CITIZENSHIP, SEXUALITY AND RIGHTS: AN EXPLORATION OF SEXUAL MINORITIES IN INDIA

Thesis submitted to Jawaharlal Nehru University
for the award of the degree of

DOCTOR OF PHILOSOPHY

POONAM KAKOTI BORAH

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI – 110067
INDIA

2017

JAWAHARLAL NEHRU UNIVERSITY
CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
New Delhi-110067
Telephone No : 011-26704413 Fax : 011-26741504
email : cpsjnu09@gmail.com

Date: 31/07/2017

DECLARATION

I declare that the thesis entitled "**Citizenship, Sexuality and Rights: An Exploration of Sexual Minorities in India**" submitted by me in fulfilment of the requirements for the award of the degree of **Doctor of Philosophy**, of Jawaharlal Nehru University is my own work. This thesis has not been submitted for the award of any other degree in this university or any other university.

Poonam Kakoti Borah
Poonam Kakoti Borah

CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

Shefali Jha
Prof.Shefali Jha
(Chairperson)

Vidhu
Prof. Vidhu Verma
(Supervisor)

ACKNOWLEDGMENTS

Ralph Waldo Emerson famously said that 'Life is a journey, not a destination'. I would like to re-phrase and say that 'Ph.D is a journey, not a destination'. And this has been a long journey, for the LGBTQ movement in India and as well as for me! While the journey of the LGBTQ movement will be described subsequently; in these pages I would like to talk about my modest journey- a journey that has been made memorable because people without whom this work wouldn't have seen light of the day.

This work is a labor of love- while I have labored; people have showered me with love. And foremost among all, this thesis owes immensely to my supervisor, Prof. Vidhu Verma, whose unwavering belief in my abilities has led to the completion of this work. She encouraged me to work in an area that remained outside the peripheries of 'respectable' Political Theory in 2010. She has given me the freedom to conceive and re-conceive the research with each development in the movement, and yet laid down that deadlines should not be crossed. Without your encouragement, Ma'am, I can't visualize completing this thesis. You have taught me to be resilient, even in the face of adversity.

This work is a testimony of my parents' unconditional love. While Maa's words of encouragement and letters have always been by my side, even when I continue to grapple with her loss; it is Deuta who has borne the brunt of a researcher's mood swings. This work is for you, Deuta, with gratitude - for bursting notions of toxic masculinity and trying to fill in the void that Maa has left.

My family through marriage has ensured that they add tranquility to the restless life of a researcher. This work is in recognition of their support, especially my mother-in-law, who has time and again cushioned me from traditional 'familial' responsibilities, emphasizing that the thesis should override anything else that comes before me. She may not use the identity of being a feminist, but she resuscitates in me the belief in women's solidarity. To you, Mummy, for being a brave and exemplary woman who has accepted me as her own bridging the ideological, linguistic, and regional divide that separates us.

When I initially began conceptualizing this research, I remained on an uncertain ground as research on sexuality is hardly dealt within Political Science. However, I remain indebted to Centre for Women's Development Studies for providing me with the initial tools to engage with the concept, through the sessions on sexuality in the Course on 'Women's Studies'. In particular, the classes with Mary E. John and Renu Addalakha remain etched in my memory. Over the years, if I have been able to shed my diffidence, it is because of the 'Sexuality, Gender and Rights Institute' facilitated by CREA. My ideas were stirred by listening to Carol Vance, Ruth Vanita, Geetanjali Misra, Janet Price, Arvind Narrain and Alice Miller. This work is in acknowledgment to Vance, a teacher par excellence. SGRI also gave me one of my treasured friends- Anubha whose contribution in this research is second to none. I also cannot forget the enthusiasm that Sharmila Rege had shown towards it, making me overcome by initial self-consciousness. To Sharmila, whose absence has impoverished us all.

My 'family of choice' has an immense contribution to this journey. While Rukmani's contribution and support has been a longstanding one, in the past few years I have found 'sisters' in Sweta, Kirti, Ritika and Paroma who have listened to my incessant banters with exceptional patience. To Sweta and Kirti, for opening your hearts and home whenever I needed. To Paroma, for handling my anxieties in the course of fieldwork and beyond.

As I also graduated into a teacher in these years, my life has been enriched by the presence of my students, who are no less than my family. It is to our mutually enriching relationship that I consider my life as a satisfying one. To Arushi, Manpreet and Kipgen who have turned out to be my 'pride' and to my new lot of 'children': Anindita, Berlin, Namsee, Nishigandha, Kavita, Smita, and Subhana, among all the others- with the hope that they will make the world a better place.

My teachers from school to university days have inspired me to favor teaching as a vocation. Dr. Sutapa Bose, Banashree Nandi, Durba Ghosh, Pompa Roychowdhary, Babita Verma, Dr. Bijaylaxmi Nanda, Prof. Valerian Rodrigues, Prof. Gopal Guru, Prof. Pralay Kanungo, Prof. Gurpreet Mahajan and Prof. Shefali Jha have shown that teaching is a passion, not a profession. It is specifically to the course on 'Feminist Theory' offered by Prof. Jha that I owe my introduction to Gayle Rubin. To you, my teachers for being my inspiration.

I owe immensely to my colleagues in Gauhati, Dr. Polly Vauquline, Dr. Sakira Sahin and Dr. Rukchana Rahman for bearing the brunt of my absence from teaching and yet encouraging me at every step. This work is a tribute to you, my colleague-sisters, for the feminist solidarity that we celebrate. My senior colleagues at the University Prof. Nandana Dutta, Prof. Sandhya Goswami, Prof. Meeta Deka and Dr. Aparna Bhattachharyya have laden me with unequivocal support over the years. I owe to them gratitude, that cannot be described in words. This work would not have been possible without the co-operation from the administration in Gauhati University, to whom I owe my leave and freedom to complete an unfulfilled dream.

My friends from my JNU days Barasa Baa and Arup Daa, Brijesh, Smruti, Subashini, Mahesh, and Amrita have shown that friendships are not bound by geographical distance. They have counseled me in times of distress, celebrated every little achievements and made me believe in myself.

The significance of Mithu and Debajani- my sisters by birth and choice-to my life and my work cannot be described in words. They have wiped my tears, baked cakes and cracked jokes, to bring in humor at several points when the research process had become overwhelming. My work is also in acknowledgement of all the women who have taken care of mundane yet tiring work like cooking and cleaning while upper caste, middle class women like me pursue research. To you, Sankori Didi for bearing with me and my tantrums.

Most importantly, this work is in acknowledgment of my friends from the movement Sanjib, Minakshi, Ditimoni, Poushali, Malobika Di and Akanksha for encouraging and facilitating me to break the insider-outsider dichotomy. You all are the wind beneath my wings. The work has been made possible only because my respondents took out the time and energy to speak to me. The willingness that they have shown in speaking to an able bodied, upper caste, middle class, hetero-cis-women about their experiences and activism is exceptional. From their lives, I have learnt to

acknowledge my privileged position within the sex/gender system. In the course of the field work I have found friends in Sachin, Pallab, and Ken. To them, who see in me an ally of the movement.

This research is the result of the reassurance that my extended family members Ruby mahi, Chandrabhan, Madhab khura, Baba mama and Dangor mama have shown in my abilities. My stay in Delhi, after leaving JNU has been made homey because of the warmth of Papori baa and Debajit daa. Bidisha, my friend from childhood, has held my thesis as dear as her own. To her, for bearing with my long absence from conversations and yet coming to my rescue, for problems large or small.

Words are short to acknowledge the contribution of Vikas in my life and my work. Without his constant support and love, life would have been a challenge. You have valued every dream of mine as your own and re-assured me that the institution of marriage is undergoing transformation. To you, for who you are and what you mean in my life. This work is a celebration of love- irrespective of whether it is a heterosexual like ours or otherwise.

They say, research is a solitary journey. But my experience does not validate such a proposition. My life, my research has been made what it is, by the fortunate presence of all these people and the confines of these acknowledgement pages are too meager to state what they mean to me.

LIST OF ABBREVIATIONS

CALERI	*Campaign for Lesbian Rights*
F-T-M	*Female to Male*
LBT	*Lesbian Bi-sexual Transgender*
LGBTQ	*Lesbian Gay Bi-sexual Transgender Queer*
MSM	*Men who have sex with men*
M-T-F	*Male to Female*
NACO	*National Aids Control Organisation*
S377	*Section 377, IPC*
SOGI	*Sexual Orientation and Gender Identity*
Voices	*Voices against 377*

CONTENTS

INTRODUCTION

The contemporary sexual landscape is an uneven one, with seemingly paradoxical developments. Among the paradoxes that surround us are events such as the Orlando shootings which was horrific instance homophobic hate crime in the 'land of liberty', as opposed to the election of a gay man to the Office of Prime Minister in Ireland- a Catholic country. Similarly while countries like Tanzania, Ghana, Nigeria and Uganda continue to resist any discussion on LGBT rights, Taiwan has recently recognized same sex relationships. Stories of violation against sexual minorities range from the hackling to death of Xulhas Mannan, founder of Bangladesh's only LGBT magazine-'Roopban' to the dismissal from service of a professor teaching in Bangalore on grounds of his sexual orientation. Despite such grim instances stories of resistance have also come to the fore. This includes cases such as the marriages between Madhuri Sarode and Jay Kumar Sharma (who was assigned gender female at birth) and recently between two women from Bangalore.

The contradictions that reign the sexual landscape become even more prominent when female genital mutilation among the Bohra community co-exist with the widespread success of 'The Vagina Monologues'. That sexuality evokes mixed responses is also visible when Baba Ramdev labels homosexuality as a disease that yoga can cure, while Arun Jaitley expresses his support for gay rights. To illustrate the matter further, while anti-Romeo squads have been formed in U.P. which police women's sexuality under the garb of protection at the same time Lucknow becomes the first city in U.P. to host a Pride March. In other words, matters related to sexuality have inundated us from all corners, but in no definite direction. Debates on censorship and right to privacy have invariable led to questions on sexuality. This is evident when the judges of the Supreme Court consider privacy claims made in the Adhaar case applicable to the question of sexual orientation and also when movies such as Anarkali of Arah, Lipstick under my Burkha and Ka Bodyscapes undergo the scissors of the censor board. In a nutshell, sex and sexualities can no longer be presumed as tangents, as add-ons, as side issues, but has started occupying a vital space within the public realm.

The realm of politics as traditionally conceived does not accord much centrality to sexuality. The identification of sexuality as a significant site where power is exercised an enduring contribution of 'second wave' feminism. Unlike the drive theorists of sexuality who explained sexual drive as innate, feminists were informed by developments in the field of anthropology which showed that societies vary in the way gender and sexuality is organized. By doing so, feminist scholars have de-linked anatomy from sexuality. In Oakley's words, "the role of anatomy in determining sexuality must remain a purely hypothetical one until some explanation is given on how the two connect."[1] Sexuality, in Oakley's account, is 'related' to sexual behavior but goes beyond it.

By questioning the biological essentialist explanations, feminism has opened up the space to discuss the power that men exercise over women. Within such an account, gender is seen as an effect of sexuality.[2] And, women's oppression is explained through a patriarchal structure which is based on male sexual dominance. Radical feminists emphasized on how "heterosexuality separates women from each other; it makes women define themselves through men; it forces women to compete against each other for men."[3] The call to political lesbianism, was therefore, not only meant for bringing all women under one umbrella but also to highlight the alternative against patriarchy. While Adrienne Rich formulates 'compulsory heterosexuality'[4] as the structure which is used to keep women in a subordinate position under patriarchy, Anne Koedt discusses how the 'myth of vaginal orgasm'[5] is deployed to retain the heterosexual structure intact.

