Asian Journal of Law and Society (2023), **10**, 70–106
doi:10.1017/als.2023.4

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Making Love Legible: Queering Indian Legal Conceptions of "Family"

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Abstract

The state has historically played favourites—by incentivizing conventional families and clamping down on alternative families like ascetic *maths*, it ensured that the heteronormative family flourished. I trace the socio-legal histories of families and establish a constitutional imperative for "family equality" located in the rights to religious freedom, privacy, and equal treatment, and propose that it (not marriage equality) drives the queer movement. "Family" must be reimagined beyond marriage in light of the public ethic of care to encompass a vast range of non-normative families like *hijra* communes. I consider the Canadian Law Commission's proposals for recognizing "families" and argue that a similar framework is an unrecognized constitutional *mandate* in India that, once recognized, would render a wealth of laws interacting with family life unconstitutional. The shared socioconstitutional contexts across jurisdictions and the growing convergence of human rights standards could well mean that this will impact legal systems around the world.

Keywords: family; public ethic of care; queerness and the law; *Puttaswamy*; marriage equality

1. Introduction

Just as the Supreme Court of India decriminalized homosexuality,[1] and even as the promise of marriage equality comes nearer with the recent writ petitions that have been filed in the Delhi[2] and Kerala High Courts,[3] this has been achieved not without backlash for the Indian queer movement—with the state making new incursions against alternative expressions of intimacy. The Transgender Persons Act 2019 ("2019 Trans Act") represents the state's latest attack against subversive love. By forcing *hijras*[4] neglected by their natal

[1] *Navtej Singh Johar v. Union of India* (2018) 10 S.C.C. 1 (Supreme Court, 2018).

[2] *Udit Sood & ors. v. Union of India & anr.*, W.P. (C) 2574/2021.

[3] *Nikesh P.P. & anr v. Union of India & ors.*, W.P. (C) 2186/2020.

[4] While there is no universally accepted "definition" of what a *hijra* identity constitutes, *hijras* in India constitute a specific subclass of non-binary gender identities who have also subscribed to the cultural identity of being a *hijra.* This cultural identity comes from membership in a *hijra gharana* (meaning "method school") and being adopted by a *hijra guru.* On attaining such membership, the other disciples ("*chelas*") of that *guru* become the new member's kin. *Hijras* tend to live in communes or kinship networks (called *deras* in some parts of India). The *hijra* identity is a cultural identity unique to some countries in South Asia and is not to be conflated with other categories such as "transgender" or "intersex," though overlaps may exist. For further discussion on the complexity of *hijra* identities, see Goel (2014), pp. 77–8. For discussion on the conflation of transgender and *hijra* identities, see Khan (2019); Billard & Nesfield (2020).

families into state rehabilitation homes,[5] the Act effectively outlaws the kinship networks and communes that most *hijras* live in and consider their family. The Act not only fails to recognize such networks as "family,"[6] but it even rejects them as legitimate sites of care where the "primary" family fails, by favouring state-run rehabilitation centres to the intimacies within a *hijra* commune. For a long time, the state has refused to grant these networks rights on a par with those enjoyed by the conventional family—be it claims to compensation for the death of kin[7] or the right to bodily remains of deceased kin.[8] The 2019 Trans Act and its denial of even secondary family status to such kinship networks are thus only the inevitable culmination of a long-standing invisibilization of such intimacies.

This suppression of alternative family forms is neither new, nor is it specific to *hijra* families. A similar impulse is reflected in the colonial clampdowns on the *tawa'if-kothas* in Lucknow[9] and the *devadasi* institution in South India.[10] *Kothas* nurtured powerful bonds of female kinship, mutual healing, and therapy between a cross section of women who often came there with painful histories of repression, harassment, and violence by their conventional families.[11] Similarly, the institution of *devadasis* stood for an emancipatory idea of womanhood and care, with its non-conjugal sexualities, matrifocal/matrilineal households in the absence of the institution of marriage, and the *devadasi*'s centrality to the household economy.[12] The refuge and freedom of escaping lives in exploitative family forms that these institutions offered to their members mark their close resemblance to today's *hijra* communes—and so does the gradual criminalization they were met with. But long before temple dedication was banned[13] and *kothas* clamped down upon as brothels, the colonial state had begun the process of disintegrating these care networks. Beginning in the late 1800s, *devadasis* were barred from adopting girls, and thus a practice key to their social reproduction came to be understood as trafficking in minor girls;[14] *tawa'ifs* began to be arbitrarily relocated to suit European soldiers,[15] reducing *kothas* to a stigmatized economic institution, and neglecting their nature as a family unit.

On a related note, even today, the state continues to protect the endogamous and heteronormative family. For example, the Surrogacy Bill, 2019 only allows a close relative to surrogate[16] and bans arrangements in which the surrogate contributes gametes[17]—perpetuating not just the monomaternalist heteronormativity[18] but also the internal caste

[5] Section 12(3), Transgender Persons (Protection of Rights) Act 2019. Because of the stigma associated with non-binary gender identities, most *hijras* ended up taking refuge in *hijra* communes, as a consequence of neglect and abuse by their natal families.

[6] Section 2(c), Transgender Persons (Protection of Rights) Act 2019 (defining families to mean persons related by blood, marriage, or adoption).

[7] Deccanherald.com (2011).

[8] Datta (2017).

[9] *Kotha* refers to the communes in which the famous women courtesans (*tawa'if*) of Lucknow, known for their wealth, political, and social influence and artistic prowess, lived. For further discussion, see Oldenburg (1990).

[10] This institution refers to a traditional practice in some regions in South India, where women are dedicated to the goddess Yellamma as wives to the deity, performing artistic and ritualistic services for the temple in return for fee/grants of land. Being married to Yellamma, they could not marry men, but often enjoyed sexual relations and bore children outside the institutions of marriage. For further discussion, see Sreenivas (2011); Ramberg (2013).

[11] Oldenburg, *supra* note 9, p. 270.

[12] Sreenivas, *supra* note 10, pp. 66–7.

[13] The Karnataka Devadasis (Prohibition of Dedication) Act 1982; Madras Devadasis (Prevention of Dedication) Act 1947.

[14] Sreenivas, *supra* note 10, p. 68.

[15] Oldenburg, *supra* note 9, p. 265.

[16] Section 4(iii)(b)(II), Surrogacy (Regulation) Bill 2019.

[17] *Ibid.*

[18] See generally Park (2013) (coining "monomaternalism" and studying sites of its resistance in queer, blended, or polygamous families).

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"purity" of the conventional family.[19] Less subtly, Uttar Pradesh recently passed the Prohibition of Unlawful Religious Conversion Ordinance, 2020 placing additional burdens on interfaith couples to prove that their marriage is for purposes other than conversion.[20] Touted as Uttar Pradesh's response to "love *jihad*"[21] and having been emulated by Madhya Pradesh[22] and Gujarat,[23] the Ordinance is effectively a state-led attack on exogamy. The state's pursuit of heteronormativity in family formation, regardless of the specific forms it takes, does not come as an end unto itself. For example, decisions to ban commercial surrogacy in some Asian jurisdictions including India do not merely enforce endogamy in the arrangement of sexual relations; they also, through such enforcement, strengthen the creation of a national identity by "protecting" Asian women's wombs from "foreigners."[24] More generally, the heteronormative and gendered norms that family formations in Asia pursue are themselves the results of other projects of nation-building in the context of a colonial past[25] and management of property relations.[26] Heteronormativity, and the specific and changing forms it takes over time and space, is thus imagined as much as a means to independent ends, as an end in and of itself. That being said, the ends pursued by heteronormativity may be both contested and continually evolving; however, the Indian state's pursuit of heteronormativity itself, in some form, has been relatively consistent. Uniformly, thus, the legal system has imposed a choice between subscribing to the heteronormative family related by conjugality or blood or adoption or being (legally) kin-less or, worse, forcibly separated from one's intimate relations. The 2019 Trans Act's treatment of *hijra* communes is only one extreme outcome of this imposition. However, even where the state permits certain alternative familial arrangements, like it does live-in relationships, it continues to exclusively (and, I argue, unconstitutionally) incentivize the conventional family through the grant of recognition and benefits.

In this light, I propose the reimagination of the legal category of "family" to grant equal legal recognition of, and conferment of equal legal benefits to, non-normative family arrangements between consenting adults—like *hijra* communes, friendship networks, parenting triads including a gamete-contributing surrogate, etc. I ground this reimagination on a doctrinal foundation of Indian constitutional jurisprudence and the normative and legal force it comes with, while insisting that the reading of it cannot but be mediated by the sociohistorical context surrounding it. I will first explore the compelling constitutional case for rethinking family under law, locating it both in the equal treatment inherent to any true guarantee of decisional autonomy, as well as in a sociohistorical understanding of heteronormativity as violating religious freedom (Section 2). Second, I will examine and reject complete legal derecognition of all family forms, in favour of universal equal recognition, as the best route to addressing the constitutional failures of the current framework identified in Section 2. In particular, I discuss the constitutional implications of "levelling down," and the significance of horizontality in understanding fundamental freedoms (Section 3). Third, I will look at equal recognition and attempt to identify, and locate within Indian jurisprudence, a foundational principle that equal

[19] Ghosh & Sanyal (2019).

[20] Section 6, Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance 2020.

[21] A derogatory term used by the Hindu Right in India to describe interfaith marriages between Muslim men and Hindu women—intended to convey the conspiracy theory that such marriages are systematically encouraged by the Muslim community to convert Hindu women into Islam.

[22] Madhya Pradesh Freedom of Religion Act 2020.

[23] Gujarat Freedom of Religion (Amendment) Act 2021.

[24] For further discussion, see Bhattacharjee (2016), p. 28; Whittaker (2019), pp. 125–44.

[25] See also Dunne et al. (2020).

[26] See Nguyen (2021) for a discussion on the political economy of "queerness" and its changing meanings with the changes in relations of production under capitalism.

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recognition of all families can be based on. In doing so, I locate the requirement for such a "foundational principle" in the fourfold test laid down in the landmark *Privacy Judgments*, whereas, for the identification of the principle itself, I rely on sociological understandings of families and their functions of care and social reproduction (Section 4). Fourth, I will attempt to formulate the contours of a regulatory model that would stay true to the foundational principles for allowing state to recognize intimacies as "families." After rejecting customary law as a viable route of recognition, I explore the Canadian Law Commission's framework for statutory recognition, and its fit in the Indian constitutional framework post-*Puttaswamy* (Section 5). In my last section, I propose the demand for "family equality" as an alternative focus point to "marriage equality," while also exploring the position of marriage abolition and its fit within my framework of family equality (Section 6).

2. The constitutional case for rethinking family

The Supreme Court's decision in *Navtej Johar* now constitutionally guarantees an autonomous zone of privacy for "organisation of intimate relations"[27] between consenting adults—interference in which has been held to be beyond any legitimate state purpose.[28] Though the issue before the bench in *Navtej* was the decriminalization of homosexual conduct, restricting its application to only sexual intimacy would defeat the point of its jurisprudence. In fact, categorizing intimacies into sexual or non-sexual for the purposes of this restricted application would itself require the state to inquire into the sexual relations (or lack thereof) by getting inside what the court has guaranteed as an autonomous zone of intimacy. This very inquiry into the presence of sexual relations is rendered unconstitutionally intrusive even if *Navtej* is understood narrowly. Thus, unrestrictedly understanding *Navtej*'s autonomous zone of privacy as encompassing all consensual intimacies between adults, sexual or otherwise, is the only logically consistent way to read the jurisprudence of *Navtej*. This inference is only strengthened further upon a close reading of the text of *Navtej*, and its emphasis on "love," as opposed to only sexual autonomy, being the core of the question at hand.[29] The "order of nature" that

[27] *Navtej Singh Johar v. Union of India*, *supra* note 1, at para. 255 (Misra J., plurality).

[28] *Ibid.*, at para. 613 (Chandrachud J., concurring) ("The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle : the State has no business to intrude into these personal matters"); see also *Shafin Jahan v. Asokan K.M.* (2018) 16 S.C.C. 368 (Supreme Court, 2018), at para. 87 (Chandrachud J., concurring) ("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").

[29] For further discussion on the foregrounding of love in the legal reasoning of *Navtej*, see Chaudhary (2019) (arguing the centrality of love—not just romantic love, but the universal values of companionship, desire, and connection that go beyond sexuality—in the legal reasoning in *Navtej*); see also *Navtej Singh Johar v. Union of India*, *supra* note 1, at paras 371, 482, 613 (Chandrachud J., concurring) (quoting Retd. Justice Leila Seth, "What makes life meaningful is love. The right that makes us human is the right to love.") ("Consensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect. *In addition* to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This 'institutionalized expression to love' must be considered an important element in the full actualisation of the ideal of self-respect. Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships," emphasis added) ("The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters"); see also Suares (2018) (quoting Senior Advocate Menaka Guruswamy, arguing counsel for the petitioners in *Navtej Johar*, as stating that "this is love that must be constitutionally recognised and not just sexual acts").

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criminalized homosexuality was explicitly recognized as being not simply about sex, but about the limits on love placed by social structures generally.[30]

Minimally, for instance, this autonomous zone of privacy means that the 2019 Trans Act's compelling of *hijra* individuals neglected by their natal family to live in state-run rehabilitation centres—thereby barring many of them from their chosen commune families—is now unconstitutional. However, to be meaningful, autonomy must mean something more than mere absence of compulsion.

