CHAPTER-6
HOMOSEXUALITY IN INDIA

“Indian cultural values are also being used by disempowered and marginalized groups to counter the ideas of the ‘authentic subject’ that informs dominant cultural essentialism…. There is a need to ensure that the cultural move, which is used to challenge master narratives about Indian cultural values, does not become in turn its own unifying, essentialist and exclusionary discourse. 188”

6.1 INTRODUCTION

Gender and sexuality have been important and contested areas in definition of cultural and national identity of India. Much more recently, links between national identity and gender/sexuality have entered a phase of renewed conflict since the early 1990s, the decade of economic liberalisation as well as the political rise of the Hindu right wing. 189 In addition to continuing struggle over feminity, masculinity and (hetero) sexual mores, this conflict became highly visible and intense in the case of non-heterosexual desire, behaviours and identities- for example, in the debate around controversial cultural products like Fire, or around the validity of section 377 in face of increasing activist pressure to read down the law.

Simplifying the many possible nuances within these debates, one observes a certain triangular structure that often delimits and defines the most visible positions in the public sphere. The Hindu right and more conservative factions of the government have set the fray in the proclamations of homosexuality as ‘western, corruptive of or in hospitable to ‘Indian’ values and society.

189 John, Mary and Tejaswini Niranjana, 1999, ‘mirror politics: Fire, Hindutava and Indian culture’, Economic and
This chapter is an attempt to trace history, present position and activism regarding homosexuality in India. Also legal and social stand on same-sex marriage is also discussed in brief.

6.2 HISTORY OF HOMOSEXUALITY IN INDIA

History of gender and sexuality in the pre-colonial period has to take into account the specify locality of strictures as well as their absence vis-à-vis factors like, caste, gender and community. Indeed, Ruth Vanita’s analysis of legal, religious and medical treaties in ancient and early medieval India seems to support this preliminary assumptions. Before the advent of Islam, the clearest examples of sexo-moral codes are to be found in the shastras and sutras, manuals and treaties falling between the last centuries BC and the 4th century AD. In her assessment of three texts, Vanita notes that while most of them ‘certainly subordinate non-penetrative’ as well as non-heterosexual sex to ‘penetrative heterosexual sex’, there is no uniform category of forbidden sex. (such as, sodomy) nor any uniform punishment. Rather, the penalty varies considerably between different acts and persons (acts involving the ‘defilement’ of virgins generally invite far more censure than that involving non-virgins; and many acts of heterosexual sex like adultery invite much more severe punishment than those between persons of the same sex).

The ‘Arthashastra’, for instance, prescribes the same grade of fine for sex acts between two men as that for robberies of not very high value; a higher amount is demanded of a woman who forces sex on an unwilling woman. The manusmriti prescribes a minor penance for a man having sex with a man, the same as that for a man who has a sex with non-human females, a menstruating woman etc., while a woman, ‘deflowering’ a virgin maiden is heavily penalised, sex between two non-virgin woman invites a minor fine. The punishment for acts is thus highly contextualized and corresponds to intricate rules of patriarchal and caste-based kinship- such that the ‘defilement’ of marriageable virgins of the same caste often attracts the highest censure. Rather than any separate categorization of non-heterosexual acts or persons punishable as such, penances are likely to have been dependant on caste and have no clear correspondence to codified juridical penalties.
As Vanita notes, ‘many of these penances apply only to Brahmins; in some cases Brahmins might have been more subjected to purity taboos and other castes might have avoided strictures, while in the other cases the other castes might have been more severely penalized.’ Medical treaties like, the ‘shushruta Samhita’ have a pejorative view of men who habitually prefer other men, and regard them as being born of scant parental sperm and the ‘shakanda purana’ issues the general warning of impotence as a consequence of such sexual acts.

With Turkish, Persian and Arabian influences and the advent of Islam in the medieval period, the specifications of taboo and tolerance do not seem to have been overwhelmed by any common code. While the Quran or the shariat might seem to have a more unequivocal condemnation of same-sex acts related to the Christian condemnation of ‘sodomy’, the shariat was never strictly adhered to by the kings and the emperors of the pre-mughal or mughal period. Rather, there were many contending authorities: different school of Muslim law jurist differed in their outlook, and the Hanafi School that gained prominence in India was among the less severe. The diplomacy of the state towards indigenous elites, as well as the role of syncretistic Sufi orders in spreading Islam's influence, ensured a growing openness to traditions like polytheism.

6.3 HOMOSEXUALS IN INDIA

Male to female transgender people of India have traditionally organized themselves in communities, usually called Jamaat. A unit of matriarchal structure features an older Hijra or aravani as a ‘guru’ (or motherly figure with several chelas), younger, newly initiated Hijras/ aravani and her acolytes. There are elaborate rituals that mark one’s entry into a jamaat and acceptance as a chela. These rituals with their mytho-religious underpinnings bind them to a structure of kinship in which relationships, roles and duties are both implicitly suggested and explicitly performed. Among these duties include the tribute of money by chelas to gurus from begging, sex work, or other forms of employment, obedience to community norms which regards to behaviours

190 Vanita and Kidwai, ‘same-sex love in India’ see note 6, p.113.
and dress, and affectionate devotion. Gurus are expected to provide guidance, emotional support for the young chelas and advice about undergoing castration. This community structure, while looser and less binding in south India rather than northern regions of the country, nevertheless provides one of the few real world models for aravani, as how to organize as a family and community after establishing a public transgender identity.

