

How Can Families be Imagined Beyond Kinship and Marriage?

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The Transgender Persons (Protection of Rights) Bill, 2019 and the Surrogacy Regulation Bill, 2019 reinforce the idea of family as a patriarchal, heterosexual and casteist institution and fail to account for other models of "chosen families" and intimacies that co-exist in India. Given that the Supreme Court has recognised the right to intimacy as a core component of autonomy and privacy, the article makes a case for the law to fundamentally rethink the way it regulates personal relationships and in doing so, adopt a more functional" approach.

On 5 August 2019, the Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2019 (hereinafter the transgender bill, 2019) and the Surrogacy (Regulation) Bill, 2019 (hereinafter the surrogacy bill, 2019) without due deliberations. These bills which reinforce patriarchal, heteronormative, and casteist values of the "great Indian family," if passed by the Rajya Sabha, could soon become a reality.

In this piece, the authors critique the predominant understanding of the family inscribed in these bills as one based solely on marriage, blood, or adoption. The bills do not acknowledge other forms of chosen families and intimacies that coexist in the Indian society. Through an

analysis of various existing judicial precedents and recently enacted laws, the authors argue that the legislature needs to rethink how the said laws regulate interpersonal relationships.

Prevalence of Non-normative Families and Families of Choice

The idea of the marital and procreative family is at the heart of regulation of intimacy by the state. Yet, there are many individuals and relationships that do not fit into this idea. Recent reports show that single person households constitute 12.5% of the all households in India (Pandit 2019). Moreover, 7.5% of all the households are lone-parent families of which majority (4.5% or approximately 13 million households) are headed by women (Pandit 2019). However, a lesser researched question is how such individuals live and define family outside of the traditional structures of marriage and blood ties.

While research in this area is scarce, the greater visibilisation of the LGBT+ community since the 1980s and 1990s in India threw light on how some individuals were creating their own structures of support outside the rigid bounds of marriage. This period saw same-sex couples document their intention to live together in the form of a registered life partnership deed (Vanita 2005:97) and in some cases, in the form of friendship contracts such as Maitri Karar,^[1] which declared their status and rights as a couple (Vanita 2005:63). By 1999, legal alternatives to the idea of the family were explored: domestic partnerships for the recognition of same-sex relationships were debated in the Indian context (Fernandez 1999: 73-74) as much as the idea of how “marriage” could be reformed to recognise queer relationships (Fernandez 1999:83-88).

Further, within the LGBT+ movement, the existence of Hijra communities also draws attention to the diversity of familial structures prevalent within the Indian society (Reddy 2005:150; Revathi and Murali 2016:10-13). Hijras, who are cast out of their natal families for defying strictly enforced gender codes, complicate our understanding of family as they create their own non-biological forms of kinship. Their households are headed by older Hijras, known as “gurus” or mothers who take on the economic and social responsibilities for their “chelas” or children and are responsible for initiating the chelas into the customs and traditions of the Hijra household. These relationships are integral to the lineage and descent within Hijra *gharanas* (Reddy 2005: 150).

Recent academic work on motherhood also explores the concept of non-normative families. Nandy (2017) explores the stories of women who identify as “queer” or “lesbian”, unwed biological mothers and unmarried friends raising an adopted child together. The narratives of these women highlight the socio-legal exclusions that are faced by those who choose to live in such arrangements. For instance, what would be the status of an unmarried woman who has a child with a married man but does not “live-in” with him or that of two or more friends raising a child together? These narratives highlight the need for broadening legal recognition of dependency under the law, especially where it arises out of

bonds that are not conjugal or romantic, but could nonetheless involve significant instances of emotional and economic interdependence (Nandy 2017: 290–324). As Nandy notes, “Friends are often seen as ‘outsiders’ to the family because they share neither blood nor material assets; hence they remain outside the structures created by bloodlines” (2017: 349–350).

Such realities underscore how the social understanding of “family” is witnessing an intermittent and patchy transition even while the idea of the marital, procreative, heterosexual family continues to dominate both the public discourse and our social imagination. In the following section, we discuss how, despite the diversity of families that exist in our society, the state continues to reinforce the idea of the marital, procreative and casteist family through the transgender bill and surrogacy bill.