Consider a case in which the state permits all forms of intimacies but privileges a few specific forms (marriage/biological kinship/adoption) by exclusively providing them with legal benefits, or even just symbolic state recognition. Here, citizens' intimate choices, even if not compelled by, are still not autonomous of state interference—with the state institutionalizing preference for these privileged forms, like marriage, without really barring other forms, like live-in relationships. This privileging of relationships like marriage or biological kin by the state—considered almost natural and inevitable—is not just an artificial construct, but also runs afoul of the autonomous zone established in *Navtej*.

This broad understanding of autonomy is not new or radical—it is already present in the way we understand religious autonomy.[31] A state that permits the practice of all religions but endorses or incentivizes one (expressly or otherwise) is typically understood as infringing religious autonomy. In India, this is reflected in the Constituent Assembly Debates around religious freedom (even if not consistently in subsequent practice[32])—Pandit Lakshmi Kant Maitra stated that the state may not "establish, patronize, or endow any particular religion to the exclusion of *or in preference* to others" (emphasis added).[33] This idea of religious autonomy as meaning something beyond mere tolerance of non-majoritarian beliefs has been affirmed by the Supreme Court. In *Ziyauddin Bukhari*,[34] the court held that impartiality in extending equal benefits to citizens of all creeds was an essential element of secularism, which prohibits imposition of disabilities on a person on account of their religious belief. In *Bommai*,[35] the court stated that constitutional provisions "prevent the State (sic) either identifying itself with or favouring any particular religion or religious sect or denomination .... The State is enjoined to accord equal treatment to all religions and religious sects and denominations."[36]

[30] *Supra* note 1, at para. 425 (Chandrachud J., concurring) ("The order of nature that Section 377 speaks of is not just about nonprocreative sex but is about forms of intimacy which the social order finds 'disturbing' .... What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority. Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all").

[31] Nussbaum (2010), pp. 14–5.

[32] While this thicker conception of religious autonomy and secularism forms a crucial part of Indian constitutional culture and jurisprudence, it is far from consistently adopted and affirmed, and has come to be increasingly tested in the arena of electoral politics and judicial review in recent years. It is not my claim that the normative foundations of Indian secularism consistently match its practice. See e.g. Wakhlu & Jadhav (2020) (discussing the installation of a statue of Manu, believed to be an ancient Hindu lawgiver, within the premises of the Rajasthan High Court); Kulkarni (2020) (discussing the almost exclusively Hindu rituals followed while inaugurating the foundation stone of the new Parliament building); *Rajesh Himmatlal Solanki v. Union of India*, 2011 S.C.C. OnLine Guj 1079 (Gujarat High Court, 2011) (upholding the constitutional validity of the inauguration of a court complex using Hindu rituals).

[33] Vol. VII, Constituent Assembly Proceedings, 7.67.79 (Dec. 6, 1948) (statement of Pandit Lakshmi Kant Maitra).

[34] *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra* (1976) 2 S.C.C. 17 (Supreme Court, 1975), at para. 44.

[35] *S.R. Bommai v. Union of India* (1994) 3 S.C.C. 1 (Supreme Court, 1994).

[36] *Ibid.*, at para. 146 (Sawant J. and Kuldip Singh J., concurring).

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In other words, Constitution-makers and interpreters have understood autonomy from state interference to mean something more than mere state tolerance of one's religious choices—by considering relative equality of recognition and treatment to be an important facet of autonomy.[37] Now that intimate choices have been recognized within a similar zone of constitutionally protected autonomy, there is no reason why autonomy in intimate pursuits should be construed in a narrower sense than autonomy in religious pursuits. Indeed, the Supreme Court itself has made this comparison in *Shafin Jahan*,[38] stating that "[c]hoices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme."[39] While the court refers only to autonomy in marriage, as that was the issue before it in *Shafin Jahan*, the underlying analogy it draws between choices of faith and of intimacies is notable. Thus, in intimacy, as much as in religion, autonomy cannot just mean state tolerance of one's chosen form of love—it must extend to equal recognition and treatment of all forms of intimacies. In other words, it is not enough to simply allow persons to live in *hijra* communes instead of in state rehabilitation centres in cases in which the natal families are negligent. Rather, the Constitution would demand that their biological families and chosen families in *hijra* communes be treated on an equal par—as an integral condition to achieving true autonomy from state interference. This view, that equality of treatment is an integral component of true liberty is further affirmed by the Supreme Court's decision in *Menaka Gandhi*.[40] In recognizing the inherent inter-connectedness of Articles 14, 19, and 21,[41] it has long since established both negative freedoms as well as a right to be equally treated as crucial constituents of autonomy and liberty.

However, my argument that the intimate autonomy talked of in *Navtej* must be construed as broadly as religious autonomy is not merely an argument drawing an analogy between two independent constitutional freedoms and their contents. While that is true as argued above, I also take it further. I argue that autonomy in arranging one's intimate relationships free of state-sanctioned preferences is an important facet of religious autonomy itself.

This is because the normativity of some intimate arrangements is itself produced by specific religious norms defining some family forms as legitimate or moral. In India, the production of this normativity was mediated by Christian-colonial administrative logic. British administrators, in their efforts to understand and administer personal law in the subcontinent, relied on religious scriptures and superimposed them on local customs and non-textual traditions.[42] This process, naturally, legitimized family forms endorsed by specific religious texts—and destroyed other forms. For example,

[37] See generally Chaudhary, *supra* note 29 (arguing that the jurisprudence of love, as opposed to the narrow, liberal scope of autonomy, gives *Navtej* its expansive ambit, particularly for positive rights). Unlike Chaudhary, I locate the radical import of *Navtej* in its understanding of "autonomy" itself and in the interlinkages between autonomy and equal treatment. In contrast, Chaudhary locates its radical potential in the possibility of positive rights stemming from its jurisprudence of love. See also Bagchi (2018), pp. 376–7 (arguing that the obligation on the state to take positive measures was rooted in the substantive equality conception deployed in *Navtej*). See also Pillai (2019) (discussing the transformative potential of the substantive equality conception endorsed in *Navtej*).

[38] *Shafin Jahan v. Asokan K.M.*, *supra* note 28.

[39] *Ibid.*, at para. 84 (Chandrachud J., concurring).

[40] *Menaka Gandhi v. Union of India* (1978) 1 S.C.C. 248 (Supreme Court, 1978).

[41] *Ibid.*, at paras 4–7 (Bhagwati J., Untwalia J., Fazal Ali J., plurality).

[42] See Mani (1987), p. 122 ("this privileging of *brahmanic* scripture and the equation of tradition with scripture is, I suggest, an effect of a colonial discourse on India .... This discourse did not emerge from nowhere, nor was it entirely discontinuous with precolonial discourses in India. Rather, it was produced through interaction with select natives .... It meant that officials could insist, for instance, that *brahmanic* and Islamic scriptures were prescriptive texts containing rules of social behavior, even when the evidence for this assertion was problematic. Further, they could institutionalize their assumptions, as Warren Hastings did in 1772, by making these texts the basis of personal law" (citation omitted)).

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Anglo-Hindu law drew from religious scriptures like *Mitakshara* that lauded the joint-agnatic family and constructed it as an "ideal" family form[43] that continues to enjoy a state-sanctioned position of privilege today. One need only to look at the preferential tax treatment offered to this joint-agnatic family form, known today as the Hindu Undivided Family (HUF),[44] to illustrate this privilege. It is easy to assume, given the way "families" are popularly and legally constructed, that this joint-agnatic form was largely unchanging across time/space/subcommunities—with deviations, if any, being few and far between. However, that this seems plausible only speaks to the success of the religious-cultural imposition of family norms—at the cost of a diversity of forms that customarily existed.

One such form prevalent in the *Nair* community in Kerala was a system of matrilineal family formation called *marumakkathayam*[45] and the *sambandham* form of conjugality that accompanied it.[46] *Sambandham* involved conjugal relations between a man and a woman who continued to live with their respective birth families—with any children often being raised by the mother's family alone.[47] Variations of this practice allowed women to maintain *sambandham* with multiple men.[48] *Sambandham* served to strengthen the matrilineal logic of *marumakkathayam*, while also decentring the conjugal couple from family formation—in contrast to the central role of the couple in the conventional family. Eventually, however, the colonial administration, influenced by their own Christian-patrilineal worldview and Hindu Brahmanical texts that they assumed to be uniformly prescriptive across subcommunities, chipped away at this system. *Sambandham* marriages were delegitimized, and so the matrilineal family unit following the *marumakkathayam* system, called a *taravad*, was weakened—giving way to patrilineal succession and patri-local, monogamous family formations with the conjugal couple at the centre.[49]

Just like *marumakkathayam* matriliny among Nairs was attacked as "un-Hindu;" the same practice among Mappila Muslims was attacked as "un-Islamic"—supported by the same colonial emphasis on scriptures over other local religious/cultural customs.[50] A similar fate befell the matrilineal, matrifocal families of *devadasis.*[51] Colonial laws reduced the land grants *devadasis* received for their temple services to what were called "women's estates"—a form of limited ownership in which the land reverted to the patron's, and not the *devadasi*'s, heirs after her death. This change in property relations fundamentally changed a *devadasi* household, gradually leading to a move away from its matrifocality and matrilineality. Aimed at breaking the institution of *devadasis* itself, driven by the fact that *devadasi* conjugality was seen as morally corrupt, these laws were demanded by a curious combination of nationalist forces, colonial administration, and the Self-Respect Movement (a social movement in Southern India for the empowerment of backward castes, which most *devadasis* belonged to). The interest of the nationalist and anti-caste forces in bringing down the *devadasi* institution came from a conflation of "respectable" or "progressive" conjugality with Brahmanical monogamous conjugality. Thus, imposing this latter form on the *devadasi* women by curtailing their property rights became a route to both caste social mobility as well as crafting a modern national identity.[52]

[43] Kasturi (2009), p. 1063.

[44] For a general discussion on the constitution of the HUF and specifically for the preferential tax treatment received by its members, see Sanyal (1995).

[45] Puthenkalam (1966).

[46] Kodoth (2001), p. 350.

[47] Gough (1952), p. 74.

[48] *Ibid.*; Arunima (1995), p. 161.

[49] Kodoth, *supra* note 46.

[50] Kottakkunnummal (2014).

[51] See *ibid.*, pp. 3–4 (for earlier discussion on *devadasis*).

[52] Sreenivas, *supra* note 10.

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Thus, it is clear that the "natural" family today is only the result of deep religious/cultural/caste contestations—resulting in a consistent state preference for specific religious (often textual) traditions over others. However, this is only the first site at which religious discourse influences family formation. There is a second, more subtle, site that goes often unnoticed. Examining this site would reveal that the very choice—of textual religious traditions over customary ones—was itself influenced by protestant-theological presuppositions about what really constitutes valid religion.[53] Thus, the privileging of specific strains of Hindu/Islamic religious practices that formed the ideal Indian family was itself mediated by Western-Christian theology, and its preference for canonical texts—making the construction of this ideal family doubly enmeshed with religion.

A preference for the written word of God, however, was not the only imperial-Christian assumption that spilled over to the Anglo-Hindu legal construction of family. British administrators also imported a specifically Christian understanding of the boundaries between the secular and the sacred—perceiving "families" to belong exclusively to the secular world, and thus assuming ascetic orders to be devoid of familial/sexual attachments and domestic lives. In fact, however, ascetic *maths* (monasteries) in colonial India had rich family lives, with attachments connecting *gurus* and *chelas* in varying forms of biological/adopted kinship, and several women from across religions/castes who served as companions and mentors and as managers of *math* property and life.[54] For example, colonial records show that an ascetic named Saraswati Gir, upon his death, left a large portion of *math* property to the companion (not wife) of his *guru.*[55] Similarly, in another case, a *guru* declared his companion to be his wife, and her son as his son—she went on to claim succession to *math* property through *bairagi* custom, instead of Hindu succession law.[56] However, these familial relationships, existing outside the domain of secular and heteronormative-patrilineal structures, eluded legibility in Anglo-Hindu law. The law drew a clear binary between secular and ascetic succession—understanding the former in family ties and the latter as only spiritual descent from *guru* to *chela.* This legal fiction then compelled and allowed a rescripting of the genealogies of *maths* to reflect an untouched linear *guru-chela* line of descent—expunged of ascetic sexuality, domestic life, and of the women who were a part of these.[57] The women, already often coming from backgrounds that marginalized them in the secular world, now found themselves legally invisibilized in the sacred one they made their homes in and shaped. Sexuality and family, inextricably linked to the secular realm in the colonial-Christian gaze, made ascetic families illegible to Anglo-Hindu law. This illegibility, as always, transformed to illegitimacy, reflected in the later nationalist push for "purifying" *maths* of the sexual corruption symbolized by *gosain* women—eventually completely marginalizing these family forms.[58]

This imperialist-theological influence on family formation continues even today. Emerging in the twentieth century, the theo-political pro-family movement in the US has made global inroads in promoting the nuclear family—with the heterosexual, child-bearing couple at the top[59]—as "God's design."[60] The increasing discursive

[53] Malay (2010).

[54] Kasturi, *supra* note 43, pp. 1044–5.

[55] *Ibid.*, p. 1054 (citing Codicil of the Will of Saraswati Gir, 6 December 1895, Filed by Mussumat Sitla Gir, Applicant in Case 50/1898 versus Jagannath, in Banaras Collectorate Records, List 4, File 112, Department 10, Box 40, Uttar Pradesh Regional Archives Baranas).