Below are some of the most common third-gender sects found in Hinduism. There are an estimated half million cross dressing "eunuchs" in modern-day India, associated with various sects, temples and Hindu deities. Despite being called "eunuchs", the majorities of these persons do not practice castration but are more accurately associated with transgender.

### 6.3.1 The Aravani or Ali

The most numerous third-gender sects is the aravani or ali of Tamil Nadu in southern India. The aravani are typically transgender and their main festival, the popular ‘Koovagam’ or Aravan Festival celebrated in late April/early May, is attended by thousands – including many transgender and homosexuals. The aravani worship the Hindu god, ‘Aravan’, and do not practice any system of castration.

Transgender woman of Tamil nadu also known as ‘Aravanis’¹⁹¹ have become the most public of sexual minorities in the state. A group of aravani activists have forged a social movement in this decade that has successfully procured certain civil rights such as the possession of ration cards, passport, voter identity cards, and the constitution of

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¹⁹¹ ‘Aravanis’ are biologically born male who define themselves as ‘a woman trapped in man’s body’. This behavioral disorder makes then behave like girls. Most of the aravanis left their home and after joining their community live miserable lives, seeking out al living by begging, dancing and prostitution; thus becoming vulnerable to diseases like HIV/AIDS. Even the name ‘aravani’, though of recent usage, bears permanent reference to the story of Aravan to the Mahabharata. Aravanis see themselves as that transgendered aspect that Krishna assumed for a right to marry Aravan, to fulfill his wish for conjugal union before his sacrifice to the gods the next morning...even today, at kooothandavar Temple in Villupuram district, Aravanis congregate every year to commemorate the narrative. Ecstatic celebrations of their marriage to Aravan.
a special welfare board with the specific task of addressing their community’s social exclusion at the state and local level.

The history of transgender involvement in the Indian queer visibility movement dates to the mid 1990s with international AID agencies such as the World Health Organization (WHO) and (UNAIDS) identifying these communities as being at risk of HIV infection, the start of anti-prostitution and trafficking activist movement in India, and the subsequent flood of international grant and donor money into the Indian non-profit sector. This social integrated development for Aravanis (SIDA) foundation has witnessed the journey from a strictly HIV-AIDS context to a civil rights based discourse.

This journey of civil rights reached an important milestone when high court of Tamil nadu announced that transgender individuals could choose either ‘male’ or ‘female’ as their gender when applying for official identity documents. In December, 2006 the state sub-committee on transgender welfare, which was formed in 2003, gave the recommendation to the state government in order to ‘improve the living conditions of the Aravanis’, which the state agreed to reinstate. The recommendations of the sub-committee included large-scale counseling and sensitization programs, particularly for children with ‘behaviour changes’ in schools and their parents, as well as counseling for MSM (Men who have sex with Men) group.

The cumulative effect of activist efforts from the transgender community and government sanction resulted in the constitution of the Aravani Welfare Board in May 2008, established specifically to address the issues of aravani constituency in Tamil Nadu. The board includes 10 official members who vote on a pass policy decisions, and 10 unofficial aravani representatives who act in advisory capacity. Aravani Welfare Board, a third government order was issued guaranteeing reserved seats to transgender individuals in Tamil nadu colleges and universities.

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192 Civil rights are newly defined as a reward given by society for good behaviour. Such rights are deemed benefits that society grants to some of its constituents- the deserving minorities- rather than as basic human rights and values. When framed in the materialistic language of law.. the idea of civil rights becomes more about the realization of access that the institution of equity. Under a right based model, the social contract we seek is fulfilled by access to the system rather than actual equal treatment under it.

193 Tamil Nadu government order 175, 2008.
Not only the state government has encouraged steps towards counseling of MSM groups, but also acting upon the recommendations of the social welfare board, had began implementing the system of Sex Reassignment Surgery (SRS) at the government general hospital in Chennai. The need for this had been recognized in the earlier government orders of 2006 along with words of caution about discouraging MSM for going for Sex Reassignment Surgery. With a careful measured approach to approving aravanis for this surgery, the state medical establishment is moving towards systematizing the counseling procedures, the surgeries required and the follow up treatments.

6.3.2 The Hijra

The most well-known third-gender group in India is perhaps the Hijra of northern India. The Hijra is the only sect that practices castration, a custom introduced during Muslim rule around the tenth century A.D. Male castration is not recommended in the Vedas and is not a traditional Hindu practice. There are an estimated 50,000 hijra in northern India.

After interviewing and studying the hijra for many years, Serena Nanda writes in her book, Neither Man Nor Woman: The hijras of India, as follows: "There is a widespread belief in India that hijras are born hermaphrodites [intersex] and are taken away by the Hijra community at birth or in childhood, but I found no evidence to support this belief among the hijras I met, all of whom joined the community voluntarily, often in their teens." Nanda also states: "There is absolutely no question that at least some hijras – perhaps even the majority – are homosexual prostitutes. Sinha's (1967) study of hijras in Lucknow, in North India, acknowledges the Hijra role as performers, but views the major motivation for recruitment to the Hijra community as the satisfaction of the individual's homosexual urges..." The hijras especially worship Bahuchara-devi, the Hindu demigoddess presiding over trans-sexuality.

