Chapter I
Introduction

This study makes an attempt to understand the lived-realities of the queer in India vis-à-vis the normative-structures of the social and the legal that define and inform our notions of the ‘family’. Here, I have put in the lived-experiences of 29 queer-identified individuals, as are gathered through in-depth interviews—which have then been put through methods of qualitative analysis (a detailed discussion on which is placed in Chapter 2). These narratives are used as tools in my weaving of the queer-qualitative critique of the Indian Family Jurisprudence wherein, the underlying idea is to describe the impact of this jurisprudence on the queer lives, and in the process, challenging the hegemonic normativity of the social and the legal. This way, the study is designed to identify and describe law’s violence over the queer—violence that operates through the junctional-assemblage of the social and the legal—I call it, the ‘socio-legal’ or the ‘socio-legal assemblage’. This study, involving such narratives-based analyses therefore, help us contribute to the evolving epistemology of queer politics in India. It helps us arguably demonstrate that the hegemony of heteronormativity does not exclusively reside in the legal, it is there very well in the social as well; and with it, it operates through all the possible intersectional forms of exclusion/marginalisation and violence whether it is class, location, age, sex, gender, sexuality, marital status or the educational-status, et.al. of the queer-individual.

Being a critical study, this thesis is designed to challenge the underlying normativity that operates as the dominant thinking within the structures of family jurisprudence—heteronormativity. For this study, the methodological lens used to view the structures of family jurisprudence is ‘queer methodology’ (a detailed discussion on this is placed in the Chapter 2). How does the normative look from the political lens of the queer? After all, what is normative’ is what is given. In the chapter titled ‘Non-thinking in the name of the normative from her book Frames of War,1 Judith Butler focuses on the role of the ‘normative’ in our regular life, in our daily judgments and in the way the larger social and juridical systems and institutions are perceived. She contends that, the normative in the society is extended to all settings based on the tool of right and wrong or for and against. Too often this ‘for and against’ of an issue is deployed by the society in order to preserve the status quo and to render thought unnecessary. Moral condemnation is non-thinking, and this kind of non-thinking purportedly leads to no thinking on problematic

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and complex contestations of life. Hence, such non-thinking entrenches the normative framework from where it is derived.²

In the same chapter, Butler presents the difference between the acts of description and acts of prescription. The acts of description merely define and lay certain attributes to a certain thing or phenomenon, whereas sometimes such descriptions often transcend as the normative. The ways we define things or describe a phenomenon predetermine the judgment that follows and de facto consist of judgments themselves. She uses the example of ‘terrorist violence’, to enunciate her claim. The expression ‘terrorist violence’ itself doesn’t need any further inquiry as the description itself carries it so well entrenched that it needs no further description. Hence, often our acts of descriptions transcend into acts of prescription. Though, the problem is not that the line between the two is very blurred, the issue is that this blurred difference is generally left unacknowledged and normative judgments are allowed to masquerade as descriptive ones. This prescriptive or normative thinking based on certain judgments that are taken as givens and that could be questioned with critical thinking is the main working principle of this research. Butler contends that, in order to encourage thinking, judgments are not abandoned just because they are based on univocal sources of the normative; judgments are made on evaluations that are self-reflective, comparative and critical. She contends that, what is adopted is rather the ease of security in a sense of non-thinking, engendering a very natural reliance over the normative. Butler puts forth the argument that the idea is not to dispense with the normative, but to let the normative thinking take on the critical and comparative form so that it doesn’t rely any further on the blind-spots and gaps in the moral frameworks.³

This and such other similar theories are used in this study to re-define/re-invent the conception of ‘family’, ‘marriage’ and ‘kinship’ as opposed to how they are understood in its normative frames. This study shows how such mindless, non-thinking reproduction of the normative can be challenged by critical thinking and subaltern experiences. For the Queer, these categorisations have no natural or essential basis. The essentialities of each of these categories change with the dominant cultures and hence, these identity-categories are inscribed in multiple, conflicting and contested ways.⁴ Identity therefore becomes politically indeterminate and a product of an ongoing contestation over social meanings and definitions.⁵ Queerness is born out of the treatment of exclusion by the rigid structure of compulsory

² Id. at 138.
³ Id. at 142.
⁴ See Althusser on the politics of dominant ideology of society, discussed in the Chapter 2.
heteronormativity; in this way, the queer refuses to assimilate in the compulsive sexual hegemony of the normative. Thus, in most ways being queer is a form of resistance to pursue the politics of defiance.