The identification of sexuality with male violence found clear articulation in the works of Kate Millet, Susan Brownmiller, Andrea Dworkin among others. Despite its radical edge, such an approach had a theoretical limitation: it confined feminists from investigating sexuality any further. In these accounts, sexuality is inherently

---

[1] S Jackson, 'Heterosexuality, Sexuality and Gender: Rethinking the Intersection', in Diane Richardson, Janice McLaughlin and Mark E. Casey (eds.), *Intersections Between Feminist and Queer Theory*, Palgrave Macmillan, New York, 2006, p. 38.
[2] Richardson, 'Patterned Fluidities: (Re)Imagining the Relationship between Gender and Sexuality', *Sociology*, Vol. 41, No. 3, 2007, p. 462.
[3] Chalotte Bunch in Bat-Ami Bar On 'The Feminist Sexuality Debates and the Transformation of the Political, Hypatia', *Lesbian Philosophy*, Vol. 7, No. 4, Autumn, 1992, p. 49.
[4] Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence', in R Parker and P Aggleton, (eds.), *Culture, Society and Sexuality: A Reader*, UCL Press, UK, 1999.
[5] Anne Koedt, *The Myth of the Vaginal Orgasm*, New England Free Press, London, 1968.

masculine. The limitation is made visible through the anti-pornography campaign led by Dworkin and Mackinnon which hinged on a simplistic correlation between violence and pornography, leading to a re-evaluation of such formulation. "The vanguardist stance taken by radical lesbians"[6] was subject to contestation from "feminists with a libertarian perspective on sexuality"[7] such as Gayle Rubin, Diedre English, Amber Hollibaugh and Pat Califia. Talking about the inability of feminism to consider 'benign sexual difference', Rubin says that feminism cannot be the framework engage in the study of sexuality because "although it talks about sex, mostly talks in terms of gender and gender hierarchy and the relationships between men and women. It doesn't really have a language for sexual desire and wants."[8]

An inspiration for such a radical break came from the works of Michel Foucault who from the late 1960s had tediously explained how power functions to construct sexuality as deviant or normal. Sexuality has always been the site where the future of our species and at the same time our truth as human subjects, are formed.[9] For Foucault, sexuality is the prime target of 'bio-power' and as such fundamental to disciplinary processes. It is the sexual body which is the object of scientific discourses. He identifies 'hysterization of women's bodies', 'pedagogization of children's sex', 'socialization of procreative behavior' and 'psychiatrization of perverse pleasure' as the techniques of control through which sexuality emerges. By providing an account of the sexual body as a text on which power is deployed, Foucault creates the space in which the emergence of the homosexual can be located. Further, he cautions against reading bodies as docile, as it is also the site of resistance. Thus, while 'psychiatrization of pleasure' is responsible for creation of homosexuality

> "it also made possible the formation of a 'reverse' discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or 'naturality' be acknowledged, often in the same

[6] Stevi Jackson and Sue Scott, 'Sexual Skirmishes and Feminist Factions: Twenty Five Years of Debate on Women and Sexuality', in Stevi Jackson and Sue Scott (eds.), *Feminism and Sexuality: A Reader*, Edinburg University Press, Edinburg, 1996, p. 15.
[7] Ibid, p.18.
[8] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in R Parker and P Aggleton (eds.), *Culture, Society and Sexuality: A Reader*, UCL Press, UK. 1999, p. 42.
[9] Michel Foucault, *The History of Sexuality Vol. 1: The Will to Knowledge*, Penguin, London, 1976, 1998.

> vocabulary, using the same categories by which it was medically disqualified."[10]

Foucault's contribution to the study of sexuality is significant because it lays down that sexuality cannot be experienced devoid of a political and social context. And therefore, the feminist position on sexuality can be re-configured through this lens. A theoretical leap from Foucault's position is made by Judith Butler who goes on to establish that gender is an effect of discourse.

Butler posits the 'heterosexual matrix' as the grid which provides coherent link to understandings of sex with gender, gender with sexuality and sexuality with sex. Gender, as masculine or feminine, is intelligible because it performed under this heterosexual matrix. Foucault's influence on Butler is perceptible in her emphasis that gender does not produce the heterosexual matrix but is in turn produced by it. The act of parody subverts the way in which this matrix works to create coherent ideas of sex, gender and sexuality. Together, Butler and Foucault along with Eve Sedgwick[11] have questioned the way in which gender- and thereby sexuality- is understood within a binary framework, and laying the foundations of what is called queer theory.

But even before Butler laid down the theoretical rupture between gender and sexuality, a conference held in Barnard College in 1982 announced the impending 'feminist sex wars.'[12] The 'Towards a Politics of Sexuality' conference brought to the fore an alternative perspective through which feminism could think of sexuality: pleasure. In a ground breaking volume *Pleasure and Danger: Exploring Female Sexuality* Carole Vance plods feminism to move beyond the framework of sexual violence, to speak about

> "sexual pleasure as a fundamental right which cannot be put off to a better or easier time. It must understand …that sexuality is a site of struggle - visceral, engaging, riveting - and not a domain of interest only to a narrow, small, and privileged group…. Feminism must insist

[10] Michel Foucault, *The History of Sexuality Vol. 1: The Will to Knowledge*, Penguin, London, 1976, p. 101.
[11] E. K.. Sedgwick, *Epistemology of the closet*, Berkeley, University of California Press, 1990.
[12] Term used by Pat Califia for the pro-sex and anti sex feminist altercation. Stevi Jackson and Sue Scott, 'Sexual Skirmishes and Feminist Factions: Twenty Five Years of Debate on Women and Sexuality', in Stevi Jackson and Sue Scott (eds.), *Feminism and Sexuality: A Reader*, Edinburg University Press, Edinburg, 1996, p. 18.

> that women are sexual subjects, sexual actors, sexual agents; that our histories are complex and instructive."[13]

This remains a decisive turn as it brings forth a debate on how the feminist position on sexuality can run into two directions. While scholars like Vance admit that the women across the world are subject to sexual violence yet engaging with sex and sexual pleasure is necessary so that the dominant representation of women as sexually passive can be resisted. Moreover, when "women increasingly view themselves entirely as victims through the lens of the oppressor and allow themselves to be viewed that way by others, they become enfeebled and miserable."[14] In effect, feminism must not only locate the sexual realm as one where violence is perpetuated but also consider using the possibility of sexual pleasure as a positive affirmation of women's embodiment.

Gayle Rubin's 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality'[15] announced that sexuality should be studied autonomously from gender and contended that the methodological tools of feminist were conceptually inadequate for studying sexuality. Rubin noted that there exists a 'moral sexual hierarchy' which functions in much the same ways as do ideological systems of racism, ethnocentrism and religious chauvinism. This hierarchy may be conceptualized as an inverted pyramid with heterosexual married monogamous procreative sex at home occupying the wide space and homosexual unmarried promiscuous cross generational commercial sex in public being cast at the tapered bottom. The hierarchy can also be imagined as a circle with the inner 'charmed circle' being occupied by sexualities that were considered natural and normal while the outer limits being occupied by those that were seen as bad, abnormal and unnatural.

Rubin's schema allows for historical and social changes to be considered as changes in sexual norms bring in changes in the way people are placed within the hierarchy. In fact, "the sexual system is not a monolithic, omnipotent structure. There are continuous battles over the definitions, evaluations, arrangements, privileges and costs

---

[13] Carole S. Vance, 'Pleasure and Danger: Toward a Politics of Sexuality', in Carole S. Vance (ed.), *Pleasure* & *Danger*: *Exploring Female Sexuality*, Routledge & Kegan Paul, Boston and London, 1984, p. 24.
[14] Ibid, p.7.
[15] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Carole S. Vance (ed.), *Pleasure* & *Danger*: *Exploring Female Sexuality*, Routledge & Kegan Paul, Boston and London, 1984.

of sexual behavior."[16] Radical feminism has changed the form of the sexual system but still upholds the sexual hierarchy as it merely replaced the position occupied by monogamous heterosexual couples with the monogamous lesbian couple in a long term relationship while continuing to relegate transsexuals, sadomasochists, prostitutes and persons engaged in cross generational sex to the outer edges.

The sexual hierarchy is clearly visible through the operation of sodomy laws and Rubin labels it as 'sexual apartheid'. She notes that sodomy laws work with the assumption that

> "some sex acts are considered so intrinsically vile that no one should be allowed under any circumstance to perform them…State prohibition of same sex contact, anal penetration, and oral sex make homosexuals a criminal group denied the privileges of full citizenship. With such laws, prosecution is persecution."[17]

The sexual stratification that sodomy laws create do not, however, lead widespread uproar because it is held that toleration of any sexual deviation is likely to have a domino effect. Therefore, "once an erotic activity has been proscribed by sex law, the full power of the state enforces conformity to the values embodied in those laws."[18] Effectively, the law is supported by the profession of mental health, social practices and popular ideology in sustaining the sexual hierarchy. Rubin characterizes the 'emergence of a new sexual movement' as an attempt to de-stabilize the present sexual stratification. Rubin locates that the "the attacks on sadomasochists by a segment of the feminist movement, and the right's increasing use of AIDS to incite virulent homophobia"[19] are indicative of a 'moral panic'[20] and this necessitates that theorization of sexuality has to move beyond the confines of feminism. But it must be mentioned that Rubin does not posit feminism and a radical theory of sexual oppression in opposition to each other, noting that "in the long run, feminism's

---

[16] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Carole S. Vance (ed.), *Pleasure* & *Danger*: *Exploring Female Sexuality*, Routledge & Kegan Paul, Boston and London, 1984. p. 294.

[17] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Carole S. Vance (ed.), *Pleasure* & *Danger*: *Exploring Female Sexuality*, Routledge & Kegan Paul, Boston and London, 1984, p. 291.

[18] Ibid, p. 288.

[19] Ibid, p.298.

[20] See J Weeks, *Sex, Politics and Society: The Regulation of Sexuality since 1800',* Longman, London and New York, 1981, p. 41. "Moral panics are the "political moment" of sex, in which diffuse attitudes are channeled into political action and from there into social change.

critique of gender hierarchy must be incorporated into a radical theory of sex, and the critique of sexual oppression should enrich feminism."[21]

Vance points out that while feminism provided one of the ways in which social construction theory was applied to the study of sexuality, there was another 'impetus' - the investigation of male homosexuality. One of the first interventions of this kind came from Mary Macintosh's who argued that "homosexuality should be seen as a social role and homosexuals a social category, rather than a medical or psychiatric one."[22] For MacIntosh, the role of the homosexual refers to the expectation attached with the role rather than a description of sexual behavior. When attention is directed towards the expectations from the homosexual role, it would become possible to have a renewed look at how expectations from non-heterosexuals act upon the self conception of those who see themselves as homosexuals. Literature within this structure does not attempt to bring in gender as essential to understanding sexuality.

MacIntosh's essay gathered responses and the essentialism vs. constructionist debate became the focal point of engagement. Critiquing MacIntosh, Frederick L. Whitam held that her essay conflates homosexuality as a sexual orientation with the homosexual sub culture. Using quantitative data, Whitam argues that "homosexuality as a sexual orientation precedes knowledge of the homosexual subculture."[23] In Whitam's account, therefore, the realm of nature gets precedence over the social context which gives meaning to homosexual acts. There is something essential about sexuality which lends itself to unfold, irrespective of whether a facilitative environment exists or not.

However, in the years to come social constructionism has occupied the centre stage with more and more scholars emphasizing on 'sexual scripts.' Arlene Stein comments that "there was a theoretical shift from "nature" to "nurture", from a drive model to what is here called an "identity" model of sex, from seeing sex in terms of family and gender systems, to seeing the sexual as increasingly significant in its own right."[24]

---

[21] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Carole S. Vance (ed.), *Pleasure* & *Danger*: *Exploring Female Sexuality*, Routledge & Kegan Paul, Boston and London, 1984, p. 309.

[22] McIntosh, 'The Homosexual Role', *Social Problems*, Vol. 16, No. 2, Autumn, 1968, p. 168.

[23] Whitam, 'The Homosexual Role: A Reconsideration', *The Journal of Sex Research*, Vol. 13, No. 1, February, 1977, p. 2.

[24] Stein, 'Three Models of Sexuality: Drives, Identities and Practices', *Sociological Theory*, Vol. 7, No. 1, Spring, 1989, p. 2.

One of the reasons for such a shift was the famous studies on sexuality conducted by Alfred Kinsley.[25] The Kinsley scales demonstrated that exclusive homosexuality and exclusive heterosexuality was the attribute of only a minuscule minority and therefore, when heterosexuality remains visible as the dominant structure the reason must go beyond biology. In fact, William Simon and J. H. Gagnon who forwarded the symbolic-interactionist model to explain sexuality had worked with Kinsley.[26] They explain that sexual conduct is learnt and sexual conduct cannot be interpreted outside the social context. Stein explains that when sexual scripts understood as a "dialectical relationship between the objective structures and the cognitive and motivating structures which they produce and which tend to produce them"[27] it helps in resolving the impasse between the biological and social explanations of sexuality.