6.3.3 The Jogappa
A lesser-known third-gender sect in India is the jogappa of South India (Karnataka and Andhra Pradesh), a group similarly associated with prostitution. The Jogappa are connected with ‘Yellamma-devi’, a popular Hindu deity of Durga, and include both transgender and homosexuals. Both serve as dancers and prostitutes, and they are usually in charge of the temple devadasis (maidservants of the goddess who similarly serve as dancers and female courtesans). Large festivals are celebrated at these temples wherein hundreds of scantily-clad devadasis and jogappas parade through the streets. The jogappa do not practice castration.

6.3.4 The Sakhi-Bekhi

The sakhi-bekhis are prominent throughout Bengal, Bihar, Orissa and Uttar Pradesh although their numbers have diminished in recent years. Members of this sect typically dress themselves as women in order to reinforce their identity as sakhis or girlfriends of Krishna and to attain the esteemed spiritual emotion known as sakhi-bhava. Such people are not always transgender or homosexual but in many cases they are. In modern times, the sakhi-bekhi sect was condemned as sahajiya (unauthentic) when some members began making public shows of their romantic feelings for Krishna while at the same time having illicit relations with cudadharis (men dressed up as Krishna with a crown of peacock feathers). Nowadays, most sakhi-bekhis crossdress in private and are less conspicuous. They generally worship Sri Radha, the consort of Lord Krishna, although some specifically worship Lord Caitanya (the incarnation of Radha and Krishna combined) and are known as gauranga-nagaris. Neither group practices castration.

Thus very personification of homosexuals is popular in India.

6.4 INDIA & STEREOTYPING OF PEOPLE

Gender stereotyping is extremely common in India. Most of us believe that gay man and lesbian woman are reactions to childhood sexual abuse or torture. In case of lesbian and gay relationships, relation between two men or woman, one is hyper masculine, the other ultra feminine, one aggressive masculine partner; the other is a
softer feminine partner. Emotional relationships between men are hardly found in men, though generally found in lesbian couples. Prostitutes bar dancers and call girls are corrupted woman. Call girls are generally portrayed with a drink in one hand and a cigarette in the other. Girls rescued from the brothels are shown looking penitent, often with their hands covering their faces in the common body of language of shame. Brothel madams are old bitter crones who lie in wait to destroy young virgins and hapless sex-starved man.

It is believed that aside from disgusting gestures towards morality and animality of humans, there is also a certain idea of contamination from other culture and races. In Indian context, western culture and sometimes modernity itself (or certain strands of sleazy modernity, cabarets, more exposure to nudity in media, homosexual behaviour etc.) is seen as alien or contaminating the ‘purity’ of certain ideas of Indian culture.

6.5 THE ROLE OF THE SAMAJ IN FIXING IDEOLOGY/ MORAL POLICING

While a surface reading might easily pin the emergence of legal homophobia on the array of laws introduced by the colonial powers, the question which still needs to be answered is whether British law was only putting a judicial imprimatur on already existing prejudice and strictures against the queer community. Will such a feeling of societal complicity in the law’s prohibitions provide an answer as to why, so many years after the coming into force of the Indian these laws continue to exist on the statute books or continue to be a part of the ‘living culture of Indian law’? Is that the reason why the radical constitutionally mandated transformation of caste and social-hierarchies has completely missed the queer community? Does homegrown homophobia and the perception of homosexuals as deviants, manifest itself through the ‘samaj’?

Vanita and Kidwai in their famous book ‘Same-sew Love in India’ argue:

[Ancient tests] tend to take a somewhat derogatory view of those who are homoerotically inclined. The range of terms used for such persons suggests a groping
for words rather than complete social integration. Many of these terms bring from heterosexual assumptions ascribing effeminacy, impotence, or some sort of inadequacy to non-heterosexual persons.\textsuperscript{194}

The contemporary salience of these age-old debates around the role of the samaj in regulating sexuality is best illustrated by the statement of RSS ideologue S. Gurumurthy on the \textit{Naz} judgement:

\begin{quote}
The king or the state in India had refrained from handling most issues which the society or families could handle. It is the colonial state, with its laws and courts that began to intrude the sovereign domain of the family and society. \textit{The Indian discipline was always built around unenforced social and family norms; not state laws}. Self-restraint and shyness were the tools to regulate the deviants from the norms, not the police or courts. Even today, it is this \textit{non-formal moral order} – read \textit{dharma} – \textit{not the laws of Parliament or State assemblies,} that largely govern this society.... \textit{In the Indian tradition, homosexuals, as elsewhere, were thus regarded as deviants}. But, here, unlike in the Abrahamic religions, the right of these deviants to exist without being punished was never denied; and will never be. Yet no one can argue here or elsewhere that homosexuality is a virtue. No law or court of law can declare it as a virtue.\textsuperscript{195}
\end{quote}

It is observed that the control on sexuality is not exercised by law alone, but a larger notion of the ‘samaj’ —a term in which the institutional aspects of society and their moral and political attributes are happily collapsed. Thus the control of sexuality devolved on those authorities and instruments—panchayats, prescriptions, prohibitions, etc., which governed the system of alliance.\textsuperscript{196}

In any discussion regarding the control of sexuality, the role of the samaj is far from benign. This is as true as in India of the twenty-first century, the couples marrying across caste and religious lines are killed for violating the rules of the samaj even

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194 Vanita, Kidwal, see note 141-, p. 26.
196 . ibid, p.150.
\end{flushright}
today as well in certain communities and regions. Suffice it to say that one cannot
discuss regulation of sexuality in colonial India by an exclusive reference to the law
alone.