This thesis attempts to draw a queer critique of the theory and praxis of Indian family jurisprudence. Queer as a methodology is productive for the researcher as it provides it with certain political vantage points to view the spaces inhabited by family jurisprudence. The rich epistemological locations of these vantage points help the researcher deconstruct the ideological assemblage of the state and the social that together build the structures of family jurisprudence. This way, the researcher is already informed about the heteronormative nucleus of this structure and its disavowal of anything that doesn’t fit in this structure—the queer.

As a legal and a social system, it appears that we have already decided upon certain forms of recognition as politically legitimate, socially acceptable, economically viable and legally justifiable, much like a set of a priori notions, as if they were already there. These set of ‘givens’ determine schemas of recognisability, as if whatever was to be known of recognition is already known to us. The social and juridical order that we live in already has decided on the fate of bodies when they are born. The body is therefore marked with politically pre-loaded genealogies of recognition that has its own signification and given functionalities in the socio-economic and legal order. Such orders have designed an entire set of different forms of recognitions for us—sex, gender, sexual orientation, marital status, race, caste, nationality, et. al. Each form of recognition has an archaeology of its own, as Foucault would argue that a set of given functionalities are attached to each of these recognitions by their respective archaeological evolutions. At the same time, each forms of recognition have their own schemas of intelligibility, as what Butler would suggest. According to her, ‘intelligibility’ is understood as the general historical schema or schemas that establish the domains of the knowable; and what is knowable is not always what is recognised. Sex is one of the first of these recognitions that a body is marked with and known by. But our knowledge of a ‘sexed body’ is restricted to the binary of male/female forms of recognition; a body that transcends this binary form of recognition may be knowable to us but may not be necessarily recognizable by the normative episteme of socio-economic and legal frames. What is recognizable is always what is accepted, legitimated, and sanctified by the epistemological domains of these frames, under which we live as ‘categories’ which are placed in certain degrees higher than what is knowable. Thinking this way, the human bodies are reduced to mere ‘categories’ by the social and legal order of our

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7 *Supra* note 1 at 7.
day. According to the Supreme Court the body that does not fit in the binaries of male/female is the ‘third sex’, the question that it raises is, who is the first or the second sex then? What is recognised is always knowable to these frames, but its inverse does not deem fit. For example, within the epistemology of the Indian criminal jurisprudence, only penal-vaginal intercourse qualifies as the legal and natural order for a sexed body; all bodies practising other forms of sexual intercourses, though, knowable to these frames, are not accorded with the same forms of recognisability; the acts of the latter sort therefore form the location of the unnatural, the illegal, and the criminal. For Foucault, what is ‘recognizable’ and what is ‘knowable’ are always present in the discourse of language, but the extent to which both these categories are in a position to display or dispel their power, it varies. The former is cherished, celebrated and accorded the location of the ‘included’ by the frames of order, whereas the latter is sometimes, denigrated, repressed and always located outside the order as the ‘other’. As Butler would say, it is because of the ‘other’ the ‘included’ exists and is able to maintain its location and power.

This thesis is a critical study of the contemporary juridical notions on family, marriage and kinship contemporarily practiced in India. The starting point of this study is based on the idea that every branch of legal doctrine must be based, if not explicitly, then tacitly, upon some picture of the forms of human association that are considered right and realistic in the areas of social life with which it deals. The legal theory is already affiliated to certain forms of power relations, it is a site that espouses a certain ideology, and carries its praxis with a bent towards what it recognises, as opposed to what it does not. But, on the face, the legal theory looks value-neutral, as it guarantees rule of law, when it envisions a democratic, secular model of social engagement that pledges to its people justice (social, economic and political), liberty (of thought, expression) and equality (of status and of opportunity). In reality, it follows a certain ideologically sustained politics of recognisability and irreconcilability. In the constitutional frame, it does not espouse that ‘family’ is the basic unit of the society, on which all the resources of the state are, or should be concentrated, but in reality, the law practiced in India exclusively recognises ‘marriage’ and ‘relations of blood’ (kinship) as the only form of inter-personal relations that are the solitary means of constituting ‘family’. A family is therefore, not just a social institution, it also is an instrument of the law that makes worthy of attracting most of the public fund, legal benefits, tax exemptions, besides, the hierarchal social division that it engenders between

