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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

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The Pot of Tar at the End of The Rainbow: An Analysis of India's Hollow Legal Protection to Same-Sex Live-In Couples

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ABSTRACT

The historic judgement in the case of Navtej Singh Johar v. UOI, decriminalized homosexuality in India, bolstered on the fundamental right of equality, right to life and liberty and freedom of expression. Although the legal battle affording the fundamental right of civil union remains a distant dream for the LGBTQ+ community, the courts in India through multiple recent judicial pronouncements have upheld the legality of same-sex live-in relationships in India. This is the closest same-sex couples can currently get to a civil union in India.

Unfortunately, the legal rights accorded in live-in-relationships are haunted by the specter of heterosexism. The progressive Domestic Violence Act, 2005 provides no protection for lesbian live-in couples. There is no pre-existing framework of legal protection which grants legal protection to same-sex partners taking into account their domestic relationship. Maintenance rights which are primarily encompassed by Sec. 125 of the CrPC do not envisage same-sex live-in partners under this protective legal umbrella. Furthermore, same-sex live-in couples are precluded from adopting a child as a couple owing to the pre-existing legislative framework being extremely heteronormative. Surrogacy becomes equally complicated and only one of the two partners can be accorded the legal parenthood for same-sex couples. This further delineates the lack of actual legal protection and social rights which same-sex live-in couples possess in India when compared to heterosexual live-in couples.

Unfortunately, when the basis of legal protection to heterosexual live-in couples is founded in their relationships' comparability to a marriage and same-sex civil unions being unrecognized in India, there exists a loophole in providing legal protection and the recognition of same-sex live-in relationships becomes a mere tokenistic acknowledgement for the LGBTQ+ community in India. It is the need of the hour to not only acknowledge these blatant differences but also ensure that the fundamental rights of the LGBTQ+ community in India is upheld and secured.

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Keywords: *Same-sex couples, live-in relationships, India, legal rights, Domestic Violence, Maintenance, Parenthood.*

I. An improved and inclusive tomorrow?

“There is no vocabulary for couples like us”[3] - ***Ankita Khanna***[4]

The historic judgement of *Navtej Singh Johar v. Union of India*[5] was a watershed moment in the history of Indian jurisprudence. After a prolonged judicial battle, the Supreme Court of India in 2018, recognized the fundamental right to engage in same-sex relationships in India, by reading down Section 377[6] of the Indian Penal Code, 1860, which criminalized homosexual relationships.[7] Bolstering the principle of ‘transformative constitutionalism’, the Supreme Court upheld the importance of decriminalization of Section 377.[8] This decision was anticipated by many legal luminaries after the Supreme Court judgement in the landmark case of *NALSA v. Union of India*[9]. A crucial win for the members of the LGBTQ+ community, the Court here, legally recognized the right of transgender persons to identify as the ‘third gender’.[10] The Court observed that the right to equality under Article 14[11], the right to freedom of expression under Article 19(a)[12] and the right to dignity under Article 21[13] of the Indian Constitution are drafted in gender-neutral terms and must provide recognition to transgender persons.[14] This milestone judgement was a crucial endeavor in fortifying the recognition of the fundamental rights of the LGBTQ+ population in India.

Augmenting the line of reasoning adopted in the *NALSA* judgement, the Supreme Court deemed the striking down of Section 377 to be imperative to further the legal recognition of the fundamental rights of homosexual persons in India. Moreover, the Court observed that constitutional morality often diverges from popular, majoritarian morality and it is the duty of the Court to mold the Constitution in a way which preserves its dynamic, transformative

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[3] Abhishyant Kidangoor, This Indian Same-Sex Couple is Fighting for the Right to Marry. But is Their Country Ready?, TIMES (Jan. 6, 2021), https://time.com/5926324/india-lgbtq-marriage-case/.

[4] Ankita Khanna, psychologist at Children First India, who has sought the legal right to marry her same-sex partner Kavita Arora through the Special Marriage Act in the Delhi High Court.

[5] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

[6] PEN. CODE § 377 (1860).

[7] Rajat Maloo & Vanshika Katiyar, Navtej Singh Johar- A Constitutional Analysis, 5 RGNUL STUDENT RESEARCH REVIEW 63, 63-73 (2019).

[8] id.

[9] National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438.

[10] id.

[11] INDIA CONST. art. 14.

[12] INDIA CONST. art. 19, cl. a.

[13] INDIA CONST. art. 21.

[14] National *Legal Services Authority* v. *Union of India and Ors.*, (2014) 5 SCC 438.

character, even at the cost of negating social morality.[15] Buttressing the principle of the right to privacy of the individuals which is embedded in the fundamental right to life, under Article 21[16], as observed the in the momentous judgement of *Justice K S Puttaswamy v. Union of India*[17], the Court in *Navtej Singh Johar* recognized that sexual relationships between two consenting adults was their fundamental right as guaranteed by the Constitution of India.[18] This judgement firmly rooted the rights of the LGBTQ+ community in the foundation of the Indian Constitution. However, systemic oppression aside, there is still a long way to go, to bridge the gap between the cis-heterosexual couples and same-sex couples. The spectre of heterosexism has not spared even the guardians of our transformative, dynamic Constitution.