6.6 PROTESTING INJUSTICE: EMERGENCE OF QUEER
ACTIVISM

The first collective and public reaction to the various injustices perpetrated on queer
people was when the AIDS Bedbhav Virodhi Andolan (ABVA) organised a public
demonstration in 1992 against police harassment of gay people. This is the first
documented protest for gay rights in India. Suddenly furtive and silent same sex
interaction became visible, the subject of both opposition and a demand for rights.

**ABVA in a memorandum submitted to the police asked:**

> When will the police get rid of its homophobia? Is it a crime for two consenting adults
>(of the same sex) to meet in a public place, become friendly and have a healthy
discussion on sexuality or any other matter—which may or may not end up in sexual
activity at a place other than a public place?[^197]

Through a path breaking report on queer rights called *Less than Gay*, ABVA created a
prophetic vision of queer rights. It placed the violence faced by gays and lesbians
within a wider culture of intolerance by the medical establishment, activist groupings
and even intellectual circles. The Report spoke of subversive queer desire and the
'intimate experiences, fears and longings of gay men and lesbians'. What it succeeded
in doing as early as 1991, was to provide an explanatory framework which was then
picked up and elaborated by queer activism in the coming years.[^198]

The 1992 ABVA protest against police harassment was not the last and the next two
decades would be followed by numerous other such protests. Queer activism was now
defined by the willingness to respond to violations, which began to capture national

[^197]: ABVA Memorandum to the Commissioner of Police, New Delhi, 11.08.92 on file with the
Alternative Law Forum.

Homosexuality in India, Nov-Dec 1991. New Delhi: ABVA.
and even international attention. There were several campaigns of a local nature (much on the lines of the ABVA protest in 1992) against police harassment and violence. Slowly these campaigns began to reverberate nationally and even internationally.

Ten years later, when a case under Section 377 was filed against staff of an organization working with HIV/AIDS, it resulted in widespread protests. The case popularly known as the ‘Lucknow four’, refers to the arrest of four HIV/AIDS activists and the sealing of two organizations working with HIV/AIDS on grounds of conspiracy to promote homosexuality. At the end of a sustained campaign which witnessed support in major cities across India, the four activists were finally released after having spent over a month in jail. The Lucknow case also demonstrated that the very presence of Section 377 on the statute books meant that the potential for its use was always there. As long as it continued to exist on the statute books, Section 377 could never be a dead letter of the law.

The campaign against the arrests in Lucknow represented a new activist zeal. It resulted in the formation of People for the Rights of Indian Sexual Minorities (PRISM), one of the first political groups focusing on queer rights in Delhi, which later played a crucial role in the formation of a coalition called Voices Against 377. As an intervener in the Delhi High Court, Voices was instrumental in highlighting the abuse of human rights implicit in Section 377.

**Asserting the Right to Love: The Struggles of Queer Women**

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199 For example, on 16 August 2006, the queer community in Bombay gathered at Flora Fountain in joint protest against Section 377, which was widely reported across the media. See: ‘Gay Community seek reforms in archaic sexuality law’, Times of India, 17 August 2005. Similarly there were protests in Bangalore, Delhi and Kolkata against police harassment.


201 In 2006, in another incident four gay men were arrested in Lucknow by an entrapment laid by the Police, with false alarms of ‘public sex’ and an ‘online gay group’. There were protests across the Country against the arrests in what came to be known as Lucknow H. See: 'Rights Groups Protest Gay Arrests', Indian Express, 13 January 2006. See also the preliminary report of the Fact Finding Team on the arrest of four men in Lucknow under IPC 377, available at http: // www.yavnningbread.org/apdx_2006 /imp -249.htm, accessed on 29.12.08.
While the first public demonstration was the 1992 ABVA protest, it was as early as 1988 that two policewomen called Leela and Urmila decided that they wanted social recognition for their relationship and proceeded to get married. Though both women were dismissed from service on the specious grounds of 'long leave of absence', their courageous act served as an inspiration for emerging queer activism. ABVA oppositely referred to Leela and Urmila as ‘frontier women in the country’s social landscape with their courageous and unusual marriage.

The much publicized marriage of Leela and Urmila was followed by a Fact Finding Report by ABVA in 1999, called, ‘Like People Like Us’ on the joint suicide attempt by Mamta and Monalisa. The Report showed how lesbian and bisexual women often find themselves trapped in a prison whose walls are made up of the normative notions of gender and sexuality. It demonstrated how lesbian women’s expressions of personhood are so hemmed in by patriarchal constraints that suicide seems to be the only option left.