Transgender Persons Bill, 2019: A Step Closer Towards Denying the Right to Chosen Families

In 2014, the Supreme Court of India in the *National Legal Services Authority (NALSA) v Union of India* (2014) (hereinafter the NALSA judgment) case laid the groundwork for the realisation of the rights of transgender persons within the framework of the constitutional rights to equality (Article 14), life and personal liberty (Article 21) and freedom of speech and expression (Article 19). With the intention of giving a legislative framework to the NALSA judgment, a private member’s bill was introduced by Dravida Munnetra Kazhagam Member of Parliament Tiruchi Siva in 2014. This was drawn up in consultation with the transgender community (Choudhary and Sharma 2018). However, in complete disregard of this bill, a series of bills from the government followed in 2016 and 2018, which in the words of the members of the community “were but a death knell on the culmination of hopes of the community” (Mudraboyina et al 2019). The Transgender Persons (Protection of Rights) Bill, 2019, the latest in the series, continues down this very path. It was already passed in Lok Sabha and awaiting discussion and passage in the Rajya Sabha.

The aggrieved community feels that the bill being tabled in the Parliament smacks of “apathy, neglect and secrecy” towards the transgender persons in the country (Mudraboyina et al 2019). The bill has problematic provisions such as the lack of self-determination, lesser punishments in cases of violence against transgender persons, lack of reservations (Sampoorna Working Group 2019) and the conflation of the transgender identity with that of persons with intersex variations^[2]. The 2019 bill is in contravention of the directions given by the Supreme Court in the NALSA judgment [paragraph 129(5)] as it makes it mandatory for the persons concerned to undergo sex-reassignment surgery in order to identify within the male-female binary. The bill also restricts the right to a legal remedy when the state officials act in “good faith” in pursuance of the provisions of the act (section 21).

Of all the issues mentioned in the bill, fierce criticism has been levelled against section 2

(c), which expressly defines family as one that is determined by blood, marriage, or adoption. Under section 12 (3), the bill empowers the court to pass orders directing a transgender person to be shifted to a “rehabilitation” centre, thus forcing them to either choose between natal families (that are usually spaces of violence) or rehabilitation homes. This reflects the paternalism of the state wherein it denies transgender persons the autonomy to decide their futures when they face rejection from their natal families.

This paternalism is further compounded by the failure of the bill to recognise Hijra households. Some members of the community have considered the bill to be an “attack on Hijra households,” which have been the only protective space for trans, intersex and gender non-binary people abandoned or disowned by their natal families (Sampoorna Working Group 2019). Others claim that the bill, which does not recognise Hijra households, is adopted without any application of mind (Mudraboyina et al 2019) and is an attempt to “erase the Hijra culture” (Sinha 2019). The invisibilisation of such families of choice is one of the chief failings of the bill.

Surrogacy (Regulation) Bill, 2019: An Exclusivist and Casteist Law in the Making

In comparison with the transgender bill, the discussion around the surrogacy bill, 2019 has been limited. An earlier attempt was made to regulate surrogacy in 2016 when the union cabinet approved the Surrogacy (Regulation) Bill. Despite the fact that the 2016 bill was critiqued by the Rajya Sabha Standing Committee (Rajya Sabha 2017), the surrogacy bill, 2019 continues to reproduce the same provisions as those contained in the 2016 bill.

The 2019 bill, like its 2016 predecessor, bans commercial surrogacy and uncritically adopts the idea of altruistic surrogacy, which has been extensively criticised by lawyers, activists, and women’s health groups. The bill defines altruistic surrogacy as one where “no charges, expenses, fees, remuneration or monetary incentive of whatever nature” [Section 2(b)] can be paid to the surrogate mother. While the rationale behind this is to prevent exploitation of women from poor economic classes—which is a possibility in commercial surrogacy—activists claim that the bill, rather than addressing the exploitation, attacks the work itself (Gopinathan 2018).

Activist Chayanika Shah critiqued altruistic surrogacy as it portrays “child bearing as a noble cause that women should do not only for their husbands, but also for all eligible close relatives chosen and screened by the state” (Gopinathan 2018). The altruistic view, thus, discounts the premise that surrogacy is a form of reproductive labour for which a person should get paid. Even the Rajya Sabha Standing Committee had argued in favour of “compensated surrogacy” and considered the ban on commercial surrogacy affecting the right to livelihood of women who wish to become surrogates (Rajya Sabha 2017: para 5.19).