[56] Kasturi, *supra* note 43, pp. 1058–9 (citing Allahabad High Court Judgement, 27 August 1875, in Saligram Das versus Mussumat Sujanio, Regular Appeal 8/1875).

[57] *Ibid.*, p. 1066.

[58] *Ibid.*, pp. 1081–2.

[59] Edgell & Docka (2007), p. 27.

[60] See Focusonthefamily.com (2022) (the "About" page has a self-description of an international US-based pro-family organization called "Focus on the Family").

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acceptance by the Indian state of this model, centred on gendered roles and sexuality,[61] is illustrated best by the familiar ring of India's family planning slogan—"*hum do, humare do*"[62]—intended to mean "two children for two parents."

It is clear thus that intimate autonomy free of preferences institutionalized or prohibitions imposed by the state is an integral part of religious autonomy. This is because the construction of "family" itself, in colonial and post-colonial India, has been mired in multiple layers of religious influence and contestations. It is, then, only an inevitable conclusion that a secular state may not preferentially incentivize, let alone impose, what are non-secularly derived normative family structures.

The above discussion clearly establishes that the Constitution binds the state to not only permit all consensual intimacies, but also to treat them equally inter se—that is, with relative equality. Now, logically, there are two routes that would seem to equally satisfy this obligation—either the state could grant equal recognition and benefits to all consensual intimacies; or it could simply equally derecognize all intimate arrangements, including the traditionally dominant ones. I will now discuss the implications of the latter route in some detail.

3. The constitutional inadequacy of derecognition

Derecognition effectively advocates for reducing all families to consensually created, privately negotiated arrangements of rights/duties, which the state would only enforce as contracts, and not constitute as status.[63] This "contractarian view" is undeniably powerful—most importantly because it challenges the assumption that it is the state's prerogative to name and constitute (and by implication, exclude from) "families." Its strength also comes from the recognition that legibility in the eyes of the state often comes with a de-radicalizing potential.[64] It is arguable that the entrenched heteronormativity of power structures, and the categorization into neat boxes that legal legibility often demands may domesticate alternative family forms to fit into a ready-made "heteronormative-like" mould, all the while reading out of the law the radical fluidity and choice that presently mark these alternative forms[65] and that empower these forms to really transform the way "family" is done. This fear is, of course, not unfounded. The above discussed transformation of matrilineal and ascetic family forms to fit into the Christo-heteronormative moulds of colonial administrative logic[66] stands as testimony to the violence that legal legibility can wreak on non-conventional practices.

However, while it is crucial to acknowledge this potential for violence when the state gets into the business of "recognizing" families—complete derecognition does not offer a satisfactory solution, for reasons I have outlined in the two parts below.

[61] Edgell & Docka, *supra* note 59.

[62] Kaur (2014).

[63] Fineman (2001).

[64] Butler (2002).

[65] See e.g. the disdain expressed by polyamorous interviewees for legal recognition and the rigidity it comes with in Aviram & Leachman (2015), p. 304 ("Beyond the lack of a strong 'push' for instrumental rights and benefits, the first author's interviewees reported political and cultural reasons for their reluctance to mobilize legally. Many interviewees expressed disdain of identity politics and a strong sense of individualism and personal agency, which made them resent governmental interference with their personal and emotional life. The interviewees repeatedly stressed the importance of freedom and fluidity in personal relationships, which, for them, meant that seeking the mainstream's stamp of approval in the form of yet one more oppressive 'box' to check on official forms would be an unwanted concession" (citations omitted)).

[66] *Ibid*., pp. 7–11.

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3.1 The levelling-down issue

Some legal benefits afforded to families are state-conferred—as opposed to contractually agreed to and state-enforced. This means that the obligations arising from these state-created benefits are incumbent on the state or some other party external to the family—making the contractarian view incompatible with these benefits. This would be the case with, for example, bereavement leave, tax benefits, and even privilege in spousal communication.[67] Naturally, some of these entitlements are capable of being reframed as entitlements conferred on individuals, not families. For example, tax deductions provided to an earning family member for dependants may just as easily be provided as welfare benefits to the dependants directly; indeed, I argue later[68] that any framework of family recognition must do precisely this. However, other entitlements, like bereavement leave or spousal privilege, inhere in persons by virtue of their relationships of care and are incapable of being delinked from familial status. Derecognition would lead to universal withdrawal of such entitlements as well, though they were previously available to some privileged family forms—simply by virtue of the fact that the state cannot grant entitlements to those it cannot recognize. Apart from its policy implications, such a move engenders constitutional complications. This is because, as I argue below, state responses that "level down" the advantaged group's rights and bring them on a par with the disadvantaged group's rights, in order to meet an equality challenge, are constitutionally suspect.

Consider a case in which, in response to demands to open up a temple to certain castes who were traditionally barred from entry, the temple authorities choose to shut down the temple, completely barring access to everyone.[69] A possible objection to this would be a purely utilitarian one—that no one is better off, while the dominant group is left worse off.[70] However, this does not take us far—not only because it is outside the remit of constitutional argumentation, but also because the very claim that it leaves the advantaged group worse off is not true in all cases of levelling down. This latter point becomes clear upon further investigation of the true content of the equality guarantee and what one understands as the injury inflicted by inequality. If inequality is to be understood formally, as mere unequal treatment in *material* terms, it would make sense to say that the advantaged group has been left worse off by being denied entry into the temple—as well as to say that equality has been achieved for the disadvantaged group by this levelling-down. However, a more substantive understanding of equality would also incorporate the non-material injuries of inequality for the disadvantaged group (and the non-material benefits of inequality for the advantaged group)—thereby requiring a response that would remedy this and not just the material terms of the unequal treatment.[71]

When viewed in this substantive light, levelling down is very clearly revealed as an inadequate remedy in certain contexts. In the temple-entry case, for example, the shutdown achieves equality in material terms. However, far from leaving the advantaged group worse off, it furthers their non-material interests in caste hierarchy and purity-based exclusion, at the small material cost of being denied access to one temple. This further consolidates their relational or social[72] power over the traditionally excluded

[67] Brake (2014), pp. 3, 8.

[68] *Ibid.*, pp. 27–8.

[69] The Hindu *Brahmanical* norms of untouchability practised in India meant that persons who are considered to be belonging to a "lower" caste are often prohibited from entering temples. This is despite the fact that a long history of temple entry and anti-caste movements culminated in Art. 17 of the Constitution of India, which abolishes untouchability. See e.g. Kabirdoss (2016), discussing instances of the state shutting down temples in the name of "law and order" in response to demands for entry.

[70] Brake (2004), p. 515.

[71] *Ibid.*

[72] *Ibid.*, p. 560.

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communities, without at all remedying the non-material injuries from purity/pollution-based exclusion from temples. In fact, the disadvantaged group here is left worse off (despite "equal" treatment in material terms) by virtue of the expressive harm[73] caused by the law. This expressive harm comes from the message of inferiority sent out by the state in signalling that it prefers shutting down a temple completely over reversing the purity-based exclusion of certain communities from the temple premises. This signalling that leaves disadvantaged groups worse off while allowing advantaged groups to consolidate their power, despite seemingly treating both groups equally in material terms, violates substantive understandings of equality.[74]

This substantive understanding of equality is entrenched in Indian jurisprudence. The strengthening of the disadvantaged group's subordination and of existing caste structures in the above example would, in fact, directly fly in the face of the Supreme Court's expounding of substantive equality in *Joseph Shine*.[75] It was observed in Chandrachud J.'s concurring opinion that substantive equality aims at eliminating all discrimination, individual or systemic, that undermines a disadvantaged group's full and equal participation in society[76]—and that, thus, the inquiry under an equality challenge must be whether the impugned law's impact "contributes towards the subordination of a disadvantaged group."[77] This inquiry, the court went on to hold, must be conducted in light of existing social structures of power—with true equality entailing an "overhaul of these social structures."[78]

The above analysis may be easily extended to a situation in which the state responded to demands for relative equality in the treatment of different family forms by simply derecognizing all family forms. This response would achieve formal equality of treatment in material terms. However, upon broadening our conception of the injuries inflicted by inequality, we find that that the cultural, non-material injury stemming from historical neglect of one's chosen family form is left unremedied by this imposition of formal equality. Withdrawal of material privileges from dominant family forms would not undo the cultural privilege these forms have attained by virtue of both the history of state endorsement of such forms and of state-led violence on other forms of love. Thus, substantively, there is no real levelling or equality at all, and such a response would only concretize inequality in two ways. One, while material benefits would be levelled, an individual's choice of family would still be influenced by the state's historical endorsement of conventional families as natural and normative. Thus, the "levelling-down" response allows the state to maintain this unlevel playing field, without having to take any responsibility for undoing this cultural privilege or overhauling the underlying heteronormative social structure—in contrast to the aim of substantive equality identified in *Joseph Shine*. Two, the expressive value of this response would be to indicate a state preference for complete derecognition over bringing into the state's legibility these excluded family forms. This expressive harm does not just impede the cultural acceptance of alternative families as "families," thus leaving them worse off. It, perhaps more importantly, also signals that recognition is either the exclusive right of heteronormative intimacies or is not a right at all. This sends a clear message of inferiority of other family forms and

[73] *Ibid.*, pp. 572–3.

[74] See generally *ibid.* for a similar discussion in the context of anti-discrimination litigation and jurisprudence in the US.

[75] *Joseph Shine v. Union of India* (2019) 3 S.C.C. 39 (Supreme Court, 2018) (declaring s. 497 of the Indian Penal Code 1860, which seeks to penalize a man who has sex with a married woman without her husband's consent, as unconstitutional—being violative of the right to equality, right against discrimination on the basis of sex/gender, and right to life and liberty).

[76] *Ibid.*, at para. 171 (Chandrachud J., concurring).

[77] *Ibid.*, at para. 172 (Chandrachud J., concurring).

[78] *Ibid.*, at para. 174 (Chandrachud J., concurring).

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furthers the subordination of the disadvantaged forms—again, falling foul of the *Joseph Shine* guarantee.

3.2 The horizontality issue

Threats to individual autonomy, in intimate relationships as much as in any other sphere of liberty, often also come from other private actors, not just the state. This idea that sovereignty is layered, not centralized exclusively in the state[79] and instead operates through "multi-layered oppressive structures"[80] is an idea as old in Indian political discourse as the Constitution of India itself. This is evident from the then radical choice to incorporate horizontal rights in Section 4[81]—a choice endorsed by recent judicial discourse that continues to recognize threats from private actors to the right to personal autonomy under Article 21 of the Constitution.[82]

History demonstrates that these private violations pose at least as serious a threat to love as violations from the state—and that, often, the state has had to step in to not only respect, but also protect individual autonomy from other social actors.[83] The recent Rajasthan Bill introducing a special law prohibiting community pressure on and honour killings of interfaith/caste couples provides a window into the need for such protection.[84] The Supreme Court's decision in *Shafin Jahan*[85] and various high courts' recent decisions protecting interfaith marriages and live-in relationships alike[86] lend further credence to the idea that the *right* to intimate autonomy needs as much protection *by* as *from* the state. Consider the Special Marriage Act 1954 ("SMA")—legislation enacted to provide for a secular system of civil marriages untied to specific religious rituals, typically used for interfaith marriages not covered by the religious personal marriage laws. Its very existence in the statute books speaks to a history of the state creating legal rituals to legitimize marriages that social rituals had deliberately excluded or failed to carve spaces for.

[79] Bhatia (2019), p. xxv.

[80] Roy (2005), p. 35.

[81] Bhatia, *supra* note 79.

[82] See e.g. *Justice K.S. Puttaswamy v. Union of India* (2017) 10 S.C.C. 1 (Supreme Court, 2017), at paras 326, 328 (Chandrachud J., plurality) (establishing a positive right to privacy and recommending that the government establish a data-protection regime to protect such a right from state and non-state actors); *Vishaka v. State of Rajasthan* (1997) 6 S.C.C. 241 (Supreme Court, 1997) (recognized the fundamental right of women to a safe workplace across the public and private sectors, and formulated guidelines for workplaces to follow pending legislative action on the same); *Consumer Education & Research Centre v. Union of India* (1995) 3 S.C.C. 42 (Supreme Court, 1995), at para. 28 (recognizing that the asbestos industry workers' right to health and medical compensation can be enforced against state and private actors alike); *Charu Khurana v. Union of India* (2015) 1 S.C.C. 192 (Supreme Court, 2014) (holding that sex-discriminatory by-laws of a trade union that is recognized as such by a statutory authority offend women's right to life and livelihood guaranteed under Art. 21 of the Constitution).

[83] A useful conceptual framework is the trilogy of the duties to respect, protect, and fulfil rights now common in human rights jurisprudence—respect constitutes only a negative right to not violate, protect implies a positive obligation to protect from violations by third parties, and fulfil obligates the states to take measures towards greater realization of the right. See for further discussion Inter-Parliamentary Union (2016).

[84] The Rajasthan Prohibition of Interference with the Freedom of Matrimonial Alliances in the Name of Honour and Tradition Bill 2019.

[85] *Shafin Jahan v. Asokan K.M.*, *supra* note 28 (reversing a lower court's judgment calling into question the validity of an interfaith marriage in a habeas corpus petition filed by the father of the bride).