While the report inaugurated a discussion around some of the core issues faced by queer women in India, what really brought a national spotlight on queer women was the controversy over the film Fire. Directed by Deepa Mehta, the film described a relationship between two women with great sensitivity. The Hindu Right called for the film to be banned. The controversy rocked the Indian Parliament, and the Supreme Court intervened against the attempts to ban the movie. When converted an

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204 ABVA. 1999, For People like Us. New Delhi: ABVA. Mamta and Monalisa were not the last women in relationships with each other to attempt suicide with the next two decades witnessing a continuing epidemic of lesbian suicides. See: V. N., Deepa. ‘Queering Kerala’, in Gautam Bhan and Arvind Narain (eds), Because I Have a Voice. New Delhi: Yoda Press, 2005, pp. 175-196.
205 Fire (1996) directed by Deepa Mehta, more details can be found at http: / / WWW imdb.com /title /tt0116308/ ; Fire has had a far reaching impact beyond the short term controversy it created in opening up a discussion on lesbian women in India. See: 'Understanding the Lesbian', FEMINA, 1 September 2002.
206 See: Yusuf Khan Alias Dilip Kumar and Ors. v. Manohar Joshi and Ors. (2000) 2 SCC  696. Eight petitioners, including the producer of Fire filed a Writ Petition under Article 32, seeking the intervention of the Supreme Court to prevent the Shiv Sena led attacks against cinemas screening Fire. However, somewhat serendipitously, during the hearing the Shiv Sena lost its majority in the State assembly elections thus taking away the heat from the protests. The Supreme Court found an easy
academic discussion into a raging street battle was the decision of the Shiv Sena to attack theatres where *Fire* was being screened. Such blatant attacks on the very screening of *Fire* mobilized civil society in India to support the core democratic value of 'freedom of speech and expression'. These extremist groups worked tirelessly against the screening of *Fire*, and then reacted similarly during the release, almost 10 years later, of another controversial movie called *Girl Friend*.207

The struggle to protect the release and screening of *Fire* was framed as a free speech issue, perhaps almost consciously overshadowing its depiction of lesbianism. This omission resulted in the formation of CALERI (Campaign for Lesbian Rights), which sought to put lesbian rights at the center of the debate. However, the articulation of lesbian rights was done with much trepidation. As one of the proponents put it:

Even as organizers prepared for the demonstration...there was conflict among us... some [protester] the use of the word ‘lesbian’ in the press statement. There was pressure to speak instead of ‘women-women relationships.’ There were problems with the word ‘sexuality’....There was an assertion that the person on the street was not ready to hear these words.208

What CALERI’s work did, in the words of another protagonist, was to challenge the assumption that lesbianism was a 'question of personal choice—therefore not a legitimate area of concern when the broader framework is democratic [or] human rights.209 Due to the work of CALERI, the mainstream human rights movement had to contend with the issue of the ban on *Fire* not just as a freedom of speech issue but also as a lesbian rights issue.

**Argument in response to why queer show off & parades?**

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way out and disposed of the matter with a sworn undertaking from the Home Secretary for the State of Maharashtra that steps were being taken to prevent any attacks. Thus, free speech clouded the issue of lesbianism—which was never mentioned or referred to in the decision.

207 See http://www.imdb.com/title/A10414714 (accessed on 19.09.2011). Girlfriend was a controversial lesbian movie, as it portrayed lesbians as man-hating, mentally disturbed, abused in childhood, psychopaths and serial killers. However that did not stop the Sena from protesting against the very portrayal of lesbianism. See: ‘Sena turns the heat on Girlfriend’, Times of India, 15 June 2004.


209 Ibid.
When asked to an LGBT Right activist of Delhi (Manish\textsuperscript{210}, name changed), during ‘Delhi Queer Pride Parade 2011’ that why this show off and parade to prove their existence and identity, he replied, “if the government removes this law, if the symbolic battle has been won, & Kothis gets their haq (rights), and if society understand that we also have rights- then there will be no more need to be so open, so public about who we are?, people will understand by themselves”.

Thus if the government recognizes their rights, there would be no need for them to spell out about their queerness or to create and adopt intelligible identities.

6.7 SAME SEX UNION AND MARRIAGE

The institutions of marriage and family are often considered central to society. The issue of same-sex marriage is a novel concept, with stories of such union abounding in areas as diverse as Italy, Nigeria and India; they have not been given exactly the same status as opposite-sex marriages.\textsuperscript{211} Matters are further complicated by the religious connotations of the word ‘marriage’ as many cannot separate the legal status of married persons from the religious implications of the marriage as a sacrament, thus providing a road block to same-sex marriage in the form of the perceived condemnation of homosexuality present in many interpretations of the world’s major religions.

Children are commonly brought up with a specific social ideal of marriage and family that involve finding a partner of the opposite sex, setting into a stable, monogamous relationship legitimized by marriage, and having one or more children. Marriage is also frequently seen as a religious institution rather than strictly a civil one, with a religious ceremony often completing the religious and legal requirements for a valid marriage (Although the religious aspect may include a number of rituals that are irrelevant to the legal aspect of marriage). For this reason, conventional notions of marriage as being between one man and one woman from the same race, religion or

\textsuperscript{210} Interviewed on 26\textsuperscript{th} November, 2011 (Delhi Queer Pride Parade)

Caste have been upheld for years in both legal and social attitudes, and the preservation of ‘sanctity of marriage’ has been used several times in the past to justify attitudes that were considered discriminatory by those seeking legal and social reform inter-racial, inter-caste and inter-religious marriages, for example, were often opposed on religious grounds and the legal protection granted to these marriages can be said to represent a shift away from the purely religious view of marriage. Thus, while religious conservatives may favour a more restrictive view of marriage, the legal concept of marriage has expanded over the years to the extent that even unmarried cohabiting partners are given certain rights normally associated with marriage in some countries.