II. One step forward, two steps backward

Despite the fact that the Supreme Court recognized the right of homosexual relationships between two consenting adults, founded on the right to privacy, the lack of legislative or judicial recognition of a civil union between couples belonging to the LGBTQ+ community, casts a grim shadow on this recognition. Marriage is a fundamental right enshrined under Article 21 of the Constitution which has been reiterated as recently as 2020 by the Karnataka High Court.[19] However, such similar recognition is not afforded to same-sex couples. The Supreme Court in the case of *Shakti Vahini v. Union of India*[20], held that "*when two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal, and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation*"[21]. Furthermore, the Constitution Bench held in the case of *Common Cause v. Union of India*[22], that "*the strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage*"[23]. Both these judgements were heavily relied upon by the *Navtej Singh Johar* bench, thereby, cementing the idea of the right to marriage being a core fundamental right of an individual.[24] However, civil unions between same-sex couples in India still continues to be a distant dream. The Centre recently, sought the dismissal of a plea seeking

[15] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[16] India Const. art. 21.
[17] Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1.
[18] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[19] Mr Wajeed Khan H B v. Commissioner of Police, W.P.H.C. 92/2020.
[20] Shakti Vahini v. Union of India, (2018) 7 SCC 192.
[21] *id.*
[22] Common Cause v. Union of India, (2014) SCC 5 338.
[23] *id.*
[24] Doorman Dalal, *How Constitutional Courts Can Recognize Same-Sex Marriage [Part II]*, The Leaflet (Nov. 11, 2020), https://www.theleaflet.in/how-constitutional-courts-can-recognize-same-sex-marriage-part-ii/#.

legalization of same-sex marriages in India in the case of *Abhijit Iyer Mitra v. Union of India*[25]. The Centre stated that in their response that reading down of Section 377, IPC, only "decriminalized a certain human behavior"[26] but the intention was to never legitimize the human conduct of same-sex marriages as it went against the bedrock of Indian values, rituals and customs.[27] All the progress made by *Navtej Singh Johar* is watered down by this regressive reply from the Centre marred by popular, majoritarian morality to the exclusion of constitutional morality and fundamental rights.

In the absence of legal recognition of same-sex marriages in India, all that they are left with it are same-sex live-in relationships. The recent 2020 judgement in the case of *Madhu Bala v. State of Uttarakhand*[28] was a pivotal moment in the fight for the rights of same-sex couples in India. The Uttarakhand High Court in this case held that same-sex couples are permitted to be in live-in relationships and the court has no standing to act as *parens patriae* and interfere with the same.[29] The Court relied on the 2018 Supreme Court judgement in the case of *Soni Gerry v. Gerry Douglas*[30], where the importance of autonomy in choosing a partner to reside with, was stressed upon. Similarly, in 2020, the Orissa High court in a pivotal order, held that two people belonging to the same gender had the right to live together.[31] In the case of *Sreeja S v. Commissioner of Police*[32], the Kerala High Court had also stated that same-sex couples had the legal right to engage in live-in relationships. However, this question only arose co-incidentally in the case and was not the subject matter of adjudication.[33] Given, the lack of legislative or judicial recognition of same-sex marriages, the only legally recognized relationship akin to civil-unions that same-sex couples can engage in, is that of live-in relationships. However, it has been a judicially-set-standard that relationships in the 'nature of marriage' shall garner the protection afforded to live-in relationships.[34] The question then remains on how same-sex live-in couples can squeeze themselves in, under the umbrella of legal and judicial protections, designed to specifically provide refuge to heterosexual live-in couples in India.

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[25] *Same-Sex Marriages not Recognised by our Laws, Society and our Values: Centre to Delhi HC*, THE TRIBUNE (Sep. 14, 2020), https://www.tribuneindia.com/news/nation/same-sex-marriages-not-recognised-by-our-laws-society-and-our-values-centre-to-delhi-hc-141139.
[26] *id.*
[27] *id.*
[28] Madhu Bala v. State of Uttarakhand and Ors., (2020) SCC OnLine Utt 276.
[29] *id.*
[30] Soni Gerry v. Gerry Douglas, (2018) 2 SCC 197.
[31] Chinmayee Jena v. State of Odisha and Ors., 2020 (II) ILR (Cut.) 514.
[32] Sreeja S. v. The Commissioner of Police, Thiruvananthapuram and Ors., (2018) SCC Online Ker 3578.
[33] *id.*
[34] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.

III. SPECTRE OF HETERNORMATIVITY ON LIVE-IN RELATIONSHIPS

The legal rights and protections intertwined with live-in relationships in India are tailored to cater to the needs of heterosexual couples. The enactment of the Domestic Violence Act, 2005[35] (hereinafter, *DV Act*) was a watershed moment in the history of live-in relationships in India. Although there was no explicit recognition of live-in relationships, for the first time, protection accorded by the Act extended to women in marriages and "relationships in the nature of marriage"[36].[37] Since there is no legal definition of "relationships in the nature of marriage"[38] provided in the framework of the DV Act, the courts have taken it upon themselves to interpret and define the same, in light of the growing numbers of live-in relationships in India.[39]

The Supreme Court in the case of *Veluswamy v. Patchaiammal*[40] stated that not all relationships would be encompassed under "relationships in the nature of marriage"[41] and therefore, laid down additional guidelines for a live-in relationship to qualify to get protections accorded by the DV Act. The Court stated that "*the couple must hold themselves out to society as being akin to spouses, they must be of legal age to marry, they must be otherwise qualified to enter into a legal marriage, including being unmarried, they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time… and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the (DV) Act*"[42]. In addition, the 2013 judgement in the case of *Indra Sarma v. V.K. Sarma*[43], listed out additional criteria for live-in couples to be accorded protection under Section 2(s) of the DV Act. Sexual relationships having an emotional component, children, pooling of financial resources, entrusting domestic responsibility on women to run the house were the additional list of requirements needed to be proved for a relationship to fall under Section 2(f) of the DV Act, 2005.[44]

The pre-existing jurisprudence largely relies on equating live-in relationship with marriages. Even so, these cases have garnered a lot of criticism from scholars for their patriarchal and

