

NOT A BATCH MATTER / NOT A PIL MATTER

ANNEXURE 'Y'

ADVOCATE'S CHECK LIST (TO BE CERTIFIED BY ADVOCATE-ON-RECORD)

1.	SLP (C) has been filed in form No. 28 with certificate	[N/A]
2.	The Petitioner is as per provisions of Order XV Rule 1.	[N/A]
3.	The papers of SLP have been arranged as per Order XXI, Rule (3)(1)(f)	[N/A]
4.	Brief list of dates/events has been filed	[YES]
5.	Paragraphs and pages of paper books have been numbered consecutively and correctly noted in Index.	[YES]
6.	Proper and required number of paper books (1+1) have been filed.	[YES]
7.	The contents of the petition, applications and accompanying documents are clear, legible and typed in double space on one side of the paper.	[YES]
8.	The particulars of the impugned judgment passed by the court(s) below are uniformly written in all the documents.	[N/A]
9.	In case of appeal by certificate the appeal is accompanied by judgment and decree appealed from and order granting certificate.	[N/A]
10.	If the petition is time barred, application for condonation of delay mentioning the no. of days of delay, with affidavit and court fee has been filed.	[N/A]
11.	The annexure referred to in the petition are true copies of the documents before the court(s) below and are filed in chronological order as per List of Dates.	[YES]
12.	The annexure referred to in the petition are filed and indexed separately and not marked collectively.	[YES]
13.	The relevant provision of the Constitution, Statutes, ordinance rules, regulations, bye laws, orders, etc. referred to in the impugned judgment/order has been filed as Appendix to the SLP.	[N/A]

<p>14. In SLP against the order passed in Second Appeal, copies of order passed by the Trial Court and First Appellate Court have been filed.</p>	<p>[N/A]</p>
<p>15. The complete listing proforma has been filled in, signed and included in the paper books.</p>	<p>[YES]</p>
<p>16. In a petition (PIL) filed under clause (d) of Rule 12(1) Order XXXVIII, the petitioner has disclosed:</p> <ul style="list-style-type: none"> a. His full name, complete postal address, e-mail address, phone number, proof regarding personal identification, occupation and annual income, PAN number and National Unique Identity Card number, if any; b. The facts constituting the cause if action; c. the nature of injury cause or likely to be caused to the public. d. The nature and extent of personal interest, if any, of the petitioner(s); e. Details regarding any civil criminal or revenue litigation, involving the petitioner or any of the Petitioner, which has or could have a legal nexus with the issue(s) involve in the Public Interest Litigation. 	<p>[N/A]</p>
<p>17. If any identical matter is pending/ disposed of by the Hon'ble Supreme Court, the complete particulars of such matters has been given.</p>	<p>[N/A]</p>
<p>18. The statement in terms of the Order XIX Rule 3(1) of Supreme Court Rules 2013 has been given in the Petition of appeal.</p>	<p>[N/A]</p>
<p>19. Whether as Bank Draft of Rs. 50,000/- or 50% of the amount, whichever is less, has been deposited by the person intending to appeal, if required to be paid as per the order of the NCDRC in terms of Section 23 of the Consumer Protection Act, 1986.</p>	<p>[N/A]</p>

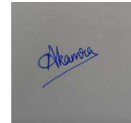
20. In case of appeals under Armed Forces Tribunal Act, 2007, the petitioner/appellant has moved before the Armed Forces Tribunal for granting certificate for leave to appeal to the Supreme Court.
21. All the paperbooks to be filed after curing defects shall be in order.

[N/A]

[YES]

I hereby declare that I have personally verified the petition and its contents and it is in conformity with the Supreme Court Rules, 2013. I certify that the above requirements of that all the documents necessary for the purpose of hearing of the matter have been filed.

Signature:



**[AAKARSH KAMRA]
Advocate for Petitioner.
AoR Code: 2599
Phone:**

NEW DELHI
DATE :14.02.2023

**IN THE HON'BLE SUPREME COURT OF INDIA
WRIT JURISDICTION
WRIT PETITION (C) NO. _____ OF 2023**

IN THE MATTER OF:

Rituparna Borah & Ors.

...PETITIONERS

Versus

Union of India

...RESPONDENT

**PAPER BOOK
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ADVOCATE FOR PETITIONER: AAKARSH KAMRA

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SYNOPSIS

That the present writ petition has been filed by two sets of Petitioners – Petitioner No.s 1 to 4 who are queer feminist activists, who have not only experienced discrimination, hate and conflict in view of their self determined gender identity and sexual orientation, but have worked actively for almost three decades to secure and protect the rights of lesbian, bisexual, trans and intersex (hereinafter referred to as “LBTI”) persons; and Petitioner No.s 5 to 10, who are young couples that have faced extremely violent rejection from their natal families in view of their self determined gender identity and their choice to establish queer relationships, as well as their desire to marry the person of their choice. The lack of legal protection for such queer marriages, as well as the complete apathy and contempt of the police and other institutions and agencies towards queer relationships, has resulted in Petitioner No.s 5 to 10 being subjected to physical violence and emotional abuse by their natal families, and criminal prosecutions have also been initiated in some cases in utter abuse of the legal process only to punish the Petitioners for having queer relationships.

The present writ petition under Article 32 of the Constitution of India has been filed to protect the fundamental rights of the Petitioners herein in the following terms:

- i. That lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, find themselves often facing conflict from natal families and the law. They suffer neglect, rejection, violence-physical and mental, abuse of law, surveillance, detention, and interference with respect to personal, professional, economic, medical and other vital decisions of their lives on account of their self-determined gender identity and sexual orientation, whether or not they are in intimate relationships.
- ii. That the directions of this Hon'ble Court in *Navtej Singh Johar v. Union of India, (2018) 10 SCC 1* on sensitizing and training the law enforcement in order to respect, protect and fulfill the basic rights of LGBTI individuals have not translated into offering a modicum of safety, security and dignity as illustrative incidents documented in this petition demonstrate that the police often act as an instrumentality of the natal family in furthering their illegal diktats, including separating chosen partners and seeking 'custody' of adults who decide to leave abusive homes.

- iii. That the decisions of this Hon'ble Court on matters relating to the fundamental right to privacy (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1), the fundamental right of choice of partner in marriage (*Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343) and anti-discrimination on basis of sex, gender identity and sexual orientation (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1) have imminent and substantial bearing on the denial of solemnization and registration of marriages involving LGBTI individuals under the *Special Marriage Act, 1954* (hereinafter 'SMA'). Sections 2(b), 4 and Parts I-II of First Schedule of SMA are thereby *ex facie* discriminatory on the basis of gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution.
- iv. That the "notice, domicile and objection" framework under Sections 5-9 of SMA acts as a deterrent for LGBTI persons to solemnize and register marriages, and thereby violates the fundamental right to marry for groups of individuals who have historically suffered stigma, discrimination and violence from

state and non-state actors, including natal families, on basis of their identities of caste, religion, gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution.

- v. That the 'Family' as a unit has traditionally been believed to be a source and site of love, care, protection and rearing, but experience demonstrates that it can also be a site of breach of basic human rights, and a source of discrimination, hate and violence, This is also recognized by law, like the Protection of Women from Domestic Violence Act, 2005, which is mandated to protect women from all forms of domestic violence from family members. That jurisprudential developments through decisions of this Hon'ble Court that advance propositions with respect to transcending the institution of natal family and marriage as a source of rights (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*) and purposively applying the constitution and law in order to protect rights of 'atypical families' or 'chosen families' (*Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088*) have imminent and substantial bearing on the protection of fundamental rights of LGBTI individuals

irrespective of marital status, against a lived experience and history where natal families are in conflict with LGBTI individuals. The law's conception of a family as members related only by 'marriage, birth or adoption' is not representative of the lived experiences of unmarried LGBTI individuals and the manner in which chosen families are organized, especially as the 'family' is the site of hetero-normative expectations, opposition and violence for many, like some of the Petitioners herein. The law's failure to recognize kinship bonds beyond the aforesaid category of 'family' leads to systemic exclusion and vulnerability in matters relating to healthcare, estate planning, housing, inheritance, and other social and economic rights which otherwise accrue as a direct incidence of a lawful marriage or blood related family ties, and is thus violative of Articles 14, 15, 19 and 21 of the Constitution of India.

That the experience of constant rejection and violence inflicted by the natal family on LGBTI persons leaves such persons vulnerable to further abuse and neglect in situations where the law recognized the right of the next of kin to take certain decisions on one's behalf, especially when the said individual may be medically incapacitated.

The present legal regime's insistence on according primacy to kinship and family on the basis of blood related ties results in LGBTI persons having to depend on their abusive families for their welfare and best interest, although otherwise the said LGBTI persons may have had to escape the abusive home and family for their survival. This necessitates that the law recognize that LGBTI persons often form intimacies not through blood related ties, but bonds forged through mutual care, love, understanding and respect – all aspects of life integral to a life with dignity. Such atypical families or chosen families, be it through queer romantic relationships or intimate friendships, provide real and greater support, comfort and care to a majority of LGBTI persons than their natal families, and the right to form such chosen families flows from the mandate of the right to a life with dignity and privacy under Article 21 of the Constitution of India.

That in view of the above, the present petition seeks the following prayers:

- i. Issue an appropriate writ, order or direction to declare that the non-recognition of marriage between persons on the basis of sexual orientation and/or gender identity under SMA is illegal and unconstitutional;

- ii. Issue an appropriate writ, order or direction to declare the usage of gender neutral terms like 'spouse' in the context of solemnization and registration of marriages between LGBTI persons, and all other corresponding provisions under SMA;
- iii. Issue an appropriate writ, order or direction to declare that the provisions of law with respect to the "notice, domicile and objection" framework in Sections 5, 6, 7, 8, and 9 of SMA are illegal and unconstitutional;
- iv. Issue an appropriate writ, order or direction to declare that the validity of marriages already solemnized or registered under the SMA would not de facto be jeopardized if one spouse transitions to their self-determined gender identity;
- v. Issue an appropriate writ, order or direction to declare and recognise the constitutional right of members of the LGBTI community to have a "chosen family" in lieu of next of kin under all laws, as an intrinsic part of their right to a dignified life under Article 21;
- vi. Issue an appropriate writ, order or direction to declare that an unmarried person can nominate 'any person(s)' to act as their nominee or next of kin, irrespective of whether such person is a 'guardian, close relative or family

member', with respect to healthcare decisions in case of incapacity such as execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

- vii. Issue an appropriate writ, order or direction to declare that State Governments must apply all preventive, remedial, protective and punitive measures, including establishment of safe houses similar to the *Garima Greh* welfare scheme, in order to guarantee safety and security of all individuals irrespective of gender identity and sexual orientation.

Hence this writ petition under Article 32 of the Constitution of India.

LIST OF DATES

DATE	EVENT
1954	The Special Marriage Act was enacted in India with a view to provide for a legal mechanism for conducting civil marriages between any two persons irrespective of

	<p>their faith or religion. The Schedule to the said Act however clarifies that the said two persons in a civil marriage solemnized or registered under this Act were envisaged to be a cis-male and a cis-female.</p>
06.09.2018	<p>A Constitution Bench judgment of this Hon'ble Court in <i>Navtej Singh Johar and Ors. Vs Union of India and Ors.</i> (2018) 10 SCC 1, decriminalized consensual sexual acts between two adult persons irrespective of their gender identity or sexual orientation by reading down Sec. 377 of the Indian Penal Code. This Hon'ble Court recognized that LGBTI persons have a right to equality before law and equal protection of the laws, and also held that there was a positive obligation on the State to facilitate the recognition of rights to bring fulfillment to same sex relationships. Further, this Hon'ble Court directed that there was immediate need for sensitizing and training the law enforcement in order to respect, protect and fulfill the basic rights of LGBTI individuals.</p>
Submission:	<p>That despite the judgment of this Hon'ble Court in</p>

Navtej, the Petitioner No.s 5 to 10 have faced immense violence from their natal families in view of their self determined gender identity and sexual orientation, and the natal families used law enforcement as a weapon against their queer relationships. For the sake of brevity, the ordeal faced by the Petitioner No.s 5 to 10 is described in detail in Paras 25 to 48 below, and not reproduced in the list of dates.

The Petitioner No. 1 to 4 are regularly approached by queer or trans persons, or persons in queer or trans relationships, seeking refuge from abusive families and homes, as well as from law enforcement agencies. Despite efforts of the Petitioner No.s 1 to 4 to help such queer and trans relationships, there are many instances where help could not be forthcoming in time and lesbian couples have chosen to end their lives to bring an end to the daily abuse, neglect, discrimination, hate and indignity that they suffered at the hands of their natal families and also society at large.

Judicial pronouncement has now recognized the right

	<p>to have 'atypical families' or 'chosen families' in some contexts, and there is a need for such recognition to be extended to the realm of marriage and familial rights, in order to respect the right of LGBTI persons to live a life with dignity and to protect their rights and freedoms to make choices and decisions vital to their life and personhood.</p>
	<p>Hence this writ petition.</p>

IN THE SUPREME COURT OF INDIA
CIVIL WRIT JURISDICTION
WRIT PETITION (CIVIL) NO. _____ OF 2023
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

- 1. Rituparna Borah,**
D/o Lt. Horen Kumar Borah,
R/o 298/1, UGF No 7, Gadaipur Village,
Fatehpur Beri, Delhi 110074 ...PETITIONER NO. 1
- 2. Chayanika Shah,**
D/o Shivjibhai Shah,
R/o 2, Vishwadeep, 95, Bhau Daji Road,
Matunga , Mumbai 400019 ...PETITIONER NO. 2
- 3. Minakshi Sanyal,**
D/O Provat Kumar Sanyal,
4A Bijoli Apt,
627 Rajdanga Main Road, Kolkata 700107 ...PETITIONER NO. 3
- 4. Maya Sharma,**
D/o Gulab Sinha Mehta,
104 Matru Ashish,
Pratapgunj , Vadodara 390002 ...PETITIONER NO. 4
- 5. A**

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER NO.

5

6. B

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER NO. 6

7. C

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITION

ER NO. 7

8. D

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER NO. 8

9. E

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER

NO.9

10. F

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER

NO. 10

VERSUS

1. UNION OF INDIA

Through The Secretary,
The Ministry of Law and Justice,
3rd Floor, 'C' Wing, Lok Nayak Bhawan,
Khan Market New Delhi-
01.

...RESPONDENT

**WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF
INDIA**

TO,

THE HONOURABLE CHIEF JUSTICE OF INDIA,

AND HIS OTHER COMPANION JUDGES,

OF THE HON'BLE SUPREME COURT OF INDIA.

THE HUMBLE PETITION OF

THE PETITIONERS ABOVENAMED

MOST RESPECTFULLY SHOWETH:

1. That the present writ petition under Article 32 of the Constitution of India is filed to protect the fundamental rights of the Petitioners herein in the following terms:

I. That lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, find themselves often facing conflict from natal families and the law. They suffer neglect, rejection, violence-physical and mental, abuse of law, surveillance, detention, and

interference with respect to personal, professional, economic, medical and other vital decisions of their lives on account of their self-determined gender identity and sexual orientation, whether or not they are in intimate relationships;

II. That the directions of this Hon'ble Court in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 on sensitizing and training the law enforcement in order to respect, protect and fulfill the basic rights of LGBTI individuals have not translated into offering a modicum of safety, security and dignity as countless incidents documented in this petition demonstrate that the police often act as an instrumentality of the natal family in furthering their illegal diktats, including separating chosen partners and seeking 'custody' of adults who decide to leave abusive homes;

III. That the decisions of this Hon'ble Court on matters relating to the fundamental right to privacy (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1), the fundamental right of choice of partner in marriage (*Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343) and anti-discrimination on basis of sex, gender identity and sexual orientation (*National Legal*

Services Authority (NALSA) v. Union of India, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1) have imminent and substantial bearing on the denial of solemnization and registration of marriages involving LGBTI individuals under the *Special Marriage Act, 1954* (hereinafter 'SMA'). Sections 2(b), 4 and Parts I-II of First Schedule of SMA are thereby *ex facie* discriminatory on the basis of gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution;

IV. That the “notice, domicile and objection” framework under Sections 5-9 of SMA acts as a deterrent for LGBTI persons to solemnize and register marriages, and thereby violates the fundamental right to marry for groups of individuals who have historically suffered stigma, discrimination and violence from state and non-state actors, including natal families, on basis of their identities of caste, religion, gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution;

V. That the 'Family' as a unit has traditionally been believed to be a source and site of love, care, protection and rearing, but experience demonstrates that it can also be a site of breach of basic human rights, and a source of discrimination, hate and violence, This is also recognised by law, like the Protection of Women from Domestic Violence Act, 2005, which is mandated to protect women from all forms of domestic violence from family members.

VI. That jurisprudential developments through decisions of this Hon'ble Court that advance propositions with respect to transcending the institution of natal family and marriage as a source of rights (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*) and purposively applying the constitution and law in order to protect rights of 'atypical families' or 'chosen families' (*Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088*) have imminent and substantial bearing on the protection of fundamental rights of LGBTI individuals irrespective of marital status, against a lived experience and history where natal families are in conflict with LGBTI

individuals. The law's conception of a family as members related only by 'marriage, birth or adoption' is not representative of the lived experiences of unmarried LGBTI individuals and the manner in which chosen families are organized, especially as the 'family' is the site of hetero-normative expectations, opposition and violence for many, like some of the Petitioners herein. The law's failure to recognize kinship bonds beyond the aforesaid category of 'family' leads to systemic exclusion and vulnerability in matters relating to healthcare, estate planning, housing, inheritance, and other social and economic rights which otherwise accrue as a direct incidence of a lawful marriage or blood related family ties, and is thus violative of Articles 14, 15, 19 and 21 of the Constitution of India.

1A. That the present petition is not a Public Interest Litigation.

ABOUT THE PETITIONERS

1. That Petitioner No. 1, Rituparna Borah, is a queer feminist activist with over 15 years of experience of working on issues of gender and sexuality. She is currently a board member at Nazariya, which is a Queer feminist resource group that focuses, inter alia, on awareness and accessibility of the rights of LBT persons by

conducting training sessions, engaging in advocacy and running a dedicated help line.

2. That the Petitioner no. 1 has handled various cases of natal family and marital family violence against LBT persons. She played a crucial role in providing support to a transgender man in escaping his violent natal family in Agra, Uttar Pradesh. It was in this case that the Hon'ble Delhi High Court in its judgment titled, *Shivani 'Shivy' Bhat v. State of NCT of Delhi, (2015) 223 DLT 391*, held that one's sexual orientation and gender identity were central to their fundamental right to self determination. Further, the Petitioner has also supported LBT couples who have faced "corrective rape" and conversion therapy at the hands of their natal families.
3. That the Petitioner no. 1, belongs to an indigenous community (Koch community) in Assam and identifies as a lesbian woman. The Petitioner no. 1 has lost both her parents, her father only very recently. While her father was an ally and was supportive and understanding of her sexual orientation and lifestyle choices, her surviving familial relatives are not. Rituparna suffers from Fibromyalgia and Chronic Fatigue, which has been recognised in the UK as a potentially disabling condition. Her diagnosis requires

those close to her to provide regular care and support and also to take medical decisions on her behalf and in her best interest. Such crucial medical decisions that determine her quality of life cannot be left to her surviving natal family members who do not support, respect or understand her and her lifestyle decisions. Currently, with no existing allies in her natal family, the Petitioner no.1 also doesn't wish to nominate any surviving members of her natal family as beneficiaries to her estate or her belongings, or desire that any legal rights or claims in her name accrue to them. Rather, she wants to assign such benefits, rights and claims to the people who might not be her de jure family but are her de facto support system and will take decisions in her best interest. She presently resides with her live-in partner in New Delhi.

4. That During Covid-19, Petitioner No. 1 and Nazariya provided relief in the form of food and ration supplies to LGBTI individuals who faced difficulties due to the restrictions on movement due to lockdowns and those who suffered loss of employment and housing.
5. That the Petitioner no. 1 was also a member of Voices Against 377, a coalition of persons who participated in the challenge against

Section 377, of the Indian Penal Code, 1860 which led to this Hon'ble Court's declaration to read-down the provision to exclude sex between consenting adults in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. The Petitioner no. 1 is also a trained peer counselor and has successfully run the helpline of Nazariya.

6. That Petitioner No. 2 Chayanika Shah is a queer woman – a teacher, researcher and activist based in Mumbai. She has a doctorate degree and was a Physics lecturer in a Mumbai based college, from which she took voluntary retirement in 2008. Since her retirement she has been actively teaching and conducting seminars on themes such as Gender Studies, Queer Studies and Science Education.
7. That in the last 14 years, Petitioner No.2 has collaborated on three studies related to queer and transgender lives. The first was a research study titled, *“Breaking the Binary: Understanding concerns and realities of queer persons assigned gender female at birth across a spectrum of lived gender identities”*, which was based on qualitative interviews with 50 such individuals across the country. This study was conducted from 2009 to 2013 and later published as a book titled *“No Outlaws in the Gender Galaxy”* co-

authored by her and published by Zubaan Press in 2015. The second was a short study in 2013 with TISS, Mumbai titled, *“Making sense: Familial journeys towards acceptance of gay and lesbian family members”*. More recently from 2017 to 2019 she has been part of a multi-city study housed in TISS, Mumbai titled *“An exploratory study of discrimination based on marginalized genders and sexualities”*.

8. That as a member of voluntary collectives like Forum Against Oppression of Women (FAOW) for the last 4 decades and more recently of the People’s Union for Civil Liberties (PUCL), Petitioner No. 2 has been actively working on issues related to human rights from a queer feminist lens. She has been part of a voluntary group based in Mumbai, LABIA - A Queer Feminist LBT Collective from 1995 to 2021. As part of LABIA, she has worked towards creating space and support for many LBT people from Mumbai. They have worked with other feminist LBT groups and women’s groups to provide safe shelter and security to many people from across the country as well. Over the years, as more and more people reached out, LABIA along with the other organizations and individuals

worked within a loose network of LBT groups and individuals across the country, of which she remains an active member.

- 9.** That Petitioner No. 3, Minakshi Sanyal is a queer feminist activist and Indian citizen based in Kolkata. She has been engaged in the LGBTQIA+ rights movements and feminist movements in India for more than two decades. She is co-founder of Sappho (formed in 1999) and Sappho for Equality (formed in 2003), Kolkata, which is the first LBT rights collective and organization in eastern India. She served as the Managing Trustee for Sappho for Equality during 2003 - 2020 and continues to play an active role in mobilizing LBT communities in West Bengal.
- 10.** That Petitioner No. 3's life's journey depended on nothing but self-reliance, which is why she took voluntary retirement at the age of 53 from a public sector company and devoted herself completely to the feminist movement and the movement for the rights of marginalized sexualities. For the last 7 years, she has been actively engaged in conducting sessions on gender and sexuality at various higher educational institutions.

11. That in 2014-1015 the Petitioner No. 3 was engaged in a research study, titled, '*Politics of Living: In search of a roadmap for LBT(F to M)Q activism*'. Her jointly edited book titled '*Monologue: Dui Banglar Lesbian Kathan / Lesbian Narratives of Bangladesh and West Bengal*' was published in 2021 in both Bengali and English languages.
12. That Petitioner No. 4, Maya Sharma, who identifies as a lesbian woman, is a queer activist and writer, and is a part of the National Network of LBT persons. She is an Indian citizen and is based in Vadodara.
13. That in the late 1980s, the Petitioner No. 4 worked on the issues of single women in Delhi resettlement colonies. While working there she realized that the diversity amongst the single women concealed 'women who loved women'. These patterns also emerged in her work with trade unions. By the 1990s, she had to leave the union because of her queer activism.
14. That Petitioner No. 4 has a prolific writing career which began with her co-authoring a book on single women in Hindi, '*Kinaro Pey Ugti Pechan*,' She has also written a book titled, '*Loving Women: Being Lesbian in Unprivileged India*', published in 2006 by

Zubaan Books, which is based on her experience of living in Gujarat in the late 1990's when the queer voices of the marginalized community were barely audible. Her most recent publication, '*Footprints of a Queer History: Life Stories from Gujarat*', published in 2022 by Yoda Press, is the result of her years of involvement with queer issues: supporting queer couples in crisis, interacting with families of queer children and of bringing home the fragile entitlements available to trans persons under the *Transgender Persons (Protection of Rights) Act, 2019*. The stories narrated in Petitioner No. 4's books tell a tale of her personal struggle, in overcoming natal family violence, socio-legal struggles and finding friendships and love. Her life's work has meticulously cataloged the pain, stigma and silence which is woven into the everyday existence of the queer community.

The National Network for LBI Women and Trans Persons

15. That Petitioner Nos. 1-4 are part of an informal network called "*National Network of LBI Women and Trans persons*". This network's members include queer, intersex and trans individuals from Mumbai, Kolkata, Vadodara, Thrissur, Delhi, Chennai, Hyderabad and other cities. The members of the Network have

been active in other collectives and organizations working with and for LBI women and trans persons over several decades, whereby they have created spaces for these communities to reach out for connection and in case of any urgent crisis in their lives;

- 16.** That this network was created during a conference held in Bangalore in June 2008, when Petitioner Nos. 1-4 came together with others as an informal network of individuals and organizations. The network has evolved as new groups were formed and new people joined from different cities. They stayed in touch through joint campaigns and conferences from time to time but most importantly as a network collaborating with each other as they responded to pleas for help from LBI women and trans persons from across the country;
- 17.** That over the years Petitioner Nos. 1-4 and other members of the network have been contacted directly by a large number of queer and trans individuals, including Petitioner Nos. 5-10 herein. The presence of this network in different states has made a significant difference because distress migration from home towns and states has been a feature of the lives of LBI women and trans persons, due to violent opposition, hostility and discrimination from

natal families and local communities. They are forced to leave their homes and take refuge and shelter in anonymity in other states as far away as possible from their natal families because they fear being apprehended and separated. The Petitioners No. 1-4 often work in coordination since many a times the person(s) may need help in multiple locations.

18. That runaway LBI women and trans persons, often wish to marry each other and are seeking to secure some legal and social legitimacy for their relationship, particularly given the hostility, threat and violence that is inflicted on them not only by society at large but specifically from family members, opposed to their choice and decision. They have tried different ways of solemnising their relationship, through ceremony in temples or approaching state authorities to help them get married. They often approach LGBT activists, including Petitioner Nos. 1-4 when they desire to live as a married couple, so that their relationship is recognised with respect and dignity, and the ire of family and discrimination by society is blunted on account of the social and cultural privileges attached to 'marriage' and the recognition of their 'spouse' by family and the world at large. Petitioner Nos. 1-4 have assisted a significant

number of such couples hailing from all parts of the country, from the remotest of villages to the biggest of metropolis; from all religions, castes and also from adivasi communities. The common thread running through the lives of all LBT couples is the myriad forms of violence that they suffer from their natal families and local communities. More often than not the natal family is hostile to the relationship and opposed to the choice of partner, and far from being a source and space of love and protection, becomes a source and site of conflict from which such persons need protection, including seeking legal and constitutional protection through marriage.

- 19.** That while intervening in such situations across the country, Petitioner Nos. 1-4 have used all available statutory and constitutional mechanisms, including the provisions for addressing violence against women, habeas corpus petitions and appeals to higher officials in the police hierarchy, in order to safeguard the right to life and personal liberty of LBI women and trans persons. In some cases, they have been able to help the people get the required support and security to lead their chosen lives. In some, they have not been able to help because families employed

physical violence and force to separate the partners. In some others, it was too late to intervene, where one or both of them ended their lives, as they could no longer endure the relentless coercion, violence and pressure from their families to end the relationship. Petitioner No.1-4 have also witnessed situations where natal families have reconciled and accepted the choices made by their children, however, the proportion of instances where the family remains in conflict with queer–trans persons far outnumber these happy endings.

20. That the Petitioner Nos. 1-4 also find in the course of their work and their own lives that family violence is also continuously directed towards queer women and trans persons who may not be in relationships because their families disapprove of their self determination of their gender and/or sexuality. This violence includes attempts at conversion therapy, depriving them access to education, forced marriages, disallowing them to be mobile and communicate with others like them, and even threats or actual disinheritance.

21. That the Petitioner Nos. 1-4 have seen and continue to see many queer women and trans masculine persons struggle with the

violence that they face from their natal families, including providing adequate social and legal support to Petitioner Nos. 5-10 herein. Petitioner Nos. 1-4 are therefore before this Hon'ble Court to secure legal and constitutional protections which can enable and assist persons such as the Petitioners herein live their lives of choice, with dignity, autonomy and independence. Their queer feminist activism of 4 decades informs them that these difficult individual battles, which are often fought alone without social support or official assistance, can be aided by assembling an appropriate legal scaffolding, and the dynamism of the forever transformative Constitution of India provides the legal tools to build the same.

PETITIONERS 5-10

- 22.** That the Petitioner Nos. 5 -10 are before this Hon'ble Court for the legal recognition of their right to solemnize a marriage with a partner of their choice, irrespective of sexual orientation or gender identity. The Petitioners No. 5-10 have all suffered physical, verbal and psychological abuse from their natal families and subjected to bias, discrimination and prejudice from the State machinery because of their self determined gender identity, sexual

orientation and choice in life partner. The current legal regime's non-recognition of the right of same sex couples or trans and intersex persons to solemnize a marriage has exacerbated the prejudice and abuse faced by them leaving them vulnerable and veritable strangers in law.

- 23.** That Petitioner No. 5 aged about 23 years old, identifies as a trans-masculine person and Petitioner No. 6 about 22 years old is a cis-gender woman and they are in a romantic relationship. Petitioner No. 5 has completed his education up to Class XI and Petitioner No. 6 has completed her education up to Class VI. They are both Indian citizens and hail from socially and economically marginalized communities in Howrah, West Bengal.
- 24.** That when Petitioners 5-6 shared the news of their relationship with their families in 2019, Petitioner No. 5's family brutally assaulted him which almost left him for dead. His father threatened him that he must forget Petitioner No. 6 and get married. Petitioner No. 6 also suffered violence at the hands of her brother.
- 25.** That Petitioner Nos.5 and 6 have made several attempts to elope due to the grave resistance from the former's natal family, but were unsuccessful as his family members traced their location,

separated them and dragged him home against his wishes. In early 2020, when they both escaped to Barasat, Petitioner No. 5's family eventually found them after 3 months and manipulated them into returning home on the false assurance that they had accepted the relationship. However, on arriving home, Petitioner No. 6 was immediately sent to her residence and Petitioner No. 5's family again physically abused him. He was so distraught after repeatedly suffering physical violence and verbal abuse at the hands of his own family, he began contemplating self-harm as a way to escape his abusive circumstances.

- 26.** That during her stay at her natal family home, Petitioner No. 6 reached out to Sappho for Equality (SFE) - a Kolkata-based organization which works for the rights of LBI women and trans persons, for assistance as she was facing pressure from her brother to get married. The familial rejection of her relationship with Petitioner No. 5 and the constant threat of a forced marriage also pushed the Petitioner no. 6 to contemplate self-harm as a means to escape her abusive circumstances. As both the Petitioners were confined to their homes against their will due to Covid lockdown

measures, they experienced constant and heightened insecurity to their physical and mental health within their homes.

27. That on their final attempt at elopement on 05.02.2021, Petitioner Nos. 5 and 6 visited the Dunlop Police Station, Kolkata, for help. Subsequently, they called SFE's helpline and sought assistance as Petitioner No. 5 was apprehensive of his family's intervention to forcefully separate them again. SFE sought the intervention of the West Bengal State Women's Commission, who instructed the Dunlop Police Station to keep Petitioner Nos. 5 and 6 safely in protective custody for the night. That the Petitioner Nos. 5 and 6 spent the night at the police station as they feared violence from their natal families. However, instead of assuring the Petitioners of their safety and security, the police subjected them to verbal abuse, issued threats of violence and shamed them for leaving their natal families in order to pursue their relationship. The police even contacted Petitioner No. 6's father and told him to "discipline" her through physical violence.

28. That the police's hostile treatment of the Petitioner Nos. 5 & 6 is illustrative of the general attitude of law enforcement towards LGBTI couples who runaway from natal families due to the real

threat of violence, wherein the legacy of criminalization and the vagueness of the legal status of such relationships translates into a climate of social disapproval by families and the police alike.

29. That due to their inability to complete their education, both Petitioner Nos. 5 and 6 have faced significant challenges in securing formal employment. At present, Petitioner No. 5 works at a cafe and Petitioner No. 6 works in a boutique and they both struggle for sustenance on a daily basis. After leaving SFE's temporary safe residence, both Petitioners continue to face challenges in securing rental housing due to intersectional vulnerabilities on account of their gender identity, sexual orientation, religion and class, apart from their inability to cohabit as a married couple in the eyes of law.

30. That Petitioner No. 7, 23 years old, identifies as a trans-masculine person and Petitioner No. 8 (21 years) is a cis-gender woman and they are in a romantic relationship. They are both Indian citizens.

31. That Petitioner No. 7 used to regularly visit Petitioner No. 8 at her residence, in Baranagar, North 24 Parganas, West Bengal, as they both lived there with their natal families. However, when

Petitioner No. 8's parents learnt about their intimacy, they started harassing and physically abusing her to discourage her from continuing the relationship with Petitioner No. 7. Unable to face the violent abuse at home, Petitioner No. 8 decided to leave her natal home of her own volition.

- 32.** That since June 2020, Petitioner Nos. 7 and 8 have been living together in a rented house in Kolkata. That after Petitioner No. 8's father learnt of her relationship with Petitioner No. 7, he canceled her enrollment at the Techno India College, where she was pursuing a Bachelor in Business Administration, and started pressuring her to get married. In order to separate them against their wishes, Petitioner no. 8's mother even lodged a criminal complaint against Petitioner No. 7 in September 2022, falsely alleging that he had abducted her daughter and stolen valuable items from their residence. Her family went to the extent of displaying "missing persons" posters in public spaces and employed local goons to trace their location. These acts by Petitioner No. 8's natal family heightened the risk to their safety and security.

33. That due to the false FIR lodged by the natal family of Petitioner no. 8, Petitioner No. 7 was arrested and he was only released on bail after unjustly suffering 3 months of detention due to an egregious abuse of the process of law. Petitioner No. 8's family was present at the court for the hearings and they attempted to forcefully bring her home. However, the family members ceased their attempts as soon as they realized they could not risk drawing attention to the dispute in the court premises. The copy of the FIR and the bail order is not being filed along with the petition in order to protect the identity of the Petitioners who remain vulnerable to threats and coercion. The Petitioners undertake to produce the said documents in court if so directed.

34. That Petitioner No. 8's parents persisted in their attempts to bring her back to the natal home by any means whatsoever. Her mother made pleas of her father being missing or her being subjected to domestic violence, in order to compel her to come home. Petitioner No.7 and 8 decided to return to their natal home temporarily until such circumstances settled down. When they returned home, they were forcibly trapped and they learnt that the Petitioner No. 8's mother had employed false pretexts in order to

bring her home and restrict her liberty. They both were not allowed to go outdoors and were under strict surveillance within the home. Both their phones were confiscated to cut them off from any support from the outside world. Her family manipulated her by imputing false and malicious allegations of “human trafficking” on Petitioner No. 7. They involved their relatives and neighbors in the matter to “counsel” Petitioner No. 8 to break the relationship and when the “counseling” wouldn’t suffice, everyone verbally abused and issued threats of physical violence against Petitioner No. 7 and 8 to forcibly separate them. The Petitioner No. 8’s father even threatened to sexually assault Petitioner No.7.

- 35.** That when Petitioner No. 7 and 8 discretely attempted to contact the local police for help, they were of no assistance whatsoever as they only spoke to Petitioner No. 8’s natal family to verify their safety and well-being, who falsely assured the police of the same and silenced the matter. That at this stage, in September 2022, Petitioner No. 7 contacted SFE and desperately requested for urgent help to protect Petitioner No. 8. When the SFE team reached Petitioner No. 8’s residence, they were intimidated by 3 men who were business associates and family friends of Petitioner

No. 8's father. The men threatened the SFE team and said that they considered homosexuality to be a "perversion" and claimed that Petitioner No. 7 is a "bad influence" on Petitioner No. 8. In front of Petitioner no. 8's natal family, SFE members asked her whether she wants to stay with her parents or live with Petitioner No. 7. When Petitioner No. 8 asserted that she wants to live with Petitioner No. 7, the SFE team helped her pack her belongings and requested her parents to handover her certificates and essential official documents.

36. That Petitioner No. 8's parents initially resisted but eventually handed over the documents. That the SFE team also contacted the Belgachia Police Station for help, who instructed all parties to appear before them to resolve the matter. At the police station, the police officers initially supported the family and insisted that Petitioner No. 8 should return to her natal home. However, with SFE's intervention and explanation of the rights of all consenting adults to choose a partner and live together irrespective of gender identity and sexual orientation, the police changed their attitude. The Police officers counseled Petitioner No. 8's mother that the family cannot interfere in her private decisions. Even when

Petitioner Nos. 7 and 8 were leaving the police station along with the SFE team, they were chased by Petitioner No. 8's mother who was verbally abusing them.

37. That at present, Petitioner Nos. 7 and 8 are living together in a rented house in Kolkata. However, the criminal proceedings falsely initiated by the family of Petitioner No. 8 against Petitioner No. 7 are currently pending and have detrimentally affected his employment opportunities. Petitioner No. 8 is currently the sole earning member and supports the family. Petitioner No. 8's family continues to keep a watch on her whereabouts and contact her from time to time in order to manipulate her into breaking the relationship and returning to her natal home.

38. That Petitioner No. 9 is a 21 year old, cis-gender woman and Petitioner No. 10 is a 22 year old transgender man and they are both in a romantic relationship. They met when they were studying in Class VI in a government school in Darbhanga, Bihar. They fell in love during their formative schooling years. They are both Indian citizens.

- 39.** That in November 2019, when they were in Class XI, Petitioner No. 10's parents started pressuring him to marry. On 26.11.2020, when he refused to get married, his family sent him to his elder sister's house in Muzaffarpur and started looking for a man to marry him in the meantime. At his sister's home, he confided in her about his gender identity and his relationship with Petitioner No. 9. His sister understood and accepted his identity and decided to not let him go back to the natal home because their parents threatened to kill him if he did not marry.
- 40.** That in January 2020, Petitioner No. 10's parents started issuing death threats to his elder sister and her husband for supporting his decisions. His sister sent him to their maternal grandmother's home in Samastipur, where he lived up to October 2020. During this time, Petitioner No. 10's maternal uncle requested his family to allow him to finish his education up to Class XII.
- 41.** That in December 2021, Petitioner No. 10's family arranged his marriage with a man in Patna. Petitioner No. 10 informed the man about his relationship with Petitioner No. 9 and requested him to refuse the marriage proposal before their respective families,

however, the man expressed his wish to solemnize the marriage notwithstanding Petitioner No. 10's explicit wishes. On 13.12.2021, the marriage ceremony was performed.

- 42.** That in March 2022, Petitioner No. 10 convinced his 'spouse' to send him to study in Darbhanga to prepare for an ITI diploma course. Petitioner No. 9 also came to Darbhanga to prepare for the CTET exam. Here, Petitioner Nos. 9 and 10 started living together in a rented house. On 27.03.2022, Petitioner No.10's 'spouse' came to meet him for Holi celebrations where he demanded Petitioner No. 9 to have sex with him and threatened to tell their families about their relationship if she refused. That when Petitioner No. 9 refused, Petitioner No. 10's 'spouse' physically assaulted them both and informed their families of their relationship. Apprehensive about their safety and security, Petitioner Nos. 9 and 10 decided to run away. They went to the nearest railway station and arrived at the Sitamarhi railway station. On 28.03.2022 at 3:00 AM, their families found them both at the Sitamarhi railway station and took them both by force to Petitioner No. 10's paternal aunt's home in Baheri, where they committed physical assault on both of them in separate rooms. Petitioner No. 10's father demanded

Rs.15000/- from the mother of Petitioner no.9 as a pre-condition for her release.

43. That Petitioner No. 10's family coerced him to write a 'suicide letter' where he was ordered to assign the reason for his 'death' to Petitioner no. 9. He wrote the letter under fear for his safety, but when he didn't mention Petitioner No. 9's name in it, his father cut his wrist. His father again demanded that he write the letter and mention that he is not 'mentally stable'. After Petitioner No. 10 wrote the letter under fear for his safety, his father submitted copies of the 'suicide letter' to the nearest police station and the local sarpanch.

44. That in April 2022, Petitioner No. 9 contacted Nazariya - a Delhi-based queer feminist resource group - for help, who connected them with Women Special Cell in Darbhanga. Petitioner Nos. 9 and 10 decided to flee from their natal family homes on 29.04.2022 and meet at the Baheri police station. However, on 28.04.2022, Petitioner No. 10's family confiscated his phone and his 'spouse' physically assaulted him. On 29.04.2022, Petitioner No 9 and 10 met at the Baheri Police Station, after leaving home under false pretexts to evade surveillance from the families. At the

Baheri Police Station, they were redirected to the Laheriya Saray Police Station which is designated as the Mahila Police station, where the officers noted the couple's written statements. The police officers assisted Petitioner No.10 and his 'spouse' in preparing their petition for divorce, which was signed by both parties. On the night of 29.04.2022, Petitioner Nos. 9 and 10 arrived at Patna to stay in *Garima Greh* shelter homes for transgender persons, which operates under the aegis of the Ministry of Social Justice and Empowerment (MOSJE).

- 45.** That since June 2022, Petitioner Nos. 9 and 10 have been living at a rented house in Delhi since they couldn't live together at the *Garima Greh* in Patna for a long duration, as cis-gender women are not permitted to stay at these shelter homes.
- 46.** The sole Respondent is the Union of India, through the Ministry of Law and Justice.

BRIEF FACTS AND BACKGROUND

Denial of Choice by Natal Families

47. That the collective experiences of Petitioner Nos. 1, 5 -10 are illustrative of the range of interference and multiple violations by natal families that LGBTI individuals continue to suffer every day across the country, which is further aggravated due to the non-recognition of their relationships under marriage laws. LGBTI individuals are often compelled to sever ties with their natal families for survival and self-preservation. Yet, they continue to live under precarious circumstances maintaining constant vigil against real and imminent dangers of surveillance and violence at the instance of natal families and the police, as Petitioner Nos. 1, 5-10 continue to do even today. The force of prejudice and extra-judicial attempts at separating the couples can be substantially mitigated if LGBTI individuals can exercise the fundamental right to marry, which can add layers of social, economic and legal protection to their safety, security and well-being against interference from natal families and the police. While natal families may continue to meddle with respect to a lawfully married couple, however, a

declaration by this Hon'ble Court recognizing the fundamental right to marry for LGBTI individuals, will slowly but surely have a cascading effect on society, including natal families and the police, in recognizing LGBTI individuals as equal citizens in a constitutional democracy.

- 48.** That the lack of legal recognition to lesbian, gay, bisexual, transgender and intersex (LGBTI) persons' relationships is historically a contributing factor emboldening natal families to force them to enter into 'heterosexual' marriages against their will. Attached herewith is a copy of extracts from '*Less Than Gay, A Citizens Report on the Status of Homosexuality in India*', *AIDS Bhedbhav Virodhi Andolan (1991)*, pgs. 8-9, marked as **Annexure-P1 at Pages 83-85**.
- 49.** That forced marriages have compelled many LBT people to run away in attempts to 'marry' a partner of their choice or die by suicide. Attached herewith are copies of extracts from '*Lesbian Suicides and the Kerala Women's Movement*', *Paper presented at Hyderabad Young South Indian Feminists Conference, Deepa Vasudevan, Sahayatrika, (2001)*, pgs. 1-6, marked as **Annexure-P2 at Page 86-98A** and '*Law like Love: Queer perspective on*

Law, Yoda Press (2011), pgs. 325-337, marked as **Annexure-P3** at Page 99-105B.

50. That lesbian couples have frequently sought to formalize their relationships under the device of *maitri karar* (friendship agreements), however, the legal ambiguity of such arrangements has increased their vulnerability to interference by natal families and non-recognition in law. Such intimate relationships may not always be sexual or romantic, but are borne out of mutual care and respect, and allow gender non conforming individuals to exercise their right to choice of family. Attached herewith is a copy of extracts from '*Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family*', *Partners for Law in Development* (2010), pgs. 66-72, marked as **Annexure-P4 at Page 106-113** ;

51. That several rural and urban LBI women and trans persons have historically undergone religious ceremonies to 'marry' in witness of their supporting families, local communities and officiated by priests, or died by suicide together, in cases where families and communities have violently opposed such relationships, often abetted by the local police force. Ironically, the

earliest reported instance from 1987 concerned 2 police-women, Leela Namdeo and Urmila Shrivastav, who married each other at a temple in Bhopal. The formal law may not recognize such 'marriages', however, local customs keep evolving and sometimes gain social recognition after long duration of practice (*Love's Rite: Same Sex Marriages in Modern India and the West*, Ruth Vanita, Palgrave Macmillan (2005))

52. That LBI women and trans masculine persons who faced violent resistance to their relationships from natal families or third parties approached High Courts for relief even before *Naz Foundation v. Govt. of NCT of Delhi, 2009 (111) DRJ 1 (DB)*. However, since at the time the law *de facto* criminalized LGBTI relationships, the vast majority of legal records relating to protection cases of LGBTI persons between the period 1947 to 2009 do not authentically represent the gender identity or sexual orientation of parties before the courts, since openly identifying as LGBTI could invite social hardships and legal penalties. Attached herewith is a copy of extracts from '*Queer Women and Habeas Corpus in India: The Love that Blinds the Court*', Ponni Arasu and

Priya Thangarajah, 19(3) Indian Journal of Gender Studies 413, (2012), pgs. 4-6, 8-17, marked as Annexure-P5 at Page 114-137.

53. That despite landmark declarations of this Hon'ble Court with respect to self-determination of gender identity and decriminalization of sex between consenting adults, LBI women and trans masculine persons are routinely compelled to resort to High Courts for seeking remedies against arbitrary interference and violations by natal families and third parties (*Mansur Rahman v Superintendent of Police, 2018 SCC Online Mad 3250; Sadhana Sinsinwar and Another v State & Ors., WP (Crl) No. 3005 of 2018 disposed of by final order dated 01.10.2018; SSG v State of West Bengal, Writ Petition No. 23120(W) of 2018, disposed of by final order dated 29.01.2019; Bhawna and Others v State and Others, WP (Crl) No. 1075 of 2019, order dt. 12.04.2019; Monu Rajput v State, 2019 SCC Online Del 9154; Madhu Bala v State of Uttarakhand and Others, 2020 SCC Online Utt 276; Paramjit Kaur and Another v State of Punjab and Others, CRWP no. 5042/2020 disposed of by final order dated 20.07.2020; Sultana Mirza and Another v State of Uttar Pradesh, Writ Petition (C) 17394/2020, disposed of by order dated 02.11.2020; Raunak Roy v State of*

Karnataka, WP (C) 85 of 2020, disposed of by final order dated 14.12.2020; Poonam Rani and Another v State of UP and 5 others, Writ Petition (C) No. 1213 of 2021 disposed of by final order dated 20.01.2021; S. Sushma & Anr. v Commissioner of Police, order dated 07.06.2021 in WP No. 7284/2021).

- 54.** That analysis of the aforesaid cases reveals that this process is fraught with real and imminent challenges for LBI women and trans people, as they are compelled to negotiate exercising their right to choose a partner against threats to personal safety and economic security by natal families. The recourse of approaching High Courts on an ad-hoc basis often provides limited relief in terms of prevention of imminent threat to life. In this context, solemnization and registration of marriages irrespective of gender identity and sexual orientation of parties can mitigate the impact of arbitrary interference and violence by natal families and third parties. Attached herewith is a copy of extracts from *'The L World: Legal Discourses on Queer Women'*, Surabhi Shukla, 13 NUJS L. Rev. 3 (2020), pgs. 14-22, marked as **Annexure-P6 at Page 138-162** .

primacy of marriage as the principal marker of adult commitment,” as explained by Deborah A. Widiss in “*Chosen Family, Care, and the Workplace*”, 05.11.2021, published in The Yale Law Journal. This idea is dealt with in greater detail below.

Revisiting the Paradigm of Care in Context of Conflict inflicted by Natal Families:

57. That a critical mass of the LGBTI community may not choose marriage as an institution to define the meaning of their intimate relationships and lives; whereas on the contrary, they seek and choose to assign rights and obligations with respect to the most intimate aspects of their private lives in relation to housing, custody of minor children, end of life care decisions, among others, to individuals like friends, live-in partners and any other persons of vital importance in their lives. These lived experiences with chosen families occur against a backdrop of restrictions and interference by natal families who deny dignity and autonomy in life and death. It is pertinent to note that while the notion of a chosen family may be borne out of the conflict inflicted by the natal family, it is not an idea that challenges natal family bonds, but merely allows for a

more inclusive understanding of adult intimacies and commitments, leading to conceptualizing of families that are more capacious, inclusive and available to LGBTI persons, especially when in need of care. Attached herewith is a copy of extracts from '*Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*', Edited and Compiled by Bina Fernandez, India Centre for Human Rights and Law (1999), pgs. 83-88, marked as **Annexure-P8 at Page 240-245A** and '*Submissions by LBT Women's Groups to the Law Commission of India (2018)*', marked as **Annexure-P9 at Page 246-251A**.

58. That LGBTI individuals face invidious interference and opposition from natal families on account of any choice (whether personal, professional, economic and others) that affirms the centrality of their gender identity and sexual orientation to their lives, irrespective of whether or not they are in relationships and/or cohabit with a partner. Hence, the recognition of an individuals' ability to nominate 'any person', not conventionally related, yet being most intimate, available and reliable, to secure their best interests in circumstances of vulnerability, incapacity or when the individual is unable to make a decision for any other reasons,

assumes greater significance for unmarried LGBTI individuals who, out of abundant caution, need to clearly define and limit the role of their natal families in their private lives to every possible extent, including exclusion in the most dire events. The primary objective being to ensure one's best interests, a large number of LGBTI persons, informed by their lived experiences of natal family rejection, hostility and violence, need the legal right to substitute natal family relatives with their chosen family or 'nominee' for medico-legal as well as social purposes. In the absence of such legal recognition, the law perpetuates natal family violence on LGBTI persons even decades after they may have succeeded in escaping violent and abusive families. Perpetuation of such violence, even though seemingly as per law, is impermissible under the constitutional scheme which does not permit the perpetuation of historic injustices, biases and prejudices through promulgation or continuance of laws.

THE SPECIAL MARRIAGE ACT, 1954

- 59.** That SMA was enacted in 1954 to serve as a secular alternative for individuals who cannot, or do not, wish to get

married under personal laws. The SMA prescribes procedure for the solemnisation of marriages, wherein notably, none of the requirements are based on religious or scriptural prescriptions. The conceptualisation of marriage under the SMA, thus, is of a relationship born out of the free choice of two adult, consenting individuals.

60. That Section 4 of the SMA refers to a marriage between “any two persons”. However, Section 4(c) stipulates “*the male has completed the age of twenty-one years and the female the age of eighteen years*” as a condition for a valid marriage. Further, Section 2(b), which defines the degrees of prohibited relationships, does so by referring to a “man and any of the persons mentioned in Part I of the First Schedule, and a woman and any of the persons mentioned in Part II of the said Schedule.” As Part I exclusively contains female family members and Part II exclusively contains male family members, a joint reading of the provisions implicitly codifies the rule that a marriage under the SMA shall be between heterosexual partners. This is the traditional, literal interpretation of the statute.

