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## Is the Law Queer?: The Pervasive nature of Heteronormativity in India

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*Heteronormativity refers to the pervasive norms of heterosexuality that infest a given society. It labels any kind of deviance from the prevalent heterosexual norms as an abnormality or a violation subject to legal sanctions. The term was coined by Michael Warner in 1991, to explain how heterosexuality becomes a normative principle in most social institutions, resulting in the creation of a heterosexual state. As an ideology, it is incredibly pervasive. Heteronormativity influences practically every aspect of society including the seemingly objective institution of law. It significantly affects how laws are enacted and implemented in society. This article concerns itself with the heterosexual state of India and its legal machinery. By analyzing the laws which explicitly or implicitly promote heteronormativity, this article aims to reveal the gross heterosexist bias still prevalent in India, almost four years after the legalization of homosexuality.*

**Keywords:** *law, heteronormativity, queer, gender, sexuality, discrimination, LGBTQ+ rights.*

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### INTRODUCTION

A husband and a wife sitting together surrounded by their children – most preferably sons – enjoying each other’s company in an upper-middle-class household is the image of a perfect and happy Indian family. Such a concept is prominently seen in media, for instance, in Karan

Johar's blockbuster movie *KabhiKhushiKabhieGham*. Amitabh Bachchan's character of a dominating patriarchal head of the family has a submissive and meek counterpart, played by Jaya Bachchan, both of whom discipline and love (in that order) their two upstanding sons. This, for a long time, was seen and is still seen as the superior family structure, provided the children also marry and procreate with a person of the opposite gender – ideally of the same caste and religious values. Advertisements, TV shows, religion, education, and much more seem to push and perpetuate such notions of heteronormativity in Indian society. Coined by Michael Warner, heteronormativity is understood as the assertion of heterosexual norms underpinned by the presupposition of the gender binary.<sup>1</sup> It is the pervasive worldview that assumes heterosexuality as the default and only valid sexual orientation while labelling any other form of sexual desire, expression, or relationship as a deviation or abnormality. In the Indian context, heteronormativity is interlinked with patriarchal institutions, caste identities, and religious principles. Heteronormativity affects us all by shunning any form of deviance from prevalent heterosexual norms. It erases and denies various identities and experiences that are a natural part of life. Heteronormativity further works to marginalize and promotes discrimination against people who do not conform to its ideals. For instance, queer representation in media is also highly problematic, by using stereotypical portrayals of gay men as laughing-stock and the usage of homophobic language to admonish anyone who is remotely queer, Indian popular media successfully exhibits the pervasive and perpetuating nature of heteronormative ideology.

For the longest time, queer interests have been pushed to the periphery by the Indian government to deal with matters of more importance. This is most noticeable in India's complete disregard for LGBTQ+ rights and the sheer amount of time it took to strike down Section 377 of the Indian Penal Code (IPC) – a colonial-era tool for oppression<sup>2</sup>. Not only did this disservice to the community label queer individuals as less deserving of equal protection, but they were also branded by their own country as second-class citizens, their mere existence codified as a crime. Given the rise of LGBTQ+ activism in India and following the

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<sup>1</sup> Michael Warner, *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press 1993) 15

<sup>2</sup> Indian Penal Code, 1860, s 377

decriminalization of homosexuality and actualization of the Transgender Persons (Protection of Rights) Bill in 2018 and 2019, respectively, the Indian mass has become somewhat aware of the problems encountered by queer individuals. However, the hurdle of heteronormativity has continued to persist and pervade every aspect of our society. The objective institution of law and legal mechanism – which is expected to be free of such influences – has also been affected by heteronormative ideology, evident in the way laws are understood and implemented in Indian society. In this article, I shall attempt to critically analyze the laws of India that overtly or implicitly promote heteronormativity and understand how such laws propagate social inequalities. For this purpose, the paper has been divided into three sections, dissecting heteronormative pillars of (i) family law – including marriage, adoption, and inheritance, (ii) rape laws, and (iii) laws relating to equality.