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[35] The Protection of Women from Domestic Violence Act, No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[36] The Protection of Women from Domestic Violence Act, § 2(f), No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[37] Nidhi Gupta, *The Myth of Live-In Relationships in India*, NLUJ LAW REVIEW, Fall 2017, at 22, 22.
[38] The Protection of Women from Domestic Violence Act, §2 (f), No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[39] Nidhi Gupta, *The Myth of Live-In Relationships in India*, NLUJ LAW REVIEW, Fall 2017, at 22, 22-27.
[40] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[41] The Protection of Women from Domestic Violence Act, § 2(f), No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[42] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[43] Indra Sarma v. V.K. Sarma, (2013) 15 SCC 755.
[44] *id.*

regressive outlook in giving a narrow meaning to relationship in the nature of marriage.[45] When heterosexual couples in live-in relationships are still on the brim of being accorded legal protections, the glaring question remains, what is to happen to same-sex couples residing together in India. The point of contention is whether the pre-existing legislative and judicial framework stands strong in the face of protecting same-sex live-in couples or are the recent judgements by the courts in India, mere tokenistic acknowledgements of such relationships. When same-sex marriages are not even legally recognised in India, the question arises whether same-sex live-in relationships can be measured on the same yardstick as that of heterosexual cisgender couples living together. What protection and rights can be afforded to such couples within the legal framework of India, is what this paper delves into in the upcoming sections.

IV. DOMESTIC VIOLENCE

The World Health Organization (hereinafter, *WHO*) defines Intimate Partner Violence (hereinafter, *IPV*) as actions between any couple that encompasses "physical and sexual violence, emotional and psychological abuse, and controlling behaviour"[46]. Despite the limited studies into IPV in LGBTQ+ relationships, data reveals that the rate of violence is comparable to heterosexual relationships[47] or even higher than them[48]. Additionally, culturally curated ideologies of feminism and masculinity impedes victims of IPV in same-sex live-in relationships from coming forward.[49] This alongside the fact that no specific piece of legislation exists to protect same-sex live-in partners when facing abuse in a relationship, further precludes protection which is accorded to heterosexual couples in India.

The DV Act ushered in a new era in the legal jurisprudence of this country by affording protection to women in "relationships in the nature of marriage"[50]. Unfortunately, the legal rights accorded in live-in relationships are shrouded by heterosexism and waters down the fundamental rights of same-sex couples. The progressive DV Act which was responsible for affording rights to women against domestic violence, could seemingly be read to incorporate

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[45] Nidhi Gupta, *The Myth of Live-In Relationships in India*, NLUJ LAW REVIEW, Fall 2017, at 22, 27.

[46] World Health Organization, (2012). *Understanding and Addressing Violence Against Women. Geneva: World Health Organization*, WHO/RHR/12.36 (2012), http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf

[47] Susan C. Turell, *A Descriptive Analysis of Same-Sex Relationship Violence for a Diverse Sample*, 15 J. FAM. VIOLENCE 281, 281-293 (2000).

[48] Adam M. Messinger, *Invisible Victims: Same-Sex IPV in the National Violence Against Women* Survey, 26 JOURNAL OF INTERPERSONAL VIOLENCE 2228, 2228-2243 (2011)

[49] Luca Rollè, *When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence*, 9 FRONTIERS IN PSYCHOLOGY 1506, 1506-1521 (2018).

[50] The Protection of Women from Domestic Violence Act, § 2(f), No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.

same-sex couples under its ambit under Section 2(a)[51] of the Act. However, Section 2(q)[52] explicitly refers to a respondent as being an "adult male person"[53] with whom a woman resides, thereby showcasing its heterosexist colors. No protection is accorded for lesbian live-in couples. The definition of domestic violence under Section 3[54] of the Act is similar to the definition of IPV given by WHO. When studies exist to showcase the pervasiveness of IPV amongst same-sex couples, even more so than heterosexual couples sometimes, the lack of protection by this progressive Act to queer women, isolates and obstructs justice for such victims. Furthermore, the court's interpretation[55] of "relationships in nature of marriage"[56] follows a heteronormative trajectory, given that marriage between same-sex couples is impermissible in India. Hence, the protection accorded to women in DV Act is completely absent in same-sex live-in relationships. The power dynamic in a relationship wherein a woman can impose hurt on another woman is completely disregarded by the pre-existing legislation.

Queer women are one of the categories who are most prone to violence, as per a study conducted by Tata Institute of Social Sciences.[57] No protection is accorded to them under the DV Act in lesbian live-in relationship, given that the abuser must be male. Messenger study from 2011, has indicated that lesbian women are at the highest risk of being subjected to partner abuse, followed by heterosexual women, homosexual men and finally heterosexual men.[58] Furthermore, two men living together have no special legislation affording them protection taking into account the nature of their relationship. While Section 350[59] and 351[60] of the Indian Penal Code, 1860 criminalize assault and battery, no special legislative protection is granted to same-sex live-in couples. Furthermore, studies reveal that the social stigma of 'men fight' and 'women are not violent' dissuades victims from seeking help.[61] The legal system is handicapped in not identifying the intricacies of a same-sex live-in relationship and how IPV can easily percolate into the same. Rape of a woman by another woman and rape of a man by another man are not considered to be criminal offences in India, further alienating same-sex

[51] *id.* § 2(a).
[52] *id.* § 2(q).
[53] *id.*
[54] *id.* § 3.
[55] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.
[56] The Protection of Women from Domestic Violence Act, § 2(f), No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[57] Bina Fernandez & Gomathy N.B., *The Nature of Violence Faced by Lesbian Women in India*, RESEARCH CENTRE ON VIOLENCE, TATA INSTITUTE OF SCIENCES (2003), https://perma.cc/M4PN-W6XE.
[58] Jyoti Vats, *The Need to Address Abuse in LGBTQ Relationships*, LATEST LAW (Aug. 8, 2020), https://www.latestlaws.com/articles/the-need-to-address-abuse-in-lgbtq-relationship/.
[59] PEN. CODE § 350 (1860).
[60] PEN. CODE § 351 (1860).
[61] Rollè, *supra* note 47.

live-in couples from legal recourse in abusive relationships. Social and legal stigma further precludes them from approaching authorities to seek help, given the lack of recognition of the uneven physical power dynamic which is persistent in heterosexual relationships.