[86] *Kamini Devi v. State of Uttar Pradesh*, 2020 S.C.C. OnLine All 1740 (Allahabad High Court, India, 2020) (offering police protection to a couple in a live-in relationship in writ proceedings instituted by the couple fearing threat from their family members); *Ridhima v. UT of J&K*, WP (C) No. 1403/2021 (Jammu & Kashmir High Court, India, 2021) (offering police protection to a couple in a live-in relationship in view of threats from their families); *Salamat Ansari v. State of Uttar Pradesh*, 2020 S.C.C. OnLine All 1382 (Allahabad High Court, India, 2020) (quashing criminal proceedings instituted by the girl's parents after she converted and married a boy from a different faith, and holding that adult persons have a right to choose their partners in marriage and intimacy).

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Similarly, in the analogous sphere of reproductive autonomy, reproductive freedom is not fully achieved by merely withdrawing state bans on abortion.[87] Of equal importance is to protect women from abortions forced by family members[88] or from inaccessibility forced by private doctors' refusals to operate.[89] Therefore, while derecognition potentially challenges state hegemony, it also closes the doors to any state-led reforms fighting pervasive horizontal invasions against intimate autonomy. In attempting to deprive the state of its ability to constitute family, derecognition also deprives it of the ability to enact special protections for vulnerable family members. Privately negotiated arrangements, which is all that the contractarian view would permit intimacies to be, often disadvantage the already marginalized—pre-nuptial agreements, for example, are known to leave women worse off.[90] And therein lies the problem with derecognition. Proposals of state withdrawal seem to imagine the state as the sole repository of sovereign-like powers to violate rights—a political fiction belied by the layered sovereignty that rests in *khap panchayats*,[91] patriarchal family structures, and the *fatwas*[92] and diktats of religious leaders.

The foregoing discussion about the constitutional and political pitfalls of derecognition leaves us with full and equal recognition of all family forms as the only route to achieving the constitutional mandate of relative equality.

However, relative equality is but one facet of autonomy—necessary, but far from sufficient. It is not enough to simply recognize and treat all forms of families equally—after all, uniformly applied invasions of privacy are still invasions of privacy. Just as autonomy means something beyond mere tolerance of alternative families, it also means more than just equal recognition and (dis)incentivization of those families. This idea of autonomy should be able to grapple with the risks of deradicalization of alternative family forms and heteronormative violence that often plague state interference in family formation. To achieve this, any policy of equal recognition must adopt contours that remain consistent with the greatest possible freedom and privacy for individuals—from the state, from non-state actors, and even from other members of the family unit—in constituting their intimacies. I attempt to lay the theoretical groundwork for such a policy in the next section.

4. Laying the theoretical groundwork: public ethic of care

While the Supreme Court (SC)'s judgment in *Navtej* firmly established the right to an autonomous zone of privacy in intimate relations, the theoretical basis for this decision is captured in what have come to be known as the *Puttaswamy* cases. In *Puttaswamy-I*,[93] a

[87] Meeks & Stein (2006), p. 151.

[88] See e.g. Velayudham (2020).

[89] See e.g. Suresh (2018).

[90] Mackay (2003).

[91] *Panchayats* are legal entities that form the most basic unit of local governance in rural India. *Khap panchayats* are sociocultural clan-based entities that run a system of governance and dispute resolution that runs in parallel to and is often at cross purposes with lawful local governance. Most famously, they are known for frequently ordering "honour killings" and perpetuating other caste- or gender-based atrocities. For further discussion, see Kumar (2012); Yadav (2009–10). The fear of *khap panchayats* is so widespread that the Supreme Court recently in a public interest litigation held that it is illegal for *khap panchayats* to prevent two consenting adults from marrying and reiterated the state authorities' duty to protect couples from such violations; see *Shakti Vahini v. Union of India* (2018) 7 S.C.C. 192 (Supreme Court, 2018).

[92] Technically means a ruling on an issue of Islamic law handed out by a recognized religious authority. For example, see business-standard.com (2018) (discussing a *fatwa* issued by an Islamic seminary in India stating that Islamic law prohibits Muslim women from marrying into a family with a banking background due to the prohibition of usury in Islam).

[93] *K.S. Puttaswamy v. Union of India*, *supra* note 82.

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nine-judge bench of the Supreme Court conclusively held that the right to life and liberty under Article 21 of the Indian Constitution encapsulates the right to privacy. In *Puttaswamy-II*,[94] the court had further opportunity to flesh out the contours of this right, while dealing with a constitutionality challenge against India's biometric ID system. Over the course of these decisions, the court authoritatively laid down the scope of the right to privacy and the conditions that may permit its restriction by expounding the doctrine of proportionality.

Every instance of legal recognition of family inherently requires state entry into and examination of a zone of privacy, and therefore is always a restriction of some measure of privacy. The proportionality test laid down in *Puttaswamy-I*, as formulated in the opinions of Chandrachud J. and Kaul J., offers a useful framework for understanding the manner in which such restrictions on privacy may be made. Between the two opinions, the following conditions may be culled out for any law limiting the right to privacy to satisfy to be constitutional. First, it must enjoy legislative sanction. Second, it must further a legitimate state interest. Third, it must be proportionate to the purpose of the law.[95] Fourth, the limitation must be *necessary* for achieving a legitimate aim.[96] Though this was added by Kaul J. in his concurring opinion in *Puttaswamy-I*, the majority opinion in *Puttaswamy-II* adopted and further clarified this condition to mean that there must not be any less restrictive but equally effective alternative to achieving the same aim.[97] Finally, fifth, there must be procedural guarantees against abuse of such interference.[98]

Of these, the trifecta of legitimate aim, necessity, and proportionality are of greatest relevance to exploring the broad outlines of an equal-recognition framework, and it is these I focus on in this paper. It is to be kept in mind, however, that the other two conditions—sanctioning law and establishing procedures against abuse—are also necessary and must be satisfied by each individual legislation within the framework.

Thus, to comply with the *Puttaswamy* doctrine, any proposal for equal recognition must first consider two broad questions. The *first* question is one of *justification* and requires the identification of a legitimate aim that would justify state entry into the autonomous zone of intimacies. This is what I answer in the remaining parts of this section. The *second* question is one of *form* and requires that the contours of equal recognition be suited to the identified legitimate aim, be the least intrusive route to it, and not disproportionately intrude on privacy. I explore these considerations while discussing a regulatory outline for equal recognition in the next section. Ultimately, both the justifications underlying equal recognition and the form it takes must be such that they enable state recognition, while resisting state hegemony over naming and constituting "legitimate" intimacies.

For an aim or justification to be legitimate, as per the *Puttaswamy* standard, it is obvious that it would at least have to be constitutional. As we have seen before,[99] relative equality of consensual intimacies is an essential element of personal autonomy, and therefore of constitutionality. Therefore, a legitimate justification for recognition must be one that is not only secular, but also equally applicable to all consensual intimacies without classifying them as valid/invalid along arbitrary lines of the form they take, the social acceptance they command, and their conformity to artificial prescriptions of "natural" forms of love. In essence, this legitimate justification, to be constitutional, must be one that is divorced from the religious norms and popular morality that have historically constituted the "legitimacy" of intimacies in the eyes of the state. In Rawls's formulation, this

[94] *K.S. Puttaswamy v. Union of India* (2019) 1 S.C.C. 1 (Supreme Court of India, 2018).
[95] *Justice K.S. Puttaswamy v. Union of India*, *supra* note 82, at para. 310 (Chandrachud J., plurality).
[96] *Ibid*., at para. 638 (Kaul J., concurring).
[97] *K.S. Puttaswamy v. Union of India*, *supra* note 94, at paras 157–158 (A.K. Sikri J., majority).
[98] *K.S. Puttaswamy v. Union of India*, *supra* note 82, at para. 638 (Kaul J., concurring).
[99] See discussion, *ibid*., Part I.

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justification would have to be one that falls within the realm of public reason—devoid of any claims grounded in contestable moral/ethical/religious conceptions of the universal good.[100] I propose that the public ethic of care offers such a legitimate aim or justification.[101]

All families, regardless of the form they take, perform social reproduction functions. These may include, though are not restricted to, emotional or attitudinal care practices, tending to the old or ill, reproducing social norms, providing a sense of self-identity, procreation, and child-rearing. The role of the family unit in performing one or more of these functions or other similar functions of care allows the state and society to reproduce themselves, while privatizing the costs of their reproduction onto the private domain of the family.[102] Public ethic of care complicates the nature of these functions performed by a family, revealing them as fundamentally public by virtue of their role in social reproduction.[103] The indispensability of these functions to the very sustenance of state and society, thus, provides a legitimate justification for state involvement in the otherwise private zone of families. Since it is these *functions* that form the crux of the state's legitimate interest in families, the specific *forms* that families performing these functions take fades into irrelevance—making marital status or consanguinity meaningless as legal markers for what family constitutes. This shift to public ethic of care, and the consequent shift from form to function, fixes three different problems that plague the current framework.

First is the problem of overinclusiveness and underinclusiveness, which has very directly prevented the current framework from achieving relative equality of intimacies. Going back to the example I began this paper with, we know that the rights to bodily remains of a deceased *hijra* or compensation for their wrongful death lie with their (often estranged) natal families, not their chosen *hijra* family. A shift of focus to the functions that a family must perform, as opposed to the form it takes, would clearly reveal the overinclusiveness of this notion of "family" in extending to the natal family, as well as its underinclusiveness in not capturing the *hijra* family.

Second, the current framework of recognition allows the state the hegemonic power to name, constitute, and exclude families by deciding what families should *look like*—a power it exercises led by religious-cultural convention. Proponents of derecognition, in opposing equal recognition of queer families, fear that equal recognition would only affirm and expand the state's prerogative to exercise this hegemony. However, an equal-recognition policy based on the public ethic of care would meet these concerns in two ways. One, a change in focus from form to function renders redundant any hegemonic power of legitimizing/delegitimizing families through arbitrary and artificial norms of how a "conventional" family looks. A system of recognition based on function would, instead, simply look at what families minimally *do*—making significant inroads into the extent of state discretion and hegemony. Two, public ethic of care dismantles the very notion of state *power* to regulate intimacies, instead reframing it as a *duty* incumbent on the state to support them. By revealing that the state fundamentally depends on and benefits from care functions, it establishes the state's duty to incentivize, support, and compensate all families performing such functions *equally*. This shift is fundamental. Reconceptualizing state support for families (ranging from tax cuts, housing support, to caregiving leave) as a duty (and corresponding right), instead of as a state-conferred benefit, reveals the hollowness of both derecognition and unequal recognition. Since state recognition is the first step to state

[100] Brake, *supra* note 67 (citing Rawls, J. (1997) "The Idea of Public Reason Revisited, 64 *University of Chicago Law Review*).

[101] Levy (2005).

[102] Harder (2009), p. 637.

[103] Levy, *supra* note 101.

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support, unequal recognition, absurdly, allows the state to exercise discretion in deciding which care units it wants to perform its duty of support for. Similarly, derecognition demands universal neglect of duty by the state—allowing it to exploit care functions performed by families without due recompense, and perpetuating a neoliberal state that privatizes the costs of its own reproduction.[104] Such privatization not only allows the state to derelict its duty, but also is bound to come at the cost of the most vulnerable members of the family (often women acting as unpaid caregivers)—which is a point I turn to now.

Third, the current framework extends recognition not to functions performed by families, but to religious-cultural morality that demands privileging of certain family forms—and demands this regardless (and often *because*) of the internally exploitative conditions fostered by those forms. A shift to conceptualizing recognition as the state's duty to support families conducting its own reproduction would inevitably entail a constitutional duty of the state to ensure that its reproduction is not founded on disenfranchisement of, or coerced participation of, vulnerable members. Thus, public ethic of care further qualifies the state's legitimate justification for regulating intimacies. It is not simply to support all carerelationships, but to do so in ways that do not render vulnerable members susceptible to exploitation and incapable of equality and autonomy *within* the relationship.[105] The legitimate aim then, if I use the phrase formulated by Giddens, is to cultivate "pure relationships"—relationships of care sustained for their own sake, from mutual volition, not out of the demands of tradition or economic/social necessity.[106]

As I have admitted before, simply expanding the legal category of "family" without overhauling the heteronormative justifications that create a state hegemony over recognition risks becoming a deradicalizing project.[107] To that extent, those who fear legal recognition are not remiss. However, as the above discussion highlights, the public ethic-of-care justification does not just make for an expanded view of "family"—it, more importantly, makes for a transformed one. The shift in focus from form to function, from power of recognition to duty to foster pure relationships, marks its potential to transform "families," what they look like, and how they are done.

The need for this transformation is, in fact, all the more reason for the state to take seriously and draw from non-heteronormative families who, perhaps due to their existence outside oppressive cultural expectations of how families are done,[108] best approximate pure relationships. The prevalence of economic independence[109] and non-oppressive hypergamy[110] in gay couples and non-hierarchical bonding in friendship networks[111] put them in stark contrast with traditional families. Similarly, *hijra* communes, *kothas*,[112] and *maths*[113] stood as refuges for those escaping from heteronormative families—and typically encouraged emancipatory care relationships across faiths/castes/class.[114] *Hijra* rituals, even today, for example, reflect an amalgamation of rites from both Hindu and Islamic origins.[115] In this sense, with the proposed shift in the framework, extending recognition

[104] Wood (2008).

[105] Levy, *supra* note 101, p. 77.

[106] Giddens (2013).

[107] See discussion *ibid.*, p. 12; for a similar discussion on the implications of expanding "family" without transforming it, see generally Barker (2012), pp. 198–204.

[108] Roseneil (2004), p. 414 (discussing the freedom that comes with friendships due to their location outside cultural expectations).