The gay liberation movements of the 1960s, by focusing on sexual identity, confronted the 'principle of consistency' with dire fallouts: it "has seriously weakened the symbolic significance of the "natural" relationship between gender identity, family formation, and reproduction that the principle of consistency signifies."[28] Gay liberation movement by celebrating the process of 'coming out' emphasized on the public affirmation of gay identity and presented an alternative to the existing cultural milieu where gay rights were couched in the language of privacy. Dennis Altman's book situates coming out as a political act that acknowledges the centrality of sexual identity.[29] As more and more, homosexuals came out of the closet, it ushered in a new form of gay politics, one that resisted the language of privacy, which rendered gay lives invisible. The contribution of Altman to the domain of gay and lesbian studies is considerable because he identifies the perils of severing 'homosexuality' from 'the homosexual'. Altman notes how such a strategy may bestow civil rights and liberties on the stigmatized population while maintaining the stigma around homosexuality unaffected. The eventual aim of the gay liberation, therefore, should be "the creation

[25] See Alfred Kinsey, Paul Gebhard, Wardell Pomeroy et. al *Sexual Behavior in the Human Male*, Saunders, Philadelphia, 1948; Alfred Kinsey, Paul Gebhard, Wardell Pomeroy et. al *Sexual Behavior in the Human Female*, Saunders, Philadelphia, 1953.
[26] William Simon and John H. Gagnon, 'Sexual Scripts' in R. Parker and P. Aggleton (eds.), *Culture, Society and Sexuality: A Reader*, UCL Press, UK, 1999, pp 29- 38.
[27] Arlene Stein, 'Three Models of Sexuality: Drives, Identities and Practices', *Sociological Theory*, Vol. 7, No. 1, Spring, 1989, p.12.
[28] Jeffrey Escoffier, 'Sexual Revolution and The Politics of Gay', 1985, available at identityhttp://www.williamapercy.com/wiki/images/Sexual_Revolution_and_the_Politics.pdf accessed on March 8, 2015, p. 147.
[29] See Dennis Altman, *Homosexual*: *Oppression And Liberation*, Outerbridge & Dienstfrey, Dutton, 1971.

of a new human for whom such distinctions no longer are necessary for the establishment of identity."[30]

Stephen Epstein takes Altman's vision of the sexual utopia further but provides a different route to do so. He proposes the 'new-ethnic model' as an appropriate framework around which the debate around sexual identity can be cast. In contradiction to the argument of normality of homosexuals with heterosexuals, the gay ethnic identity model is radical because it recognizes that "freedom from discrimination of homosexual persons is an insufficient goal, if homosexuality as a practice retains its inferior status."[31] It must be emphasized that Epstein calls his model 'quasi' ethnic because he uses a modified constructionist perspective- one that avoids the essentialist trap of understanding sexuality as fixed and the constructionist inability to speak about identity. He contends that it would be useful to conceptualize gay politics in quasi ethnic terms because: first, gay identity aims at the forging an affective bond for influencing state policy and for social rewards; second, gay identity seeks to appeal to the principles invoked by the dominant culture; and finally, gay identity charts out certain geographical areas for influencing decision making. The benefits of such a framework would not only be that it accommodates the claims of essentialism with constructionism but also that it makes space for articulation of difference.[32] By working within such a framework, the accomplishment of lesbian and gay movements can be "the creation of a positive identity and the simultaneous redefinition of legitimate sexual and affectional possibilities."[33]

While the debate on essentialism and constructionism is an important one, a related debated has ensued on the ethnocentric bias when categories related to sexual identity are used cross culturally. Dennis Altman discusses how globalization and the discourse of human rights have led to "the apparent internationalization of a certain form of social and cultural identity based on homosexuality".[34] Altman indicates that

---

[30] Altman quoted in Jeffrey Escoffier, 1985, 'Sexual Revolution and The Politics of Gay', 1985, available at identityhttp://www.williamapercy.com/wiki/images/Sexual_Revolution_and_the_Politics.pdf accessed on March 8, 2015 p. 145.

[31] Stephen Epstein, 'Gay Politics, Ethnic Identity: The Limits of Social Constructionism', *Socialist Review*, Vol. 93, 1987, p. 47.

[32] Ibid.

[33] Ibid, p. 45.

[34] Dennis Altman, 'Rupture or Continuity? The Internationalization of Gay Identities', *Social Text*, No. 48, Autumn, 1996, p. 77.

when the following attributes are considered as crucial to modern homosexualities: first, gender and sexual transgression is differentiated from each other; second, insistence on emotional as well as sexual aspects of relationships; and third, the expansion of public homosexual worlds, it emerges that gay identities are moving beyond liberal western democracies. Such formulations have however been strongly contested. Ashley Tellis argues that the emergence of the identity category 'LGBTHKQ' is the result of "the logics of global funding for NGOs."[35] Using Neville Hoad's articulation that the universality accorded to gayness reinforces oppression, Tellis cautions against participating in an uncritical acceptance of sexual identity categories. Tellis' caution is echoed in Shivananda Khan's emphasis on retaining the distinction between 'male to male sexual behavior' and 'male sexualities'.[36] Such articulations contravene Altman's assertion that "as gay identities increase, so the number of men having homosexual sex may decrease."[37]

While Tellis holds NGOs responsible for the entrenchment of LGBTHKQ as sexual identities, Khan cites 'sexual neo-colonialism' in defense of his argument. However, Khan concedes to the subtleties and states that gay and lesbian identities which have emerged in India must be understood only in the context of a specific class. Akshay Khanna also poses a compelling critique of sexual identification. Referring to sexuality, he says "this 'identity' means something different to different people. The idea of 'identity' is being reconstituted through local discourses…the problem lies in the hegemony of the use and meaning of these terms…we need to recognize the mechanisms through which this growing hegemony takes place."[38] Khanna proposes, therefore, that 'sexualness' be used to understand the sexual in India.[39] Doing so, he argues, would enable the displacement of sexuality as essential aspect of understanding the self.

As far as the question of investigation of sexuality in the Indian context is concerned, it is an uneven and rugged field which is still in a nascent stage. Though debates

[35] Ashley Tellis, 'Postcolonial Same-sex Relations in India: A Theoretical Framework', in Manas Ray (ed.), *Space, Sexuality and Postcolonial Cultures*, Enreca Occassional Papers, Kolkata, 2003, p. 221.
[36] Shivananda Khan quoted in N. Menon, 'Outing Heteronormativity: Nation, Citizen, Feminist Disruptions', in Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p. 16.
[37] Dennis Altman, 'Rupture or Continuity? The Internationalization of Gay Identities', *Social Text*, No. 48, Autumn, 1996, p. 85.
[38] A, Khanna, 'Beyond Sexuality(?)', in Arvind Narrain And Gautam Bhan (eds.), *Because I Have A Voice: Queer Politics In India*, Yoda Press, New Delhi, 2005, p. 101.
[39] A. Khanna, *Sexualness*, New Text, New Delhi, 2016.

around sexuality touch almost every disciplinary border within the social sciences, but most of the work on sexuality comes from the field of sociology, anthropology, law, history, literature and geography. Within the domain of political science the engagement with sexuality has been insufficient, if not rare. This is far prominently marked in the Indian context. And this is a glaring inadequacy considering that matters pertaining to sexuality portend to power as well as the state. In India, with the presence of S377 in the law book, the engagement of discipline of politics with sexuality becomes even more paramount. However, as the discussion below shows though there has emerged a vibrant discourse around sexuality, concerns from the discipline of political science is limited. However, it must be acknowledged that the contribution of Nivedita Menon in this regard has been vital.

Ruth Vanita and Saleem Kidwai's *Same Sex Love in India: Readings from History and Literature* published in 2000 re-ignited scholarly interest on reading sexuality within the Indian context and remains one of the finest works on homosexual desire.[40] It brings together readings from literature and history to explode to explode the myth that homosexuality was not known to pre-colonial India. What is argued instead is that virulent homophobia is a western import.

In her book, *Made In India: Decolonizations, Queer Sexualities, Trans/national Project* Suparna Bhaskaran discusses discrete events such as the emergence of the Indian homosexual, lesbian suicides, marriage and kinship contracts in small towns around India, the new trans/national heterosexual woman, and the simultaneous evolution of the modern homophobia and lesbian NGOs and ties them together through the discourse on decolonisation.[41]

The essays in *Erotic Justice: Law and the New Politics of Post colonialism* is one of the earliest works on how law has been implicated in contemporary debates dealing with sexuality, culture and `different' subjects such as including women, Muslims, sexual minorities, and the transnational migrant.[42] For Kapur, law is a discursive

[40] Ruth Vanita. & Sallem Kidwai, *Same Sex Love in India: Readings from Literature and History*, Macmillan, New Delhi, 2000.
[41] Suparna Bhaskaran. *Made in India*: *Decolonizations, Queer Sexualities, Trans/National Projects*, Palgrave MacMillan, Basingstoke, 2004.
[42] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, Permanent Black, New Delhi, 2005.

terrain, where exclusion/inclusion of subjects are determined on the terms determined through colonialism.

Geetanjali Misra and Radhika Chandiramani's *Sexuality, Gender and Rights: Exploring Theory and Practice in South and South-East Asia* seeks to locate how political, social, and cultural frameworks in South and South-East Asia constitute a 'sexual hierarchy'.[43] Using a social constructionist approach, the authors argue sexual experiences have to be understood within a cultural context and it determines how some sexualities are seen as the norm while others as immoral and obscene. In brief, the articles talk about the violence that cultures cause on non-normative sexualities.

The contribution of Arvind Narrain and Gautam Bhan remain seminal in the sphere of queer studies in India. In their edited work, *Because I have a Voice: Queer Politics in India* they not only provide a chronology of the queer movement in India and also raise important questions pertaining to the shift in the language of the movement.[44] Additionally, the book discusses how the queer movement should approach the law and if any alternative politics is available. The book looks at how law, religion and medicine work together to create 'sexual deviants'. Gautam Bhan's essay 'Challenging the Limits of Law: Queer Politics and Legal Reform in India' highlights the foucauldian position that social norms and thinking are both shape the law and are in turn shaped by it. Bhan is cautious of the legal path adopted for decriminalising homosexuality. He argues that without challenging - the family, the work places, the streets and private and personal relationships, law cannot alone bring down homophobia.

The article 'Section 377 and the Dignity of the Indian Homosexuals' by Alok Gupta uses Goodman's analysis and contextualises it in reference to India and argues that despite the low rate of conviction under S377 it functions as a disciplinary mechanism.[45] Therefore, its retention is an affront to the dignity of the homosexuals in India.

---

[43] Chandiramani, Radhika and Geetanjali Misra *Sexuality, Gender and Rights: Exploring Theory and Practice in Southeast Asia*, Sage, New Delhi, 2006.
[44] Arvind Narrain And Gautam Bhan (Eds.), *Because I Have A Voice: Queer Politics In India*, Yoda Press, New Delhi, 2005.
[45] Gupta, Alok. 'Section 377 and the Dignity of Indian Homosexuals', Economic and Political Weekly, XLI(46): 4815.

Brinda Bose and Subhabrata Bhattacharya in their volume *Phobic and the Erotic: the Politics of Sexualities in Contemporary India* brings together essays that highlight that 'fairly universal heterosexual code' renders sexuality as most visible and most hidden in our lives.[46] The Essays together pose that it is necessary to multiple sites and discourses as valid for sexuality. By foregrounding those sexual choices and identities that are counter-hetero-normative the book seeks to highlight the changes in politics that are being played out.

Nivedita Menon's introductory essay in her edited book *Sexualities* is a bold interrogation of "the norms of heterosexuality, of feminine and masculine behaviour, of recognizably gendered bodies, norms that declare ungoverned desire to be illegitimate".[47] The book locates how the dominance of heterosexual desire and practise must be placed within modernity. In her own essay, 'Outing Heteronormativity: Nation, Citizen, Feminist disruptions' Menon contends that the story of the Indian nation-state can be destabilised by both feminist movements as well as queer movements. Since patriarchy underpins citizenship, any feminist or queer engagement of the contemporary times must engage with questions of heteronormativity and the family under citizenship. Finally, Menon prescribes postnational politics as the only option forward. In another essay, 'How Natural is Normal? Feminism and Compulsory Heterosexuality' which Menon contributed in Arvind Narrain and Gautam Bhan's book, *Because I have a Voice: Queer Politics in India* Menon contends that while homosexuality is considered as unnatural, it is heterosexuality which is artificial. She refers to the vast network of controls such as gendered dress codes, disciplining of thoughts, violent coercive measures to check non-heterosexual behaviour and law that exist to maintain the privileged position of heterosexuality.