- 61.** That it is important to note that personal laws on marriage also codify the rule by implication that a marriage can only subsist between heterosexual partners. However, these conceptions must have no role to play under SMA as the law was enacted as an alternative to religious marriages under personal laws, and must therefore be guided by adequate determining principles in accordance with the Constitution.
- 62.** That Sections 5 to 9 of the SMA set out the procedural framework to be complied with for a marriage to be solemnised. The “notice, domicile and objection” framework proceeds through the following stages: a. The individuals intending to marry must notify a Marriage Officer in the district in which at least one of the parties to the marriage has resided for a period of not less than 30 days, before the date of solemnisation. b. The Marriage Officer must enter the details of the individuals into a Marriage Notice Book. This Book is to be made open to public inspection. c. The Marriage Officer must also affix the details of the parties in a “conspicuous place.” d. Once the thirty-day notice period commences, “any person” is authorized to object to the proposed marriage, on the basis that the requirements of Section 4 are

contravened. e. On receiving an objection, the Marriage Officer is obligated to decide it within thirty days, and has the powers of a civil court in doing so. f. It is only after these steps have been completed, that the marriage may be solemnised.

- 63.** That the “notice, domicile and objection” framework, thus, ensures that whether or not they want to, individuals’ decision to marry will be publicised to the world at large, and - specifically - to their families and to the immediate societies in which they live.
- 64.** That the intention of the “notice, domicile and objection” framework appears to be to address potential situations where individuals suppress or conceal a breach of a Section 4 condition from the Marriage Officer. However, the manner in which the SMA seeks to address this issue is grossly disproportionate. It is also important to note that the “notice, domicile and objection” regime is conspicuously absent from personal laws governing marriage.
- 65.** That the “notice, domicile and objection” regime casts an undue burden upon many individuals who wish to marry, especially when such marriages are in the teeth of familial or social opposition. There are, therefore, countless cases where individuals have no choice but to keep their relationship a secret from their

families. This extends to marriage: once a marriage has been solemnised, familial objection might be blunted. However, familial and social objections are likely to be particularly strong in the interregnum period between a publicly-declared intention to marry, and the solemnisation of the marriage itself, as natal families will perceive that through coercion and pressure, the situation is still reversible.

66. That most vulnerable to familial and social pressure will be individuals who already exist at several axes of marginalisation and disempowerment, those who are economically dependent on their families, those who are already subjected to caste discrimination, inter-faith couples, and for the purposes of this petition, in particular - gender and sexual minorities. It is thus relevant to note the intersectionality within which such laws operate and the heightened vulnerability of LGBTI persons in such circumstances. Attached herewith is a copy of the news report 'How the Special Marriage Act is Killing Love', *Article 14*, dated 19.10.2020 marked as **Annexure-P10 at Page 252-265**.

67. That the "notice, domicile and objection" framework under SMA is facially neutral, however, the adverse impact in

implementation falls disproportionately on inter-caste and inter-religious couples. Petitioner Nos. 1-4 and other LBT persons have authored and published a large volume of research studies, literature and books which document the nature and extent of the epidemic of abuse and violations committed by natal families, police and third parties against LGBTI individuals. These provide evidence of the very real and imminent risk to life and liberty of individuals in relationships irrespective of gender identity and sexual orientation, who are very likely to face similar or worse consequences under the “notice, domicile and objection” framework of SMA. The authorisation of ‘any person’ to object and cause interference in solemnization and registration of marriages on the basis of gender identity and sexual orientation, directly infringes upon personal autonomy in organizing the most intimate aspects of one’s lives. A declaration by this Hon’ble Court to affirm the fundamental right to marry, without dismantling the “notice, domicile and objection” framework under SMA, will perpetuate the cycle of queer and trans persons facing conflict from the law and natal families, and compel them to ‘abscond’ from one state to another in search of safe havens. Attached herewith are copies of

extracts from '*The nature of violence faced by lesbian women in India, A Study by Bina Fernandes and Gomathy N.B.*', Tata Institute of Social Sciences (2003), pgs. 40-46, 111-112, marked as **Annexure-P11 at Page 266-275** '*Documenting and Mapping Violence and Rights Violations Taking Place in Lives of Sexually Marginalized Women to Chart Out Effective Advocacy Strategies*', Sappho for Equality (2011), pgs. 30-42, marked as **Annexure-P12 at Page 276-289** '*Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Identities, A Study by LABIA*' – A Queer Feminist LBT Collective (April 2013), pgs. 33-38, marked as **Annexure-P13 at Page 290-296**; '*Beyond the Roof: An action-research study on women survivors of violence and shelter homes in Delhi*', Action India, Jagori and Nazariya (2019), pgs. 16-19, marked as **Annexure-P14 at Page 297-301**; '*Progressive Realization of Rights: A Co-Traveller's Reflections on Crisis Intervention*', Suchithra K K, Deeptha Rao V N & Sathyakala K K (2022), pgs. 5-15, marked as **Annexure-P15 at Page 302-313**.

68. That for these reasons, the unconstitutional legacy of "against the order the nature" is writ large on the "notice, domicile

and objections” framework, as SMA’s legal regime directly fosters a culture of intolerance, whereby third parties use the law and extra-judicial means to deter “*all forms of intimacy which the social order finds ‘disturbing’*”.

69. That the Petitioners approach this Hon’ble Court for the reliefs prayed for herein on the following, amongst other grounds, which are without prejudice to one another:-

GROUND

- I. **Non-recognition of marriage between two consenting adults on basis of gender identity or sexual orientation under the scheme of solemnization and registration of marriages in SMA violates Articles 14, 15, 19 and 21:**

70. BECAUSE LGBTI persons need the layers of social, economic and legal protections which accrue as a direct incidence of marriage, in order to shield themselves from the opposition, interference, violence and violations by natal families;

71. BECAUSE as conflict with natal families is a recurring phenomenon in many queer and trans persons’ lives, the right to marry can substantially mitigate these circumstances by offering

the immunity of state sanction to queer and trans marriages, and hence shield them against the misuse and abuse of law by natal families;

- 72.** BECAUSE as conflict inflicted by natal families results in loss of social and economic rights accrued as members of such families, the benefits accruing as the direct incidence of marriage will offer a source of support to queer and trans couples in order to live with dignity;
- 73.** BECAUSE the rule of law mandates that notions of public morality must give way to constitutional morality in a Constitutional Republic. As a result, laws that codify inequality on prohibited grounds of discrimination must be interpreted in a manner that protects this guarantee (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1);
- 74.** BECAUSE LGBTI individuals' prayer for the right to marry under SMA must be adjudicated keeping in view the interpretive changes to the statute by the passage of time. This Hon'ble Court must take into consideration the progressive development of social and jurisprudential norms which have taken place since the

passage of SMA. Although constitutional in 1954, the SMA's validity must be interpreted as per LGBTI individuals' aspirations and recognized rights in 2023 (*John Vallamattom v. Union of India*, (2003) 6 SCC 611);

75. BECAUSE the mere fact that LGBTI marriages are considered “unconventional” by social norms does not justify depriving it of equal protection of law. The freedom of making a choice also encompasses the freedom to make an “unpopular” choice. (*Joseph Shine v. Union of India*, (2019) 3 SCC 39);

76. BECAUSE marriage is an expressive choice, therefore, it implicates the freedom of expression and association under Articles 19 and 21 of the Constitution (*Asha Ranjan vs State of Bihar*, (2017) 4 SCC 397; *Shakti Vahini vs Union of India*, (2018) 7 SCC 192);

77. BECAUSE the denial of recognition of marriages under SMA on basis of gender identity or sexual orientation are not based on any adequate determining principle, therefore, the impugned provisions are manifestly arbitrary. (*Shayara Bano v. Union of India*, (2017) 9 SCC 1);

78. BECAUSE the law can govern conditions of solemnizing a valid marriage and dissolution thereof, however, neither the State nor the law can dictate a choice of partners or limit the free ability of every person to decide on this aspect. Social approval for intimate personal decisions is not the basis for recognizing them. The Constitution guarantees the right of every individual to take decisions on matters central to the pursuit of happiness. (*Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343)
79. BECAUSE this Hon'ble Court noticed that non-recognition of self-determined gender identity leads to denial of social, economic, civil and political rights of transgender individuals, including unfair exclusion from marriage laws which are coded in the binary of "male/female" (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438);
80. BECAUSE the institution of marriage cannot be limited between biological men and women, as with the march of time, the law recognizes that self-determined gender identity is the appropriate basis for recognizing rights of individuals, (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438);

- 81.** BECAUSE provisions of the *Transgender Persons (Protection of Rights) Act, 2019* codify the rule of law on recognition of self-determination of gender identity and guarantee equality before law, and existing older laws must be revisited to ensure that the protections under the Transgender Persons (Protection of Rights) Act, 2019 see the light of day and are implemented on the ground;
- 82.** BECAUSE SMA's denial of recognition of marriages between two consenting adults, irrespective of gender identity or sexual orientation, embodies a stereotype which violates the guarantee of non-discrimination based on 'sex' under Article 15. The SMA is an instance of law where biological differences between sexes has devolved into oppressive cultural norms and therefore merits strict scrutiny in so far as the impugned law suffers from incurable fixations of stereotypical morality and conception of sexual roles (*Anuj Garg v Hotel Association of India, (2008) 3 SCC 1*);
- 83.** BECAUSE on the basis of this Hon'ble Court's recognition of self-determination of gender identity, there is judicial precedent under the HMA, MTP and IPC of expansive and inclusive

interpretation of gendered categories, to include transgender women and intersex persons identifying as women in laws regulating private aspects of family life and impacting violation of sexual autonomy. Laws governing marriage and other aspects of family life too must keep pace with this jurisprudential advancement, and specifically under the SMA, categories such as, 'woman/bride' and 'man/bridegroom' need to be interpreted as including transgender persons and intersex persons self identifying as woman or man, and not be limited to cis women and men. The submission herein seeks that legal terms be read and interpreted in an expansive and inclusive manner to ensure the right to marry and attendant and consequential rights are available and accessible to persons of all sexual orientation and gender identity. This is without prejudice to the Petitioner's prayer that the law be interpreted to recognize the right to marry any person of one's choice irrespective of sexual orientation or gender identity (*Arunkumar and Sreeja v. Inspector General of Registration*, AIR 2019 Mad 265; *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, 2022 SCC Online SC 1321;

Anamika v. Union of India W.P. (Crl) 2537/2018 before High Court of Delhi);

- 84.** BECAUSE the exclusion of LGBTI individuals from the institution of marriage under SMA perpetuates a history of discrimination, prejudice and social exclusion against the group. Any form of stigmatization which leads to social exclusion violates the anti-exclusion principle as codified in Article 17 (*Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1*);
- 85.** BECAUSE determining the constitutional validity of limiting the solemnization of marriages under SMA exclusively for heterosexual couples under the framework of analysis of the 'classification test' misses the true value of equality as a safeguard against arbitrariness. The exclusion of LGBTI individuals from the institution of marriage must be decided on the touchstone of the guarantee of substantive equality under Article 14, which in turn would inform and influence the classification test. (*Navtej Singh Johar v. Union of India, (2018) 10 SCC 1*);
- 86.** BECAUSE the codification of the complete spectrum of marriage related laws on basis of the male/female binary in matters relating to maintenance, child custody, divorce proceedings and

other aspects does not detain this Hon'ble Court from intervening on the limited aspect of solemnization of marriages by breaking the binary at this stage. SMA excludes LGBTI individuals from the institution of marriage for failing to conform to heterosexual expectations of society. In doing so, it perpetuates a symbiotic relationship between anti-LGBTI laws and traditional gender roles. One cannot separate the discrimination on the basis of sexual orientation and discrimination on the basis of sex because the former inherently proceeds on stereotypical notions of sex and gender roles. By attacking these gender roles, LGBTI individuals, in this move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchal sexual roles in order to function. (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1);

- 87.** BECAUSE in order to remedy systemic discrimination, the responsibility of constitutional courts is not limited to the negative duty of striking down discriminatory policy, criteria or practice (PCP) such as anti-sodomy laws and compensating the aggrieved for the harm, but also a positive duty to affirm the right to choose a partner

for marriage that can facilitate social redistribution by providing for entitlements that aim to negate the scope of future harm (*Madhu & Anr. v. Northern Railways & Ors.*, 2018 SCC Online Del 6660; *Lt. Col. Nitisha v. Union of India*, 2021 SCC Online SC 261);

88. BECAUSE the recognition of the right to marry and found a family for LGBTI individuals under SMA would guarantee substantive equality for the community by breaking a cycle of disadvantage associated with status, promote dignity and thereby redress stigma, stereotyping, humiliation and violence because of membership of an identity group and facilitate full participation in society, both socially and politically (*Lt. Col. Nitisha v. Union of India*, 2021 SCC Online SC 261);

89. BECAUSE the denial of the right to marry for LGBTI individuals under SMA fails to meet the material threshold of restriction of fundamental rights under Article 21, i.e., there exists no legitimate state interest in restricting the institution of marriage exclusively for cis-gender and heterosexual couples. Any purported justification is outweighed by the detrimental effects of systemic discrimination and violence on the lives of LGBTI individuals due to

exclusion from the institution of marriage (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1);

- 90.** BECAUSE domestic law must be applied in a manner consistent with binding international human rights commitments, therefore, SMA must recognize LGBTI marriages pursuant to Principle 24 (The Right to Found a Family) of the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, in order to withstand scrutiny of Articles 14, 15, 19 and 21 of the Constitution (*Nisha Priya Bhatia v. Union of India*, 2020 SCC Online SC 394; *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1);
- 91.** BECAUSE the substantial questions of law as to the interpretation of SMA and the Constitution are within the powers of adjudication of this Hon'ble Court and do not merit deference to the Parliament. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being

favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. In a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1);

II. The “notice, domicile and objection” framework under Sections 5-9 of SMA violates Articles 14, 15, 19 and 21

92. BECAUSE the struggle of individuals who seek registration of their marriages under SMA irrespective of gender identity and sexual orientation is located within the larger history of struggles against various forms of social subordination in India. The impugned provisions under SMA perpetuate the unconstitutional legacy of “against the order of nature” formerly sanctioned under Section 377, Indian Penal Code, 1860, (IPC) which was conceptually not limited to non-procreative sex, but applied to all forms of intimacy which the social order finds ‘disturbing’. This

includes various forms of inter-caste and inter-religious relationships which are sought to be curbed by society, including natal families. The re-imagination of the 'order of nature' as being not only about prohibition of non-procreative sex but instead about limits imposed by structures such as gender, caste, class, religion and community necessitates the protection of the right to marry and removal of impugned barriers under SMA, not just for LGBTI individuals, but for all (*Navtej Singh Johar v. Union of India, (2018) 10 SCC 1*);

- 93.** BECAUSE although the “notice, domicile and objection” framework is facially neutral, the adverse impact in implementation falls disproportionately on inter-caste and inter-religious couples, and especially on further marginalized couples, where one or both partners do not conform to the gender binary or have non conventional sexual orientation(s). Individuals in relationships across gender identity and sexual orientation are very likely to face worse consequences, on account of the ignominious history of violence and opposition from natal families as illustrated herein above. The impugned provisions have the effect of perpetuating disadvantage in the shape of social, economic and political

exclusion, psychological and physical harm, when viewed in the backdrop of the systemic disadvantages as well as the conflict inflicted by natal families faced by minority communities on basis of the aforesaid prohibited grounds of discrimination. Therefore, the impugned provisions of SMA are unconstitutional as they amount to indirect discrimination under Article 15 (*Madhu & Anr. v. Northern Railways & Ors.*, 2018 SCC Online Del 6660; *Lt. Col. Nitisha v. Union of India*, 2021 SCC Online SC 261);

94. BECAUSE the doctrine of intersectionality presents a framework of analysis to interpret the implementation of the “notice, domicile and objection” framework under SMA, by focusing on the effects of natal family opposition to solemnization of marriages by the intersection of caste, religion, gender identity and sexual orientation which shape individual and collective experiences of inequality (*M. Sameeha Barvin v. Jt. Secy., Ministry of Youth and Sports Development*, (2022) 1 Mad LJ 466; *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190);

95. BECAUSE it is necessary to consider the impact of SMA’s “notice, domicile and objection” framework on marginalized groups, whose social and economic conditions heighten their vulnerability

to discrimination, harassment and violence by natal families and third parties. The implementation of laws must not mirror the systemic discrimination prevalent in society but must be aimed at remedying this discrimination and ensuring substantive equality (*Devika Biswas v. Union of India And Ors.*, (2016) 10 SCC 726);

96. BECAUSE the “notice, domicile and objection” framework signals to natal families and local communities that third parties have a legitimate and vested right to cause interference and disruption in the most intimate and private aspects of lives of consenting adults, whether before or after marriage, resultantly depriving inter-caste, inter-faith and LGBTI couples the freedom from insecurity, interference and violence by state and non-state actors (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438);

97. BECAUSE Article 21 guarantees both procedural as well as substantive due process. Therefore, the scheme of SMA must be applied in a manner that is fair, just and reasonable in order to guarantee the fundamental right to marry. The procedure with respect to inspection of the marriage notice book and opportunity for filing objections with respect to a notice of intended marriage by

“any person” violates both the guarantees (*Mohd. Arif v. Registrar, Supreme Court of India, (2014) 9 SCC 737*);

98. BECAUSE the “notice, domicile and objection” framework is rendered unconstitutional on the ground of vagueness, as it lacks reasonable standards and clear guidance for citizens, authorities and courts, in so far as it allows “any person” to inspect records and cause interference between an intending couple. When a law uses vague expressions capable of misuse or abuse, it leaves affected parties in a boundless sea of uncertainty and has a chilling effect on the ability of individuals belonging to vulnerable groups to solemnize a marriage (*Shreya Singhal v. Union of India, (2015) 5 SCC 1*);

99. BECAUSE the Law Commission of India has recommended the procedure with respect to notice, domicile and filing objections under SMA to be completely deleted (*Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework. Report No.242 (2012)*);

100. BECAUSE while intra-community marriage laws (Hindu, Muslim, Christian, Parsi personal laws) do not provide for “notice,

domicile and objection” framework, the codification of the same under SMA is unconstitutional in so far as the impugned provisions are (a) disproportionate to the object of prevention of violations of the law and (b) there exists no legitimate state interest in regulating inter-religious marriages and inter-caste marriages when intra-community marriages are not subject to similar regulation (*Justice K.S. Puttaswamy v. Union of India (I)*, (2017) 10 SCC 1)

101. BECAUSE while intra-community marriage laws (Hindu, Muslim, Christian, Parsi personal laws) do not provide for the “notice, domicile and objection” framework, the codification of the same under SMA is unconstitutional in so far as it casts a presumption of criminality on any two consenting adults who choose to marry beyond constraints of caste, religion, heteronormativity, gender identity and sexual orientation (*Justice K.S. Puttaswamy vs Union of India (II)* (2019) 1 SCC 1);

102. BECAUSE the additional “notice and objection” framework under Sections 15-16 of SMA, meant for registration of marriages formerly solemnized as per personal laws, suffers from the same defects and violations as the “notice, domicile and objection” framework impugned herein, since it imposes an unconstitutional

barrier in circumstances where one party to a marriage has transitioned to affirm their self-determined gender identity and both parties have mutually decided to continue the marriage and save it's validity under Sections 15-16 of SMA;

103. BECAUSE the fundamental right to marry under Article 21 is rendered futile by the “notice, domicile and objection” framework, as such provisions have the direct and inevitable effect of emboldening natal families and local communities in negating this fundamental right (*RC Cooper v Union of India (1970)*, 1 SCC 248);

III. Non-recognition of ‘atypical families’ or ‘chosen families’ beyond constraints of marriage, blood or adoption violates Articles 14, 15, 19 and 21

104. BECAUSE for those who ‘come out’ as queer or trans to their families or are inadvertently found out to be queer or trans, the conflict from the family does not start and end with relationships. Irrespective of relationship status, queer or trans individuals are seen as “ill and abnormal”. Families resort to all desperate attempts to “reform” their children through coercive and violent means, which involve illegal and medically harmful methods

like “conversion therapies” or traditional methods through faith-healers or even forced heterosexual marriage, which is seen as a “cure” for all assertions of individual choice;

105. BECAUSE LGBTI individuals face opposition, denial of identity, restriction of liberty, surveillance, forced marriages and violence from “guardians, close relatives and family members” when they ‘come out’ and present their authentic selves before their families and society. The limitations of law’s recognition of only a typical family unit is grossly inadequate as it strips LGBTI individuals the autonomy to choose ‘any person’ in order to secure their best interests and ensure security of person, especially where the natal family is predisposed to reject and harm the LGBTI person. LGBTI people form different kinds of families for taking care and responsibility for and of each other, and pooling of financial and immovable assets, which are not protected by the law’s notion of a ‘family’.

106. BECAUSE the predominant understanding of the concept of a “family” both in the law and in society is that it consists of a single, unchanging unit with a mother, a father and their children. This assumption ignores both, the many circumstances which may lead

to a change in one's familial structure, and the fact that many families do not conform to this expectation to begin with. Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. A household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers of children may change with remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally, if not more deserving, not only of protection under law but also of the benefits available under social welfare legislation and policies. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones. (*Deepika Singh v. Central Administrative Tribunal*, 2022 SCC OnLine SC 1088);

107. BECAUSE while much of law's benefits are rooted in the institution of marriage, the law in modern times is shedding the notion that marriage is a precondition to the rights of individuals (alone or in relation to one another). Changing social mores must be borne in mind when interpreting the provisions of an enactment

to further its object and purpose. Statutes are considered to be “always speaking”. Societal reality indicates the need to legally recognize non-traditional manifestations of familial relationships. Such legal recognition is necessary to enable individuals in non-traditional family structures to avail of the benefits under beneficial legislation. Both married and unmarried persons have equal decisional autonomy to make significant choices regarding their own welfare (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*);

108. BECAUSE adults with capacity to consent have the fundamental right to self-determination and autonomy to refuse medical treatment. In this regard, Advance Directives by a terminally-ill person or a person in vegetative state, for withdrawing medical treatment, is entitled to be followed by a treating physician under Article 21 of the Constitution. This Hon’ble Court has laid down guidelines to facilitate the process of implementing Advance Directives, and outlined the role of *guardians, close relatives or family members* of the executor in giving effect to the same (*Common Cause v Union of India, (2018) 5 SCC 1; 2023 SCC Online SC 99*);

- 109.** BECAUSE competent courts routinely declare and appoint one spouse as the legal guardian of the medically incapacitated spouse, for managing the estate as well as participating in healthcare decisions in the best interests of the family. (*Rajni Hariom Sharma v Union of India and Anr.*, 2020 SCC Online Bom 880);
- 110.** BECAUSE the ability to nominate a caregiver in such emergency healthcare situations is severely restricted for LGBTI individuals who are facing conflict from their natal families. Often the ‘guardians, close relatives or family members’ are at best unaware of the wishes of the person, or worse, actively dishonour the wishes of the person, thereby, violating their rights and heaping indignity even in the midst of critical events;
- 111.** BECAUSE likewise LGBTI individuals are stripped of autonomy with respect to nominating ‘any person’ due to the non-recognition in law of ‘atypical or chosen families’ which are formed beyond the constraints of marriage, blood or adoption, in matters ranging from estate planning, housing, transfer of property, employment-based partner benefits, guardianship of children,

access to assisted reproductive technologies and many other private aspects of family life;

112. BECAUSE certain High Courts have expanded the scope of legal heirs for the hijra community by declaring that non-conjugal kinship bonds of the *guru-chela parampara* are not opposed to public policy and recognized members of a hijra gharana as lawful heirs with respect to devolution of property of a deceased member (*Illyas v. Badshah alias Kamla, AIR 1990 MP 334; Sweety v. General Public, AIR 2016 HP 148*);

113. BECAUSE Section 14 of the *Mental Healthcare Act, 2017* recognizes an individual's right to appoint 'any person' as the nominated representative, in addition to 'relatives', for purposes of giving effect to their advance directive on the course of mental healthcare treatment in the event of their incapacity. It is humbly submitted that the law's recognition of 'any person' as capable of serving the best interests of individuals in a state of vulnerability or incapacity ought to be reproduced in general contexts for LGBTI individuals to assign a right, title, interest, claim or benefit accrued as per law;

- 114.** BECAUSE the principle of substantive equality mandates that the State must not exact conformity as a price for equality. Instead, it should accommodate difference and aim to achieve structural change. LGBTI individuals, who do not choose marriage, deserve the recognition and protection of law when they seek to nominate ‘any person’ beyond the constraints of ‘guardians, close relatives or family members’ as they seek to lead autonomous lives independent of any restrictions imposed by natal families, by virtue of their inherent dignity. (*Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608; Lt. Col. Nitisha v. Union of India, 2021 SCC Online SC 261*);
- 115.** BECAUSE the inviolable nature of the human personality is manifested in the ability of an individual to make intimate choices. The recognition that the fundamental right to privacy is an intrinsic recognition of heterogeneity and the right of the individual to stand against the tide of conformity must lead towards the inescapable conclusion of recognition of the authority of the individual in nominating ‘any person’ in order to secure their best interests in matters relating to organizing chosen families and other vital

aspects of life (*Justice K.S. Puttaswamy v. Union of India (I)*, (2017) 10 SCC 1);

IV. Saving of validity of pre-existing marriages where one party has transitioned to affirm their self-determined gender identity in order to protect rights accrued under Articles 14, 15, 19 and 21 of the Constitution:

116. BECAUSE in cases of pre-existing marriages recognized under law, where one partner has transitioned to affirm their self-determined gender identity and parties mutually choose to continue the marriage, there exists uncertainty in terms of social, economic and legal consequences as to the status of the marriage thereafter. It is submitted that as long as parties to the marriage do not object to one partner transitioning to affirm their self-determined gender identity, the law must continue to recognize the validity of the marriage between the parties.

117. BECAUSE Sections 24-25 of SMA on void and voidable marriages respectively, in context of violation of a condition of a validly solemnized marriage under Section 4, provide for such declaration only at the instance of one party to the marriage, and

no third party objection to the status of the marriage ought to be permissible in law.

118. BECAUSE the bouquet of rights which flow from marital and familial ties between parties to a marriage cannot be arbitrarily snatched from a family where a party to a marriage transitions to affirm their self-determined gender identity. State institutions and service providers often deny services like banking, insurance, etc by raising dubious objections against the status of a marriage where either party to the marriage is a trans person or has transitioned into another gender identity. The law must recognize and protect such marriages from discrimination and moral policing which leads to a denial of fundamental rights.

119. BECAUSE instances of such marriages solemnized under personal laws can be saved by the device of registration under Sections 15-16 of SMA;

120. Because this Hon'ble Court has passed directions to occupy the field of law in absence of statutory guidance in order to do complete justice under Article 142 of the Constitution (*Vishaka v State of Rajasthan*(1997) 6 SCC 241;*Common Cause v Union of India*, (2018) 5 SCC 1);

V. Interference, opposition and violence from natal families, irrespective of marital status, violates the fundamental Right to Life and Personal Liberty under Article 21 of the Constitution:

- 121.** BECAUSE whether or not LBI women and trans persons are in intimate relationships, they are often faced with conflict from the natal family by virtue of the opposition to the self-determination of gender identity and sexual orientation;
- 122.** BECAUSE despite solemnization and registration of marriages, LGBTI couples will remain vulnerable to unabated cycles of opposition, interference and violence from natal families, undermining the fundamental right to marry and found a family, therefore, it is incumbent to protect the life and liberty under Article 21 irrespective of relationship/marital status;
- 123.** BECAUSE international human rights bodies recognize that the predominant social and cultural justification for natal family violence suffered by LGBTI individuals in Asia is embedded in notions of “family honour” - the same oppressive norm which fuels

opposition, interference and violence against inter-caste and inter-faith couples (*Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: Practices of so-called “conversion therapy”, A/HRC/44/53, 1 May 2020*);

124. BECAUSE LBI women and trans persons run away from natal families and homes often due to real and imminent threats of forced marriages, or when the family finds out about their identity. The families typically respond by detaining them against their will under ‘house arrest’ and without communication with any of their friends. Often their education is stopped and their jobs, if any, discontinued;

125. BECAUSE in case of LGBTI couples, natal families often file false missing person complaints when their adult ‘daughters’ voluntarily leave homes and use the police to track them across states. They often also file false charges of kidnapping and theft against the partners as well as their own adult children, as acts of retaliation and insidious means to seek their ‘custody’ and compel them into heterosexual expectations of society;

- 126.** BECAUSE district courts have directed that in cases of missing persons cases, once the police have obtained statements from the runaway LGBTI couples that they are adults and have left their natal homes of their free will and volition, the case must be closed forthwith and the police must ensure there is no further interference in the relationship (*S. Sushma & Anr. v. Commissioner of Police & Ors., WP No. 7284/2021, order dated 07.06.2021*);
- 127.** BECAUSE this Hon'ble Court has declared that any kind of torture or torment or ill-treatment in the name of "honour" that violates the right to choose a partner in a relationship or marriage by any group of persons is illegal and has issued directions to state governments for adopting preventive, remedial and punitive measures, including establishment of safe houses to respect, protect and fulfill the fundamental right to marry and found a family for inter-caste and inter-religious couples (*Shakti Vahini vs Union of India, (2018) 7 SCC 192*);
- 128.** BECAUSE this Hon'ble Court's aforesaid directions have been extended to runaway LGBTI couples by High Courts, who face similar vulnerability to "honour" based natal family violence

(Dhanak of Humanity & Ors. v. State of NCT & Anr. WP (CrI)1321/2021, final order dated 23.07.2021);

- 129.** BECAUSE High courts have directed the Ministry of Social Justice and Empowerment (MOSJE) in a series of orders to enlist non-governmental organizations (NGOs) in order to make shelter homes available for all members of the LGBTI community in a manner similar to the *Garima Greh* welfare scheme, which provides shelter homes run by members of the transgender community for at-risk members of their community (*S. Sushma & Anr. v. Commissioner of Police & Ors., WP No. 7284/2021, orders dated 23.12.2021, 08.04.2022, 08.07.2022, 22.08.2022, 09.12.2022*).
- 130.** BECAUSE the Petitioners crave leave to rely on additional grounds at the stage of arguments.
- 131.** That the Petitioners have no other alternative efficacious remedy but to approach this Hon'ble Court for the relief prayed for herein.
- 132.** That the Petitioners have paid the requisite Court fees on this Petition.

133. That the Petitioners have not filed any other petition in any Court, High Court or in the Supreme Court of India in respect of the subject matter of this Petition.

PRAYERS

It is therefore, most respectfully prayed that your Lordships may graciously be pleased to:

- i. Issue an appropriate writ, order or direction to declare that the non-recognition of marriage between persons on the basis of sexual orientation and/or gender identity under SMA is illegal and unconstitutional;
- ii. Issue an appropriate writ, order or direction to declare the usage of gender neutral terms like 'spouse' in the context of solemnization and registration of marriages between LGBTI persons, and all other corresponding provisions under SMA;
- iii. Issue an appropriate writ, order or direction to declare that the provisions of law with respect to the "notice, domicile and objection" framework in Sections 5, 6, 7, 8, and 9 of SMA are illegal and unconstitutional;

- iv. Issue an appropriate writ, order or direction to declare that the validity of marriages already solemnized or registered under the SMA would not de facto be jeopardized if one spouse transitions to their self-determined gender identity;
- v. Issue an appropriate writ, order or direction to declare and recognise the constitutional right of members of the LGBTI community to have a “chosen family” in lieu of next of kin under all laws, as an intrinsic part of their right to a dignified life under Article 21;
- vi. Issue an appropriate writ, order or direction to declare that an unmarried person can nominate ‘any person(s)’ to act as their nominee or next of kin, irrespective of whether such person is a ‘guardian, close relative or family member’, with respect to healthcare decisions in case of incapacity such as execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

- vii. Issue an appropriate writ, order or direction to declare that State Governments must apply all preventive, remedial, protective and punitive measures, including establishment of safe houses similar to the *Garima Greh* welfare scheme, in order to guarantee safety and security of all individuals irrespective of gender identity and sexual orientation;
- viii. Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper to do complete justice in the circumstances of the case.

**AND FOR THIS ACT OF KINDNESS, THE PETITIONERS HEREIN
SHALL EVER PRAY**

Settled by: Vrinda Grover, Adv.

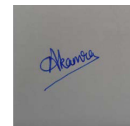
Drafted by: Suraj Sanap, Adv.

Soutik Banerjee, Adv.

Devika Tulsiani, Adv.

Mannat Tipnis, Adv.

FILED THROUGH:



**AAKARSH KAMRA
Advocate for Petitioner**

IN THE HON'BLE SUPREME COURT OF INDIA
WRIT JURISDICTION
WRIT PETITION (C) NO. _____ OF 2023

IN THE MATTER OF:

Rituparna Borah & Ors.

...Petitioner

Versus

Union of India

...Respondent

AFFIDAVIT

I, Rituparna Borah, D/o Lt. Horen Kumar Borah, aged about 41 years, R/o 298/1, UGF No 7, Gadaipur Village, Fatehpur Beri, Delhi 110074, do hereby solemnly affirm on oath and state as under:

1. That I am the Petitioner No. 1 in the above captioned Writ Petition, and have been duly authorised by the other Petitioners, I am aware of the facts and circumstances of the present case and as such I am competent to swear this Affidavit.
2. That the accompanying Writ Petition and Application(s) have been drafted on my instruction and has been shown to me, and I state that the contents of the Synopsis at pages _____ Writ Petition at pages _____ and all accompanying Application(s) are believed to be true and correct to the best of my knowledge and belief and as per legal counsel.
3. That the facts stated herein are true and correct to the best of my knowledge and nothing has been concealed therefrom.
4. That the Annexures are true copies of their respective originals.



[Handwritten Signature]

DEPONENT

06 FEB 2023

VERIFICATION

Verified at _____, on the _____ day of February 2023, that the contents of the above affidavit are true and correct, no part of it is false and nothing material has been concealed therefrom.

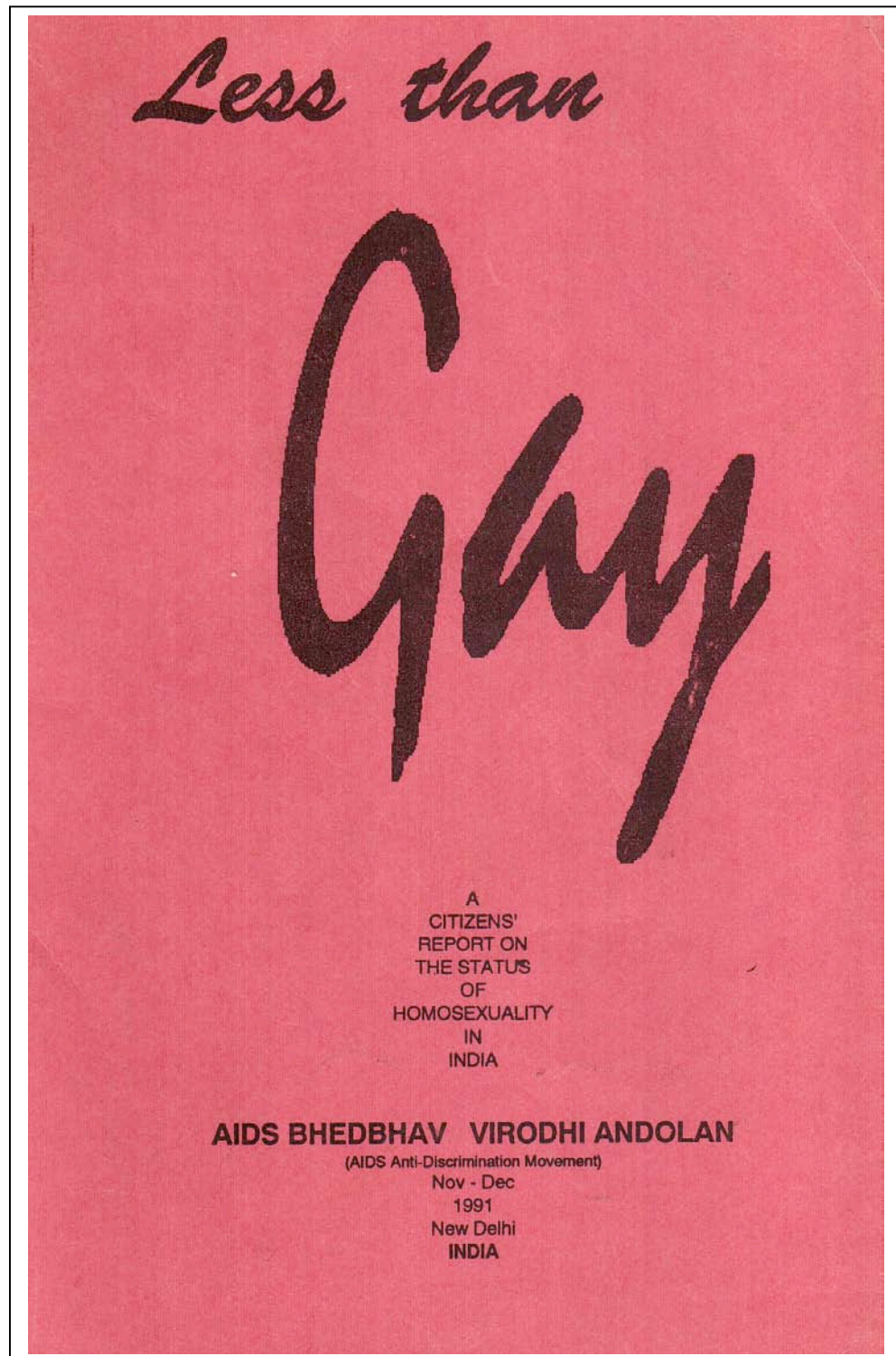
[Handwritten Signature]

DEPONENT

[Handwritten Signature]
Identify the Executant/Deponent
who has signed in my presence



Identified that the deponent
Shri. *Rajiv Kumar*
S/o *Ch. Ram Prasad*
Shri. *Ch. Ram Prasad*
R/o *06 FEB 2023*
Identified *at*
at *Delhi*
I read over and explained
the contents of the affidavit to him and he has acknowledged that the contents are true and correct to his knowledge.
[Handwritten Signature]
06 FEB 2023



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time I came to Delhi in 1970. The gay life in Delhi is very different from what I had seen in England. There are various levels of homosexuality here. There are the unofficial clubs for the upper echelons as the one in the house of a famous fashion designer. It is a world of superficiality, all hyped up - I would describe it as frantic. Then, there are those who like to dress outrageously and indulge in exhibitionism. I am very different from all these people and don't like attracting attention through flashy clothes.

"As far as I am concerned. I have reached an age when sex no longer remains a major part of my life. As for my preferences, I suppose that I would not go in for a partner older than me. I have never preferred older men. The youngest boy who lived with me in Delhi was 17 years old.

"All my friends are Indians and I find their acceptance of my sexuality really nice. They all know that I am a homosexual--I don't care to hide it or keep it secret from them. Perhaps, acceptance is one of the facets of Hinduism, which is all embracing. The fact that I am homosexual has never affected either my personal or working relationships."

3. Rahul's story

"In my tenth class, I fell hopelessly-in love with a boy one year my senior with an incredible body and classic Rajput good looks. We were buddies for, a long time and then started flirting and making jokes about how attractive we found each other. The jokes started getting serious. One evening we were at his house and were lying on his bed and talking. The next thing I knew we were hugging madly. We took each other's clothes off and touched for hours. Our affair continued for a year. He always felt guilty after sex and would go to his family mandir to pray. I would feel a little guilty on seeing his guilt, but felt largely happy. Emotionally we were close as any lovers. We wrote love letters, had passionate telephone conversations much to the astonishment of our families. In recent years he got married. When he talked to me about it, what came through was his terror of social disgrace. Right now he is being a good Rajput son with a wife and maybe kids--goes to the mandir for Gita readings--in short, living the classic life of the closet gay. His family will probably never know how scared he is of their rejection. (Trikone, May-June 1989)

4. The marriage trap

Once upon a time I had a close physical friend. We loved each other at many levels. A change came over him as it became more and more apparent that he could not avoid an arranged marriage. The end result of it is that he has a life that is crushing him mentally. His wife, who is a great person, feels the strain and does not understand why. He never drank, until yesterday, and the day before, and the day before. And all of the tomorrows, too, I fear.

"I got over our break-up and adjusted. About the only joy I see on his face is when he comes to visit us and sees that I am happy. Hard, cruel realities. I should have had the guts as the older, wise one, to have said "Let's put our faith in each other and move, get away from the relatives and make a new life." What are we going to do to help others escape from the same trap?

"On a different note, gays love a green India. We must each be able to plant a few trees. (A.P., Vizianagaram, Trikone, Nov-Dec 1989)

5. Life is gay

"I live in a small district of eastern Madhya Pradesh. I teach at a government polytechnic. Whenever, I disclose my gay identity in front of others, I get a tremendous response from them, even offers of sexual flings! The boys in my neighbourhood have a big crush on me. I think they like my style and way of conversation. I have decided not to hide my gayness. I have become frank enough to express my thoughts openly in front of my non-gay friends. (Aseem Tiwari, Trikone, Nov-Dec 1989)

6. Alone in Mizoram

"After a lot of thinking, I have come to a conclusion. I have been alone and single in the love, sex, etc., department for 20 years. I can see that I am living a bloody big lie but I can't really come out because of various factors. So I am going to ignore my love, sex areas and I will put all my energies into my work. If I could have lived for 20 years without a lover or boyfriend, I know I can live for another 20. I have my yoga, exercises, and work to keep me busy. Until last year I was desperate to have a lover or boyfriend for both emotional and physical support, but I have reformed from this year. I am going to be gay forever but I am so very discouraged by the environment around me that I have decided not to worry anymore. I have found a strange peace and a deep sense of satisfaction knowing that other gays are going to be shown the right path (accepted by society, even if partly, free from AIDS, etc.). As for me, I want to discontinue my correspondence with you all, and I hope you will understand. I may find someone very special somewhere in the future and with this I end my letter. Goodbye. (G.H., Mizoram, Trikone, January 1988)

7. Anamika

"Referring to your question in the editorial about why women who have some choice do not resist marriage. The answer is isolation and loneliness. Conditions in India being what they are, you feel you are fighting a battle in isolation. Any cause, whatever its worth, is not worth fighting in isolation. Many of us enter into relationships with women in hostels during student days. Once these break up, and most do for the obvious reason of marriage, then how are we to sustain ourselves? In fact nearing the forties, I no longer feel anything is worth the loneliness and isolation I have faced in the last twenty years. (M.A., letter to Anamika, June 1987)

8. Against nature?

Ishwar Kale, a 32-year old industrial worker from Virar, Bombay, narrated his situation in Marathi to The Sunday Observer: "They think we are enemies of prakruti (nature) and of sanskruti (culture) ... people refuse to believe that IT can work between man and man. After I started working in a factory, one man was so attracted to me that every morning in the crowded Virar-churchgate train, he would sit or stand close to me and make love. It went on for two years and ended abruptly when he changed jobs. I have never met him again. I have had many such relationships, with the rich as well as the poor, with many strangers and some regulars. But I never felt there was anything wrong with me ... I have two children now but I have not let my wife or any other relative know that I lead an energetic gay life outside my family. Initially, my dual life caused me untold trauma but now I have got used to it." (July 29, 1990)

9. Love against all odds

"One early winter afternoon I had come home with my friend Kuni. Mother was next door chatting as usual. The servant woman said that there was a pot of extra hot water on the stove if I wanted a bath. When she turned back to her cooking, I looked at Kuni. Between us we lifted the brass pot off the fire and poured it into the tank of cold water in the bathroom.

"I slid the little bolt on the door and we took our clothes off. For a few minutes we stood fondling each other and then my friend poured some of the hot water still in the brass pot over the floor. We lay down and did what I now know was the number 69. It was fantastic. It was not the first time, but maybe the hundredth time, and every single time was different, good, positive, and exciting, both physically and mentally.

"We were still on the floor in that position when a terrible noise erupted as the door came crashing down and nearly smashed Kuni's head. We both jumped and looked with horror and total fear at my elder brother. The servant woman appeared next to him and, after a few minutes of his screaming, my mother came rushing in. He turned and bolted the door....

Lesbian Suicides and the Kerala Women's Movement

Paper presented at Hyderabad Young South Indian Feminist's Conference

October 29 to November 1, 2001

By Deepa Vasudeva

I've come to this conference to speak about a very specific issue: the incidence of suicides among women in same-sex (lesbian) relationships in Kerala, and why this is an important issue for women's groups in Kerala to take up. This problem must be seen as a specific example of a broader issue which has been addressed and continues to be addressed in other parts of India: why is it important feminist movements in India to take up and consider the rights of women who love women. We can also view it as part of a still broader agenda why women's movements and other social movements need to recognize the rights of all sexuality minorities—lesbians, bisexual women and men, gay men, and transgendered peoples- as important social justice and human rights issues.

This problem of lesbian suicides is also deeply related to other issues of sexuality, especially women's sexuality. So I'm hoping this presentation will raise important questions and discussions about how women's group in Kerala and other parts of India address sexuality, and who included and excluded in these approaches.

I'm focusing on feminist groups in Kerala because that's where I'm living and working right now, and that's where these suicides are being reported, at least in the media. For about a year now, I've been trying to start something called Sahayatrika Project, developing support for sexuality minorities in Kerala, especially for women in same-sex relationships. We're trying to develop a support network for lesbian and bisexual women here using a post office box and emails; as well as developing alliances among all people, women and men, of any orientation, who concerned about the rights for sexuality minorities in the state.

Longer term goals include ensuring that service are available to women loving women and other sexuality minorities who need help, raising public awareness about issues, and advocating for sexuality minority rights. I've received a lot of help and encouragement in this project from some very committed women and men in Kerala, who have been concerned about the situation for people in same-sex relationships, and especially these suicides, for a long time.

At this point in time, we don't have funding for our project. So if it appears that there are a lot of areas which are left uncovered, or that our project has not yet addressed, this is one of the reasons why.

As I present this topic, it is important for me to locate myself and my relationship to this issue. So: I am a Malayalee-Keralite in origin, both my parents are Malayalees, but I was born and raised abroad. I am a bisexual woman who was active socially and politically in lesbian communities in Canada. I was also involved in Canada with many issues outside sexual orientation, such as violence against women, racism, support for aboriginal people in Canada, anti-poverty and anti-globalisation activism.

It is also important, as I address these concerns within Kerala or Indian women's movements, to acknowledge my position as an outsider. I've been living in Kerala for only the past two years, and my engagement with women's organisations here has been for less than one year. So I'm not speaking about this subject as any sort of authority or expert, but rather as someone who sees this issue as important and has begun the process of asking questions about it. I know that I have a tremendous amount to learn about this and other issues from everybody who is here.

This past August, the story of two young Adivasi women who committed suicide was carried in most of the Malayalam language newspapers. These were young women, one was fifteen and the other twenty-two, and according to the newspapers they were living together for some time and wanted to marry each other. They sought help from their families and the police, and were seeing a psychiatrist shortly before their deaths. But, obviously, no one was able to help them: their dead bodies were found together in an outdoors location, near their homes.

This suicide was not an isolated incident. Malayalam newspapers have been carrying stories of lesbian suicides and occasionally gay male suicides for at least the past 9 years. I've handed out a list of media reports of suicides in Kerala by people in same-sex relationships. I will talk about how we can know whether or not these newspaper reports are true later on in this paper.

For the time being I would like to note, that between January 1995 and August 2001, i.e. within a space of 7 years, ***at least 21 have been reported as 'successfully' killing themselves because they were unable to maintain a lesbian relationship.*** Between 1993 and this year, at least four men, two gay couples, have also been reported killing themselves. This media list is far from complete, we haven't obtained all the newspaper reports yet, and it only includes those suicides which the press (and/ or the victims' communities) identified as gay-related.

These newspapers stories tend to portray young women, under age 24 (pre- marriage age), who are unable to contemplate life without their same-sex partner. These women are also being portrayed as predominantly coming from working class or "lower middle class" backgrounds, and often belonging to other marginalized communities. I

think it's important to consider these suicides as just one indicator of the situation for sexuality minorities, especially lesbians, in Kerala. It is really just the tip of the iceberg.

As heartbreaking as these newspaper articles are, they say nothing about those women (or men) with same-sex orientation who don't kill themselves, but either maintain an underground existence with secret partners, suppress their sexual orientation and get married, or live in isolation from others like them. These stories also say nothing about the many women who really don't really know what their true sexual orientation is.

I had been working on and off on Sayahatrika Project, with the help of other people, for about year before this most recent suicide happened. To make a long story short, we've received some positive responses and some negative responses to our work on this issue. In this paper, I will present some of the reasons different social groups and individuals, women's groups and others, have given **against** addressing sexual minority rights, and lesbian rights in Kerala. I will then offer some counter-arguments to this resistance, as a basis for further discussion and hopefully action.

I. “How do you know these suicides are being committed by lesbians?? The media may be sensationalizing these stories to defame innocent victims or sell newspapers.”

This is an important question, and the fact is we don't really know for sure, although most of the newspaper articles seemed to give some substantiating evidence such as suicide notes, or comments from family or community members. In the case that happened last August, the two women seem to told several people that they wanted to marry one another. A long term goal for Sahayatrika Project, if we get some funding, is to verify and document these reports. We consider this important because, besides the testimony of women themselves, these newspaper reports are among the only documentation that we have for the situation for women-loving- women in Kerala.

However it is highly likely, given that Kerala has one of highest reported suicide rates in India, and that gays and lesbians all over the world are a high risk group for suicide, especially in youth, that the unreported suicide rate is actually much higher than what is listed here.

II. “Lesbians are a small, obscure group. Discrimination against different sexual orientations is a marginal problem affecting only a small portion of the population.”

Is discrimination against sexual minorities a minor concern, or rather is it an invisible one?? I will argue for the latter. Sexual minorities in Kerala live an underground existence, with the suicides reported in the media being only one indicator, only the tip of the iceberg, of the many problems we face.

Same-sex love seems to be a phenomenon in all cultures and societies. Classical statistics say 10-12 % of any given population have a same-sex primary orientation and larger percentages of the population are bisexual.

In the weeks following the recent suicide, Sahayatrika Project has managed to get our post office box and email address published in a number of newspapers. We've received many letters and emails in response to the work we are doing, with several women writing in and identifying themselves as women-loving-women.

We've also received a strong response, via the internet, from people like me: gays/lesbians of Malayalee or part-Malayalee origin who live in other parts of India or the world. So we have this very interesting phenomenon where Malayalees **leave** Kerala and suddenly **become** gay, lesbian, bisexual, hijras. But while we live in Kerala we are totally invisible as living, breathing beings. I think this says much more about cultural constraints within the state than any predisposition of Malayalees to be overwhelmingly heterosexual.

III. “The recognition of lesbianism in feminist circles is really just an academic or theoretical issue carried out by elite feminists in urban centres.”

***Or* “The gay/lesbian movement in India is largely an upperclass urban English-speaking (western-influenced) social movement.”**

Mainstream LGBT organisations in India **are** largely English-speaking middle-class dominated organizations that have been influenced and empowered by their contact with much more developed international LGBT movements. These organizations are nonetheless very important: they have created a sense of consciousness or identity for people where before there was none. Also many groups like Sangama or organisations in north India are increasingly trying to work with non-English speaking sexual minority populations from different class backgrounds.

But the fact is, even if the most visible section of this movement may come from a certain background [similar to certain types of feminism], it doesn't follow that **all sexual minorities** come from this same background. Like gender, sexual orientation and gender identity cut across all classes, communities and castes. As with many of the women who committed suicide, lesbians and other sexual minorities from marginalized backgrounds face discrimination against their sexual orientation, **on top of** all the other marginalisations and discriminations they may be living with.

With the advent of the recent Amnesty International report on "Torture and ill-treatment based on sexual identity," organisations like the International Gay and Lesbian Human Rights Commission, and publications like the PUCL-K fact-finding on human rights violations against sexual minorities in Bangalore, it is high time that social justice groups in Kerala recognize sexuality minority rights, including lesbian rights, not as an academic or elite issue but as an urgent human rights issue. It is time that these organizations recognize that in many societies across many communities and cultures, some of the harshest punishments and most flagrant human rights abuses are carried out against those people who are seen as "deviating" from perceived sexual and gender "norms".

The suicides in Kerala are another example of the urgency of sexuality minority rights as a human rights issue. These women are literally **dying** because of the lack of acceptance in Kerala society for same-sex relationships, and because of the lack of choice women here have around sexuality, marriage, etc.