### **IGNORANCE, PREJUDICE, AND DISCRIMINATION**

When the notion of being ‘straight’ becomes related to the state, there is a shift from being a ‘normal’ individual to that being a ‘law-abiding citizen’.<sup>3</sup> This is one of the main reasons why the state and its legal machinery support heterosexuality and discriminate against any alternate forms of gender or sexuality – explicitly and implicitly. Thus, the ignorance of the state on matters of queerness becomes legitimized through the enactment of heteronormative laws. Consequently, these laws work to create an atmosphere of hostility and prejudice towards the queer community. Such persistent marginalization of queer individuals is a grievance that the LGBTQ+ movement has worked to eliminate from Indian society. Not only that, but LGBTQ+ activism raises the issue of identity, individuality, and the protection of basic fundamental rights.<sup>4</sup> The objective of LGBTQ+ activism is to normalize queer identities and subsequently challenge the heteronormative state, including its legal machinery which perpetuates heteronormativity among the masses. It calls for the perception of queer identities as something that is innate and does not require ‘disciplining’.<sup>5</sup> Before the reading down of Section 377 of the IPC, LGBTQ+ activism had brought about many victories for the Indian

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<sup>3</sup> Sumit Saurabh Srivastava, ‘Disciplining the ‘Desire’: ‘Straight’ State and LGBT Activism in India’ (2014) 63 (3) Sociological Bulletin, 369 <<http://www.jstor.org/stable/43854980>> accessed 14 June 2022

<sup>4</sup> *Ibid*, 372

<sup>5</sup> *Ibid*

queer population. Its spread has helped sensitize the public on alternate genders/sexualities and increased the visibility of queer identities that were previously oppressed by the heteronormative state. The LGBTQ+ movement has garnered massive support and helped improve public perception of the queer community. Furthermore, they have fought relentlessly to ensure equal rights and a positive environment for the LGBTQ+ community in Indian society.

However, the concessions being conferred by the state are merely obligatory and have deceptive implications. Maintaining this, the judgment in the case of *NALSA v Union of India* and the Transgender Persons Bill of both 2014 and 2016 guarantee rights for the transgender community. However, there are glaring inconsistencies in the definition of transgender identities – both, in the judgement<sup>6</sup> and the bills – a lack of reference to trans people and transwomen, as well as a complete exclusion of individuals with alternate sexualities. This is examined in Jennifer Ung Loh’s paper, where she argues that the neo-liberal Hindutva state of India only accepts those forms of gender identities as legitimate, which can serve to reinforce the right-wing ideologies of the nation and its citizens. The state places transgender persons – specifically hijras – within Hindu nationalism by establishing them in pre-colonial history, mythology, and classical literature as “Hindu-used” queer identities.<sup>7</sup> Therefore, only certain transgender identities (more specifically hijras) appear to be culturally acceptable in the Hindu-normative state, whereas deviations based on sexual orientation and other unconventional transgender identities are not.<sup>8</sup> This provides a form of symbolic gender justice for the transgender community, a counterproductive principle of equality that is not for all.

The historic reading down of Section 377 of the Indian Penal Code in 2018 decriminalized homosexuality<sup>9</sup> while the Transgender Persons (Protection of Rights) Act of 2019 protects the

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<sup>6</sup> *National Legal Services Authority v Union of India* (2014) Writ Petition (Civil) No. 604/2013

<sup>7</sup> Jennifer Ung Loh, ‘Transgender Identity, Sexual versus Gender ‘Rights’ and the Tools of the Indian State’ (2018) 119 (1) *Feminist Review*, 51 <<https://www.jstor.org/stable/26776500>> accessed 14 June 2022

<sup>8</sup> *Ibid*, 50

<sup>9</sup> *Navtej Singh Johar & Ors. v Union of India the Secretary Ministry of Law and Justice* (2018) Writ Petition (Criminal) No. 76/2016

rights and ensures the welfare of the trans community<sup>10</sup>. Though these measures are definitely steps taken in the right direction, various other laws in India work to deny queer individuals their rights and enforce heteronormative ideals in society. A major and fairly vital right that the queer community is denied is their right to marriage. Even though same-sex relations have been legalized, none of them has the choice to marry their partners due to active discrimination in this sphere. In the Indian context, the term ‘marriage’ is associated with heterosexual couples or in other words, only permissible between a biological man and woman as prescribed by India’s traditional and cultural norms.<sup>11</sup>

This further promotes the idea that “marriage in India is still a heterosexual privilege.”<sup>12</sup> Marriage between transgender persons or between a transgender and a cisgender person (opposite genders) can be registered under the Special Marriage Act of 1954. However, by only recognizing the union of opposite genders as a monogamous unit, the state pushes the idea of heterosexual couples as the preferred and ‘correct’ form of family structure. A related aspect to this is the right to adopt. Given the fact that same-sex couples are not allowed to marry, they are also deprived of adoption rights. In fact, adoption in India is an arduous process by itself, denying even single parents and unmarried heterosexual couples the right to adopt.