In a close resemblance to Gautam Bhan's apprehension towards legal change, Ratna Kapur's 'Out of the Colonial Closet, but still thinking 'Inside the Box': Regulating 'Perversion' and the role of Tolerance in Deradicalising the Rights claims of Sexual Subalterns' argues that even when the Delhi High Court has decriminalized homosexuality by upholding the challenge to section 377, such engagements have not

[46] Brinda Bose and Subhabrata Bhattacharyya *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*, Seagull books, Kolkata, 2007.
[47] N. Menon, (ed.) *Sexualities*, Women Unlimited, New Delhi, 2007, p xii.

necessarily conferred additional rights on the sexual subalterns. "It is a call to tolerate consensual sexual conduct between homosexuals rather than the right to full, substantive equality."[48] Kapur contends that toleration as a principle is problematic because it proves to be a tool for social and political.

Law Like Love: Queer Perspectives on Law by Arvind Narrain and Alok Gupta is an indispensible volume in discussions on sexuality and the law.[49] The book was published after the landmark Delhi High Court victory and argues how the July judgement stands on the shoulders of a much longer history. Essays in the volume articulate the necessity of queering the law.

Queer Activism in India: *A Story In The Anthropology Of Ethics* by Naisargi N. Dave is an ethnographic research conducted on lesbian communities in India from the 1980s to the early 2000s.[50] Dave studies how queer activism in India is constituted by everyday practices. In Dave's account activism is an ethical practice comprising critique, invention, and relational practice.

Sanjay Srivastava's *Sexuality Studies* is a significant intervention as it marks the moment when 'sexuality studies' has emerged as a discipline in India.[51] Srivastava's emphasis is on the question of how certain aspects of sexuality gain visibility at particular moments. The essays in the volume, together, provide a sociological analysis regarding the sexual subject who has emerged since the 1990s.

In *Sexual States: Governance and the Struggle over anti-sodomy law in India*, Jyoti Puri pits the state at the centre of the efforts to decriminalize homosexuality in India. The book uses interviews with activists and NGO workers in five metropolitan centers, along with crime statistics and case law, to argue that Section 377 is but one element of how homosexuality is regulated in India.[52] In brief, Puri talks about a state that is heterogeneous and fragmented while dealing with sexuality.

---

[48] R. Kapur, 'Out Of The Colonial Closet, But Still Thinking 'Inside The Box': Regulating 'Perversion' And The Role Of Tolerance In Deradicalising The Rights Claims Of Sexual Subalterns, *NUJS Law Review 2*, 455, 2009, p. 388.
[49] Arvind Narrain and Alok Gupta (Eds.), *Law Like Love: Queer Perspectives On Law*, Yoda Press, New Delhi, 2011.
[50] N. Dave, *Queer Activism in India: A story in the anthropology of ethics*, New Delhi, Zubaan, 2016.
[51] Sanjay Srivastava (Ed.) *Sexuality Studies*, New Delhi: Oxford University Press, 2013.
[52] Jyoti Puri, *Sexual States: Governance And The Struggle Over Anti-Sodomy Law In India*, New Delhi: Duke University press, 2016.

The discussion above re-affirms the argument made earlier, that the domain of political science has paid inadequate attention to the role of sexuality. Such under-theorization is alarming because law constitutes, defines and regulates sexuality. Acts such as sodomy, rape and child sexual abuses are, therefore, dealt with by many laws while marital sex by few. The significance of law implies that the state's intervention with sexuality will remain central. The role and centrality of the state in addressing. Moreover, the state also promotes and legitimizes a particular notion of sexuality through positing the heterosexual families are the recipients of welfare schemes and marriage laws which are highly gendered. Though marriage has been considered to be a private affair, Nancy F. Cott's study of the intertwining of marriage and the nation has shown that, "it is very much a public institution and a configuration of state power."[53] The state's preference for heteronormativity is apparent from the fact that a uniform standard of marriage as heterosexual and monogamous has been advocated. Therefore, to consider the realm of sexuality and politics as separate and unrelated would not only be wrong but also a gross underestimation of the scope of politics. Referring to political science as heterosexual discipline, Joe Rollins exhorts that,

> "just as the field has recognized that scholarly is incomplete if it fails to account for gender, race, socioeconomic status, so too our work is incomplete if we neglect the most basic fact of life: sex. As long as we ignore sexuality-homo, hetero or otherwise-the people whose sexuality is most privileged can continue to express their interests and inhabit their bodies without consideration of the damage that is being done to those who lack such privilege."[54]

STATEMENT OF THE PROBLEM

In the backdrop of the above discussion, it is evident that that a systematic investigation of the interface between sexuality and politics is vital as well as desirable. Within the realm of politics, the concept of citizenship can be identified as one of the central sites in which questions of sexuality can lead to productive interventions. Citizenship rights become central arena for contestation not only because of its 'universalistic' appeal but also because citizenship status accords rights

[53] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation*, Harvard University Press, Cambridge, 2000.
[54] Rollins, 'Political Science, Political Sex, Symposium: The State of LGBT/Sexuality Studies', *Political Science,* January, 2011, p. 29.

and benefits that the state bestows. Since the 1970s and 1980s, sexual minorities have de-mystified the universalistic claims of citizenship by demonstrating that notions of who the individual is, guides access to citizenship.

In this research the objective is to explore the question of sexuality and citizenship within the Indian context. As already referred to above, one of the ways in which Rubin's 'sexual hierarchy' operates is through sex law and anti-sodomy laws are the paradigmatic sex law: "once on the books, they are extremely difficult to dislodge."[55] The presence of S377 in the Indian Penal Code constructs consensual non-heterosexual relationships among adults as an aberration and a crime that needs to be checked. Though S377 case law suggests that only a few cases of same sex adult sexual activity are prosecuted in the higher courts, it locates sexual minorities in the peripheries of the 'charmed circle' rendering them away from the full and equal membership in the community. In other words, this research seeks explore the ways in S377 circumscribes the citizenship status of sexual minorities by creating a sexual hierarchy based on notions of natural/unnatural sex. The study is contextualized within the sexual citizenship framework and uses both legal documents and interviews with sexuality rights activists to interrogate the relationship between sexuality and citizenship. Within this broad framework, the study looks into certain other dimensions such as the centrality of law, alliance building between gay activism and lesbian activism, the LGBTQ movement's engagement with the judiciary and legislature and reflections on the movement to throw light on how the issue can be framed.

OBJECTIVES OF THE STUDY

(1) To critically evaluate the theoretical challenges that sexuality poses to citizenship which has led to the development of the concept of sexual citizenship and also identify how such a concept is a manifestation of differentiated citizenship.

[55] Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in Carole S. Vance (ed.), *Pleasure* & *Danger*: *Exploring Female Sexuality*, Routledge & Kegan Paul, Boston and London, 1984, p. 298.

(2) To investigate the role of colonialism in creating notions of sexual deviance, through law, and its implications in fostering a social movements that coalesces around sexual identity.

(3) To analyze the arguments deployed by the LGBTQ movement, its opponents and the state in the course of the legal struggle around S377 of IPC. Consequently, to understand if there has been an argumentative shift and the plausible reasons thereof.

(4) To conduct qualitative research through interviews of LGBTQ activists regarding:

- ✓ Reflections on citizenship, in the backdrop of various forms of discrimination.
- ✓ Approach towards the state, particularly in engaging with the judiciary and legislature, in its pursuit of repealing S377.
- ✓ The question of sexuality as an identity and its ramifications on the LGBTQ movement and
- ✓ Issues that the LGBTQ movement can foreground, in additional to S377.

RESEARCH QUESTIONS

- What has been the interface between sexuality and citizenship as a concept?
- In what ways has sexuality determined access to rights?
- What is the role of law in producing normative ideas regarding sexuality?
- How has S377 IPC, as an exemplar of law, become central to the emergence and consolidation of LGBTQ movement in India?
- What has been the language of rights deployed by the movement in its legal tussle against S377?
- What is the nature of engagement that LGBTQ movement seeks with the state?

RESEARCH METHODOLOGY

The findings of the study are based on two distinct sources which form two discrete segments of the study. While Chapter 4 of the study is an engagement with the documents from the legal struggle around S377, Chapter 5 and Chapter 6 are based on narratives from interviews conducted. For Chapter 4, a total of 45 documents placed before the judiciary were selected and analyzed. These included 21 documents presented from the LGBT community and its allies, 13 were from those who were opposed to decriminalization, 4 from Union of India and its ministries and 7 from the judiciary. Content analysis is the method used while tracking the arguments that were used in the different phases of the movement. The process involved use of deductive coding, assisted through Qualitative Data Analysis software, atlas.ti.

Data generated through 25 in-depth interviews using a structured interview schedule is used for Chapter 5 and Chapter 6. The participants of the study comprised of individuals who have worked on the area of sexuality rights. Since the participants have all been engaged with the legal struggle against S377 of the IPC their insights, it was hoped, could provide a perspective on how access to citizenship is regulated on the basis of sexuality. While eighteen are currently working with organizations that work in the area, four used to work earlier. Though these four respondents are no longer officially attached to the organization that they used to work for, unofficially they state that they remain strongly committed to the broader movement. In fact, when enquired about how important they considered their association with the organization, all twenty four responded that it was very important.

Among all of the 25 respondents, while ten identified their sex as male, twelve identified as female and three identified questioning. Their gender identification remains as man (seven), woman (nine), trans (three), genderqueer (five) and androgynous (one). On the basis of their sexuality, four identify as heterosexual, eight as gay, four as lesbian, two as bisexual, four as trans and three as queer. The participants of the study also cut across several age groups: nine are within the age bracket of 20-29, seven within 30-39, five within 40-49, three within 50-59, and 1 within 60-69. The educational attainments of all the respondents were high: twelve were graduates, ten were post graduates, and three had degrees above the post-graduate level.

Purposive sampling through snowballing technique was used as the method for data collection. My association with a grass root queer group in my home state helped as a gate-opener to a community that is otherwise quite closed. The participants were approached for conduct of interviews via email.

The study is located in two urban metropolitan cities: Delhi and Mumbai. Cities have always been safer spaces for the LGBTQ community on account of the anonymity that it provides, in contrast to the communitarian values of non-urban spaces. Moreover, Delhi and Mumbai happen to be cities which have been witness to LGBTQ presence for a long time. Mumbai has a vibrant gay sub-culture, while Delhi has been at the centre of LGBTQ rights struggle. Though other cities of the country have also seen LGBTQ activism on the rise, Mumbai and Delhi are most visible because of their cosmopolitan cultures. As it is not possible to conduct such an extensive study, Delhi and Mumbai were selected.

My identification as a heterosexual feminist cis-woman created its own pros and cons. Since

I also identify as an ally of the LGBTQ movement, some spaces opened while others remained closed. My identification as such also made a lot of my participants curious about me, thereby reversing the proverbial gaze.

The field study was conducted between the months of July in Mumbai and in the month of September and October in Delhi. Participants were interviewed in their private residence, coffee shops and even in office spaces. Each interview lasted for approximately sixty-five minutes. And an electronic recorder was during the process, with the consent of the participant. Most interviews were conducted in English, except five which were bilingual, primarily Hindi interspersed with English.

The interview data was then manually transcribed to facilitate further coding of the themes.

An inductive and phenomenological approach is adopted to understand the standpoint of the participants. While some responses to some questions have been quantified, the study is primarily a qualitative study with narratives from the participants providing important insights to the area under investigation

As a feminist researcher the question of exercising reflexivity in the research process is desirable as well essential. This research attempted to do so by making my own location as an upper caste, middle class heterosexual cis-woman explicit to my respondents and also acknowledging the same in the process of analysing the data collected. Detailed field notes maintained in the process, also helped me faced by own limitations of looking at the world largely through the lens of gender binary. In fact, towards the end of my field work, I had broadened my perspective to look at how complex the 'gender galaxy' is. In additional, all the respondents were also asked about their reaction to the usage of the word 'sexual minority' for the LGBTQ community.

Ethical concerns in the research have been addressed through seeking informed consent of the participants, sharing of interview schedule before the conduct of interview wherever asked (in two instances), sharing of the transcripts wherever asked (two instances again. Anonymity of those participants who have asked for non-disclosure has been maintained by assigning pseudonyms.

CHAPTERISATION

Having explored the legal documents as well as interview data, the study proposes to establish the ways in which citizenship and sexuality intersect with each other. The central objective of this study is to explore whether a notion of differentiated citizenship emerges from the intervention of sexual minorities and the stance that the contemporary LGBTQ movements adopts towards the state. Keeping these objectives in mind this work is structured into six chapters excluding introduction and conclusion.

Chapter 1 of the study deals with the concept of sexual citizenship as middle ground between citizenship theory and sexuality. Reviewing the literature on the subject, the chapter shows how sexuality has opened up new vistas for citizenship theory by making the sexual body visible. Sexual citizenship as a theoretical framework exposes the heterosexual propensities of citizenship by centering on the partial availability of rights to gays and lesbians. Sexual citizenship also makes a significant contribution to Marshallian scheme of citizenship as rights by opening up the 'fourth realm' of rights, sexual rights.