As suggested earlier, while there are women from all backgrounds on this suicide list, there seems to be an **overrepresentation** of women from marginalized groups. The most recent suicide case was of two Adivasi women. The news story before this one involved a Dalit woman. Others on the list are described as: two women from "lower middle class" backgrounds, a tailoring and a beautician student, two women working in a shrimp factory, a tailoring teacher and her student, three women from "lower middle class" backgrounds, a daily wage labourer in rubber plantation, two college students, two girls from peasant families, and a tuition teacher and her student.

Why are so many of these suicides enacted by women experiencing multiple marginalisations - eg. Adivasi and lesbian, Dalit and lesbian, from a peasant background lesbian, etc. We don't have an clear answer to this question a

question yet; is it a question I would like to pose the audience. My personal theory is this: women loving-women from middle class or more privileged backgrounds, while also experiencing a lot of suffering, have more choices with which to deal with their different sexual orientation. One option such women have is to leave Kerala. It is also possible that those women who stay in Kerala have more resources available to them to either independently and/or maintain secret same-sex relationship.

But women from more marginalized backgrounds have less choices, less access to resources. The women on this list who are killing themselves are almost consistently young women of marrying age who are already in same-sex relationships. My theory is that, when time comes when these women are forced to marry, or are faced with the threat of separation, they don't have other options available to them. So they resort to suicide instead.

I should note this point that there some limitations to my use of the word "lesbian" in these contexts. I'm using this word to describe women in same-sex relationships; its simpler to use the term "lesbian". But these women may not have spoken English, and they most likely did not have access to English medium information about the culture of lesbianism. Possibly, some of these women did not even think about themselves in this way.

IV. "You cannot expect women who are fighting for basic issues, such as starvation, to take on the fight for lesbian rights."

Someone made this point to me, and at that time I agreed with her, however to some extent I am reconsidering this position. I've been considering that perhaps we shouldn't make assumptions about what feminists from marginalized communities think about this issue; it is probably more important to simply ask them directly. I can recall one of the first times I went to the women's center in Trivandrum, when I was just starting to talk to people about this project. I happened to talk to a young Dalit activist who didn't have much experience with this issue. And yet, after talking with her for 15 minutes about it, she was immediately supportive and offered to help.

So I've been wondering about **where** this resistance within women's organisations to sexuality minority issues comes from? Is it something that occurs uniformly throughout women's movements? Or is this resistance something that might vary, between women of different classes, or from community to community??

As mentioned earlier, a lot of these suicides seem to be happening in communities that experience other types of marginalisations. A question worth asking is how are these communities affected by these same-sex death pacts?? For example, how do people feel when their female family members or community members take their lives because they couldn't marry, when absolutely no one in Kerala society is openly saying that there is nothing wrong with same-sex love. Would it make a difference if we were to go into these communities, and engage in discussion with those people??

If we did a fact-finding in the Adivasi community where these last two women killed themselves, could it be possible to do it in way that was actually supportive of that community??

One of the reasons it is very important to gain the support of women's organisations on this issue is because of the relatively well-developed connections some feminist groups have with women at the grass roots level, eg. Panchayat women, rural women, and women in popular movements. If we are truly going to address this issue of same-sex suicide in Kerala, and not only create an urban-based, English-speaking lesbian/gay social movement, we need to be working in cooperation with other social movements like women's movement.

- V. This set of objections has to do with who is responsible for this issue, and how do we prioritize it in relation to other social justice issues.**
- a. Lesbians need to take the responsibility for bringing this issue forward. This is your problem.**
 - b. Why is this an issue for the women's movement?? The women's movement is dealing with so many other more fundamental issues.**
 - c. Why are you focusing on lesbians when there are so many other problems in Kerala society?? Children are starving, not everyone has achieved basic literacy, there are broader issues of violence against women...**
 - d. Lesbians need to join other social movements, and work for other social justice causes, if they want other social justice movements to support them.**

The idea that lesbians and other sexuality minority groups have the main responsibility for addressing this problem comes out of a type of identity

politics which I partly agree with: the idea that social movements need to be determined by and empowering to those people most effected by the issue the social movement addresses.

But this issue of lesbian suicides in Kerala is one example of some of the **limitations** of this type of identity politics. Now, these suicides have been in the public consciousness, because of the newspaper reports, for the past seven years. The question I'd like to ask is: did we really have to wait seven years for a self-identified "lesbian" [or bisexual woman] to come along before we could do anything about this??

And in the absence of any developed and visible gay/lesbian/bisexual/transgendered movement in Kerala, which social movement is responsible for this??

I consider this problem of lesbian suicides to be a issue for women's organisations, first and foremostly, because it is women who are dying. And they are dying as much because of **sexism** as because of heterosexism. Probably the most important reason these women are taking their lives is because, in Kerala society, the majority of women still do not have the choice **not** to marry men. It is imperative that women's groups recognize lesbians as being among the women who suffer because of this. When feminists question the relevance of lesbian suicides to the women's movement, it is almost as though they are considering lesbians to be something **less** than women. But lesbians are women too.

I don't think this issue is **only** a responsibility for the women's movement. Human rights groups, and gay-lesbian organizations [as they emerge in Kerala] need to take on this issue too. Ultimately, I am arguing for the inclusion and recognition of sexual orientation and gender identity as an important rights issue for **all** social justice organizations to support, in the same way that these groups may support the women's movement, environmental movement, Dalit and Adivasi rights, trade unions, fisher peoples' movements, and other popular movements. This recognition has been happening in other parts of India; (for example, activists in the Narmada Valley struggle will often support sexual minority rights in their public speeches.) But this recognition has not yet happened among social and political organizations in Kerala.

Clearly lesbian suicides are not the only social problem existing in Kerala. But in spite of all the popular movements and political organizations in this

state, it seems to be one of the issues that no one really wants to touch. At some point we need to recognize that 21 women killing themselves because they could not maintain their same-sex relationship is **just as important** as 21 women dying of starvation; and certainly as important as 21 women being sexually harassed. To argue for anything else is to treat lesbians as being less than women, and less than human.

And while it is both ethically and strategically valuable for LGBT activists to be involved in and support other issues, at some point we have to support social issues because of their intrinsic importance, and not because of what we might get in return. For example, if I genuinely support Adivasi land rights in Kerala, I support it because of the historical injustice done to Adivasi people, and not because of some expectation of what Adivasi activists can do for me. Similarly we need to see the rights of sexual orientation as being intrinsically important, something we should work towards for its own sake.

Social and political organizations which are unable to recognize the validity of sexuality minority rights fail to recognize the interconnectedness between different oppressions, no single oppression exists in isolation from all the others. The inter-relationship between sexism and heterosexism, for example, is deep and complex. Women's groups in Kerala need to recognize that if we lived in a society where it was acceptable for two women to live together as lovers, a lot of other practices such as women living alone, or women having sexual relationships outside of marriage, would have to be acceptable too. Recognizing different sexual orientations as different and legitimate ways of being really only creates more space for everyone.

VI. The next set of objections are concerned with social attitudes towards sexuality, and also the consequences of lesbian visibility in Kerala society.

- a. Society is already saying that feminists just want free-sex. If we take on issues of lesbian rights, the women's movement is going to be further undermined.
- b. Increased visibility for lesbians makes society less safe for other women. Women who are simply holding hands or living with their female friends will be accused of being lesbians.
- c. Increased visibility for lesbians also makes society less safe for women who are having same-sex relationships, but are not "out" about it.

- a. Being a lesbian has nothing to do with free-sex (although some people, such as the male consumers of a pornography industry that exoticises lesbians, seem to think that it does). But the fact is, women with same-sex attractions can have one partner, no partner, or multiple partners, the same as heterosexual women.

Furthermore, there's actually nothing **wrong** with being a free-sex feminist. I'm not trying to argue that this should be an ideological requirement! But, feminists need to recognize the right for a woman to have control over her own sexuality and her own body, and to be self-determining as a sexual being.

It seems that one of the fundamental obstacles for women's organisations in Kerala and other parts of India for supporting lesbian/ women-loving-women's rights is that we have unresolved issues around sexuality and the sexual rights (as opposed to the reproductive right) of women.

And yet unless the feminist movement (among other social movements) gets past these cultural taboos around discussing sexuality, we cannot even **begin** to conceptualize what a Kerala feminist or South Indian feminist approach to sexuality would even look like. This culturally and socially sanctioned silence around sexual issues encourages and perpetuates a whole range of problems in Kerala society, from child sexual abuse to rape (within and outside of marriage) to sexual harassment. Marginalised sexuality minorities must also be counted among the vast array of people who suffer because of this silence.

Several activists who have worked on issues of reproductive health and sexuality, in both rural and urban settings, have remarked upon a cultural dichotomy. On the one hand, there is this idea that men have **unlimited** sexual rights: the right to make sexual comments, the right to harass, the right to be sexually satisfied whenever and wherever they desire. Even within marriage, men are supposed to be satisfied whenever they are aroused, and women still don't have even the legal right to say no.

Women, on the other hand, don't have any sexual rights, but are expected to bear all reproductive responsibilities. The dominant social values hold women as being primarily responsible for birth control and reproductive care, and often assign them moral responsibility for the fertility/infertility of a couple, the spreading of sexually transmitted diseases, etc.

In recent years, some reproductive and sexual health programs in India responded to feminist critiques by increasingly focusing on male responsibility

for reproductive health, fertility control and the prevention of sexually transmitted diseases. But what doesn't seem to have emerged yet is a corresponding feminist policy emphasizing education for women about their sexual rights.

To pursue this discussion further, I think that women's organizations in Kerala are doing invaluable work around what I would describe as women's "negative" sexual rights: the right to be free from sexual violence, rape, harassment, and exploitation. Indeed, one of the enormous challenges to women's groups is that these types of violence seem to be very pervasive in Kerala society, and not much understood. Now, it is possible to think about lesbian rights in terms of these "negative" sexual rights: for when a woman who is not sexually oriented towards men is forced into marriage, we can consider this to be a type of rape. However, clearly lesbians are not the only women who are being raped in marriage.

But what about women's "positive" sexual rights?? Feminist groups do not seem to have yet arrived at a common understanding about what these rights might be. And I think this is one of the fundamental reasons that feminists sometimes resist working for lesbian rights; it is because we haven't properly conceptualized what women's positive sexual rights really are.

Take for example, the right to a sexually fulfilling relationship. To whom should this right be available? Women?? Unmarried women?? Lesbians?? Children?? And is this an important or worthwhile right to have?? I am not arguing for an "anything goes", "free-sex" approach, for example in the case of children. But women's groups in Kerala seem to be a long way from articulating what is a positive sexual right, and what isn't. We need to be able to make distinctions, start drawing lines, and have the courage to draw them from a feminist perspective which may be counter to the traditional perspective.

Perhaps what I'm saying is obvious: that the women's movement resistance to recognizing and working for lesbian rights seems to be deeply linked to these unresolved questions around sexuality. And yet I think the situation in Kerala clearly demonstrates the importance of advocating for women's positive sexual rights. Lesbian suicides are one example in which the denial of such rights leads to death.

- b. The argument that increased lesbian visibility creates more unsafety for all women is similar to argument that the visibility of sex trade workers makes all

women walking the streets more prone to harassment. But really, if there were no sex trade workers, is it true that women would no longer be harassed in public places?? And aren't women sometimes harassed in places where there are no sex trade workers, like trains or buses or in their own homes??

Similarly, if there were no lesbians, is it true that women who live alone or want to live only with each other would not face discrimination??

Ultimately, the harassment of women who move freely in public spaces or live independently is a function of patriarchy. These harassment are rooted in the patriarchal control of women's mobility through the constant threat of violence, and in the fear that men with patriarchal values have of the autonomy of women. Arguments that place responsibility for such problems on lesbian or sex trade worker visibility simply blame those women who are most marginalized by patriarchy, rather than seeking to understand the broader issues.

Furthermore, it is apparent that lesbian visibility, and the visibility of lots of other sexually related issues, is already present in Kerala, and probably increasing. Its just that it isn't necessarily **positive** visibility. For example, one of the main sources of visibility for lesbians in Kerala in the past ten years has been these periodic stories of double suicides in press. But until recently, these stories appeared with no contextualizing discussion, to suggest that maybe these women weren't mentally ill or societal aberrations but simply women with a different sexual orientation, who died because of the lack of choices presented to them by society.

Other sources of lesbian visibility in Kerala include: pornography (from blue films to the internet); tabloid magazines (one newspaper carried a two page spread of the most recent suicide, publishing the same photo of the two girls dead bodies three times, from different angles); media from other parts of India; and media from other parts of the world (from "Fire" to foreign films to cable TV).

Such media allow negative images and stereotypes to proliferate, reinforcing destructive beliefs. At the same time there is no social movement in Kerala that is critiquing these images or placing them in some sort of social justice/feminist/rights framework. I personally think that one of our tasks, as feminists or gay rights activists or social justice activists, is to deconstruct these images, and to give alternate readings and representations of these realities.

- c. A real concern for Sahayatrika project has been the suggestion that increased lesbian visibility makes the Kerala situation less safe for women who are living their lives as lesbians, but are not "out" about their sexuality. It is something I thought about a lot when designing this project; so we emphasize as much as possible a respect for women's choices around their safety and privacy.

Yet there seems to be a clear need to create some sort of support and advocacy network, to counter the silence, ignorance and isolation which compels so many women to take their lives. Furthermore, the arguments previously made hold true in this case as well: with or without a socially-conscious raising of lesbian issues, lesbian visibility is increasing.

VII. The women's movement is not ready to take on this issue. The women's movement in Kerala is a young movement. This issue could split the movement.

This is one of the most significant criticisms that we've faced from feminists in Kerala who are opposed to raising this issue. It is a very important objection to address.

The argument is this: in a society where inter-caste or inter-community marriages are sometimes vehemently opposed, where any sort of sexuality outside of marriage is considered to be taboo, and where feminism already is viewed as a major threat to the institution of the family, how do you fight for the rights of people in same-sex relationships?? There is also a parallel argument for those of us who are sexual minorities living in Kerala and not completely "out" in this society: how do we come "out" in a society that seems to have such strict values on so many issues surrounding sexuality??

But the **truly** pressing question, in my opinion, is: if the women's movement (and other social movements) are not at ready to address this problem, then **when** will they be ready to address this issue?? And how many more people will have to die before that happens?? Many of the suicides in this list were compiled before I even came to Kerala. One of the people who was involved in this says he approached feminist groups seven years ago when these suicides were publicized, asking them to take action. At that time feminists said the women's movement in Kerala was not ready for this issue. And now, seven years later, women's groups are **still** saying the same thing. So then, when will we be ready??

Now seems like a pretty good time to me. There is a growing international recognition of the human rights of sexuality minorities; and increasingly women's groups in other parts of India are recognising the need to fight for these rights.

Many feminists inside and outside of Kerala seem to have the perception that the women's movement here is "behind" other women's movements in India. Another question worth raising is, why does this have to be so?? It is true that feminist groups in Kerala have emerged relatively recently, in a socially conservative state without a major cosmopolitan centre. But in spite of the our perception of Kerala as being 'one of the most patriarchal and oppressive societies for women', in spite of the high rates of violence and harassment here, lack of personal choice, and great political disempowerment faced by women in this state, feminist groups in Kerala have some clear advantages over women's movements in other parts of the country. We have high literacy rates, a high female/male sex ratio, low birth rates, and high life expectancy for women. So why do we have to see ourselves as "behind", when we have so many things that other women's groups in other parts of India are still fighting for?? The Kerala women's movement actually has tremendous **potential** to become a truly transformative and egalitarian women's movement.

Ultimately I am arguing for a feminism that addresses the issues of **all** women at the same time, as opposed to one which replicates the marginalisations of the dominant culture by deciding which issues the women's movement is "ready" for and which it isn't.

Someone suggested to me once that I should start a new feminism, and see how many women would join it. And maybe that's what will happen in the end, for myself and other people who think like me; we'll have to start a different kind of women's movement. But I still don't understand why I should have to start a new feminism, when I agree so fundamentally with so many of the things that feminist groups in Kerala are already doing.

When women's groups and other social justice groups become open to the issues and struggles that are raised by people like me, we are not making these social movements weaker. We are only making them stronger.

ANNEXURE P3**Queer Women and the Law in India****Priyadarshini Thangarajah and Ponni Arasu****Introduction**

This essay is written with two related yet different purposes in mind. While being an attempt to record the history vis-a-vis the law of a specific group in contemporary India - the categorisation of which will be explained shortly - it is also an attempt to use a case study to critically analyse the role of law in social change. Specifically, it looks at the strengths and the weaknesses of identity /community-based legal lobbying and the nature of the change desired in that process. When speaking of any queer person in India or in most other countries of south Asia the oft remembered law is Section 377 of the Indian Penal Code (IPC), the colonial sodomy law of 1860. The experiences with the law of queer persons, however, extend way beyond this particular section of the penal code as do the implications vis-a-vis the legal status of queer people.¹

This essay will review the experiences of queer women with Indian law and their position in the campaigns/struggles around the same. Before we begin, it is important to define what we mean by the term 'queer women'. Politically, the word 'queer' is often used among some activists in India to mean any person who questions dominant norms of gender and sexuality. While the strength of this definition lies in its potential inclusivity, the need to state more exclusive and categorical identity 'tags'. as it were, are important in many contexts such as those described in this essay. Thus by 'queer women' we are referring to individuals with vaginas who are only/also attracted to people of the same gender as their own. The names these people may call themselves are spread across a broad spectrum, some more defined and acknowledged than others. The word 'queer' as an overarching term, however, is still useful in this particular essay as it is not often homosexual or bisexual sexual acts/behaviour that one is referring to in terms of legal changes but an assertion and acknowledgement of an identity based on the same that becomes a threat. The sexual act, though till very recently criminalised in India, will still be tolerated if committed in silence, in the private sphere and in a way that does not hinder the normative processes in a woman's life such as marriage, childbirth, etc. The public political identities of lesbians/bisexuals or queer women are the potent threats to the hegemonic patriarchal norms that govern all our lives. Further, any behavioural term such as 'lesbian' 'bisexual' and so on will not and cannot capture the whole array of sexual practices, gender performances and identities that the women in this essay exhibit. Thus, one is

left with the need for an inclusive term. In terms of carefully choosing a language of theorisation, 'queer' in this context is rather useful. We would also like to establish at the very outset that the women referred to in this essay are not just queer but belong to specific regions, religions, castes and classes. These identities also have a profound impact on their struggles. The exact nature of the impact cannot be pinned down but it is significant to remember a larger political frame - work of intersectionality of identities and thus struggles. We will return intermittently to this point. The experiences of queer people who are seen socially as men and their counterparts who are socially seen as women are - expectedly- very different. As we know, queer men, by virtue of being male often have the freedom of movement and access to the public sphere in India and other South Asian countries. Further, this interaction of men with the public sphere is the norm necessitated by employment, for instance, which is a significant aspect of normative masculinity. This access to the public sphere then provides freedom for men to live their lives with their various preferences and identities-however deviant they may be -for certain periods or moments in their lives. This access might even be a pressure rather than a privilege for some. Further, the experience of queer men vis-a-vis the law cannot be described with a single sweeping statement but may be said to be nuanced and based on a range of factors such as gendered inhabiting of public/private spaces, as well as caste, class, region, ability and religions. the relative lack of access for women to the public sphere and the segregated female space has also meant freedom for some men for activities such as same- sex sexual activity. Segregated spaces of any kind - male or female - provide the quintessential space for same - sex sexual activity, which is the fortunate fallout of silence and invisibility. On the other hand, with regard to women the awareness of one's body, of sexual pleasure and even pain is often not allowed. For men there exists a culture of sexual talk and exposure. However limited, factually wrong and sometimes offensive (to some) that this exposure might be, it is seen as 'part of growing up' for boys. Women are not attributed any knowledge of or freedom to explore their own bodies, leave alone those of other. It is for this reason that same - sex sexual activity among women is often a huge threat and is seen as a significant 'aberration' from accepted notions of women's sexuality. Myths such as 'only men masturbate' and so on are part of this differential status of sexual speech in the lives of men and women.

The purpose of making this differentiation between experiences of queer people of different genders is to illustrate the complexity of homophobia and discrimination, which cannot always be illustrated by broad brush strokes but are nuanced by a range of factors other than sexual orientation. Further, it is not to set up a hierarchy of

oppressions and violence, which is an unproductive and theoretically unsound exercise in this context, but to complicate them. Given this background, queer women, like many heterosexual women who choose their own partners (irrespective of case, class, religion, race, ability and region) and/or choose to engage in sexual activity before or outside of wedlock and so on, challenge patriarchal structures in significant ways. While some parts of the struggles of women who assert their own sexual identities - heterosexual, homosexual or bisexual - are shared, queer - identified women have significantly different experiences. This is due to a number of reasons. First, they shake the very bases of heteronormativity, which is the need for a man in an intimate, interdependent or sometimes just compulsorily dependant relationship. Second, the structure of family is challenged significantly as these women then engage in sexual activity with does not and cannot result in procreation. Third and most significantly, queer women engage in activities that give them sexual pleasure. Sexual pleasure, a 'luxury' not allowed to women as a whole (illustrated very clearly by the not - so-popular status of the clitoris internationally) is the basis of same-sex sexual activity between women, thus making it a serious threat to heteronormative structures.

Experiences with the Law

An argument that can be made based on case law is that queer women have to first face the repercussions of being women, legally and socially. The very fact that a woman wishes to and sometimes demands that she live outside the natal home and not in the 'custody' of another man, namely the husband and/or his family, is in itself a significant threat. The idea that she might want to live with another woman then adds fuel to fire. In terms of legal status of queer men and women, there are significant differences as well as some shared struggles. Section 377 is used against queer men and women as a threat. In many cases, the police do not want to make arrests but use it as a threat. This is common to queer men and women although some queer men (of a particular class) face it much more due to their prominence in public spaces as compared to women. Similarly, the use of (il)legal status as a threat within the private sphere is vastly different for queer men and women. There are various other laws, however, that are often used either as threats or most often for filing cases against queer women by their own families and others.

Laws that are not Section 377

Apart from Section 377, there are a number of laws in the Indian Penal Code which have had a direct impact on the lives of queer women, These laws include: Section

340 - wrongful confinement², Section 361 – kidnapping³ and Section 362 – abduction⁴, Section 366 - compelling a woman to marry⁵, Section 368⁶ - wrongful concealment or confinement of an already kidnapped person, and Habeas Corpus writs, among many others. A case which saw an interesting judgement took place in Delhi in early 2006. A lesbian couple approached queer rights groups in Delhi. One of them had left home due to which the parents had filed a kidnapping charge against the other woman under Section 366 of the IPC.⁷ Eventually the charge was nullified based on the statement of the woman who had run away from home that she was not forced but had left out of her own will and volition. As this was celebrated by all the activists and lawyers involved as a victory, we chose for that moment to forget to ignore the fact that any reference to the lesbian relationship between the two women was avoided by all those involved. The line of argument was to prove the woman's adult status while covering up and even denying her lesbian identity in the courtroom. This is a classic example of the difficulties faced in even recording that might have involved queer women. This is one of the many cases where the legal adulthood of the women in question has been highlighted to ensure their rights while their lesbian identity has been consciously invisibilised. The 'adulthood defence',⁸ as we may call it, then emerges as a comment on notions of 'citizenship' and 'sexual citizenship',⁹ and more particularly, has an intrinsic relationship with adulthood, which needs to be explored in the queer context. In many 'runaway' lesbian cases, adult women have found themselves charged with offences of kidnapping and abduction. For example, in one such case in Kerala, one of the two women was charged with abduction and the parents also filed a report at the police station saying their daughter was missing. What is interesting to note here is that the magistrate heard the case and sent the two adult women back to the custody of their parents only to be treated for mental illness. Yet in an antithetical verdict, also in Kerala, in a case where the parents of one of the girls filed an application under the Writ of Habeas Corpus, the magistrate decreed that the two women could live by themselves or together if they chose to do so as they were adults and could not be placed under the custody of anybody.¹⁰ Adulthood then always remains a precarious strength, though no certain guarantor in protecting women. The writ of Habeas Corpus is used to secure the release of a person who has been detained unlawfully or without legal justification. Habeas Corpus may also be issued when a person complains of illegal custody or detention by a private person. When conflicting claims are made for the custody of an infant, the court can enquire into these claims and award the custody to the proper person.¹¹ In the context of Habeas Corpus involving men, where it is filed against the detention in state institutions, it is a grievance redressal mechanism. In the case of women, however,

who wish and choose to live with chosen partners who might be men (of an unacceptable nature as per caste, class, religion, character, etc.) or women, it is a repressive mechanism. It is significant to note that the court in the first place would allow parents to file a writ of Habeas Corpus against their adult daughter's 'lover' and that it would then hear it and grant custody to the parents when the daughter clearly states that she does not wish to live with them. In some instances where the court has not granted custody to the parents, it has taken the role of *parens patriae* and placed the women in question and kept the two women apart. Let us remember that in the case of heterosexual couples, is still easier for the male lover to reunite with the woman. The unacknowledged nature of homosexual relationships makes the case harder for same-sex couples.

In the case of two women – let us them R and N – in Kerala, they did receive a positive judgement from the court that ruled that they can live with each other. However, parents of both women were asked to facilitate this process. The parents intercepted the execution of the judgement, separated the women, and physically and emotionally tortured them. N, after having escaped confinement in her house, filed a Habeas Corpus petition to find R. This petition however was immediately dismissed on the grounds that N had no *locus standi*¹². This is an erratic dismissal based entirely on the notion that a woman who is not family member cannot file for custody of another woman, and that a woman cannot file for the custody of any human being who not related her 'blood'.¹³ It is also shows the limited reach of the law in the private sphere in many instances, especially when it involves women. A simplistic analysis of the law as an overarching empowering or oppressive institution then needs to be re-assessed. This we shall return to later. In another case, two women, S and J, fought a legal battle to protect their right to live together. This case took place with an open acknowledgement by both, of their relationship as lovers. The gender identity of one of the women – as one who dresses and lives as a 'man' - was both a weakness and a strength. In court, the question as to whether this person was a man or a woman. This case is significant in the context of this discussion as it was one of few where the exact nature of the relationship between the two women was known to all those involved - the women, their parents and the court. Given all these circumstances, the women were allowed to live with each other on the grounds that they were adults.¹⁴ On the contrary, Shahzina and Shumail from Lahore, Pakistan are another case in point. In this case, the couple, one of whom, Shumail, was a female-to-male transgender, were charged with purgery and sentenced to three years in jail. The court released the couple saying that there was nothing illegal about two women living together. The judgement, although unrelated to the earlier purgery charge, freed the

women nevertheless. What ought to be noted here is that Shumail, who had gone through surgery and was also identified as a man in court, was not accepted as being one by the court. As women, they could thus so easily be charged with purgery although the case was about their relationship and not about their gender identities. The utter confusion in court spaces when it comes to cases involving two women is highlighted in the following case. In Jalgaon, Bombay, two women were long-term lovers and neighbours. Both were also married to men and had children. They decided to approach the local police authority to get married. The police in turn questioned the women and eventually put them in prison along with the husband of one of the women who had come looking for them. They were all eventually let off. The couple in question seemed to have approached the police due to the notion of 'authority' in society where the lack of parental support has often meant seeking support from state structures such as the police. This case is perhaps also inspired by Bollywood cinema - which itself claims to be 'partially inspired by real lives' - where a number of heterosexual couples who are not accepted by their families turn to police structures where their right to marry is upheld. Extending this notion of the rights of these couples, the Jalgaon women seem to have expected a similar 'right to marry' that the police would uphold. The police on the other hand, completely perplexed by the scenario, not only made completely illegal arrests of the women and the husband, but also subjected the women to medical scrutiny to detect fingerprints inside their vaginas as proof of sexual activity between the two women.¹⁵ This is yet another instance which cries out for a more nuanced analysis of the perceptions of the law and its reactions to members of communities who necessarily engage with it from a discriminatory position. In another case in Bombay, a woman who was involved in a lesbian relationship was threatened by her mother and brother-in-law with the help of the police using Section 377 of the IPC. Although no action was pursued, this threat was strong enough to cause substantial emotional harm to the woman in question. This as we may note is one of the few cases where Section 377 was directly quoted¹⁶. Here too, the law was not used to file a case but to threaten the woman so that she would get out of her relationship. As a queer activist, Shalini, from Bombay put it. 'It was used in the exact manner that it is supposed to for moral policing.' This process is common to both queer men and women - the threat of Section 377 as the 'curing mechanism'. The recent judgement, we hope, will at least begin to change this situation in the long run. The threat is now weakened if not completely obliterated.

Conclusions

The legal lobbying around Section 377 within the ambit of sexuality rights has been enormous political and symbolic significance. In terms of ground realities, however, it is a much more complicated socio-legal battle. In the case of women, among others, the struggles and the impact of law must be nuanced. Legal changes and their significantly public nature with regard to case law have a very different impact on women as compared to men. In general, positively empowering laws that provide redressal mechanisms for women in cases of violence, or within other institutions such as marriage and the workplace, have had a pronounced impact on women's lives. Comparatively, legal changes that undo discrimination without providing legal rights explicitly, such as the decriminalising of adult consensual same-sex activity, have little impact for women. This is due to number reasons. First, ground level, the police harassment based on Section 377 is targeted largely towards those seen to be 'men' in society and who belong to a particular class. The changes in this law have little impact on women as is the case with some 'men' of privileged classes. Second, as a result of the association of Section 377 with sodomy law, it has often been related to men rather than women. The history of the law in terms of cases and its place in the public imagination over time, has also largely involved sex between men rather than between women. The perception of the law and the battles against it are also then seen as being primarily male. The significance of this battle in the lives of women often perplexes many, including some within the queer communities and struggles.

We can use this analysis also as a basis to take a critical look at the role of law in social change. This can be articulated through a two-pronged approach. First, the centrality attributed to legal change in processes of social change can be questioned, as has been argued in myriad contexts within processes of social change. Second, this centrality given to and visibility of legal battles may (and often does) leave out certain communities/identities as the law *per se* has invisibilised them. Further, the public nature of the law as mentioned earlier, in many ways, structures forms of dissent. It thus follows that the struggles of queer women are not often the material for posters of queer struggles in India as they are not a part of the public eye of the law; women also have relatively less privilege to be openly identified queer. Having said that, one must clarify that what we are suggesting is not a simplistic inclusion of queer women in the law or in the struggles against the same, but the use of their stories to question both the law and the expressed dissent. We must be conscious that the structures of oppressions that are being questioned many ways also configure the dissent. The life of Section 377 will invariably decide who is involved and/or is

affected by the protest against it. We must be wary of internalising, in our struggles, the exclusions and inclusions necessitated by the structures we oppose. One is also not suggesting that varied forms of dissent and struggle do not thrive. We are, however, critiquing the popular representation and perception of queer struggles in India. This questioning emerges not from a fear of difference within the movements – which in our opinion is nothing but a strength - but as a word of caution from the perspective of long-term social change. The enormous significance of the campaign against Section 377 at this historical moment is beyond doubt. However, from a broader perspective, we must be conscious that struggles that are of real and symbolic significance for one community/identity are only a speck in the universe of political struggles based on an alternative worldview. Legal battles are an even smaller aspect of social change especially when they are not simultaneously analysed and critiqued. In this context, recognising the significance of the Habeas Corpus writ, for example, in the lives of queer women is an excellent strategy to establish solidarity with various other struggles of women. This solidarity need not be just a strategic alliance. It could imply a broader political dialogue which might or might not mean consensus, but it would strengthen the different yet shared struggles of various women. With regard to the queer struggles across the South Asian region, there is a need to constantly re-emphasise and cherish the existence of the whole array of diverse forms of struggles. While some are shared, others need to be different. Exclusive spaces of support and sharing for men, women, gay men, hijras, lesbian and bisexual women, etc., are of enormous value within their particular scope and nature. Having said that, we need to always be conscious and critical of their purpose and impact. Our shared struggle, in many ways, can sometimes take the form of strategic alliances on specific instances and/or issues. At most other times, it might mean a larger political articulation of 'queerness', which is the dream of a world where persons and communities have the right to question norms of gender and sexuality and make their choices. This we see as a desirable larger politics which includes identity-based articulations only in specific and hopefully short-lived moments as strategy. Rights of identities and communities may seem to be the beginning, middle and end of many social struggles but we must move beyond this frame. We must acknowledge and remember that no philosophy of social change is about or for any one group of people. We argue that we need to be critical of a few things we often taken for granted in academic and activist work around issues of gender and sexuality. First is the simplistic clubbing together that is 'LGBT'. We have to remember that the selection of alphabets is not exhaustive and never will be, given the vibrancy of human experience. And second, the alphabets are not equals but are part of a social hierarchy and some

within them are, at times, invisibilised. Further, we need to be critical of addressing sexuality issues from the vantage point of sexual identities alone and try to evolve a language that is complex, including various aspects that affect our lives, of which sexuality is a part. The ghettoisation of any one kind of politics in both academics and activism, we argue, has to be countered effectively. In India, while we are still at the initial stages of activism, academic writing and public discourse on the whole gamut of issues of sexuality, we are struggling to highlight the differences and diversity in our struggles as a strength and a formidable force against simplistic arguments couched in the language of rights of specific communities and people, which in the long run might (as they often have in the past) leave oppressive and hegemonic systems unshattered if not untouched.

Given the recent judgement and the possible spaces it may open up within the public sphere and within queer spaces themselves, hopefully, now we can move on from our significant yet minimal struggle against the sodomy law to the larger questions that we can address and act upon with self-criticism and vibrance. Now is the time to raise these questions and begin to evolve a language to articulate them effectively.

RIGHTS IN INTIMATE RELATIONSHIPS

TOWARDS AN INCLUSIVE AND JUST FRAMEWORK
OF WOMEN'S RIGHTS AND THE FAMILY

A RESOURCE BOOK

BY

Partners for Law in Development

norms typically attributed to the lower castes and Muslim by upper-caste Hindus, in a context of urbanization, migration, and changing economic patterns.

Same-Sex Relationships (Kerala)

The concerns of same-sex desiring women in Kerala have been extensively documented, which allows us to examine issues related to this context. Kerala is exceptional for other reasons as well. The state leads in social indicators of progress, with the highest literacy, highest female literacy, highest balanced male–female sex ratio, and other progressive socio-economic indicators. Yet the practice of dowry has increased across all communities; the gendered division of labour remains unchallenged in the home despite large numbers of women in the workforce; and there is evidence of great institutional resistance to investigation of, and demands for accountability in cases of sexual harassment and sexual violence. Women and gender justice remain at the margins of the political concerns of the state, and of social movements within it. Kerala reflects a complex outcome of high social indicators and rigid sexual and gender norms, which results in gender disparities alongside social development, and a high degree of intolerance of sexual and gender transgressions by women. As a consequence, the situation of same-sex desiring women is characterized largely by secrecy, fear, violence, and suicide. In the context of Kerala, the spectrum of violence ranges from less to more explicit violence, such as surviving in situations hostile to same-sex desire and gender transgression, concealment of sexuality, forced marriage, forced migration, displacement, and suicide. Of course, the degree of fear and violence, as well as the capacity to negotiate these challenges, varies with the caste, class, and urban–rural positioning of the women. Given the fear of persecution upon being identified as lesbian, few same-sex partners are able to spend their life together, and the few who succeed do so by hiding their sexual identities. The queer movement, and the growing support from progressive movements in opposing the violence and stigma attached to same-sex relationships, has created confidence among same-sex people in urban India. Nonetheless, as Narrain and Bhan write, it is a ‘hesitant freedom for none of us can afford to forget how fragile the few accepting spaces we inhabit are, or how few of us have access to them.’⁶⁹

69 Arvind Narrain and Gautam Bhan, ‘Introduction’, *Because I Have a Voice: Queer Politics in India*. New Delhi: Yoda Press, 2005 at page 1.

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The context of Kerala illustrates the constellation of violations around lesbian women in documented empirical terms most clearly. Although in the context of India, most same-sex desiring women do not identify as lesbian, the term lesbian is used here for convenience to refer to those who are same-sex desiring, whether they identify as lesbian, or bisexual, or neither of the two. The large number of suicide pacts between lesbian couples in the last two decades has transformed the understanding of mostly lower-class and lower-caste lesbian women's realities from that of 'mere' sexual orientation to a matter of life and death. Media reports over a seven-year period (roughly from the mid-1990s to 2002) show that there have been 25 lesbian suicides in Kerala and that the majority of these were women below 22 years. These data include only those

women who killed themselves along with their partners. If one counts the women who killed themselves alone, the number will be higher.⁷⁰ Extracts from newspaper reports on lesbian women in Kerala highlight the degree of fear, isolation, and hostility these women faced, as well as the concerns of housing, employment, and shelter they confronted, all of which increase the vulnerability of lesbian women to violence.

70 Devaki Menon, Sahayatrika coordinator, in *India Today*, 25 December 2002.

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- *Jisha's letter says that no one should try to find my whereabouts, in which case I will kill myself. (Thuravoor, Malayala Manorama, 16 February 2006)*
- *Two women, Nasheeta and Sumita, got married at the Guruvayoor temple. Sumita's father took them home. When asked 'if this is proper?', Nasheeta, it seems, replied 'like a real man' that 'we will be together in life and death'.* (Mathrubhoomi, 24 April 2003)
- *Attingal: Two girls from Chirayinkeezhu Higher Secondary School were dismissed for getting married in the Chirayinkeezhu Devi Temple. When their friends came to know about their marriage, the news spread and the Parent Teacher Association immediately called for a meeting and took the decision to suspend the girls.* (Keralakaumudi, 26 November 2002)
- *Thrissur: The court granted permission to two women who wanted to live together. They are Shiby (22) and Prema (23).* (Mathrubhoomi, 27 October 2002)
- *Sisha changes her mind: Refuses Mini: 'After living together with her girl friend, Mini, for a few months, Sisha is finally taking a decision to leave her. Mini and Sisha, who eloped to Coimbatheer together five months ago and came back home to live together, are now separating. Sisha has confessed about her sins and is now attending the mass (prayer). But Mini is preparing herself to go to court, accusing Sisha's family of forcefully taking Sisha away from her.'* (Malayala Manorama, 13 October 2000)
- *On 14 January 1995, Mathrubhoomi reported the suicide of Gita (22) and Saija (16) who had eloped from Allepey one month after Gita was married. Gita was discovered almost dead, having consumed poison. The police discovered love letters they had written to each other.* (Times of India, Mumbai. 15 August 1999)

- *Sree Nandu is among the first lesbian women in a relationship who came 'out' to the media. The following is an extract taken from her interview published in the Malayalam magazine, Bhashaposhini (September 2004): 'Only a woman can really understand and love another woman the most. That is not the way men love women. Our conservative society looks at women only as objects of sex and that is why they are unable to conceive this reality. . . . my sister got married three years ago. All the arrangements for the marriage were done by me, like booking the hall, ordering and buying things, etc. Normally, these are things that a brother would do. People asked: Isn't that your sister? Why is she doing all this? But my father never had a problem with all this. My father used to say, why can't a sister do what a brother can do? That is the way my father brought me up. He always bought me boy's clothes . . . Just because I am like this, I do not want to run away to Bangalore. I want to live here. I was born here and want to live here only. I know many people here have committed suicide. And people ask me if I will do the same. Never. . . . when Achu's father fought with us, we left for Bangalore for a short while to be away from here. I got to know much more while I was living there. That these are not big issues when you live in a city. Only in our Kerala it is seen as a big problem, as it is wrong. That gave me a lot of courage. Now I can say anywhere that I am a lesbian. I feel that now no one should kill themselves because of this. If my saying this in public gives courage to some others, I am extremely happy.'*

- *"Two persons love each other and they want to live together. If they both happen to be women, what is the issue? Others start asking questions like: "How will you have children? How will you enjoy sex, etc.? Is it only for sex or for children that people get married or is it to get closer to each other? Can't two people be together for love, friendship and togetherness?" asks Sheela. (Vanita, Malayalam Magazine, 15–31 August 2004)*

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It is in this context that Sahayatrika, a lesbian support group in Kerala, is situated. According to Devaki Menon, the coordinator of Sahayatrika, activists from human rights, women's rights, and queer rights movements came together to create a support group for lesbian women in 2001. It started work with the support of Sangama in Bangalore and of FIRM (Foundation of Integrated Research in Mental Health) in Thiruvananthapuram to promote awareness of queer issues and to address, specifically, the issues faced by lesbian and bisexual women in Kerala. Sahayatrika, which originally began as a one-year project of FIRM, is now an independent organization. In 2002–2003, it started a helpline for lesbian and bisexual women and undertook research and documentation of lesbian suicides and related issues in Kerala. Through small workshops held across the state, it reached out to women in same-sex relationships and raised issues of sexuality at any available forum. Following Sahayatrika, other queer groups and spaces emerged in Kerala.⁷¹

The grave and life-threatening hostility against lesbian women has caused nearly all the attention of supportive social movements to be focused on violence, fear of violence, and suicide, that is, violence that obstructs 'choice' in terms of sexual preference. Testimonies of women recorded at a small workshop organized by PLD with Sahayatrika in Thiruvananthapuram (see Appendix E) bring out the extent to which class, caste, and economic insecurity exacerbates the degree of hostility and increases the likelihood of displacement of lesbian women and transgender persons (female to male). Queer feminists from Kerala believe that the focus on violence has marginalized the equally pressing concerns relating to employment and housing that stem from the stigma and hostility faced by same-sex desiring women, and that this also affects lower-class/caste same-sex desiring women. Some of the vital areas that have been neglected as a result of the focus on violence are the inability to open a joint bank account, to seek insurance, and to open a provident fund, all of which typically require a blood or marital relationship for someone to qualify as the joint holder or nominee.⁷² Living together also is shrouded in secrecy, and is usually accompanied by strong assertions of being 'just friends' or flat mates to erase signs of being a family or a couple to the neighbourhood and to the world at large.⁷³

71 Such as Snehapoorvam, Vathil, Vathilakam, and Gaia. FIRM runs four drop-in centres in Kerala (in Ernakulam, Thiruvananthapuram, Thrissur, and Calicut), which run distinct projects relating to lesbian women, sex workers, and men who have sex with men (MSMs).

72 Queer feminists from Mumbai, too, agree that the focus on violence has been at the expense of concerns such as spousal benefits accruing from insurance and joint banking, child custody, and protection from intimate-partner violence. LABIA, Mumbai, at the National Consultation on Rights in Intimate Relationships, PLD, May 2008.

73 Awaz e Niswan and Forum Against Oppression of Women, Mumbai, at the National Consultation on Rights in Intimate Relationships,

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Sahayatrika's services for lesbian, bisexual, and transgender persons (female to male)⁷⁴ include crisis intervention, shelter, police protection, dealing with loss of employment, and relocation to safe shelters outside Kerala. For working-class women, once they leave the house, their own survival remains the biggest issue. In the face of such severe persecution, women are known to commit suicide or are forced to move out of Kerala to relocate in the neighbouring state of Karnataka with the help of Sangama (Bangalore). The typical middle-class responses to women who 'come out', or who are found out and brought back to their family after eloping, are forced therapy, confinement at home, and coerced marriage. The class, caste, and economic status of the women, in addition to their location (urban or rural), determine their options and influence their capacity to deal with such situations. For example, a higher-caste woman who is economically secure can get other jobs, or even move to a more liberal environment, whereas a less privileged woman cannot risk giving up the employment she has; nor does she have the savings or the means to relocate, or to live independently of her family. As a consequence, Sahayatrika has prioritized the securing of basic rights, such as housing, employment, and survival, over advocacy against Section 377 of the IPC.

One of the main reasons for the dehumanized responses by the media, the law enforcement system, the community, and the family is the equation of lesbians with deviant sex. Lesbian women are perceived as oversexualized as a result, and their relationships are reduced to sex acts alone.⁷⁵ Even where the families accept the women, society does not. Thus, once identified, lesbians cannot escape the stigma of perversity and unnaturalness, making them not only less women, but also less human. Lesbians evoke such strong reactions primarily because their visibility challenges the ideals of passive female sexuality, heteropatriarchy, and marriage in a very fundamental way. Stigma and persecution are part of an everyday reality for working-class lesbian women, for whom livelihood options are tenuous and choice of housing and mobility is restricted. Under such pressures, some working-class lesbian women seek sex-altering surgeries to conform to the norms of compulsory heterosexuality. Although many transgender persons

PLD, May 2008.

74 Transgender persons are persons who are born into a particular sex but who identify with the opposite sex. As a result, they assume, to varying degrees, the gender characteristics of the opposite sex. Many transgender people do not believe in the strict male–female dichotomy that prevails in society, and exhibit a combination of male–female physical attributes and a combination of masculine and feminine social attributes, hence assuming a unique gender identity.

75 Ruth Vanita, *Love's Rite: Same Sex Marriages in India and the West*. Palgrave Macmillan. 2005, p. 10.

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want to change their bodies to reflect their gender identity, some make the choice to gain social acceptance and live more easily as man and woman.

An Amnesty International report on intimate-partner battering notes:

Like in heterosexual partnerships, battering among LGBT intimate partners crosses age, race, class and socio-economic lines. While same-sex battering mirrors heterosexual battering both in nature and prevalence, its victims receive fewer protections. Many LGBT victims of intimate partner violence are denied services such as emergency shelter, medical treatment, financial assistance, counselling, job training, legal services, and many others that are routinely prescribed for battered heterosexual women.⁷⁶

Such an environment requires women's groups to integrate concerns of same-sex relationships into their larger body of work, beyond condemnation of violence and affirmation of 'choice' of sexual preference. The neglect of caste, class, and transgender concerns is reflected in the lack of attention to housing, education, and employment rights, which result in displacement. The silence around these concerns is, in and of itself, a human rights violation. It falls upon all progressive groups, particularly women's groups, to give visibility to these rights, to question the grading of desires along the spectrum of good–bad and natural–unnatural, and, simultaneously, to question the privileges attached to marriage. One way of challenging heteronormative marriage is to demand the right to enter same-sex marriage. Another way is by developing frameworks of a core set of obligations in intimate relationships without reference to marriage. Simultaneously, it is necessary to talk of queer families (and not only of intimacies) that are diverse and non-nuclear, but bonded by commitment and caring.

⁷⁶ NCAVP LGBT DV report for 2002, quoted in the Amnesty International report, 'Domestic Violence in LGBT Communities' <http://amnestyusa.org/women/violence/domestic-violence-lgbt.html>

Queer Women and Habeas Corpus in India: The Love that Blinds the Law¹

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Abstract

The article employs the example of the use of the writ of Habeas Corpus in cases involving lesbian women in India. These cases, few and far between, provide a broad canvas to theoretically reflect on the relationship of the lives of queer women with the law as well as with the women's movement and the queer movement in India. The article proposes a critical analyses of the way the law frames identities, struggles and movements and suggests possible direction for theoretical perspectives that take on this nexus and evolve a language that is closer to the reality of the lives addressed in legal, academic and activist work, with all its conflicts, contradictions and chaos.

Keywords

Habeas Corpus, queer, lesbian, women, feminism, law, social movements in India

For the 'I' to launch its critique, it must first understand that the 'I' itself is dependant upon its complicitous desire for the law for the possibility of its own existence.

Judith Butler (1995, p. 7)

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The term 'queer' is used by some activists and theorists in India to mean a critique that does not merely address normative practices *vis-à-vis* gender and sexuality in isolation. 'Queer' encompasses and engages with a larger world view that recognises and critiques complex systems of class, caste, gender, sexuality, race, region and religion (Menon, 2005, pp. 33–39). In the context of this article, the term 'queer' is being used to refer to women who engage in sexual and/or romantic relations with other women. It also refers, in some cases, to women who identify as men or as transgendered individuals. The use of the phrase 'queer women' is thus a conscious political and theoretical choice distinct from an engagement with a long list of markers of 'identity', which can never be exhaustive. Alternatively, this choice is in favour of a limited reading of the coinage of 'queer' as many of the cases referred to in this article involve queer women from backgrounds that are marginalised on the basis of class, region and caste. It is these women who are often forced to appear in front of the law; this is much less so among queer women of relatively privileged backgrounds in urban areas and from upper class and caste backgrounds.

The epigraph of this essay on the 'I', when read as 'queer women' in many ways summarises the tensions this article attempts to analyse. Even a cursory look at the position of queer women's everyday lives will make this apparent. The constraints of space and mobility that affect the lives of all women also apply to queer women. This is best explained by contrasting their story with that of many queer men in the Indian context. Many queer men² in India are often married to women, which might well create pressures for them. But this multiple life is itself only possible because of the kind of space and mobility that remains the privilege of men. Apart from such privilege within the private sphere, the public sphere still remains largely hostile to women's presence and their forms of expression. For instance, the option of discussing 'cruising' in public parks as in the case of queer men is an impossibility for queer women. Queer women often meet, get to know each other and evolve different kinds of relationships through networks created specifically for this purpose and/or in their everyday lives like others. The gendered privilege then is a comment on the construction of the role of sex in the lives of men and women, which is often drastically different. While it would be wrong to generalise, we do argue that the relative chances of looking at 'sex' as a 'good' thing remain greater for men. This in turn is a comment

on how women and men view their bodies in terms of feeling pain, shame and pleasure. A language for pleasure for women is simply much rarer.

Apart from this, the engagement of queer men with the law is also significantly different. A large part of the conflict with the law lies in everyday harassment of all kinds from the police and other persons in the public sphere. Cases of indecency, immorality and so on are common. Queer men who are sex workers face all the harassment that female sex workers face, above and beyond their plight as queer men. More often than not, the law's effect on queer women's private spaces is not visible. All of this is apart from the overarching suppression imposed by Section 377³ of the Indian Penal Code, the law to curb sodomy introduced in India, among other colonies, by the British. This statute still remains in the books and its use has traditionally been associated with 'queer men'.

Segregated gender spaces are common in our society. These spaces often become ones where illicit pleasures are experienced, which we can illustrate through the story of the 'L' in a particular women's college hostel. The hostel in question saw a lot of same sex activity, often not secretive. These encounters did not always grow into longer term emotional commitments between the women involved, nor did they lead these women to identify themselves as 'lesbian'. 'L' was how all the girls referred to those who engaged in same sex sexual activity. This 'L' was a nondescript, not particularly dangerous, entity. It almost seems as if the use of the term 'L' was safer, if not absolutely safe, in contrast to 'lesbian'. In the case of both queer men and women it is the act of naming that becomes the source of the threat, rather than the sexual act, so long as it is done in secret.

Even at this preliminary stage of our discussion, it becomes apparent that queer women share a great deal with any heterosexual woman who chooses her own partners (irrespective of caste, class, religion, race, region), who engages in sexual activity before or outside of marriage, decides to be a single mother, have multiple sexual partners and so on. There are, however, significant differences in the challenge that queer women articulate to heteronormativity. First, they shake the very basis of heteronormativity, which is the need to have a man in an intimate, interdependent relationship. Second, the structure of the family is significantly challenged, as these women engage in sexual activity which does not and cannot result in procreation or in the fixed legal category of marriage.

Third, and most significantly, lesbian women's sexual activity is one that is *only* for sexual pleasure.⁴ Sexual pleasure, a 'luxury' not allowed to women as a whole and to some men (the disallowing being a gendered process) is in many ways the basis of lesbian sexual activity, thus making it incomprehensible and a threat (Thangarajah and Arasu, 2011, pp. 325–338).

Queer Women and the Law

Section 377 explicitly linked criminal sexuality... with male agency, and hence did not *have to* criminalise lesbian sexuality... [emphasis added] (Thadani, 1999, p. 149)

Most discussions concerning queer identities and the law begin with Section 377 of the Indian Penal Code. IPC Sec. 377, as well as the legal position of queer women, are complicated issues (Thangarajah and Arasu, 2011, pp. 325–338). The symbolic potential of the struggle against Sec. 377 within the context of the history of the law and its role in constructing a homosexual identity remains a significant one (Narain, 2004, p. 76). In the context of the present article, we are less concerned with critiques of articulating social struggles and identities around a law, than in noting Giti Thadani's comment regarding how the struggle against Sec. 377 has been primarily male and thus addresses queer men.