**World view**

There is a popular Urdu Saying, “Miya biwi razi, toh kya karega Kazi?”. It means, when husband and wife consents, what can the judge do? This refers to the fact that marriage worldwide is conceived of primarily as an agreement between two individuals. Many people would assume that state has always regulated marriages. Even in the west, the state’s takeover of marriages is relatively recent. In medieval Europe, the church did not perform marriages nor did the state validate them. Marriage was considered as a secular arrangement though instituted by god; celibacy, considered a higher state, was the province of the church. Priests did not perform marriages; they simply blessed them as they did other secular undertakings, such as sowing or crops or opening or workshops.

Under pressure from influential families in medieval Europe, the priest’s blessing at the church door gradually became a blessing at the altar inside the church. This developed into the newlyweds taking the sacrament together. From the 13th century onwards, the church increasingly began to take control of people’s sexual lives. Thus began the gradual move to the priest performing a wedding ceremony and recording in a church register. This is the origin of the modern practice of the state registering marriages. As a Christian historian of marriage wrote in 1905, ‘what is actually essential for marriage is very simple form of consent’\(^\text{212}\). Episcopalian Bishop John

\(^{212}\) Lacey, T.A.1912, Marriage in church and state, London: Robert Scott, p.44.
Shellby Spong referred to this fact when he wrote, ‘The church does not in fact, marry anyone. People marry each other’. 213 Section 60 the Indian Christian Act, reflects a similar underlying assumption in slightly less direct language, requiring that ‘the age of the man intending to be married shall not be under twenty-one years, and the age of woman intending to be married shall not be under eighteen years’. 214

**Indian View**

Indian democracy, although in most respects very similar to western democracy, provides an alternative and less authoritarian model as far as marriage is concerned. In western countries, a marriage is valid only after the state issues license, that is, gives permission for the marriage to take place.

In India, a religious marriage is legal even if the marriage is not registered and the couples do not obtain a license. This means that virtually any Hindu priest or scholar in a temple or home can marry two Hindus and any Muslim can marry anywhere. Under the Hindu Marriage Act, the state recognizes any Hindu marriage as legal that is ‘solemnized in accordance with the customary rites and ceremonies of either party thereto’. A Muslim marriage is a contract, and not a sacrament. The reality is that the vast majority of Indians today have not registered their marriages with the government, yet they are legally married, by customary ceremonies.

Ancient Hindu Law list two to 12 types of marriages, some more socially approved than others, but all valid. Eight types are listed in later text, among these types; the gandharva vivaha is marriage by mutual consent. Gandharva marriage requires no parental consent, no rituals, and no witnesses. Shakuntala’s and Dushyant’s is perhaps the most famous marriage of this type. Of the eight, ancient forms two have survived and are widely understood in India today- family arranged marriage and gandharva marriage (*popularly known as Love marriage*).

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214 On the other hand, the Parsi marriage and Divorce Act, 1936 does not actually states that a marriage must consist of a bride and a bride groom, with section 3(1) (c) merely stating that no marriage shall be valid ‘ in the case of any Parsi, who is a male, has not completed twenty-one years of age, and if a female has not completed eighteen years of age’. 
Indian marriage laws continue to operate on the presumption that marriage is reserved exclusively for opposite sex couples. Although none of India’s personal laws define marriage explicitly, there is a clear heterosexist bias. The Hindu marriage Act, 1955 states, ‘A marriage may be solemnized between any two Hindus, if certain conditions are fulfilled. The list of conditions prohibits bigamy, insanity, marriage not before the age of 21 for the groom and 18 for the bride, and certain kinds of biological relationship between the two, unless these forms are permitted by community customs.

The gender of the two ‘Hindus’ is not stated. However, gender is assumed and appears in the third requirement of age. Now, as a matter of practice, most of the people assume that a bride is biologically a female and a groom a male.

In Muslim marriage, the basic ceremony consist of the officiant (any Muslim Male) asking the bride and groom if they consent to the marriage; when they say so, the marriage becomes valid.

*Can bride and the groom be of same sex?*

In India ‘personal laws’ specific to each religion spell out the marriage laws applicable to each religion’s followers. Same-sex marriages thus becomes a religious issue for many of its opponents, not just a legal one, with the result that the conversion of the ‘private’ nature of a romantic relationship into the ‘public’ status of marriage becomes the subject of debate involving such concepts as religious freedom, the separation of church and state, and the relation between law and morality. The last of these concepts is especially important when understanding the rationale behind laws that criminalize intimate contact between two persons of the same gender, which is again a supposedly ‘personal’ act in the private sphere of an individual upon which many countries have seen fit to legislate.