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the ‘family-haves’ and ‘family have-nots’¹¹. A set of friends, a same-sex couple, a few individuals in a polyamorous relation, or any such non-normative inter-personal arrangement do not qualify to be called a family, irrespective of whether functionally such relations are just like what a family stands for. Thus, bodies engaged in such later forms of relations (the family have-nots) are always going to be devoid of the benefits of law; and, the ones engaged in former forms of relations (the family-haves) will always keep getting the benefits of the law. This study critiques such practices of inequality in the legal order which is already biased in the favour of certain forms of family formations, as opposed to the other forms. The legal order works through its own pre-ordained, *a priori* frames of recognition, and by implication, the bodies are left with no choice as subjects of this order. The liberty of thought and expression, therefore remain restricted to the textual frame of the Preamble to the Constitution and are never allowed to percolate deep in all the real forms of social relations and practice. This way law remains a site, where, the priestly order outnumbers the prophetic order, in one of the metaphorical descriptions by Unger.¹²

The thesis is divided into six Chapters, including this introductory chapter. So, I will start the description-ritual from Chapter 2. The Chapter 2 discusses the Objectives, Research Questions, Methodology and the Methods adopted for the study. This Chapter is divided into three sections. The first one discusses the objectives and research questions of the study. The second one solely focuses on the methodological aspects. As the methodology used for this study is a fairly evolving arena of critical socio-legal research—queer methodology; it was felt needed that I discuss a brief background on the queer politics and its arrival as a form of serious academic-research engagement. For this, I have tried to genealogically approach the queer epistemology starting with discussions on the Critical Studies movement, going to its offshoots of feminist methodology, before finally approaching queer methodology and queer legal methodology. The third section deals with queer methods that are deployed to conduct this study. This section starts with an existential question: is there a queer method? Further, this section describes the target universe, sampling techniques and its limitations as thoughtfully incorporated in the study. It then presents with a statistical analysis demonstrating the demographic representation of the respondents who volunteered to participate in this study. It then discusses the nature and form of data that is generated through the deployment of queer methods; before, finally describing the ethical standards deployed in the pre/post phases of data collection.

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¹¹ See Annexure IV to see an inexhaustive list of legal rights that the liberal Indian state bestows over the heteronormative family (the family-haves), at the cost of all non-normative forms of socialized units—the queer (the family-have nots).

¹² See *Supra* note 9 at 28.
Chapter 3 is titled ‘the Problematic Normativity of Family Jurisprudence: a queer-qualitative critique’ which is schematised into three parallel and interconnected sections, as discussed in brief here. Section one problematizes the notion of family as a normative structure both in social as well as in the law. It attempts to deconstruct the history and praxis of ‘family’ with a queer dialectical approach. It explains the manner in which the institution of ‘family’ is deployed/used by the socio-legal assemblage in constructing and enforcing the monolithic ideological order of heteronormativity over its subjects and abjects. In other words, it informs us, how through the space and institution of family, the legal and the social jointly produce a body of juridical episteme—family jurisprudence; and, how family jurisprudence is then deployed further by the heteronormative forces of the socio-legal assemblage to domesticate its subjects and to objurgate its abjects—the queer. Section two problematizes the notions of ‘sex’ and ‘gender’ that defines the core of our family jurisprudence. It does a dual-deployment of philosophical-dialectics and queer narratives to theorise and re-read how sex and gender operate in our daily lives. The dialectical discourse lets us understand that the power of heteronormative ideology operates through the spaces of public/private (mainly the intimate spaces of family and kinship to public spaces such as neighbourhood, schools, workspaces, medical establishments, and state agencies). Further, in this section, the queer narratives help us understand how sex/gender operate along with the multiple intersectionalities of sexuality, class, gender, sex, marital status, age, location, and education in these spaces and in/on the queer lives. These narratives help us map the gender-journey of the queer through these multi-layered vulnerabilities as experienced vis-à-vis the normative structures of public/private. Finally, this section presents a set of concluding remarks to suggest certain ways to engage with the law, so that some constructive changes in its body and operation could be imagined and inflicted. The section three reveals how ‘desire’ is constantly regulated/manipulated by the theory and praxis of family jurisprudence (the socio-legal assemblage) through its unrestricted operation in public/private spaces. It builds upon the philosophical dialectics of Freud and Foucault clubbed with the queer experiences that together inform us how science has historically and contemporaneously been deployed to regulate sexuality—a structural operation that reifies the ideology of heteronormativity through public/private spaces of family/parents, hospitals/doctors, mental asylums/psychiatrists. It then contemplates certain suggestive ways through which law could be re-imagined/re-deployed to produce substantial changes in the way medicine/psychiatry operate through its extensions of the public/private. Further, this section, explains how marriage and childcare are historically and contemporaneously deployed to regulate adult and child sexuality by the heteronormative power of socio-legal assemblage which operates through
public/private spaces of family, neighbourhood, schools, universities, workspaces, medicine, psychiatry, police, courts, financial institutions, et.al.