The private sphere of cohabitation creates unique challenges which breeds the monster of domestic violence. When the only available recourse remains under the Indian Penal Code, the question remains why special protections are only granted for heterosexual live-in couples. People in abusive relationships might often be in denial or unaware of the violence being inflicted upon them.[62] The LGBTQ+ population are victims to a violence outside the domain of their relationship with their partners.[63] Internalization of this violence further plays a role in discouraging them from seeking out legal authorities for help. The lack of legislative or judicial protection further waters down the severity of this abuse and makes the abused even more vulnerable. Brenda Cossman and Ratna Kapur have shed light on focusing on this intersectionality of a person while deciphering their proneness to be subjected to domestic violence and their hesitance to report.[64] Not only are members of the LGBTQ+ community more prone to violence by the society, abuse at the hands of their own partners and lack of special legal protection against the same, endangers their fundamental rights to life[65]. This right to life must be secured to every citizen of the country by the State. *Navtej Singh Johar* was a predominant step in recognizing the fundamental rights of sexual minorities in India. In the absence of special positive rights which reinforce legal protection, taking into account the nuances of a relationship in the private sphere just like the DV Act, the State is violating their obligation to ensure fundamental right to life to same-sex live-in couples. The protection accorded in a heterosexual live-in relationship must be extended to same-sex live-in relationships, regardless of the gender of the couple. While heterosexual live-in couples sit at the cusp of protection, owing to the DV Act, 2005, the same-sex live-in couples are completely excluded from seeking refuge under this protective legal umbrella culminating from facing IPV in the private sphere.

V. Maintenance

The concept of maintenance in Indian law has been deemed to be "prophylactic in nature"[66] by The Supreme Court of India, for it intends to obligate individuals to financially maintain

[62] Vats, *supra* note 56.
[63] *id.*
[64] Ratna Kapur & Brenda Cossman, Subversive Sites: Feminist Engagements With Law in India 95-137 (1st ed. 1996).
[65] India Const. art. 21.
[66] Mohd. Ahmed Khan v. Shah Bano Begum and Ors., 1985 SCR (3) 844.

indigents dependent on them, when they refuse or neglect to do so. Such dependents, as per law usually are wives, children and parents who are unable to maintain themselves. The objective of empowering these with a right to maintenance is to protect them from states of destitution and thereby, secure their "*equality and dignity"*[67] *in the society. Discriminatingly however, the same isn't secured for same-sex live-in couples, for they are not accorded the protection of the right to maintenance by and large, predominantly due to the law being subservient to heteronormativity.*

Within the bracket of instances whereby, being a couple, partners have the right to maintenance against each other, numerous maintenance laws have been legislated by the Indian Government that are applicable. Yet, none of these grant the said right to partners in same-sex live-in relationships. Section 20[68] *of the DV Act provides the right to the female victims of domestic violence, even if not married and in a live-in relationship*[69]*. However, as mentioned above, the Act's protection isn't awarded to same-sex live-in couples. The Hindu Marriage Act, 1955*[70] *accords the right to maintenance to partners irrespective of gender, under Section 24*[71] *and Section 25*[72]*, but limits it to only Hindu couples, legally married as per the Act's Section 5*[73]*, thereby excluding same-sex couples. The Hindu Adoptions and Maintenance Act, 1956*[74] *though progressively provides the right to a widow against her father-in-law under Section 19*[75]*, apart from a wife against her living husband under Section 18*[76]*, the law is chained by the same shackles as the Hindu Marriage Act, 1955. Same-sex couples are also similarly failed by the* Muslim Women (Protection of Rights on Divorce) Act, 1986[77] *under Section 3*[78], the Divorce Act, 1869[79] of Christians under Section 37[80] and the Parsi Marriage and Divorce Act, 1936[81] under Section 40[82], on account of not being a heterosexual

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[67] Badshah v. Urmila Badshah Godse, (2014) 1 SCC 188.
[68] The Protection of Women from Domestic Violence Act, § 20, No. 43 of 2005, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[69] Lalita Toppo v. The State of Jharkhand and Anr., (2019) 13 SCC 796.
[70] The Hindu Marriage Act, No. 35 of 1955, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[71] *id.* § 24.
[72] *id.* § 25.
[73] *id.* § 5.
[74] The Hindu Adoptions and Maintenance Act, No. 73 of 1956, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[75] *id.* § 19.
[76] *id.* § 18.
[77] The Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[78] *id.* § 3.
[79] The Divorce Act, No. 4 of 1869, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[80] *id.* § 37.
[81] The Parsi Marriage and Divorce Act, No. 3 of 1936, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[82] *id.* § 40.

legally married couple.