In most of the lesbian weddings reported in India over the last two decades, one woman presented herself as a groom and the other the bride. Several couples performed the rite of the groom by putting ‘sindoor’ in the bride’s hair parting. Some biologically female grooms undergo or say they intend to undergo a sex-change operation. Others have no such intention but have short hair and wear shirt and
trousers. When two women in India, publicly claim the right to marry (as opposed to privately marrying each other in death) they seem to rest this claim in on their presentation of themselves as a couple in which one woman is the bride and the other the groom, even though both are female\textsuperscript{215}.

An important Hindu interpretation of the same-sex relationships, expressed by several priests and teachers, is that same-sex lovers were cross-sex lovers or spouses in a former life. In that case, the groom, though biologically female, may be perceived as a male in spirit.

It is not surprising then, that activist campaigning for LGBT rights often fight to overturn the criminalization of intimate contact between members of the same sex before arguing for the legal recognition of the same sex relationships. Challenging traditional notions of ‘marriage’ may then open the door for further activism to allow partners in such relationships to adopt children with equal parental rights for each partner, thus challenging traditional set up of ‘family’. It is this progression that worries those who seek to defend ‘sodomy’\textsuperscript{216} laws: while sodomy laws themselves are impractical to enforce rigorously, they create a concept of homosexuals as a criminal class that prevents any possible expansion of the institutions of marriage and family to include them.\textsuperscript{217}

\textsuperscript{215}“Raju who married childhood friend mala (Both females) in 2004, had short hair, wore jeans and leather jackets, and has a male sounding name while mala wore red bangles, a symbol of marriage. After their marriage, which was conducted by a Hindu Priest in Delhi, returned to their hometown Amritsar, where Raju told reporters, ‘we have vowed to live together for the rest of our lives as husband and wife’. Mala threatened to commit suicide if they were forcibly separated. (See: Rataul, Dharmandra, ‘Even death can’t do us apart’, Indian Express, 11\textsuperscript{th} December, 2004.)

\textsuperscript{216}‘Sodomy’ is one of the terms often used to refer to same sex sexual intercourse in legal context. Etymologically, this is derived from the name of Sodom, a city mentioned in Bible as having been destroyed by god for its arrogance, haughtiness and inhospitable nature, and from the belief that same sex sexual activity between men was one of the practices which resulted in god’s decision to destroy it. However, same sex sexual activity is not mentions in Jesus Christ’s explanation for its destruction.

\textsuperscript{217}In Lawrence V. Texas, Justice O’Connor of the U.S Supreme court argued in her concurring opinion that, while the sodomy law in the state of Texas fell afoul of the equal Protection Clause, Texas could not assert a ‘legitimate state interest…. Such as national security or preserving the traditional institution of marriage…as other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.’
In India, section 377 of the Indian Penal Code, 1860 (IPC) has served this function by providing a tool for police harassment of sexual minorities, although actual prosecutions have been rare. However, not all activists seek to follow this progression. Radical strands of LGBT theory rejects the institution of marriage, arguing that there is no need for same sex couples to imitate opposite sex couples by creating families mimicking those conventionally formed by heterosexuals.

**Same-Sex Marriage Not Illegal**

Unlike bigamy, same-sex marriages are not punishable in India or the west. It is so because, marriage is not equivalent to the performance of any sexual activity. Even the police seems to recognize this distinction. When two Muslim men, Harfan, 28, the groom, and Mustafa, 22, the bride, got married in Garhmukteshwar, Ghaziabad in 2004, Harfan’s relatives handed over both men to the police, but the police refused to arrest them, because sodomy law is a crime in Indian Law, same-sex marriage is not.

**Arguments in Favour or Against Legalization of Homosexual Marriages in India**

Article 14 of the constitution of India assures all persons equality before law and equal protection of Laws. It can be contended that the lack of adequate provisions allowing for marriage between people of same sex puts them in a situation where they are not on the same footing as two people of opposite sexes, thus violative of Article 14. Amnesty’s International Inclusion of sexual orientation in its notice of ‘sex’ for the purpose of defining discrimination on the basis of sex in their 2001 report on violence against sexual minorities, as well as the successful use of Article 14 in the Naz Foundation case, could provide grounds for a challenge to marriage laws claiming discrimination on the basis of sexual orientation.

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218. As Christopher Leslie puts it ‘by creating a criminal class, sodomy law stigmatize gay men and lesbians, which weighs heavily on their psyche. By labeling gay men and lesbians as criminals, sodomy laws make gay individuals target for physical violence in the form of gay bashing, sometimes perpetrated as de-facto enforcement of sodomy laws. Sodomy laws encourage the abuse of gay citizens by both private individuals and police officers, because sodomy laws convert all gay men and lesbians into presumptive felons based on their sexual orientation, a status. Gay citizens are often treated as criminals without any proof of conduct.’ See: ‘people’s Union for Civil Liberties, Karnataka (PUCL-K) Fact finding Report,(2001),p.104-105’.
The feasibility of expanding the concept of same sex marriage in family centric India looks very likely to depend upon the ability to separate its religious aspect from civil aspects—something that worked very well with inter-religious marriages, as shown by the enactment of Special marriage Act, 1954. The fundamental purpose of family (marriage) in all societies we know of is regeneration of population. *(functionalist theory)*. Extending marriage "rights" to gay and lesbians seems only logical from the perspective of marriage for love, but from the functional perspective of marriage as an institution of society, it proves to be a failure altogether. Secondly, Gay Marriage is not only an issue of civil rights but also is a question of how we, as a society intend to define our family structure.