Such archaic restrictions demonstrate how anything outside the box of a monogamous heterosexual married couple, is not acknowledged as a proper family by the heteronormative state of India. Moreover, laws relating to succession, as governed by the Hindu Succession Act of 1956, use terms that plainly exclude queer individuals. For instance, in the case of a Hindu male dying, a share of his property shall be allotted to his widow(s)<sup>13</sup>, whereas, in the case of a Hindu female dying, a share of her property shall be bestowed upon her husband<sup>14</sup>. Herein, the usage of gendered terms such as ‘his widow’ or ‘husband’ in specific circumstances refers explicitly to heterosexual relationships, leaving no room for the recognition of same-sex

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<sup>10</sup> Transgender Persons (Protection of Rights) Act, 2019, ss 3, 4, 8, 9, and 12

<sup>11</sup> Hindu Marriage Act, 1955, s5

<sup>12</sup> Mukul Sharma, ‘Marriage in India is still a ‘heterosexual privilege’ 3 years after Section 377 Ruling’ (*The Print*, 3 November 2021) <<https://theprint.in/campus-voice/marriage-in-india-is-still-a-heterosexual-privilege-3-years-after-section-377-ruling/760976/>> accessed 14 June 2022

<sup>13</sup> Hindu Succession Act, 1956, s 8

<sup>14</sup> Hindu Succession Act, 1956, s 15

couples. This proves how family laws in India, including issues of marriage, parenthood, and succession, reinforce heteronormativity and the gender binary.<sup>15</sup> Therefore, increased awareness of queer demands and the consequent legislation of a few queer-friendly laws have not necessarily secured equal fundamental rights for the queer community.

## HETEROSEXUAL BIAS IN RAPE LAWS

Even in the 21st century, the heinous act of rape is still prevalent in Indian society. It is a crime that any individual could fall victim to, regardless of their gender or sexual orientation. Surely, the queer community is deserving of protection against such sexual offences. However, the state has virtually no provisions for the same and understands the offence as a heterosexual experience. Discourse on gender and sexuality has drawn attention to Indian rape legislations which are still subject to sexist and heteronormative biases. For instance, in Sections 375 and 376 of the IPC, rape is codified as a crime committed against only women by only men. Exclusive usage of the term 'woman' and female pronouns ('her' will, 'her' consent) to describe the victim and further use of 'man' and male pronouns to label the offender in both sections of the IPC reveals blatant heterosexist bias in India's legislation. By issuing 'penetration' as an essential feature that constitutes rape<sup>16</sup>, the heterosexual state outright refuses to consider females as perpetrators of the revolting act. Female-female and female-male rape are not acknowledged due to sexist notions that consider women incapable of inflicting harm, especially on the physically stronger sex.<sup>17</sup>

In recent times, given the decriminalization of Section 377, it is also questionable whether forced acts of sodomy (male-male rape) and transgender rape are punishable at all, having no explicit mention in any legislation. Therefore, not only does the law deny females as perpetrators of rape and label males as the only valid offender, but such legislation also does

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<sup>15</sup> Akshat Agarwal, 'LGBT+ marriage: To secure equality in civil rights, family law must also be reformed.' (*Scroll*, 1 October 2020) <<https://scroll.in/article/974136/lgbt-marriage-to-secure-equality-in-civil-rights-family-law-must-also-be-reformed>> accessed 14 June 2022

<sup>16</sup> Indian Penal Code, 1860, s 375(a)

<sup>17</sup> S neha Annavarapu, 'Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India' (2013) 8 (2) *IJCJS* 259

<[https://www.academia.edu/5177996/Heteronormativity\\_Rape\\_and\\_Law\\_in\\_India](https://www.academia.edu/5177996/Heteronormativity_Rape_and_Law_in_India)> accessed 14 June 2022

not take into account the experiences of queer sexual assault. This sets a dangerous precedent wherein instances of same-sex and transgender sexual assault/rape go effectively unpunished and unnoticed thereby reinforcing the heterosexual matrix. Sneha Annavarapu's paper on this issue observes that such legislation confuses the differing concepts of sex, gender, and sexuality, stemming from ignorance and the prevalence of heteronormativity in Indian society. Heteronormativity in this context is a dangerous doctrine; not only does it undermine different (read queer) experiences of sexual assault, it categorizes male-female rape as the only valid and hence, punishable act. It is high time that India considers the legislation of inclusive and gender-neutral rape laws; to protect queer individuals who remain outside the ambit of justice and ensure true equality among all sexual and gender identities.

