered that not formally and legally recognising something can provide greater flexibility and space to negotiate relationships. For instance, two same-gendered friends can apply for housing or open of bank accounts technically, even though it involves consistent negotiation with authorities and bureaucrats for easing access to such services.

- Second, there needs to be an emphasis on taking conversations regarding the law outside well-established silos and merging them with grass root politics as a way of ensuring law and society transform simultaneously.

### **Way Forward**

- Some members highlighted the need for developing a consensus on a queer perspective of the Uniform Civil Code as a way for reforming family laws.
- Emphasis was also laid on the need for more active consultation with women’s groups when it pertained to making certain provisions of the law gender neutral.
- Attendees to the consultation also stressed on the need for developing greater consensus on the values and visions that guide the legal regulation of relationships and family. For this, fact-finding reports are essential to understand the material realities that shape demands for reform.
- It was also felt that more discussion was required to evaluate the overwhelming demand for same-sex marriage and whether the plurality of legal structures can accommodate same-sex marriage without enacting a new law.

# Annexure ‘A’

S.No	Subject	Name of Law
1.	Marriage and Divorce and Maintenance	Hindu Marriage Act, 1955
		Special Marriage Act, 1954
		Dissolution of Muslim Marriages Act, 1939
		Indian Divorce Act, 1869
		Parsi Marriage and Divorce Act, 1936
		Indian Christian Marriage Act, 1872.
		Muslim Women (Protection of Rights upon Divorce) Act
		Hindu Adoption and Maintenance Act, 1956
		Section 125, Code of Criminal Procedure 1973.
		Protection of Women from Domestic Violence Act, 2005.
2.	Guardianship and Adoption	Guardians and Wards Act, 1890
		Juvenile Justice Act, 2015 and Central Adoption Resource Authority Guidelines.
		Hindu Minority and Guardianship Act, 1956
3.	Property-Succession	Hindu Succession Act, 1956
		Indian Succession Act, 1925

<b>4. Muslim Personal Law</b>	Muslim Personal Law (Shariat) Application Act, 1937. This law deals with marriage, succession and inheritance within the Muslim community.
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# Queering the



Please direct all correspondence to:  
Akshat Agarwal  
Vidhi Centre for Legal Policy,  
D-359, Defence Colony, New Delhi – 110024.  
Phone: 011-43102767/ 43831699  
Email: [akshat.agarwal@vidhilegalpolicy.in](mailto:akshat.agarwal@vidhilegalpolicy.in)  
[vcpl@vidhilegalpolicy.in](mailto:vcpl@vidhilegalpolicy.in)