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RECOGNISING QUEER FAMILIES: A CONSTITUTIONAL PUSH FOR LEGAL PLURALISM IN INDIA

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INTRODUCTION

Contrary to popular belief, homosexuality and queer relationships are not modern concepts imported from the West. Historically, in India diverse sexualities and identities have been celebrated in some contexts. Ancient sculptures like those in the temples of Kahuraho as well as religious narratives point to such instances.

Being conscious of India's history can help disintegrate the notion that queer identities are modern to our society while creating a space for more inclusive discourse.

ANCIENT INDIA

Ancient Indian society cannot be viewed as exclusively heteronormative. It includes references to inclusivity regarding gender identities. In the Rigveda certain hymns hint at sexual fluidity and same sex desires. The epics too reveal some such instances. The Mahabharata tells of a warrior, Shikhandi who was born a female, Shikhandini, but lived as a man. The Ramayana narrates how a group of third gender persons were loyal to Rama during his exile in the forest. Temples at Khajuraho and Konark depict sculptures of same-sex intimacy as well.

Deities in Puranic myths transcend binary gender norms like Vishnu who transforms into an enchanting Mohini.

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Such narratives highlight a tolerant and non judgmental view toward same-sex relationships. The colonial impact through Section 377 of the Indian Penal Code consolidated a legal prohibition and less inclusive view stepping aside from legal pluralism.

FAMILY AS A CONCEPT

Something that sets India apart from the West is the strong family bond that is shared. Children feel a sense of duty toward their parents, to care for them and remain close even after they get jobs and start their own families. In the traditional concept, an Indian family is taught to be tolerant despite facing its share of arguments and unpleasantness. Whether this tolerance is sometimes beyond reasonableness is subjective, but when it comes to queer families, our society does have the ability to use this tolerance and inclusivity to create a safe space. Queer families broaden the scope of a “family” beyond the imaginary lines of heteronormativity. The roadblock, however, may lie in the legal sphere, which poses the question: can queer families find legal recognition and acceptance in India?

This article aims to analyse the legal recognition of queer families through the lens of cultural realities, parliamentary and judicial decisions and constitutional principles. This analysis seeks to chart a path toward legal acknowledgement of families that do not fall within the heteronormative structures.

TRACING THE JOURNEY OF LGBTQ+ RIGHTS

DECRIMINALISING CONSENSUAL HOMOSEXUAL ACTS

In terms of the rights of the LGBTQ+ community, it has taken a long journey to get to where we are today, with still a great distance left to cover. This journey began with the colonial remnants of Section 377 of the Indian Penal Code which criminalised "carnal intercourse against the order of nature," targeting homosexual relationships.

In the late 20th and early 21st centuries, activism gained momentum. This led to the landmark Delhi High Court ruling in Naz Foundation v Govt of NCT of Delhi in 2009 that decriminalised consensual homosexual acts. Much to the allies' disappointment, this victory was short-lived only

to be overturned by the Supreme Court in Suresh Kumar Koushal v. Naz Foundation in 2013. This reinstatement of Section 377 of the IPC left an air of uncertainty for the LGBTQ community.

The pivotal moment for LGBTQ+ rights in India came with the Supreme Court's judgment in Navtej Singh Johar v. Union of India in 2018. In a historic ruling, the Court decriminalised consensual homosexual acts by declaring Section 377 unconstitutional, affirming the rights to equality, dignity, and privacy for LGBTQ+ individuals. The Bench unanimously ruled that Section 377 violated Articles 14, 15, 19 and 21. It further held that “sex” under Article 15 encompassed sexual orientation, thereby protecting LGBTQ persons from discrimination.

Taking another step forward, the Transgender Persons (Protection of Rights) Act, 2019 recognised the rights of transgender individuals and prohibited discrimination. Prior to this, in 2014, NALSA v Union of India legally recognised transgender persons as “third gender” and acknowledged a right to self-identification as this choice stems from personal autonomy.