There are many other laws that affect the lives of queer women and need to be foregrounded. Given the nascent stage of thinking about and analysing the relationships between queer women and the law in India, Habeas Corpus occupies a very important place. Such cases are part of the little known story of queer women and the law, and will be the focus of our reflections here. We offer some examples in the following paragraphs, in order to broaden the common sense knowledge of the relationship between law and queer women in India.

Section 339⁵ and Section 340⁶ of the Indian Penal Code (IPC) make wrongful confinement a crime. Wrongful confinement occurs when a person is confined by one who does not have the authority to do so. In Habeas Corpus cases we see this section being used when it is alleged that the state or husband/lovers or fathers/families are illegally confining a woman. In the case of M and L⁷ who ran away together when they

realised that they could not live together in their village, L's parents filed a case of illegal restraint. Even though L stated that she would not like to go home, the court ordered that this 21-year-old be sent back to her parents (April 2006, Kokrajhar, Assam).

Section 361⁸ is concerned with kidnapping from lawful guardianship. If a person 'entices' or takes a minor (under the age of 18 for girls) from the legal guardian without the consent of the guardian, he/she can be charged for kidnapping. The consent of the woman/girl kidnapped is immaterial under law. Kidnapping is a crime that most families take advantage of in the case of queer women and it is interesting to note the extent to which proof is produced regarding the minor status of the woman so as to keep her in the custody of her family. What is even more pertinent is the court's decision to send an adult woman back into a home that she does not wish to live in, leading to an ironic violation of the requirements under Section 340. In the case of Sonu (21) and Rekha (18) who eloped to Punjab, they were traced after Rekha's parents filed a kidnapping complaint. Sonu was forced to undergo a medical examination to establish that she was a woman. Under pressure, the girls publicly declared they were just friends. In this remarkable case, on 8 March, the Halol magistrate ruled that as consenting adults they were free to live together (January 2006, Halol, Gujarat).

Section 362⁹ is concerned with abduction. Abduction is another allegation that gets thrown at women who run away together. The allegation then is that one of them enticed the other to another place with the intent of committing a crime such as an illicit sexual relationship. Pooja, a widow with an 8-year-old son, was jailed for 'abducting' Sarita (19). The two had exchanged vows in a temple and eloped. Sarita was sent back to her parents. The police claimed Pooja was 'characterless' and involved in 'criminal activities' (December 2004, Patna, Bihar).

Interestingly, Section 366 has also been used against lesbian women. Section 366 criminalises kidnapping that is done with the intention of compelling someone to marry them.¹⁰ This section is used widely by parents of heterosexual couples when they run away. R and M met while working together. When R's parents heard of the relationship they confined her within their home. However, R and M left home. Their parents filed a complaint under Section 366. The magistrate's court decided that the 21-year-old R must return to her parents. The decision was appealed against by an activist, and lawyers in the Delhi High Court. The judge

agreed that no adult can be forced to be with her parents. Throughout the case, the relationship between R and M was consciously concealed.

It is interesting to note that the court has also charged lesbian couples with perjury. Under the IPC and other penal codes in the subcontinent, giving false evidence to the court is seen as a crime.¹¹ SR was a female transsexual who was married to ST. They both live in Pakistan and all court proceedings mentioned below were in Pakistani Courts. ST's family filed a case against SR for kidnapping and fraud. While the magistrate's court decided in their favour, the Lahore High Court on the allegation by ST's father that SR was a woman ignored the contentions before him and ordered that SR be examined. When it came to be known that 'he' was indeed a 'woman' SR and ST were sentenced to 3 years' imprisonment for perjury. Note here that although ST had undergone basic surgery and he himself identified as a man, the court took no heed of this and declared his 'manhood' a lie in the eyes of the court. However, the Supreme Court, in a path-breaking judgement, not only held that there was nothing wrong with the relationship that these women had but also that there was no perjury on their part as it was not illegal to change one's gender identity.¹²

Feminist Legal Debates in India and the Place of Lesbians

The story of feminist legal debates is a nuanced one, and has been told by many with different foci and in many contexts.¹³ It would suffice here to say that legislation has been a significant method of affirming women's rights in India, thus forming a significant analytical frame¹⁴ for gender and feminism in India. As Flavia Agnes (1992, p.19) has put it:

If oppression could be tackled by passing laws, then this decade [namely the 1980s] would be adjudged a golden period for Indian women when protective laws were offered on a platter. Almost every single campaign against violence on women resulted in new legislation.

At the same time, the effects of legislations on the lives of women have also been analysed critically, and advocacy for legislation as a strategy for feminist struggles has been questioned.

There have been specific analyses about the role of sexuality in the Indian women's movement(s), and the law has been a significant aspect of these studies. 'Interestingly enough, it is in the legal sphere... that the mediations of sexuality by the structures of gender, caste and class are most clearly revealed' write John and Nair (1998, p. 24). For this particular essay, we wish to borrow those aspects pointed out by feminists which might be useful to our analysis. With regard to the addressal of sexuality within legal activism by feminist struggles, certain broad observations can be made.

First, until now feminist struggles engaging with the law have primarily concentrated on violence, though of different varieties such as the struggle for legislations around domestic violence and sexual assault. This is not, for a moment, to say that these movements and discussions are not significant. However, it is important to critically analyse them in light of more recent struggles such as that of queer women. The law often recognises violence in a way that it does not in many other acts. Many social movements, including feminism, have spoken to the law in the language it understands—that of highlighting instances of violence while the issues might be broader. Legal advocacy around the issue of sexual violence has been criticised and its limitations articulated¹⁵ (Menon, 2000, pp. 66–106). Consider for a moment the recent struggle of the bar dancers in Mumbai or the debate over sex work in India. Both issues have had legal dimensions. Neither of these struggles has had the kind of unequivocal support from feminists in India as did the Domestic Violence bill that became an Act in 2005. Interestingly, this bill was being debated around the same time when the ban was first imposed on bar dancers in Bombay, which was also when sharp differences over prostitution/sex work emerged among feminists.¹⁶ Interesting insights emerge when the differences are considered, between women who are the subjects of the Domestic Violence Act, on the one hand, and the bar dancers and sex workers on the other. The main difference seems to be a clear articulation of desire and sexual agency in the case of the latter. Although all women suffering one or other forms of violence might invoke the language of rights, citizenship and so on, the differences between them are important. A feminist language that incorporates discourses of pain, pleasure and shame, sometimes with blurred lines between them has yet to be developed. The rudiments of such a language are not yet legible, but the process of finding one ought to be a worthwhile feminist exercise in India

today. Lesbians tell this complex story of violence unleashed on them by virtue of their 'deviant' desire and their choice to live by them.¹⁷

Second, while campaigns have critiqued the heteronormative family from various angles—violence against women, dowry, female infanticide, to name a few—there has been inadequate articulation of the fact that the law is entirely based on the 'legitimate' heteronormative¹⁸ 'family' and on heteronormative marriage. This is not to claim that bar dancers or sex workers have been excluded from feminist concern. There have been debates along the lines of the 'objectification of women' which include bar dancers and sex workers.¹⁹ There have been other nuanced differences for instance, over 'decriminalisation' versus 'legislation' in the context of sex workers. There have been criticisms that the emphasis on 'pleasure' as it were, cannot be extended to the level of denying the experiences of violence altogether. For their part, sex workers' organisations and activists have critiqued feminists in this country for only addressing so called 'chaste' women (chaste being a euphemism for married) while leaving out the issues of the '*veshya*'²⁰ (prostitute). From these debates, we hope to ask a different question. Is the reason for reluctance to address issues impelled by the general need to give a secondary status to women outside the folds of normative 'marriage' and 'family'; or is there also a discomfort with and/or the lack of a feminist *language* to address issues outside the frame of marriage and family? These questions will continue to structure the following sections of this article.

Habeas Corpus and Queer Women

Feminists have argued that the writ of Habeas Corpus²¹ is often used by members of the natal family of a woman to claim ownership over her in cases of marriage against the will of and/or without the consent of the natal family. This brings into focus the feminist critique of family/community's ownership of women's bodies, spaces and lives. Nasser Hussain discusses one of the earliest Habeas Corpus cases involving a woman where the court's utter incomprehensibility of looking at her 'individual agency' turns the case instead, into one between two religious organisations, one that the girl seems to have chosen to join and the other that supports and helps the parents to 'get her back' (Hussain, 2003, p. 90). In

his discussion of the 'writ of liberty' (read writ of Habeas Corpus) he argues primarily that the evolution of Habeas Corpus in the pre-World War II period was caught in the conflict of assuring people their rights while not allowing any challenge to the colonial state or its policies (Ibid.) This analysis can offer useful parallels in the feminist context, namely, the need of the state to maintain normativity while claiming sensitivity to rights. More specifically, in the context of Habeas Corpus, we argue that the 'ownership of women' position is taken forward through an analysis of case law involving women (Chakravarti, 2005, p. 314; P. Baxi, 2006, p. 59).

What often gets left out of such discussions is how the institution of marriage itself is upheld as the only recognisable institution of partnership/intimacy in the context of heterosexual couples. Put simply, if a heterosexual couple were to counter a case of Habeas Corpus (or any other case) filed in court by the girl's family, they would have to be legally married. Proving legal marriage has been the crux of their defense in most cases. This of course does not mean that such a line of defense assures the woman's interests. First, the natal family might still be privileged in the courtroom (Chakravarti, 2005, p. 314; P. Baxi, 2006). Second, the implication is that the woman's individual interest within the marriage cannot be questioned as it (legality of marriage) is the couple's sole defense and questioning it would mean jeopardising their chances of being together. The woman rarely questions her marriage of choice as the only other option (according to the court) remains her natal home, which she has left for myriad reasons, including the desire to be with her male lover.

This power tussle between the father and the husband is not a simple process. It is not simply a case of the state upholding the norms of society, while paying lip service to rights. It is one that complicates the very intention of the state.

...the lower judiciary acts in complicity with the family to 'rescue' adult women from 'improper' alliances, which contradicts the juridical emphasis on enforcing marital relations through the technique of reconciliation. The emphasis on upholding the institution of marriage means that distinctions between arranged marriages and marriages of choice must find challenge within the judiciary... (P. Baxi, 2006, p. 60)

We wish to extend Pratiksha Baxi's argument by drawing on the experiences of queer women. First, this means looking more critically at the

implication of the supreme legitimacy of marriage as an institution in the lives of women. Second, this means looking at the bodies that the court identifies and those that it does not. Upendra Baxi's (2006) discussion of 'readerly rights' is useful in this context. He complicates the notion of rights ensured within the constitution by arguing that rights are not those that are simply *given* to citizens, but rather are also those that can be *read into* the constitution. Thus, if a particular reading is not possible then acquiring those rights through constitutional means becomes correspondingly difficult. It is this 'readerly right' that is the one we possess (U. Baxi, 2006, p. 178). To read queer desire then is the challenge. The standard position on queer women in court, in society at large, as well as within queer movements themselves has been that of 'silencing' (Thangarajah and Arasu, 2011, pp. 325–338). The 'readerly rights' argument counters as well as takes forward this view to read it as non-recognition.

Third, we need to look at the implications of this non-recognition and how it can be used for an assertion of oneself and one's desire. As we have already seen, arguments so far have taken the form of a complaint against silencing and thus a lack of agency to assert one's rights and desires (Thadani, 1999). In this article, we hope to ask questions which might complicate this alleged 'lack of agency'.

The next section will look at two cases that have involved queer women and the writ of Habeas Corpus. These are the only two cases we have found so far, having looked at records of Habeas Corpus cases involving women from the 1940s till October 2007. Our examination of the records was to look for what we, almost in jest now, refer to as 'lesbian undertones'. In all these cases there was a husband/male lover and a father/natal family; however, we also know that many cases that do involve women wanting to be with/love other women have not entered the court records as cases ostensibly involving same sex desire. In the following paragraphs is the script of a hearing that one of us (Ponni) witnessed.

The case involved a lesbian couple who had left home and the parents of R,²² one of the women, charged the other, M, with kidnapping. R had to present herself at the Delhi High Court and declare that she left home out of her own will and volition. R and M 'won' the case as the judge declared that R was an adult and could live wherever she pleased. The charges against M were nullified. The scene in the court is described as below. This is to give you a sense of the nature of the drama in court,

in order for you to be able to perceive the nature of these cases beyond what the judgements and other paper based sources tell us:

A packed court room with an old, pleasant looking man as the judge. A senior lawyer who supports the case of queer persons in India is fighting the case. Ponni stood next to R who was dressed respectfully in a salwar kameez, dupatta and bindi (read good North Indian girl).

Parents' lawyer (*after restraining R's parents from physically pushing us, in an angry tone*): Your honour, M has kidnapped R to use her for immoral and illegal purposes.

R's lawyer (*in a calm and composed tone*): Your honour, there remains no proof to assert that R has not left with her own will and volition. R does not have any relationship with M apart from being a colleague. My client and I have no knowledge or concern with her whereabouts (*in a mocking tone*). Besides, my dear friend here in his submission has alleged a sodomy charge. This is unheard of, as you can clearly see that R is a woman and so is M from what I gather. This day too we had to see—of women being charged with sodomy.

(*giggles in court and the judge laughs openly*)

The exact nature of M and R's relationship is obviously known only to the activists and lawyers involved in the case, and have been *actively kept out* of court records. This remains the primary methodological problem with writing a legal history of lesbian relationships and law in India, and hence demands a different reading than one of mere absence or silence.

Further, in one of the two cases we discuss below, N and R were thrown out of court for the reasons that will be mentioned. One can comfortably assume that this is not specific to N and R but is the story of many such cases invoking the writ of Habeas Corpus or any other law. We are able to write this story only through our access to queer archives that are being built in India which tell stories that could never enter the haloed sphere of the court.

Two Stories

Two adult women, Mini aged 29 and Nisha aged 19, were working together in an industrial unit that employed unmarried women at

Varapuzha, Kerala. In May 2000 the girls left their village for Coimbatore, where Mini changed her name to Babu, cut her hair and dressed like a man. Mini's family filed a complaint regarding her disappearance. When the women heard of this they returned home. They were produced before the first class magistrate in Paravur. At the hearing Mini was dressed as a 'man' (*Malayala Manorama*, 11 October 2000). The court then granted them permission to live where they wanted to but the families wanted them separated (*Ibid.*). Even though the court ruled that two adults could live together as they wished, the parents separated them and took Nisha with them. Subsequently Mini filed a writ of Habeas Corpus demanding that Nisha be brought to court and that she was being illegally confined by her parents. The relationship, however, broke down when Nisha was brought before the High Court and she said that she was not being held against her wishes and that she would like to return to her parents (*Malayala Manorama*, 23 November 2000).

In the year 2005, N filed a writ of Habeas Corpus at the Kerala High Court for the release of R, who was being confined against her wishes by her parents. N and R were friends for a long time and R confided in N about the abuse she faced from her brother. This was one of the reasons why R wanted to leave home. The situation increasingly deteriorated and the girls decided to run away as R threatened to commit suicide, if she had to continue to stay in that house. They ran away and sought shelter at a women's organisation, Sahayatrika²³ and called their parents to assure them of their safety. The parents complained to the police due to which they had to be presented to the magistrate who allowed the women to do as they wished. Despite the assurances given by their parents, they were separated and N was put on medication. N escaped from her parents but was unable to find R and thus sought remedy under the Constitution. The court however dismissed the writ of Habeas Corpus on the grounds that N had no right to seek this remedy as she had no *locus standi*, she was not related to R, neither was she an affected party.

The Stories Within the Story

Let us take a cursory look at available court records and newspaper reports about the two cases in question. These quotes involve descriptions

of the women by the press which often uses the language of the court as well of the women themselves cited in court documents and in the press.

Naming the Relationship

‘close friends for the past two and half years’ (*Malayala Manorama*, 11 October 2000).

‘The petitioner submits that she has been searching for her friend’ (Mini’s petition to the Kerala High Court).

‘Mini returned to her home with Nisha. Her father Bhaskaran received the friends with pleasure’ (*Malayala Manorama*, 23 November 2000).

‘...extremely nervous nature and would easily get frightened and it was a major support for the detainee that she had a friend’ (Mini’s petition to the Kerala High Court).

The most common and safest form of referring to lesbian women in the court and in reportage has been ‘friend’. A process of sanitising, de-intensifying the relationship then is in place. Other references in news reports are more truthful.

‘Nisha is trying to give up her partner and friend Mini after living together for months in Coimbatore’ (*Malayala Manorama*, 23 November 2000).

‘...who kidnapped her partner and lover’ (*Malayala Manorama*, 23 November 2000). [The term ‘partner’ is used, commonly used also in the case of an unmarried heterosexual couple. Rarely does one see the word ‘lover’. This term is however used here without leaving any loose ends in declaring the illicit nature of this ‘love’ affair.]

‘They lived there for three months as husband and wife’ (*Malayala Manorama*, 23 November 2000).

‘...they came back from Coimbatore after three months of married life. After they got this permission they were living together as husband and wife in Mini’s house’ (*Malayala Manorama*, 23 November 2000).

A common and interesting practice is to refer to these couples as ‘married’. This is done, one can argue, for two reasons. First, often the couples

themselves imitate a marital relationship through performances of their gender and married roles. Second, the press often has no other way of recognising this relationship except through the trope of marriage. Taking the invocation of marriage as a description of such a relationship to new heights is the heading of an article which says:

‘Nisha not in confinement, divorces Mini’ (*Malayala Manorama*, 23 November 2000).

‘The Petitioner fears for the safety of the detainee and it is under these extreme circumstances she is approaching this Hon’ble court’ (in Mini’s petition to the Kerala High Court).

‘...into a depressive state and would threaten to commit suicide if she continued staying there. It was only on the persuasion of the Petitioner that the detainee would avoid taking that extreme step’ (in Mini’s petition to the Kerala High Court).

‘...earlier she tried to commit suicide. She threatened Nisha’s family saying that she would hang herself in front of their house if they don’t allow Nisha to live with her’ (*Times of India*, 23 November 2000).

In a desperate bid at least to begin to articulate the intensity of the relationship to the court, the petitioner uses convoluted language. As there remains no language to articulate intimacy outside of heterosexuality and heterosexual marriage, she is left with no choice but to argue her case in a language that is almost incomprehensible to the court. The last quote is anecdotal to prove the intensity and thus the significance of the relationship.

The Natal Family’s Recognition of the Relationship

‘...he started tormenting the detainee mentally by spreading rumors that she did not have a healthy relation with the Petitioner’ (Mini’s petition to the Kerala High Court).

‘Nisha’s relatives stated that Mini began a close relationship with Nisha by loving and threatening her’ (Nisha’s father’s response to the Habeas Corpus petition in the Kerala High Court).

It is by invoking immorality and criminality that the natal family puts forward their case. The family's non-acceptance of the relationship is not expressed in any other way. Giving a reason is considered unnecessary in the case of 'unhealthy', immoral and criminal relationships. Here is where you see the stark difference between heterosexual and homosexual 'runaway couples': in the former the question is always one of 'non acceptance' by the family for various stated reasons, be they of caste, class, religion or any other.

Some conclusions can be drawn from the above. First, the court hears the cases without ever being exposed to the full nature of the case in question. This of course remains inadequate and unjustified legal practice. Second, exposure to the court would be impossible as there is no legal language that permits the expression of the nature of this relationship. If one were to risk serious consequences and use terms such as 'lesbian' or 'homosexual' or 'women loving women', the court might still not comprehend the concept and were this to happen the situation would only worsen as it would provide grounds for criminal prosecution under Section 377, although this is no longer the case in Delhi.²⁴ The language of the media follows that of the court, spicing it up with an element of sensationalism. The simple fact that the exact nature of the relationship has not entered the court at all has never been pointed out, and seems to lie outside the scope of media coverage. Positive media coverage may even express support to the couple and point to the 'injustice' done to them if any, but will still not address the silences.

Describing the Body

'I am no longer Mini, I am Babu' (*Malayala Manorama*, 11 October 2000).

'Mini cut her hair and wore men's clothes so as to live like a man' (*Hindustan Times*, 24 November 2000).

'Mini's voice and structure are almost like a man's. She is able to do electronic work and climb trees. She has changed her name to Babu. She has had some similar relations with other girls in the unit in which she worked' (*Hindustan Times*, 24 November 2000).

Notice that the discussions of Mini's body are entirely descriptive in nature. Being limited by the man-woman dichotomy, description of attire, physical attributes and so on becomes the only means of hinting at the situation.

'Mini is the youngest daughter of Bhaskaran. She was brought up as a boy since the family has no male child' (*Malayala Manorama*, 11 October 2000).

'I dress like a man for safety in traveling. For this reason I have decided to live as Babu' (Ibid.).

'Mini dressed like a man for filing a petition before the court. Mini is filing this petition for the protection and safety of Nisha as well' (Mini's petition to the Kerala High Court).

These quotes point to the reasons for Mini being a 'man'. This of course flows from the assumption that the deviance has to be compulsorily explained. It is also important to note that it is also a bid to legitimise the deviant body through explanations that can be justified. The last quote is the most interesting. It points to many things. For one, the ease of the male self in court is apparent as opposed to that of the female (Mini repeatedly stated that safety was a reason for her 'male behaviour'). Second, in this particular instance, Mini, a woman, seems to be doing nothing but performing the recognisable act of a husband seeking the body of his wife in a context where a Mini/Babu is not recognised in court. Further, that Mini's case was thrown out for lack of *locus standi*, points yet again to the fact that this intimate relationship is unimaginable let alone legitimate.

In the light of the discussions above, what is it that we are asking for? Do we want to see terms such as 'lesbian' normalised in the court and media? Do we want 'lesbian marriage' to be deemed legitimate? Is one asking for the recognition and acknowledgement of the 'deviant' body? The simple answer would be to ask for these rights, which will then 'normalise' and thus maybe ease the strains on these women. Normalising then becomes another matter of debate. Are we asking for a place within the norm or are we asking to create our own spaces outside of and sometimes opposing these norms? The reality today remains that many lesbian, gay, transgendered individuals veer towards the comfortable space of normalcy. The relief of this comfort in the otherwise difficult life of lesbian, gay and transgendered people cannot be emphasised enough. Not for a moment can we be disrespectful towards the use of such comfort in order to advance our critical arguments. However, it cannot be left unquestioned or held sacred. It is as important to the everyday lives of LGBT people as it is to the purposes of critiquing the traps of normativity. The non-

inclusivity of normalcy becomes apparent in LGBT lives sooner rather than later, and this facilitates the questioning of it. This is most explicit with the non-inclusivity even of 'L, G, B, T'. Many slip through the cracks of this alphabet list and have to create new ones. It remains to be seen how long this 'alphabet creation' can sustain itself as a strategy, apart from its limitation as an analytical frame. Either way, this quest, we argue, is primarily because of the lack of even the remote beginnings of a fresh imagination.

For now however, by virtue of this denial of a name and recognition or acknowledgement, lesbian women and some others in India have only the privilege of challenging societal attitudes in court, among other spaces. This challenge becomes important within the trope of creating new feminist legal languages and spaces. It gives us the pleasure of imagining new desires, intimacies and even rights.

Concluding Questions

Let us begin our conclusion with a provocative statement using heteronormative marriage as a symbol. This discussion is not limited to marriage but uses marriage to discuss normativity as a whole.

Even for argument's sake, at the risk of sounding naïve and unproductive, can we imagine a critique that asks for the 'abolition of marriage' in the way that the 'abolition of sex work' has been argued for, for instance? Needless to say, we aren't the first to suggest this in one form or another and we will not be the last.²⁵ We are not suggesting that this provocative view be a serious demand. The point is not to 'abolish' marriage because the dictum of abolition itself can be deemed as problematic.²⁶ The intention is only to explore the possibilities of destabilising marriage's position as the sole system of intimate relationships and social organisation, and examine what we can learn from this line of thought.

First, we do have to train ourselves to think outside of this structure, for which we need a more comprehensive critique of the family that goes beyond its unequal structure (however world altering this critique has been, and one from which so many arguments have been made, including our own) to also address the ways in which the power it holds

structures our bodies, desires and our perceptions of intimacy and violence. This critique would therefore encompass normative notions of gender, sexuality, identity, community, marriage, family, desire and intimacy, and the list could continue. This critique might have to be coupled with questioning all the realms we deal with in processes of social change, including the law. The law, being based entirely on privilege and criminalising, rooted in marriage and family norms, can then be questioned. Let us be warned however, that this will necessarily shake up the very notion of 'the law' which necessarily requires 'naming'. A politics of deconstruction that refuses to 'name' will have consequences which will also have to be dealt with. The challenge seems to lie in simultaneous processes of broadening the scope of the law while maintaining a basic critique of it at all times. Our critique then will extend as much to the law as it will to the nature of our interactions with it (Thangarajah and Arasu, 2011, pp. 325–338). Recalling Butler's 'I' we know that 'for the "I" to launch its critique, it must first understand that the "I" itself is dependent upon its complicitous desire for the law for the possibility of its own existence' (Butler, 1995, p. 7). Can we imagine a critique of the law which goes beyond one that is from an imagination different from the legal and thus finite 'I'? What will that critique look like? And how will we say it, shout it, assert it?

Second, if these critiques were to evolve significantly, then maybe we could recognise and acknowledge different kinds of support structures and social organising. Queer women, in many ways, demand this acknowledgement and this language, by virtue of being denied marriage as well as the privilege to make choices freely by virtue of being women.²⁷ This imagination might contribute positively to the earlier process of interacting with the law.

The fine balance between critical and strategic engagement is the challenge ahead of us. The imagination, theoretical as it may be, if used in engagement, may then show us this colourful spectrum we wish to create. Yet another challenge lies in communicating this imagination through creating a language equipped to do so. Let us remember that the theoretical remains different from everyday engagement precisely because of this lack of language. Last, and not by any stretch of imagination the least, we must be aware at all times that this imagination will be and should remain vibrant and we would do well to challenge one another constantly.

Notes

1. It is important to note at the very outset that the co-authorship of this article is in itself a statement of the dialogues and tensions we wish to highlight. Apart from both of us being queer women and feminist activists, we also come from two different kinds of academic backgrounds. Priya is trained primarily in law and Ponni mainly in the social sciences, leading to a partnership in which the dialogue between different kinds of criticisms of the law through articulations of feminism occurs.
2. Here the term 'queer men' is used in the same way that 'queer women' has been used earlier, that is, those who are recognised by society to be 'men' irrespective of their own identification *vis-à-vis* their gender and sexual orientation.
3. The Sodomy law introduced by the British in India among many other colonies criminalises 'carnal intercourse against the order of nature' and prescribes a punishment of up to 10 years and a fine. This law was challenged for the first time in 1998 by the Aids Bhedbhav Virodhi Andolan. That case was dismissed. The Naz foundation brought forth a case in 2000. Naz was then supported by other support groups such as Voices against 377, a coalition of child rights, women's rights, sexuality rights and human rights groups. This case in the high court ended with a historic judgement on 2 July 2009 which read down Section 377, thereby decriminalising adult consensual same sex sexual activity in private. The judgement used the Constitutional argument to reach its end, thus providing a major boost for arguments of dignity and respect for LGBT communities. This case has now been challenged in the Supreme Court and the hearings are underway.
4. See http://www.dnaindia.com/lifestyle/comment_my-favourite-part-of-being-lesbian-is-the-exhilarating-sex_1540708
5. Section 339 of the Indian Penal Code (IPC): Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.
6. Section 340, IPC: Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person.
7. The first letter of the names of the persons involved has been used for purposes of anonymity in the article, except when the use of the full name has been consented to by the person involved.
8. Section 361 (IPC). The text is as follows: Whoever takes or entices any minor under 16 years of age if a male, or under 18 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such

- minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
9. Section 362 (IPC). The text is as follows: Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.
 10. Section 366 of the IPC (Kidnapping): Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.
 11. Section 191 (IPC): Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.
 12. See http://news.bbc.co.uk/2/hi/in_depth/6679733.stm, <http://womensspace.wordpress.com/2007/05/31/todays-male-terrorism-female-born-couple-imprisoned-for-marrying-to-prevent-one-of-them-from-being-sold-to-pay-uncles-gambling-debt/>, <http://www.samarmagazine.org/archive/article.php?id=239>, http://www.dailytimes.com.pk/default.asp?page=2007%5C10%5C30%5Cstory_30-10-2007_pg13_2
 13. Some significant texts on feminist movements in India have discussed in detail the role of advocacy for legislation as well as the debates around the same. See, for instance, Baxi (2006); Chakravarti (2005); John and Nair (1998); Kapur (2005); Khullar (2005); Kumar (1993); Menon (2000); Mukhopadyay (1998); Parashar and Dhanda (2008); Shah and Gandhi (1992) and Thapan (1997).
 14. It is important to remember that by 'frame' we do not mean an unquestioned context but one that is not only useful but also constantly and critically analysed.
 15. Menon (2000) argues that the 'binary logic' of the law cannot comprehend women's experiences in all its complexity. She further questions the construction of the 'body' as a pre-existing entity which can be universalised through the law. She speaks of the primary place given to legal changes in feminist practice and therefore of how we might be reasserting notions that we seek to break through processes of law, by being forced to resort to its binary language.
 16. We are not arguing that there was unanimity on every aspect of the DV Act or the process by which it was formulated, since we are well aware that there

- were differences. A general consensus however did prevail over the need for the law. Sex workers and bar dancers, on the other hand, have had the support of only some feminists, while others have opposed their demands.
17. This is not to deny the role of desire in women's experiences in general as well as in experiences of violence in particular. It is only to emphasise the singular nature of the role of desire in the lives of queer women and the violence they face.
 18. Heteronormativity here is being used to refer to a system that asserts as the norm not only heterosexuality, but also caste, religious, regional oppressive factors. Arranged marriages for instance have been critiqued by feminists as a system that keeps in place all these practices at the cost of loss of agency to the woman in the matter of choosing the course of her life.
 19. See JAGORI (1998); <http://jagori.org/wp-content/uploads/2006/03/Trafficking%20workshop.PDF>
 20. This term is used extensively in the contemporary context by VAMP (Veshya AIDS Mukabla Parishad), a sex workers' organisation providing new meaning to the older Sanskrit term referring to sex workers.
 21. Habeas Corpus is a constitutional writ that can be used in the higher judiciary to ask that the court orders relevant authorities and/or persons to produce a person who is in custody of the state or otherwise, to be produced in court.
 22. The names of persons are protected in the interest of safety and anonymity.
 23. Sahayatrika is an organisation based in Kerala that works on issues concerning queer women and facilitates creation of safe spaces for queer women and a network of queer women within Kerala. Sahayatrika's work has involved a large number of emergency interventions.
 24. Refer to Note 4.
 25. Mary Wollstonecraft's (1796) reference to marriage as 'legal prostitution' in *A vindication of the rights of women*, and Alexandra Kollantai calling for the abolition of bourgeois marriage are examples.
 26. The abolition of any specific set of practices usually does not necessarily translate into the abolition of the spirit it embodies or the politics it espouses. Abolition of sex work, for instance, does not mean that women will not be seen as 'sexual objects'. We are not speaking of 'being viewed as a sexual object' in a pejorative tone but only as an example for purposes of this explanation.
 27. This is not to say that queer women in India have necessarily been denied the privileged place of marriage. On the contrary, some of the earliest records of lesbians in modern India have emerged through news of them getting married. The marriage of Leela and Urmila, two police constables who got married in 1988, is often used as a starting point or a significant event in any history of lesbian women in India. But the fact that they often accept these norms have

to do with the comfort that normativity seems to give them, as well as not knowing any other way to 'solemnise' their relationship as it were.

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Acknowledgements

ANNEXURE P6

THE L WORLD LEGAL DISCOURSES ON QUEER WOMEN

*Surabhi Shukla**

This article looks at the issues faced by queer women in India through a legal lens. It identifies four issues for discussion—privacy, live-in relationships, allegations of lesbianism in matrimonial disputes, and the pressure to enter heterosexual marriages. It engages in-depth with the first two while laying down the groundwork for the last two. This article asks whether the law in its current form, is aware of, and equipped to, address these issues. First, it finds that the Navtej Johar case, by permitting a right to same-sex sexual relations between adults in private, failed to understand the very nature of the privacy concern of queer women. Secondly, it critically analyses live-in relationship cases between queer women before and after the Navtej judgment to find that a lack of respect for the autonomy of women continues to characterise the disposal of these cases. It also finds that investigative illegalities and violations of the fundamental rights of privacy, dignity, and equality are visited upon these couples during the course of the case. Finally, this article provides legal and extra-legal solutions for addressing the problems identified here. It concludes by asking whether given the law’s limited success in delivering freedom to queer women, a narrow and measured engagement might be more profitable in the long run. It does not answer this question but raises it for future deliberation.

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The definition of transgender used in this article is the same as the one used by the Supreme Court in the case of National Legal Services Authority (NALSA) v. Union of India WP (Civil) No. 400/2012, ¶11. As per the Supreme Court definition, a transgender person is a person whose gender identity does not match the gender assigned at birth.

The title is inspired by a show in the early 2000s about a fictional group of queer women in Los Angeles— the L Word.

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I. INTRODUCTION

The legal experiences of queer women in India are severely under-researched. Most of the scholarship on queer women is in the area of literature, culture, and associated fields. Activists have given important accounts of the interaction of queer women with State institutions like the police, but there are few sustained legal studies of the experiences of queer women with the court systems, laws, and State acts and omissions that have legal ramifications.¹

This article aims to take a step towards filling this gap. It aims to: 1. Study the court cases and the resulting legal narratives surrounding queer women in India, 2. Theorise about the main legal problems faced by queer women in India, 3. Evaluate whether the *Navtej Singh Johar v. Union of India* judgment (‘Navtej’),² has shown an awareness of those problems, and 4. Initiate a conversation about how those problems might begin to be addressed.³ It proceeds by critiquing societal structures which make the queer experience, queer (strange or different). There will certainly be individual stories of queer women that are positive, families that are supportive, friends and workplaces that are open and progressive, and landlords and landladies who are non-interfering. Not only are these stories reaffirming, they are essential, as they present alternative models on how the society is capable of treating them. Perhaps, the freedom that queer women seek is present in these alternatives. However, these stories are exceptional, and if the overall conditions of queer women are to improve, we need to understand how societal structures impose themselves on women sanctioning a limited heterosexual and heteronormative script for their sexuality with its own spatial and temporal elements. Those who reject these scripts in favour of loving women are then constituted into the category of queer.

Queer women, therefore, are women, i.e., persons who are socialised as women, who have, romantic and/or sexual feelings for/relations with, other women. After reading

¹ One notable exception is the study conducted by Arasu and Thangarajah on the *habeas corpus* petitions concerning queer women in the Indian High Courts from the 1940s to 2007. Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413 (2012).

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³ It does not offer an internal critique of these relationships.

various historical reports and personal accounts, I have concluded that identity markers are made possible by social contexts, and also have a personal element to them, making them non-exhaustive. In scholarship and activism, a variety of phrases have been used to refer to queer women depending on what has been possible in a particular historical and social context. Examples include, *ekal mahila*,⁴ women who are attracted to women, lesbians, bisexual women, queer women, women who are in a husband and wife relationship with each other, etc. I use one or more of these terms in this article, depending on the research that I cite, or the demands of the situation. Finally, although transgender men do not self-identify as women, many may have been socialised as females, and so they may have commonalities of experiences with queer women. To that extent, the issues raised in this article are relevant to understanding the difficulties faced by that community as well.⁵

To accomplish the aims of the article, I adopted the following methodology. I found cases concerning queer women from a keyword search on Manupatra. This search revealed that live-in relationships and divorce were two primary life events that saw the interaction of queer women with the law. I also read the existing scholarly and activist literature on queer women in India along with seminal stock-taking reports on women who are attracted to women from the 1980s and 1990s, when the queer movement in India was beginning to form. From these, I culled privacy, and pressure to enter a heterosexual marriage as two other issues that the law needs to take account of. Once the issues were obtained, I did one of two things. One, I examined the current state of the law to see how well-equipped it was to provide solutions for the specific needs of queer women on these issues; or two, I analysed the cases with a critical lens to interpret their narrative on queer women. I then related these narratives to the denial of substantive and procedural rights of queer women.

I begin my discussion by problematising the concept of privacy which continues to play a major role in the legal entitlement granted by *Navtej*. I argue that women, including queer women, have no privacy of person even in the most private and intimate spaces they occupy, such as their homes, and I demonstrate that by using reports of collectives and organisations in India, and sociological and anthropological research on queer women in India. I argue that it is important for queer women to have public spaces where they can begin to grow and live-out their intimate relationships, and the concept of privacy needs to be developed along these lines if it is to serve queer women (**Part II**). I use “public spaces” to refer to spaces outside the home. While some of these places will be “public” as generally understood (parks, cafes, etc.) some may also be of a private nature, such as shelter homes. What makes them public is that they exist outside the physical sphere regulated by the family. I then discuss the

⁴ A single woman.

⁵ Gee Imaan Sammalar has noted that transgender men have limited and regulated opportunities to occupy public spaces, they are vulnerable to sexual harassment, a factor which complicates their ability to gain financial independence and move away from negative circumstances. He also argues that transgender men are subjected to stricter disciplining at home, including mental, physical, sexual abuse, and forcible marriage once their gender identity is discovered. See Gee Imaan Sammalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42(3/4) WOMEN’S STUDIES QUARTERLY 288 (2014); A. REVATHI, A LIFE IN TRANS ACTIVISM 128 (translated by Nadini Murali, 2016). See interviews with trans-masculine persons in A. REVATHI from pages 126–214. Revathi also notes the following about trans-men at page 128 (does this need to be put in your footnoting style?): ‘the fact they are biologically female makes them more vulnerable to sexual harassment and this persistent fear makes it more difficult for them to leave their families’. One of the prominent legal experiences faced by transgender men are those concerning legal identity documents, but that is distinct from the scope of this article, and has been studied in a separate paper; Surabhi Shukla, *Transgender Persons in Indian Courtrooms* in THE SAGE HANDBOOK OF GLOBAL SEXUALITIES 705-728 (Zowie Davy, Ana Cristina Santos et al, 2020).

issue of live-in relationships. Queer women who wish to live with their partners face a unique legal problem in distinction to other members of the queer community. Family ideology affords a limited script of sexual propriety to women, and empowers the families to intercept and interrupt the choices that these women make to live with each other. The ensuing police investigation and court proceedings unleash an array of illegalities and denial of rights, acquiescing in the familial logic (**Part III**). In the last part of the article, I flag two problems. The first is the charge of lesbianism in divorce cases, and the second, the issue of marriage-pressure on queer women. I present ethical reasons for not engaging with the first issue. The ethical reason I present for scholarly restraint is insufficient information to proceed. The second issue is an age-old problem and I argue that activists and scholars should, in consultation with queer women, come up with lasting solutions to address it (**Part IV**). I offer concluding remarks (**Part V**).

II. PRIVACY: NO ROOM OF HER OWN

One of the major legal themes that gains special importance with respect to queer women is that of privacy. When the Naz Foundation⁶ filed the famed public interest litigation (*'Naz'*) for the reading down of §377 of the Indian Penal Code (*'IPC'*),⁷ they argued for a right for same-sex sexual intercourse among consenting adults, “in private”.⁸ Feminists critiqued this legal framing, because it put privacy at the centre, creating a public-private distinction; a distinction that has historically been used to put the violence against women beyond the reach of the law.⁹ One need not travel far back in history to see an example of this. For a long time, crimes such as dowry murders and domestic violence enjoyed impunity from the law, because of this very idea of the sacred private sphere, where the State had no business interfering.¹⁰

⁶ Naz Foundation v. Government of the NCT of Delhi, 2009 SCC OnLine Del 1762. Incidentally, the Naz Foundation petition was not the first legal action challenging the constitutionality of §377. The first constitutional challenge was filed in 1994 by the AIDS Bhedbhav Virodhi Andolan (ABVA), a volunteer organization of social activists and professionals from various fields who worked on a host of issues, including the rights of queer persons. They argued for the section to be declared unconstitutional, and their petition envisaged that §377, being based on sexual moralising about what is natural and what is unnatural, could possibly affect sex workers, and persons with AIDS, in addition to the queer community. This petition was dismissed; ABVA v. Union of India & Others, Civ. WP. 1784/1994 (Delhi High Court) (Unreported).

⁷The Indian Penal Code, 1860, §377.

“Section 377 - Of Unnatural Offences: Unnatural offences

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

⁸ Naz Foundation v. The Government of NCT & Ors. Writ Petition (Prayer, on file with me); Naz Foundation v. The Government of NCT of Delhi & Ors 2009 SCC OnLine Del 1762 ¶8-10; NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 172 (2012).

⁹ NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 180-182 (2012); Gautam Bhan, *Challenging the Limits of Law: Queer Politics and Legal Reform in India* in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 46 (Arvind Narrain & Gautam Bhan et al, 2005).

¹⁰ RADHA KUMAR, THE HISTORY OF DOING: AN ILLUSTRATED ACCOUNT FOR MOVEMENTS FOR WOMEN’S RIGHTS AND FEMINISM IN INDIA 1800-1990 119 (1993); Arati Rao, *Right in the Home: Feminist Theoretical Perspectives on International Human Rights*, in FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMEN AND LAW IN INDIA 100-121 (Ratna Kapur, 1996).

The claim to a private sphere where a woman could claim sanctuary from her family members to enjoy sexual relations with another woman, even if legally available, would be socially implausible.¹¹ There is not even enough privacy to *talk* about romantic life, let alone experience it within the home. Maya Sharma conducted a research with working-class queer women and she recounts that she usually had no privacy to conduct the interview. The family members were nearly always present in the shared living spaces where the interview was conducted, and they either participated in, or controlled the dialogue. In the rare moments when privacy was available, there were constant disruptions or time pressure. “Private” conversations were only possible outside the home, in places of worship, *en route*, in courtyards, at railway stations, etc. Owing to the constant presence of family around the interviewees, conversations about sexuality remained largely tacit, sub-textual, and coded in socially acceptable terms.¹² To be sure, sexual privacy is a sparse commodity for any unmarried person (and married women) in an Indian household, but women’s claims to it are all the more precarious in a hetero-patriarchal setup that believes that women have no sexuality/have no right to act on their sexuality outside of a heterosexual marriage.

By no means is this lack of privacy a working-class phenomenon. In the early 2000s, during the time that the *Naz* petition had just been filed, Naisargi Dave conducted an ethnographical research on lesbian activism in India. In response to the feminist objection that women did not have privacy of their own to claim the kind of sexual autonomy that the *Naz* petition envisioned, she recalls the time spent working at the weekly helpline at an organisation where queer women from varied socio-economic backgrounds called.

“I thought of the married women I sometimes spoke to on the helpline, who would rush desperately through five minutes of talk before a husband, grown son, or mother-in-law could become suspicious about their absence. These are women without dominion, women incarcerated by the private but never lords of it”¹³

What Dave tries to tell us here is that women did not have any privacy within their homes. They were watched and supervised and always remained accountable for where they were, and what they were doing. Making a call to discuss their sexuality was not an easy thing to do in such an environment. She recalls an exercise she had participated in with members of a lesbian support group at Sangini - one of the oldest known organisations working with lesbians and bisexual women in India. The exercise was an image exercise, where everyone had to draw their personal utopia. She recalls that the unifying theme of these utopias was space: “dreams of homes, rooms, and quiet solitude.”¹⁴ These accounts tell us that women did not have any, “room of their own” spatially and metaphorically where they could just be themselves.¹⁵ In fact, they longed for such a space. However, it was not to be achieved within the confines of a space that co-opts the logic of a patriarchal home. Had the petitioners factored in these social experiences, perhaps, their legal demands would have been different.

¹¹ NAISARGI DAVE, *QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS* 180 (2012).

¹² MAYA SHARMA, *LOVING WOMEN: BEING LESBIAN IN UNDERPRIVILEGED INDIA*, Introduction, 1-41 (Yoda Press, 2015).

¹³ NAISARGI DAVE, *QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS* 181 (2012).

¹⁴ *Id.*

¹⁵ *Id.*, 182.

The reader may wonder why I am pondering an old critique, when it is the *Navtej* judgment, and not the decision in *Naz*, that is the final legal pronouncement on §377. It is because *Navtej* did not learn from this critique of *Naz*. The majority of the judges in *Navtej* allowed a right of same-sex sexual intercourse to consenting adults, “...so long as... it is confined within their most private and intimate spaces.”¹⁶ While some judges attempted to show the limitations of this idea of privacy, imagined as spatial privacy, their critiques did not go far enough to grapple with the issues that are particular to queer women. I will delve deeper into this point in due course, but for the present moment, I would like to bring out these privacy concerns.

For a long time, the women’s movement in India did not engage with issues faced by queer women.¹⁷ This was partly because of the ignorance about the unique nature of those issues,¹⁸ but also because of the heritage of the Left movement which considered these issues bourgeois.¹⁹ Additionally, there was a fear that the emerging acceptance of women’s issues would be jeopardised if they sought to include the concerns of queer women within their advocacy.²⁰ Similarly, the human rights movement did not consider these matters important.²¹ The final nail in the coffin was the assumption that queerness was “western”, a burden that the queer community continues to shake off till date.²²

In the first known large-scale research to study the violence faced by lesbian women in India, authors Bina Fernandez and Gomathy N.B. argue that though lesbians are vulnerable to all kinds of violence faced by women - rape, sexual harassment, domestic violence, child marriage, etc., they face specific kinds of violence *as lesbians*— an intersectionality that continues to be woefully understudied in academic research in India.²³ They face violence because of their identities as lesbians, the epistemic basis of which is the very denial of the presence of lesbians in India society.²⁴ Because they do not exist, or more

¹⁶ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶221 (per Misra J. & Khanwilkar J.). A majority of the judges also formulated the right in this way.

¹⁷ SHARMA, *supra* note 12, 1-41.

¹⁸ Forum Against Oppression of Women, *Another Challenge to Patriarchy* in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY & BISEXUAL RIGHTS IN INDIA 29 (Bina Fernandez, 1999).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*, 17.

²² Naz Foundation India Trust, *History’s Flirtation with Fire: Documenting the Controversy* खामोश! एमरजेंसी जारी है: Lesbian Emergence 15-16 (Campaign for Lesbian Rights, 1999); Campaign for Lesbian Rights, *Myths and Realities- Lesbianism* खामोश! एमरजेंसी जारी है: Lesbian Emergence 41 (Campaign for Lesbian Rights, 1999); Campaign for Lesbian Rights, *Lesbians and the Law: Memorandum Submitted on the 26th of February, 1999 to the Committee on the Empowerment of Women* खामोश! एमरजेंसी जारी है: Lesbian Emergence 54 (Campaign for Lesbian Rights, 1999); GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 120-123 (2016); NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 2 (2012).

²³ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 14 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

²⁴ *Id.*

accurately, have been erased,²⁵ there is no way to imagine a woman who would reject heterosexuality. Asserting a lesbian identity is at once rejecting the need for a man, the structural hierarchy of a man woman relationship, indeed, the very paradigm of heterosexual perpetuity.²⁶ A lesbian is not of society, but outside it. She is not a woman at all, and needs to be put back in her place, to take up her rightful role as a daughter/wife/daughter-in-law, so on and so forth. Consequently, the ensuing violence that they face is not just because they are women, but because being women they have acted in a way that is incomprehensible within the hetero-patriarchal paradigm— they have become lesbians.

One autobiographical account has remained particularly unforgettable.

“One early winter's afternoon I had come home with a friend. Mother was next door chanting as usual. The servant woman said that there was a pot of extra hot water on the stove if I fancied a bath. I looked at my friend when she had turned back to her cooking. Between us we lifted the brass pot off the fire and poured it into the tank of cold water in the bathroom. I slid the little bolt on the door and we took our clothes off. For a few minutes, we stood fondling each other and then my friend poured some of the hot water on the floor. We lay down and did what I now know was the number 69. It was fantastic. It was not the first time, but maybe the hundredth time and every single time was different, good, positive and totally exciting, both physically and mentally. We were still on the floor in that position when a terrible noise erupted as the door came crashing down and nearly smashed onto my friend's head. We both jumped and looked with horror, and I suppose total fear, at my elder brother. The servant woman appeared next to him and after a few minutes of his screaming, my mother came rushing in. He turned and bolted the back door just as the woman from next door was about to come in too. The words he used were words that I hardly knew the meaning of. My mother and the servant woman stood in total silence as my brother cursed and cursed. My friend handed me my clothing and I put on what I could. My brother then stepped forward and grabbed her by the arm and dragged her out of the bathroom and opening the back door shoved her outside. ... My brother then returned and grabbed me and like a wild animal beat me until I fell on the floor. My mother tried to stop him as did the servant woman

²⁵ GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 1-13 (2016). Thadani has surveyed many goddess temple sites in India and studies the Shakti tradition that is based around independent (i.e. unaccompanied by males) female goddesses. Goddess temples do not have a central deity. The central space is left free to symbolize *adya shakti* (primal energy). What she has found repeatedly is that pluralistic gynefocal traditions have been deconstructed and masculinised to construct a monolithic continuum of heterosexual tradition, with a god at the center and the goddesses at the periphery. For example, in the 64-Yogini temple in Ranipur, Jharia, Odisha, a statue of Shiva has been installed in the central space which was previously empty. She has observed this deliberate erasure of feminine iconography at other temple sites in India also. For example, at the Lingraj Temple in Bhubaneswar, she observed the breasts of a goddess being cut, and polished over, to convert her into a male god. Similarly, at Tara Tarini, the original iconography of lesbian goddesses in embrace has been replaced by a heterosexual image.

²⁶ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 15 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

but they only got shoved out of the way. He picked me up by the hair and beat me in the stomach, by the crotch and the breasts. I fainted...’’²⁷

This account provides a glimpse into the violence that women have faced at the hands of their own family for their sexual transgressions. The site of the sexual act could not have been more private—the actors were in a bathroom, but this did not stop the brother from barging in, and verbally and physically abusing the sister and her partner. Privacy did nothing to protect the women. The mother bore witness to the act but her silence sanctioned the violence. The brother bolted the back door so that no one from outside the household could know and the family could be spared the shame and dishonour that would follow if any word of the sexual act got out. Ironically, this account exemplifies many others in which it is the act of pleasure, and not the act of violence, which reduces family honour.

The Fernandez-Gomathy study²⁸ has also found that a large majority of lesbians had experienced violence (78%), the family being the main source of the same (77%).²⁹ The physical violence took the form of eviction, confinement within the home, and deprivation of basic necessities.³⁰ These women encountered battering, hair pulling, kicking, pushing, burning, cutting, binding, and throttling.³¹ Emotional violence came in the form of taunts and verbal abuse, threats of abandonment, threats of self-harm or harm to others, allegations of

²⁷ GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 81 (2016) (quoting P. Parivarif in Shivananda Khan, *Khush: A Shakti* 10-11 (1991)).

²⁸ This study triangulated the results from structured closed-ended questionnaires circulated to 50 lesbian women, narrative interviews with 8 lesbian women, 22 interviews with mental health professionals, and 70 lesbian client profiles gathered from the notes of medical health professionals. Lesbian participants were recruited through a network of organizations working for lesbian women in Mumbai, Pune, Delhi and Kolkata. Overall, the interviewees were urban, well-educated and employed women, belonging to different religious backgrounds, who identified as lesbians. Necessarily, poor, rural or small town, unemployed lesbians, and those with reduced mobility and other marginalisations were not studied. Given the invisibility of this group, it was not possible for the researchers to locate or interview them. TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 22-23, 39, (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020). Indeed, a more wide-based study needs to be undertaken to unearth the problems faced by those lesbians as well. Despite its limitations, it remains the largest study to understand the unique nature of violence faced by lesbians in India. See also LABIA, *Breaking the Binary: Understanding the Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Realities* 102 (2013), available at <https://perma.cc/M2GG-Z9ZQ> (Last visited on September 5, 2020) for findings from a research based on 50 life history narratives of persons assigned gender female at birth; 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 <https://perma.cc/AWT9-F49R> (Last visited on September 5, 2020) presents findings from a study based on 75 semi-structured qualitative interviews with non-heteronormative women, their immediate intimate circle of friends, family, and neighbours, the general non-queer society, and women’s right and queer rights activists. For accounts of working-class women in same-sex relationships, see MAYA SHARMA, *BEING LESBIAN IN UNDERPRIVILEGED INDIA* (2005); Amanda Lock Swarr & Richa Nagar, *Dismantling Assumptions: Interrogating Lesbian Struggles for Identity and Survival in India and South Africa*, SIGNS 491 (2003).