[109] Monk (2016), p. 179 (qualitative research noting inheritance lawyers' observations in the interview that most homosexual couples were economically non-dependent on their partner).

[110] See Stacey (2004).

[111] Roseneil, *supra* note 108.

[112] See discussion, *ibid*., pp. 3–4.

[113] See discussion, *ibid*., pp. 10–1.

[114] See generally Kasturi, *supra* note 43; Oldenburg, *supra* note 9.

[115] Ghosh (2016), p. 189.

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to queer families has the potential to queer the very category of "family," disturbing the heteronormative order it stands on. After all, as Ambedkar recognized while proposing inter-caste marriage as the route to annihilating caste, subversive forms of love and kinship form powerful alliances against the dominant order.[116]

In the next section, I will propose broad contours of a regulatory framework that remains true to the full transformative potential of the public ethic-of-care framework.

5. Outlining a regulatory model of care

In the last section, I postulated the dual requirements of relative equality and the *Puttaswamy* test as essential to a formulation of family recognition that remains true to constitutional baselines. The public ethic-of-care justification was then proposed as satisfying the demands of relative equality and the first *Puttaswamy* prong, namely a legitimate state aim justifying state entry into the privacy of intimacies. My attempt in this section is a modest one. A sweeping range of laws would need overhauling due to this shift—from succession and core family law, to social security frameworks, insider trading regulations,[117] spousal privilege, and tenancy laws.[118] Therefore, I do not propose specific amendments. Instead, I propose broad guidelines that should inform any recognition model that seeks to satisfy the other *Puttaswamy* prongs—necessity and proportionality—while also remaining true to the transformative promise of relative equality and our identified legitimate aim of cultivating pure relationships.

At the outset, I deal with a possible objection—that, regardless of any normative justifications, it is administratively impossible to recognize non-conventional families given the amorphousness of their form and the fluidity of their creation, expansion, and dissolution. This claim ignores that the Indian legal system recognizes marriages conducted through the customary rites and rituals of either of the parties thereto,[119] without any uniform requirement for civil registration such as is present in jurisdictions like France.[120] Custom's nature makes it inevitably amorphous across communities and local boundaries—also rendering amorphous the mode of solemnizing marriages. Relatedly, Indian taxation law also readily mires itself in considerable administrative ambiguity in determining whether certain families are HUFs for the purposes of granting them tax benefits as assessable entities.[121] These existing sites of legal fluidity and amorphousness reveal this objection as baseless.

Another question remains open before we move on to the core of this section—whether a new framework of recognition is best rooted in statutory or customary law. To some, custom as a source of law represents a more democratic division of law-making power between the state and the community—allowing centrally imposed homogeneity in family recognition to be tempered by diverse and locally derived customs.[122] However, I argue

[116] Narrain (2011), p. 19.

[117] Sections 2(1)(d), 2(1)(f), Securities and Exchange Board of India (Prohibition of Insider Trading Regulations) 2015 (defines "immediate relatives" who are deemed to be "connected persons" for the purposes of insider trading restrictively to only include financially dependent spouse or sibling or parent).

[118] See e.g. s. 2(k), Delhi Rent Control Act 1958, providing for succession of tenanted premises in the event of death of the primary tenant only to members of the conventional family co-habiting with the original tenant.

[119] Vanita (2011), pp. 343–4 ("Judges examine evidence like photographs and testimonies of priests, witnesses and guests, to figure out if the wedding took place according to the community's customs. The general principle seems to be one of common sense: if it looks like a wedding, if it is seen and understood to be a wedding, it is a wedding"); see e.g. s. 7, Hindu Marriage Act 1955 (providing that a marriage is solemnized when it is conducted in accordance with the customary rites of either of the parties thereto).

[120] Franceintheus.org (2007).

[121] Sampath (1978).

[122] Vanita, *supra* note 119.

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that sole reliance on custom for an equal family-recognition framework has its own pitfalls.

First, custom is all about "long usage," "continuity," and "consistency" of practice. Simply put, the "customary" is derived from the "conventional," thereby naturally marking and casting aside all else to the stigmatic category of "unconventional." Thus, a custom-based recognition model could create exclusions and hierarchies potentially like those created by the "traditional" family forms recognized today. For example, there is a popular *hijra* belief that those *hijras* who leave the customary *hijra* family (the *hijra* commune) are "inauthentically" *hijra.*[123] This exemplifies the stigmatizing risks of embedding certain families as customary. This stigmatization would, naturally, come with exclusions. A further example would be relatively modern family forms like friendship networks or parenting triads, which would almost certainly be excluded by a customary model of recognition.

Second, as custom evolves through judicial recognition, it is likely to be fragmented in its formation—leaving much to uncertain post facto adjudication for families living on the margins of legality. I will briefly illustrate my point here. *Hijra* communes are organized in lineages of *gurus* and *chelas* (disciples), and a widely acknowledged practice within the *hijra* commune is the devolution of the *chela*'s property to the *guru* upon the former's death. I will now look at two judicial decisions that deal with the recognition of this practice as custom. In *Sweety*,[124] the court recognized the *guru-chela parampara*, or the guru-disciple custom, in *hijra* communes. However, the factual matrix of this decision is worth noting. The *chela*'s will and religious affiliation were both unproven before the court. Now, in India, one's religion typically governs the intestate succession statutes one is governed by. The fact that neither a will nor any religion was proved, thus, rendered indeterminable the applicability of any statutory law, leaving open the possibility of applying secular *hijra* customs. In fact, the court specifically rejected the application of the Hindu Succession Act 2005 in favour of the guru-chela *parampara*, due to the lack of proof of the *chela*'s affiliation to Hinduism.[125] Our second judicial precedent, the decision in *Ilyas*,[126] which *Sweety* peculiarly relies on,[127] stood on a wholly different footing. Here, the court was aware of both the deceased *guru*'s will and religion. Nevertheless, the court held that the *guru-chela* custom, not testate or intestate succession law, governed the succession of the suit property—explaining further that said custom barred devolution of such property to a non-*hijra* legatee. However, it is notable that the property in question was obtained by the deceased *guru* from their *guru*, down the *guru-chela* customary line, and was not self-acquired property. While being progressive, neither of the cases recognized the *guru-chela* custom as establishing a *family.* Instead, they limited their reach to only establishing an alternative line of succession outside the family. The parallels to colonial-era recognition of *guru-chela* succession of *math* property, all the while denying familial status of the *math*,[128] are all too obvious. Due to this implied characterization of the *guru-chela* relationship as being outside "family," it remains unclear whether intestate succession to self-acquired property of a *hijra* whose religion is known would devolve to the *hijra* family by *guru-chela* custom or to the legal family by religious personal law.[129] This remains open to future adjudication—being outside the ambit of the fragmented custom formation that has taken place across two and a half decades in *Sweety* and *Ilyas.*

[123] Ghosh, *supra* note 115, p. 190.
[124] *Sweety (Eunuch) v. General Public*, 2016 S.C.C. OnLine HP 909 (High Court of Himachal Pradesh, 2016).
[125] *Ibid.*, at para. 6.
[126] *Ilyas v. Badshah alias Kamla*, 1989 S.C.C. OnLine MP 175 (High Court of Madhya Pradesh).
[127] Sweety (Eunuch) *v.* General Public, *supra* note 124, at para. 13.
[128] See discussion, *ibid.*, pp. 10–1.
[129] Shukla (2017).

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Lastly, judicial evolution of custom, through the inherent nature of judicial processes, will inevitably be case by case (here, family by family). This fact combined with custom's emphasis on convention and long-standing practice brings customary law very close to a form-based system in practice, with all its problems of over- and underinclusiveness. The decision in *Ilyas*, again, is a case in point. The court in *Ilyas* noted the respondent *chela*'s failure to perform the care functions that underlie the *guru-chela* custom.[130] However, the court rendered this irrelevant in recognizing as custom only the form, and not the function, of the *guru-chela* descent—thus allowing the property to devolve to the *chela.* Granting customary practices legitimacy qua custom tends to favour form over function, making it unsuitable for our proposed framework.

This leaves us with the core purpose of this section—to propose a statutory framework of recognition in line with the transformative principles identified earlier, and their use of function to decide which forms merit recognition. Models of family recognition proposed by some theorists prioritize function over form,[131] but leave some aspects unexplored. It is not enough to merely decide which chosen groupings can be "families" generally—after all, it is also relevant to decide what circumstances provide the state the power to make this decision, the degree of personal autonomy that recognition can come with in each instance, and how a function-based recognition framework may account for the purpose of such recognition. Do the same functions matter for a law seeking to provide emotional support (such as bereavement leave), as a law seeking to create financial obligations (maintenance provisions)? Instinctively, as recognized by Minow while proposing a functional version of family recognition,[132] the answer is no.

To address these practical questions that a functional framework necessarily throws up, one needs a super-framework of sorts; this super-framework would need to govern not just the matter of which groupings are "families," but also the more preliminary matter of *when* this question falls for the state's decision at all and the extent of discretion the state may have to decide it. The super-framework that would answer these preliminary and secondary questions would also be required to merge with the *Puttaswamy* tests of legitimacy, necessity, and proportionality. The most comprehensive framework I came upon that met these needs of actualizing the functional models proposed by many was the four-step framework outlined by the Canadian Law Commission (CLC) for recognizing and regulating intimacies.[133] Proposed as a set of first principles circumscribing the state's power to define (and therefore, confine) "families," the CLC's framework transcends boundaries to the extent that it serves only as a set of questions for the state to answer in each instance of family-facing law-making. The questions themselves are designed specifically to account for both equality of treatment and an autonomous zone of privacy in constituting intimacies and are therefore informative for addressing Indian constitutional concerns on family recognition.

The first two steps of this framework are intended to identify laws that must completely eliminate any determinations of or reference to familial status. The *first* step involves a rather preliminary inquiry matching the first prong of the *Puttaswamy* doctrine—whether the law in question serves a legitimate aim. Naturally, any offending law would be repealed.[134] The second level of inquiry, becoming relevant only if the first level is crossed, asks whether determining familial status is *unavoidable* to the legislation's otherwise

[130] *Ilyas v. Badshah alias Kamla*, *supra* note 126, p. 213 ("Document further indicates that Munnilal had executed a Will in favour of Kamla alias Badshah who belongs to his community but the said person had stopped rendering any service to him after the Will and did not give any financial help during the illness. Munnilal has, therefore, cancelled the Will in favour of said Kamla alii Badshah").

[131] Mirabelli (2018).

[132] Minow (1991).

[133] Law Commission of Canada (2001).

[134] *Ibid.*

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legitimate aim—and recommends removing reference to such status if it is not.[135] This step maps on neatly to the *Puttaswamy* requirement for necessity. Since every instance of legal recognition of family inherently requires state regulation of a zone of privacy, such recognition must be *necessary* for achieving a legitimate aim, and there must be no equally effective route to achieving it that is less restrictive of this zone.[136]

5.1 Step 1

The first step would, *in limine*, filter out provisions criminalizing homosexuality,[137] or the clampdown on *hijra* communes effected by the 2019 Trans Act. Such provisions unconstitutionally discriminate against and extinguish the autonomy of certain intimate expressions—and clearly do not serve a legitimate aim. Let us now consider a different variety of laws invoking familial status—"spouse-in-the-house" rules that deny welfare entitlements to women living with an earning partner.[138] Provisions such as these assume economic dependence as an essential feature of family life and perpetuate it through law[139] —creating impure relationships of dependence, not choice. The very framework of the Indian welfare system is geared to this. The Mahatma Gandhi National Rural Employment Guarantee Act 2005 ("MGNREGA") identifies "households," not individuals, as the holder of its 100 days' work guarantee.[140] More structurally, the Below Poverty Line ("BPL") status, used across welfare schemes to identify beneficiaries, also classifies "households" and not individuals as being below/above a certain poverty line. Thus, families as a whole, not their members, are the holders of welfare entitlements—without regard to intra-familial allocation of household consumption or welfare aid.[141]

The state, thus, sees an individual's economic wellbeing as synonymous with the household's. This blind spot masks unequal distribution of resources within the households. It does so by hiding the poverty of vulnerable individuals (like women, orphans, and the elderly) within households otherwise above the poverty line, and by hiding the fact that such individuals in BPL households also do not reap their share of household-targeted welfare benefits. This also means that the family becomes the primary resort for welfare and material wellbeing—if your family is above the poverty line, you are above the poverty line, and the state need not step in. Sociologically, however, the rise of a welfare state geared around the individual was critical to dismantling family dependencies and making possible families of choice or pure relationships.[142] By making the family the beneficiary of welfare, and stepping in only as a last-resort neoliberal framework when internal family dependencies fail,[143] the Indian state has undone this transformative potential.

Thus, a welfare system based on family status runs into two constitutional hurdles. First, it runs afoul of the legitimate aim of welfare—individual wellbeing. Second, by allowing the state to privatize care and dependence onto the family, it runs afoul of the legitimate justification and aim, respectively, of any legal recognition of family status—the public ethic of care and the cultivation of pure relationships. Having identified these laws as not serving a legitimate aim, and thus not satisfying the *Puttaswamy* test, they too would be filtered out. Seen in this way, this is a transformative step that re-orients the way family is done and its relationship with the state. An expansion of families to include

[135] *Ibid.*
[136] See discussion, *ibid*., p. 19.
[137] Section 377, Indian Penal Code, 1860.
[138] Cossman & Ryder (2001), p. 300.
[139] Law Commission of Canada, *supra* note 133, p. 77.
[140] Section 2(f), Mahatma Gandhi National Rural Employment Guarantee Act 2005.
[141] Fernandez (2010), p. 422.
[142] Beck-Gernsheim (1998).
[143] Harder, *supra* note 102.