Chapter 2 of the study works as a backgrounder for the subsequent chapters. It locates the contribution of colonialism in structuring the ways in which categories such as deviant sex, wrong sex, bad sex, and intercourse against the order of nature were inserted through the operation of laws. It describes how 'legal orientalism' as a framework can be used to look at the uncritical acceptance of sodomy laws as indigenous to the country.

Chapter 3 of the study presents a chronological account of the contemporary LGBTQ movements in India, which centers around the demand for decriminalization, dating from the ABVA petition of 1994 to the curative petition filed in 2016. While the chapter focuses on S377 as the primary site for the LGBTQ movements, it also presents an account of lesbian activism to showcase the internal differences that exist within the formulation termed as 'LGBTQ'.

Chapter 4 of the study is an engagement with the arguments that have been used by the LGBTIQ movement and judiciary in India during the course of the legal struggle against S377. Using content analysis of forty-eight legal documents, the chapter presents that there has been a visible shift in the principles that the LGBTQ movement has invoked from 1994 to the present. It shows that the vocabulary of equal citizenship is gaining ground in the recent legal interventions, unlike the previous one which were mired in the HIV/AIDS epidemiology paradigm.

Chapter 5 of the study deals with the narratives, presented by sexuality rights activists, on how citizenship is experienced when discrimination is a pervasive feature in LGBTQ lives. It describes the acknowledgment that LGBTQs are 'unequal citizens' of the country as legal discrimination is sanctioned. Nevertheless, the chapter shows that the concept of citizenship does not lose its appeal. Further, the chapter engages with the issues which may emerge as potential sites for engagement of the LGBTQ movement, with the aim of explicating the nature of language that the movement utilizes.

Chapter 6 of the study carries forward the discussion of the previous chapter but makes a detour to discuss the LGBTQ movement in India as a paradigmatic social movement that engages with the state and yet remains critical of it. While discussing nature of the LGBTQ movement, this chapter also marks out the way sexuality as an identity is used by the participants.

The study has been concluded by reiterating that sexuality interrogates citizenship theory in a central manner. The presence of S377, though not the lone reason, contributes to the 'partial' citizenship status of sexual minorities in India. The necessity of demanding decriminalization becomes even more imperative so that ideas of natural and unnatural sex can be debunked, leading to a re-drawing of the 'sexual hierarchy' in India. The study ends with the contention that engagement with *differentiated forms* of sexual citizenship could be the way forward for both sexuality studies as well as citizenship studies.

MISCELLANOUS CONCERNS

Before proceeding to the main text of the study, I would like to offer the following clarifications. First, this study is a work on sexual identity and makes a distinction between gender and sexuality. Therefore, though it considers the question of transgender population as relevant it is guided more by their sexual orientation than by their gender identity. Undoubtedly, gender identity and transgender politics are as significant as engaging with the issue sexual identity but considering the enormity of such a task, the study steers clear of it.

Second, the study uses different pronouns for persons based on their own gender identification. Hence, the reader will confront ze and hir, apart from he, she, his, and her in the course of the chapters from the field.

Third, the study also makes interchangeable use of LGBTQ with the words 'queer' and 'sexual minorities'. The interchangeability of LGBTQ activism and queer activism is informed by Arvind Narrain's work.[56] The word sexual minorities was initially used in Bangalore based LGBTQ activism. Though it has been contested in recent years, it remains useful in naming the power of heterosexuality. As Chayanika says, "though I am personally not happy with the word, it has been used not because it is a minority in numbers, but it is a minority *in power*."[57]

[56] A. Narrain, *Queer: Despised Sexuality, Law and Social Change*, Bangalore, Books for Change, 2004.
[57] Chayanika Shah, Personal Communication, July 22, 2016.

CHAPTER I

UNSETTLING CITIZENSHIP: THE CHALLENGE OF SEXUALITY

INTRODUCTION

At the present moment, we are surrounded with claims from tribal movements, women's movement, lesbian and gay movements, disability movements, animal rights movement and several others that have been claiming recognition and redistribution from the state. Engagement with the state has become inevitable, owing to the centrality of citizenship status. Amongst all these new social movements, the ones based on sexuality have gained significant attention as sexual identities

> "are not merely the expression of natural instincts, but are social as well as political constructs. With the differentiation of sexuality from reproduction, anatomy has ceased to be destiny…Sexuality is not a predefined 'given' any more… sexual identities are the outcome of individual as well as collective formation processes, which, in turn, connect in important ways to relations of power."[1]

Sexuality and sexual identity have been fundamental to the way in which people have understood themselves in the modern period. For Anthony Giddens, sexual identity is also constitutive of the 'reflective project' of late modernity.[2] As sexuality has been opened up for scrutiny, we find that theoretical interventions in the area has spanned across several disciplines, ranging from biology to sociology and history. Political Science has, however, remained at the margins, displaying ambiguity for sexuality. The entry of sexuality into the discipline of politics has been through the concept of citizenship which now places concerns of the sexual along the tangent of the state. With power being a component in how the sexual is conceived, the earlier position has now evaporated. In this chapter, my attempt is to introduce the idea of sexual citizenship as middle ground between citizenship theory and sexuality. The main argument of this chapter is that sexuality has opened up new vistas for citizenship theory, not only by laying down what has been called as sexual citizenship but also

[1] Veronique Mottier, *Sexuality: A Very Short Introduction*, Oxford: Oxford University Press, 2008, p. 113.
[2] Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism*, California: Stanford University Press, 1992.

providing space for newer citizenship theories like lesbian citizenship, intersex citizenship, transgender citizenship and queer citizenship, which though at a nascent form is transforming the ways in which citizens understand themselves.

The chapter is divided into three broad sections. The first section describes the journey of citizenship as a concept that is valued as well as criticized for its lacunae. This part also describes the recent changes that are taking place in citizenship-from being acknowledged as a status to being considered as an act. While traditionally citizenship envisages a disembodied being as the repository of rights, in contemporary period the body has become central (or an attempt is underway) to theorizing citizenship. The second section of the chapter investigates into the concept of sexuality. Though sexuality came to the social sciences through the framework of gender, today sexuality is considered as an autonomous realm (though not unrelated) to gender. This section looks at the way sexuality is understood in sexology, Freudian Theory, functionalist and interactionist approaches and by the post structuralist position. An important debate that took place on sexuality, between the essentialists and the social constructionists, is also addressed in this section. Though there is no certain way of defining sexuality, definitional parameters remain important and thus few definitions that touch the contours of sexuality have been provided. Additionally, this section also addresses another significant debate: pro-sex feminists vs. anti-sex feminists as it has close resemblance to the essentialism vs constructionism position. Moreover, it also has significant bearings on the sexual domain, in the years to come. Section three of the chapter examines sexual citizenship as a concept that emerges from being challenged by the sexually marginalized. Sexual citizenship propels citizenship theories to re-conceive traditional boundaries of the public and private dichotomy, by revealing that citizenship is not only gendered by also a sexualized concept. This section provides an account of the major theoretical interventions made in the realm of sexual citizenship, while also throwing some light on the idea of sexual rights which has an umbilical tie with sexual citizenship.

Citizenship Theories and its Contestation

In its simplest form, a ‘citizen’ is a member of a political community who is endowed with a set of rights and a set of obligations. For Trevor Purvis and Alan Hunt,

> *'Citizenship connotes a distinctly political identity, one that stipulates the conditions of membership in and exclusion from a political community…In addition to stipulating membership, citizenship also implies a matrix of rights and duties to which citizens are, respectively entitled and bound. It is this association with rights and duties of membership that ensures that in struggles around citizenship the stakes are particularly high.'* [3]

Citizenship as a political concept envisages primacy accorded to the citizen identity. It tends to cast all people into a homogenous mould by denouncing all other identities as irrelevant. Once the identity of being a citizen is assumed, all other alternative identities are to be banished. 'Whatever the social or group difference among citizens, whatever their inequalities of wealth, status and power in the everyday activities of civil society, citizenship gives everyone the same status as peers in the political public.'[4] Considerations of race, gender, and sexual orientation which structure reality are denied as inconsequential and immaterial to citizenship. The principle of equality that underpins citizenship explains why it remains a much sought after ideal.

Traditionally, theories on citizenship have been divided into two schools of thought: the liberal school that emphasizes on citizenship as individual rights and private interests, and the civic republican school that emphasizes on the ideas of common good, public spirit, political participation, and civic virtue. An examination of the liberal and civic republican traditions reveals that a neat division between the public and private spheres underpins their construction of a citizen. Liberal understanding of citizenship-as-rights emphasizes on the inviolable limits of the private sphere. Citizenship, in fact, defines the limits of state power and where the private spheres of free individuals begin.[5] The creation of the private sphere allows the individual to pursue his self interest against the obligation to participate in public affairs. In contrast, the civic republican tradition of citizenship-as- obligation emphasizes on the public sphere as the realm of liberty and equality. The public was not a realm only of freedom but also of moral choice. Participation in the public/political affairs was a pre-condition for liberty, the civic republicans argued.

---

[3] Trevor Purvis and Alan Hunt, ' Identity versus Citizenship: Transformations in the Discourses and Practices of Citizenship'. *Social and Legal Studies*, Vol. 8 (4), p. 457.
[4] Iris M. Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', *Ethics*, January, Vol. 99(2), 1989, p. 250.
[5] Maithreyi Krishnaraj 'Between Public and Private Morality'. *Economic and Political Weekly*, April 26, 2008, p. 43.

Despite the apparent difference in these two theories, they share two common grounds: first, both the traditions take the public-private distinction as indispensable and second, both accept universalism and rejection of particular identity as a touchstone of citizenship.

Another notable conceptual development in thinking about citizenship came from T. H. Marshall's work *'Citizenship and Social Class'*, in which he defines citizenship as "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the state is endowed"[6]. Marshall divides citizenship rights into three categories which he sees as having taken hold in England in three successive centuries: civil rights which arose in the eighteenth century; political rights which arose in the nineteenth century and social rights which have come to be established in the twentieth century. He notes that with the expansion of the rights of citizenship, there was also an expansion of the class of citizens. In his formulation, rights are central not only as an element of membership but also as an integrative force. The definition of citizenship as 'full and equal membership in a political community' "encapsulates the two promises which modern citizenship makes: (i) a 'horizontal camaraderie' or equality as opposed to hierarchical inequalities among members of the 'political community', and (ii) the promise of 'integration' whereby citizenship gradually brings into its fold various marginalized sections of the population."[7] Citizenship as a political concept envisages primacy accorded to the citizen identity over all other identities. However, as Iris Marion Young in *'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship'* has shown, citizenship's understanding of universality as generality leads to pressures for homogenous citizenry by emphasizing on a common good, a general will and a shared public life.