Thus, pro marriage activism can be justified with the argument that the right should be available to all people regardless of sexual orientation, and that it should be left to the individual to decide whether or not to avail of this option. Rather than impeding the liberation of LGBT people by forcing them into a heterosexual institution, the legalization of same sex marriage liberates LGBT people by giving them the option to do as they please.

Thus, with all issues dealing with LGBT rights in India, the reading down of section 377 of the IPC is key to the change in social and legal attitudes necessary to recognize and legalize same-sex marriages. If there ceases to be a law perceived as criminalizing homosexuality, homophobic social attitudes will cease to have the apparent sanction that they do at present.

**6.8 CUSTOM & GAY COMMUNITY**

Custom, being fluid and constantly changing, is notoriously difficult to define. Indian courts have sometimes defined customs as prevailing from ‘time immemorial’, but have modified this to ‘longstanding’ practice. There are numerous communities in India. Powerful communities such as, Aggarwal and Punjabis have formed their nationwide bodies, whose leaders meet and decide their customs. Upwardly other mobile communities gradually changed their customs to conform to upper class and caste practices.
When the conflict between settled communities and other communities, such as Scheduled tribes erupts, Scheduled tribes members do not change their customs to conform to majority norms. When questioned in court, the community members give widely divergent accounts of the customs. Courts tend to recognise a custom as valid if it is mentioned in several cases over a period of time. If a group performs a ritual repeatedly over a period of time, it may convince the courts that this ritual has become a custom.

One Hindu scholar, Pandit Shailendra Shri Sheshnarayan Ji Vaidyaka, has argued that gay people could be seen as constituting a separate community. When questioned about same-sex marriage at the Kumbh Mela in 2004 by Hinduism Today reporter Rajiv Malik, he said,

“Whatever is done in a hidden manner becomes a wrongful act and is treated as a sin. But whatever is done openly invites criticism for some time but ultimately gains acceptance. Why not give them the liberty to live in their own way, if they are going to do it anyway? After all, we have kinnars, eunuchs, who have been accepted by the society. Similarly, these people can also be accepted. Likewise, we have a kinnar samaj; we can have a gay samaj.”

6.9 CONCLUSION

It’s only the last decade or so that the notion of a queer politics has come to have increasing salience in both academics as well as activist circles in India. Much of the critique around normative notions of sexuality and gender has centered on the growing opposition to the anti-sodomy law (section 377 of the Indian penal code).

Critics of the modern nation state have rightly pointed out how, in spite of the attempt of some states to embed respect for cultural diversity, state invariably take on the identity of the majority community, with the minorities being expected to adapt to the majority’s ways. The resurgence of ethnic identities in the public arena right from Rwanda to Pakistan, India to USA and France is simply a testament to the fact that nation states have failed to make space for their minorities. Minority groups do not feel included in even in those states which are multi-cultural in their constitutional
design, as these states in spite of their constitutional commitments, remain fiercely non-ethnic in their everyday practices. Even so called multi cultural states remain unable to create a sense of belonging outside the bounds of religion or ethnicity. The nation still remains identified with one ethnic group\textsuperscript{219}.

At the level of conceptualizing queer struggle, it has been argued that it must indeed go beyond the question of rights to critique fundamental structures in society. A queer vision is not merely about equal rights for LGBT Persons but about loosening up the rigid structures of caste, gender and compulsory sexuality. It is about questioning notions of purity, muddying rigid boundaries and opening out a space for those at the margins of the hegemonic structures which make up our society.

More than 80 countries around the world still criminalise consensual homosexual conduct between adult men, and at times between adult women\textsuperscript{220}. ‘Robert Mugabe’s\textsuperscript{221} in) famous ‘homosexuals are worse than pigs and dogs‘ speech has been followed by the Indian\textsuperscript{222}, Nigerian\textsuperscript{223} and Ugandan\textsuperscript{224} governments defending anti-sodomy laws in their country as both morally important and foremost culturally rooted. When section 377 of the Indian penal code (IPC) was challenged, India’s ministry of home affairs admitted an affidavit stated that ‘the law does not run separately from society. \textit{It only reflects the perception of the society}…when section 377 was brought under the

\textsuperscript{222} The government of India, in classic defence of anti-sodomy laws, has stated that ‘the right to privacy cannot be extended to defeat public morality, which must prevail over the exercise of any private right’. It further affirms the real purpose of the anti-sodomy laws, which is not to monitor some obscure sexual acts, but behavioral sanctions of legislative authority of the state, as it tends to affect the social environment’. Special leave petition (civil) no. 7217/ 7218 in the Supreme Court against the Delhi high court order.
statute as an act of criminality, it responded to the values and mores of the time in Indian society’.

The dream of nationhood as conceptualized by Nehru was that with the coming of the modern nation, older identities based on region, language, caste and religion would be treated as citizens unmarked by categories of caste, religion and gender. However, at the beginning of the twenty-first century, identity in the public sphere remains of great political salience. Now, the time has come that this cherished vision of pt. Nehru is looked and fulfilled upon by the policymakers in India.