FALLING SHORT OF LEGAL RECOGNITION OF SAME SEX MARRIAGE

In the case of Supriyo and Ors v Union of India, the petitioners sought the Court’s declaration that LGBTQ persons have a right to marry as per their choice and that the Special Marriages Act was violative of Articles 14, 15, 19, 21 and 25 of the Constitution.

In a 366-page judgment, the Supreme Court observed that queerness is not an urban or elitist product in India but has been known since ancient times. Though endorsing a view that same sex unions need safeguarding, the court concluded that there was no Fundamental Right to marry.

Further, the court observed that the aftermath of holding the Special Marriages Act void would be that persons of different religion or caste would be unable to form a union in marriage. This would take the nation back to a time of social inequality and religious intolerance. This highlighted a judicial struggle between eradicating one form of discrimination while replacing it with another.

The majority shifted responsibility to the Parliament, although there was an emphasis on urgent action required to ensure equality and dignity with regard to the LGBTQ community.

ADOPTION RIGHTS

Being a parent is an experience almost everyone desires and one's identity should not stand in the way of that experience. When it comes to adopting, denying a same sex couple the right to adopt a child is not only a punishment to them for no fault of their own but also deprives a child of their potential home and family. Since a child's standard of life hangs in the balance it is of course necessary to be cautious. This, however, must not lead to the conclusion that a same sex couple must be wholly excluded from the decision.

Adoption is one of the concerning areas where queer families face legal invisibility in India. Currently, the right to adopt is not directly available to same-sex couples. The primary legislations in this regard are the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Hindu Adoption and Maintenance Act, 1956.

CENTRAL ADOPTION RESOURCE AUTHORITY (CARA)

CARA or the Central Adoption Resource Authority, is a statutory body that was established under the Juvenile Justice Act to regulate adoption procedures. According to CARA Regulation 5(3), a couple can adopt if they have held a marital status for at least two years. This regulation was challenged in Supriyo v Union of India. Since same sex marriage has not been recognised in India this bars a same sex couple from adopting jointly as they would not meet the two-year marital status requirement.

Justice Chandrachud and Justice Kaul formed the minority judgment where they stated the impugned regulation was unconstitutional and discriminatory against same sex couples. It was well observed that the best interest of the child should be considered and the impugned regulation is based on a presumption that only heteronormative parents can be good parents.

However, the majority opinion upheld the regulation on the rationale that the impugned regulation was gender neutral and applied to all couples who are unmarried.

The responsibility is deferred to the parliament since such policy choices may fall beyond the courts purview. While courts play the role of guardian of citizen's rights it cannot be ignored that it is the legislature that needs to provide the basis for inclusivity for the court cannot legislate but is bound to interpretation.

HINDU ADOPTION AND MAINTENANCE ACT (HAMA)

Under the Hindu Adoption and Maintenance Act, adoption is restricted by marital status as well as gender. This can be observed through the language used, which assumes the structure of a heterosexual family. There is no visible path under the HAMA for a same-sex couple to adopt a child either. A queer person may still adopt a child as a single individual but jointly with their partner until their union can be legally recognised.

What is needed is a progressive move by amending such regulations and definitions that focus on the welfare and stability of a child being adopted rather than excluding eligible persons based on their sexual orientation alone. Further, the concept of "good parents" is widely arbitrary. It is worth noting that good parents are not solely defined by their adherence to heteronormative relationships.

CONCLUSION

Challenges such as legal recognition of same-sex marriages, adoption rights, and societal acceptance persist. While cultural shifts towards greater acceptance are underway, ongoing advocacy is crucial to achieving full equality and inclusion for the LGBTQ+ community in India.

However, a profound and progressive foundation for social recognition of queer families can be found in *Deepika Singh vs Central Administrative Tribunal* where Justice D.Y. Chandrachud and Justice A. S. Bopanna observed:

"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 (who traditionally occupy the roles of the "mother" and the "father") 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.”