The idea of citizenship as a status that is negotiated through the presence of the state "has been contested and broadened to include various political and social struggles of recognition and redistribution"[8] in contemporary times. Bryan Turner, in his critique of Michael Mann, distinguishes between a conservative view of citizenship and a

[6] T. H. Marshall, 'Citizenship and Social Class', in T.H. Marshall (ed) *Class, Citizenship and Social Development.* Westport, Conn.: Greenwood Press, 1973, p. 71.
[7] Anupama Roy, *Gendered Citizenship*, New Delhi: Orient Longman, 2005, p. 15.
[8] Engin F. Isin and Bryan S. Turner, 'Citizenship Studies: An Introduction', in Engin F. Isin and Bryan S. Turner (eds.) *Handbook of Citizenship Studies*, New Delhi: Sage Publications, p. 2.

revolutionary view of citizenship.[9] Arguing that, in recent times citizenship is not only developed from above (that is, the state) but also from below (more local participatory institutions) Turner gives a historic overview to argue the case in favor of struggles expanding the ambit of citizenship. Increasing scholars on citizenship have turned their attention away from the narrow politico-legal dimension of citizenship as a status to the broad sociological understanding of citizenship as an identity. In fact,

> "various struggles based on identity and difference (whether sexual, 'racial', 'ethnic', diasporic, ecological, technological, or cosmopolitan) new ways of articulating their claims as claims to citizenship understood not simply as a legal status but as political and social recognition and economic redistribution."[10]

Not surprisingly, therefore, there has been a growth of citizenship studies that looks beyond the state, from the civil society to the global. While the state remains central to citizenship, it is one among the several 'arenas of citizenship.'[11] This re-conceptualization of citizenship, can be described in Engin F Isin and Patriacia K. Wood's words as,

> "not only as a set of legal obligations and entitlements which individuals possess by virtue of their membership in a state but also through practices through which individuals and groups formulate and claim new rights or struggles to expand or maintain existing rights."[12]

In a similar vein, Lister looks at the identity of a citizen not as an outcome but as a process- driven by human agency. In her characteristic negation of dualistic categories, Lister juxtaposes agency and citizenship identity as dialectically reinforcing each other: "to act as a citizen requires first a sense of agency, the belief that one can act; acting as a citizen, especially collectively, in turn fosters that sense of agency."[13]

For Isin, the status of a citizen does not guarantee that one would act as a citizen or vice-versa. What is significant, for Isin, is that it is in the process of enacting as

---

[9] Bryan S. Turner 'Outline of a Theory of Citizenship', *Sociology*, Vol. 24, No. 2, 1990, pp. 189-217.
[10] Engin F. Isin and Bryan S. Turner, 'Citizenship Studies: An Introduction' in Isin, Enfin F. and Turner, Bryan S. (Eds.) *Handbook of Citizenship Studies*, New Delhi: Sage Publications, 2002, p. 2.
[11] Alison M. Jaggar,'Arenas of Citizenship', *International Feminist Journal of Politics*, Vol. 7, Issue 1, 2005, pp. 3 - 25
[12] Engin F Isin and Patriacia K. Wood, *Citizenship and Identity*, New Delhi: Sage Publications, 1999, p. 4
[13] Ruth Lister, *Citizenship: Feminist Perspectives*, Hampshire: Palgrave Macmillan, 1997, p. 39.

claimants that the subjects are transformed into citizens. Thus, citizenship being enacted begs the question of 'what makes a citizen' instead a status-based explanation. At the heart of Isin's analysis is the importance accorded to agency of the actors which makes citizenship a fluid concept.[14]

Thus, while the centrality of citizenship has never been cast under a shadow of doubt, increasingly the idea of what is means to be called a citizen has undergone transformation. Citizenship as a realm of rationality and freedom is opposed to the heteronomous realm of particular need, interest and desire. In extolling the virtues of citizenship as participation in a universal public realm, modern men expressed a flight from bodily difference:

> "the body and its desires are treated as loathsome, even inhuman, things that must be overcome if a man is to remain powerful and free…individuals must separate themselves from and conquer the feelings and desires of the body."[15]

But, the rise of identity based politics has eschewed the 'universal' citizen and replaced it with particular attributes such that today there is a proliferation of categories of citizenship: multicultural citizenship, sexual citizenship, ecological citizenship, healthy citizenship, disabled citizenship, diasporic citizenship, transgender citizenship. This recasting of citizenship, in various ways, indicates that citizenship and identity no longer remain 'incompatible, incommensurable and antinomic concepts.'[16] Instead, identities challenge the universalistic pretentions of citizenship and lays bare the groups which are privileged in the traditional citizenship model.

For instance, feminists have showed how citizenship traditionally privilege men and have criticized the dominant conceptions of citizenship on two counts: first, that citizenship is gender blind and second, most historical conceptualizations of citizenship have thrived on the division between members and non-members. As citizenship is gender-blind, it focuses on uniform and equal application; it fails to take cognizance of the fact that modern societies are steeped in patriarchal traditions,

---

[14] Engin F. Isin 'Theorizing Acts of Citizenship' in E. Isin and G. Nielson (Eds.) *Acts of Citizenship*, London: Zed Books, 2008, pp. 15–43.
[15] Nancy Hartsock quoted in Ruth Lister, *Citizenship: Feminist Perspective*. Hampshire: Palgrave Macmillan,1997., p. 72.
[16] Engin F Isin and Patriacia K. *Wood, Citizenship and Identity*, New Delhi: Sage Publications, 1999, p. 14.

which make for male domination and privileges. Equality in such conditions remains a façade and the inequality of women is sustained by policies that work within the framework of formal equality. Feminists, while criticizing citizenship have focused on deconstructing the public-private dichotomy and the radical feminist call of 'the personal is political' has informed it's critique of citizenship. Feminist critique of the dominant notions of citizenship have also evolved alternative frameworks that create "a number of new paths including the theorization of intimate and sexual citizenship and debates around the relationship of care to citizenship."[17]

While feminists have indicated towards the gendered nature of citizenship, the civil rights movement pointed towards the racialised nature of citizenship. The Blacks showcased how the ideal citizen was conceived to a white male and vested with attributes that were distinctly opposed to black masculinity. The scientific-eugenicist theories on racial superiority and the system of slavery attached idealized good citizenship with whiteness and economic self-mastery, which created an axis of exclusion. In this account, blacks could not be associated with the virtues of good citizenship. Since the reason-emotion dichotomy was used in the case of blacks too, it was the association of certain affective qualities- emotional, angry, and oversexualized- with a category of people-the blacks-which was used to justify exclusions from citizenship status. In effect, two approaches have developed: while particular sections have advocated that blacks to overcome such stereotypes by bringing about a change in their affective and get assimilated into citizenship, others have resisted the idea of transcending blackness and have called for a race-differentiated citizenship. The trajectory of the feminist and black thought almost run on the same track, though the question black women have remained marginal to both. Nevertheless, what both these positions show is that the human body is a biological given, it is inscribed with meanings and the social structure creates inclusion/exclusion based on these very bodily differences. Not surprisingly, therefore, social science investigation of the body as a site of privilege/oppression has recently gained attention.

The body is not only demarcated as gendered or racial but also as abled. The social model of disability has highlighted how the citizen is cast not only in the image of a

[17] Ruth Lister, 'Inclusive Citizenship: Realizing the Potential', *Citizenship Studies* Vol. 11 , Issue 1, 2007, p. 55.

white, middle-class, man but white, middle-class, *able-bodied* man. By emphasizing that disability should be looked as a social status, disability theorists have shown how institutions have created barriers that invisibilise disabled persons. Significantly, even when the concerns of disabled persons are taken care of, there is an assumption of homogeneity within the group. Disability theory challenges citizenship theory to look beyond the model of the individual as an abstract entity who can transcend limitations of the body. Butler's formulation that we all exist as 'temporarily-abled bodies', indicate the fluidity in the understanding of disability as attributed to a group of people.

With such development the body gets inserted into citizenship discourses like never before. These new accounts, which place the body at the centre of theorization, raise serious questions regarding the embodied nature of citizenship and also pose an epistemic challenge to the enlightenment project of rationality. In a noteworthy contribution to the debate, Chris Beasley and Carol Bacchi argue that though there has been significant developments in citizenship theory and body theory, the two rarely 'speak to each other' in any straightforward sense.[18] Though feminist theory has ventured into the study of both citizenship and the body, there is no reference to the 'social flesh' and this remains an under-theorized area. Similarly, body theorists' do not move to consider the intersections of citizenship with the body and thereby overlook a significant social feature. While considering this under-theorized intersection of citizenship and bodies, this chapter conceives of the 'sexual citizen' as a paradigmatic example of what Beasley and Bacchi term as 'embodied citizens.' With the development of the idea of sexual citizenship the material existence of the sexual body not only challenges citizenship as an identity category but also provides new ways of thinking about bridging the age-old public-private dichotomy.

Sexuality: Concept and Debates

While the history of gender and race-based movements contesting and claiming citizenship is a stretched one, new grounds like sexuality have deepened the debate further. With the advent of psychoanalysis, sexuality broke new grounds as a marker

[18] Chris Beasley and Carol Bacchi, 'Citizen Bodies: Embodying Citizens – A Feminist Analysis', *International Feminist Journal of Politics*, Vol. 2 Issue 3, 2000, pp. 337-358.

of identity. While the study of sexuality as an autonomous realm began with sexology, the advent of Freudian theory of sexuality ushered in the debates around sexual identity. Sexology or the study of sexual discipline emphasized on unraveling the scientific basis of the sexual drive and attempted to create a classificatory schema of sexual behavior. In the true spirit of enlightenment, sexological pioneers like Karl Heinrich Ulrichs, Richard Von Kraff-Ebing, Edward Carpenter, Havelock Ellis, Magnus Hirschfield and Alfred Kinsley believed that it was possible to apply objectivity while studying sexuality. Sexologists believed that they could explain the properties of the complex of sexuality by reference to an inner truth or essence and they set out to discover this truth in biology, to devise a "science of sex" which would reveal a single, basic, uniform pattern ordained by nature itself. The conviction with which the sexologists moved also proved to be their Achilles heel: they elevated the role of science and objectivity to such a great height that their approach ignored the mediating role that society plays while understanding sexuality. While several of them remained committed to liberalizing criminal penalties against ‘perverse’ sexualities, they remained trapped within the biological essentialist argument. What distinguished the work of Sigmund Freud from the works of sexologists was the importance he laid on mental activities thereby proposing that there is a deep linkage between the body and the mind. For him, sexual development in an individual happens in a sequential manner: beginning with polymorphous sexuality in infancy which is to be guided by forces of civilization towards heterosexuality. A noteworthy feature in Freud’s exposition of sexuality is his use of ‘male sexuality’ as the paradigmatic case while women’s sexuality is conceived of in terms of its lacking. Despite the androcentric bias in Freud’s work, it remains seminal for delinking sexual motives from reproduction. At the same time, Freud’s theory allows for conceptualizing homosexuality as one form of human sexuality, but it explains homosexuality as a wrong object-choice. The deterministic nature of Freudian theory as well its attempt at providing a universal pattern in which human sexuality unfolds have been critiqued time and again. The biology guides sexuality model is the common thread that links the works of sexologists and Freud.

While the attempt at scientifically studying sexuality was picking up its grounds, disciplines like anthropology started looking towards non-western societies and found that sexuality was organized differently in different societies. This prompted

questions of variability of sexuality amongst societies, giving a body-blow to the biological-essentialist camp. Bronislaw Malinowski and Margaret Mead's case studies proved that societies structure sexuality and therefore, having a euro-centric, universalistic explanation in matters of sexuality would be untenable. Studies on the interaction of sexuality and society demystified the naturalness of sexuality and fostered the entry of social science interpretations of the sexual realm. Thus, they set the stage for development of sociology of sexuality which tried to look beyond the individualistic approach while understanding matters of sexuality. Functionalists scholars like James Henslin, Kingsley Davis, F.A. Beach, John DeLamater, and Jacqueline Rose worked around the idea that society shapes, facilitates and hinders the development and expression of sexuality in its members. Also, galvanized through the works of anthropological scholars were John Gagnon and William Simon, who used an interactionist approach to explain the development of human sexuality. Social motives and settings determine an individual's sexual conduct and therefore

> "far from being the most natural phenomenon, sexuality might actually be the most malleable… Sexual conduct…was shaped in culture, and sexual meanings arose from socio-sexual scripts, which inevitably varied in any particular culture and changed through history."[19]

That the sexual scripts allows the individual to choose from a set of social parameters, entails that there is some amount of flexibility in the range of sexual meanings that co-exist at a time.

The debate between the sexologists and the advocates of sociology of sex can be largely re-phrased as the debate on essentialism versus social constructionism. According to Diana Fuss, essentialism is "most commonly understood as a belief in the true essence of things, the invariable and fixed properties which defines the 'whatness' of a given entity."[20] An essentialist theory would maintain that since sex and sexuality are integrally linked to each other through the function of the body, it would allow for a binary along the lines of heterosexual orientation or homosexual orientation be created. Typically, therefore, there would be an essence of homosexuality and heterosexuality to which certain sections of people would conform. By contrast, social constructionism, "insists that essence is itself a historical

[19] J. Weeks, J. *Sexuality*, London and New York: Routledge. 1986 p. 5
[20] Diana Fuss, *Essentially Speaking: Feminism, Nature and. Difference*, Routledge: London 1990, p. xi.

construction."[21] Social constructionists subject sexuality to historical and cultural analysis and argue that

> "cultures provide widely different categories, schema, and labels for framing sexual and affective experiences. These constructions not only influence individuals subjectivity and behavior, but they also organize and give meaning to collective sexual experience through, for example, the impact of sexual identities, definitions, ideologies and regulations."[22]

Social constructionism has been adopted to study sexual acts, sexual identities, sexual communities, the direction of erotic interest (object choice), and sexual desire itself.[23] Unlike the essentialists, for social constructionists categorizations of heterosexuality and homosexuality are not stable, as there is no core to which it can be tied and identities can be transcended. Since social constructionists are interested in interpreting the meanings attached with sexuality, they allow for an examination of how sexuality is named and categorized.[24]

Michel Foucault's seminal work also falls within the social constructionist position, although he takes the argument further. In his *History of Sexuality*, Foucault situates his position against the Freudian model of sexuality that emphasizes on the naturalness of sexuality and the conflicting role between sexuality and civilization. Instead, he argues that sexuality is historical construct that is the product of discourses, in this case of medicine that emerged in the nineteenth century. The power that medical experts wield lays down the parameters under which cultural meanings are to be interpreted. By introducing the idea that knowledge/power create identities, Foucault distinguishes between sexual behavior and sexual personhood and he attributes this transition from the former to the latter due to three factors,

> "the increased importance attached to sexuality in general; a more widespread transformation in the structures of social control, from control that operate through sanctions against specific acts to control based on highly individualized discipline; and the growing power of

[21]Diana Fuss, *Essentially Speaking: Feminism, Nature and. Difference*, Routledge: London 1990, p.2.
[22] Carol S. Vance, 'Anthropology rediscovers Sexuality: A Theoretical Comment', *Social Science and Medicine*, Vol. 33, 1991, p. 878
[23] Ibid.
[24] Geetanjali Misra and Radhika Chandiramani, 'Introduction' in Misra, Geetanjali and Chandiramani, Radhika (eds.) *Sexuality, Gender and Rights,: Exploring Theory and Practice in South and Southeast Asia*, New Delhi: Sage Publications, p.14

> professionals, and especially doctors to define social problems and enforce social norms."[25]

The Foucauldian position is distinct (although drawn) from social constructionism because unlike it, here power does not work on the body; the body is itself a product of power. Here not only sexuality but the entire body is a product of the operation of power and therefore in his study on sexuality, he attempts to see how sexuality has been produced in different eras through different discourses thereby concluding that the sexual person is produced only in particular period (the 19th century), prior to which it does not exist.

