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BEYOND DECRIMINALIZATION: BRIDGING THE GAPS IN LGBTQ+ FAMILY LAW IN INDIA

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ABSTRACT

This article critically examines the systemic inadequacies in Indian family law that continue to marginalize LGBTQ+ individuals despite significant progress in LGBTQ+ rights, notably the decriminalization of homosexuality in *Navtej Singh Johar v. Union of India* (2018). Although decriminalization was a milestone, the Indian family law system remains deeply heteronormative and fails to legally recognize and protect LGBTQ+ families in marriage, adoption, inheritance, and surrogacy.

The article identifies the constitutional contradictions arising from excluding LGBTQ+ persons from marriage equality, adoption rights, and inheritance laws through a comparative jurisprudence analysis and landmark Indian cases. It claims that the failure to enact reforms is perpetuating inequality, societal prejudice, and legal uncertainty. It discusses the possible role global precedents from decisions such as *Obergefell v. Hodges* (U.S.) and *X and Others v. Austria* of the European Court of Human Rights could play as guidelines for legislative evolution in India.

Lastly, the article underlines the imperative need of overall legislative reforms in the form of gender-neutral amendments to the Special Marriage Act, religious marriage laws, explicit recognition of LGBTQ+ adoption rights, and inheritance provisions. For this, it also advocates domestic partnership laws and expansion of surrogacy and assisted reproductive technologies to LGBTQ+ individuals and couples.

1. Marriage Equality: An Incomplete Journey

Marriage is a constitutionally protected, social institution too, and involves many rights or privileges and safety measures. In the case of *Shafin Jahan v. Asokan K.M.*³⁴³, the Hon'ble Supreme Court highlighted the fact that the freedom of a person to marry whomsoever one pleases forms a vital component of the right to life guaranteed by Article 21³⁴⁴. While there is that admission, the right to marry one's choice extends only for opposite-sex couples and not for same-sex marriages.

Article 14³⁴⁵, which prevents discrimination based on equality before the law, further raises

concerns since same-sex weddings are not equally acknowledged as opposite-sex weddings. The Hon'ble Supreme Court, in *Dharam Dutt v. Union of India* (2004)³⁴⁶, held laws that discriminate against people have to be quashed if they cannot pass the test of reasonable classification and violate the principles of equality. This standard appears to be violated by the exclusion of same-sex couples from marriage privileges, which arbitrarily denies a particular group of people the same rights as heterosexual couples.

In the *Navtej Singh Johar* case³⁴⁷, the Supreme Court decriminalized homosexuality by reading down Section 377 of the Indian Penal Code,

³⁴³ *Shafin Jahan v. Asokan K.M.*, AIR 2018 SC 1933 (India).

³⁴⁴ India Const. art.21.

³⁴⁵ India Const. art.14.

³⁴⁶ *Dharam Dutt v. Union of India*, AIR 2004 SC 1295 (India).

³⁴⁷ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

marking a monumental step toward LGBTQ+ rights. However, the judgment was careful to avoid venturing into the broader issue of marriage equality, leaving it for future consideration. The court recognized that sexual orientation is an integral part of one's identity and that a right to privacy encompasses rights to intimate relationships. While this was a landmark acknowledgment for same-sex relationships, there was not a concomitant legal right to marry, thereby continuing the inequality for LGBTQ+ individuals.

In *Suresh Kumar Koushal v. Naz Foundation*³⁴⁸, the Hon'ble Supreme Court upheld the validity of Section 377³⁴⁹ and contended that homosexuality as a concept is still not widely accepted in Indian culture. Although the *Navej Singh Johar* case finally rejected this view, it remains to explain the deep-seated societal opposition to LGBTQ+ rights that still affects the law.

The Honourable Supreme Court of India struck down the colonial-era law of adultery in *Joseph Shine v. Union of India*³⁵⁰, recognizing the fact that an institution like marriage requires equal rights and respect to be shared among spouses. Still, for couples who are forbidden from getting married, this concept of equality among spouses in marriage serves no purpose whatsoever. In effect, LGBTQ+ people are denied marriage privileges, which makes their partnerships invisible to the law and prevents them from enjoying the full rights of legal personhood.