²⁹ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 40-41 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020); See also IGLHRC Report, *Violence on the Basis of Sexual Orientation, Gender Identity and Gender Expression Against Non-Heteronormative Women in Asia Summary Report*, 4-5 (February 2010), available at <https://perma.cc/Q3HC-677T> (Last visited on August 16, 2020).

³⁰ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 41 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

³¹ *Id.*, 42.

mental illness, silent hostility, continuous suspicion, denial of the lesbian sexual orientation and relationship, and violation of privacy in the form of opening letters, and entering personal space.³² The participants reported their male partners to be the primary source of sexual violence against them.³³ The next section connects these experiences of violence with strategies for dealing with it, setting the stage for the importance of a safe space outside home.

A. ARRIVING

For a majority of the women, abuse terminated when they left home or indeed, the country,³⁴ or reassured their abuser that they were not lesbians.³⁵ Thus, they left home, physically or mentally. This resonates with Naisargi Dave's research. She has found that for lesbian women in India, coming out stories were much less significant than stories of leaving home.³⁶ She argues that *prima facie*, "coming out" and "leaving home" are two different paradigms. One suggests taking one's place in the world, the other, forfeiting it. One suggests assertiveness, the other, capitulation. The act of leaving, however, is not one of forfeiture or capitulation, it is one of courage, the indispensable ingredient that is needed to leave the familiar, and arrive into a new and unknown world—away from home.³⁷ Further, it is an act ripe with possibilities; for women to script their lives with characters of their choosing. To provide a glimpse of possibilities such acts can entail, Dave recounts an account shared in a Sangini support group meeting she attended.

“A group member named Jasmine had told of her leaving home story in Northeast India. She knew only that she did not want to marry and that in order to avoid marriage, she would have to leave her family. So, she took a job with

³² *Id.*

³³ *Id.*, 41. Some of the women had been previously married, or had had boyfriends.

³⁴ Giti Thadani presents diary entries over several weeks from an Indian emigrant's diary which highlights her difficult choice between cultural exile (leaving India), and sexual exile (leaving her sexuality). GITI THADANI, SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA 117-119 (2016).
Week 1 I have in fact spent the entire week feeling the same way. Surprised by the depth of my relief at being home. In India, among sensations so familiar that one forgets to name them. Like anyone else in exile I spend a lot of time and energy musing and complaining about alienation - the frustration of always being slightly out of step with everything around me. I'd miss India with an intensity that was physical. A dull and gnawing ache. At such times, I would recall the logic that kept me away. I was a lesbian and felt that I would be in an impossible situation in India. Isolated. Alone. A lesbian? ...
Week 2 I've been home two weeks. Enough time to catch up with most of my friends. 'Catch up', I realize ruefully, means dismissing my life in a few short exchanges and focusing on theirs. It's easier... Besides, I share a complex history with most of my friends and it's simpler for us to continue inscribed within it, especially for most of them there remain important connections between this past and their present. And what about me? Has my life changed drastically because I've 'come out'? Have I become someone utterly different? If I have then why do I miss India so acutely? I realize afresh the meaning of institutionalized heterosexuality.
Week 3 I have begun to swing between feeling angry and sad. Anger at the heterosexual privilege enjoyed by my recently engaged cousin and her fiancé, both of whom are welcomed into the arms of my 'liberal' family. Anger at the spontaneous and genuine interest displayed in their every action and plan. Sadness that I will never be able to share, with most of my family, a relationship founded on the very values they espouse. Anger that they know nothing of someone who is central to my existence, sadness that she knows so much about who they are... I start dreaming about my return. About the lesbian community that denies the 'Indianness' that is so essential to who I am, but affirms the equally essential 'lesbian' in me.

³⁵ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 44 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

³⁶ NAISARGI DAVE, QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS 62-63 (2012).

³⁷ *Id.*, 63.

an NGO, hoping to travel. It was at an NGO workshop in Delhi about HIV/AIDS that she first heard about lesbianism; that same day she met her future partner. Though she has never come out to her parents, whom she loves and trusts, her relationship gave her the impetus she needed to leave home. Several others told similar stories that day, and none ever came out to their families. For them, it was the moment of leaving the natal home as unmarried women that marked their moment of rupture and arrival”.³⁸

For Jasmine, and many other women in her situation, leaving home freed her from the expectations of the heteronormative timeline, and provided her with an opportunity to have authorship of her life.

B. A ROOM OF HER OWN

If leaving home marks the moment of rupture and arrival in lesbian lives, then it is critical that there be a place at which to arrive. It is critical for queer women to have a room of their own – away from the violence, from marriage pressure, from the denial of their beings; where there is space and freedom, to be alone or with someone, “to realize whatever pleasure there is in what they too often experience as sorrow.”³⁹ I refer to pleasure not just in the sexual sense. Pleasure also refers to the possibility of being able to be oneself, to form bonds of kinship, and to take pleasure in the company of those with whom one need not hide. For queer women who have managed to find these spaces, it has been the houses, offices, and other informal spaces created by activists. By 2005, Sangini had created several informal shelters for queer persons, primarily transmen, lesbians, and bisexual women who were experiencing violence at home. Between 2008 and 2012, this shelter also received funding, before it shut down in 2013 due to lack of funding.⁴⁰ Shelter for queer women is an issue that falls through the cracks in much of the discussion about shelter homes.⁴¹ Maya Shankar, the co-founder of Sangini, notes the difficulty that queer women face when they approach a shelter home, even if they arrive with a Sangini reference.

“When two women approached a shelter together...they would refuse them admission. Women facing trauma want to speak about it and hence living in a space where one has to stay quiet about the violence was problematic. Shelters could recognize violence when a woman is beaten by her husband... but it was difficult for them to acknowledge a same-sex couple who wanted to live together”.⁴²

The quotation above highlights two difficulties that they face in shelter homes. The first is that many a time, they are turned away from the shelter home. The second, that even if admitted, the shelters do not provide an encouraging environment for the discussion of the violence that they have only recently escaped. On the contrary, they claim to “cure” them, as I will later show.

³⁸ *Id.*

³⁹ *Id.*, 181.

⁴⁰ ACTION INDIA, JAGORI AND NAZARIYA, *Beyond the Roof: Rights, Justice and Dignity* 18 (March 2019), available at <https://perma.cc/V3V8-MMTC> (Last visited on August 16, 2020).

⁴¹ *Id.*, 18.

⁴² *Id.*, 18-19.

As gender non-conforming looking women are not automatically assumed to be queer, the violence they face in public is less compared to that which they face at home. The Fernandez-Gomathy study has also found this to be true. It reported that the violence faced by lesbian women in public was low, relative to the one faced by them at home.⁴³ This distinguishes queer women's struggle for privacy from the one experienced by queer men and transgender women. In the *Navtej* judgment, Justice Chandrachud offered a critique of limiting a sexual intimacy right to the private sphere. His critique was that the right to same sex relations in private does not guarantee privacy of person to the LGBTQ community when they leave their home, because they are still subject to discrimination and violence in public.⁴⁴ This critique is true, but limited to those sections of the LGBTQ community whose gender transgressions in attire, gait, and physicality are more easily perceptible to society. In particular, gender non-conforming persons assigned male at birth—whether they are gay or transgender. The privacy concerns of queer women are of a different nature. Given the limited and fraught claim to privacy within their homes, the right of women to have romantic and sexual relations with other women becomes a right in hiding, which is no right at all. As the Humjinsi report noted, the urgent need for lesbians is to be able to claim the space to form relationships, while for gender male assigned sections of the queer community, the struggle is to claim public places free from harassment and the threat of §377.

“Specificities of space available to and claimed by lesbians are different: for lesbians, the urgent need is to claim the space to form partnerships, while for gay men, there is a need to claim public spaces free from harassment under the threat of Section 377”.⁴⁵

Surely this quote harkens to the need for a reordering of the sexual surveillance norms which can give queer women the much-needed breathing space that is vital to form relationships, but I also read this as a call for creating public spaces where women can be safely open about their sexuality. If the former is a long-term goal then the latter is a short-term one.

Another section of the queer community that is not served by the spatial notion of the privacy entitlement is that of working-class queer men and transgender women who do not have individual quarters, and who have sex in public spaces like cruising parks. They are constantly under the threat of public decency laws and nuisance charges by the police. The point I am making here is not the disproportionate impact of these seemingly neutral laws on the above-mentioned population, though it would not be difficult to conceive that the extant prejudice against queerness⁴⁶ coupled with the lack of private spaces for this particular section of the queer community would produce these consequences. My point here is to highlight that the *Navtej* judgment will not protect those who do not have private physical spaces. In reality, the privacy argument offers limited protection for all members of the queer community. Yes, it grants protection from the landlords/police/neighbours barging into one's house, catching

⁴³ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 40-41 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020); Public violence faced by queer women was in the form of taunts (46), un-wanted outings by the press (84-85) censure, stigmatization, and alienation by the community (64).

⁴⁴ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud J.).

⁴⁵ Forum Against Oppression of Women, *Another Challenge to Patriarchy* in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY & BISEXUAL RIGHTS IN INDIA 31 (Bina Fernandez, 1999).

⁴⁶ INTERNATIONAL COMMISSION OF JURISTS, “*Unnatural Offences*”: *Obstacles to Justice Based on Sexual Orientation and Gender Identity*, 21-24 (February 2017), available at <https://perma.cc/7XAC-KCWC> (Last visited on August 17, 2020).

them in the sexual act, and threatening to bring criminal charges against them,⁴⁷ but other than that, neither does it solve the problem of lack of private space nor does it offer respectability to the queer community. The members of the community remain wretched subjects who have deviated from societal norms. They still remain subject to police and public harassment.⁴⁸ Confining same sex sexual intimacy to the private sphere also reinforces the “ambient heterosexism of the public sphere”.⁴⁹ Justice Chandrachud remarked in the *Navtej* case that, “...it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance.”⁵⁰ However, he did not develop this criticism to respond to the distinct problem faced by queer women which is the access to safe public spaces in the first instance. Even with the looming threat, access to affection in public spaces exists for queer men and transgender women in a way that does not exist for queer women, because they inhabit female bodies.⁵¹ Public spaces after dark are disproportionately male spaces, and women are actively cautioned to not go out in the dark, let alone to isolated spots in public parks or to the back alleys of buildings.⁵²

In the *Navtej* judgment, Justices Nariman and Chandrachud recounted a paragraph from the case of *Anuj Garg & Ors. v. Hotel Association of India*,⁵³ which stated that limiting employment opportunities for women because of consequences flowing from sex differences severely affects their privacy rights.⁵⁴ This insight, if developed, could have an important impact on the lives of queer women because it recognises that gender proscribes opportunities which has a privacy-reducing effect. It recognises that the privacy concern that is paramount for queer women, is to be able to have the space to form and carry on their relationships, whether it is an employment relationship, or a romantic one. What can these places be and how can they be created? Will they be in the form of parks, cafes, hostels, libraries, etc.? These are vital questions for future engagement with queer women, and groups working with queer women. The State⁵⁵ and other funding bodies should equally do their part in providing unrestricted funds to this enterprise, so that expansive participatory processes can be set up to invite queer women, rural or urban, from all walks of life, religions, and mental

⁴⁷ As was in the case of *Lawrence v. Texas*, 539 U.S. 558 (U.S. Supreme Court).

⁴⁸ INTERNATIONAL COMMISSION OF JURISTS, “*Unnatural Offences*”: *Obstacles to Justice Based on Sexual Orientation and Gender Identity* 21-24 (February 2017), available at <https://perma.cc/7XAC-KCWC> (Last visited on August 17, 2020).

⁴⁹ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud J.).

⁵⁰ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud J.).

⁵¹ Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413, 414 (2012).

⁵² See JAGORI, *Safe Cities for Women and Girls: Recent Developments*, (May 2016), available at <https://perma.cc/WTE9-2LUJ> (Last visited on August 14, 2020); JAGORI, *Study on Violence Against Women in Public Spaces in Ranchi and Hazaribag, Jharkhand: A Synopsis*, (April 2016), available at <https://perma.cc/S595-B2EM> (Last visited on August 14, 2020).

⁵³ *Anuj Garg & Ors. v. Hotel Association of India & Ors.* (2008) 3 SCC 1, ¶5. The impugned Act prohibited women from being servers in liquor serving establishments. The State argued that this was to protect them from sexual harassment at the hands of the customers.

⁵⁴ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶45 (per Nariman J.); *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶37 (per D.Y. Chandrachud J.).

⁵⁵ The irony of relying on the State to fund this enterprise is not lost on me, given that I have spent a considerable amount of space in this article critiquing the support that hetero-patriarchal structures enjoy from State institutions. However, engagement with the State is inevitable and in some instances, practical (for example, to attain non-criminal status). Given this reality, it is important to consider the extent of State engagement and the nature of entitlements that one ought to demand from the State.

and physical abilities, and obtain their views on an array of solutions. These solutions must deliberate not only upon the nature of the public space, but also upon its organisation and management, so that the current modalities of oppression are not replicated in what is meant to be a safe space.

C. SHELTER HOMES

Within existing structures, shelter homes can be one such space. These homes, however, come with their own set of problems. First, State-run shelter homes do not accept women without a court order. Second, most State funded shelter homes make them undergo medical checks before admission, which causes further trauma.⁵⁶ Once admitted, the living conditions are very poor. In many instances, the phones of the inhabitants are taken away and they are not permitted to work.⁵⁷ In all instances, they are not allowed to leave the shelter home without permission.⁵⁸ Therefore, these women leave one restrictive situation and arrive in another. The situation is so unpalatable, that the *Beyond the Roof* researchers have remarked that, “given the poor living conditions, strict regulations and restrictions on mobility, even many women’s rights organizations do not like to refer their clients to shelters, unless that is the only option available.”⁵⁹ The queer-phobic attitudes at many shelters also ensure that either they do not accept queer women, or if they do, they claim to cure them.⁶⁰ Nevertheless, the study has found that all the residents acknowledged the critical role of shelter homes in providing a physically safe space which offers immediate relief. In addition, the study also found that shelter homes offer bargaining power to the women.

“Dynamics change when an individual moves out of the house. A shelter space that is secure can be powerful in providing the individual with bargaining and negotiating power...especially with legal backing”.⁶¹

Shelter homes then need to be viewed as crucial first stops for queer women looking to arrive at a safe space. The existing rules of admission of shelter homes need to be revised to admit queer women. Along with this, gender and sexuality training needs to be provided to the staff managing the shelter homes so that queer women feel emotionally and mentally safe when they arrive at these spaces.

D. PROTECTION ORDERS

Understanding privacy from the point of view of queer women can also open up legal solutions. One such solution is the grant of protection orders from various high

⁵⁶ ACTION INDIA, JAGORI AND NAZARIYA, *Beyond the Roof: Rights, Justice and Dignity* 33, (March 2019), available at <https://perma.cc/V3V8-MMTC> (Last visited on August 16, 2020). The Government guidelines do not require a medical examination at the time of admission, but within three days of admission, see Swadhar Greh Guidelines (2018) Appendix IV, x.

⁵⁷ *Id.*, 40.

⁵⁸ *Id.*, 40.

⁵⁹ *Id.*, 38.

⁶⁰ Lam-Lynti Chittara Nerallu, *Time for Overhauls: Report of National Consultations on Services in and Around State-Run and Funded Shelter Homes for Girls, Women and Other Vulnerable Populations*, 23, (February 2017), available at <https://perma.cc/JT3B-ZV9R> (Last visited on August 16, 2020).

⁶¹ ACTION INDIA, JAGORI AND NAZARIYA, *Beyond the Roof: Rights, Justice and Dignity*, 39, (March 2019), available at <https://perma.cc/V3V8-MMTC> (Last visited on August 16, 2020).

courts.⁶² These orders are obtained through the writ jurisdiction of the court. Women who have exercised their choice to live with one another can be subject to physical threats and emotional pressures from their families, as I will explain in detail in the next section. These protection orders can provide an immediate veneer of physical safety to them in these situations. Typically, the Station House Officer of the local police station is put in charge to assess the safety requirements of the petitioning women. Along with that, the mobile number of a beat constable is shared with the women to call if any danger to safety and security is apprehended. A lawyer colleague also agrees with the power of protection orders.⁶³ She states that the immediate effect of these orders is that the physical threat from the family ceases in most cases, even if the emotional threats continue.⁶⁴

In this part of the article, I have tried to show that the *Navtej* judgment has not understood the privacy concerns of queer women. Women have a precarious claim to privacy within their homes. The family is the main site of violence for many queer women. Therefore, if the concept of privacy is to serve queer women, it needs to be interpreted to provide safe access to public spaces. These spaces refer to spaces traditionally understood as public, such as libraries, cafes, parks, etc., but also to private spaces which exist outside the family controlled physical sphere, such as hostels, shelter homes, rented homes, etc. I argue that protection orders are one way of providing privacy to queer women in the public sphere. The discussion on protection orders provides a good segue to the next section which deals with yet another legal fallout of the decision of two women to live together.

III. LIVE-IN RELATIONSHIPS: THE LITTLE-KNOWN STORY OF QUEER WOMEN AND THE LAW⁶⁵

Live-in relationship related litigation is a significant area of litigation for women who are in romantic relationships with other women or transmen. It is also a distinct area of litigation for these sections of the queer community, as compared to other sections of the same community, and are produced by the intersectionality of being a woman, being queer, and being in a live-in relationship. Seldom do queer men or transgender women in live-in relationships have to reckon with litigation arising from their decision to live together.⁶⁶ Similarly, queer persons in non live-in relationships do not face this kind of litigation. The impetus for such actions is provided by familial ideology, which Ratna Kapur and Brenda Cossman have conceptualised in their work. Familial ideology refers to those set of societal norms which constitute men and women into gendered beings with specific moral and economic expectations. While the economic expectations rest on men, women emerge as the “repositories of tradition”.⁶⁷ Moral expectations that are imposed on women include the

⁶² For example, see *Monu Rajput & Anr. v. State & Ors.*, WP CrI 3407/2019 (Delhi High Court). In *Madhu Bala v. State of Uttarakhand & Ors.*, HABC 8/2020 (Uttarakhand High Court) [hearing dated 27.5.2020], the protection order was issued to provide reasonable protection from any untoward action by the mother and brother toward the detenu (a woman in a lesbian relationship) while she was living in her own home.

⁶³ My thanks to Advocate Amritananda Chakravorty for her input on this point. Adv. Chakravorty handles many protection order matters in the Delhi High Court.

⁶⁴ My thanks to Advocate Amritananda Chakravorty for the discussion on this point.

⁶⁵ This phrase is taken from Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413, 416 (2012).

⁶⁶ A live-in relationship between men has been the subject of a legal challenge, but these cases are extremely rare. Although I am aware of such an instance, I am unable to cite the case because neither the petitioner nor the detenu opened up about their sexuality on record in the proceedings.

⁶⁷ RUTH VANITA, *GENDER, SEX AND THE CITY: URDU REKHTI POETRY* 29 (2012).

expectation of chastity, and for them to be dutiful wives and mothers, and virginal daughters.⁶⁸ The society and law rewards those who adhere to these expectations, constituting the logic for the ownership and severe policing of women's sexuality by families.

Therefore, when adult women run away from their homes, whether with men or women, in defiance of their moral expectations, the family feels empowered to take legal action, even if they have left a note saying that they have left of their own volition. For the purpose of this article, I am interested in those cases where women run away with each other. One modality through which these cases come to be is when two women run away from their homes to be with each other, and the family of one of the women files either *habeas corpus* petition or a case of wrongful confinement, kidnapping or abduction against the partner. Arasu and Thangarajah have surveyed the legal provisions that are used against these couples.⁶⁹ The first set of provisions are §339 and §340 of the IPC, which make wrongful confinement a crime. The crime occurs when a person confines another without the authority to do so. The second provision is §361 of the IPC which criminalises removing a minor from legal guardianship, without the guardian's consent. The consent of the minor is irrelevant in these cases. The researchers find that this provision is very popular in lesbian runaway cases although the eloping women are adults.⁷⁰ The third is §362 of the IPC, which criminalises abduction, and is another popular provision to be used against one of the lesbian partners by the parents of the other. Finally, §366 of the IPC is used against lesbian couples alleging that one partner has been kidnapped by the other to be compelled for marriage. Ideally, the investigation procedure in these cases should ascertain whether the runaway daughter has left of her own volition. If the answer is yes, a closure report should be filed by the police. A statement of the runaway daughter may be recorded before a judicial magistrate for added certainty, and the case should be closed.

Another modality through which lesbian relationships make an appearance in court is when one of the partners files a *habeas corpus* petition, alleging that the other is being kept captive by her parents or relatives. In these petitions, she prays that her partner be produced before the court, her will be ascertained, and her liberty be granted. In the sections that follow, I will discuss how State institutions treated the runaway cases of queer women before the *Navtej* judgment, and how queer women negotiated those cases. I will then note the changes that have occurred in those cases after the *Navtej* judgment. Finally, I will analyse the post-*Navtej* live-in relationship cases to see if they have succeeded in upholding the rights of queer women or whether they have merely re-inscribed old myths and familial ideology.

A. STRATEGIC SILENCE

Before the *Navtej* judgment, as a matter of strategy, in most of these cases, the lawyers would not disclose the relationship between the women in court. This was required because of the presence of §377 of the IPC. Although, research has revealed only two instances of §377 cases against women,⁷¹ the threat and stigma of criminality brought about by the

⁶⁸ RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES* 100-101 (1996).

⁶⁹ Ponni Arasu & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Court*, 19(3) INDIAN JOURNAL OF GENDER STUDIES 413 (2012).

⁷⁰ *Id.*, 417.

⁷¹ The first case was reported by India Today in 1990. It reports the story of Tarunlata and Lila Chavda, who had been in a relationship since 1985. It reports that Tarulata underwent a sex change operation in 1989 and married Lila. Thereupon, Lila's father, filed a criminal case against Tarun under §377 of the IPC. The proceedings of this

Section have always operated at a societal level against women to discourage and obstruct their relationships with other women. Lawyers would advise their clients to not disclose the romantic nature of their relationship because of this reason. In their important paper, Thangarajah and Arasu look at the records of *habeas corpus* cases involving queer women, from the 1940s to October, 2007. They were able to only find only two such cases.⁷² The researchers admit that, “[t]his remains the primary methodological problem with writing a legal history of lesbian relationships and law in India, and hence demands a different reading than one of mere absence or silence.”⁷³ In other words, they argue that the absence of lesbian runaway cases does not mean that they have been absent, but that they have been hidden. Researchers Sunil Mohan and Sumathy Murthy summarised their experiences of police treatment of lesbian runaway cases. They argued that in abduction, kidnapping or missing person cases of adults, the police have a duty to verify the truth of the claim, and if the subject of the complaint herself states that she has left her house of her own free will, to close the case. They argued, however, that this did not happen in several instances of lesbian runaway cases, and that the biases of the police officers against lesbian relationships resulted in the women being sent back to their homes.

“There have been several instances of adult lesbian couples running away from home and their families to start a life together. In such cases, their families usually file “missing persons” complaints with the police, or even accuse one of the partners of “kidnapping” or “abduction” their missing relative. The police have a duty to inquiry into the veracity of these claims. In cases where the women have been found, the attitudes and biases of the police have often meant that police officers have insisted that each woman should return to her “home” and her family, even when they [sic] individuals in question were adults and clearly stated that they would not wish to live separately from one another. Sunil noted, ‘In the case of a missing persons case that is filed, if it is an adult person, the police’s responsibility is to find that person. If the person says they don’t want to come back, the case is closed. Or should be. But if it is a lesbian woman, the police will insist that the person has to go back to the family’. In a similar case in a different state, despite the woman repeatedly telling the police that she was an adult and wanted to live away from her parents, the police kept sending her back to her parents.”⁷⁴

case are not to be found on the Gujarat High Court website anymore. The Humjinsi report noted that, “the case subsequently disappeared from public notice,” *Dateline* in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY & BISEXUAL RIGHTS IN INDIA 50 (Bina Fernandez, 1999). The second was reported in 1999, when Jaya, a Christian woman approached her local police station, and asked the police officers to get her married to Ramabai, her neighbour, with whom she had had a relationship for 17 years. A series of complicated events transpired after this station visit, which ultimately resulted in Ramabai and her husband being charged and jailed under §§376 and 377 of the IPC. Researchers Bina Fernandez and Gomathy N.B. interviewed Jaya personally, and arrived at the conclusion that the police manipulated her demand to be married to Ramabai, into making her a victim of an offence under §377. When their research was written, Ramabai and her husband had been released on bail. TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 22-23, 50-59 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

⁷² ARASU et al., *supra* note 70, 422.

⁷³ *Id.*, 423.

⁷⁴ INTERNATIONAL COMMISSION OF JURISTS, “Unnatural Offences”: *Obstacles to Justice Based on Sexual Orientation and Gender Identity* 40-41 (February 2017), available at <https://perma.cc/7XAC-KCWC> (Last visited on August 17, 2020).

B. COMING OUT IN COURT

What has changed after the *Navtej* case is that these relationships have come to be openly acknowledged in court. The first case to cite the *Navtej* judgment was a case of a lesbian live-in relationship. This case was *Sreeja S. v. The Commissioner of Police, Thiruvananthapuram & Ors.* ('Sreeja S.').⁷⁵ This was also the first documented case, as per available court records, that openly acknowledged the romantic relationship between the women involved. The case concerned two adult women, Sreeja and Aruna. Aruna had left her natal home to be with Sreeja. Aruna's parents filed a missing person complaint which resulted in Aruna being taken into police custody and produced before a judicial magistrate. The magistrate set her at liberty after recording her statement under §164 of the Code of Criminal Procedure, 1973 ('CrPC') and ascertaining her will, which was to continue to live with Sreeja. Outside the courtroom, however, her parents forcibly took her into custody and sent her to be admitted at the local mental hospital. When Sreeja, the petitioner, met Aruna at the mental hospital, "she was ready and willing to come along with the petitioner."⁷⁶ However, the mental hospital refused to let Aruna go without a court order. Following this meeting, Sreeja filed a writ of *habeas corpus* in the Kerala High Court, alleging that Aruna's parents were keeping her captive at the mental hospital.

At the court hearing, Aruna stated clearly, once again, that she wanted to live with Sreeja, that she was being illegally detained by her parents who admitted her into a mental hospital though she is perfect mental health, and that she did not want to return to her parental home. Accordingly, the court ordered that she be released from the mental hospital and allowed to go with Sreeja, as she desired.

Here, one can see that ultimately, Aruna's wish was respected. Legally, it was a victory for the couple, and for the relational rights of queer persons, specifically that of queer women. However, when we pay close attention to the process, and the illegalities and unnecessary harassment that the couple had to face, we begin to unmask the lagging respect for the sexual choices of women or female bodied persons. When the missing person complaint was filed by Aruna's parents, why was it that she was taken into police custody and produced before the judicial magistrate? It was illegal in this case for the police to take her into custody as she was neither a suspect nor an accused in any crime.⁷⁷ If the police had wanted her to record a statement before a judicial magistrate as a witness in her own case, they should have asked her to present herself at the magistrate's court at the appointed hour. The police were not empowered to take her into custody for the same.⁷⁸ Additionally, by what authority had the mental hospital admitted an adult woman at the request of the parents, and why had they refused to release her without a court order? The Mental Healthcare Act, 2017 ('MHA') states that as a rule, admissions into a mental health establishment can occur only upon *self-initiation* by adults *with mental illness*⁷⁹ (independent admission rule). Only those adults who need a high degree of support "approaching hundred percent" in making decisions can be admitted in

⁷⁵ *Sreeja S. v. The Commissioner of Police, Thiruvananthapuram & Ors.*, CrI. W.P. 371/2018 (Kerala High Court).

⁷⁶ *Sreeja S. v. The Commissioner of Police, Thiruvananthapuram & Ors.*, CrI. W.P. 371/2018 (Kerala High Court) ¶3.

⁷⁷ The Code of Criminal Procedure, 1973, §41.

⁷⁸ The Code of Criminal Procedure, 1973, §171.

⁷⁹ The Mental Healthcare Act, 2017, §85; Even so, further conditions need to be met before an adult can be admitted into a mental health establishment, *see* §86 (M).

exception to the abovementioned rule,⁸⁰ and even so, under highly specialised circumstances. Aruna's case did not meet the pre-conditions required to be admitted into a mental health establishment on her own, let alone warrant the exception to the independent admission rule. Neither had she been diagnosed with a mental illness nor did she approach the hospital to be admitted. The hospital acted in clear violation of the MHA when it chose to rely on the parental request in preference to Aruna's own desire. Aruna's own voice played no role in her admission into, and her release from, the mental hospital.

Other cases also demonstrate similar acts of institutional violence against lesbian women. The next case to be considered is *Shampa Singha v. The State of West Bengal & Ors.*⁸¹ The facts of the case are that Shampa and Mary were in a romantic relationship and had been living together for about three months when Mary's family removed her from Shampa's house. Shampa filed a *habeas corpus* petition alleging that her partner was being kept captive by the mother, and that she should be produced before the court to ascertain her will. During the course of the writ petition proceedings, Mary gave her statement before the magistrate according to §164 of the CrPC. She stated that she was a lesbian, and was currently living with her partner, but was now inclined to live with her mother. The court ordered accordingly and dismissed the petition.

I would like to draw the reader's attention to the first interim order passed in this case. The order from the first hearing states that about three months after Shampa and Mary started to live together, Mary's family got a report that Mary was unwell and locked in a room in Shampa's house.⁸² They submitted that they went to Shampa's house, rescued Mary, and admitted her to the hospital where she was found to be hemodynamically unstable, that is, she had unstable blood pressure. Subsequently, they submitted that they admitted her to the Santoshpur Agnishika Women Foundation ('the Foundation') for rehabilitation. They also submitted that Mary was suffering from trauma and depression.

We need to pay attention to the various procedures that Mary had to go through before the conclusion of the case. First, she was admitted to the aforementioned Foundation for rehabilitation. The Foundation website suggests that it is a drug and alcohol de-addiction centre.⁸³ The reasons for sending Mary to a de-addiction centre to rehabilitate are conspicuous by their absence from the court record. A justificatory reason for this action is neither presented by Mary's family nor required by the court. Second, she had to undergo a psychological test because her family asserted that she was suffering from trauma and depression. If A alleges that B has a mental illness, is that sufficient reason to order a mental examination for B? No. The MHA has provided very specific conditions which need to be satisfied for a person's mental health to be tested. §105 of the MHA states that if in a judicial proceeding, one party produces *proof* of a mental illness which is challenged by the other party, the court may refer the matter to a Mental Health Review Board ('Board') and the Board shall then examine the person and submit an opinion to the court.⁸⁴ First, the MHA does not clarify what "proof"

⁸⁰*Id.*, §86(3); Even in these situations, certain other conditions need to be met before a person can be admitted on someone else's request. *See* §89.

⁸¹ *Shampa Singha v. The State of West Bengal & Ors.*, 2019 SCC OnLine Cal 153.

⁸² *Shampa Singha v. The State of West Bengal & Ors.*, W.P. 23120W of 2018 (Calcutta High Court- Appellate Side), hearing dated 26.11.2018.

⁸³ Santoshpur Agnishikha Women Foundation, *What Agnisikha Does*, available at <https://perma.cc/C5CG-XX4W> (Last visited on September 16, 2020).

⁸⁴ Mental Healthcare Act, 2017, §105.

means in this context. Is it enough to submit old mental health reports, or is expert testimony required to prove mental illness? Secondly, mere allegation does not to the level of proof rise. No document or any expert witness was produced by the family to “prove” Mary’s mental illness. The order presents no legal grounds for ordering the mental health examination. The court’s order is in contravention of §105 of the MHA.⁸⁵

The prominent role played by mental hospitals and mental health checks in these cases raises the question of whether the old association of queerness with mental illness still lingers in the psyche of our institutions. This association has historically been used to discredit and disregard the sexual choices of the queer community. Homosexuality is not a mental illness and this has been categorically stated by the World Health Organization,⁸⁶ the Indian Psychiatry Society,⁸⁷ and the American Psychology Association.⁸⁸ Additionally, under the current Indian legal framework that regulates mental healthcare, even if a queer person has a mental illness, they are assumed to have the capacity to take decisions concerning themselves. For example, they have a right to, nominate a representative to support them in mental health decisions,⁸⁹ admit themselves for treatment,⁹⁰ and decide to stop the treatment and leave the mental health establishment.⁹¹ By the same logic, they have the right to choose their romantic and sexual partners. A mental illness does not, by itself, mean that a person has no legal capacity to enter into a relationship or choose the person with whom they want to live.

C. TESTING THE WHIMSY?

Perhaps the case that most clearly shows institutional violence against queer couples is the case of *Monu Rajput v. The State of Haryana & Ors.* (‘Monu Rajput’).⁹² In this case, Ms. Neeshu, an adult woman, ran away to live with her partner, Monu, a transgender man. Although Monu is a transgender man, as I explained in the scope of this article, the familial experiences of transgender men may coincide with those of queer women because many may be socialised as women. That is why this case is included in this analysis. Neeshu’s parents filed a wrongful confinement case against Monu under §346 of the IPC. In the investigation that followed, Neeshu was found in Delhi staying with Monu and another friend, and taken into police custody for almost 12 hours before she was produced before a magistrate where she recorded her statement under §164 of the CrPC, stating that she wanted to go back to her parents. Once again, as she had neither committed a crime nor was suspected of having committed one, the police could not legally take her into custody to produce her before the magistrate.⁹³

⁸⁵ The examination revealed that Mary was of sound mind.

⁸⁶ World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines*, 1992, available at <https://perma.cc/D855-CQHH> (Last visited on September 28, 2020).

⁸⁷ Indian Psychiatric Society, *Position Statement of the Indian Psychiatric Society Regarding LGBTQ*, available at <https://perma.cc/RH5V-YEY9> (Last visited on September 6, 2020).

⁸⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (2nd ed., 1973).

⁸⁹ The Mental Healthcare Act, 2017, §§14, 17.

⁹⁰ *Id.*, §85.

⁹¹ *Id.*, 2017, §88.

⁹² *Monu Rajput v. The State of Haryana & Ors*, CRWP 621/2019 (High Court of Punjab and Haryana).

⁹³ The Code of Criminal Procedure, 1973, §§41, 171.

In her statement, she confirmed that she had gone to Monu's house of her own volition, and that she had not been forced by anyone. However, she stated that she wanted to return to her parents. Accordingly, Neeshu went back to live with her parents in Haryana. Subsequently, Monu filed a *habeas corpus* petition against Neeshu's parents in the Punjab and Haryana High Court alleging that she was being kept captive at her home in Hansi. The High Court ordered the police to investigate, but not before issuing a stern warning to Monu, "...it is made clear that if this petition is found frivolous and the detinue is found residing with the private respondents as per her own consent, then very heavy costs shall be imposed."⁹⁴

The police were also ordered to produce Neeshu before the court if indeed their investigation revealed that she was being kept at her parents' house forcibly. This is a curious directive. A *habeas corpus* petition, by definition, is a writ to produce the body in court, and to ascertain the liberty of the detinue. The production of the detinue in court is not dependent on the investigation of the police.

In any case, it is safe to assume that the police investigation indeed found that Neeshu was being kept at home against her will, as she was produced at the first hearing following the admission. On that date, instead of ascertaining her will, the court adjourned the matter.⁹⁵ She was sent back to her parents' house where she remained for almost another month. Justice is surely defeated if a detinue is sent back into the custody of the very same people who are alleged to be detaining her. As a lawyer friend of mine remarked, drawing a parallel with a kidnapping case, "you won't send back the kidnappee to live with the alleged kidnapper till the case is decided."

In the second hearing, the court once again adjourned the matter as the father was not present. The court noted, "[i]n the absence of respondent No.4, the adjudication of the controversy raised in this petition for *habeas corpus* is not possible and the Court is compelled to adjourn this case, in the interest of justice."⁹⁶ This is patently illegal. The Supreme Court has in the recent past clarified that in *habeas corpus* petitions concerning adults, all that needs to be ascertained is the free will of the detinue. The mother's and father's disapproval of the detinue's choices cannot change the legal outcome.⁹⁷ Are the detinue's choices not legitimate choices in the absence of her family members? This case was not a criminal trial where the accused has a right to defend themselves. *Ex-parte* orders do not extend to criminal proceedings, and in that situation, it would have been legally permissible to adjourn to provide the accused father an opportunity to justify why he was not guilty of illegally confining or abducting Neeshu. However, this was not that kind of case.⁹⁸ This was a *habeas corpus* petition, and the only relevant opinion was that of Neeshu's, before the court, whether or not given in the presence of her father.

That was not to be. The court adjourned the proceedings and sent Neeshu to a Nari Niketan, a shelter home for women, where she ostensibly "chose" to go. The third hearing

⁹⁴ Monu Rajput v. The State of Haryana & Ors, CRWP 621/2019 (High Court of Punjab and Haryana), admission hearing 17.7.2019.

⁹⁵ *Id.*, 1st hearing 05.8.2019.

⁹⁶ Monu Rajput v. The State of Haryana & Ors., CRWP 621/2019 (High Court of Punjab and Haryana), 2nd Hearing, 13.8.2019.

⁹⁷ Soni Gerry v. Gerry Douglas AIR 2018 SC 346; Shafin Jahan v. Ashokan K.M. & Ors., (2018) 16 SCC 368.

⁹⁸ I am grateful to Advocate Maulshree Pathak for discussing the differences between the proceedings in criminal trials and *habeas corpus* proceedings.

was adjourned for no apparent reason.⁹⁹ The fourth hearing was also adjourned as the matter was listed before another court, and that court sent it back to the original bench.¹⁰⁰ The fifth hearing was adjourned for the same reason.¹⁰¹ Meanwhile, Neeshu continued in the Nari Niketan. The sixth hearing was adjourned at the request of the parents.¹⁰² The seventh hearing was also adjourned; this time because of the petitioner.¹⁰³ At the eighth hearing, once again the daughter said that she did not want to go back with her father.¹⁰⁴ Once again, the matter was adjourned. At the ninth hearing, finally the daughter said she wanted to go back to her parents.¹⁰⁵ The matter was immediately disposed, and the daughter was allowed to return with her parents. In the meanwhile, Neeshu had spent about 2 months and 10 days at the Nari Niketan. Why was she sent back to the Nari Niketan so many times - was the court testing whether the daughter was serious in her decision to live with her partner, or whether she was just being whimsical?

A mockery of the free will of the daughter was made in this case until she ultimately “chose” to return to her parents. A little under two months after the disposal of this writ petition, the couple ran away together and got a protection order from the Delhi High Court.¹⁰⁶

The final case in this series is the *Madhu Bala v. State of Uttarakhand & Ors.* (‘Madhu Bala’) case,¹⁰⁷ which tells a similar story. It is once again a *habeas corpus* petition filed by the partner of a woman, alleging that she had been kept captive by her family. The detinue was produced before the court and she deposed that she wanted to live with her partner, but to no avail, as her family members had not been notified and were neither present nor represented in court. Notices were sent to the family members and the hearing was re-scheduled. At the next hearing, the family was represented by their lawyer, and the daughter decided to stay with the family.¹⁰⁸ The same result occurred at the third hearing, which the judge had scheduled to finally decide the matter, and to perhaps give the daughter a chance make a final decision, given that she had changed her mind. The daughter decided to continue to live with her family. The petition was dismissed.¹⁰⁹

It is certainly possible that in the *Madhu Bala* case, the daughter was exercising a genuine choice by changing her mind, but no justificatory reasons have been presented by the court for the departure from the law declared by the Supreme Court in *Shafin Jahan v. Ashokan K.M. & Ors.* (‘Shafin Jahan’).¹¹⁰ The law is entirely clear that in *habeas corpus* petitions concerning adults, all that needs to be ascertained is the will of the detinue. Why then was the procedure in the last two cases tweaked to give the family an opportunity to represent their side? Perhaps, the court would do well to remember that the family is the main site of

⁹⁹ *Monu Rajput v. The State of Haryana & Ors.*, CRWP 621/2019 (High Court of Punjab and Haryana), 3rd hearing, 26.08.2019.

¹⁰⁰ *Id.*, 4th hearing, 30.8.2019.

¹⁰¹ *Id.*, 5th hearing, 3.9.2019.

¹⁰² *Id.*, 6th hearing, 12.09.2019.

¹⁰³ *Id.*, 7th hearing, 24.09.2019.

¹⁰⁴ *Id.*, 8th hearing, 03.10.2019.

¹⁰⁵ *Id.*, 9th hearing, 22.10.2019.

¹⁰⁶ *Monu Rajput & Anr. v. State & Ors.* W.P. CrI. 3407/2019 (Delhi High Court).

¹⁰⁷ *Madhu Bala v. State of Uttarakhand & Ors.* HABC 8/2020 (Uttarakhand High Court).

¹⁰⁸ *Id.*, 2nd hearing 08.06.2020.

¹⁰⁹ *Id.*, 3rd hearing 12.06.2020.

¹¹⁰ *Shafin Jahan v. Ashokan K.M. & Ors.* Criminal Appeal No. 366 of 2018 (S.C.).

violence for queer women. This sociological fact combined with the law laid down by the Supreme Court in *Shafin Jahan* make the correct disposal of these *habeas corpus* petitions even more urgent.

Detailed analyses of these cases reveal the violation of several fundamental rights of women in queer relationships. The first is the right to privacy. In the *Navtej* judgement, Justice Nariman cited the Yogyakarta Principles according to which, the right to privacy includes, "... decisions and choices regarding both one's own body and consensual sexual and other relations with others", which would include decisions about romantic relationships and cohabitation.¹¹¹ A majority of the judges in *Navtej* agreed with him that the fundamental right to privacy had this relational element. This aspect of privacy was also recognised by the *Puttaswamy* case.¹¹² The continuous adjournments in *Monu Rajput* and *Madhu Bala* signalled a violation of their relational privacy as their relationship and cohabitation choices were not respected. A majority of the *Navtej* court had also found that the right to privacy includes the right to choose a sexual partner.¹¹³ However, the continuous adjournments delayed the realisation of this right, and in turn violated the privacy of the parties involved. In addition to the continuous adjournments, these women were also taken into illegal police custody. These incidents signal a privacy violation of the kind that Justices Misra and Khanwilkar conceptualised in *Navtej*, "the right of privacy takes within its sweep...the right of every individual...to express their choices in terms of sexual inclination without the *fear of persecution* or criminal prosecution."¹¹⁴ [emphasis mine].

The second is the right to equality and equal protection of the laws. The Supreme Court has categorically stated that there is a fundamental right to be free from sexual orientation discrimination.¹¹⁵ The *Navtej* judgment reiterated that the "LGBT community possess equal rights as any other citizen in the country..."¹¹⁶ However, these cases have demonstrated that lesbians and women in queer relationships were not treated as equals before the law. In *Sreeja S. and Monu Rajput*, the women were taken into police custody although the conditions allowing for custody did not arise in those cases. Similarly, in *Sreeja S.*, Aruna was denied the equal protection of the law when her statement on oath was disregarded and she was admitted into a mental hospital at the request of her parents. Additionally, Justice Nariman had clearly recognised in his concurring judgment in *Navtej* that cohabiting same-sex couples are entitled to equal treatment,¹¹⁷ and the right of heterosexual couples to a live-in relationship regardless of marriage has been upheld by the Supreme Court in the case of *Nandakumar & Anr. v. State of Kerala*.¹¹⁸ However, we see that in the *Monu Rajput* and *Madhu Bala* cases, the Punjab and Haryana High Court repeatedly adjourned the matter even though the detainee was present in court and stated her will to go with her partner. The constant adjournments in these cases unjustifiably delayed the right to live-in relationships to queer women and denied them equality with live-in heterosexual couples.

¹¹¹ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶87 (per Nariman J.).

¹¹² *Justice Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, (2017) 10 SCC 1.

¹¹³ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1.

¹¹⁴ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶229 (per Misra J. & Khanwilkar J.).

¹¹⁵ *National Legal Services Authority v. Union of India and Others* (Writ Petition (Civil) No. 400/2012) ¶55 (S.C.).

¹¹⁶ *Navtej Singh Johar & Ors. v. The Union of India*, (2018) 10 SCC 1, ¶251 (per Misra J. & Khanwilkar J.).

¹¹⁷ *Id.*, ¶66 (per Nariman J.).

¹¹⁸ *Nandakumar & Anr. v. State of Kerala*, AIR 2018 SC 2254.

Finally, these cases demonstrate a violation of the fundamental right to dignity which forms of one of the *rationes decidendi* of the *Navtej* case. In this case, majority of the court conceptualised dignity as self-worth.¹¹⁹ They stated that a person or a group was said to possess dignity when they experienced self-respect or self-worth. When unfair treatment is meted out on personal traits, or circumstances unrelated to personal needs to merits, dignity was said to be offended. Taking these women into illegal police custody and refusing to honour their will in court proceedings for no ostensible reason, amounts to just this kind of unfair treatment that is dignity defeating. It also signals to other women in queer relationships that they should conduct their relationship in secrecy to avoid these consequences, which in turn creates feelings of fear, isolation, disempowerment, and negatively affects their claims to self-worth and respect in these relationships.

IV. ALLEGATIONS OF LESBIANISM IN MATRIMONIAL DISPUTES AND PRESSURE TO ENTER HETEROSEXUAL MARRIAGES

An understudied legal location where the romantic relationships of women with other women gain visibility is matrimonial disputes. In fact, before the live-in relationship cases came to be recorded, matrimonial disputes were one of the two sites where the word “lesbian” occurred in court records.¹²⁰ In these cases, the husband alleges that the wife is, or has been a lesbian. Although this allegation is usually mixed up with other allegations of misconduct during the marriage, geared to demonstrate that the wife has been a bad spouse, daughter-in-law, or parent, it has appeared as the sole ground in two of the reported cases.¹²¹ However, in none of these cases has the court ever recorded a finding of lesbianism. The cases usually take one of the following forms: the husband alleges that his wife is having unnatural relations with another woman but nevertheless wants to settle the marital discord; the husband alleges that his wife is a lesbian as a ground for claiming divorce stating cruelty as a ground;¹²² or the husband alleges that the wife is a lesbian to take custody of the children.¹²³ This allegation has also come up in maintenance proceedings,¹²⁴ and *habeas corpus* petitions where the wife has filed to relieve children from the illegal custody of the husband.¹²⁵ While in some cases, the lesbian activities were alleged during the subsistence of the marriage, in certain other cases, the alleged lesbian activities took place before marriage.¹²⁶ In neither of these cases did the women identify with this sexuality. They denied the charges of lesbianism. Reading these judgments as concerning queer women may end up incorrectly ascribing a particular sexuality to the women involved in these cases. The letters and friendships that were points of contention in these cases will get similarly coloured. This raises issues for legal scholarship about how

¹¹⁹ Surabhi Shukla, *The Many Faces of Dignity in Navtej Johar*, Issue 2, EUROPEAN HUMAN RIGHTS LAW REVIEW 193, 201-202 (2019).

¹²⁰ Court records show two murder cases in which the word lesbian is used. In one case, the deceased is alleged to be a lesbian, and in the other, the alleged murderer is said to be a lesbian. Both these cases do not contribute anything significant for the present purpose and therefore are not discussed here; Sohan Raj Sharma v. State of Haryana, Criminal Appeal No. 1464/2007 (S.C.) and Sathi v. Kerala CrI. A. No. 372/93 (Kerala High Court).

¹²¹ Akshata Akshya v. State of U.P. Special Appeal No. 141/2014 (Allahabad High Court-Lucknow Bench), and Rajesh v. Baby Girija RPF No. 364 of 2016 (Kerala High Court).

¹²² D. Suryakumari v. R. Srikanth C.M.A. No. 1283/2004 (Madras High Court); Dipika Lal v. Vipin Kumar Gupta MANU/PH/0099/2009 (High Court of Punjab and Haryana)

¹²³ Dipika Lal v. Vipin Kumar Gupta MANU/PH/0099/2009 (High Court of Punjab and Haryana High).

¹²⁴ Rajesh v. Baby Girija, RPF No. 364 of 2016 (Kerala High Court).

¹²⁵ Richa Bhasin v. Commissioner of Police & Ors. 84 (2000) DLT 190 (Delhi High Court).

¹²⁶ D. Suryakumari v. R. Srikanth C.M.A. No. 1283/2004 (Madras High Court); Dipika Lal v. Vipin Kumar Gupta MANU/PH/0099/2009 (Punjab and Haryana High Court).

best to ethically engage with these cases, including whether to engage with them at all. No meaningful insights can be produced on this topic without field work in this area. Therefore, I restrain from making any remarks on this at the present moment.

A final issue that I want to raise is that of marriage pressure that many queer women face. Men and women both face marriage pressure within Indian households, but men have greater maneuverability within the marriage relationship,¹²⁷ and greater latitude in deciding the conditions under which they will marry. Research on queer women has indicated that once the families find out about the sexuality of the women, the pressure to enter into a heterosexual marriage increases.¹²⁸ In the first hearing of the *Madhu Bala* case, the State of Uttarakhand was given the responsibility to ensure that no untoward pressure was exerted on the woman to get married to a man. Naisargi Dave's research also states one of the biggest fears of queer women was compulsory marriage, "and the alienation that would result from its eschewal."¹²⁹ Sustained solutions to this issue need to be identified.

V. CONCLUSION

In this article, I have tried to show how the State and its institutions, through their acts and omissions have manufactured a queer life for queer women. I started my discussion by problematising the concept of privacy which qualifies the intimacy right made available to the queer community. I brought up the old concerns of privacy that have remained a constant issue for queer women and argued that the *Navtej* judgment has failed to assuage those concerns. Privacy is a precarious commodity for queer women and they have precious little of it in their homes. On the contrary, the home and the family form the main site of violence for queer women. Therefore, the concept of privacy needs to be developed along the lines of access to safe public spaces outside the home, if it is to be productive for queer women. Thinking of privacy in this way provides the grounds for opening up shelter homes to queer women, subject to the fact that its operational logic does not replicate hetero-patriarchal ideology. It also recasts protection orders as an important privacy enhancing tool. However, these are but two solutions that are already present for queer women. These solutions also come into play in extreme situations; when they have run away from home or when they are in immediate physical danger. There is a need to think of more everyday solutions for privacy, and they should be put in place in consultation with queer women.

Next, I demonstrated that even though the *Navtej* judgment has granted a right to sexual relations to queer persons, queer women face legal challenges to their live-in relationships. This is a distinct legal scenario that they face as compared with queer men and transwomen in live-in relationships, and queer persons who are not in live-in relationships. I argued that these court cases are made possible because of familial ideology which gives a

¹²⁷ MV Lee Badgett, *The Economic Cost of Stigma and Exclusion of LGBT People: A Case Study of India* 14-15 World Bank Group Working Paper (2014), available at <https://perma.cc/2QEC-4H49> (Last visited on September 16, 2020).

¹²⁸ TATA INSTITUTE OF SOCIAL SCIENCES, *The Nature of Violence Faced by Lesbian Women in India: A Study Conducted by Bina Fernandez and Gomathy N.B.*, 9 (2003), available at <https://perma.cc/M4PN-W6XE> (Last visited on August 16, 2020).

¹²⁹ NAISARGI DAVE, *QUEER ACTIVISM IN INDIA: A STORY IN THE ANTHROPOLOGY OF ETHICS* 180 (2012); See LABIA, *Breaking the Binary: Understanding the Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Realities* 102 (2013), available at <https://perma.cc/M2GG-Z9ZQ> (Last visited on September 5, 2020).

great degree of control to the family over the sexual lives of women. I then analysed the cases to demonstrate how familial ideology sanctions and is simultaneously reinforced by the various procedural and substantive rights violations that queer women face in these cases.