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non-conventional family forms without the above transformation would end up a neoliberal project[144]—expanding dependence by domesticating queer families into the economically dependent, inegalitarian mould of the conventional ones. This risk of conscripting expansion of families to the neoliberal agenda is best illustrated[145] by the Canadian Supreme Court's decision in *M v. H*,[146] expanding economic obligations imposed on common-law couples to include same-sex couples—considering it important that the purpose of such an imposition was to "alleviate the burden on the public purse to provide for dependent spouses."[147]

With this in mind, the following specific proposals may help the Indian welfare regime. Welfare schemes such as MGNREGA should target individuals, not households, and thus help in cultivating economic independence of vulnerable individuals within their families. On a similar note, tax deductions given to an earning member for expenses on a financially dependent unpaid caregiver[148] do not recognize the gains of the earning member from the caregiver's unpaid labour. Therefore, these should be replaced with direct benefit transfers to the dependent caregivers as economically vulnerable individuals.[149] The latter solution cultivates economic independence by dismantling the economic dependency of unpaid caregivers; recognizes the earning member's dependency on the caregiver; and compensates the caregiver for the economic value of this work. Tax deductions fail to achieve any of these outcomes. These reform proposals filter out legal references to family status that do not serve the legitimate aim identified for such recognition.

5.2 Step II

On the other hand, there are legislations that serve aims that are not per se illegitimate, but which can be equally or more effectively fulfilled without a reference to family status. This is the category that the CLC's second step, and *Puttaswamy*'s necessity standard, speak to.

Consider the position of living wills or advanced directives in India, elaborated upon by the Supreme Court in *Common Cause v. Union of India.*[150] The decision laid down detailed guidelines for the treatment of advanced directives. In doing so, the court held that the directive must designate a "guardian or close relative"[151] who, if the patient is rendered incapable of decision-making, be authorized to consent to withdrawing treatment on the patient's behalf within the broad contours of the directive. The patient's wishes are already recorded in the directive, and the designated person is only responsible for implementing them. Given this, there is no basis for the assumption that a person in a close personal relationship (who will have emotional and/or financial interest in the decision) will be any more effective at this task than, say, a specialized professional (albeit emotionally detached) caregiver who participated in the formulation of the directive. The legitimate aim of advanced directives—to uphold a patient's autonomy in making end-of-life decisions—is such that the existence of a care relationship between the patient and the designated person is irrelevant, though not detrimental, to the aim. A similar problem plagues decision-making as to post-mortem organ donation in India—the law requires a near relative to bear witness to a person's written authorization to donate his organs post-death.[152] If the aim of such a provision is merely to ensure the

[144] Cossman & Ryder (2017).
[145] Harder, *supra* note 102.
[146] *M. v. H* [1999] 2 S.C.R. 3 (Supreme Court of Canada).
[147] *Ibid.*
[148] Section 80C, Income Tax Act 1961.
[149] Law Commission of Canada, *supra* note 133, pp. 74–7.
[150] *Common Cause v. Union of India* (2018) 5 S.C.C. 1 (Supreme Court of India, 2018).
[151] *Ibid.*, at paras 198.2.5, 198.4.4 (Misra J., plurality).
[152] Section 3(2), The Transplantation of Human Organs and Tissues Act 1994.

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voluntariness of the authorization, the familial relationship of the witness is not relevant —and should be replaced with alternative safeguards, like registration requirements/tests for the reliability or disinterestedness of the witnesses.

The proposals for reform I would like to suggest in the above two areas are exemplified by the Mental Healthcare Act 2017. By allowing a patient of mental illness to appoint any individual as his "nominated representative" in their advanced directive for treatment/care of the mental illness,[153] the Act has centred patient autonomy in the conversation on health-care decision-making and avoided irrelevant qualifiers of and examinations into family status. In order to fulfil the necessity requirement of *Puttaswamy*, the organ donation and general advanced directives regimes should follow suit.

That leaves us with legislations that serve a legitimate aim, and which aim necessitates a reference to familial status. This takes me to the third and fourth steps of the CLC's framework that cover this class of laws and speak to the *mode* of family recognition that any such law should adopt (between self-designation or ascription) and the scope of "family" that it should extend to. The framework allows both the choice of mode of recognition and the scope of the "families" covered by any given legislation to be tailored to be proportionate to its specific purpose.[154] Since the mode and scope of recognition determine the extent to which any law would invade the privacy of intimate expressions, these steps are crucial towards meeting the *Puttaswamy* requirement of proportionality. As we shall see below, any single uniform determination to these questions, imposed across laws and facets of regulation, will likely be under- or overinclusive, and thus fall afoul of the proportionality test.

5.3 Step III

If the legislation is found to have a legitimate aim, and the aim is found to require reference to family status, the third step becomes relevant as a mode of ensuring that the intrusion is *proportionate* to the purpose of the law. It requires that the state examine whether self-designation of one's own family, being the less intrusive and more choice-generating route, is a viable mode of recognition for the legislation's purpose.[155] This self-designation may or may not be circumscribed by certain functional qualifiers having a reasonable nexus to the legislation's goals.

To illustrate this point, let us consider the case of compassionate appointments to government service of the dependants of those civil servants who die in harness. A typical compassionate appointment scheme in India covers only dependants in the immediate conventional family of the deceased—usually the spouse and child, or siblings in the case of unmarried officers.[156] Insofar as the scheme's purpose is to provide support to the dependants rendered financially insecure by the death of the deceased, this is obviously constitutionally inadequate. By defining who can constitute a legitimate dependant "deserving" of compassion, the scheme works against its own purpose and violates relative equality by unreasonably classifying dependants into those sharing conventional relationships with the deceased and those who do not. This restriction on the deceased's autonomy to identify those who will need most support in the event of their death is not in service of the scheme's purpose and is therefore *disproportionate* to it. That is, it disproportionately intrudes into the decisional privacy of intimate choices, in clear violation of the *Puttaswamy* standard. Ultimately, thus, to bring it in line with the proportionality requirement and the CLC's third test, the scheme should allow for as much self-designation as

[153] Sections 14, 5, The Mental Healthcare Act 2017.

[154] Law Commission of Canada, *supra* note 133.

[155] *Ibid.*

[156] See e.g. Scheme for Compassionate Appointment in the Registry of the Supreme Court of India 2006.

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possible, within the purpose of the law. I propose that this purpose would be best served if the government employee, upon joining service, was asked to self-designate any person(s) as a potential beneficiary of compassionate appointments, subject to the qualifying requirement that the said person must be financially dependent on the employee.

The above example is a form of limited self-designation that uses a functional qualifier to ensure that the self-designation serves the law's purpose. One can imagine another class of legislations in which only absolute self-designation would satisfy the proportionality requirement, and all qualifiers circumscribing the right to choose would be disproportionate. I use the example of caregiving leave to illustrate my point. India recently introduced caregiving leave of 730 days for unmarried male central government employees with children in need of care—a provision that was only available for women before this.[157] The policy still imagines women as principal caregivers in any family unit—and contemplates men in caregiving roles only in the absence of a wife. However, the provision also falls short by not recognizing other forms of inevitable dependencies, like those of the aged, the disabled, or the terminally ill as well as forms of caregiving relationships outside a heteronormative child-centric mould. In doing this, the state intrudes into intimate care decisions in a manner that is disproportionate to its purpose, which is to support forms of care that are essential to its citizen's wellbeing and to its own social reproduction. The state imposes on employees its own heteronormative answer to the question of which of their care relationships merit caregiving leave. I, therefore, propose an alternative provision that would allow greater autonomy to an employee, while still meeting the purpose of caregiving leave. Such a provision would allow all employees (regardless of their gender or marital status) absolute self-designation in this regard—such that they can take a certain amount of caregiving leave in a year to care for certain persons predesignated by them. The fact that the persons will be predesignated and that the number of leave days can be capped should assuage any fears of abuse. The employee's emotional involvement with a person is implicit in the very decision to designate that person in advance of their requiring care—making any functional qualifier of emotional dependence redundant and making absolute self-designation the only proportionate measure.

5.4 Step IV

In contrast to the above discussion, self-designation is clearly an inadequate mode of recognition for laws purporting to regulate, coerce certain conduct, or protect members within intimacies. It is only in this class of legislations, in which self-designation is unviable, that the state can *ascribe* to a group of persons the status of a family using a statutory definition. Recognition of families by ascription is, to be clear, only a last resort—where self-designation is a viable choice, ascription will be a disproportionate measure, in violation of the *Puttaswamy* standard. Proportionality, as I have mentioned above, would also demand that the scope of relationships labelled "familial" by legislation must also be tailored to the aims of that specific legislation. The proportionality test, thus, neatly incorporates the fourth step of the CLC framework into Indian law—allowing the state to ascribe family status only where self-designation fails and requiring it to tailor the legal definition to capture all and only such relationships that the legislative aim targets.[158]

Consider the legitimate aim of the Protection of Women from Domestic Violence Act 2005 ("DV Act") to protect women in domestic relationships from abuse or violence. Naturally, domestic violence is not easily reducible to violence simpliciter. Many aspects make it distinct—its occurrence in a fiduciary setting; the private zone in which violations often occur; the difficulties in proof due to the absence of independent witnesses; and,

[157] Jain (2018).

[158] Law Commission of Canada, *supra* note 133, p. xx.

https://doi.org/10.1017/als.2023.4 Published online by Cambridge University Press

most importantly, the way the victim's emotional and/or financial life is implicated with the abuser's, creating the need for protective remedies (such as right of residence/maintenance) as well as unique pressures against criminal prosecution or even reporting. This special nature of domestic violence, irreducible to violence criminalized in general penal laws, requires that the domestic nature of the relationship be recognized in law. Also, naturally, self-designation is unworkable—in that it would simply allow abusive families to escape the DV Act's net by merely refusing to formalize a relationship. This leaves us on the threshold of the fourth step of the CLC's framework, and with the question of which legal definition of a domestic relationship would proportionately fit the purpose of the DV Act.

The current definition of domestic relationships in the DV Act has two necessary criteria—a functional one, requiring present or past cohabitation; and a form-based one, requiring the relationship to be related by marriage, consanguinity, adoption, or a marriage-like dynamic.[159] Of the form-based requirements, "marriage-like" presents an interesting crossover between formal and functional definitions. True to the hybrid nature of this criterion, courts have clarified that a couple in a marriage-like relationship must be otherwise eligible to marry in India,[160] while also laying down a diversity of functional factors to determine what a marriage-like relationship is. These include sharing of resources and finance, sexual relations, public socialization as a couple, and cohabitation.[161] This makes for odd irony—where marriages themselves are not scrutinized for compliance with what the state thinks is marriage-like, but other relationships are held to this rigorous standard of proof. They are forced to either aspire to this imaginary homogeneity that the state believes marriages are (or should be) or be deprived of protection.[162] This excludes a wide variety of relationships within which also any violence shares the unique characteristics of domestic violence—*hijra* communes, or live-in relationships that are not "marriage-like," for example.[163]

To fix this gap, having identified the purpose of the DV Act as addressing the peculiar problem of domestic violence, the first step would be to eliminate any references to the *form* of a domestic relationship, prioritizing its functional features and how they fit the Act's purpose over how it looks.[164] The next step would be to consider the specific remedy for which a definition of "domestic relationship" is sought, and acknowledge the need for differing definitions for the different aims served by different remedies.

I first consider the remedy of maintenance,[165] very commonly considered to be aimed at avoiding destitution in cases in which a victim of domestic violence sues a perpetrator they are financially dependent upon. This, however, is the logic of neoliberalism and economic dependence. First, it thrusts forward the family as the first line of defence against destitution and relegates state welfare to the margins—cultivating, unconstitutionally as I argued above, a legal environment conducive to impure relationships of dependence. Second, the disempowering language of dependence is misrepresentative—invisibilizing the maintenance-giver's dependence on the maintenance-seeker's unpaid labour. Thus, the right to maintenance hinges not on the seeker's economic dependence or inability to maintain themselves, but on the need to compensate the claimant for

[159] Section 2(f), Protection of Women from Domestic Violence Act 2005.

[160] *D. Velusamy v. D. Patchaiammal* (2010) 10 S.C.C. 469 (Supreme Court of India, 2010), at para. 31.

[161] *Indra Sarma v. VKV Sarma* (2013) 15 S.C.C. 755 (Supreme Court of India, 2013), at para. 56.

[162] Cossman & Ryder, *supra* note 138, p. 288.

[163] See e.g. *Indra Sarma v. VKV Sarma*, *supra* note 161, at para. 68, denying protection to a woman in a live-in relationship on grounds that the victim knew that the respondent was married when she entered the relationship and holding that that barred the relationship from the status of being "marriage-like."

[164] Mirabelli, *supra* note 131.

[165] Section 20, Protection of Women from Domestic Violence Act 2005.

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their contribution to the household or the opportunity cost of unpaid carework in the form of projected future earnings.

The purpose, understood like this, would require a functional definition of who is entitled to maintenance—one that covers all domestic relationships exhibiting patterns of unpaid labour or opportunity costs for earnings. For example, consider a *chela* who has been expelled from the *hijra* household by the *jamaat* or the decision-making council.[166] The current law would allow this to happen without enforcing any right of maintenance—despite the *chela*'s contribution through earnings that typically go directly to the *guru* for the household's collective use,[167] as well as through unpaid care. Adopting the above functional definition would change this position for *hijra* households, as it also would for live-in relationships, non-cohabiting unpaid caregivers, polyamorous partners, etc.