Influenced by the work of Michel Foucault, Queer theory developed in the humanities in the mid-1980s and foregrounds sexual identity, pleasure, and desire. Queer theory has been embraced by some as a means out of the homosexual/heterosexual split and a move beyond the politics of identity, in that 'queer' plays around with identity and refuses to be fixed or categorized. In a sense, queer is anti-identitarian. Adopting a 'queer' position is actually a celebration of one's 'outlaw' status as well as actively denying the meanings attached to sexual identity. In the words of David Halperin, queer identity is "an identity in the state of becoming rather than as the referent for an actually existing form of life."[26] Despite the keen interest that queer theory generated, it created a peculiar problem: by dissipating identity queer theory threw away the possibility of engaging in politics struggles. Though it allowed for sexualities to be informed in their own right, it did not provide an ethics through which actions could be judged. As a product of post-structuralism, queer theory therefore academically thrives but politically becomes suspect.

The debate between the essentialists and the social constructionists on sexuality has been an enduring one. Steven Epstein commenting on the impasse between essentialism and social constructionism states that we can see a growing tension between an evolving essentialist politics and a constructionist politics that is firmly in place. As it is motivated by the drive theory of sexuality, within the essentialist approach, sexuality is expressed through metaphors like 'spasms', 'water dammed up'

---

[25] Steven G. Epstein, 'Gay politics, Ethnic Identity: The Limits of Social Constructionism', *Socialist Review*, Vol. 93, 1987, p. 16.
[26] David M. Halperin, *Saint Foucault: Towards d Gay Hagiography*. New York: Oxford University Press, 1995, pp. 112-113

or 'saving' and 'spending', 'cravings' etc.[27] Since essentialism gives a biological explanation for sexuality, they understand homosexuals and heterosexuals to be essentially different from each other psychically or even genetically. This kind of an argument has found a cozy fit with gay and lesbian rights organizations, placing the onus on biology for the difference and de-legitimizing discrimination done on such basis. Effectively, such collectives draw similarity to that strand of the women's movement and civil rights movement which decry any discrimination done on the basis of anatomy and color of the skin. According to Steven Epstein, though essentialism has provided a legitimation strategy to such gay and lesbian rights organizations, it runs into the danger of concluding that gays and lesbians are different than heterosexuals, thereby running into the fear of validating the eugenicist arguments. Riding on the claim of difference, there has been a commodification of sexual desire and white men have assumed hegemonic role in community building. [28]

As against this, social constructionism faces a different problem. In the words of Weeks, "it has no political belonging. It does not carry with it any obvious programme. One the contrary, it can be, and has been, used recently as much by sexual conservatives as by sexual progressives."[29] Constructionism is faced with two extreme alternatives: either people are free to choose their sexuality, rise above it and take control of their lives or the individual's sexual identity is created and molded by social and historical context.[30] Moreover, Epstein also indicates how constructionism cannot take into account experiences of those gay people who claim that their identities are relatively stable from childhood. Thus, "against the uncertainties of constructionism, then, many seek the certainty of nature. Isn't it better, the argument seems to go, to argue that lesbians and gays are a permanent and fixed minority of the population, like a racial minority, and to claim a place in the sun as a legitimate minority on that basis?"[31]

---

[27] Jeffrey Weeks, *Sexuality and its discontents*: *Meanings, myths, & modern sexualities.* London: Routledge & K. Paul, 1985, p. 87.
[28] Steven G. Epstein, 'Gay politics, Ethnic Identity: The Limits of Social Constructionism', *Socialist Review*, Vol. 93, 1987, p.22.
[29] Jeffrey Weeks, 'Invented Moralities', *History Workshop* No. 32, Autumn, 1991, p. 155.
[30] Steven G. Epstein, 'Gay politics, Ethnic Identity: The Limits of Social Constructionism', *Socialist Review*, Vol. 93, 1987, p. 23.
[31] Jeffrey Weeks, 'Invented Moralities', *History Workshop* No. 32, Autumn, 1991, p. 155.

Responding to such gridlock between the two positions, scholars such as Jeffrey Weeks, Nicholas Bamforth, Steven Epstein, Dennis Altman, Raja Halwani and Ken Plummer have evolved their own responses which believes in developing a mid-way path between the two.

Weeks proposes a strong view of the social character of sexuality and states three factors for such a view, first, 'sex' can no longer be pitted against 'society' treating them as separate domains; secondly, sexual forms, beliefs, ideologies, and behavior are socially variable and there has been a growing recognition of this; and thirdly, sexuality is something which society produces in complex ways. To quote Weeks, "it is a result of diverse social practices that give meaning to human activities, to struggles between those who have power to define and regulate, and those who resist. Sexuality is not given, it is a product of negotiation, struggle."[32] Weeks contends that creating a dichotomy between essentialism and constructionism will not help the cause of marginalized sexualities, as theoretical perspectives have no meaning on their own, but only within a specific context and a set of power relations. Similarly, the significance of sexual identities is "not because they are either 'natural' or 'social', but because they provide the basis of social identification which makes possible a political struggle."[33] Thus, for Weeks, sexuality is not be understood only through biology but how biology has been understood in a social context: sexuality is, in Weeks' words, 'a necessary fiction.'

Recognizing that the conceptions of sexuality have an important bearing on the nature of gay and lesbian politics, Nicholas Bamforth distinguishes between radical and moderate constructionism, to overcome this theoretical dilemma. Clarifying his classification that is inspired from Edward Stein, Bamforth proceeds stating that

> "a radical constructionist is one who believes that human beings lack an innate sexuality of any particular variety, and that people's individual sexual desires are socially determined, as is their understanding of what counts as sexual desire. A moderate constructionist, by contrast, would suggest that while a person's direction of sexual attraction may be effectively fixed and beyond their control, whether as a result of biological or psychological factors ('nature or 'nurture'), a person's perception of sexuality and sexual

[32] Jeffrey Weeks, *Sexuality*, Second Edition, London: Routledge, 2003, p. 19.
[33] Jeffrey Weeks, 'Invented Moralities', *History Workshop* No. 32, Autumn, 1991, p. 155.

> categories-both their own and other people's- is determined by their social surroundings."[34]

In 'Prolegomena to any future Metaphysics of sexual identity: Recasting the Essentialism and Social constructionism Debate', Raja Halwani contends that there be no bone of contention between the essentialists and the social constructivists as they are concerned among two distinct aspects of sexuality: sexual desire and sexual identity. While essentialists are conceptualizing sexual desire and locating it within biological or (and) psychic grounds, social constructionists are looking into the matter of sexual identity and therefore, apply a historical and sociological framework. Halwani's argument resonates with Ken Plummer's distinction between sexual orientation and sexual identities. Plummer considers the possibility that for some sexual orientation may be fixed in early childhood

> "while some people develop restrictive and rigid orientations, others may be open and flexible, while still others may develop no 'orientations' at all…. Likewise identities are - in all likelihood - highly variable throughout social encounters; but while for some people this may mean drastic restructuring of self conceptions at critical turning points in life, others may develop relatively stable identities at early moments in life and use these as foci to orientate most future conduct."[35]

This allows to account for the feelings described by several groups of people who do not see their being sexual as a fluid state of being.

Ken Plummer's model is described by Steven Epstein as a synthetic approach and he tries to take the essentialism-constructionism debate towards a fruitful encounter. For Epstein, the empirical fact that gay groups in the 1990s had started using emphasize on an 'ethnic identity model' to talk about their identities, signifies an ambiguous process- as it does not hinge on the essentialist claim of basic difference nor the constructionist insistence on fundamental similitude. Similar to ethnic identities, gay and lesbian identities exist at the cross roads of choice and constraint and between the individual, the group and the larger society. In brief, Epstein is seeking to transcend the binary posed by the essentialist and social constructionist position and offers the position of modified constructionism which will also direct attention of the movement

[34] Nicholas Bamforth, *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law,* London and Washington: Cassell. 1997, p.79.

[35] Ken Plummer quoted in Steven Epstein, 'Sexuality and Identity: The Contribution of Object Relations Theory to a Constructionist Sociology', *Theory and Society*, December 1991, Vol. 20, Issue 6, p. 832

towards challenging structural inequalities. A modified constructionism, allows for the problem of determination and addressing diversity, to be defeated. By conceptually separating sexual orientation from sexual orientation, gay and lesbian movements can challenge the discrimination of homosexual persons as well the inferior position of homosexuality while also looking at the ways in which they inform each other.

In a later article, Epstein re-thinks about the way in which this moderate constructivist position can be chalked out. He finds that the resources that the object-choice theory of psychoanalysis (that assumes an essentialist position) provides by stressing on regular patterns and conflicts associated with sexuality can be an instructive fit to constructionism. At the same time, constructionism with its emphasis on sexual scripts can help to re-examine the domain of the pathological in object choice theory.

Looking at the way in which the biological and the social intersect with each other to create the categories of men and women, Diana Fuss had reflected that how this dichotomy is falsely conceived to be polar opposites, "there are many instances which suggest that essentialism is more entrenched in constructionism than we previously thought…it is difficult to see how constructionism can be constructionism without a fundamental dependency upon essentialism."[36]

While the section above has discussed in detail the academic development of sexuality as a contested field, providing definitions on sexuality was withheld as the definitions of sexuality are bound to be caught between the essentialist and social constructivist position, and it becomes difficult to reach one singular position. Therefore, an attempt is made to provide a bird's eye view of the most effective definition, though none can be attributed as authoritative. For Stevi Jackson "sexuality is a sphere of life, which need not necessarily be associated with social division, but as currently socially ordered, it is associated with both gender and the social division between homosexuality and heterosexuality."[37] In the same social constructionist tone, Jeffrey Weeks says that understanding sexuality

[36] Diana Fuss, *Essentially Speaking*: *Feminism, Nature and. Difference*, Routledge: London 1990, p. 4.
[37] Stevi Jackson, 'Heterosexuality, Sexuality and Gender: Rethinking the Intersections' in Richardson, D., McLaughlin, J., Casey, M. (Eds.) *Intersections between Feminist and Queer Theory*, New York: Palgrave Macmillan, 2006, p. 41.