Finally, I identified two further concerns that were unique to queer women. The first was the allegation of lesbianism in marital disputes, and the second was the pressure to enter into a heterosexual marriage. I did not engage with the first issue because I argued that it needs to be investigated first at the ground level to gain a nuanced understanding of its component parts. These investigations should then inform the scholarship on this point. In all of those cases, the women denied the charge of lesbianism and the husbands remained unable to prove it. The courts also did not record any finding of lesbianism. There is a danger in scholarship trying to pre-empt the problem by imposing its analytical and descriptive categories on phenomena it may not fully understand at present. Since the women themselves denied those charges, reading them as cases concerning queer women may end up wrongly labeling the women involved. I raised the second issue of marriage-pressure but did not offer any legal insights into it as I think that activists and scholars may benefit by working together to provide solutions to this problem.

In this article, I have shown that the law and legal discourse, including the *Navtej* judgment, have had limited success in delivering freedom to queer women. While on the one hand some issues like privacy have been overlooked, on the other hand the ideological norms that restrict the autonomy of women continue to operate within the State machinery. Certainly, to the extent that the court and State institutions are implicated in the problems highlighted here, they need to course-correct. But, what do the findings of this article mean for the future of queer women's activism? To be sure, engagement with the law and the State is essential sometimes: for the repeal of criminalising laws, for instance. The question is, to what extent should queer women continue to agitate for more rights through the court and the legislature? Will the accumulation of more rights bring about greater freedom, or will it release the queer woman into a governance regime which will discipline and regulate her within the logic of the prevalent norms, rewarding only specific ways of behaving and conducting, bringing about more un-freedom?¹³⁰ The hope is that this article will give some pause to rights activists in designing their demands from the law. It will urge them to consider how best to engage with the legal system so that they can secure necessary entitlements from it while leaving a broad area of individual expressive freedom untainted by rules.

¹³⁰ RATNA KAPUR, ON GENDER, ALTERITY, AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 27-28 (2018).

September 2021

ANNEXURE P7

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

Policy Brief

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

September 2021

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

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The views expressed in this publication do not necessarily represent those of the Centre for Health Equity, Law & Policy or the Indian Law Society.

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

INTRODUCTION

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

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

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

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

1. ENGAGEMENT WITH LAW

1.1 Objectives of this Policy Brief

- 1.1.1 The three decades-long legal effort to overturn the *de facto* criminalization of homosexuality in India, beginning with the *AIDS Bhedbhav Virodhi Andolan's (ABVA)* writ petition before the Delhi High Court in 1994,¹ to the participatory community-led effort² leading to the seminal decision of the Delhi High Court in *Naz Foundation v Government of NCT of Delhi*,³ concluded in 2018 with *Navtej Singh Johar & Ors. v Union of India ('Navtej')*.⁴ A 5-judge bench of the Supreme Court of India in *Navtej* declared the criminalization of sex between consenting adults in private under Section 377 of The Indian Penal Code, 1860 (Section 377, IPC) as violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution, and held that lesbian, gay, bisexual and transgender persons are entitled to equality before law and freedom from discrimination on basis of sexual orientation and gender identity.
- 1.1.2 During this period, the Supreme Court also issued its landmark decision in 2014 in *National Legal Services Authority v Union of India (NALSA)*,⁵ recognizing transgender persons' right to self-determination of gender identity, and directed the central and state governments to grant legal recognition to their gender identity as male, female or transgender (including third gender or *hijra*). The court further issued multiple directions to these governments under Articles 14, 15(4), 16(4), 19 and 21 of the Constitution, particularly on protection of social and economic rights of transgender persons, including providing reservation in public employment and education by classifying transgender persons as socially and educationally backward class (SEBC) of citizens, and targeted healthcare services, among others.
- 1.1.3 Trans*,⁶ intersex and gender non-binary individuals and communities across the country have led the path in engaging with law for an equal

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

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

³ (2009) 160 DLT 277

⁴ (2018) 10 SCC 1

⁵ (2014) 5 SCC 438

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

and fairer distribution of State resources, goods and services. These efforts have particularly focused on implementation of NALSA's directives to the central and state governments,⁷ enforcing reservation in public employment and education,⁸ contesting elections to public office,⁹ access to employment¹⁰ and education,¹¹ freedom from discrimination in access to healthcare on basis of intersex status,¹² access to food security¹³ and shelter homes,¹⁴ in addition to mounting constitutional challenges against criminalization under various police laws which expressly target *hijra* communities.¹⁵

1.1.4 The legislative process of enacting the *Transgender Persons (Protection of Rights) Act, 2019* ('Trans Act') also saw extensive community engagement and substantive critique of the proposed law's provisions.¹⁶ At present, the Act is facing multiple challenges from the trans community before the Supreme Court¹⁷ and the Karnataka High Court¹⁸ for fundamentally eroding the progressive law declared in NALSA on the right to self-determination of gender identity and failure in guaranteeing reservation in public employment and education, among other grounds.

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸*Ondede v Union of India*, WP No. 11679 of 2020

- 1.1.5 In April 2019, the Madras High Court in *Arunkumar and Anr. v Inspector General of Registration & Ors.*¹⁹ declared the expression ‘bride’ in section 5 of the *Hindu Marriage Act, 1956* to mean and include a transwoman and an intersex person identifying as a woman, thereby interpreting the law to allow solemnization of marriages involving trans persons.
- 1.1.6 Courts are also positively engaging with legal claims with respect to media representation of queer sexuality²⁰ and non-discrimination in public employment on basis of sexual orientation.²¹
- 1.1.7 At present, the High Courts of Kerala and Delhi are dealing with the question of ‘marriage equality’ under the existing legal framework of marriage laws in India. The first writ petition was filed before the Kerala High Court in January 2020 by a gay couple, seeking recognition under the *Special Marriage Act, 1954*.²² Four additional petitions are pending before the Delhi High Court, by (i) four Hindu individuals who filed in September 2020, seeking inclusion under the *Hindu Marriage Act, 1955*²³ (ii) a couple involving two women who filed in October 2020, seeking recognition under the *Special Marriage Act, 1954*²⁴ (iii) a gay couple who also filed in October 2020, one of whom being an Overseas Citizen of India, solemnized their marriage as per US law in Washington, D.C. and seek recognition in India under the *Foreign Marriage Act, 1969*²⁵ and (iv) by four individuals who filed in February 2021 and seek recognition of same sex marriages under the *Special Marriage Act, 1954*.²⁶
- 1.1.8 One critique of the legal process of the constitutional challenge to the anti-sodomy law has been of having the unintended consequence of transforming a broad range of the queer community’s socio-legal vulnerabilities into a single-issue struggle.²⁷ It has been argued that the fight against the *de facto* criminalization of homosexuality overshadowed the disproportionate impact of police laws and the criminalization of begging and sex work on working class and Dalit

¹⁹*Id* at 12

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

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

²² Copy of the petition available at: https://www.livelaw.in/pdf_upload/pdf_upload-369544.pdf

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

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

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

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

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

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

1.1.9 In this context, an engagement on the legal recognition of queer relationships from the prism of Transformative Constitutionalism may offer advantages, making the realization of social and economic rights central to the aim for equality and non-discrimination. Such an understanding is reflected in claims for recognition and redistribution through which formal equality for queer relationships must also embrace redress of socio-economic injustice irrespective of relationship/marital status.²⁸ This strategy suggests that seeking legal recognition of queer relationships in isolation may provide a limited remedy for protection of rights of the queer community, unless it is also accompanied by demands of socio-economic justice, particularly for those in the community who may prioritize other struggles. A pursuit of formal equality claims like ‘marriage equality’ may be merely symbolic in remedying historical injustices, in a context of gross disparities in material wellbeing of a vast majority of the queer community.

1.1.10 In fact, participants in the community consultation organized by the Centre for Health Equity, Law & Policy voiced support for the strategy outlined in this paper of delinking the claim social and economic rights from marital status. Community activists and lawyers who provide legal aid and support services for queer people in crisis asserted that legal recognition of relationships *per se* does not serve as a one-stop solution, and as a community we must focus on mitigating the vulnerability of queer people on basis of gender, caste, class and disability by committing efforts and resources for support services like shelter homes, adequate housing, mental healthcare, employment opportunities, legal aid and other services.²⁹

1.1.11 The objective of this paper is to present issues which arise in relation to the legal recognition of queer relationships, and to suggest a response to access social and economic rights, irrespective of relationship/marital status. It is shared with the hope of provoking dialogue within the queer community, to foster engagement in informing legal processes and creating change that is representative of the community’s diverse needs and demands in relation to the recognition of queer relationships. In

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

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

doing so, the paper builds on the writings and interventions of queer³⁰ activists in India over the decades in conceptually challenging the State's interest in limiting access to a variety of social and economic rights reserved exclusively to persons in marital relationships which are defined by underlying assumptions of binary of gender, heterosexuality, monogamy and conjugality.

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

1.2 Demands for Recognition

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

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

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

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

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

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

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

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

³²*Ibid*, pgs. 6-7, 10

³³*Id* at 31, pg. 9

³⁴*Id* at 31, pg. 12

³⁵*Id* at 31, pgs. 10-11

³⁶*Id* at 31, pg. 51

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

³⁸*Id* at 31, pgs. 68-69

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

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

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

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

⁴²*Ibid*, pg. 8

⁴³*Id* at 41, pg. 83-88

⁴⁴*Id* at 41, pg. 16-19, 66-72

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

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

1.2.11 In early 2019, Sampoorna (a collective of trans, intersex and gender non-binary individuals) published a manifesto of rights, seeking principally the recognition in law of the vast spectrum of gender identities and expressions⁴⁷ to allow such persons to truly reflect their numbers in census figures, for policy and budgetary advocacy with the State. The collective aims to engage with the State on rights of trans, intersex and gender non-binary persons to marriage, inheritance, reproductive rights, adoption and other laws,⁴⁸ and views the conception of 'family' only on basis of relations by blood, marriage or adoption under the *Transgender Persons (Protection of Rights) Act, 2019* as exclusion of *hijra gharanas*/households.⁴⁹

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

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

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

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

⁴⁹*Id* at 16

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

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

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

1.3 Seeking Judicial Remedies

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

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

⁵¹*Ibid*, pgs. 33-34

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

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

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

- 1.3.3 In October 2018 (a month after *Navtej*), the Madras High Court granted police protection to a man and his trans partner when the man's family and persons belonging to a 'political outfit' harassed and threatened the couple.⁵⁴ The court cited jurisprudence on protection granted routinely to inter-caste and inter-religious couples⁵⁵ and held that marriage with transgender persons and resistance by families deserves similar response in law.
- 1.3.4 Again, in October 2018 the Delhi High Court passed a detailed order granting police protection to two women who received violent threats from family members on basis of their relationship status, and sought departmental action against a police officer who did not co-operate with the women's request for assistance and threatened to file a frivolous criminal case against them.⁵⁶
- 1.3.5 In January 2019, the Calcutta High Court entertained a writ petition by a lesbian woman who sought her partner's release from unlawful detention by her family. However, when produced before the Court, the detained woman stated that she chose to live with her mother, and the matter was consequently disposed of.⁵⁷
- 1.3.6 In April 2019, the Delhi High Court granted police protection to two women who cohabited together in a live-in relationship, against threats of violence from their families who did not approve of the relationship.⁵⁸
- 1.3.7 In July 2019, the Delhi High Court refused to entertain a writ of habeas corpus by a trans man to seek the release of his partner from the unlawful detention by her paternal relatives, as the woman subsequently chose to live with her parents.⁵⁹

⁵⁴*Mansur Rahman v Superintendent of Police*, 2018 SCC Online Mad 3250.

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

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

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

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

⁵⁹*Monu Rajput v State*, 2019 SCC Online Del 9154

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁰*Id* at 4, paragraph 385

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

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

2. LEGAL DEVELOPMENTS

2.1 Transformative Constitutionalism

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

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

⁷²*Id* at 12

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

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

⁷³*State of Kerala v NM Thomas*, (1976) 2 SCC 310

⁷⁴*Id* at 4, para. 95

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

2.2 Gender, Sexuality and Constitutional Law

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

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

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

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

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

⁷⁶ (2008) 3 SCC 1

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

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

⁷⁷ (2017) 10 SCC 1

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

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

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

⁷⁸ (2014) 1 SCC 1

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

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

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

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

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

⁷⁹ 2018 SCC Online SC 343

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

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

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

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

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

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

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

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

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

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

⁸⁰ (2019) 3 SCC 39

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

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

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

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

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

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

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

⁸² 2018 SCC Online Del 6660

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁷*Griggs v Duke Power Co.*, 401 US 424 (1971)

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

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

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

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

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

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

⁸⁹ *Id* at 4, paras. 395-396

⁹⁰ 2021 SCC Online SC 261

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

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

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

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

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

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

⁹¹ 2015 SCC Online Bom 6256

⁹² (2016) 7 SCC 761

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

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

2.4 Making Social and Economic Rights Inclusive

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

⁹³ (2015) 4 All LJ 339

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

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

I. HEALTHCARE

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

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

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

⁹⁶ (2018) 5 SCC 1

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

⁹⁷ 2020 SCC Online Bom 880

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

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

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

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

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

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

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

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

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

¹⁰³ Section 14 of the HIV Act

commitment of economic resources to life-saving medicines and treatment.¹⁰⁴

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

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

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

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

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

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

¹⁰⁷ Section 15, *Transgender Persons (Protection of Rights) Act, 2019*

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

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

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

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

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

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

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

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

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

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

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

II. MAINTENANCE

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

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

2.4.20 The well-established rule of law, first declared by the Privy Council¹¹⁸ and applied by the Supreme Court¹¹⁹ today, is that a man and a woman cohabiting under the same roof for a number of years, gives rise to a rebuttable presumption of marriage, i.e., they live as husband and wife (and children born to them are not 'illegitimate').

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

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

¹¹⁵ Sections 24-25 of *Hindu Marriage Act, 1955*

¹¹⁶*Rani Sethi v Sunil Sethi*, 179 (2011) DLT 414

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

¹¹⁸*A. Dinohamy v W.L. Blahamy*, AIR 1927 P.C. 185

¹¹⁹*Bharatha Matha v R. Vijaya Renganathan* (2010) 11 SCC 483

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

2.4.22 Courts have supported such incrementally progressive interpretation by relying on the object of the law under section 125, CrPC—the prevention of destitution of women and children. The law serves the interests of securing social and economic justice for women and children, as reflected in the Constitution’s articulation of special provisions for women in Article 15(3) and the Directive Principle under Article 39.¹²³

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

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

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

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

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

¹²¹*Badshah v Urmila Badshah Godse* (2014) 1 SCC 188

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

¹²³*Capt. Ramesh Chander Kaushal v Veena Kaushal* AIR (1978) SC 1807

¹²⁴ Preamble of the DV Act

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

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

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

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

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

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

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

¹²⁵Section 3(*Domestic violence*) defines ‘economic abuse’ as:

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

¹²⁶(2010) 10 SCC 469, para. 31

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

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

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

¹²⁷ (2013) 15 SCC 755, para. 56

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

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

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

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

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

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

¹²⁹ (2016) 10 SCC 165

¹³⁰ Writ Petition No. 57 of 2020, disposed of by final order dated 24.08.2020

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

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

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

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

III. SOCIAL SECURITY

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

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

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

2.4.40 The Second National Commission on Labour (2002) recommended granting social security and all labour rights protections to sex workers as self-employed workers.¹³² However, sex workers do not find express coverage under definitions of self-employed workers¹³³ or unorganized sector workers¹³⁴ under the *Code on Social Security (2020)*¹³⁵ enacted pursuant to the Commission's recommendations. The Code subsumes the *Unorganized Worker's Social Security Act, 2008* and *Employee State Insurance Act, 1948* – a premier social security law – which for the first time provided for unemployment insurance¹³⁶ under various policies between 2005-2020. Such social security policies typically provide access to benefits related to health, disability, old age protection, housing, childcare, and education among others.

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

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

¹³³ Section 2(75) of Social Security Code, 2020

¹³⁴ Section 2(86) of Social Security Code, 2020

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

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

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

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

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

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

IV. PROPERTY RIGHTS

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

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

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

¹³⁸ Section 15 of the HIV Act

¹³⁹ Sections 8 and 14 of the Trans Act

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

¹⁴¹ *Id* at 50, pgs.24-25

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

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

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

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

¹⁴² (2008) 2 SCC 238, paras. 11-15

¹⁴³ *Id* at 46

¹⁴⁴ AIR 2016 HP 148

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

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

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

V. HOUSING

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

2.4.52 In addition to foregrounding a hetero-normative construct of ‘family’ under tenancy laws, states like Maharashtra,¹⁴⁸ West Bengal¹⁴⁹ and Tamil Nadu¹⁵⁰ and the union territory of Puducherry¹⁵¹ require morality clauses in lease agreements.

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

¹⁴⁵ *Ilyas v Badsha alias Kamla* AIR 1990 MP 334

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

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

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

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

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

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

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

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

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

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

¹⁵³*Id* at 147, pgs. 51-52

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

¹⁵⁵Section 4 of RERA

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

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

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

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

¹⁵⁶Rajasthan Real Estate (Regulation and Development) Rules, 2017

¹⁵⁷*Id* at 68

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

¹⁵⁹Article 34 of Schedule I, Maharashtra Stamp Act, 1958

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

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

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

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

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

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

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

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

¹⁶³ *Id* at 17

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

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

2.4.64 The High Courts of Delhi¹⁶⁵ and Jammu & Kashmir¹⁶⁶ have struck down local anti-beggary laws as violative of Articles 14, 19(1)(a) and (d) and 21 of the Constitution, on the basis that such laws essentially punish the status of poverty or homelessness *per se*. In both cases, courts were largely driven to decriminalize begging by a nuanced exploration of the intersection of law, economy and crime. The courts observed that begging is inextricably linked to poverty, landlessness and caste-based discrimination, and it is the State's responsibility to remedy such inequalities through redistribution of wealth, social security, and public services. The courts concluded that the State's failure in remedying such inequalities calls for treating the issue of begging through an economic/destitution model, not a penal model.

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

¹⁶⁴*Id* at 140

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

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

¹⁶⁷Section 3 read with sections 7 and 18 of ITPA

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

VI. GUARDIANSHIP, ADOPTION & ASSISTED REPRODUCTIVE TECHNOLOGY

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

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

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

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

2.4.70 The Central Adoption Resource Agency (‘CARA’), constituted as a result of Supreme Court’s directions¹⁷² on adoption and the *Juvenile Justice (Care and Protection) Act, 2015* (‘JJ Act’) provide access to

¹⁶⁸ (1999) 2 SCC 228

¹⁶⁹ *Personal Laws (Amendment) Act, 2010*

¹⁷⁰ Section 6 of *Hindu Adoption and Maintenance Act, 1956*

¹⁷¹ Sections 7-8 of *Hindu Adoption and Maintenance Act, 1956*

¹⁷² *Lakshmi Kant Pandey v Union of India* (1984) 2 SCC 244

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

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

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

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

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

¹⁷³ (2014) 4 SCC 1

¹⁷⁴ Section 57, *Juvenile Justice (Care and Protection) Act, 2015*

¹⁷⁵ *Adoption Regulations, 2017*

¹⁷⁶ *Ibid*, Regulation 3(a)

¹⁷⁷ *Id* at 175, Regulation 5

¹⁷⁸ Section 2(1)(g) of ART Bill

¹⁷⁹ Section 2(1)(m) of ART Bill

¹⁸⁰ Section 21 of ART Bill

¹⁸¹ Section 2(g) read with (r) of Surrogacy Bill

This Bill seeks to prohibit commercial surrogacy¹⁸² and permit only altruistic surrogacy.¹⁸³ After passing in the Lok Sabha, the Rajya Sabha Select Committee recommended widening the scope of intending parents to include single women who were formerly married and subsequently divorced or widowed.¹⁸⁴ The report is silent on single men and queer persons altogether.

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

2.4.76 Crucially in this regard, the Yogyakarta Principles¹⁸⁸ are fully domesticated for application under Indian law. This position has been re-affirmed by *Navtej*.¹⁸⁹ Article 24 of Yogyakarta Principles specifically requires States to adopt all legislative, administrative or other measures to ensure:

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

¹⁸²Section 3(ii) read with Sections 35, 37 of Surrogacy Bill

¹⁸³Section 4(ii)(b) of Surrogacy Bill

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

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

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

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

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

¹⁸⁹*Id* at 4, paras. 338-342

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

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

2.4.77 In 2017, the Yogyakarta Principles were revised¹⁹⁰ on account of developments in the understanding of law’s intersection with sexuality, gender identity and sex characteristics to further provide that States shall ensure that surrogacy, where legal, is provided without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics, with respect to the right to found a family under Article 24. Therefore, as per India’s binding obligations under international human rights law, queer individuals and relationships have an equal right to parenthood by adoption and assisted reproductive technologies (including surrogacy), regardless of marital status.

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

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

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

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

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

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

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

¹⁹⁵ *Id* at 193, pg. 2

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

VII. PARTNER BENEFITS IN LABOUR LAWS

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹⁸ Employee’s Provident Fund Organization, Ministry of Labour & Employment, Government of India; Available at: https://www.epfindia.gov.in/site_en/AboutEPFO.php

¹⁹⁹ Regulation 23 of the Employee’s Deposit Linked Insurance Scheme

²⁰⁰ *Id* at 154, pgs. 68-71

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

²⁰² Sections 5-13 of the *Maternity Benefit Act, 1961*

²⁰³ Section 2(24) of the *Code on Social Security, 2020*

²⁰⁴ Section 2(33) of the *Code on Social Security, 2020*

affordable life-saving medicines and treatment for the insured person and the family.²⁰⁵

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

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

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

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

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

²⁰⁷Draft Science, Technology and Innovation Policy, Ministry of Science and Technology, Government of India, December 2020

²⁰⁸*Id* at 147 pgs. 65-103

trans communities in achieving 1% horizontal reservation across SC/ST, OBC (other backward classes), MBC (most backward classes) and open categories in civil services through a PIL²⁰⁹ is clearly instructive of the struggles and demands of the community. A legal strategy of claiming rights for the queer community must focus on the fundamental right to equality of opportunity irrespective of sexual orientation, gender identity or inter-sex status.

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

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

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

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

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

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

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

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

²¹³ 2020 SCC Online SC 1023

3. ALTERNATIVE INTERVENTIONS IN LAW

3.1 Direct Inclusion under the Existing Legal Framework

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

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

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

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

²¹⁴*Id* at 41, pg. 17-19, 72

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

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

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

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

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

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

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

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

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

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

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

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

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

²¹⁹ (2020) 2 SCC 1

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

²²⁰*Id* at 28

²²¹ Section 40 of the Parsi law; Section 37 of SMA; Section 25 of the Hindu law, Section 125, CrPC

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

²²³*Id* at 48

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

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

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

2013²²⁷ or state-level laws such as the *Tamil Nadu Prohibition of Harassment of Women Act, 2002*²²⁸ – rape²²⁹ and domestic violence.²³⁰

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

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

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

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

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

²²⁹*X v State of Uttarakhand*, AIR 2019 Utt 138

²³⁰*Id* at 130

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

²³² 1983 (2) APLJ H.C. 37

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

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

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

3.1.14 In January 2021, the Allahabad High Court declared mandatory publication of notice under SMA to be unconstitutional as it violates the fundamental right to privacy of inter-faith and inter-caste couples, and exposes them to interference and harm by State and non-State actors.²³⁷ At present, the Supreme Court²³⁸ and Delhi High Court²³⁹ have issued notice in matters raising a constitutional challenge to this legal procedure under SMA, on grounds of violation of the right to privacy, personal autonomy and freedom from violence for inter-caste and inter-faith couples.

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

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

²³⁵ Sections 5-8 of SMA

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

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

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

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

²⁴⁰Preamble read with Section 3 of the Ordinance

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

3.1.16 The UP law has set off a domino effect with Madhya Pradesh²⁴³ and Gujarat²⁴⁴ introducing similar laws. Even as the Supreme Court is hearing a batch of petitions challenging the validity of many state anti-conversion laws,²⁴⁵ these various state legislations are leading to divergence within the judiciary. While one bench of the Allahabad High Court refused to grant protection to three interfaith couples on alleged violation of the law,²⁴⁶ the Gujarat High Court placed reliance on *Shafin Jahan* and ordered a stay on provisions of the local law which are deemed to criminalize inter-religious marriages per se, until final adjudication of the constitutional challenge.²⁴⁷

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

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

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

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

²⁴³*Madhya Pradesh Freedom of Religion Ordinance, 2020*; copy available at:

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

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

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

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

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

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

²⁴⁸*Id* at 5, para 75

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

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

²⁴⁹ Section 2(c) of the Trans Act

²⁵⁰ *Id* at 41, pgs. 86-88

²⁵¹ *Munish Kakkar v Nidhi Kakkar* 2019 SCC Online SC 1636

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

²⁵²*Id* at 186

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

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

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

3.2.10 The *Hawaii Reciprocal Beneficiaries Act, 1997* in the US recognizes relationships of any two individuals who have significant personal, emotional and economic interdependence, and grants equal rights and benefits as those available only to married couples. The law includes friends who do not share a romantic relationship and persons who may be related to one another, to register as reciprocal beneficiaries.²⁵⁵

3.2.11 The *Vermont Domestic Relations Act, 2000* in USA recognizes persons related by blood or adoption as reciprocal beneficiaries, and grants equal social and economic rights as heterosexual, gay and lesbian conjugal partners or spouses.²⁵⁶

3.2.12 The *Adult Interdependent Relationships Act, 2002* in the Canadian province of Alberta defines a ‘relationship of interdependence’ as a relationship outside marriage in which any two persons:

- i. share one another’s lives
- ii. are emotionally committed to one another, and
- iii. function as an economic and domestic unit.²⁵⁷

3.2.13 In determining whether two persons function as an economic and domestic unit, it is immaterial whether the persons have a conjugal relationship, as is exclusivity of the relationship.²⁵⁸ However, there are restrictions with respect to having more than one adult interdependent partner, i.e., absence of monogamy is *per se* not a ground for dissolving the partnership.²⁵⁹

3.2.14 The *Relationship Act, 2003* in Tasmania (Australia) allows persons to enter into registered partnerships as either a ‘significant relationship’²⁶⁰

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

²⁵⁶ Chapter 25: Reciprocal Beneficiaries

²⁵⁷ Section 1(1)(f)

²⁵⁸ Section 1(2)

²⁵⁹ Section 5

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

or 'caring relationship',²⁶¹ which are characterized by financial dependency, care-giving and domestic support, and a sexual relationship is immaterial.²⁶²

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

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

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

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

-
- (a) the duration of the relationship;
 - (b) the nature and extent of common residence;
 - (c) whether or not a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
 - (e) the ownership, use and acquisition of property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of children;
 - (h) the performance of household duties;
 - (i) the reputation and public aspects of the relationship

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

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) the performance of household duties;
- (g) the reputation and public aspects of the relationship;
- (h) the level of personal care and domestic support provided by one or each of the partners to the other.

²⁶² *Relationship Act, 2003* (Tasmania); Available at:

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

²⁶³ City of Somerville, Ordinance No. 2020-16, In City Council: June 25, 2020: An ordinance adding provisions regarding domestic partnerships in the city of Somerville; Available at: https://library.municode.com/ma/somerville/ordinances/code_of_ordinances?nodeId=1028806

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

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

3.3 Anti-Discrimination Legislation

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

²⁶⁴*Id* at 80

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

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

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

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

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

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

4. CONCLUSION

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

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

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

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

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



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Vision of Gender Just Realities

(Excerpts)

Forum Against Oppression of Women

Paper presented at workshop on "Strategies for furthering lesbian, gay & bisexual rights in India", Mumbai 1997

As part of the women's movement we have always tried to work out laws, or amendments to law as part of our campaign strategy. This is so in spite of the fact that as women we have stayed away from the legal machinery as much as possible. Law today is something that a common person shies away from using or continues to abide by out of the sheer fear and need to be away from the law and order implementing machinery. As women being marginalised, this experience is even more common. In case of family law the situation is worse because of the limitation of the law itself which is not based on any concepts of gender justice. To this is added the monetary cost as well as the price paid by the individual woman because of the humiliation and isolation that she undergoes. Most of the time, even if we know we are right and our demand for justice is fair, justice does not come without pain and anguish. We as women, have been divided in many categories, and such fights and struggles with people with whom we share our lives and intimacies make us more isolated. As result the battle remains, to varying degrees, a lone battle. In this process we are forced to take shelter and security of our near and dear ones, our kin and religious or caste communities. Some of us also take resort in the almighty for justice while some of us find that such faith is unwarranted. We cannot express this loss of faith because the security and shelter offered by the kin and communities is also outcome of that faith. It is a tightrope walk and also an uncraving experience. We undergo it as individuals and also as groups of women coming from particular communities.

The questions then that come to mind are : What kind of law will give us justice ? Can there be any law in this world that can give a fair deal to women? Can there be a law that while reflecting our reality also shows the path ahead ? Is it at all possible to dream beyond what exists and plan for the future where we would not

only have more legal rights but also where the machinery would be more approachable? Is it possible to mitigate the trauma by at least having a better deal in terms of the law ?

These are the questions that have been bothering us in forum for the last few years. As an outcome of discussions for a long time amongst ourselves and also with others we have come to some understanding about these questions. We put forth here our vision, which is based on real life situations and also the struggles undergone by various individuals and groups of people, especially with respect to issues related with our personal lives.

This vision or thought processes is being presented as a basis for the beginning of a dialogue. It needs to be enriched and extended in its line of thinking. We put it forward hoping to initiate a dialogue amongst us on issues like. Personal lives and family that have been very crucial to our individual and collective struggle against patriarchy. The basis on which we are putting forward our suggestions for the contents of the law governing the family are as follows:

The laws governing personal lives should help in defining a coherent and equitable system, in society within which intimate social interactions take place. In actuality, it is defining the accepted norms of these interactions. In this process, some social practices are given a legal sanction, while at the same time some others are deemed illegal and thus invalidated. Since social interactions are dynamic and concepts of accepted and unaccepted are continuously changing, obviously these law have to change, have to be reformed and updated from time to time. So we put forward the bases of the laws with the clear understanding that this put is what we have to say in today's reality. It will change with time .

The thumb rule guiding the formulation of the law or in the reforms has to be ensuring the rights of individuals, especially those of the marginalised sections. Social interactions are not always just and neither have traditions always been beneficial to all those who adhere to them. What are considered 'normal' practices in society are not necessarily upon, safeguards have to be provided in the law.

In this role the, the law has to provide more rights and equality than society itself. We also are very clear that formulating and implementing a law does not change social attitudes but we do believe that the existence of the law facilitates a process

of social change. It is thus obvious that, not only has the law to be changed from time to time to take into account the changes in a dynamic society, but the law also has to be forward-looking and progressive.

Broadening the concept of the family

As far as the laws themselves go, society's understanding of the family presumes patrilineality and patrilocality. Both these concepts need to be challenged in every possible way. We feel that the meaning of family has to be recognised in the wider sense in which it is lived.

There are many groupings of people living together outside of marriage. There are instances of consenting homosexual and heterosexual adults staying together and working out a close relationship. Such mutual contracts and partnerships need to be recognised, and the rights and social security granted to individuals in a marriage extended to these partnerships too. In our suggestions for the law we include such contracts too.

These contracts should be looked at as future directions of the norms of relationships in society. These new kinds of arrangements would help in liberating marriage as an institution that is today controlled by conservative norms of society that do not have any concept of equality within it.

According to us, although the status accorded to homosexual and heterosexual contracts has to be equal, the law governing these cannot be the same, because we presume an inequality in all hetero-relational realities. The terms of settlements and the rights of each individual in these realities are hence different from those of persons in a homo-relational reality. Since gender is not the only factor that creates a power balance between two persons, these other differences should be taken care of when referring to rights of the individuals in a homo-relational reality.

Marriage

In today's context, marriage is reduced to sexual interaction for giving birth to a male child. It is a sexual contract but without other commitments, especially for a man. Man is a taker, and also looked upon as provider till the time of dispute arises. Our vision has attempted to dwell on looking at marriage differently. Is it a sacrament, or is it a relationship based on trust, faith and companionship? We wish to explore this question. We also want to look at the relationship within marriage, not as a social institution alone, but most importantly, as a space which

allows one to grow, demands commitment, and provides security - particularly to women.

We are trying to formulate the law to make marriage into a contract for companionship and commitment. Procreation and transfer of property along the prescribed familial lines is not the only reason for marriage, and so its basic nature itself changes.

We define marriage as a registered companionship contract between two consenting adults of any sex above the age of 21 years without any prohibitory degrees. (a. the marriage contract is not only for procreation. B. We also do not want prohibitory degrees for eugenic purposes.) At the time of registration each individual should provide the following to the registering authority and the concerned partner:

1. Date of Birth Certificate
2. Declaration of non-existence of any valid marriage contract
3. Medical certificate giving health status especially regarding STDs and HIV
4. Declaration of immovable and movable assets.
5. Declaration of annual income

Any two cohabiting persons may enter this registered contract at any point.

Cohabiting partners have the same rights as married partners, as long as cohabitation can be proved for at least six months.

Two persons, whether married or cohabiting, can enter into self - defined contract, where they agree upon their respective rights and obligations within the contract and /or upon the dissolution or separation of the contract. These can be :

- A. Ownership or division of the property.
- B. Maintenance.
- C. The right to decide on the education and training of the children, but not the right to the custody of or access to their children, and
- D. Any other matter in the settlement of their affairs

Any provision in such contracts which seeks to limit the rights of a partner in respect of matrimonial home or property is void.

Particular conditions for home - relational Reality

Since hetero - relational and home - relational contracts are to be considered on par with each other, the partners in such contracts have similar rights. The difference is in the latter, we are considering it to be a contract between two

persons from the same sex, and so there is no clear - cut power relation as in the case of a man and a women.

- I. Each partner has an equal right to the matrimonial home.
- II. Each person has the complete right over the property that they individually own at the time that the contract is made. Both partners have an equal share and jointly own all property that is subsequently acquired.
- III. Each partner is responsible for the well - being of the other with greater responsibility on the one who is earning to meet the material needs of the other.
- IV. Both partners are guardians of the children jointly adopted, and are responsible for their welfare.

Breakdown of contract

Since marriage or cohabitation is strictly between consenting adults, we do not feel that the breakdown of such contracts requires legal proof or reasons. The two adults are in a position to determine the breakdown of the marriage. The legal machinery should help a fair settlement rather than opine and judge on the validity of the breakdown.

If any one of the partners in the marriage believes that the marriage has broken down beyond reconciliation, then it has to be accepted her/his consent to the contract does not exist. In such a situation the person should not be forced to continue with the marriage. Hence, we believe that there has to be a provision for either partner to go in for irretrievable breakdown of marriage.

Our recommendations in a situation of breakdown of marriage are as follows:

- Divorce proceedings can be initiated only after a minimum period of six months after signing of the marriage contract.
- No fault divorce has to be the norm.
- Mutual consent divorce would be available. A six - month period of separation after the filling of application for divorce (as exists today) should be there.

Irretrievable breakdown of marriage is a clause available for both the partners.

- I. Either partner can ask for a divorce claiming irretrievable breakdown of the marriage. Such a divorce would get finalised six month after filing of the petition.
- II. The property acquired during the relationship would be divided equally.

III. Either of the partners can have a right to maintenance or residence only if destitution is proved. The right to residence is for a maximum period of one year.

IV. If the child is adopted the responsibility for providing maintenance and residence to the child is with both parents.

Responses of women's groups (in different fora) to FAOW's draft

There were several questions raised. One was : why were we trying to institutionalise relationships into structures like marriage and family? It was felt that these institutions are oppressive and so we should not force relationships that are presently outside their purview, into them. New norms of rights and responsibilities within such relationship would emerge if we do not straitjacket them into the contract of marriage.

This was countered with various arguments. One was that anyway entering a contract was optional and only those who wanted to do so would opt for it. Secondly this was a need felt by women themselves as was evident from the instances of women actually getting married or asking for a marriage to be conducted .

Besides this, there was a need to establish a mechanism to ensure, that for any two persons in such a relationship, the rights vis-a-vis each other and the State be established and ensured. Further, if we really felt that marriage was such an oppressive institution, then why don't we actively campaign against it? Why do we not dissuade women from getting into hetero - relational marriages? Why were we raising the issue only in the context of a demand for acceptance of homo - relational contracts?

Another opinion expressed was that the family laws were for hetero - relational families, and same - sex relationships were not included in it. To get the rights for people in these relationship maybe we should have a separate law. There seemed to be a divided opinion about whether we should consider both these relations on par, and hence raise the relevant issues together.

The other objection to including the issue of home-relational realities as part of changes in family laws, was that it would "discredit" and jeopardise the broad based support for family law reforms. Then would it be strategic for us to raise the whole issue of home - relationality?

The reply to this question was that there is never a situation when the time is right. Every time a new issue is raised there is a fear that it would not be acceptable to

everybody, and so there would be a backlash to the already ongoing movements. Besides , in this case, one of the aims of this whole exercise was to initiate dialogues on various aspects of the family. Therefore, our accepting different kinds of families that exist, and asking for their recognition by society and State, is necessary.

In a way the Opinion on the issue was quite divided. While there were these objections from some people , there were others who found inclusion of home - relational realities as one of the most positive aspects of the draft. There were others who also expressed that legal recognition for these relationship would help in looking upon them as an alternative way of living .

On reflection later within the *FAOW*, there was a feeling that the discussion had to be forced. Some of us felt that by not talking about it at all, somewhere the issue of home - relational realities was being invisibilised. We also felt that due to the fact that we were not all open for the discussions, the tone was in some sense of ‘us’ and ‘them’ which was very disturbing. We do feel in *FAOW* that we are in a position to raise the issue and we should not shy away from doing so. Some people had also expressed that they themselves could not raise these issues today but would find it easier to put it forth as a demand by some others groups with which they were in agreement. Even if this could happen, or more importantly, if we were at least able to openly dialogue and face the dilemmas and hesitation that we ourselves are facing in talking about home - relationships, it would be a step forward.

July 10, 2018 To

ANNEXURE P9

Law Commission,

Justice Dr. B S Chauhan

lci-dla@nic.in

Subject: Response to Law Commission on Uniform Civil Code

We are a group of feminist organisations and individuals who have been working with lesbian and bisexual women and trans persons and are also part of the larger women's rights movements in the country. Details of our work and backgrounds are attached with this letter. Many of us have been part of discussions and debates on gender justice in family laws. We have all been working with communities that do not usually get covered by the ambit of family laws, and yet who get affected directly by laws around inheritance, custody and adoption of children, which are directly under the purview of personal laws.

In the last few years, there have been many debates around different assertions of gender and sexuality in society and very often in the courts as well. The latest judgement that has given relief to a large number of citizens and which is hailed as a landmark ruling is the verdict given by the Supreme Court in April 2014 in *NLSA vs Union of India and ors.* In this verdict the Supreme Court upheld the right of “transgender persons right to self-identified gender” and directed “the Centre and State governments to grant legal recognition of gender identity such as male, female, or third gender.” It also directed the Central and State Governments to take measures to safeguard their fundamental rights.

In this judgement the esteemed court looked at and referred to some of the Yogyakarta Principles and said that “Principles . . . including Yogyakarta Principles, which we have found not inconsistent with the fundamental rights guaranteed under the Indian Constitution, must be recognised and followed, which has sufficient legal and historical justification in our country. We would like to highlight in the context of the debate and enquiry on the Civil Code or on laws related to marriage, divorce, inheritance, custody and guardianship Principle 24 of these Yogyakarta Principles.

PRINCIPLE 24. THE RIGHT TO FOUND A FAMILY

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted

procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;

b) Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;

Since the Law Commission is looking at issues related to Uniform Civil Code, we use this context to give suggestions for changes within family laws so that justice is done to all citizens of this country and the mandate of the Supreme Court verdict is also adhered to.

Our submissions can be classified under two heads.

1. Issues in family laws that have cropped up since the Supreme Court recognised genders beyond male and female and also that self identification is the way to determine a person's gender.
2. Issues arising especially with respect to key decisions and choices in lives that are not approved by natal families.

Collectively we have a vast pool of experience in both these areas and we explicate below our concerns and our specific requests for inclusion in the laws related to the personal and the family. These are essentially insights that we have gained as part of our larger struggle for getting equal rights for all citizens of this country.

Issues related to Transgender persons' rights in existing laws:

As soon as gender identities are recognised, there are issues that come up in the context of family laws and we would like to highlight them and request you to address them in your report on the civil code or family laws as the case may be.

The family is an institution where the gender roles are well defined and laws reflect some of these notions of gender practice at the level of the family even today. All our family laws clearly identify a person by their gender. It could be in terms of differential inheritance for sons and daughters, or it could be different clauses as reason for divorce for husband and wife, or it could be ability or inability to be declared guardian of the child. When there are such clear directions based on the gender of the person concerned, there obviously arises the question of what happens if the person's identity is neither man nor woman? Also if the person chooses a gender identity that is different from what they have been assigned at birth then how do these criteria affect their other rights and responsibilities in their familial roles? We urge you to look at the following incidents which are all concerns of people that we have been in touch with.

A. Issues related to marriage and divorce:

Marriage is defined as possible between a man and a woman within all laws. Even though Hindu law speaks of marriage between two persons, it actually throughout speaks of husband and wife thus assigning specific genders to the two persons in marriage. The SC verdict says that people can self identify as “either male, female, or transgender/third gender”. All people today are assigned either male or female at birth and so the self identification means that at some point a person might self identify in a gender different from that which they were assigned. This creates some issues around marriage laws.

a. Two people are married under any personal law or the Special Marriage Act. If at some point in their marriage, one of them self identify as a gender different from the one they were at the time of marriage, with full consent from their spouse, and if they want to continue to live together in the marriage, how would their rights as a couple to be recognised as parents of children, to being considered as family in any employment or insurance or property related right be protected?

V and A married under the Hindu Marriage Act and now have a child. V has transitioned from male to female with the consent and full knowledge of the spouse A. V and A plan to stay together and remain married, and raise their child together. They are worried about the legal validity of their marriage if V changes her legal gender to female, in accordance with her physical transition.

b. In our reading of the law if a person self identifies a gender within the binary (that is if they were assigned male at birth but self identify as female or vice versa), they shall be considered a man or a woman and hence can get married under the law. This needs to be clearly stated so that people access formal systems of marriage and do not suffer because they did not register their marriages formally. We give below a recent case of a trans man and his wife who suffered because he did not get the required legal protection of the law and the family to survive through their differences.

C. A transman was in love with a woman H. He proposed to her and she married him with full knowledge of the fact the he was a trans man. Both their families knew about this marriage and relationship. Post marriage, C went through his transition surgery in the same hospital where he worked with his wife nursing him. The couple also went in for IVF to get a child but were unsuccessful. C supported his wife's family financially and also helped her set up a beauty parlour. Through this whole period they did not register their marriage. Subsequently, H fell in love with a cis man. Her family started dissuading her from keeping her relationship with C and also taunted C for not being a 'real man'. C and H separated. One day C went to meet H in her beauty parlour to ask her to restart the relationship, she firmly refused. In frustration C doused himself in petrol and lit a fire right there and died a week later.

c. What are the provisions for a transgender person who wishes to marry a cis man or a cis woman? We know of many instances of such marriages especially of hijras marrying cis men and unable to register these as marriages. Some have even tried to do so and failed.

B. Issues related to inheritance:

In some of our existing laws there is a differential treatment between sons and daughters of a family and also difference between male and female relatives. The question that transgender persons are asking today is that in case they transition, will their inheritance rights change as per these laws? Also if they identify a gender different from male and female then what will be their inheritance rights?

The same person cannot have different rights because they identify in a different gender. The debate here for us is not of identifying the “true” gender of the person and giving them rights as per that.

As we understand this is actually a case for demands for gender equality in all laws, a demand that has been raised by women's groups and women's rights advocates for a long time. We believe that self identification of gender actually unravels before us the social construction of gender. In a secular democratic country where the Constitution assures no discrimination based on sex, such differential laws do not make sense.

So we hope that all inheritance laws are made equivalent and irrespective of the genders of the persons in the familial relationships.

C. Issues related to Adoption:

Adoption and guardianship laws are also gender dependant. This affects the rights of those who already have children prior to their transition and also those who wish to adopt children. In recognising the full civil rights for transgender persons, right to adoption and guardianship is an important aspect that needs to be looked at.

As per the new CARA guidelines and changes within the J J Act, a man cannot adopt a girl child while a woman can adopt a boy child. How does this clause apply to trans men and trans women? What about a person who identifies as transgender or third gender? Can they adopt a child of any gender?

Again as in the case of inheritance, we think that the law should not be gender dependant. If there is fear of CSA and the redressal for CSA under POCSO is gender neutral, this clause makes no sense at all. We urge that the adoption guidelines be made gender neutral. To conclude, all of the above situations arise from the fact that currently in India we have recognised the fact that people can self identify a gender different from the one assigned to them at birth. At the same time along with male and female, there is recognition of other genders as well. This immediately suggests that a number of laws need to be altered or formulated afresh so that an already neglected and marginalised community of people gets full access to rights as citizens within the country.

We understand that most of the family laws are religion based and there may be a problem in amending all of them to take into account these realities. Changes within the special marriage act to accommodate some of these concerns and also making of secular inheritance and adoption laws accessible to all citizens irrespective of the religion that they are assigned at birth, in our opinion seems to be the way in which many of these dilemmas can be addressed.

2. Issues related to key decisions in lives not approved by natal families.

In the work that we do, and in many of our lives, we find that our support systems and care networks are very different from our natal families. Often when people make choices in their lives that are distinct from those that their families want them to make, they make support systems that draw upon others not necessarily the natal family. This could be friends, other people like them, or other community spaces like the hijra households. In case of those assigned female at birth this happens more often since parents and even the State often see unmarried “daughters” as incapable of taking decisions about their lives.

We have many instances of how families control people's lives in multiple ways. From the point of view of families, it is done in the notion of looking after the welfare of the adult person concerned but in effect it means being the medium to impose societal ideas of normative gender and sexuality. The methods used are often very harmful and very difficult for those who resist and get out and assert their choices. When a transman started expressing his gender identity and dressing as a man his family thought he had been possessed by a demon and took him to the local exorcist. He stayed with this exorcist for days and was sexually abused, often to the point of losing consciousness. The exorcist even offered to marry him. Realising how wrong the entire situation was, he ran away and returned home, where his parents weren't happy to see him. They forced him to wear a burkha and locked him inside a room for months. The situation was such that, he had to run away from his natal home. R is a single child of her parents. She is in her late twenties and from a town in Assam. She works as an assistant professor in a college. Her father is the principal of the college. Her family has recently come to know about her sexual orientation as a bisexual woman. She is constantly kept under surveillance. Her father has setup a CCTV camera in her room. She is forced to hand over her entire salary to her father as soon as she receives it. She encounters mental torture from her natal family members every day. We have found out about this person recently and she is still in contact. A woman X and a trans* person Y, both taxi drivers were in a deep friendship with each other. Their messages were intercepted by X's family. She had to run away from home and started living with Y. Due to the pressure of the family she even gave a statement to the police that she had run away. Within a few days the family came and abducted her back with full support of the police. They confiscated all her papers, her

certificates, her driving license and kept her under house arrest. She managed to run away and come back but the organisations supporting her had to fight a hard battle with the police and the family to get all her papers back so that she could continue to drive her taxi and live independently with her friend. G was a 22 year old trans person who was assigned female at birth. G wanted to start their medical transition but their parents did not support them through this. They managed to get some organisation's support and approached a doctor. The doctor, however, also refused saying that they could not start any procedure including administering of hormones without the parents' permission. Feeling helpless G jumped off a four storey building and killed themselves. This is a case from May 2018.

These are just a few of the many examples that we have come across of the nature of family violence against people asserting their gender and sexuality related choices. They are subjected to many punishments like physical and mental abuse, sexual abuse, corrective rapes, humiliation, house arrests, denial of education and other entitlements, disinheritance from property, abandonment and neglect, forceful medical corrections like ECT and administering of harmful drugs, forced marriages and pregnancies, and many more. Many people do not manage to get enough support to survive all this and build a life of their choice. Either they succumb to live lives dictated by others or are forced to end living. Some of us do manage to survive through this all and make a life for ourselves with the help of others, often people in similarly precarious life situations as themselves. These others who are the support structure, however, do not have any legal recognition. Hence, at some point of vulnerability like a bout of physical or mental illness or any other crisis, the natal family steps in to take decisions and force these on the person while completely denying the established support structure to be involved in this decision making. This is often in violation of what the person themselves may choose.

Two persons lived together for six years. At a time when one of them went through a mental breakdown partly due to their family's disapproval of their life, the family swooped in forcibly taking decisions about health care and separated the two. It took many friends and supporters and a lot of negotiation with the hospital authorities and the family to be able to assert the fact that the two people were living with each other consensually and that it was unjust to do this separation.

A transman and his partner lived together for three years. The woman partner had a child while they were together and they both brought the child up together. On the sudden death of the woman, the trans man had to struggle to claim their child as his own because the natal family wanted to establish their kinship and take the child from him.

P ran away from an abusive home at the age of 18 to be able to live in her self identified gender identity and found home and support in a hijra gharana. At the age of 24 she

suddenly died. Her family was informed and as soon as they came they took charge of the last rites for P. They dressed her in male clothes, cut her hair, and finally did her last rites as their son with the name they had given her. None of her large family of grieving hijras and other friends and activists could prevent this from happening.

It is evident from these examples that for many of us our natal families (by birth or adoption) may not really be the people we want to leave our property, earnings or loans to; we may not see them as taking over care functions in times of debility and disability; we may not see them as deciding for us at times of medical incapacity and so on. Instead we may want to appoint person/s who we think can take care of our material, medical and other needs during our lifetime and after death.

To help resolve these situations we suggest that there be some way by which people are legally able to announce the names of the persons who can take decisions for them or who they feel are better suited to be called their “legal representatives” rather than the ones legally acquired through blood.

The “Legal Representatives” shall act on our behalf in life and death in matters related to:

- Choice of profession
- Choice of living arrangements
- Choice of nominees
- Choice of custody of minor children
- Choice of heirs
- End of life decisions

We request the Law Commission to issue guidelines for people to register their legal representatives through affidavits or other methods which are accessible and easy to execute with a standard format. This option be made available to all those who are not in marriages recognised by law. These are some preliminary suggestions from a few groups and individuals who have been working with and living such lives for many years now. We urge the Law Commission to seriously consider these lived realities and suggest changes in family laws to account for these lived realities. We also wish to impress upon the commission the need for very large consultations with many others across the country so that all citizens can avail of just laws related to family.

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Annexure P10

How The Special Marriage Act Is Killing Love

NAMITA BHANDARE AND SURBHI KARWA 19 Oct 2020

The withdrawal under social media pressure of a Tanishq ad that depicts an interfaith marriage tells us that even in modern India some alliances continue to be out-of-bounds. Provisions in a law that enables secular marriage are, ironically, often a tool for harassment.

New Delhi: When she was in the fifth standard, the last of her four elder sisters got married, and her mother asked: “Who is going to help with the housework?”

Amreen Malik never again went to school. While her mother worked in the fields, it was the job of the 12-year-old to cook, clean and care for the rest of her family, including three younger brothers.

“I was not allowed to go out or have friends,” she said.

Mohit Nagar’s father had a small medical store right across the road from Amreen’s house in the village of Kharauli in the western Uttar Pradesh district of Meerut. Elder to Amreen by four years, Mohit would often hang out at the store.

One day when she was around 15 or 16, she can’t remember when he called on the landline at her house. She picked up. And so began a relationship by phone until his father found out and told Amreen’s father.