Consider, instead, the right of residence provided for in the DV Act,[168] and consider how the definition of domestic relationship might vary to achieve the purposes of this remedy. The very nature of the remedy would warrant a different functional criterion for domestic relationships—with cohabitation being a necessary requirement, unlike with the remedy of maintenance.

Moving to a different facet of the way law interacts with and defines close relationships, one may look at the law on testimonial privilege. In India, this immunity is currently only provided to spouses.[169] The purpose of such provision is clearly to foster trust in and maintain privacy of the marital bond.[170] If this rationale is accepted as justifying loss of relevant testimony at all, it has to equally apply to all relationships of care involving a high degree of emotional commitment, including friendships. All other elements, be it functional ones of economic dependence or formal ones of conjugality, must be relegated to irrelevance.[171]

Different legal spaces, thus, interact with, constitute, and influence intimacies in completely different ways—some of these interactions serve aims that are illegitimate, whereas some serve legitimate aims but do not really require reference to any intimacies at all. Others, that is those that serve legitimate aims that can only be fulfilled by referring to intimate relationships, form the zone in which the state can validly recognize and interact with "family" as a legal category. Whether the proportionate manner of recognition in such cases is to be self-designation or ascription and what scope of relationships, if any, should be ascribed the status of family are questions that can only be constitutionally resolved after a deliberate assessment of the purpose of any given law.

This four-step framework corresponding to the prongs of the *Puttaswamy* test thus calls for a comprehensive and wide-ranging overhaul of all laws recognizing and thus entering the domain of "families." The above proposals only present a blueprint of the path forward, and provide a glimpse of the enormity of both the exclusions and violence wrought by the current legal framework as well as the transformative inclusivity that the proposed shift will make possible.

I coin this shift in the conceptualization of family the demand for and the constitutional right to "family equality."

6. "Family equality" or "marriage equality"?

On 6 September 2018, the Supreme Court of India read down section 377 of the Indian Penal Code to the extent that it criminalized consensual sexual relations between adults

[166] Goel, *supra* note 4.
[167] Gettleman (2018).
[168] Section 19, Protection of Women from Domestic Violence Act 2005.
[169] Section 122, Indian Evidence Act 1872.
[170] Amar (2005).
[171] Law Commission of Canada, *supra* note 133, p. 80.

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of the same sex.[172] This historic verdict, by decisively establishing a zone of privacy around sexual intimacies, opened doors to legal recognition of same-sex marriage. Petitions demanding it have already reached the Delhi[173] and Kerala High Courts.[174] As the Indian queer impact-litigation movement sets its eyes on marriage equality as the next milestone, it is imperative to reassess this prioritization, and reorient queer political and legal strategies towards their full constitutional potential. I propose that the focal goal of impact litigation change from marriage equality to the constitutionally sounder and broader vision of family equality. That this is a constitutional requirement and a regulatory possibility has already been argued in Subsections 5.1 to 5.4, speaking to the judicial and legislative processes. In this part, I address a third process that drives constitutional meaning-making—social movements. To the queer movement, I seek to advance the political and strategic case for a direct demand for complete family equality—as against its current focus on marriage equality as an end in itself as well as a means to incremental recognition for other families.

I argue that "family equality" is a project of the radical politics of liberation—demanding legal recognition not in the name of sameness to other family forms, but by queering and transforming "family" itself. In doing this, "family equality" rejects the norm of family as the economic unit and recognizes all queer intimacies as "products of unfettered creativity,"[175] with no fixed norms of replication or walled boundaries. It recognizes that "family" can mean different things to different people and in different contexts. In this sense, "family equality" does not demand inclusion into the normative family, but transforms the normative family to include itself as well as its potential for making families egalitarian, diverse, and pure relationships. Thus, difference, not sameness, holds the pride of place in liberation politics.[176]

The pursuit of accessing heteronormative institutions like marriage, in contrast, often hinges on arguments from formal equality—that is, homosexual relationships are the *same* as heterosexual relationships *but for* their gender.[177] The petition before the Delhi High Court, in fact, makes a claim along exactly these lines, stating that the "[p]etitioners are like any other couple you might meet, except they are both women."[178] This language of sameness privileges equality over liberation[179] and affirmation of the equal legitimacy of one's family over transformation of the category of family.[180] This is because the category of legitimacy, constituted by hetero-norms and left unquestioned by a politics of equality, extends equal recognition only at the cost of assimilation—reproducing the gender roles, the economic dependence, and the desire for monopoly over a family member's care and love that characterize conventional families generally and marriages specifically.[181] By extension, the demand for recognition of same-sex marriages also comes with this assimilationist pull. It uses norms of legitimacy to construct the "respectable queer"[182] or the "good sexual citizen"[183]—the monogamous, typically middle-class, publicly desexed, privately queer person.[184] Considering same-sex marriage as the *primary*

[172] *Navtej Singh Johar v. Union of India*, *supra* note 1.
[173] Dutta (2021).
[174] Sirohi (2020).
[175] Barker, *supra* note 107, p. 180.
[176] See discussion in Joshi (2012).
[177] Gaucher (2014), p. 64.
[178] Tripathi (2020).
[179] Joshi, *supra* note 176.
[180] Agarwal, Sanyal, & Mukherjee (2020), p. 16.
[181] See generally Barker, *supra* note 107.
[182] Joshi, *supra* note 176.
[183] Barker, *supra* note 107, p. 175.
[184] *Ibid.*, pp. 173–5.

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political aspiration for the queer movement,[185] by giving in to the politics of respectability, gives in to the politics of sexual shame that heretofore condemned some—and allows it to condemn others instead, be it cruising gay men, publicly gender-queer trans-persons, promiscuous or single women, or people practising public sex or polyamory.[186] This shifting face of respectability is apparent around the world. In Canada, for example, even as same-sex marriage was legalized, the state continued its clampdowns on gay and lesbian public bathhouses in the same month.[187] Studies in the UK show that adoption officers give preference to applications from "good" lesbians—cisgender, apolitical, publicly heterosexualized, and having heterosexual friends.[188] In a similar vein, advocates of same-sex marriage, in justifying their demand, often reinforce the stigma around single motherhood by claiming that gay couples would provide better parenting.[189]

This has the inevitable effect of creating the binaries of ideal minority versus dangerous minority—widening the gap between what has been described as the "queer underclass" and the "queer aristocracy."[190] This fissure in the community manifests variously. In the US, for example, resistance from upper-class queers to gentrification of queer public spaces is waning.[191] The gentrification drive has also extended to such iconic queer neighbourhoods as the Castro in San Francisco[192]—where the displacement of poor queer tenants is only being accelerated by gay homeowners' objections to the presence of queer homeless shelters near their houses.[193] A similar trend characterizes Indian queer politics, too. For example, in the discourse around decriminalization of homosexuality, there is a clear undercurrent of class, often stated as a demand for equal rights for "law-abiding" "tax-paying" citizens[194]—as if queer rights were not for the poor, or the imprisoned. Moreover, the movement in India until now had fought dominantly against section 377 of the Indian Penal Code, 1860 ("IPC") a rallying point, the choice of which did not go politically uncontested within the community. The choice has been criticized for being driven by the fact that section 377, more than any other queer issue, had a direct impact on the lives of cis gay men who enjoy the greatest capital in the movement.[195] This is only confirmed by the queer movement's relatively lukewarm response to the 2019 Trans Act and numerous other laws, outside section 377, that allow the state to criminalize and inflict violence on transgender bodies.[196]

Even now that section 377's excesses are past, these issues remain neglected—with the movement now gearing up for marriage equality instead. Much like the choice of the previous rallying point, this one is also steeped in the power relations within the queer community, because the politics of respectability that informs the demand for marriage is not equally accessible to all. The institutions of respectability and privilege are more accepting of those that are already relatively invested in them—accepting the desexed, homosexual monogamous couple, while rejecting the non-dyadic polyamorous partners, or the parenting triads.[197] Respectability, ultimately, begets respectability—and the gap

[185] I distinguish this, of course, from considering marriage one's primary *personal* aspiration.
[186] Barker, *supra* note 107, pp. 173–5; Joshi, *supra* note 176.
[187] Gaucher, *supra* note 177, p. 66.
[188] Hicks (2000).
[189] Eskridge (1996), p. 140.
[190] Joshi, *supra* note 176, p. 458.
[191] Barker, *supra* note 107, p. 188.
[192] Downing (2019).
[193] Barker, *supra* note 107, p. 189.
[194] See thehindu.com (2020).
[195] Prasad (2020); Radhakrishnan (2019).
[196] Radhakrishnan, *supra* note 195.
[197] Joshi, *supra* note 176, pp. 437–8.

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between the respectable and the disrespectable widens as the former are assimilated into the heteronormative mainstream.[198]

The stand-alone recognition of same-sex marriage, thus, will only amplify the fissures within the community—depoliticizing and fragmenting sections, and making any subsequent collective action for recognizing other forms of intimacies less effective.[199] This brings me to the strategic part of my case—why a direct demand for full family equality is a better strategic route than starting off with marriage equality as a piecemeal route to eventual full recognition. While some argue that same-sex marriage will pave the ground for this to happen, past experience should give us pause. A part of the reason, of course, could be that recognizing same-sex marriage is less about accepting sexual liberty/homosexuality and more about accepting its domestication into heteronormativity.[200] Another part of the reason, however, is that the recognition of same-sex marriage, rooted in the assimilationist logic of sameness and legitimacy, is likely to fragment the queer community, and weaken future action for full family equality.

These fault lines in the social movement tend to only be exacerbated by impact-litigation strategies that incentivize deradicalized arguments to appeal to the status-quo-ist tendency of the law. Examples of this trend also abound.

In the US, same-sex marriage was recognized by the Supreme Court's five-to-four decision in *Obergefell v. Hodges*,[201] with then Chief Justice Roberts registering his dissent. One strand of his reasoning was that if the sex of the parties to a marriage is held to be an inessential element of marriage, so could the number of parties in a marriage—and that nothing would then prevent the slide to legalizing polyamorous marriages.[202] This all-too-common slippery-slope argument against same-sex marriage is consistently met by impact-litigation counsels by distinguishing what they demand from polyamorous relationships—in the process denying polyamory as a sexual orientation, and insisting that marriage is inherently dyadic.[203] In fact, the counsels in *Obergefell* responded to Robert C.J.'s concern about plural marital unions by stating that the state "does not have such an institution"[204]—again, playing into the politics of assimilation and (il)legitimacy that the stand-alone demand for same-sex marriage is inevitably enmeshed in. In another decision of the New Jersey Supreme Court on marriage equality, in response to a similar argument, a judge noted that "[p]laintiffs do not question the binary aspect of marriage; they embrace it."[205]

A similar impulse reveals itself in Indian impact-litigation discourses. Consider the Delhi High Court's decision in *Naz Foundation*[206]—the first time any Indian court had decriminalized homosexual acts. The transcript from 18 September 2008, the first day of arguments, is revelatory. The bench expressed concern that decriminalization might loosen state control on public sex. The counsel for the petitioner had a ready response—that such public acts can be penalized under other laws on public indecency and nuisance.[207] A similar admission, that public acts are not protected by the constitutional right to privacy, was made by the counsel in the proceedings before the SC in *Koushal*[208]

[198] *Ibid.*
[199] Joshi, *supra* note 176, p. 454.
[200] *Ibid.*, p. 455.
[201] *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Supreme Court of the United States, 2015).
[202] *Ibid.*, p. 21 (Roberts C.J., dissenting).
[203] Aviram & Leachman, *supra* note 65.
[204] *Obergefell v. Hodges*, *supra* note 201, p. 21 (Roberts, C.J., dissenting).
[205] *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (New Jersey Supreme Court, 2005), p. 26 (Collester J., dissenting).
[206] *Naz Foundation v. Govt. of NCT of Delhi*, 2009 S.C.C. OnLine Del 1762 (Delhi High Court, 2009).
[207] The day-wise transcripts are available at pad.ma (2022).
[208] *Suresh Kumar Koushal & anr. v. Naz Foundation & ors.* (2014) 1 S.C.C. 1 (Supreme Court of India, 2013).

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wherein the decision in *Naz* was under challenge.[209] It is well known that the conventional private space, that is the home, is a notoriously unsafe environment for most gays and lesbians, and that access to a private room is not an easy luxury for lower-class India. Yet, the litigation strategy *required* the disavowal of the "disrespectable"—of cruising, and of sex in public bathrooms or near railway tracks. And this disavowal by the impact lawyers reflected in the high court's decision in *Naz*, the final order of which only decriminalized homosexual conduct between two consenting adults *in private.*[210] *Naz*, thus, brought the light of legality to only the upper-class or outed queer who can either pay for private space or have it at home—continuing to relegate the others to the shadows of criminality.