Additionally, the bill imposes the ideals of a heteronormative family while defining the eligibility for availing surrogacy. A heterosexual couple [Section 2 (g) read with Section 4

(iii) (c)], who are married for at least five years and have no child of their own [Section 4 (iii) (c)] and have been medically certified to be an infertile couple [Section 2 (r) read with Section 4 (ii) (a)] are eligible to commission surrogacy. More importantly, the surrogate mother needs to be a close relative^[3] of the couple, is married with children of her own and does not donate her own gamete for the purposes of surrogacy [Section 4 (iii) (b)].

By restricting the eligibility to a heterosexual couple associated through “marriage” and permitting only a “close relative” to be a surrogate, the surrogacy bill seeks to regulate what women do with their bodies, but also reinforces the idea of the heteronormative family. Further, it also criminalises surrogacy in case of single men, women, and live-in partners including same-sex couples and transgender persons (section 38). Such a restriction is not only discriminatory, but is violative of the right to reproductive autonomy as an aspect of the right to privacy guaranteed under the Indian constitution (Ghosh and Khaitan 2017). Further, by allowing only a “close relative” to be a surrogate mother, the state promotes casteist notions by trying to preserve the “purity” of the family (Gopinathan 2018).

A Legal Paradox

Both surrogacy and transgender bills perpetuate a narrow vision of the “family” based on hetero-patriarchy and caste purity. This completely ignores instances of Indians creating and living in non-normative families. The legal regime in India recognises only monogamous, heterosexual, conjugal relationships that are legitimised by marriage. Non-biological kinship networks or Hijra *Gharanas*, same-sex couples, those in polyamorous relationships or more fluid friendship networks cannot access a range of civil rights that flow from marriage (Agarwal et al, 2019: 7).

For instance, even though the Protection of Women against Domestic Violence Act, 2005 (PWDVA) recognises live-in relationships, it does so only between men and women (*Indra Sarma v VKV Sarma* 2013: para 37). Further, these relationships must be as “marriage-like” as possible (*D Velusamy v D Patchaiammal* 2010: para 33).^[4] Thus, where a woman enters into such an arrangement with a married man, she does not receive any protection under the law. By making marriage and marriage-like relationships the only institution through which the basic human need for connection, intimacy, and dependency is realised, the law leaves out many individuals who intend to establish more fluid living arrangements, or platonic associations that could nonetheless be characterised by economic and/or emotional interdependence (Duncan et al 2014: 1-10).

A Silver Lining

There are some encouraging signs of change within the law. In 2017, the Supreme Court recognised privacy as a fundamental right where the right to sexual intimacy was recognised as a core component of the right to privacy (*Justice KS Puttaswamy & Anr v*

Union of India 2017: para 157). Based on this robust framework of privacy, the Supreme Court, while reading down the draconian Section 377, also observed that the manner in which individuals choose to exercise intimacy was beyond the legitimate interests of the state (*Navtej Johar v Union of India*, 2018: para 240). Even prior to this, in 2016, the Himachal Pradesh High Court interpreted the guru-chela relationship as a “custom” and held that a guru would thus be entitled to the deceased chela’s property (*Sweetey [Eunuch] v General Public* 2016). These judgments have opened up avenues for recognising the diversity of relationships, intimacies and families many of which may not necessarily be heterosexual, marital, or biological. Significantly, in 2019, the Madras High Court upheld marriage between a biological man and a transgender woman under the Hindu Marriage Act, 1956 (*Arunkumar v The Inspector General of Registration* 2019). Despite the heteronormative understanding of “consummation” as peno-vaginal intercourse between a cis-man and a cis-woman under the law, the fact that the court validated this marriage displays its willingness to interpret “consummation” beyond its traditional interpretation.

Towards a Functional View of the Family

If the law recognises the right to intimacy as a core component of autonomy and privacy, then arguably, it should maintain neutrality between various forms of intimate relationships and the diverse domestic, emotional, and economical arrangements that are a part of it. This argument forces us to re-examine the role of law regulating close, adult, personal relationships. In other words, how can the law facilitate autonomy in the ways in which we define “family” while also ensuring that those most vulnerable within such arrangements are protected?