There was no contact for some days after that. Then Mohit began hanging out at the shop again and she would sneak up to the terrace of her house for a stolen chat.

He gave her a mobile phone—her first. But when her brother saw her talking on it and complained to his father, she got a “really bad beating,” Amreen said. Mohit stopped coming to the store. Then one night, he managed to sneak on to the terrace to give Amreen another phone but the village dogs barked, and they got caught.

“My father beat me with his belt,” said Amreen. “He said he would shoot me if I met Mohit again. I was locked up inside a room and given no food for days.”

When she turned 18, Amreen’s family fixed her marriage with her elder sister’s brother-in-law. Somehow, Mohit found out and told the brother-in-law that he was in love with Amreen. That marriage was called off.

On 6 January this year, without bothering to inform her, Amreen’s father got her engaged to another man. The wedding was fixed for 30 March. She wept. She stopped eating. It did not matter.

Mohit had managed to smuggle another phone to Amreen and this time she kept it at a relative’s house. As soon as she could get away, she called and told him about her impending wedding.

Mohit had already got in touch with an NGO, [Dhanak for Humanity](#). Amreen was sent to a women’s shelter in Delhi and the local police station back at Meerut was informed that she had chosen to stay there until her marriage to Mohit.

Then on 22 March the nation went into a total lockdown, as a response to the Covid-19 pandemic.

“There was nothing we could do except wait,” said Mohit who had also left his home because it wasn’t safe for him there and was staying with a distant relative.

On 20 May after the lockdown had eased somewhat, the two went to the special district magistrate's office in Lajpat Nagar, Delhi. But the guard wouldn't let them in, saying there was nobody inside. They returned 10 days later but still couldn't get a date.

The counsellors at Dhanak advised Mohit to file a writ petition in the Delhi High Court. On 10 June, the court instructed the special district magistrate to give a date for the marriage. On 25 June, Mohit and Amreen finally submitted the paperwork required for a marriage license and just over a month later, on 29 July they were finally husband and wife.

Amreen's family remains implacable. They claim she stole Rs 350,000 when she ran away from home, a charge she denied. The couple said the family has threatened to kill them both and it is not safe for them to return home. "I didn't even attend my sister's wedding in April," said Mohit who has managed to get a job as a helper at a medical store in Delhi.

But they have no regrets. "When you write about us," said Mohit with a flourish of romance, "Call us Mohreen."

Special Marriage Act's Arbitrary (And Extra-Legal) Procedures

The course of love in India has seldom run smooth.

Marriages in contemporary times continue to be 'fixed' by families with overriding considerations of religion, caste, *gotra*, astrological alignment, skin colour, family background, status. Rules of endogamy ensure that marriages take place not just within the same faith, but within the same caste.

These “arranged” marriages, sanctioned by parents and the larger community, continue to make up the bulk of all marriages that take place in India. [Findings](#) by the Lok Foundation-Oxford University surveys administered by the [Centre for Monitoring Indian Economy](#) (CMIE) and analysed by data journalist Rukmini S, show that 93% of respondents had arranged marriages—not very different from the generation aged between 80 and 90 where 94% had had arranged marriages.

But what of that minority that falls in love, and falls in love outside socially-prescribed boundaries of caste and religion?

One barometer of the existing social disapproval of interfaith marriage can be seen in the [outrage over a television ad](#) by jewelry brand, Tanishq. The ad depicts a fictionalized interfaith marriage where the Muslim mother-in-law of a visibly pregnant Hindu daughter-in-law is celebrating the baby’s impending arrival with a customary *godh bhara* (baby shower) ceremony.

Outrage over the ad by right-wing groups on social media led Tanishq to hastily withdraw the ad—a fact that did not deter a vigilante mob from [threatening](#) its Gujarat showroom which then pasted an “apology” on its display window.

The [Special Marriage Act](#) was enacted back in 1954 for those in interfaith relationships, or even those who just wanted a secular marriage.

Under the provisions of this Act, couples must give 30-day notice, a copy of which is to be displayed in “some conspicuous place” in the office of the marriage officer, usually a district magistrate. This was done in the interest of transparency and to enable those with legitimate objections, an existing spouse for instance, to come forward.

But, said lawyer Saurabh Kirpal, “It’s not as if a spouse is hanging around outside the magistrate’s office to examine notices. In any case there are legal provisions and remedies against bigamy and the other prohibitions under the SMA.”

There is absolutely no scope in the law for either parental objection or any other objections to inter-caste or interfaith marriages.

But of late, marriage documents, including public notices with details of names, addresses and phone numbers, have become a red flag for right-wing activists.

In Kerala, an interfaith couple, Hindu woman and Muslim man, who married on 15 July under the SMA, found their details [splashed on social media](#), including on Facebook groups as evidence of “love jihad”. Although the couple was already married when the social media “revelation” blew up, their details were available online on a public domain for anyone to download.

As it turns out, details of as many as 120 interfaith couples had been leaked on social media by vigilante groups. The Kerala government [responded swiftly](#) and has since 25 July stopped the practice of uploading marriage applications on its website.

But this is not the experience in every state.

In Lucknow, capital of UP, S, who asked that her name not be used, applied in October 2019 to the district magistrate’s office to get married under the SMA. There was no parental opposition to her marriage but she wanted a secular marriage minus religious rituals, she said. Within a few weeks, a policeman knocked at the door of her house. Would she mind coming to the station? Would her father?

At the police station the father and daughter were separately asked a barrage of questions: Why get married in court? If everyone was happy with the marriage, then why not from home?

Over a month later, when S hadn't heard back from the registrar's office, she decided to go ahead with a Hindu marriage. The trouble and procedural delays just weren't worth it, she said.

There's a small postscript to S's happily-ever-after.

It is neither legal nor the job of marriage officers to put procedural roadblocks in the way of an intended marriage, but this is what happens very often on the ground. "In Uttar Pradesh it is routine to call couples and often their parents to the police station, particularly in cases of inter-religious marriages," said Lucknow-based lawyer Renu Mishra of the [Association for Advocacy and Legal Initiatives \(AALI\)](#).

In Delhi too it was routine to send a copy of the SMA notice to the residential addresses of the couple intending to marry through the local police station. In 2009, the Delhi High Court agreed with [Pranav Kumar Mishra's petition](#) opposing this practice. "The unwarranted disclosure of matrimonial plans," ruled the court was "completely whimsical" and "without authority of law".

It took a court case in Rajasthan ([Kuldeep Singh Meena v. State of Rajasthan, 2018](#)) to stop the practice of posting an intended notice of marriage to the homes of the couple.

In Haryana, executive overreach resulted in a practice of not just dispatching notices to the residences of the couple, but publishing it in a national newspaper as well. This was challenged in the Punjab and Haryana High Court by an interfaith couple where the Hindu woman

petitioner argued that since she faced virulent opposition to her intended marriage by her parents, the state's seemingly arbitrary procedural "checklist", including a pre-condition that the couple could not be "staying at one place (under one roof)", to be verified by the local tehsildar, at the time of applying for a license violated her right to privacy.

The condition, argued the [petition](#), amounted to moral policing at a time when live-in relationships were judicially recognized by courts. Hearing the case, the court agreed that the terms and conditions imposed by the state government "largely violate the rights to privacy of the petitioners". Such provisions, it observed, "appear particularly offensive excessive executive action beyond the purview of the Act and have, therefore, to be ignored."

There are at present two legal challenges to the provisions of the SMA, asking a couple that intends to marry to publish their private details for public scrutiny. The first was [admitted in the Supreme Court](#) on 4 September, and the second in the [Delhi High Court](#) on 7 October.

The Supreme Court petition filed by senior advocate Kaleeswaram Raj on behalf of a law student from Kerala, challenges SMA provisions on two grounds. The first, it violates privacy which has been upheld to be a fundamental right ([K.S. Puttaswamy v. UOI](#)) And the second, it is discriminatory since notice periods and official enquiries are absent in customary Hindu and Muslim marriage.

Advocate Utkarsh Singh who has filed the challenge in the Delhi High Court agrees. "The idea of a notice period is to ensure transparency. But these conditions—neither party must have a living spouse, both must be of sound mind etc—prevail in religious marriages as well. So, if religious marriages are not put to the test, then why a marriage under the SMA?"

Court Rulings And Ground Reality

Parveen Ansari and Ram Yadav had been friends from school and stayed in touch even after she completed her graduation and he his engineering degree from Uttar Pradesh.

When her brother's friend saw the two of them hanging out together, Parveen's family responded by looking for a suitable match for her. Rather than marry someone her parents had picked, Parveen decided to marry Ram.

In March 2020, just before the lockdown, after her parents got her engaged, Parveen managed to sneak away from home and go to the special magistrate's office in Dwarka, Delhi. "I can't tell you how much the magistrate scared us," said Parveen. "He said, 'Why are you doing this? Get married in an Arya Samaj temple. If you insist on getting married in court, we will have to send a notice to your house and the police will come'."

But the couple said they had the papers and were prepared to give notice. On their way out, a clerk in the office asked for a small bribe and said the notice would not be sent home.

Nonetheless, 20 days later, the notice arrived at home. "My brother would have killed me that day, but my father restrained him," said Parveen. Her phone was taken away, she was locked up at home and Ram had to move a habeas corpus (literally, "produce the body") petition in the Delhi High Court. Under court orders, Parveen was able to leave home on 19 March, but three days later, when the lockdown was imposed, their marriage plans had to be postponed. After a two-month wait, they were finally married only on 20 May.

Writing on *Love and Law- Love Marriage in Delhi* Perveez Mody, a lecturer at the University of Cambridge, notes: “The process is extremely open ended...anyone who wishes to obstruct the marriage can do so with considerable ease.”

Parveen had a narrow escape. But between 2014 and 2015, the National Crime Records Bureau (NCRB) recorded a 792% spike from 28 to 251 “honour” killings with Uttar Pradesh alone accounting for 68% of these killings.

These murders, committed by the family members of a couple for transgressing caste and religious boundaries, are not recorded under a separate category and the 2017 NCRB report, published after a year’s delay, left out honour killings (along with lynchings) altogether since it deemed the available data to be “vague”.

Anecdotally, it is clear that “honour” killings continue—even during the lockdown. On 27 March, M. Sudhakar, 24, returned from Chennai to his village in Tiruvannamalai district, Tamil Nadu from Chennai and was killed allegedly by his wife’s relatives for marrying outside his caste.

The problem of these so-called “honour” killings is so grave that in 2012 the Law Commission suggested a separate law and even drafted a bill: Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of honour and tradition).

Seven years later, only Rajasthan in 2019 passed a special law for “honour” killings. The Bill never came up in Parliament.

In 2018, a three-judge Supreme Court bench headed by then Chief Justice Deepak Misra while hearing a plea filed by the NGO Shakti

[Shalini](#) for steps to prevent “honour” killings passed extraordinary guidelines to protect couples.

“It was a beautiful judgement,” said advocate Rahul Mehra who appeared for Shakti Shalini. “Unfortunately, courts can only give directions. But these are not implemented or, if implemented, then in a completely lopsided and arbitrary manner.”

This was not the first time that the apex court was intervening to protect the right of consenting adults to live as a couple, free of harassment from their families.

In [Lata Singh v State of UP \(2006\)](#), a two-judge bench of the apex court was unequivocal: “This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence.”

Lata Singh had married outside her caste and although she and her husband had had a child, Thakur brothers were not prepared to accept her marriage.

Not only did they threaten her, they physically assaulted her husband’s mother and uncle, took forcible possession of his property and even got the husband’s relatives, including sisters, arrested on trumped up kidnapping charges.

Lata Singh approached the Rajasthan Women’s Commission, the National Human Rights Commission, the U.P. chief secretary, NGOs, including AALI, and anyone who could help. Finally, it was the Supreme

Court to the rescue as it ruled that no offence was made out against Lata Singh. It quashed the cooked-up trials, revoked arrest warrants and ordered UP police to protect Lata Singh, her husband and his relatives from violence.

The case of Lata Singh is a cautionary tale that tells of the enormous, sometimes insurmountable, gap between legal protections, including a judgment, and ground reality. A social worker familiar with the case told **Article 14** that the property usurped by the brothers is still a matter of legal dispute and even now, 14 years after the Supreme Court judgment, Lata Singh continues to live in Rajasthan, afraid of the repercussions should she ever return to UP.

Memories of Hadiya linger.

While studying in a hostel at a homeopathic college, Akhila, the 24-year-old only child of K.M. Asokan and Ponnamma converted to Islam and subsequently married Shafin Jahan in 2016. Despite the assertions of Hadiya, as Akhila now chose to call herself, before the Kerala High Court that she had converted of her own free will and could not, as her father claimed, be whisked off to Syria simply because she did not have a passport, the court annulled her marriage. A “girl aged 24 years is weak and vulnerable”, the court ruled, assuming the role of “*parens patriae*” (literally, parent of the nation).

It took a Supreme Court [order](#) in 2018 for Hadiya’s marriage and autonomy—not to mention dignity—to be restored.

Like Hadiya, [Shruti Meledath](#) had fallen in love with her fellow student, Anees Hameed. On 16 May 2017, Shruti left for Delhi with Anees, converted to Islam and married him.

Shruti's parents, meanwhile, filed a missing person's complaint with the Kerala police at Pariyaram Medical College. On 20 June, the police nabbed the couple from Sonapat, Haryana, where they had been living. They were flown back to Kerala and produced separately before the magistrate at Payyannur.

A distraught Anees first moved a lower court for a search warrant for Sruthi and then filed a habeas corpus petition at the Kerala High Court. Only then was Sruthi freed from her illegal confinement at the yoga centre.

The court noted that Sruthi was indeed the lawful wife of Anees, according to their Special Marriage certificate and applauded her "extraordinary courage" while decrying her parents' attempt to "deflect the course of justice by misleading litigations".

Whose Marriage Is It Anyway?

Assam's finance and health minister Hemanta Biswa Sharma, of the BJP is **convinced** that "Many Muslim boys create fake Facebook accounts with Hindu names and post pictures of themselves at temples. A girl gets married to one such boy, only to discover later that he is not from the same religion."

There can be no legal validity to a marriage under such false pretexs. But, reported TimesNow, Sharma told a BJP Mahila Morcha meeting on 11 October that "Assamese girls are becoming victims of love jihad."

The doxxing of the personal details of interfaith couples by vigilante groups on Facebook, which has 240 million users in India, that comb through various sources including the marriage registrars' offices, is not new. In April 2018, details of a 21-year-old Hindu student and her

Muslim boyfriend were [revealed](#). Online groups such as Hindu Against Love Jihad [sic] and Girls--Beware of Love Jihad abound.

The “love jihad” trope is the right-wing’s conspiracy theory of a sinister plot whereby Muslim men snare and entrap innocent Hindu women to marrying them with a purpose of converting them. In October 2018, the National Investigation Agency (NIA) found no evidence of “love jihad” in Kerala and shut its investigation, ordered by the Supreme Court while hearing the Hadiya matter.

Since there is no notice period required by religious marriages, the Law Commission report recommends: Scrap the notice period or put in place adequate protections for the couple.

To get married under the SMA, the first stop for couples is the marriage officer. It is this official who must be satisfied that all papers are in order. But very often it is the marriage officer who proves to be the biggest stumbling block. “The objections begin from the marriage officer,” said advocate Uttkarsh Singh.

“When two people want to get married, they want to do so by any means,” said Asif. “There are so many cases where people opt for conversion rather than go for the hassle of getting married under the SMA.”

At the heart of the debate on the SMA and whether its provisions are perverting its original intention, lies a simple question: the right of adult individuals to choose their partner.

Several human rights treaties including the [Universal Declaration of Human Rights](#) and the [Convention for Elimination of All Forms of Violence Against Women](#) to which India is a signatory have held that a

woman's consent to marriage is her inviolable right. The Supreme Court of India has upheld the right to choose one's partner for marriage under Article 21 of the Constitution in the landmark judgment of Lata Singh, discussed above.

And, yet, in terms of social attitude, marriage in India is rarely understood to be a private affair between two consenting adult individuals as much as it is a community-sanctioned union between two families, said lawyer Seema Misra of AALI. "Marriage is a patriarchal construct that is threatened by the idea that a daughter, or son, might exercise a choice that goes against the grain of what society permits or considers suitable."

<https://article-14.com/post/how-the-special-marriage-act-is-killing-love>

The nature of violence faced by lesbian women in India

A study conducted by

Bina Fernandez and Gomathy N.B



Research Centre on Violence Against Women

Tata Institute of Social Sciences, Mumbai

2003

4.1.2 Personal status

The second set of background information focused on partner status, current living status, sexual orientation, marital status, arrangement of marriage and children. 78% of the women were not living in their natal homes. A sizable percentage of women (40%) were living with their woman partner. Thirty-two women identified themselves as lesbian, while 6 identified themselves as bisexual. A majority (82%) of the sample had never been married. Four of the 9 women who were currently married had arranged marriages (See Table 3, Annexe 4). A majority (92%) of the women were never married and 3 of the 9 women who were married have children (See Table 4, Annexe 4).

4.2 Disclosure of lesbian identity

The maximum number of women (48) had disclosed their lesbian identity ("come out to") to their friends. This figure is predictable, given that the sample has been identified through lesbian social networks.

A surprising percentage of women (64%) were out to their mothers. Of the 32 women who were out to their mothers, 19 were also out to their fathers. However, 13 were out only to their mothers, thus pointing to a trend of women being out to their mothers, rather than their fathers.

Three women were out to both brother and sister. The 29 women out to their extended family represent a composite figure (including brother-in-law (1), sister-in-law(1), aunt (5), uncles (6) and cousins (8)) which accounts for the high figure.

Of the 9 women who were ever married, only one was out to her husband. All 3 women who have children were out to them.

Of the total sample, 7 women were out in public, i.e. they had disclosed their sexual orientation in a public forum or in the media (See Table 5, Annexe 4).

4.3 Violence

The questionnaire sought information on four types of violence experienced as a consequence of being lesbian:

- Suicidal ideation and action (self-inflicted harm)
- Physical violence
- Emotional violence
- Sexual violence

A significantly large percentage of women (39 out of the 50, i.e. 78%) indicated that that they had experienced some form of violence or had felt suicidal (See Table 6, Annexe 4). All the women who experienced physical or sexual violence had also faced emotional violence. Reporting of violence from the public was relatively low.

Violence from others was linked to disclosure, since the 11 women who did not report any violence had

disclosed their sexual identity to fewer people (on average 3) than the women who had experienced violence (average disclosure to 6 people).

The family was the primary domain of violence for 77% of the women who experienced violence. Most of the physical violence centred on eviction, imprisonment and deprivation within the family. Most of the emotional violence centred on acts of silent hostility, denial of sexual orientation and relationship, neglect and violation of privacy. Sexual violence within the family was less easy to track, partly due to ambiguity of the responses, and partly because the question did not differentiate childhood or marital sexual abuse and sexual violence due to expression of lesbian identity. Sexual violence was most severe from male partners and was often accompanied by physical acts of violence like battering.

4.3.1 Suicide

Ten women indicated that they had suicidal ideation or felt suicidal. None of them had required medical attention. Of them, 8 had experienced emotional violence. Six women had experienced sexual violence and 4 experienced physical violence. Only 2 of these women had not experienced any other form of violence. One of these 2 had only come out to friends.

4.3.2 Physical Violence

The section on physical violence focused on four different types of physical violence.

- Battering, hair pulling, throttling, kicking, pushing, burning, cutting, binding (referred to as battering)
- Physical confinement (confinement)
- Depriving of basic necessities (deprivation)
- Forcible Eviction (eviction)

Location and Incidence of Physical Violence

Nine of the 12 women who reported physical violence, reported it within the family, while 3 indicated that they had suffered violence only outside the family (See Table 7, Annexe 4). Two of them needed home remedies for the physical injuries. Most of the women had experienced more than one form of violence (See Table 8, Annexe 4).

Physical Violence within the family

The most significant form of physical violence centred on eviction and loss of home. Of the 6 women evicted from their homes, 3 women indicated that they had been evicted by parents (once), mother (twice) and family (a few times). One woman was evicted by her brother and the last was denied access to her house of birth by her uncle.

Two women experienced confinement over years, while the third experienced total confinement over a period of four and a half months.

Three women indicated that they faced physical deprivation from their parents. Two of them faced this over a period of years, one of who was denied access to her house of birth including food, education, etc

by her uncle. Books and photographs of the third woman were burnt by her mother.

Both experiences of battering were over a period of years, one by her father and the other by her mother.

Physical violence outside the family

Four women experienced battering episodes as a consequence of being lesbian. One woman was battered by her friends, who turned on her once. The second indicated that her boyfriend pulled hair and pushed her once. The third was pushed by strangers a few times while the fourth was battered by her woman partner, and she reported that the frequency decreased over a period of time.

Two women were evicted by their housing co-operative society.

One woman experienced things being thrown at her twice on the streets over a 3-year duration.

4.3.3 Emotional Violence

The acts of emotional violence included

- Taunts / put downs / personally demeaning comments (referred to as Taunts)
- Swearing and verbally abusing (Verbal Abuse)
- Threats to abandon, imprison, disclose sexual identity to others, to harm self or others, etc. (Threats)
- Controlling and compelling actions (Control)
- Extorting money or property (Extort)
- Allegation of mental illness / abnormality (Allegation of abnormality)
- Taken to medical or psychiatric doctor for abnormality (Psychiatric Treatment)
- Blackmail
- Isolating by restricting socialising with family / friends / neighbours (Restricting socialising)
- Invasion of privacy – opening letters, entering personal space, etc. (Invasion of privacy)
- Silent contempt and hostility (Silent hostility)
- Non-recognition or denial of lesbian sexual orientation (Denial of sexual orientation)
- Non-recognition or denial of relationship with woman (Denial of relationship)
- Neglect – disinterest in emotional, physical and financial well-being, ignoring, lack of communication (Neglect)
- Continuous distrust / suspicion (Distrust)

Location of Emotional Violence

A majority of women (37, i.e., 74%) indicated that they had faced some form of emotional violence. One

respondent has indicated neglect that has occurred a few times and says the duration is difficult to state, and has not indicated the perpetrator of the abuse. Of the 36 women, 83% had faced emotional violence by the family, while 5 had faced abuse only outside the family.

The distribution of violent incidents indicated that taunts had the maximum frequency (25) of occurrence. Of the 25 incidences, 12 were within family and 13 outside family.

Incidence of Emotional Abuse within the family

Two constellations of emotional abuse within the family emerged from the data based on the frequency of acts (See Table 10, Annexe 4). *Constellation 1* refers to acts of denial, ignoring and acts of silent hostility, where the perpetrator refuses to engage with the woman. *Constellation 2* included directly confrontational, punitive acts.

The clustering of data based on frequency of occurrence indicated that there is potentially a third constellation distinction that could be identified from last three acts (psychiatric treatment, blackmail and extortion). The criteria for such a constellation would be that such acts involve financial resources, and may involve public exposure. However, the question design (and consequently the ambiguity of the data collected) was inadequate to justify these criteria for a third constellation.

Constellation 1 had the highest frequency of abuse. The maximum incidents were denial of orientation and relationship, and invasion of privacy (the last act has been included in this constellation, because the perpetrator does not have to directly confront the woman and can carry it out in secrecy). *Constellation 2* - centred on direct controls, verbal violence, punitive and remedial action exerted on the woman.

Incidence of Emotional Abuse by non-family

Of the women who reported incidents of violence against them by others, the highest number (13) reported taunts (See Table 11, Annexe 4).

4.3.4 Sexual Violence

Information was collected on the following acts of sexual abuse:

- Forcibly showing sexual images (referred to as Sexual images)
- Making sexual threats (Sexual threats)
- Derogatory sexual name calling (Sexual name calling)
- Pornographic interest – for e.g. a third person forcing the respondent to have sex with a woman (Pornographic interest)
- Unwanted sexual touching
- Unwanted sex
- Unwanted sexual language, songs and gestures (Unwanted sexual language)

Location and Incidence of Sexual Violence

Here incidents of violence were almost equally divided between family and non-family. Additionally, 3 women had faced violence from their male partners (husband and boy friend) (See Table 12, Annexe 4)

Incidence of Sexual Violence within the family

The total number of incidents of sexual violence perpetrated by the family was 5 (See Table 13, Annexe 4). The distribution of episodes of sexual violence indicated that 2 women faced sexual name-calling from parents – one from her mother and the other from her father. One woman faced incidents of forcible showing of sexual images and of sexual threats from her uncle. One woman faced incidents of unwanted touching by cousins.

Sexual violence was inflicted on four of the respondents by their male partners. Two women experienced display of pornographic interest – one from her husband and the other from her boyfriend. One of the women who experienced display of pornographic interest, also experienced unwanted sex over a period of years from her husband. The other woman experienced rape by her ex-boyfriend.

Sexual Violence from non-family

Nine incidents of sexual violence were reported to have originated from non-family sources. Six women experienced unwanted touching from friends, colleagues, and strangers. Two women experienced sexual name-calling from a stranger once, and from friends a few times; and one woman was sexually threatened (See Table 13, Annexe 4).

4.4 Abuse Termination

Of the 39 women who indicated that they had suffered from some form of violence, 15 indicated that the abuse had not terminated, while 14 indicated that it had (see Table 14, Annexe 4). Of the 15 women who had indicated that the abuse had not terminated, two had left the abusive situation and the third defined abuse as that faced in 'public'.

Of the 14 women who indicated that their abuse had terminated, only 3 women indicated it was due to the acceptance of their sexual orientation, and one of them had supportive family members. She did not indicate who this family member was.

Six women left the abusive situation, of which one had the support of her mother and brothers.

Two women indicated that they negotiated a termination of abuse by not talking about their orientation any more, while one woman terminated the abuse by reassuring the abuser that she was not a lesbian, and therefore "continued with a lie." One woman indicated the support of her mother as the means for termination of her abuse.

Of the 2 women who managed to negotiate a lessening of abuse, one stated that three factors were responsible for the lessening of abuse - she had left the abusive situation, there was acceptance of her

sexual orientation and because of the intervention of supportive friends.

The other woman who indicated reduction in abuse indicated that it was mainly because she had gained economic independence and because she remained firm in asserting her sexual orientation.

4.5 Support

Highest on the list of people who provided support were friends (22). Nine women indicated that they received support from lesbian/gay/bisexual/transgender (LGBT) organisations. Mothers were the source of support for 7 women, followed by 5 women who derived support from their sisters. Four women had approached an MHP and an equal number received backing from support organisations. Three women received support from their colleagues. Brothers, cousins, teacher and partners each provided support to two women. Support from extended family, employer and father were the least, for one woman each (See Table 15, Annexe 4).

4.6 Analytic Comment

A majority of the respondents were urban, highly educated and employed. Further, the sample represents the women who are in contact with the city-based lesbian social networks, and as such, cannot represent the total population of lesbian women.

Disclosure of sexual identity to friends was predictably the highest frequency, followed by the mothers. Significantly, fewer fathers knew about their daughter's sexual orientation. This trend was corroborated by the fact that friends and mothers were a primary source of support for the women who experienced violence, while only one father was a source of support.

Disclosure of sexual identity can be either voluntary ("coming out"), or forced ("being outed"). The latter is violent since it doesn't involve the consent of the woman. Unfortunately, a gap in the question design was the absence of a differentiation between these two methods of disclosure.

Disclosure of sexual identity was linked to incidence of violence. The 11 women who did not experience violence had disclosed their sexual identity to fewer people (on average to 3) than those who had experienced violence (average disclosure to 6 people). However, the design of the questionnaire was inadequate to establish linkages between the person to whom disclosure was made, whether the disclosure was forced and whether violence was a consequence.

The data clearly established that all the women who had experienced physical and sexual abuse had also experienced emotional abuse. Emotional violence could therefore be considered the "foundational" violence, which for some women extended into physical and/or sexual violence. Most of the women who reported emotional violence experienced more than one form of violence.

There are clear indications that suicidal ideation exists in conjunction with emotional violence (in the

majority of cases), and extreme isolation (in the case of one woman). The data collected functioned as a measure of the extent of self-inflicted violence. Unfortunately, the questionnaire did not differentiate between suicidal ideation and suicide attempts; neither did it question the origin of the ideation, i.e., whether the respondent felt suicidal specifically because of her sexual orientation.

Another major trend the survey underscored was the maximum incidence of violence in the family domain. The only emotional abuse that was higher outside than within the family was taunts faced in public.

Within emotional abuse, there was a concentration of violence in *Constellation 1*, which involved acts of denial, silent hostility and neglect. Confrontational emotional violence (*Constellation 2* – i.e., taunts, emotional blackmail, etc) occurred to a lesser degree.

Acts of emotional violence that involved control over resources, and people outside the family structure (psychiatric treatment, blackmail, extortion) had the lowest frequency of occurrence. Acts of physical violence primarily involved exertion of physical control over resources and avoided open confrontation (deprivation, eviction and imprisonment). Acts of physical battering were relatively fewer.

There are potential linkages indicated by these patterns around control of resources and public disclosure, which offers scope for future study. A possible hypothesis is that violence is contained within the family because families are not willing to disclose the woman's sexual identity to the outside world for fear of social stigma and ostracisation. To illustrate the point, only 5 women were forced to go for psychiatric treatment, in spite of the fact that 11 faced allegations of abnormality or mental illness. Further exploration could also be on the nature and extent of control over resources post disclosure.

Sexual violence and battering was mostly present in the context of male partners, which underscores the vulnerability of women within a patriarchal society.

A disturbing trend is the continued violence experienced by 50% of the women who reported abuse. Further, abuse termination for most women depended on their leaving the abusive situation or denial of their sexual identity. This would indicate that severance of relationships with the family or eviction from the home is the woman's primary means of escaping violence. Unfortunately, only three of the women who reported abuse termination indicated that it occurred due to acceptance of their sexual orientation.

Further enquiry could be made to establish connections between women's economic autonomy, disclosure of sexual identity and the incidence of violence. Some findings that point to possible linkages: that a majority of the women were employed (88%) and many of them self-employed, 78% of women were not living in their natal homes (due to forcible eviction or choice), a majority (82%) of the women had never been married, and 40% of them were living with a woman partner.

7.4.2 Expression of Sexual Identity

Predictably, there is a correspondence between disclosure of sexual identity and incidence of explicit violence. However, in the questionnaire design we had not differentiated between forced and voluntary disclosure of sexual identity. The significance of this difference was revealed only after the analysis of narrative data, when we made the connection between forced explicit expression and ongoing violence.

A further conceptualisation that was not apparent in the first two data sets, but emerged in the narrative analysis was non-explicit expression of sexual identity. In this case, the negative consequence for women was primarily emotional violence.

7.4.3 Familial Violence

The arena of maximum violence (of all types) for women was the family. This was clearly established in all three components of the study. In the survey, 77% of the women who experienced violence (30 out of 39) indicated the family as the domain for incidence of violence. This is not surprising, given the central role of the family in Indian society, and the patriarchal familial control exerted on a woman's sexuality, mobility and access to resources. The form of control exerted by the family lies in a continuum between silent and punitive, and depends on the degree of disclosure and the nature of the existing relationship.

When a woman's lesbian identity is explicitly disclosed (forcibly or voluntarily), the family's reaction may be accepting or not. Emotional violence forms the foundation of the family's non-acceptance of the woman's lesbian identity and their attempt to control her. There is a convergence of all three data sets to indicate that the family would keep the fact that she is lesbian a secret from the outside world, due to the associated shame and stigma.

Non-acceptance can extend to more directly physical violence, including beating, imprisonment, and even remedial action such as shock therapy. However when the woman seeks external help to counter this physical violence, the family may retaliate by approaching social institutions such as the police, or mental health professionals. In many cases of explicit violence, the woman was forced to make a choice between her family/home and her partner/orientation. The consequence of such a choice in any case would be a loss for the woman. In many cases her choice of her partner results in eviction from the family home, and loss of the family relationships. This again is corroborated in both the questionnaire and the narrative reports, where the abuse termination occurred when the woman was compelled to leave her home and/or sever relations with her family.

Fear of the loss of family and fear of violent consequences underlay many of the choices that lesbian women made, even in the choice to suppress her identity, or disclose it in non-explicit ways. In the latter case, actively violent episodes may not occur, but the family may engage in silent hostility, which then enforces her silence, and erodes her sense of self.

Thus, this research clearly establishes the family as the critical domain for the enforcement of coercive control over a woman's sexuality. Despite this bleak picture, there are also a few instances where the family has accepted and supported the woman, which was evidenced in both the quantitative and narrative data.

7.4.4 Cycles of Violence

The transitions from violence to ignoring, tolerance or acceptance occur over time, and can be tracked through linked narrative cycles. Within a domain, a woman constantly negotiates the disclosure of her sexuality, and the violence (real or feared) experienced. The consequences of disclosure may start with violence and shift to silent hostility when the woman refuses to submit to the coercion. It is rare for a cycle that begins in violence to end in acceptance. None of the narratives indicated this, and only 3 of the 39 women in the survey who experienced abusive reactions indicated that the termination of abuse was due to acceptance. Cycles may also start with silent hostility or denial and shift to acceptance, and in this process, acceptance can be facilitated by exposure to the reality of lesbian existence, as some of the narratives demonstrate. Also, a couple of MHPs have facilitated acceptance through family counselling to help parents come to terms with their daughter's lesbian identity.

7.4.5 Institutional Violence

The violent consequences of the prohibitions on homosexuality encoded in religious, legal and mental health institutions were clearly established in this study. Regardless of the woman's religiosity, some of the narratives clearly pointed to the use of religious prohibitions by others to justify their intolerant or hostile reactions to a woman's disclosure of lesbian identity.

The narrative data pointed to the possibility that devout women from religious traditions (such as Islam and Christianity) with explicit condemnation of homosexuality might experience greater internal conflict than women who do not practice their religion. A significantly high proportion of the questionnaire respondents (66%) did not practice their religion. Of the 9 women from Judeo-Christian traditions, only 1 practised her religion. However, the survey design did not probe for further to establish if there was a connection between absence of religious practice and internal conflict about homosexuality and religion.

Violence and coercion that began in the family was often sought to be re-enforced through referral to one or several of these institutions, particularly the police or mental health professionals. The role of the police has been more directly coercive, as evidenced in the narrative data of four women. In three of the cases the family was responsible for invoking police assistance to control the woman. In each instance, the police attempted to separate the woman from her partner by subjecting them to public ridicule, threats, taunts, and even by the fabrication of a case under Section 377. It is apparent that although Section 377

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understanding violence and violation. In a way violence and violation is dealt here as a general overarching idea as well as a definite contextualized one. We needed both, as gender based violence is a more generalized form of violence whereas sexual orientation based violence is more contextual. About violation, one thing was interesting that most of the respondents have linked violation with rights, violation is not letting one have her/his rights, but understanding of rights per se is rather vague for almost all.

5.1 Category I (The LBTs)

This is the section where we are taking an account of actual violence and violation happening on LBT persons. From the findings of this category we have been able to collect documents on:

- 0 A varied range of understandings of violence and violations
- 0 Issues of violence and violation
- 0 Different forms of violence and violation
- 0 Sources of violence and violation
- 0 Coping techniques of the individuals

5.1.1 Understandings of Violence and Violations

Violence is understood by all the LBT respondents in very clear terms but violation is not so explicit. The relationship between violence and violation are unclear but that the act of violence emerges out of violation of rights is clear. Power relationships vis-à-vis violence, optionlessness as violation, self inflicted violence and violation of one's own rights has clearly come out at practical as well as conceptual levels. Internalization of violence and violation that is practiced in the society and enacting the same in intimate relationships is a consciousness that became helpful for many of our respondents. The realization that the patriarchal framework has been internalized by those who are supposed to challenge it, was a challenging moment. The chain of violence, in which violence gives birth to even more severe forms of violence, within relationships and also in the society is another concern expressed by our respondents. Similarly, 'how far is too far' is a question asked by many to understand the limits of own rights vis-à-vis family.

5.1.2 Issues of Violence and Violation

Issues of violence and violation experienced by respondents in this category are generally both sexual orientation based and gender based. Overt violence had been experienced by LBTs for not conforming to the gender roles. Along with that we have noted specific forms of violence happening particularly because a person is an illegal child or an only child or an orphan or a married woman with children or a nun inside a convent or having a mentally ill father and so on. It clearly indicates that violence happens to people who do not conform to norms and expectations of the society, an only child is supposed to fulfill all her parent's dreams or an illegal child is not supposed to exist.

5.1.3 Different Forms of Violence and Violations

We have categorized instances of violence and violations faced by our LBT respondents under different forms. The numbers within bracket is the number of varied instances of violence and violation faced by LBTs that came out from this research.

[Please see ANNEXURE, page 74 - 83 for detailed lists for each form].

- o Physical violence and violation [31]
- o Psychological violence [139]
- o Verbal abuse [37]
- o Any other form of violence and violation [20] [within educational institutions/work spaces/health care services/support groups]
- o Gender based violence and violation [29]
- o Self inflicted violence and violation [39]
- o Respondent as perpetrator [41]
- o Violence and violation within the LBT relationship [49]

5.1.3.1 Physical Violence and Violation

We have identified many forms of physical violence, 31 in number to be precise. This includes rape by own brother, murder/abatement to suicide by husband, forced sex by partner, consumption of contraceptive pills by force by partner, medical violence as head to foot examination including vagina by male doctor after learning about the person's sexual orientation, innumerable instances of sexual abuse by close relatives, neighbors, known persons, different forms of mob violence beginning with stone pelting to severe beating, police case, false legal case, physical captivity by family as well as by partner, physical abuse like beating, throttling, using teeth, nail,

sharp objects, cigarette butts to cause physical harm by partner, and many more. It is interesting yet painful to note that most of this violence is perpetrated either by family or by the same sex partner.

A young girl, lost both her parents at 3, was living with her uncle's family along with her own elder brother. At 17 she fell in love with another girl and as expected her cousin brother and her own brother both came to know about it. How disgraceful, they thought. They decided to teach her a lesson, actually many lessons, as they both raped her repeatedly just to purify her soul and bring her back to the sacred path of heterosexuality. But the girl got their intention all wrong and plunged into severe depression; she was practically an orphan, yet to complete her studies, dependant on the uncle and her own brother, who happened to be the only family left to her. Her girlfriend was as young as she was and not particularly equipped to handle the complexities of this situation. She decided to marry, she may have thought that marrying a man would give her the stability, peace (?) and family honor. Her family was happy, her girl friend was sad. We do not know how she exactly felt as we never met her after her marriage. She died within four months of marriage, supposedly by hanging herself, a young girl of 23.

5.1.3.2 Psychological Violence

Psychological violence has 139 entries in our list. Frustration, anger, helplessness, humiliation, dejection, worthlessness, self doubt, phobia, anxiety, psychosomatic diseases, attempt to suicide, stress, trauma, distress, public shaming, paranoia, panic, unlovedness, claustrophobia, hatred, loss of self worth – these are the basic emotions that has appeared in different permutations and combinations throughout these interviews. The family has exerted as much emotional pressure as they could to bring the 'erring member back to sanity' and the same sex partner has on the other hand done everything under her control to keep this cow tied to her noose.

It often seemed like a jigsaw puzzle to us, every piece fitting into the other. A is getting harassed by her family, feels frustrated and angry, takes that out on B, her partner, who is also emotionally tortured by her family thinks A is her only refuge, so she never retaliates, thus designing an exact replica of hetero-patriarchal violence within a homo-relational boundary.

She had everything possible to make herself successful and happy. But society, family and her own internalization of patriarchal norms, her need to be the 'good girl' played their respective parts to perfection. An only child of highly demanding parents, she always gave in to her parents' wishes without considering that as any kind of violence on her being. She was a brilliant student, took up engineering as her profession and is doing a quite well paid and prestigious job according to her parents' demand. She is the brilliant and successful daughter that they had wished for. But neither her brilliance nor her professional success helped her when she fell in love with another girl. That was the most violent blow to her parent's reputation and they were beyond themselves in shame and anger when they discovered her secret affair. Her parents went to every possible person they knew, relatives, friends, neighbors to help them come up with ideas to combat this 'vile crime' by their own daughter. These people pressurized her, her parents emotionally threatened her, and a male friend who she had confided in, blackmailed her to marry him! She married, as she did not want to remain an outcast, her own honor as a social being was at stake with her parents' honor thrown into it for good measure. She actually believed that she is going to be happy with this 'friend' turned husband who used her vulnerability to become a messiah for her parents. And she in return to this wonderful proposal agreed to be his wife, gave her parents their much needed son-in-law, and continued to keep her same-sex partner tied down to this relationship without a future, violating her rights and getting violated at every step. Next came the question of posterity, a family demand again, and definitely a justified demand, which she could not ignore, though by then she knew that her marriage is a compromise, her parents have always used her to fulfill their own unresolved desires. An expecting yet expectationless woman, she is living within that invisible cloak of 'societal respectability', 'obedience' and 'family prestige' that is slowly strangling her towards an imperceptible death.

5.1.3.3 Verbal Abuse

Kinds of verbal abuse identified are in this process 37. Verbal abuse ranging from 'slut' to 'daughter-fucker', from 'non-man' to 'fuck your ass' – has no end, no rational explanation. And most of these came from closest of relatives — mothers, brothers, husbands or even same sex partners. **A mother who was almost 70, when she came to know about her daughter's orientation, her first reaction was of horrified stupor. The daughter was married by then and had a 12 year old girl child and the mother not knowing how**

to cope or combat lashed, at her daughter with extremely abusive words - does she [the LBT daughter] feel sexually attracted to her own 12 year old girl child?! We have another F to M transperson, who was forced into marriage with a man and had a child out of that marriage. This transperson's female partner verbally abused him/her calling ugly words meaning pseudo-man for his/her maternal inclination towards that biological child.

5.1.3.4 Other Forms of Violence and Violation

Violence happens to a LBT person in almost all sectors of her life. If her identity gets exposed she can be hunted down by her class mates or school/college authorities. She can be **punished by taking away her school game-team captaincy or by denying her promotion. We have come across students who discontinued education as they were not being able to cope with open hatred and slandering by fellow students and the authorities for their non-girly attire/attitude. The same happens in work places where promotion is denied, work opportunity is withdrawn and general work atmosphere gets so much vitiated that an employee has to opt for transfer or quit her job.** There are instances where a LBT person was sacked after her identity got exposed under some other pretext. Violence within the health care system, particularly psychiatric violence is very much to be noted in this context. LBT persons are treated as sexual perverts not just by lay persons but by qualified psychiatrists and other medical practitioners, which gives them the license to be physically/sexually/psychologically abusive to the person. Against a dark back drop of violence and violation, a support group, may or may not be identity based, can help people to a great extent. But in few cases violence and violation had been experienced by our LBT respondents from the support groups where they took refuge.

A robust young girl realizes that she has a sexual inclination towards persons of her same sex. She knows it is wrong, her surroundings tell her so, her friends tell her so. Nowhere in the romantic movies, in popular literature, in everyday life, can she see a reflection of her desires. Surely not everyone is wrong, those everyone who say that she is wrong! It was at this juncture when she decided to go to a doctor. The doctor is the most venerable, the most knowledgeable person in her own knowledge arena. She went to check if she could be cured or if it is a disease at all, she was tired to being afraid of herself. The doctor, a general physician, must be a knowledgeable one, when he came to know about her desires, decided to look for any abnormality in the body. If mind is desiring

the abnormal can body be left behind?! He conducted a head to foot physical examination of the body that included probing inside the vagina of a confused, afraid, girl of 22, who had come to seek help from a dependable person. The body probe did not help her, but it did cure her from her internalized homophobia.

5.1.3.5 Gender Based Violence and Violation

A LBT person begins her life with a double discrimination – as a woman and as a same sex loving woman. Therefore gender based violence forms a very significant part of her life. We got rampant instances of sexual abuse in this category; respondents are sexually abused by close relatives, neighbors or unknown men just because they are women. Then they went through corrective rape because of their orientation as same sex loving women. Another form of gender based violence in this category is because of gender non-conformity. A woman who does not behave or dress like a woman is not accepted in the society and there are instances that such women were driven towards committing suicide.

S/he consumed enough sleeping pills to make sure that s/he won't have to wake up again to face this world! Her/his world meant the family, the neighborhood friends and the girlfriend, all of whom participated in the violence in some way or other. A F to M transperson who transgressed gender norms and threatened the neighborhood boys by 'winning' the most beautiful belle in the locality, had too much life still left to survive emotional blackmailing, public humiliation, relational trauma, mob violence and overdose of sleeping pills. S/he gave us a detailed account of how her/his widowed mother begged her to dress and act like a woman, how the neighborhood pals started perceiving him as a threat, how her/his girlfriend's family members gathered local goons to 'teach the pervert a lesson', how s/he felt lost, dejected, frustrated, purposeless and thought of suicide as the only answer to all her/his questions. It was after this incident s/he decided to join a support group in 2005 and today s/he is one of the executive committee members of her/his organization.

5.1.3.6 Self Inflicted Violence and Violation, Respondent as Perpetrator, Violence and Violation within the LBT Relationship

Violence within the homo-relational structure, self inflicted violence and respondent as a perpetrator, inputs under these three codes actually brings us face to face with the most difficult issue to address, the internalized notions of hetero-patriarchy. **The accounts that we collected on relational violence within the LBT relationship speaks the same language of violent heterosexual relationships. The gender binaries are very spelt out in these relationships and the adopted form is patriarchal. It is often coupled with lack of actual social support that a hetero-normative structure gets, which leaves a void, accentuating violence towards soft target, the femme partner. Therefore in the process, the LBT person becomes the perpetrator. Those who are conversant in the violence language know that survivors have a tendency of becoming the perpetrator. And it is not uncommon in our case. Violence received from outside takes a complete 360 degree turn and becomes violence directed at others. We have documented instances of such violence perpetrated by LBT persons. Self inflicted violence is the most common form of violence documented through this research. In the process of trying to cope with the society LBT persons have negated their core identity and kept on living a pseudo life or a closeted life. Or to hold on to a relationship, since LBT relationships are difficult to form, they are letting themselves be violated as much as possible, which in other words mean the age old practice of holding on to a 'bad marriage'. Internalized homophobia also plays vital role in case of self inflicted violence.**

When a woman, unwomanly in dress code, looks, ways, passions, knowing her sexual orientation still chooses to marry a man just to fit into the heteronormative structure of the society, she can violate her rights and inflict violence upon herself in such a way that no outsider can. She tried to cut her toes to fit in the shoes that she thought were meant for her, though she was economically independent, educated with a fairly supportive family to back her up. She married a male friend who shared her passion for outdoor adventure sports and thought she could be happy in this way. But she never enjoyed sexual intimacy with her husband, rather was in constant fear of forced anal sex. Her husband guessed about her orientation and tortured her with threats of 'anal rape' till she mustered courage to come out of the marriage. She was one of those fortunate few who could actually undo some

of the damages done to themselves, while we have also seen a great number of LBT persons suffering within their own self created torture chambers by internalizing the heteriopatriarchial societal notions unquestioningly.

5.1.4 Sources of Violence and Violations

Family, both intimate and extended, stands out as the seat of severe-most violence and violation happening on LBT persons. It can begin with psychological pressure, to emotional blackmail to mental torture and can reach up to rape to 'cure' the LBT family member. Sexual abuse is abundantly thrown in for good measure here and there in between.

The girl was forced to go to a temple and recite hymns to get rid of her evil same-sex partner. After some days when her family members realized that worshipping could avail nothing, they stopped financial support for her education and sent their daughter to her maternal uncle's house, far away from the city of Kolkata where her maternal uncle attempted to rape her. She requested her father to take her back home but was refused. Probably her father thought that it was a cock and bull story made up by her to come back to her same-sex lover. After all, the person was her maternal uncle, therefore, a respectable man! She then fled from her maternal uncle's house, collecting her passage money by selling her used clothes and came back just to know that she was disowned by her family. Her address then became a women's shelter 'Home' where she fell ill severely. When she was taken to the hospital the 'Home' authority informed her parents, who refused to come to even see her. The family completely abandoned their sick child because of her sexual orientation; a lost daughter was more acceptable than a lesbian one.

Educational institutions and workplace end as a close runner up. Especially because the authority and power they have over LBT persons as students or employees. Refusing promotion, taking away captaincy, vitiating atmosphere in such a way that a student is compelled to take a TC or victimizing a worker for her orientation, refusing job, taking away job, these are all instances of institutional power at its best display. Friends, colleagues, associates are individuals are nails and screws in the hate machinery.

She was politely asked to leave the company as women employees were not feeling safe with her! When she asked for a written complaint, the boss said that would put her into more trouble and her dues won't get cleared. But how did they come to know about your sexual orientation in the first place? When we asked her, she answered with a tinge of disbelief still lingering in her voice, 'ours was a different kind of work place, very creative, very open, we used to work together, share so much of our lives with each other, ask for help, it was a positive kind of atmosphere. So I thought I too can seek help, I too can talk about my relational issues!' However much creative, positive, open and accepting her work atmosphere was, she learnt her lesson by paying a high price of losing her livelihood as well as self respect. A lesbian is a threat to the womankind, not her male/heterosexual colleagues, or family members or road romeos, or anyone for that matter whom we see everyday glaring at us as perpetrators from print, electronic and other media.

Within relationships between LBTs, a strange yet not so strange event was identified. Expressions like 'gender-typical relational expectations leading to violence' or 'inherent violence of heterotypical relationship' was repeated over and over. Mistrust, suspicion, promiscuity, disrespect – are violent words from hetero-normative world that has found their way into their couple-dom. In one hand there is lack of security in socio-legal terms and on the other hand lack of recognition. Then there is internalized homophobia, lack of proper information and in-depth knowledge about homosexuality in general and same-sex relationship between women in particular. All these factors have contributed negatively in intimate spaces. In fact for many, homosexuality used to mean only having sex with a same sex partner. Therefore many of our respondents had entered into marriage with this idea of living a married life as well as continuing with their same sex practice, exposing themselves, their partners and their husbands into more violence and violation.

'Yes, I can give you wonderful violence stories', the young, energetic, happy face broke into excited laughter! 'I know what violence as an illegitimate child is, my father did not marry my mother and my girlfriend always used to make that an issue. She said my *jali rakto* [polluted blood] should be purged out when

she used to beat me severely. She used to cut my flesh with sharp objects so that I bleed profusely, once she even tore off my *kurti* [Indian style upper outfit] in public saying that as a *lawaris* [illegitimate] I do not have any honor left so I can be disrobed anywhere. And she also forced me to take contraceptive pills' . . . But why? Surely there was no question of getting pregnant, we asked. 'No, but she liked that feeling of acting like a man, as if she could get me pregnant.' The 23 year old was continuing unflinchingly with her tale, we the seasoned activists had to take a break!

As researchers we have tried to bring out a more generalized version of individual encounters with violence and violation. The instances of violence and violation that are listed reflect that generalized version where we tried to capture in an objective way, subjective cases of violence and violation happening on people. Some of the items listed are more frequent than others. **We have identified one pattern of physical abuse like beating as a common occurrence, but have classified that into two parts – beating by family and beating by partner. It clearly shows violence within and outside can actually converge. Every single interview talked about variety of psychological abuse that was categorized into an exhaustive list, but a similar category was made where self inflicted violence was listed. It clearly shows again that violence within somewhere resonates with violence outside.**

5.1.5 Coping Techniques of the Individuals

Coping techniques already explored and/or suggested to deal with violence and violation clearly shows a bipolar division. One set talks about creating a space within the society, to be self sufficient, emotionally strong, economically independent, knowledgeable, continuous dialogue with family in particular and larger society in general, joining a support group, joining the rights (women's/LBT) movement, taking help from women's organizations, creating issue awareness – these are positive approach to combat violence and violation. The other set talks about keeping a low profile, compromising as a married woman, compromising with feminine dress and/or behavioral code, living inside closet, pretending as a heterosexual and finally exercising violence against violence. As researchers we have uncovered the second group as well as the first, now as interventionists we will be building upon the first to combat the second. [Please see ANNEXURE, page 83]

She was the son that was not born to her parents in every respect other than the issue of marriage. She was brought up with good education, was allowed to take up a job, move freely, and help parents to arrange for her sisters' marriages. But she was in a secret relationship with a girl that they did not know. But she was ashamed of herself, sad for her parents, she considered herself to be a disgrace to her family. Also afraid if people came to know about her secret life, her sisters won't get married. Her sisters were getting married and her parents were asking her to get married as well, normal, simple, right wishes of parents of 'good' daughters, taking up the role of a son. She was willing to oblige her parents, left her girlfriend and went to a psychiatrist as she thought herself infected by the disease called homosexuality. The doctor was also a genuinely god fearing, honorable doctor who said it all happened because she had never tasted sex with a man and that she was assigned a 'male role' in the family. Everything will smoothen out if she marries. And she married, ready to sacrifice herself. But her husband was impotent, who used to beat her black and blue cursing her as the cause of his inability. Her in-laws branded her as the 'barren' woman, and all the while she was trying to put up with these in the name of family honor, her natal family, as well as the marital. Unfortunately for her husband and rather fortunately for her, she finally could take her own decision after getting pushed to the wall. She came out to her mother and sisters and divorced her husband on grounds of cruelty. She is today living on her own terms with her same-sex partner.