Impact-litigation strategies end up mediating rights through a prism of class, merit, and "good citizenship." *Navtej Johar*,[211] the landmark SC decision that conclusively decriminalized homosexuality in India, is another case in point. The subtly exclusionary use of these prisms to appeal to an elite judiciary is clear in the following extracts from a press release by Pravitti, an informal lesbian, gay, bisexual, and transgendered (LGBT) group consisting of past and present members of the prestigious Indian Institutes of Technology (IITs), which filed one of the petitions that was finally heard in *Navtej*:

> We are ordinary citizens of this country, and most of us have never been involved in activism ....
>
> We are scientists, entrepreneurs, teachers, researchers, business owners and employees in companies. We are children of farmers, teachers, homemakers and government servants ....
>
> S. 377 has also further contributed to the brain drain of several LGBT individuals including some of the petitioners from the IITs across industries ... Within India, LGBT alumni including some amongst the petitioners have chosen sectors or companies with progressive policies over those that might have provided better career trajectories or in STEM fields which are instrumental in building a modern and strong India.[212]

Similarly, the counsel in *Koushal* also deployed the power of class identity and the notion of good, productive citizenship, stating:

> [T]here are people who are open about their sexuality. They are prime ministers, civil rights activists, judges, activists, and business leaders like the CEO of Apple. This list is to show and project that there are contributing citizens entitled to dignity in its complete form.[213]

While the bench in *Koushal* ultimately rejected the plea for decriminalization, it was accepted in *Navtej* subject to the same caveat introduced by *Naz*—that the acts must be done in private.[214] Again, rights were construed to be held only by those who had the social status to either be out or financially capable of accessing private spaces other than home. A careful reading of *Navtej* reveals the subtext further—the way in which social status and class interwove emotively appealed to the bench and constructed their class-laden notion of rights. This comes out in Chandrachud J.'s opinion:

[209] Supreme Court of India (2012), p. 77.
[210] *Naz Foundation v. Govt. of NCT of Delhi*, *supra* note 206, at para. 132.
[211] *Navtej Singh Johar v. Union of India*, *supra* note 1.
[212] See thewire.in (2018).
[213] Supreme Court of India, *supra* note 209, p. 80.
[214] *Navtej Singh Johar v. Union of India*, *supra* note 1, at para. 645.

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> 49 ... the Petitioners are a group of persons belonging to the LGBTQ community, each of whom has excelled in their fields *but* suffer immensely due to the operation of Section 377 ....
>
> 50 ... One of them qualified to become an Indian Administrative Services officer in an examination which more than 4,00,000 people write each year. But he chose to forgo his dream because of the fear that he would be discriminated against on the ground of his sexuality.[215] (emphasis added)

The history of impact litigation for recognition of same-sex marriage has, thus, come at some very real costs to liberation politics—it has marginalized public sex and therefore the intimacies of lower-class, closeted homosexuals; it has surrendered the cause of polyamory; and it has given in to the idea that rights are for "good citizens." Law is ultimately steeped in heteronormativity, and so appeals designed for success before legal institutions are likely to employ assimilationist and exclusionary discourses. Herein lies the very real choice facing the queer movement—between exclusionary impact likely to succeed in the short run or a longer-term strategy designed to use litigation and social processes to achieve direct full equality. The trade-off has often been made in favour of the former, hoping that it will pave the path to the latter in time. However, as I argue above, this is not simply a matter of which intimacies receive recognition first.

Rather, assimilationist sections of the movement and the deradicalized discourse of impact litigation unwittingly employ tactics of exclusion to achieve their incremental goals, actively creating what has been called a "new homonormativity"[216]—extending legitimacy to certain queer intimacies *by* further delegitimizing other queer intimacies. Thus, the framework of inclusions and exclusions remains, but merely shifts to a different terrain. This renders suspect the argument that recognition of same-sex marriages will eventually trickle down to more and more kinds of families—making a direct demand for full family equality, which would of course *also* include marriage equality, the only strategically tenable route to liberation.

A quick overview of legislations across the world that have made tentative moves towards expanding recognition to queer families beyond marriages would only confirm the thesis that marriage needs to be displaced from the centre of conversations about families and their recognition. I consider three such legislations—Adult Interdependent Relationships Act 2002 ("AIRA") enacted in Alberta, Canada; Relationships Act 2003 ("ARA") in Tasmania, Australia; and Reciprocal Beneficiaries Act 1997 ("RBA") in Hawaii, US. All these legislations have extended recognition to non-conventional forms of intimacies that go beyond marriage or marriage-like forms—naming them variously as "adult interdependent relationships,"[217] "personal relationships,"[218] or "reciprocal beneficiaries."[219] While these forms seem to eschew conjugality or consanguinity as determinative of what families are, ghosts of marriage remain in them.

The relationships recognized are invariably dyadic and required to be exclusive to be valid—a format peculiarly influenced by marriages and that happens to be completely incompatible with most non-conventional relationships like friendship networks, blended families, etc. Sociologically, it is almost insensible to say that one is allowed only one "adult interdependent relationship" and with only one person—and yet that is how the law has created these relationships' legibility. The influence of convention and marriage on these legislations reaches even further—extending to the legislations

[215] *Ibid.*, at paras 455–456 (Chandrachud J., concurring).
[216] Duggan (2002), p. 175.
[217] Adult Interdependent Relationships Act 2002.
[218] Sections 4–6, Relationships Act 2003.
[219] Reciprocal Beneficiaries Act 1997.

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themselves continuing to expressly sustain the privileged status of marriages over these relationships. The Tasmanian legislation, for example, provides for automatic revocation of a deed of "personal relationship" upon the marriage of either party.[220] The Hawaiian legislation, going a step further, only recognizes those as "reciprocal beneficiaries" who are otherwise prohibited from marrying each other[221]—basically, homosexual couples or persons within prohibited degrees of relationship. This purportedly progressive recognition of new forms, thus, ultimately only created a second-class alternative to marriage for those barred from it—while also extending marriage as the inevitable norm for everyone else and only regressing the struggle for family equality. This felt need for non-conventional relationships, when legally recognized at all, to be recognized as imperfect substitutes for marriage while also almost shadowing the norms of marriage reflects exactly why family equality can be achieved in any real sense only when it is seen as a precondition to marriage equality, and not as a mere epilogue to it.

To be clear, the argument is not against the recognition of same-sex marriage—it is against the stand-alone push for marriage equality as opposed to the more inclusive goal of family equality that would encompass same-sex marriages and much more. As a stand-alone demand, by privileging marriage and replicating the oppression of the traditional family system, marriage equality would replicate both the relative inequality of and internal inequality within intimacies.[222]

Having said this, in proposing that the law recognize all intimacies regardless of and without consideration to the form they take, I recognize that the continued existence of the institution of marriage as a separate form of "family" sits uncomfortably with my proposed framework's choice of function over form as the only relevant basis for recognition. In that sense, the theoretical arc of my argument favours the variety of positions adopted by various theorists that may broadly be put under the umbrella of abolition of marriage as a legal institution. However, abolition does not, as a matter of logical necessity, flow from my argument; certain forms of family may be recognized as the form they take, as long as the *basis* for recognition itself is not the form of families.

Having said that, however, the arguments for abolition are compelling. Marriage's historical pull as a seemingly inevitable and natural form of family and its tendency to dictate the terms of the way other families are recognized risks sustaining a *de facto* hierarchy, even as we do away with *de jure* ones.[223] Butler's warning that "marriage … only becomes an 'option' by extending itself as a norm"[224] certainly calls for caution in according to marriage any "separate-but-equal" status within intimacies. Indeed, Lewis has considered the abolition of marriage to be essential to the abolition of the "isolated privatisation of human misery,"[225] by allowing an exemplar of "the family" (singular) to be replaced by communized care networks or families (plural).[226] And while that may indeed be the utopian culmination of transformative changes in family-making proposed by this paper, I do not intend for this paper to stand for either side in the debate on marriage abolition. Even though the arguments for abolition share a normative kinship with my position, I believe that abolition is not a *necessary* logical companion to my argument. Even so, it may perhaps be a desirable one. However, I stop short of endorsing that opinion in this paper, wishing to explore two considerations further before. First, a framework that recognizes what entities are families based on their function need not and should not be

[220] Section 15, Relationships Act 2003.
[221] See nuca.gov (2022).
[222] Gaucher, *supra* note 177.
[223] Wood, *supra* note 104.
[224] Butler, *supra* note 64, p. 21.
[225] Lewis (2020).
[226] Lewis (2021); Lewis (2018).

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blind to any special needs of regulation arising in specific family forms by virtue of the form itself. It merely requires that their very recognition may not be because of their form. The completely unilateral power dynamic and complex questions of consent that plague a parent-child relationship form has is one such example of family forms requiring special regulatory consideration. Marriage, for these purposes, is another. The fact that it is steeped in and is a product of generations of oppression and inegalitarian practices merits its retention as a separate legal category enabling additional regulation. The practice of dowry, for example, is unique to the marriage form of family-making and its regulation while abolishing the legal category of marriage may throw up particular complications that need further thought.

Second, I fear that the demand for abolition of marriage, as radical and powerful a normative argument as it is, may also be liable to be appropriated by conservative interests. By abolishing marriage *legally* for everyone and thereby preventing its legal extension to same-sex marriages, it becomes possible to retain marriage as a heterosexual preserve *socially*. The problem of levelling down I had referred to earlier[227] thus applies with equal force here. Heterosexual couples will continue enjoying the cultural institution of marriage, regardless of its recognition by law, while the message sent out would be clear—the legal right to marry will either be a heterosexual right or it will not be.

Nor is it the case that the fear of conservative anti-queer interests appropriating radical queer politics is mere academic paranoia. The Canadian and the Hawaiian legislations that moved towards expanding recognition to non-conventional, chosen families were, politically, led by conservative motivations. The Preamble to the Adult Interdependent Relationships Act 2003, for example, starts with the following acknowledgement:

> WHEREAS marriage is an institution that has traditional religious, social and cultural meaning for many Albertans; and
>
> WHEREAS the Legislature of Alberta affirms that a spouse is a person who is married; and
>
> WHEREAS there are Albertans in interdependent relationships outside marriage.[228]

These legislations were seemingly progressive in recognizing queer families and stressed the irrelevance of conjugality or sexual relations as a marker for "family." However, this emphasis was not a progressive move towards equality for non-conventional, non-conjugal family forms—but was intended at staving off the demand for marriage equality by giving certain rights to same-sex couples, without having to recognize the sexual element of their intimacies. Effectively, same-sex couples were given rights as no-sex couples.[229]

My fear is that the abolition of marriage for everyone, though radically different from a civil union-like "separate-but-equal" arrangement, has a real potential to serve the same interests and same ends in the current political scenario. It would allow the institution of marriage to socially survive in the exclusively heterosexual domain—by simply making the law blind to it. It is not the historically recognized forms of marriage that need the legal sanction anyway. It is for the historically invisibilized and criminalized marriages for which having their conjugality recognized by the law becomes an act of coming out and healing. And abolishing marriage as a legal institution just when this recognition is on the horizon, *without abolishing it socially*, may turn a blind eye to the history of this struggle. This is not to say that the problem of conservative appropriation of radical queer politics

[227] See *supra* Subsection 3.1.

[228] Preamble, Adult Interdependent Relationships Act 2003.

[229] Harder, *supra* note 102.

https://doi.org/10.1017/als.2023.4 Published online by Cambridge University Press

of marriage abolition is an intractable one. But it is one that merits broader, more consultative deliberation within the Indian queer movement and with feminist and anti-caste allies. However, whether marriage is recognized as a separate institution or not, there is no singular history, or a singular struggle. To make a stand-alone demand for marriage equality, instead of a larger push for full family equality, is also to turn a blind eye to the histories of struggles of many others. And it is this that I argue against.

7. Conclusion

The general privileging of conjugal intimacies has found its way into queer politics and advocacy. This paper is an attempt at addressing this blind spot by advocating for a wider, more transformative understanding of intimacies and families—one that promotes full equality for all intimacies and fosters internal equality within them. While this paper builds up the constitutional, regulatory, and political claim for intimate arrangements between consenting adults, I hope for its normative implications to trigger conversations about children's autonomy in arranging intimacies. Naturally, given that consent and autonomy are contested territories for minors of various age groups, I reserve this for the future.

I term this paper's argument "family equality" and propose it as a more liberationist alternative to the current singular focus on marriage equality. I have chosen this term in great consciousness of the baggage of oppression that it comes with. I am also aware that jurisdictions that have taken steps towards recognizing these non-conventional family forms have typically created distinct categories for them—"personal relationships" and "civil unions," to name two. However, as J. Deborah says, labels and language matter[230]—and "separate-but-equal" is ultimately not equal at all.

Therefore, I appropriate and queer the term "family" conscious of the baggage of oppression that comes with it, hoping that "when the unreal lays claim to reality, something other than a simple assimilation into prevailing norms ... does take place. The norms themselves can become rattled, display their instability, and become open to resignification."[231]

Subsequent to the authorship of this paper, the Supreme Court of India took up the hearing of petitions demanding marriage equality and the recognition of non-heterosexual marriages. While one of the petitioners sought the recognition of a wider range of queer family forms, the hearings primarily addressed access to the marital institution. The Supreme Court's decision remains pending.

Acknowledgements. The author is grateful to Prof. Kunal Ambasta at the National Law School of India University, Bangalore for helping to conceptualize this paper. The author would also like to thank Aditya Wakhlu, Kaustubh Chaturvedi, Shubham Jain, and Vrishank Singhania for their valuable feedback on the manuscript.

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[230] *Lewis v. Harris*, *supra* note 205, p. 27 (Poritz C.J., partially dissenting) ("What we name things matters, language matters .... Labels set people apart surely as physical separation on a bus or in school facilities .... Ultimately the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage").

[231] Butler (2004), pp. 27–8.

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Cite this article: Jain, Hrishika (2023). Making Love Legible: Queering Indian Legal Conceptions of "Family". *Asian Journal of Law and Society* **10**, 70–106. https://doi.org/10.1017/als.2023.4