Legal alternatives for recognising non-normative families have been especially prominent in the discourse surrounding unmarried, cohabiting heterosexual partners as well as LGBT+ relationships (Barker 2012: 59-60). Civil unions and registered partnership laws have been pursued in other countries. At the same time, given the prevalence of fluid friendship networks, siblings staying together and a large number of individuals opting to cohabit than to marry, laws meant to provide defacto recognition to such relationships have been enacted. Many such acts operational in Canada, Tasmania and Hawaii recognised not only conjugal, romantic relationships, but also non-conjugal, caring relationships characterised by some form of economic and emotional interdependency.^[5]

Recently, a group of lesbian, bisexual and trans women when consulted for their views on the Uniform Civil Code, wrote a letter to the Law Commission recommending that those who are not married by law should be able to nominate people who can act as a “legal representative” on their behalf. These representatives should not have to be related to the person by blood, adoption, or marriage and would have the authority to act on behalf of a person in the choice of nominees, custody of minor children, legal heirs and end-of-life decisions (Shah et al 2018). This could be enabled by issuing certain rules/guidelines under laws that would allow people to register their legal representatives through affidavits or any

other standard legal format.

A good precedent of such a practice is already prevalent in the form of the Mental Healthcare Act, 2017. By giving individuals the freedom to decide who can be their nominated representative, the Act provides a great degree of autonomy to individuals. As per section 14 (3), any person who is not a minor and is competent to discharge the duties can be a nominated representative under the Act. This person does not have to be related to the person by blood or marriage. The nominated representative has the authority to execute an advance directive made by the person in question. This is an instrument that allows a person to choose how one wants to be cared for during a mental illness when they no longer have the capacity to make their own decisions (section 5). Other legislations could also follow a similar model.

A vision of the family, which is broad and inclusive and is based on recognising functional aspects of families rather than their form, that is, what families do rather than what families look like (Mirabelli 2018), would serve as a useful template when lawmakers are drafting legislations that regulate intimacy and dependency. Recognising that families are diverse, complex, and dynamic means providing individuals with the freedom to nominate/designate their beneficiaries wherever possible and not assuming ties of blood and conjugality as the only relevant ones. In addition, it would also involve closely evaluating factors of economic and emotional interdependence and interpreting them flexibly depending on the legislative objective and situation (Cossman and Ryder 2001). For instance, in some situations, co-habitation and duration of the relationship could be a relevant factor, but in other cases, it may not matter. Hence, maintaining flexibility as opposed to pursuing a one-size fit all policy is essential and could in the future, legitimise families of choice.

End Notes:

[1] Maitri Karar is a registered companionship/friendship contract that was used by some lesbian couples in India during the late 1980s to provide a degree of recognition to their relationship in the eyes of the law and society. Such a contract was used by Gujarati businessmen during the 1980s to confer financial and other rights to their second wives/companions who otherwise, had no status under the law. See Vanitha (2005).

[2] See section 2 (k) of the Transgender Persons (Protection of Rights) Bill, 2019.

[3] The surrogacy bill does not define the term “close relative.” However, a definition of “relative” can be understood from other legislations such as the Companies Act, 2013. Section 2(77) of the said act defines “relative,” with reference to any person, means any one who is related to another, if: a) they are members of a Hindu Undivided Family; b) they are husband and wife; c) one person is related to the other in such manner as may be prescribed.

[4] The phrase “relationship in the nature of marriage” was interpreted to mean: a) The couple must hold themselves out to society as being akin to spouses; (b) they must be of legal age to marry; (c) they must be otherwise qualified to enter into a legal marriage, including being unmarried; (d) they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

[5] See, for instance, the Reciprocal Beneficiary Act, 1997 in Hawaii allows any two adults, otherwise prohibited from marrying, to enter into an arrangement with certain benefits available to married couples. These include hospital visitation rights, the ability to sue for wrongful death, availing the benefits of family health insurance, and property and inheritance rights. A unique feature of this law was that it enabled two adults related to each other to enter into a reciprocal beneficiary arrangement. In Tasmania, the Relationships Act, 2003 recognises non-conjugal “caring” relationships between opposite and same-sex persons and can include family members as well. Such relationships involve a significant level of economic, emotional interdependence and mutual commitment. Similarly, the Adult Interdependent Relationships Act, 2003 operational in Alberta, Canada, defines a relationship of interdependence in section 1(f) as “a relationship outside marriage in which any 2 persons: (i) share one another’s lives (ii) are emotionally committed to one another and (iii) function as an economic and domestic unit. Such legislations would therefore allow even friends or siblings to enter into a relationship of mutual care and dependence.

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