Finally, this section presents a set of concluding remarks (spread around four different locations in this chapter) to suggest certain meaningful ways to engage with the law, so that some constructive changes in its body and operation could be wrought.

In Chapter 4, I attempt to further develop the scholarship of this study in the purview of the following two objectives:

(1) Studying the web of chosen relationalities that the queer engages itself with, which are in the nature of social support-systems or, perhaps queer families; and, as its extension

(2) to study the nature of polymorphous intimate relationship(s) (carved out of the larger web of queer’s chosen relationalities)—formed, sustained and broken by the queer within and outside the normative bounds of the socio-legal notions of family and kinship.

Taking it this way, this Chapter takes the work of the previous one a few more steps ahead. This Chapter supplies a fresh anthology of vulnerabilities that the queer lives experience while engaging with all possible forms of polymorphous relationalities (whether intimate or not-so-intimate). Minimalistically speaking, these narratives act as recorded sources of queer desires, emotions, love, and violence—both within and outside the queer’s intimate spaces and moments, both in the public and in the private. Since, the queer is always already located in heteronormative spaces and structures of the socio-legal assemblage—the queer’s lived experiences help us to understand how the queer forms, sustains and breaks out of its interpersonal relationalities—which in turn, help us to draw a sketch of the plausible reforms that could be suggested onto the epistemology of this assemblage. Yes, we need reforms for the epistemology of the socio-legal assemblage because, (as the queer methodology tells us) in its current state, its powers turn the queer lives into precarity. This knowledge of the methodology is tested through the analytical combination of the queer narratives presented in the previous and in this Chapter. Besides offering an anthology of the queer narratives, this Chapter heavily draws upon the rich episteme of queer philosophy—and, just like its previous chapter, this one follows a discursive track of switching on and off the theory and practice of queer politics to produce certain conclusive and suggestive remarks at the end. This Chapter is divided into four sections: the first one deploys the queer narratives that present a sketch of the multiple forms and sub-forms in which the queer chooses to make around itself a web of its polymorphous-relationalities and, live thereunder—relationships that have their own chosen names, some exist unnamed, some are subversive and, some are an act of reclaiming the normative. These interpersonal relationalities include intimate
relationships, such as that between two or more lovers, or intimate caregivers that may or may not sexually, romantically, or emotionally be always connected. Such interpersonal relationalities may also include friends, or other allied support systems of the queer. This section therefore, presents an existential anthology of the polymorphous nature of queer relationalities that could be called the queer’s chosen family/friendship-circles/support-systems/kinship. The second section of this Chapter attempts to map the vulnerabilities that the queer experiences in living/doing its chosen polymorphous relationalities in the spacial and temporal domains of the public/private. It presents the queer journey of living/doing these chosen-relationalities through a three-phase thematic distribution, given below—which discusses three major questions: how the queer forms its relationalities; how does it sustain its relationalities; and, how does it break-out of its relationalities? The related sub-themes are listed along with the major ones below:

(1) Studying the ‘formation’ of the polymorphous queer relationalities:
   a) Modes of engaging: virtual/physical/etc.;
   b) Nature of concerns/reasons of the queer before/while engaging in relationalities;

(2) Studying the modes of ‘sustaining’ queer relationalities:
   a) Negotiating with positionality, spaces, and distance;
   b) Nature of care-giving involved;
   c) Negotiating with normative relational values—such as gender roles, sexual/emotional fidelity, dyadic/polyamorous-ness;
   d) Studying the queer’s experiences of being at the liminal spaces of expectations and realities of socio-legal recognition.

(3) Studying the ‘breaking-up’ of such queer relationalities:
   a) Vulnerabilities experienced by the queer in its relationalities;
   b) Violence within queer-relationalities.

This section uses the aforesaid three-phased presentation (of the queer’s journey of doing/living these chosen relationalities) to map the vulnerabilities experienced by the queer in domains that are social and legal; and, in spaces that are private and public. This way, this section mainly draws upon the queer lenses to read the queer's journey of doing relationalities—to problematize the role of the social and that of the law which operates through both its presence and, its absence. This section also draws upon a comparison of the legal abilities/disabilities of the heteronormative relationalities vis-à-vis queer relationalities; for which, it mainly relies upon a survey\(^\text{13}\) of exclusive legal rights/exemptions/privileges that are extended by the state exclusively to its heteronormative (non-queer) family units. This kind of a comparative analysis help us to understand the deep involvement of the

\(^{13}\) See Annexure IV of this thesis.
Indian state with the heteronormative ways of doing relationalities (e.g., marriage); and, how such partisan roles of the state directly contributes to the layers of vulnerabilities and precarity in and around the queer relationalities. The third section discusses the various possibilities of engaging with the law—with the object of positively transforming the queer’s experiences of doing its relationalities. This section mainly draws upon the ‘status model’ and the ‘contract model’ of legal regulation of intimate relationalities to suggest that a carefully engineered amalgamation of both these models work best in the interests of the queer in the contemporary Indian society.