### THE PRIVILEGE OF EQUALITY

The question of equality pertaining to the LGBTQ+ community in India is a muddled one. On the face of it, India appears to be working for the welfare of its queer citizens. However, the truth is much more bitter. One other concern for queer individuals is their right to health. Arvind Narrain in his paper delves into sexual identity and health concerns in the era of Hindutva politics. The use of case studies in his research points out how an individual's queerness could hamper their access to health resources due to a lack of social acceptance and consequent fear of rejection.<sup>18</sup> And though Section 377 of the IPC (before 2018) was predominantly used to prosecute cases of child sexual abuse, it insidiously legitimized a culture of violence and discrimination towards queer individuals by allowing arbitrary arrests, blackmail, and sexual abuse by the police.<sup>19</sup> The section also impaired work on HIV/AIDS especially with the MSM community (men who have sex with men), because the criminalization of same-sex acts drove high-risk behaviour in terms of unprotected sex underground and beyond the reach of safe-sex interventions.<sup>20</sup> Narrain predicted in 2004 that the Hindu right would pose an obstacle to queer activism and would resort to rampant

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<sup>18</sup> Arvind Narrain, 'The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva' (2004) 7 (2) Health and Human Rights 145, 148 <<https://doi.org/10.2307/4065351>> accessed 14 June 2022

<sup>19</sup> *Ibid*, 151

<sup>20</sup> *Ibid*, 155

religious nationalism to invalidate queer identities. Following the recognition of same-sex relationships and queer identities in India, the right to equality and the right against discrimination also became applicable to queer citizens. However, in practice, members of the LGBTQ+ community continue to be stigmatized and marginalized in our society. Violence against transgender and queer persons remains rampant<sup>21</sup> with no proper recourse in sight, given that the state machinery itself promotes harassment. The Transgender Persons Act fails to provide for reservations in government institutes and jobs, and though it punishes crimes against transgender individuals, the severity of punishment is much less compared to punishment for crimes against normative identities<sup>22</sup>.

Queer individuals are also subject to systemic discrimination in terms of economic opportunities, housing as well as healthcare. The Indian military continues to punish homosexuality under the Army Act and openly bars queer individuals from serving in the Armed Forces<sup>23</sup>, further reinforcing prejudice against the community. Though the state has enacted laws for the protection of queer identities, its implementation has been slow and oftentimes non-existent in conservative states. The stigma against the LGBTQ+ community continues to prevail due to a lack of awareness and the state's promotion of heteronormativity. Not only that, but the law acts as a state-sanctioned method for promoting the heteronormative ideology and queer oppression. Equality in this aspect is a pipe dream; though there have been steps to improve queer legislation, the deep-seated heteronormative ideals in Indian society continue to impede any real progress and further propagate social inequalities.

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<sup>21</sup> Sreemanti Sengupta, 'Family Prejudice, Lack of Safe Spaces: What the Pandemic Has Meant for India's LGBTQI Community' (*The Wire*, 7 October 2021) <<https://thewire.in/lgbtqi/lgbtqi-community-pandemic-family-support-groups>> accessed 14 June 2022

<sup>22</sup> Transgender Persons (Protection of Rights) Act, 2019, s 18(d)

<sup>23</sup> Amrita Nayak Dutta, 'Army chief rules out gay sex, adultery in Indian Army' (*The Print*, 10 January 2019) <<https://theprint.in/india/governance/army-chief-rules-out-gay-sex-adultery-in-indian-army/175891/>> accessed 14 June 2022



## CONCLUSION

Heteronormativity is the dominant ideology prevailing over Indian society. It stereotypes, denies, and discriminates against queer identities and establishes a heterosexual matrix. In doing so, societal norms are regulated to accept only those identities that fit the criteria and ostracize those that do not. These ideals are manifested through various channels of media, education, religion, and most importantly the law. If the legal framework itself, whose main function is to bring about equality and justice, begins to promote heteronormative ideas, it becomes increasingly difficult to express queer concerns and grievances. Not only that, but by validating heteronormativity, Indian law allows for open discrimination against the LGBTQ+ community which is already widespread in our society. This gives rise to massive inequalities based on a person's gender or sexual orientation and segregates queer communities as an abnormality in the heterosexual state. Therefore, the legislation of queer policies and the usage of inclusive terms in pre-existing enactments are the need of the hour. The Indian legal machinery has untapped potential to bring about true equality in society. However, that can only be realized by acknowledging heteronormative influences in various legislations and thereby correcting them.