2. Comparative Jurisprudence

Legal systems from around the world are very enlightening on how Indian law may develop in this regard. Same-sex marriages are afforded a constitutional right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as determined by the U.S. Supreme Court in *Obergefell v. Hodges*³⁵¹ in

2015. The court stated that the denial of equal access to marrying same-sex partners is a core right which goes against their equal dignity and esteem. In an analogous way, the legal sanction of same-sex unions in South Africa, Canada, U.K and a host of European countries point to the direction of global advancement towards marital equality. More so, the European Court of Human Rights ruled in *X and Others v. Austria*³⁵² that Austria had violated the European Convention on Human Rights for prohibiting a gay couple from adopting together. The court emphasized that same-sex couples should be given equal rights to heterosexual couples, and sexual orientation cannot be used as a legal ground for discrimination in adoption issues.

On the other hand, judicial precedents in India have been very reluctant to take a decision directly on same-sex marriage till date, preferring to wait for the legislature to enact the required changes. Unfortunately, this reluctance keeps bigotry alive as LGBTQ+ couples are still denied legal recognition and rights. Marriage recognition petitions under the Special Marriage Act from LGBTQ+ couples highlight just how pressing the matter is. For instance, they face so many challenges if their rights are not clearly set, such as loss of social support and inheritance to name a few.

3. Adoption: A Right Denied by Omission

The Main legislations through which adoption is regulated include the Hindu Adoption and Maintenance Act, 1956 (HAMA) as well as Juvenile Justice (Care and Protection of Children) Act, 2015 JJ Act. However, neither of these laws explicitly allows or prohibits same-sex couples or LGBTQ people from adopting children, leaving the matter in a legal limbo.

Section 57 of the JJ Act³⁵³ states one of the requirements of a Prospective Adopting Parent (PAP) that "no kid shall be placed in adoption to a couple if they have not had at least two years of solid marital relationship." This makes it

³⁴⁸ *Naz Foundation v. Suresh Kumar Koushal*, AIR 2014 SC 563 (India).

³⁴⁹ Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

³⁵⁰ *Joseph Shine v. Union of India*, AIR 2018 SC 4898 (India).

³⁵¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁵² *X and Others v. Austria*, Application No. 19010/07, Eur. Ct. H.R. (2013).

³⁵³ Juvenile Justice (Care and Protection of Children) Act, 2015, § 57, No. 2, Acts of Parliament, 2015 (India).

impossible for same-sex couples to adopt because same-sex marriages needed to be legalized in the first place. Under the Act, unmarried individuals and marriage by a couple qualify for adoption under the law but the language speaks to a normative heterosexual model. Single LGBTQ+ individuals qualify for adoption although same-sex couples are not extended joint adoption rights which creates a wide loophole.

In *Deepika Singh v. Central Administrative Tribunal (2021)*³⁵⁴, this issue was raised by a lesbian woman who sought to adopt a child. According to CAT, her sexual orientation was a valid reason for rejection of her application, even in the absence of legal restrictions. Even though the Hon'ble High Court of Punjab and Haryana ultimately decided in her favor and acknowledged her individual right to adoption, the case brought to light the broader legal uncertainty experienced by LGBTQ+ persons in adoption matters. Denying LGBTQ+ people and couples the opportunity to adopt not only upholds discrimination but also fails to consider the child's best interests.

Research in countries that allow same-sex adoption has shown that children raised by LGBTQ+ parents perform as well as children raised by heterosexual parents, thereby debunking the notion that same-sex parenting is socially unacceptable³⁵⁵. In addition, the absence of clear legal standards for LGBTQ+ adoption leads to inconsistent legal application. Adoption agencies may be resistant to taking in applications from the LGBTQ+ people because of biases in society, which deprives children of their chance to grow up in a loving and supporting environment.

4. The Legal Disinheritance of LGBTQ+ Partners

As per Section 2 of the Hindu Succession Act³⁵⁶, only Hindus, Buddhists, Jains and Sikhs are

eligible to inherit and does not recognize same-sex couples which is why there is no provision that allows same-sex partners to be declared as legal heirs. Similarly, the Indian Succession Act, 1925 has a similar loophole due to which LGBTQ+ people are left with no choice but to rely on wills to secure property rights for their partners but even then, disputes and challenges from biological family members can arise.