Apart from these laws, the right to maintenance has also been provided to partners under Section 125[83] *of the Criminal Procedure Code, 1973 and most efficaciously so, since firstly, it is secular*[84]. *Secondly, t*he Supreme Court has repeatedly held in numerous cases[85], including the reputed Justice Krishna Iyer in *Captain Ramesh Chander Kaushal v. Veena Kaushal*[86], that the Section is a "measure of social justice"[87] preventing vagrancy and destitution in society and thus, must be construed with a "brooding presence of constitutional empathy"[88] for the weaker sections. Under Section 125(1) (a) read with Explanation (b), a husband is legally bound to maintain his wife, upon the fracture of their marriage or even divorce, until the wife remarries. Therefore, with the scope of 'wife' being limited to legally wedded or divorced wives and that same-sex couples cannot be legally married in India under any personal law, the indigent partner upon the fracture of their same-sex live-in relationship, is callously left remediless under the Section and is forced into a state of destitution.

To add to their misery, same-sex couples are further excluded from being protected under the Section due to inadequacies in judicial interpretation. The Supreme Court has long debated the idea of expanding the scope of 'wife' under the Section to include women in heterosexual live-in relationships, with long periods of cohabitation being sufficient to infer a presumption of marriage to award the right to such women[89]. In the most conclusive case on the matter, *Chanmuniya v. Virendra Kumar Singh*[90], the Court called for such expansive interpretation considering that a man in a live-in relationship shouldn't be permitted to enjoy the privileges of a de-facto marriage, albeit not being liable for the corresponding duties and obligations attached to a marriage, such as maintenance, due to the inadequacies of law. It was also observed and rightly so, that the alternate narrow interpretation of 'wife', only meaning legally wedded wife whether divorced or not, would fail the Section's objective of social justice. The case of *Vimala v. Veeraswamy*[91], was relied upon in *Chanmuniya* as it promulgated that the Section intended, in congruence with its social objective, to include women lacking the legal

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[83] CODE CRIM. PROC. § 125 (1973).
[84] Mohd. Ahmed Khan v. Shah Bano Begum and Ors., 1985 SCR (3) 844.
[85] Vimala v. Veeraswamy, (1991) 2 SCC 375; Captain Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807; Jagir Kaur v. Jaswant Singh, AIR 1963 SC 1521; Nanak Chand v. Chandra Kishore Aggarwal, AIR 1970 SC 446.
[86] Captain Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807.
[87] *id.*
[88] *id.*
[89] Rajendra Anbhule, *Aggrieved Women and Live-In Relationships*, 2013 BHARATI LAW REVIEW 67, 70 -73; Anuja Agrawal, *Law and 'Live-in' Relationships in India*, 47 BHARATI LAW ECONOMIC AND POLITICAL WEEKLY 50, 50-56 (2012).
[90] Chanmuniya v. Virendra Kumar Singh, (2011) 1 SCC 141.
[91] Vimala v. Veeraswamy, (1991) 2 SCC 375.

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status of wife within the scope of 'wife', since divorced wives under its Explanation (b) have been legislatively incorporated within the scope's ambit. The 2003 Report of the Justice Malimath Committee on Reforms of Criminal Justice System[92] was also relied upon, which advocated the adoption of the expansive interpretation legislatively. The most recent judgement in favor of the expansive interpretation is that of the Punjab and Haryana High Court in the 2016 case of *Ajay Bhardwaj v. Jyotsna*[93], which depended upon *Chanmuniya*. On the contrary however, the two-judge Supreme Court bench in *Chanmuniya* had found itself incapable of overturning two previous decisions of the same Court that had adjudicated in favor of the narrow interpretation, since these were decisions of larger Supreme Court benches; *Yamunabhai Anantrao v. Anantrao Shivram Adhav*[94] and *Savitaben Somabhat Bhatiya v. State of Gujarat*[95].

Thus, due to this divergence of judicial opinion in the interpretation of 'wife' spanning over three decades, the Supreme Court has been unable to decisively secure the right to maintenance of women in heterosexual live-in relationships under Section 125. With abundant ambiguity on the matter with respect to heterosexual live-in couples, it isn't far-fetched to believe that there exists no judicial pronouncement interpreting the Section to provide the right to indigent partners upon the fracture of their same-sex live-in relationships. Furthermore, even if such right is granted, given that Section 125 only gives the right to women and not men, only queer women in live-in relationships will benefit from the Section and not queer men.

With regards to the right to maintenance of children against their parents, Section 125(1)(b) and (c) accords the right to married and unmarried legitimate or illegitimate minor children, and unmarried major children with physical or mental impairments. The right is myopically operational only against fathers as per the Section, but it has been judicially interpretated to also include mothers by the Madhya Pradesh High Court[96]. Therefore, while the Section triumphs the children of queer parents when either is a natural parent, given that such children would inevitably be illegitimate or out of wedlock, it fails at large, the children of queer parents, whether mothers or fathers. This is because a child of queer parents can claim maintenance only from the legal natural or adoptive parent under the Section and such a parent is only one amongst the queer parents, either on account of the heterosexual underpinnings of natural conception or joint adoption, as we will learn in detail in the Section of Parenthood below. This

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[92] Dr. Justice V.S. Malimath, *Committee on Reforms of Criminal Justice System*, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA (2003), https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf.

[93] Ajay Bhardwaj v. Jyotsna, (2016) SCC P&H 9707.

[94] Yamunabhai Anantrao Adhav v. Anantrao Shrivam Adhav, AIR 1988 SC 644.

[95] Savitaben Somabhat Bhatiya v. State of Gujarat, AIR 2005 SC 1809.

[96] Madhuri Bai v. Minor Surendra Kumar, 2000 (1) MPHT 602.

is in gross negligence of the fact that such other parent, lacking the legal status of a parent, might not only be equally involved in child-rearing as the legal parent but may also be more economically capable of the two to provide maintenance. On the other hand, given that a child born to a heterosexual live-in couple would be the illegitimate child of both the father and the mother, such child can claim maintenance from both parents.