The Chapter 5 largely deals with the constitutional obligations of what the state ought to do on matters of one’s intimate life-choices, relationalities—eros, erotica, the social and its public manifestation. Hence, the primary question—why the Indian state and its law ought not continue to get involved in the re-production and re-enforcement of the hegemonic structure of the heteronormative kinship and family under a democratic and constitutional order? This way, the Chapter challenges the systemic efforts that purport to reflect a natural desire for the institution of marriage—how it actually draws upon and endorses the state’s deep involvement in shaping our ideas of human intimacy and socialisation, in guiding our desires, and in persuading us to assume status-like relations with respect to one another.14 The scheme of this chapter is divided into two sections. The first section provides an orientation into the theory of reading constitutionalism as a tool of transformative justice—an exercise of re-imagining the constitution as a vehicle of meaningful social and legal change. Here, I have attempted to draw a genealogy of Constitutionalism through its dual-pasts that may be identified as liberal and post-liberal—wherein, I try to map the location of the Indian Constitution through its formative and interpretative discursivity. Taking the clue from Jacques Derrida and reading its extensions through the works of Upendra Baxi, Ranabir Samaddar, Karl Klare and, Kalpana Kannabiran, I try to discuss the mystification/justification of constitutionalism’s multifaceted roles in re-defining justice; and, how the ‘foundational violence of law’ and the ‘politics of forgetting’ very successfully have contributed to a sense of denial and betrayal to the otherwise legitimate claims of the subaltern (the queer). This sense of denial and betrayal of the subaltern’s legitimate claims, hopes, and desires are further nuanced through the theorisations of Wendy Brown and Oishik Sircar wherein, they discuss the inherent and inevitable paradoxes of the liberal rights’ regimes and their cumulative-impact that creates certain special ontological sites for the subaltern—the sites of the disadvantaged. This section, after discussing the crisis within constitutionalism, goes to further discuss the growing

epistemology of ‘transformative constitutionalism’ or ‘insurgent constitutionalism’, taking it as an exercise of re-reading the constitutional text, its histories of rupture and connections with the past, and developing certain new scales of rearticulating the frames of constitutional justice, attempting to re-define its understanding of failures and successes. Overall, this section provides an orientation to the reader about the theoretical lenses and methodologies (i.e., transformative constitutionalism) that are used to theorise the constitutionality of the ‘re-imagined state of law’ (as was proposed through the works in Chapters 3 and 4). The second section uses the frames of transformative constitutionalism to re-evaluate the abstract power relations that are produced through the impact of certain hegemonic ideologies (i.e., heteronormativity in particular) over onto the theory and operation of the Indian constitutional order. In other words, it discusses the primary question—how can the scales of constitutional justice be perpetually tilted to favour the heteronormative power relations at all possible times and spaces? Deliberating on this question, the discussion takes us to understand the shifting bases of constitutional thinking—and, specifically onto the question, why the Indian Constitutionalism ought not be tilted in favour of the dominant narrative of justice, i.e., heteronormative justice; and, why is it important to substitute the hegemonic order of heteronormative justice with the power of constitutional justice? This second section, further deliberates upon the use and efficacy of certain insurgent tools of constitutional justice that could be deployed as an attempt to transform the meaning and working of certain conventional principles of constitutional justice—namely, the new relationships formulated through the works of Upendra Baxi, Tarunabh Khaitan and Kalpana Kannabiran (e.g., trying to re-understand the relationship between discrimination and liberty through an extended analysis of Article 15 with Article 21 and the golden triangle jurisprudence espoused by the Supreme Court in Maneka Gandhi or, to re-imagine swaraj through a fresh reading of Article 15). In short, this section discusses the various constitutional means to fructify the ‘re-imagined state of the law’ as proposed through the analysis of queer narratives demonstrated in Chapters 3 and 4 of this thesis.

Finally, the Chapter 6 (being the conclusive chapter) other than resonating the ‘re-imagined state of the law’ (based on the multiple conclusive and suggestive remarks in Chapters 3 and 4) provides a summary of this project and lists out its key findings.

As this is an academic writing, it has its own inherent limitations which are obvious. However, I sincerely hope that at least the academic fraternity (finds some substantive merit in this research and its outcomes.