While there has been progress towards acknowledging non-heteronormative relationships, there has also been the case of *Arun Kumar v. Inspector General of Registration, 2019*³⁵⁷, wherein a marriage by a transgender woman was declared valid under the Hindu Marriage Act. However, it was applicable only for the transgender group and not to the same-sex group. This shows that there is a legal difference in treating LGBTQ+ unions because transgender persons are accorded more respect compared to gay or lesbian couples.

Additionally, biological family members tend to contest such claims to inheritance when the couple is not legalized, especially with large estates and properties.³⁵⁸ Ultimately, that leaves LGBTQ people vulnerable because after years of sharing a home they can be left legally disinherited.

5. A Need for Comprehensive Legislative Reform

The language of the Special Marriage Act, 1954 must be updated with gender-neutral terminology such as changing the term "husband" and "wife" to "spouse," doing away with the requirement that was specific to genders. For instance, eligibility criteria should be revised to accommodate any two consenting adults, regardless of their gender or sexual orientation.

³⁵⁴ *Deepika Singh v. Central Administrative Tribunal*, 2022 SCC OnLine SC 1088 (India).

³⁵⁵ D. Mazrekaj, M. M. Fischer, & H. M. W. Bos, *Behavioural Outcomes of Children with Same-Sex Parents in The Netherlands*, 19 INT'L J. ENVTL RES. & PUB. HEALTH 5922, 5922-40 (2022).

³⁵⁶ The Hindu Succession Act, 1956, § 2, No. 30, Acts of Parliament, 1956 (India).

³⁵⁷ *Arun Kumar v. Inspector General of Registration*, (2019) W.P. (M.D.) No. 4125 (India).

³⁵⁸ Wealth Enhancement Group, *7 LGBTQ Estate Planning Concerns You Haven't Considered*, WEALTH ENHANCEMENT GROUP BLOG (Jan. 2, 2025, 9:00 AM), <https://www.wealthenhancement.com/s/blog/7-lgbt-estate-planning-concerns-you-haven-t-considered-MCFXPVQW44BBTTPP7UHT24DG5PI>.

Also, the Juvenile Justice Act and the Hindu Adoption and Maintenance Act should include inclusive language with reference to "parents" or "guardians" instead of the "mother" and "father." Adoption agencies and Child Welfare Committees (CWCs) should be trained to eliminate biases against LGBTQ+ applicants and assess adoption applications purely based on the child's best interests.

The Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021, were enacted to regulate ethical practices in ART and surrogacy but fail to include the LGBTQ+ individuals and couples. This limitation denies the surrogacy services to the LGBTQ+ couples and unmarried individuals and thus infringes on their fundamental right life and personal liberty. In addition, the ART Act forbids clinic-based discrimination but makes no explicit statements regarding LGBTQ+ applicants, and as such, its interpretation is a matter of controversy and may encourage biased practices. Reform under both of these acts must not only introduce amendments in the eligibility provisions but also the addition of express anti-discrimination clauses to deny service on grounds of sexual orientation or gender identity.

Not everyone in the LGBTQ+ community would want to tie themselves down into marriage because of personal, cultural, or societal reasons. The institution of domestic partnerships recognized as a valid union legally offers an alternative which grants individuals and their partners various rights without having to be wedded. The legal framework on domestic partnerships should provide similar rights and benefits like those enjoyed by married couples. These include joint bank accounts, shared property ownership, access to health insurance benefits, and next-of-kin status for medical and legal decision-making. For LGBTQ+ couples, this recognition ensures that their relationships are not dismissed or overlooked, even in conservative societal settings. A simplified registration process for domestic partnerships is crucial to ensure accessibility, particularly for

individuals from marginalized communities. This process may involve a declaration before a magistrate or registrar, thereby eliminating bureaucratic hurdles.

Addressing the critical areas enumerated above would put India closer to its aim of providing a truly inclusive legal framework for LGBTQ+ persons and families. These reforms not only carry with them legal obligations but also a moral imperative to enforce equality, dignity, and human rights for all.

Conclusion

In conclusion, though decriminalization of homosexuality in the Navtej Singh Johar case constitutes a big leap toward LGBTQ+ rights, family law remains deeply entrenched in heteronormativity in India. Legislative changes in law are necessary to fill gaps in marriage, adoption, inheritance, and surrogacy laws. India should adapt to these inclusive and gender-neutral legal frameworks against LGBTQ+ relationships and families by adopting global precedents. These reforms not only carry with them legal obligations but also a moral imperative to enforce equality, dignity, and human rights for all.

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