Under Section 125(1)(d), the provision of the right to maintenance to parents against their major children, has also been made, wherein a father or mother can exercise the said right but only against their son. Nonetheless, in the case of *Vijaya Manohar Arbat v. Kashiram Rajarao Siwai*[97], this legislative shortcoming was overridden, and the right was made exercisable against both, sons and daughters. Therefore, one amongst the queer parents, who is the legal natural or adoptive parent, will be accorded the protection of Section 125(1) (d), regardless of the child's gender. However, acute legislative oversight simultaneously persists since one amongst the queer parents is failed, given that while one of them has the legal status of a parent, the other doesn't and hence, is without Section 125(1) (d)'s refuge. Such parent has been abandoned by the law, even though they may be the one in need of maintenance, and not the other queer parent. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007[98] is another secular law that accords the right to maintenance to parents against their children, but like Section 125(1) (d), only the legal queer legal parent will benefit from the Act, and the other queer parent would again be left remediless, neither having the right as a parent nor a senior citizen under the Section 4[99] of the said Act.

It is, therefore, explicitly evident that none of the maintenance laws in India provide any requisite protection to same-sex live-in couples, except under Section 125. But the latter also only awards the right to same-sex couples inadequately and more importantly, in a perfunctory fashion at best, given that the Section, as evident through its text, intends to protect only heterosexual married couples and their children. While the right to maintenance of partners in heterosexual live-in relationships, against each other, is currently confined within the cast of diverging judicial opinions, the right of children born to heterosexual live-in couples and the right to maintenance of couples against such children, is arguably secured under Section 125(1) (b), (c) and (d). This is in light of the Supreme Court's decisions in *Tulsa v. Durghatia*[100] and *Madan Mohan Singh v. Rajni Kant*[101], where children born out of wedlock to heterosexual live-

[97] Vijaya Manohar Arbat v. Kashiram Rajarao Siwai, AIR 1987 SC 1100.
[98] The Maintenance and Welfare of Parents and Senior Act, No. 56 of 2007, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[99] *id.* § 4.
[100] Tulsa v. Durghatia, AIR 2008 SC 1193.
[101] Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

in couples, have been deemed as legitimate and not illegitimate, and are to have all rights that accrue otherwise to legitimate children born to married couples. However, children adopted by heterosexual live-in couples and such couples themselves face the same legal handicaps as queer parents and their children under Section 125, given that joint adoption isn't allowed for even heterosexual couples, as we will learn in the Section on Parenthood below. In toto therefore, Indian maintenance laws discriminately accord more abled protection to heterosexual live-in couples, than the LGTBQ+ in a same-sex live-in relationship.

If any adequate protection of the right to maintenance was to be given to same-sex live-in couples and their children, the most promising prospect was that of Section 125, given its commitment to social justice. However, by being informed by archaic and draconian heterosexual definitions of relationships and patriarchal notions of employment and economic independence, the Section today stands frustrating its own objective of being a "measure of social justice"[102] and having "constitutional empathy"[103] towards same-sex live-in couples.

VI. Parenthood

Society and the judiciary lay a lot of emphasis on procreation and having a child, while assessing the validity of a heterosexual live-in relationship in India.[104] Even though same-sex couples in India are not granted the legal protection of marriage, they cohabite as any heterosexual married couple and hence, may also be desirous of child-rearing. Unlike heterosexual couples, same-sex couples cannot independently reproduce due to biological insufficiencies and lack of medical alternatives in India. Hence, prima facie, three distinctive ways of entering into parenthood exist for them in India, but all of these remain carpeted with legal and social impediments.

The first means of entering into parenthood for same-sex live-in couples is through adoption. The Adoption Regulations, 2017[105] and the guidelines introduced by the Central Adoption Resource Authority (hereinafter, *CARA*) together govern adoption, both of which were constitutionalized under The Juvenile Justice (Care and Protection of Children) Act, 2015[106]. As per Section 5 of Adoption Regulations, 2017, a prospective adoptive parent who is eligible to adopt, irrespective of already having a biological child, includes a single or unmarried male, single or unmarried female and a married couple with a minimum of two years of "stable

[102] Captain Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807.
[103] *id.*
[104] Indra Sarma v. V.K. Sarma, (2013) 15 SCC 755.
[105] The Adoption Regulations, 2017, Gazette of India, pt. II sec. 3(i) (Jan. 4, 2017).
[106] The Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016, Gazette of India, pt. II sec. 1, http://www.egazette.nic.in.

marital relationship"[107]. In effect, a couple in a live-in relationship, whether heterosexual or homosexual, is devoid of firstly, the opportunity of jointly adopting a child and secondly, of both partners having the legal status of a parent before law. Nonetheless, same-sex live-in couples are not absolutely failed by the Adoption Regulations as the alternate solution for them is for either of them to adopt a child, as a single parent. However, this encouraging prospect for same-sex couples was eclipsed by CARA's May 2018 Circular, Registration of Cases of Single PAPs [Prospective Adoptive Parents]. Having a Live-In Partner in a Long Time Relationship and Not Married[108]. It deemed any individual in a live-in relationship ineligible to adopt a child as a single parent, for a relationship devoid of marriage was, parochially, not considered to be a "stable family"[109] for children to be placed in. The Circular had the potency to absolutely incapacitate, not only same-sex couples but also heterosexual live-in couples, from adopting. Realizing its abject consequences, CARA withdrew the said Circular in October 2018, through another Circular, Reconsideration of Decision to Allow Single PAPs [Prospective Adoptive Parents] in Live-In Relationship[110].