Twist in the tale

"Positive side of violence is clear understanding of one's own situation and the need to stand on one's own feet"

- LBT Community Person

5.2 Category IIA (The Intimate Circle)

Findings of this category throw light on the reaction of the intimate space inhabited by a LBT in day to day life.

Category IIA (intimate circle) constitutes the smallest section, but nonetheless, a very powerful one. Here we were dealing with people, family/friend/colleague/neighbor, who share the most intimate space with the LBT persons. The first problem faced in the very beginning was people were not willing to volunteer for interview. People, who are generally open and accepting about their LBT relatives, friendly with the research team, even they were not willing to let us document their views. Even LBT persons within the group were not keen to have us talk to their families. Friends were easy to get, but colleagues were not. In a workplace where exposure of orientation can actually cost one's job, it was really difficult to get hold of colleagues who could speak about a person, whom s/he knows to be a LBT. We were lucky to get a neighbor, who has rented out her ground floor flat to Sappho for Equality, knowing fully well what kind of organization it is.

From all our respondents in this category we tried to find out what they actually understand by violence and violation. Our findings show that sometimes the family, friends, colleagues or neighbors are not aware that they are inflicting violence upon or violating the rights of LBTs in the name of doing 'welfare' of their daughters/sisters/friends/colleagues/neighbors/or any other relationships. So understanding of violence and violation was a major issue.

But one thing became clear as soon as we began working with this group that we are interviewing only those who have accepted their close one's orientation. There is subtle adversity, a feeling of helpless frustration or irritated indifference in some cases, but there was no overt negativity. **In most of the cases it was clearly seen that people have accepted the LBT as someone close, they have accepted the person as their daughter, sister, sister-in-law, friend, colleague etc, i.e., the relationship with the LBT has become more important than her/his existence as an individual. They are coping with the situation out of love and responsibility. Acceptance/recognition of the issue as another individual's free choice remained as forbidding as possible. Family is playing the most important and interesting role here. It is the family that brings down the most hideous forms of violence on its LBT member, because it believes in purging through punishment, it is the family that accepts its LBT member because after all she is family and finally it is the family whom the LBT cannot think as a perpetrator, hence disregards all violence done to her. It is quite problematic to assess the relationship between family and LBT, there are many instances where the LBT person understands and speaks in clear terms about the violence done to her by her family, but it is nonetheless very complicated.**

Some of the LBT persons, who appeared in Category I, have their family or friends speak in this section. In certain cases we have documented contradictory versions among them.

Same incident or same situation have been described by an individual LBT and her family from two completely different and incongruous positions. In such cases we have treated these two versions as two completely different narratives, each true to its own perception.

A housewife, family of an LBT person, married at 17, mother at 18 and 21, who could not even finish high school, living as happily/unhappily married as anyone else for 22 years, after a little trepidation, somewhat bewildered at her own expression, said that she never could think about having sex with a woman, she doesn't know if that is possible at all, but she would have been happier if she could be as free and confident as her LBT sister-in-law! For her lesbianism signifies independence, autonomy, self-determination.

Twist in the tale

"I don't think it is a disease any more now..... apart from the sexual part, I rather like her life style."

– LBT family member

5.3 Category IIB (The Larger Society)

In this category we tried to find out acceptance or non-acceptance of LBTs and LBT issues by the larger society.

The most interesting observation in Category IIB (the larger society) is emergence of the gendered face of society. We know gender is inevitable, but every time that inevitability materializes, it gets reinforced once more. From the responses of our respondents from the larger society it was very clear that there is a basic gender based distinction in understandings of violence and violation. All male respondents defined these two terms in a more general way while for most of the women respondents these are more personal in nature, more specific and more subtle. At the beginning of each interview we informed the respondents about our topic of discussion. Only one person, a woman, included lesbians as victims of violence – 'marriage of a lesbian with a man'.



understanding concerns and realities of
queer persons assigned gender female at birth across
a spectrum of lived gender identities

breaking the binary

A STUDY BY LABIA - A QUEER FEMINIST LBT COLLECTIVE

We embarked on this project with a fair notion that if we could gain our respondents' cooperation and trust so that they were forthcoming enough, our detailed questionnaires would surely elicit a wealth of comprehensive data for analysis. Yet even we were unprepared for the sheer scope and richness of the material we gleaned during this journey; we are still, at the time of this writing, continually amazed by the range of stories and memories, pain and pleasures, experiences and desires that tell us complex things about complex lives. What our respondents shared with us challenges every lazy preconception and resists every easy generalisation. We hope to do better justice to it all in the book based on the study. Here we look at some of our key findings about how our respondents charted their non-normative lives through the always fraught normative territories of family and school, public space and workplace, while negotiating zones of comfort with their intimate partners and their selves.

family

People have to do a test to drive a car but no one has done anything to prove that they are capable of having a child. You go to a mall and see all these families, mini catastrophes waiting to happen. Has any one of them ever asked themselves if they have any capabilities?¹¹

One of the most critical aspects in the lives of most people is their relationships with their natal families. This was not an easy space for the majority of our respondents. It was with a good deal of dismay that we found narrative after narrative speaking of outright discrimination and extreme violence from parents and other family members.

abuse
neglect

Much of the abuse and neglect began very early, and often had nothing to do with non-normative gender expression or sexuality. Prem, who grew up in a very poor family, remembers the nature of violence ze faced as a child when ze asked for two rupees to go and see a cartoon film from school. "I came home in the lunch break and insisted that I wanted to go for the film and my mother got angry with me, she just picked up a knife and threw it at me and I got a big cut. Then she applied turmeric on it, consoled me, gave me two rupees and sent me for the film."

Whether it was violence linked to adult frustrations because of a tough life of poverty and hard labour, or overall situations of domestic violence that cut across class and other social differences, several respondents retained scars from their childhood. Meghana recalls, "Both mum and dad beat us. Dad was particularly violent when he beat us, for instance with a belt. Sometimes when he hit us, it felt as if I had lost my hearing in one ear or had broken some teeth. It never really happened but it felt like that."

11. The unattributed quotes at the beginning of each section of this chapter are from our interviews.

Many individuals were neglected or lonely as children. Priya says, “Over the years my brother had been violent towards me. I guess he was learning from my father. I became a loner and that’s how I still am.” Troubled by her violent brother as well as an unspoken attraction for another woman student in college, she tried to kill herself by taking sleeping pills. She says, “I slept for 36 hours and no one even noticed.” Taken together, all such experiences are indicators of the repression and trauma that routinely take place within the private and supposedly safe space of family.

A number of respondents faced sexual abuse within their families or inside their homes. 18 people said that they were sexually abused as children. Maushami has horrific memories of being sexually abused by her uncle, household help and many other people. “When I was a child I tried to kill myself a lot of times because of the sexual abuse. I had no security. . . . I was a depressed child. . . . It is a big house, with open courtyards. During vacations, I used to be alone at home. I was always tense. My mother used to laugh at me for locking all the doors and windows.”

Neha’s father stopped living with them when she was 10. She spoke of the abuse from him while he lived with them. “My father in the later years proved to be a complete sex addict. He’s acted funny with both my sister and me. Although my friends knew about it and were planning to inform my mother, due to my mother’s violent behaviour I made them promise not to tell her. And so I never informed her till much later, but from her response I don’t think she believed me really.”

Besides overt violence and covert neglect, there were the usual stories of blatant discrimination between boys and girls. After all, our respondents had all been assigned gender female at birth and brought up as “daughters”. Devi, who grew up in a working class family says, “My mother used to cook meat very well. Then she would give the pieces to my brothers and father, and add water to the masala and serve me and herself. She too would not eat, but would not give me any either.”

Extended families also exerted control, or attempted to do so, even when the parents were more open. Saumya says, “Earlier, one uncle and aunt came . . . and sat for three hours. I just do not answer them. They talk to my parents about why I do not want to get married. Parents do not encourage interference. And my parents’ support makes it easier for me.”

Some parents were supportive for other reasons. Falguni, an only child, says:

I played with guys, I climbed trees, I went here and there without telling my parents. I also played cricket, basketball, tennis and badminton. I wasn’t restricted. I enjoyed myself. . . . Dad’s behaviour towards me made me feel that he wanted me to be a boy. He took me out shopping and would buy me jeans and shirts. My mom used to protest . . . But he paid no heed. I feel he wanted me to grow up independent like a boy because he wanted me to be able to look after myself after they were no more.

Usually, however, families took on the onus of creating perfect gender-stereotypical adults out of their children. Although many respondents said that they always did all the “boy” things and

played with boys when they were younger, adult tolerance levels dipped when their children reached puberty. Gender norms were now imposed and expected to be followed in a much more strict manner. For those not comfortable with their assigned gender, this was a particularly trying phase: on the one hand the changes in the body were difficult to accept; on the other, external restrictions grew.

Rahul recalls how deeply he felt the mismatch between himself and the world around him. “At home, from class 11, I started speaking about how I am. I spoke in the masculine gender for myself. Earlier they didn’t mind me speaking in this way, in a tomboy way, but later they started asking me why I talk like this. . . . A time comes when you are made to realise that you are a girl. That time came. I felt bizarre. I wondered how, why? . . . I used to keep very quiet then.”

Rahul waited eagerly to turn 18 because he knew he could then do as he wished. At the time of the interview he had begun taking hormones as a precursor to surgery, and although his parents and siblings still cannot comprehend him, they are resigned.

In a few cases, respondents who did not see themselves as ‘woman’ were allowed by families to live according to their gender even after puberty. For Sumit, who today identifies as ‘transgender’, it was as if his dreams and his family’s needs coincided:

If I look at my photos from childhood I see myself in boys’ clothes only. . . . Maybe it was because we were eight sisters and so my parents looked at me as their son. . . . It is not because my parents gave me boys’ clothes. I just felt like a boy from within. . . . All my sisters are married and away. I am at home and look after my mother, do everything that she needs outside and inside the house. So in a way it is good for everyone else also, to have someone doing this work.

Yet Sumit’s story is not one of unconditional acceptance. Ze has never felt able to speak to his family about his sexuality. Nor do they ask, although they have never pressurised him to get married.

For other respondents too, their gender non-conformance wasn’t necessarily a problem until their non-normative sexuality entered the picture. Confiding in their families was thus not an option for most people, though they were usually aware of their sexuality very early on, and had been in relationships with other PAGFB. When these relationships were discovered by families or revealed to them by their children’s teachers or friends, reprisals were swift and severe. There were stricter rules, greater surveillance and restricted mobility, if not complete house arrest.

In what must also be the story of so many people we never hear about, a respondent described a suicide pact with a partner, entered into because they could no longer stay with their families and realised they couldn’t survive on their own without shelter and jobs.

Suicide attempts, cutting or harming oneself in other ways, depression – these seem to be commonplace occurrences. As many as 13 of our respondents recounted stories of attempted suicide while still living with their natal families. Two others spoke of seriously considering it. While most of these attempts were made because of tensions around gender and sexuality, many times the reasons were general deprivation, neglect and abuse.

Given all of this, it is unsurprising that as many as a third of our respondents had completely hidden important parts of their lives from their families. This has not just meant living through relationships without ever talking about them but also going through severe emotional and other stresses alone, while families remain oblivious. Such silence and indifference are not just alienating but also violent.

Even when parents are likely to be supportive, the homophobia so embedded in society can be inhibiting. Aditi lost her father when she was just a toddler. She was brought up by her mother and aunt. The mother is very understanding, and has been there for Aditi throughout. Yet when her relationship of many years with the person she still refers to as “the love of her life” ended, Aditi attempted suicide thrice, but did not tell her mother about her relationship. “I gave a wrong reason, saying that I have tensions with my job. So my mother told me to give up the job. She can take care of me. My mother said that she would not live if anything happened to me. So now I have given up the idea of dying.”

control
policing

It seems somewhat ironical that parents who cannot handle their children’s own assertions of their sexuality are almost always eager to get them married off. Not all our respondents were able to resist such forced marriages. Six were married to cismen at some point in their lives. Two of these marriages took place when the respondents were still very young. Another respondent actually used marriage as a way to escape her abusive and neglectful family, in a gamble that sadly meant exchanging parental violence for marital violence. The other three all tried hard to resist, but to no avail. Five respondents eventually got out of these marriages and lived lives of their own choosing, but only after all concerned went through tremendous pain, guilt and sorrow.

Rigid controls and policing, violence from parents and siblings because of non-normative gender or sexuality, forced separation from partners, increased marriage pressure on one or both young people in a relationship – these were all factors that led many to flee their homes, alone or with intimate partners.

Kamal and Murali, both from rural areas, eloped with their partners once their relationships were discovered. So did Jai, when his girlfriend’s mother spotted them together even though they had

been banned from meeting each other, and she was too frightened to go back home. Ranjana, who lived in an urban area, also ran away from home with her girlfriend, to another city where they knew of supportive queer people. Her family did not know about her sexuality but was pressurising her to get married. Sam, on the other hand, had to run away from home as he was being beaten and denied food for flirting with girls in his class and not dressing or behaving like a “good girl” should.

If relationships with family members have been bad all along, running away is the obvious solution. It is when relations have been good that the decision to leave becomes very difficult, because it means a complete break with family. In some instances, either very gradually or after a long period of time, there may be some reconciliation. Or cracks appear in the happy family portrait.

Neel has been in a long relationship with another PAGFB. She does not talk at length about the problems they went through, but mentions the police complaint filed years ago by her partner’s parents, who are not yet reconciled to the relationship. Neel says her own family does not completely approve either. “I was the pet in the family, that is why all of the family is in sad mood now. I was always studious and good, now all that is changed.” She says of her childhood, “Those times were golden times, now one feels terrible.” Neel does visit her family with her partner but some members don’t speak to them.

We did of course have respondents who were out to their immediate families, and who were affirmed in their gender identities or whose sexuality was never questioned or punished, but this was true for perhaps just 3 of the 50 people we met. It was more common for one or both parents to have come around eventually after being hostile at first. A few respondents had reconnected with natal families after achieving economic independence; there were even instances of respondents or their live-in partners having a parent who now lived with them.

Sometimes, of course, it’s possible to leave home for the sake of education or work, and live as one chooses in a different place without sharing much about one’s life but without cutting off all ties. Yet others continue to stay on as they do not see any alternative, so they live with natal families while hiding parts of their lives, and gain an acceptance of sorts by becoming a source of support for the family financially and in other ways. Yet whether people chose to stay or had no choice but to leave, what comes through clearly is the isolation experienced by respondents who had nobody else, or perhaps only their partners, with whom to share their lives and dreams and struggles.

Although most of our respondents had difficult lives, there were often unexpected sources of support even in the midst of deprived childhoods and painful or abusive intimate relationships. Sometimes knowing about others in the family and neighbourhood who were similar to oneself made a difference. For Meghana, who grew up in a middle class family in a semi-urban setup, it was the knowledge of her aunt’s lesbian relationship and life that opened up new avenues and worlds for her.

Many respondents found solace in the animals that became part of their lives. Arun says, “When I was young I had seven dogs, love birds, a garden.” These pets were his companions in a childhood where he faced a lot of violence from his father. And Divakar admits that in the worst of times, when he could not really talk about what was happening to him, “Yes, there was a cow. I used to talk to her and be with her.”

Some people were helped, emotionally or financially, by members of the extended family or other adults in the vicinity. Alpana, Nidhi and Jai all speak of uncles who cared for them in various ways. Juhi’s mother was distant and uncommunicative, but Juhi recalls with affection the various women neighbours who were around in the chawl where he grew up. “Due to the communal living . . . I felt I had many mothers and never depended solely on my own mother.”

For another respondent, who was studying music, many hours of the day were spent with the guru who became an unexpected ally. “Very gentle, very nice, very funny, very humorous. Never shouted at me, never screamed at me . . . We would talk about everything and by the time I was 16 or 17 he was my best friend.” This guru, many decades older, was the one person in whom the respondent was able to confide about a girlfriend’s suicide.

These findings underline for us how crucial it is to understand people’s experiences with their natal families, both while they are growing up and as adults, to be able to make sense of their later lives. They also emphasise the need to understand the dynamics of birth families, with their inherent violence and hierarchies.

Families emerge as extremely violent and non-supportive places that work to strengthen the hierarchical structures of society, rather than provide the nurture and support that they are supposed to.

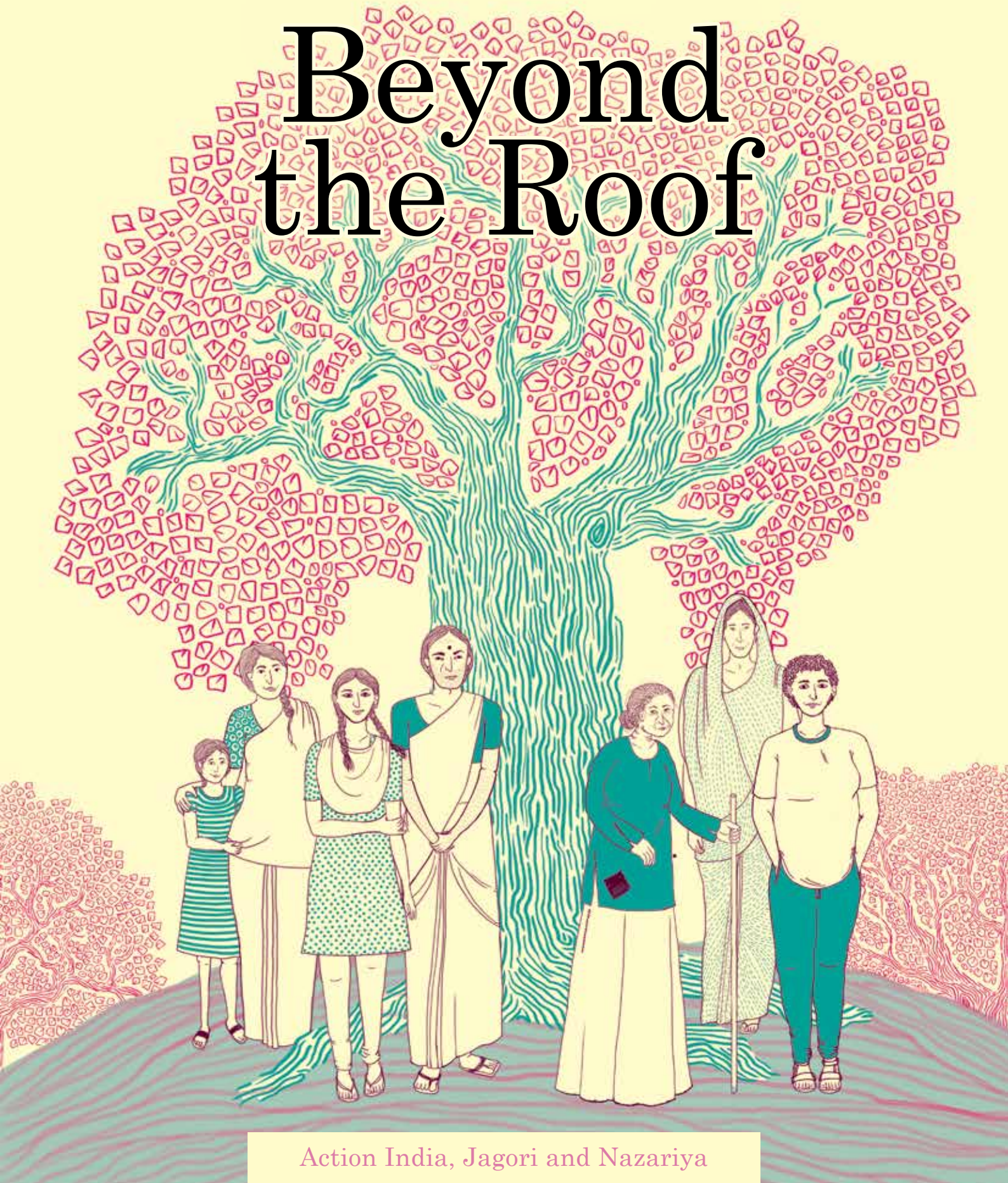
Considering the patriarchal nature of society, all PAGFB tend to face greater violence and discrimination within the family. And when non-normative gender and sexuality enter the equation, things become even worse.

Natal families emerge in this study as one of the most important sites for intervention, so that they can become supportive and safe spaces that allow the young to make real choices, even if these do not conform to the norms of the world around, and in order to alter society’s prescriptions around gender and sexuality.

family is
an important site
for intervention

An action-research study on women survivors
of violence and shelter homes in Delhi

Beyond the Roof



Action India, Jagori and Nazariya

Forty-something Raaka had been trafficked to Mathura and she used to live on the streets around Kalkaji Mandir. She said:

“I have asked many women to join the shelter and learn a skill so that they can get a job, but no one wants to leave this place. It has become comfortable for them to stay here in safety and continue to beg near Kalkaji Mandir.”

Although the creation of a shelter near religious sites goes a long way in sustaining the homeless-survivor physically, it also perpetuates the cycle of poverty and heightens vulnerabilities, especially in the utter absence of long-term rehabilitation mechanisms and housing.

II. Feminist and queer safe spaces

Access to Delhi’s few and mostly occupied government-run shelter homes for women is coursed through the police and/or courts. Over the years, as and when these shelter homes have not been available, accessible or not preferred by survivors, human rights and women’s rights activists and organizations have opened up their personal homes or offices—if not set up safe spaces—to accommodate women experiencing threats or violence. Legal and psychological counselling, food and even financial assistance would be arranged, if needed.

Some of the survivors who felt moved by the help they received and were convinced by the importance of this work joined the staff of these spaces that gave them a new lease on life. Scores of these survivors are employees, volunteers or friends of the organizations. Others are running their own organization and offer safe spaces to women in need. This has both positive and negative implications. The following is an alphabetical snapshot of such organizations in Delhi. We feature them as alternatives to the shelter homes for survivors in Delhi and to explore the links between shelter homes for women in distress and these human rights, feminist, women’s and lesbian, bisexual and transwomen (LBT) groups. By including them here, we acknowledge their role. We realize – and hope – that this list is partial and that there are more safe spaces in the city.

DHANAK

Set up in 2005 as a support group for and by interfaith couples to promote their “right to choice” in marriage or relationships and ending honor-based crime, Dhanak remains a unique presence in Delhi. This is also because, in November 2017, it opened a safe space (shelter) for interfaith and inter-caste couples who have escaped the violence or threats of violence their families and communities tend to unleash. Unlike the state government-run “couples homes”—with police protection—to ensure the safety of inter-caste and interfaith couples in Haryana and Punjab states, Delhi has had no such government-run facility, despite the Supreme Court’s 2010 judgment requiring safe houses to be set up in each district for the safety of inter-caste and interfaith couples. Dhanak fills this crucial gap.

Dhanak works on multiple fronts. It helps couples who have left their family, acting as a mediator to prevent the family of the woman (in the couple) from pressing charges of abduction or rape to falsely implicate the male partner. They also guide couples through legalities of their imminent marriage. Dhanak’s larger mission is to advocate for diversity, secularism, interfaith and inter-caste marriages and families and legislative changes to the Special Marriage Act. It has also been advocating with the Delhi government to set up safe homes for couples.

At the time of our meeting with Dhanak, they were sheltering, among others, their first lesbian couple from a neighboring state. One of the women had been forcibly engaged to a man against her wishes. The couple's attempt to win acceptance from their respective families—after the Supreme Court's September judgment decriminalizing homosexuality—had failed. Their parents threatened to kill themselves and the young women. The families had placed restrictions on their mobility and interaction. Left with no choice but to run away from their families, they surfed the Internet and found the Lawyers Collective, who, along with the Nazariya LBT rights NGO, helped them find emergency accommodation in Delhi at a women's shelter and then at Dhanak. Members of Dhanak informed the local police station and secured a protection order from the Delhi High Court.

Dhanak receives an average of nearly four queries daily from interfaith and inter-caste couples. Its Delhi-based members meet once a month to discuss developments and concerns.

MAHILA PANCHAYAT

Created in 1994 to facilitate a community-based redress mechanism against domestic violence, Mahila Panchayat was initiated by Action India as a women's collective in urban resettlement colonies. Mahila Panchayat provides safe spaces for survivors of violence by offering paralegal support with a feminist approach. At its weekly meetings, paralegal workers and other collective members mediate cases, facilitate survivors' access to services (such as protection officers), file police reports, facilitate investigations and advocate for better implementation of the Protection of Women from Domestic Violence Act, 2005. These alternative dispute-resolution collectives have grown in number to 20 and are active across Delhi, with some 3,000 members. The paralegal workers are trained on women's legal rights and feminist counselling to support survivors of domestic violence. Enforcing and implementing the Protection of Women from Domestic Violence Act, in its true spirit, is the mission of the Mahila Panchayat network.

NAZARIYA

Formed in October 2014 by Delhi-based queer feminist activists, Nazariya came about in response to the void that was felt among LBT individuals after Sangini (described on the next page) closed down. Because LGBT spaces tended to be male-centric or hijra-oriented, the Nazariya founders decided to work toward affirming the rights of LBT and queer people via the creation of an enabling environment. Primarily, it conducts capacity-building workshops on gender, sexuality and harassment in schools, colleges and organizations. It also runs a Delhi-based, peer-counselling helpline for women struggling with their gender identity and/or sexual orientation. Nazariya works with a team of lawyers to provide legal assistance to queer women. This is done through a referral system whereby it connects queer individuals with the nearest rights-based organizations and lawyers, ideally in the same city or town.

Nazariya's crisis intervention work started in 2015. They were assisting people looking to escape violent situations from their natal or marital family due to their gender identity or orientation. For women facing a threatening situation, Nazariya used to offer a modest safe space in Delhi. People can stay there for a maximum of three to four days. Due to safety concerns, however, it was shut down. Now when a need arises, Nazariya offers survivors an alternative space for a brief period.

SAHELI

In the early 1980s, when women hesitated to inform their parents or policemen about dowry-related or other forms of abuse and violence, partly because they would be pushed to “compromise”, Delhi-based feminists set up a drop-in crisis intervention center. In 1981, with four old chairs and 80 rupees, the center opened in the garage of someone’s home in Delhi’s Nizamuddin neighborhood. Meant to be a space where survivors could talk and seek help during a crisis, it was run by 16 women who volunteered their time to keep the center open, morning to evening, seven days a week. Feminism was central to the center’s democratic vision and practice

In the beginning, the volunteers were available even on Sundays and offered some financial support to women. Part-time domestic workers would drop in every afternoon for a chat with peanuts or bananas for a chat, and in time, referred many survivors of violence to the shelter. By the second year, a survivor of violence decided to become a full-time volunteer—she had been tricked into marriage with a mentally challenged man but walked out of the marriage and back into her parents’ home with help from the Saheli group.

Saheli received about 500 cases between 1981 and 1986, many of which pertained to interfaith and inter-caste marriages. Because these young couples needed safety from their threatening families, some members of Saheli opened their own homes to them.

Saheli tried running a safe space for female survivors of violence in the mid-1980s. After much difficulty, an affordable room was found outside a cowshed near Barapullah. At that time, homeowners were wary of renting their space to single women who lived away from their family. After sheltering a few women for a couple of months, the space had to be shut down because it was not financially or logistically viable. Saheli continues to be a prominent and autonomous feminist voice in Delhi and outside.

SANGINI

Sangini was set up in 1997 as a helpline for the LGBT community. By 1998, it also had become a self-help group. By 2005, it expanded to an informal shelter for queer individuals who were experiencing violence at home and wanted to move out. Initially, survivors stayed at the home of Sangini’s co-founders, Maya Shankar and Betu Singh. Because they had no funding to

support the shelter, they ran a guest house in the same space. But the guest house eventually was forced to close due to frequent raids by the police who came in search of survivors.

Between 2008 and 2012, Sangini’s safe space received funding, and a few hundred individuals accessed its services. Mostly they were female-to-male transgender individuals, women attracted to women and bisexual individuals. Sangini offered accommodation for a maximum of three months with free food, counselling and legal services.

The shelter space shut down in 2013 due to lack of financial resources. Funding for LGBT issues is constrained. Officially, Sangini the organization does not exist anymore, but unofficially Maya Shankar still responds to individuals who reach out to her. In most instances, shelter homes refuse to take in individuals referred by Sangini, she explained:

“When two women approached a shelter together...they would refuse them admission. Women facing trauma want to speak about it and hence living in a space where one has to stay quiet about the violence was problematic. Shelters could recognize violence when a woman is beaten by her husband... but it was difficult for them to acknowledge a same-sex couple who wanted to live together. And the women’s movement then was not supportive of the LGBTQ movement. So, many women’s organizations did not know how to approach issues faced by LGBTQ individuals.”



The screenshot shows a news article from The Times of India. The headline is "Lesbian couple hounded in Delhi". The sub-headline reads "NEW DELHI: There was high drama in a Vasant Kunj neighbourhood on Saturday night when policemen from Mumbai and Delhi landed at the flat of two women, Rhea and Sakshi (names changed). The two, aged 20 and 30 years, respectively, are from Mumbai and have been staying at this house since January. And they have no qualms about admitting that they are lesbians and partners." Below the text is a photograph of a man in a green jacket standing in front of a group of people, with a caption that says "Activists protested outside the flat even as the cops tried to take the couple away." The article also includes social media sharing icons for Facebook, Twitter, Google+, LinkedIn, and a comment icon.

The Times of India, <https://timesofindia.indiatimes.com/city/delhi/Lesbian-couple-hounded-in-Delhi/articleshow/7531247.cms>.

F. GAPS IN RESEARCH ON SHELTER HOMES FOR WOMEN

“The state is [reluctantly] compelled to provide physical space, food and water for [women]. It is a highly judgmental, moralistic and punitive space where there is little respect for the resident’s privacy. The painful facts of their lives and stories of abandonment by family and community are shared widely with everyone in the shelter. Often, the women are labelled as ‘paagal’ (mad) or (lovewalis) [those who fell in love with someone their family did not approve of].” – Prita Jha²³

23 Prita Jha (2018), “Redefining the purpose and rules of shelters”, Economic and Political Weekly, vol. 53, No. 37, www.epw.in/journal/2018/37/commentary/redefining-purpose-and-rules-shelters.html.

**PROGRESSIVE REALISATION OF RIGHTS:
A CO-TRAVELLER'S REFLECTIONS ON
CRISIS INTERVENTION**

Suchithra K K,
Deeptha Rao V N & Sathyakala K K

The Natal Family

Our society is built on the notions of prestige, purity, heredity and tradition, while the frequently cited phrase “Indian culture” is dictated more by cis-gendered heterosexual brahmanical patriarchal morality than humanity. Family, being a social institution, is defined by these fundamental elements. Our childhood is filled with being taught what is “good” about predetermined roles – how to be a good son or daughter, husband or wife, father or mother, brother or sister, the list of binaries goes on. To remain part of this system, there is an obligation or unspoken commitment that we must sacrifice our own life and independence for the good of the family. What is good for the family is also predetermined – two recognised gender identities (male and female) each with its own set of gender-roles, heterosexual marriage at the appropriate age, childbirth at the appropriate age, getting your children married and taking on the role of the family elders. While there is some diversity in this formula for perpetuating bloodlines, “acceptable” families remain boxed within the cis-gendered heterosexual imagination. While legal recognition of rights is a welcome change,¹ homosexuality and queer-trans expressions continue to be rejected within the family unit. As a result, members of the LGBTQIA+ community

1 Progressive judgments like *NALSA v. Union of India* (2014) and *Navtej Singh Johar v. Union of India* (2018) have made their mark in law and policy change, but their effect is yet to be felt inside the family.

remain marginalised on the basis of gender identity and sexual orientation because such diversity is not considered a *good* fit for Indian culture, tradition and morality. Additionally, to assert one's rights as a queer or trans person is to assert one's freedom, independence and dignity. This is a simple truth that does not sit well with *belonging* to a family.

Getting married should be the ultimate aim of a woman - women are supposed to “construct a family” just because they have the ability to give birth. In order to maintain and preserve property, caste purity, and other so called ‘virtues’ of every family, women are forced to get married and give birth, more often against their will. In addition, marriage is never considered a personal matter and family members believe they have the authority to make decisions for women. If a woman doesn't want to get married, there is no space for her to say ‘NO’. Regardless of class, caste, religion or region, our cases show that persons assigned female gender at birth continue to be treated as property, not as independent human beings. Many cases involve families forcibly getting the person married to “fix” their identity or as a punishment for identifying as a community member and challenging the orders of the family. The idea of marriage and childbirth as a time-tested cure for gender dysphoria or homosexuality is still held very strongly by orthodox families. Our community members who are married forcefully by the families are being raped in the name of family honour and duty to the family. In such situations, the physical and emotional trauma that community members have to go through is terrible and may have a lifelong impact.

One of the most prevalent challenges community members face is being locked up in the house by their own families. Here, the family has different strategies - they will hide the community member in some relative's place, not in their own house, so that it is not easy to trace the person; they will confiscate their phone and laptop so they cannot contact anyone; confiscate their ID cards and marks cards so they cannot travel anywhere; they will make sure some family member is always following them wherever they go inside the house; they will make the person resign from their job or discontinue education; usually they will immediately start looking for a marriage partner to get rid of the problem once and for all.

It is for this reason that most of our cases involve community members who are running away from their families. In the recent past, most of our cases have involved inter-state migration where couples are so afraid of their families that they cannot risk being in the same region. They end up with no resources to take their life forward. The family system never recognizes the fact that every person is an individual and each individual has the right to make their own choices and the right to lead their life the way they want. In the case of persons from marginalised sexualities and gender identities, most of the cases are of families never accepting the person's feelings and desires but also trapping them within houses and denying them every opportunity for a happy life. Just because parents bring a child into this world, does it mean the whole life of that child is owed to their parents? How can our parents or family members put their children in social prisons in the name of 'love' and 'concern'? When will our parents or family members realise the pain and trauma that their

children are going through to protect the prestige and dignity of the family? Many parents think that they know better and they should decide who their child should love or who they shouldn't, but that is not the reality. Many of our community members have committed suicide due to the violence and struggles they had to face in forced marriages. It is naïve to say that legal protections should enable community members to stand and fight for their rights inside their families. In a society where we are not even recognised as human beings, legal changes are only one step to addressing a very old and powerful institution.

On a regular day, the family will merely approach the jurisdiction police station to register a missing person complaint and begin tracing their runaway children's whereabouts. Some of our clients' families have been far more cunning. When someone in the family is associated or connected with the law, the family can easily manipulate the system. In one case, our client's father, who was a lawyer, filed a false case of attempt to murder so that the police would arrest the community member and prevent them from running away. In another case, our client's father was a senior police official with connections all over the state. They were so scared of leaving their home but were also unable to live with the family due to pressure to marry. Another complication is family connections with local politicians. Political pressure goes hand in glove with the nexus between family and police. The political pressure that families put on the police is one of the reasons for the violence and injustice we face from the police.

Some families will come after the community member again and again. They may have a battalion of relatives or goondas with

them to forcefully take community members back. They will land up in their houses or workplaces and will create a scene to make them lose their job or rented home. We don't know what exactly they want, and what pleasure the family gets by holding back one's freedom, rights and happiness. In one case, the brother of our client along with a group of rowdies physically carried our client away in broad daylight right next to a police station. The police then refused to register the complaint of our client's partner, and told them to go to the station that was closest to our client's home in a small town in a different state, where they were being kept under house arrest. Forcing complainants to run from one police station to another in order to establish jurisdiction is an utter dereliction of duty, but community members constantly face this problem.

We can only know a family's true colours when they confront community members inside the police station. Community members face the accusation of "being like this" because it is their "choice". There is an expectation that as a member of the family, one would mechanically switch off an integral part of their personhood in order to make those around them feel better. The usual complaint is that the parents have invested so much blood, sweat and tears to raise their children, and in return they get no prospect of a dream wedding and social status, no prospect of becoming grandparents, and absolutely no chance of living with their heads held high. One's identity is reduced to nothing more than a bad deal, and the family feels cheated of what they think is their rightful claim over their long-term investment. Shame and betrayal, closely followed by concern over the security of the family property, drive parents to take drastic steps to protect

themselves from the perceived social and moral degradation of their offspring belonging to the LGBTQIA+ community.

Emotional blackmail and suicide threats are the handiest weapons, the family's strategy is to break community members down emotionally. The oldest trick in the book is to claim that a beloved relative (usually a parent or grandparent) is critically ill and is in the ICU, and they ought to see them one last time. The fact is that the people who go to visit the "patient in the ICU" will never come back. Ironically, in all these years, not one allegedly "dying relative" has actually passed away because our clients asserted their rights. In one case, a mother who was supposed to be on her deathbed in our client's hometown, was spotted shopping in the marketplace by our client's well-wisher. Tactics like this make it very difficult for community members to draw the line and make decisions that put their own safety first.

In one case involving a trans man and his female partner who ran away from home, both the families of the trans man and his partner agreed to their relationship in the police station. The partner's family took them both back saying that they don't have any opposition to their relationship and were ready to support them. Once they reached home, the partner's parents called the trans man's family, handed him over and put the partner under house arrest. It is clear that the family will do anything and go to any extent to hold back that person to protect their prestige. In such situations, we cannot interfere too much because the family can easily accuse us of brainwashing their child.

We have handled many cases where police officials force or threaten the community person to go with the family even after we explain our rights. On one occasion, the police slapped one of our clients in the station when he went to file a complaint that his partner was being wrongfully confined at home. Some police officers have confidently told us that homosexuality may be decriminalised and transgender persons may have legal protections elsewhere in India, but those laws are not applicable inside their police stations. Instead of providing protection, the police treat our clients like some nasty creatures. In order to access legal protections, we are forced to face the arrogance and humiliation of facing the police. Almost everyone in the station will come over and stare at our clients, whisper among themselves and pass insensitive comments, and they often demand that we explain our client's physical anatomy, how they "became like this" and why they cannot just "adjust". The most infuriating part is when law and order personnel don the hat of a friendly well-wisher and "counsel" community members "for their own good". Apart from humiliation and discrimination from the police, the family also have the courage to attack our clients in the station in front of the police, and face no consequences. In the station, the person who is facing the crisis will not get an opportunity to talk for themselves because the police will be paying more attention to the dramatic performance of their abusive family. This makes the police treat our cases like some form of entertainment.

The pressure that parents of community members face to meet demands for dowry, wedding expenses, expectations of the entire family and good standing in society are aimed at the community member who must bear the brunt of their rage all alone. Parents

who would have been in tears and begged their children to return home will turn violent in an instant. It is very common for families to demand a written statement where the community member must renounce their family, agree to be treated as “dead to their parents” and write off any claim (present or future) over the family property. In cases where lesbian women or partners of trans men are involved, this is closely followed by an inventory of the jewellery they were wearing when they left home and a demand to return everything. Many parents threaten to strip their daughters’ naked, because even their clothes are the family’s property. This act of *publicly stripping* community members of their membership in the family after doggedly pursuing them (with or without the help of the police) is one of the most degrading forms of punishment. In most cases, the public dehumanisation of community members by their own parents and siblings, in the presence of an authoritative figure (most often the police), signals the end of the threat to life. But in cases where the community member had been promised in marriage to a distant relative or family friend, we find it very hard to predict how the betrothed will react, and how far they will go to reclaim their “property”. Often, when the parents back down, it is the enraged fiancé with a wounded cis-heterosexual male ego who continues to harass and threaten our community members.

In the case of inter-religious couples from the community, communalism becomes an additional challenge. Both the families will accuse each other of religious conversion. Here also, Fundamental Rights exist on paper but not in reality. Even if it is just a strategy of the family, these kinds of accusations are very much capable of complicating the case and making our

clients suffer more. In one case, the family had connections with a religious fundamentalist group that went out of their way to help the family pursue the runaway couple. While there is some awareness of trans women among such entities, they have no idea about female assigned communities, and treat them the same way they would treat a “proper Indian woman”.

On a few rare occasions, some local chapters of progressive movements have also been ignorant of our issues and have negatively impacted crisis cases. We often have multiple marginalised identities, and when support groups that work on specific identities do not understand each other or speak to each other, it is the person facing the crisis who suffers. In this scenario, we definitely acknowledge their work and effort in supporting other marginalised communities, but at the same time, the issues faced by the LGBT'QIA+ community is also an important area that they should be aware of.

During the Covid 19 pandemic and lockdown, we got many calls for help from people who were under house arrest. Many community members have struggled a lot to deal with violence and discrimination from the family at that time. People were stuck in their homes during the lockdown where movement was strictly prohibited. Many of our community members went through severe mental health issues and trauma in that period while staying with the family. They didn't have an opportunity to run away or even call for help but had to face all the violence and abuse on their own.

The vast majority of our cases follow a disturbing pattern of abuse and violence. It is surprising how similar orthodox families in our country are in their thinking and strategies. It does not matter whether it is a large joint family or a smaller nuclear family, it does not matter if the community member lives in the same house or independently, it does not matter whether they are from a small town or a large city from any part of this country. If the family, or just one or two members, believe that one's gender identity or sexual orientation is unacceptable to their world view, our cases show that they would go to any extent to brush this aberration under the carpet and protect the "honour of the family." As a society, we need to see how we can respect one's freedom and choices, imagine a life beyond prestige and honour, and address who defines the dignity of a person.

What often goes unsaid when we talk about issues and challenges, is just how difficult it is for any person to be forced to cut ties with their family. Our clients mostly come from very humble backgrounds and have experienced various kinds of marginalisation. They often share how much they respect and love their parents and family members despite all the abuse and torture they suffer. One of the first questions they ask is when their families will accept them. Sadly, we do not have a confident answer to give them.

Most of our cases involve a complete severing of ties from natal families because the danger of staying in touch with them is too high. These are families that openly attempt honour killing, conversion therapy, corrective rape, and other brutal attempts to force their children to conform to their beliefs. A few families

have made their peace, and are on speaking terms with their children, even if they are not comfortable meeting them. There is hope that things will be better in future. In our experience, we have only come across a handful of families that have tried to understand their children's identity and continued to love and care for them. The families that were genuinely willing to renegotiate the relationship between them and their children and heal together have rebuilt their bonds and slowly learned to trust each other again. Only in one case in the past 3 years did we come across a mother who reached out to us seeking information and resources to better understand her minor child's gender identity; she effectively prevented a crisis from arising. We hope that we come across more families like this.

V A K A L A T H N A M A
IN THE SUPREME COURT OF INDIA
WRIT PETITION (C) NO. _____ OF 2023

IN THE MATTER OF:

Rituparna Borah & Ors.

Versus

Union of India

I, Maya Sharma, aged about 72 years, D/o Gulab Sinha Mehta,

R/o 104 Matru Ashish, Pratapgunj , Vadodara 390002,

_____do
 hereby appoint and retain **Aakarsh Kamra, Advocate on Record**, Supreme Court of India to act and appear for me in the **Petition/Suit/Appeal/Application** and on my/our behalf to conduct and prosecute or (defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed their in, including proceedings in taxation and application for Review, to file and obtain return of documents and deposit and receiver money on my/our behalf in the said Suit /Appeal/Petition/Reference and in application of Review, and to represent me/us and to take all necessary steps on my/our behalf in the above matter. I agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the11th1th.....day of
February.....2023

Maya Sharma

PETITIONER
 (Maya Sharma)

ACCEPTED, IDENTIFIED & CERTIFIED

AAKARSH KAMRA
 Advocate for Petitioner

A1 FIRST FLOOR NEW RAJINDER NAGAR
 NEW DELHI-60, PH NO. 9650659748

MEMO OF APPEARANCE

To,
 The Registrar,
 Supreme Court of India

Please enter my appearance on behalf of **PETITIONER(S)** / Respondent(s)
 Appellant(s) in the above matter.

Date: 11.02.2023

Aakarsh Kamra
Code No. 2599

V A K A L A T H N A M A
IN THE SUPREME COURT OF INDIA
WRIT PETITION (C) NO. _____ OF 2023

IN THE MATTER OF:

Rituparna Borah & Ors.

Versus

Union of India

I,

Chayanika Shah, aged about 64 years, D/o Shivjibhai Shah, R/o 9

Bhau Daji Road, Matunga, Mumbai - 400019,

_____,do
 hereby appoint and retain **Aakarsh Kamra, Advocate on Record**, Supreme Court of India to act and appear for me in the **Petition/Suit/Appeal/Application** and on my/our behalf to conduct and prosecute or (defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed their in, including proceedings in taxation and application for Review, to file and obtain return of documents and deposit and receiver money on my/our behalf in the said Suit /Appeal/Petition/Reference and in application of Review, and to represent me/us and to take all necessary steps on my/our behalf in the above matter. I agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the11th.....day of
February.....2023

Chayanika

PETITIONER

(Chayanika Shah)

ACCEPTED, IDENTIFIED & CERTIFIED

AAKARSH KAMRA

Advocate for Petitioner

A1 FIRST FLOOR NEW RAJINDER NAGAR

NEW DELHI-60, PH NO. 9650659748

MEMO OF APPEARANCE

To,
 The Registrar,
 Supreme Court of India

Please enter my appearance on behalf of **PETITIONER(S)** / Respondent(s) / Appellant(s) in the above matter.

Date: 11.02.2023

Aakarsh Kamra
Code No. 2599

**VAKALATHNAMA
IN THE SUPREME COURT OF INDIA
WRIT PETITION (C) NO. _____ OF 2023**

IN THE MATTER OF:

Rituparna Borah & Ors.

Versus

Union of India

I, Minakshi Sanyal, aged about 59 years, D/o Provat Kumar Sanyal,

R/o 4A Bijoli Apt, 627 Rajdanga Main Road, Kolkata 700107,

_____, do hereby appoint and retain **Aakarsh Kamra, Advocate on Record, Supreme Court of India** to act and appear for me in the **Petition/Suit/Appeal/Application** and on my/our behalf to conduct and prosecute or (defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed their in, including proceedings in taxation and application for Review, to file and obtain return of documents and deposit and receiver money on my/our behalf in the said Suit /Appeal/Petition/Reference and in application of Review, and to represent me/us and to take all necessary steps on my/our behalf in the above matter. I agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the 11th day of February 2023

Minakshi Sanyal
PETITIONER

(Minakshi Sanyal)

ACCEPTED, IDENTIFIED & CERTIFIED

AAKARSH KAMRA
Advocate for Petitioner
A1 FIRST FLOOR NEW RAJINDER NAGAR
NEW DELHI-60, PH NO. 9650659748

MEMO OF APPEARANCE

To,
The Registrar,
Supreme Court of India
Please enter my appearance on behalf of PETITIONER(S) / Respondent(s)
Appellant(s) in the above matter.

Date: 11.02.2023

Aakarsh Kamra
Code No. 2599

V A K A L A T H N A M A
IN THE SUPREME COURT OF INDIA
WRIT PETITION (C) NO. _____ OF 2023

IN THE MATTER OF:

Rituparna Borah & Ors.

Versus


Union of India

I, Rituparna Borah, aged about 41 years, D/o Lt. Horen Kumar Borah,

R/o 298/1, UGF No. 7, Gadaipur Village, Fatehpur Beri, Delhi 110074

_____,do
 hereby appoint and retain **Aakarsh Kamra, Advocate on Record**, Supreme Court of India to act and appear for me in the **Petition/Suit/Appeal/Application** and on my/our behalf to conduct and prosecute or (defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed their in, including proceedings in taxation and application for Review, to file and obtain return of documents and deposit and receiver money on my/our behalf in the said Suit /Appeal/Petition/Reference and in application of Review, and to represent me/us and to take all necessary steps on my/our behalf in the above matter. I agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the11th.....day of
February.....2023


 PETITIONER
 (Rituparna Borah)

ACCEPTED, IDENTIFIED & CERTIFIED

AAKARSH KAMRA

Advocate for Petitioner

A1 FIRST FLOOR NEW RAJINDER NAGAR

NEW DELHI-60, PH NO. 9650659748

MEMO OF APPEARANCE

To,
 The Registrar,
 Supreme Court of India

Please enter my appearance on behalf of **PETITIONER(S)** / Respondent(s)
 Appellant(s) in the above matter.

Date: 11.02.2023

Aakarsh Kamra 
Code No. 2599

IN THE SUPREME COURT OF INDIA

(Writ Jurisdiction)

Writ Petition (C.) NO. _____ OF 2023

IN THE MATTER OF:

Rituparna Borah & Ors.

... Petitioner

Versus

Union of India

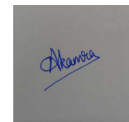
... Respondent

S.No.	PARTICULARS	Copies	Court Fee
1.	List of dates and Synopsis.	1	
2.	Writ Petition along with Affidavit	1	
3.	Annexures P1-P15	1	
4.	Vakalatnama		

NEW DELHI

14.02.2023

FILED BY:



AAKARSH KAMRA

ADVOCATE FOR PETITIONER

A-1, First Floor New Rajinder Nagar

New Delhi-110060, Ph. No. 9650659748

CC. No. 2599, aakarshkamra@gmail.com

ANNEXURE 'X'

PROFORMA FOR FIRST LISTING

SECTION _____

The case pertains to (Please tick/check the correct box):

- Central Act: (Title) Special Marriage Act, Constitution of India
- Section: Article 14, 15, 19 and 21
- Central Rule: (Title) NA
- Rule No(s) NA
- State Act: (Title) NA
- Section: NA
- State Rule: (Title) NA
- Rule No(s) NA
- Impugned Interim Order: (Date) NA
- Impugned Final Order/Decree: (Date) NA
- High Court: (Name) NA
- Names of Judges: NA
- Tribunal/Authority: (Name) NA


1. Nature of matter: Civil Criminal

2. (a) Petitioner/appellant No.1: Rituparna Borah
(b) e-mail ID: _____
(c) Mobile phone number: _____

: 2 :

3. (a) Respondent No.1: Union of India
 (b) e-mail ID: _____
 (c) Mobile phone number: _____
4. (a) Main category classification: 18
 (b) Sub classification: 1807
5. Not to be listed before: NA
6. (a) **Similar disposed of matter with citation, if any, & case details:** No similar matter has been disposed of
 (b) **Similar pending matter with case details:** WP(C) 1011 OF 2022
Supriyo@ Supriya Chakraborty v. Union of India
7. Criminal Matters: NA
 (a) Whether accused/convict has surrendered: Yes No.
 (b) FIR No. _____ Date: _____
 (c) Police Station: _____
 (d) Sentence Awarded: _____
 (e) Period of sentence undergone including period of detention/custody undergone: _____
8. Land Acquisition Matters: NA
 (a) Date of Section 4 notification: _____
 (b) Date of Section 6 notification: _____
 (c) Date of Section 17 notification: _____
9. Tax Matters: State the tax effect: NA
10. Special Category (first petitioner/appellant only): NA
 Senior Citizen > 65 years SC/ST Woman/child Disabled
 Legal aid case In custody
11. Vehicle Number (in case of Motor Accident Claim matters): NA

Date: 14.02.2023



AOR for petitioner(s)/appellant(s)
 (Name) AAKARSH KAMRA
 Registration No. 2599
aakarshkamra@gmail.com