Therefore, the law, as it should be idealistically, does permit same-sex live-in couples to adopt children. However, it is important to take cognizance of the fact that perennial homophobia within the Indian society, may deter CARA from administratively approving a single parent to adopt, if it is revealed that the said parent is in a same-sex live-in relationship. Additionally, since such adoption will be by one of the partners in the same-sex relationship as a single parent, the other partner will not be awarded the legal status of a parent. The said partner, therefore, has neither legal rights over the adopted child nor any obligations that are to be furnished towards the adopted child, irrespective of the fact that such partner may assume all the required duties of a parent. The adopted child would also not be bound by any obligations against the said partner as parent, such as maintenance under Section 125(1) (b) and (c) of the Criminal Procedure Code, 1973. Apart from this, as per Section 5(c) of the Adoption Regulations, 2017, a single male cannot adopt a female child. Thus, queer fathers only have the choice of having a son, if they wish to adopt.

The Hindu Adoptions and Maintenance Act, 1956 also allows for adoption, but only by Hindu males and females. Furthermore, a Hindu male, as per Section 7[111], is only eligible to adopt if

[107] The Adoption Regulations, 2017, § 5, Gazette of India, pt. II sec. 3(i) (Jan. 4, 2017).
[108] Central Adoption Resource Authority Circular: Registration of Cases of Single PAPs Having a Live-In Partner in a Long Time Relationship and Not Married, 2018, Gazette of India, pt. II sec. 3(i) (May 4, 2018).
[109] *id.*
[110] Central Adoption Resource Authority Circular: Reconsideration of Decision to Allow Single PAPs in Live-In Relationship, 2018, Gazette of India, pt. II sec. 3(i) (Oct. 11, 2018).
[111] The Hindu Adoptions and Maintenance Act, § 7, No. 73 of 1956, GAZETTE OF INDIA, pt. II sec. 1,

he is in a heterosexual legal Hindu marriage and a Hindu female is eligible only when she is a widow, divorcee or unmarried, as per Section 8[112]. Therefore, while queer fathers are not allowed to adopt under the Act, queer mothers can attempt to do so, on account of being unmarried. However, only one of them will enjoy the legal status of a parent and the other will suffer due to the lack of it, as discussed above. Furthermore, disclosure of their status as a same-sex live-in couple might pose potential hindrances in their path to adoption. Moreover, the said adoption is further restricted by Section 11(i)[113] and Section 11(ii)[114] of the Act which suggests that a male or female child can only be adopted when the adoptive parent has no child of the same gender already, legitimate or illegitimate.

The second means of entering into parenthood for same-sex couples is surrogacy. Currently, the only regulation that governs surrogacy in India is the Indian Council for Medical Research's non-binding regulation of National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005[115]. As evident from the National Guidelines' Section 2.2[116], Section 3.10[117] and Section 3.12[118], the said law is primarily hypothesized upon the circumstance of a heterosexual married couple opting for surrogacy as a last resort, due to their medical incapacities of conceiving. Therefore, the National Guidelines furnish no provision for heterosexual live-in couples to opt for surrogacy, let alone same-sex live-in couples. Even if one is to argue that since the Guidelines are non-binding and arguably although, same-sex couples can opt for surrogacy, the possibility of such a prospect transpiring into reality is meek. This is because the society's profound and ingrained homophobia carries the potential of deterring surrogates, gamete donors and ART clinics performing surrogacy, from aiding same-sex couples in the surrogacy process. The reality is also bleak for same-sex couples if the Indian Parliament passes the Surrogacy (Regulation) Bill, 2019[119], enacting it into law. Even though the Act will be India's first comprehensive and binding law on surrogacy, it will devoid same-sex live-in couples absolutely from opting for surrogacy, since it only allows surrogacy for an infertile married heterosexual couple, with the exception of widows and divorcees, excluding

http://www.egazette.nic.in.

[112] *id.* § 8.

[113] *id.* § 11(i).

[114] *id.* § 11(ii).

[115] National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2002, Gazette of India, pt. II sec. 3(i) (2005).

[116] *id.* § 2.2.

[117] *id.* § 3.10.

[118] *id.* § 3.12.

[119] The Surrogacy (Regulation) Bill, No. 156-C of 2019, GAZETTE OF INDIA, pt. II sec. 2, http://www.egazette.nic.in.

unmarried women, which would have otherwise given the window to queer women to opt for surrogacy.

The third means for a same-sex couple to enter parenthood is that of either partner deciding to conceive a child outside of the relationship, given the heterosexual nature of conception. However, in such a circumstance, only the natural parent between the partners will be the legally recognized parent. The other partner may furnish all duties as a parent but will still remain invisible before law. Even if such partner wishes to obtain the legal status of a guardian, if not a parent, with respect to the child, the Guardians and Wards Act, 1890[120] will not permit this, since the status is only awarded to an individual when the natural parents of a minor child die, or they fail to discharge their duties towards minor.

Therefore, in totality, the Indian legislative framework deserts same-sex live-in couples with regards to having any legal recourse for jointly becoming parents. It is only possible for them to enter parenthood if one of them sacrifices their want to have the legal status of a parent, and the corresponding legal rights and duties. However, it is pertinent to note that a heterosexual live-in couple is also similarly restricted by legal impediments in its options for child-rearing. Thus, it is not just heterosexism but rather the untenable importance that has been given to the institution of marriage in Indian law and thus, society, that obstructs a same-sex live-in couple from entering into parenthood. Nonetheless, unlike a heterosexual live-in couple, a same-sex couple encounters social impediments in form of homophobia, which only shuts those doors of entering into parenthood that would otherwise remain open for a heterosexual live-in couple.

VII. NEED FOR A BETTER TOMORROW!

The DV Act, despite being the first and only Indian legislation to recognize live-in relationships, does not extend its protection to same-sex live-in couples, especially when they are equally vulnerable to domestic violence as heterosexual couples. The Bombay High Court has read the right to motherhood[121] within Article 21 of the Indian Constitution, and it can be argued thus, that the right to parenthood also exists under Article 21. However, there rights are heavily restricted by unwarranted governmental interference when it comes to same-sex couples. The right to maintenance may be a "measure of social justice"[122] but it is neither adequately available to same-sex couples as partners, nor their children. The implication of these insufficiencies within the Indian legal framework in affording such basic rights to same-sex couples, can only be one. That, while heterosexual live-in couples have been given the

[120] The Guardians and Wards Act, No. 8 of 1890, GAZETTE OF INDIA, pt. II sec. 1, http://www.egazette.nic.in.
[121] Hema Vijay Menon v. State of Maharshtra, (2015) SCC Online Bom 6127.
[122] Captain Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807.

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privilege of legal protection even though limited, same-sex couples have not even been accorded this privilege.

In some isolated circumstances, both may have the same legal standing, but largely same-sex couples have been deserted by the law, for no expressed legal protection is provided to them and such isolated circumstances are cases of unintended, perfunctory and offers inadequate protection. Therefore, it is evident that the rights and social benefits that are analogous to the existence of heterosexual live-in relationships, let alone marriages, are not correspondingly available to a same-sex live-in couple. Therefore, even the judgements[123] of the Kerala High Court, Orrisa High Court and the Uttarakhand High Court, holding that same-sex couples have the legal right to be in live-in relationships as any heterosexual couple, are mere tokenistic acknowledgements of the right. For they may have the right in theory, but in practice, without the corresponding legal protections and social benefits attached to live-in relationships, in no circumstance can they exercise the right fully, actualizing it into reality. In practice, thus, heterosexual and homosexual live-in relationships are not equal before the law in India.

Without the official recognition of marriage, we are "strangers in law"[124] *- Ankita Khanna*

These words only reverberate the truth. The right to marriage is a fundamental right available to the LGBTQ+ community[125], but the law fails to make this right operational for them. The only other legally recognizable union for the community, is live-in relationships. But without the rights, protections and consequences of a live-in relationship being accorded to same-sex couples, they truly are "strangers in law"[126]. This is resultant of the specter of heterosexism, the majoritarian morality in India, that casts its ominous shadow over the legal realities of same-sex couples. Even though the said majoritarian morality has permeated the Indian society, as evident through the Centre's response in *Abhijit Iyer Mitra*, it is not a conventional phenomenon but rather a modern one. Heterosexism is an aberration that has been imposed upon the Indian society in the nineteenth century, by the Britishers in accordance with their Victorian moralities. This homophobic attitude was then legalised by the Britishers under Section 377[127]. In pre-colonial India however, gender fluidity was the norm and not heteronormativity, evident through various ancient literature and scripts[128]. Therefore, today's

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[123] Madhu Bala v. State of Uttarakhand and Ors., (2020) SCC OnLine Utt 276; Chinmayee Jena v. State of Odisha and Ors., 2020 (II) ILR (Cut.) 514; Sreeja S. v. The Commissioner of Police, Thiruvananthapuram and Ors., (2018) SCC Online Ker 3578.

[124] Kidangoor, *supra* note 2.

[125] Mr Wajeed Khan H B v. Commissioner of Police, W.P.H.C. 92/2020.

[126] Kidangoor, *supra* note 2.

[127] SALEEM KIDWAI & RUTH VANITA, SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY xxii-xxiv (1ST ED. 2000).

[128] *id.*

majoritarian morality that is ironically advertised as a value of ancient India, has pervasively worked to water down the constitutional morality upheld in the case of *Navtej Singh Johar*. A value that we have not inherited from our diverse Indian heritage, but was rather dictated to us, has effectively created a malignant disparity and made the existing legislative and judicial framework ill equipped to protect the LGTBQ+, even within the boundaries of the only legally recognized union between them.

It is imperative for the Indian society, and especially the Legislature, to find their way back to their roots and not only uphold but also bolster constitutional morality. Decriminalisation of Section 377 was half the battle won and this fight for social justice and legal parity will only end upon a comprehensive realisation of civil rights of the LGBTQ+ community. While the legal recognition of marriage for same-sex couples would be the most optimum means to achieve the said realisation, currently it remains a distant dream. The eradication of the majoritarian morality and widespread homophobia is the need of the hour, yet still the Indian society and Government, remain caged by it. The Centre's response in *Abhijit Iyer Mitra* being the most prominent example of this, given the sub judice case demands the legal recognition of marriage. Therefore, until the fundamental right to marriage of same-sex couples is legally exercisable for them, it is pertinent to empower the institution of live-in relationships, being the only union remotely recognised for them. The legal right to be in such relationships is unequivocally accorded to same-sex couples, but it also must be made operational in practicality. The rights and protections intertwined with live-in relationships in India, especially that of domestic violence, maintenance and parenthood, are limited and mostly available to heterosexual couples. Not only should the range of the rights and protections be expanded, but it must also be similarly applicable to both same-sex and heterosexual couples. In fact, once this is done, only then is it possible to move another step forward and look beyond majoritarian morality and truly recognize the fundamental right to marry of the queer.

Nonetheless, the reality of a same-sex live-in couple today continues to be bleak, given the hollow protection law grants to them. All that awaits the LGBTQ+ community in same-sex live-in relationships in India, is a pot of tar at the end of the rainbow.

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