> "involves seeing sexuality not as a primordially 'natural' phenomenon but rather as a product of social and historical forces. 'Sexuality'… is a 'fictional unity', that once did not exist, and at some time in the future may not exist again. It is an invention of the human mind."[38]

Nicholas Bamforth believes that sexuality is an assemblance of "sexual desire, feelings, aspirations, emotions and behavior" and it

> "is of central importance for human beings, regardless of the ways in which sexual behaviors and sexual categories are interpreted from society to society. Sometimes, people value and desire sexual acts just as sexual acts; on other occasions, their value stems from their role as a central means of communicating affection and experiencing desire within broader emotional relationship. Sexual freedom of action can thus be important either as a means (one of the most powerful means of expressing affection within an emotional relationship) or as an end (simple sexual communion and pleasure)."[39]

In Bucholtz and Hall's conceptualisation, sexuality refers to "the systems of mutually constituted ideologies, practices, and identities that give sociopolitical meaning to the body as an eroticized and/or reproductive site."[40]

It is noteworthy that the debate on sexuality has also informed the World Health Organization, definition of sexuality which lays down that

> "sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviors, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, ethnical, legal, historical, religious and spiritual factors."[41] (2006)

While these developments took place in the study of sexuality in the disciplines of sexology, psychology, anthropology and sociology, the women's liberation movement also addressed the question of sexuality and made it a visible aspect of feminist thought. However, it would be wrong to conclude from this that sexuality emerged as

---

[38] Jeffrey Weeks, *Sexuality*, Second Edition, London: Routledge, 2003, p. 11.
[39] Nicholas Bamforth, *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law*, London and Washington: Cassell. 1997, p. 259
[40] Bucholtz and Hall quoted from Veronika Koller , *Lesbian Discourses: Images of a Community*, New York: Routledge, 2008, p. 17.
[41] Gender and Human Rights: Sexual Health available at http://www.who.int/reproductivehealth/topics/gender_rights/sexual_health/en/ accessed on April 24, 2015.

an important question only in the second wave. In fact, the debate on sexuality and its relation with women's body can be traced back to Mary Wollstonecraft's *The Vindication of the Rights of Women.* Hinged on Victorian values, women's sexuality was either linked to motherhood or to sexual promiscuity. Victorian attitudes to sexuality were largely based on fear: of male violence towards women, a widespread concern about the incidence of prostitution and the dread of contracting venereal disease. In this background, reflecting the spirit of her times, Wollstonecraft was a sexual puritan. Cora Kaplan has argued that *The Rights of Woman* "expresses a violent antagonism to the sexual, it exaggerates the importance of the sensual in the everyday life of women and betrays the most profound anxiety about the rupturing force of female sexuality."[42] Since Wollstonecraft's main premise was that women possessed equal rationality as men it implied that she advocated women leaving behind the concerns of the body. It was imperative for Wollstonecraft to denounce the sexual difference between men and women as significant as her response was directed towards Rousseau who considered women to be reducible to their bodies. Repeatedly, therefore Wollstonecraft urges women 'to obtain a character as a human being, regardless of the distinction of sex.' Even after Wollstonecraft, liberalism continued its flight from the body which meant that sexuality continues be cast to the background and the attempt was always that matters of the body be transcended to reach the rational. This juxtaposition of the body against the mind implied that women's bodies replicate men's in order to find a place in the public realm.

Unlike liberalism, since Marxism does not create a dichotomous categorization between production and reproduction, sexuality is not seen as belonging strictly to one realm. However, it never became a focus of theorization until the arrival of Alexandra Kollantai who placed sexual love at the same plane as sensitive and comradely love amongst equals. Kollantai rejected human sexuality's comparison with animal sexuality and developed a critique of how 'free love' under conditions of inequality meant sexual slavery for women. Despite the leap that Kollantai takes from orthodox marxism, her analysis remains incomplete as she conceives heterosexual relations as the only possibility.

[42] Cora Kaplan, 'Wild Nights: Pleasure/Sexuality/Feminism' in Mary Evans (Eds.), *Feminism*: *Feminism and the Enlightenment*, London: Routledge, 2001, p. 357.

These previous conceptions around sexuality in feminism remained sketchy and it was left to the second wave of feminism to set the stage for a revived interest in sexuality. Unlike the first wave when sexuality was a offshoot of other concerns, in the second wave there was a sustained theorization on sexuality. In fact, sexuality was identified as one of the central features contributing to women's subordination. Radical cultural feminists located the aggressive nature of male sexuality as the sole reason for various forms of violence that women were subjected to. Men have controlled women's sexuality through pornography, prostitution, sexual harassment, rape, woman battering, foot binding, suttee, purdah, clitoridectormy, witch burning, and gynecology. All these practices aim at providing sexual pleasure to men. And therefore, within this patriarchal heterosexual structure, the possibility of women's sexual pleasure does not arise. Opening up the domain of 'the private' for political analysis, radical feminists have attributed heterosexual sex as the primary weapon through which patriarchy is sustained, "'male domination of the female body is the basic material reality of women's lives; and all struggle for dignity and self-determination is rooted in the struggle for actual control of one's body."[43] Not surprisingly, therefore, resistance towards patriarchy meant that heterosexual sexuality was to be shunned and all energies were to be directed towards lesbian separatism which indicated a revolt against patriarchy. The primary advocates of this model include Catherine Mackinnon, Adrienne Rich, Carole Pateman, Mary Daly Sheila Jeffreys, Melissa Farley, Janice Raymond, and Rebecca Whisnant and is popularly known collectively as anti-sex feminists. Carisa R. Snowden uses the label 'dominance feminism' to denote this stand of feminism and distinguish it from the pro-sex feminist position which she calls as 'sex radical feminism'.[44]

Within dominance feminism, sexuality has to be treated with suspicion and treats gender and sexuality as analytical inseparable from each other,

> "sexuality, in feminist light, is not a discrete sphere of interaction or feeling or sensation or behavior in which preexisting social divisions may or may not be played out. It is a pervasive dimension throughout

[43] Andrea Dworkin, *Pornography: Men possessing Women*, New York, Perigee Books, 1981, p.205.
[44] Carisa R. Showden, 'Theorising Maybe: A Feminist/Queer Theory Convergence', *Feminist Theory*, Vol 13, Issue 1, 2012, p. 6

> the whole of social life, a dimension along which gender pervasively occurs and through which gender is socially constituted."[45]

Since men wield power in society both masculinity and male sexual desire is defined by them and femininity and female sexual desire is defined in terms that provide pleasure to men. Thus, it is not only difficult but almost impossible to create the space for women to seek and conceptualize female sexual pleasure under patriarchy. The task for feminists is therefore, not to find an alternative way to re-think sexuality but apply the feminist lens look at "sexuality as a social construct of male power: defined by men, forced on women, and constitutive in the meaning of gender."[46] It is noteworthy, here, that Mackinnon uses the term feminism to talk about her position, though not all feminist would ally with her position.

While Mackinnon's proposition is formulated in the background of the pornography debate, Carole Pateman's coupling of women's subordination and men's sexuality is through the use of the example of prostitution. Pateman lays down very cogently why the liberal argument that draws a similarity between a prostitute who decides to part with services of her body and any other worker is faulty. Against this, she holds that it is not possible to engage in voluntary prostitution as "when women's bodies are on sale as commodities in the capitalist market… the law of male sex right is publicly affirmed, and men gain public acknowledgment as women's sexual masters."[47] By using the master/slave dialectic of Hegel, Pateman denies any sexual agency to the prostitute and uses a simplistic reductionist model to understand sexual practices.

The debate on sexuality has turned out to be one of the most contentious amongst feminists themselves. Against the reductionist model that saw heterosexual sex and women's oppression as synonymous with each other, there is an alternative position that does not condemn sex as intrinsically harmful for women. The legal and social mechanisms under patriarchy sex have constrained women's pursuit of sexual pleasure and autonomy and therefore feminists should encourage women "to claim and explore desire, pleasure, and explicit sexual knowledge and self-defined

[45] Catharine A. Mackinnon, 'Sexuality, Pornography, and Method: "Pleasure under Patriarchy", *Ethics*, Vol. 99, Issue 99, Vol 2, Dec. 1989, p. 318
[46] Ibid, p. 316
[47] Carol Pateman, *The Sexual Contract*, Cambridge: Polity Press, 1988, p. 208.

eroticism."[48] This pro-sex or sex-radical feminist position has been critical of the conflation of gender and sexuality. Among those who advocate this position, names of Gayle Rubin, Carole Vance, Amber Hollibaugh, Pat Califia and Diane Richardson are the most prominent.

Though the pro-sex position admits that sexuality is gendered it also believes in having an analytical separation between the two. Gayle Rubin suggested as early as 1984 that while feminism is an appropriate theoretical lens for analyzing gender, it may not be sufficient for understanding questions of sex. Rubin shows how a sex hierarchy has been created in which heterosexual, monogamous, married, reproductive, at home sex lies at the top of the ladder while transvestites, transsexuals, fetishists, sadomasochists, cross-generational, for money sex lies at the bottom. By indicating to the varied ways in which sex is categories, Rubin successfully shows that gender cannot encompass the entire field of sexuality, "the realm of sexuality also has its own internal politics, inequalities and modes of oppression."[49]

In a similar vein, Carole S. Vance has also criticized feminism's insistence on sexual danger which has led to the overshadowing of sexual pleasure. She argues for a 'dual focus' in works of sexuality which would acknowledge that sexuality is simultaneously a domain of restriction, repression and danger as well as one of exploration, pleasure and agency.

Since the pro-sex feminist do not see an essential core to sexual identity, they tread a path quite close to the other so-called sexual minorities and have formed alliances with gay men. According to Snitow, the anti-sex feminist and pro-sex feminists agree on two counts: first, both agree with that there is an intimate relationship between sexuality, political power, and a gendered world order, and second, danger is always a possibility in sex. But they part way, as sex radicals also claim that "sexuality can be a site of self-definition, a way to contest, not just reiterate, patriarchal assumptions about what women want and are worth."[50] Though the heightened panic created around pornography and sadomachosism ensured that the anti-sex feminist position

[48] Carisa R. Showden, 'Theorising Maybe: A Feminist/Queer Theory Convergence', *Feminist Theory*, Vol 13, Issue 1, 2012, p. 6.
[49] G. Rubin, 'Thinking Sex: Notes for a Radical theory of the Politics of Sexuality' in Parker, R. and Aggleton, P (Eds.) *Culture, Society and Sexuality: A Reader*, 1999, p. 143.
[50] Ann Snitow etal., 'Introduction' in Ann Snitow, Christine Stansell and Sharon Thompson (Eds.) *Powers of Desire: The Politics of Sexuality*, New York: Monthly Review Press, 1983, p.37.

led by Mackinnon has legislative victory, the pro-sex position has survived and metamorphosised into the theoretical field called as Queer Studies. While it is noteworthy here to mention that this bears a very close resemblance to the resilience of essentialism in gay politics while social constructionism gets housed in intellectual circles, it should not be an unexpected outcome, as pro-sex feminists define themselves as social constructionists.

The Sexual Body and Sexual Citizenship

As has been indicated in the section above, the domain of the sexual has been subjected to biological as well as sociological analysis. However, within common sense parlance, sexuality remains a realm that is strictly private and hence its discussion and expression remains proscribed in public places. While one has to cede some ground to the biological base of sexuality, it remains perplexing that social arrangements are made to transform the 'natural' into the normal. In 'How natural is the normal?', Nivedita Menon talks about four network of controls used to keep sexuality in its place: gendered dress codes; the discipline of thought that takes place in schools, families, the media, education, and religion; violent coercive measures; and laws.[51] The body is thus subject to 'discipline' sexual orientation that it does not become 'abnormal'. Though all components of Menon's classification remains important, this chapter with its emphasis on citizenship intends to place law at the centre of its examination. The productive role of the legal system has been explored at length by Foucault. The legal discourse creates a distinction between 'the criminal' and the 'normal' citizen, and by formulating laws and a surveillance system it subjects individuals to public scrutiny. Any deference from the law, would result in the shifting of an individual's position. The site of law becomes important when the sexual subject is being conceived as a complex set of legal arrangements exist which demarcates the limits of sexual permissibility. Thus, in several countries practicing sexual acts such as sodomy, fellatio, incest, paedophilia, fetishism, sadomasochism may convert a citizen to a criminal.

[51] N. Menon, 'How Natural Is Normal: Feminism and Compulsory Heterosexuality', in Narrain, A. and Bhan, G. (eds.) *Because I Have a Voice: Queer Politics in India*, New Delhi: Yoda Press, 2005, pp. 33-39

According to Martha Nussbaum, the necessity for legal provisions around issues of sexuality, arise because of the false association of sexuality with animality and thereby associating it with feelings of disgust. Proposing that disgust found defenders in the law like, Lord Patrick Devlin and Leon Kass, Nussbaum holds that the politics of disgust has to be countered through a politics of humanity. While supporters of disgust argue that disgust in itself "is a sufficient reason to ban a practice that causes no harm to non-consenting parties"[52] for Nussbaum disgust is to tantamount to violence as it denies another person's full humanity: "disgust relies on moral obtuseness. It is possible to view another person as a slimy slug or a piece of revolting trash only if one has never made a serious s attempt to see the world through that person's eyes or to experience that person's feelings."[53] Though Nussbaum's suggestion that a politics of humanity that moves beyond respect to encompass love can counter the present politics of disgust that frames constitutional law in the USA, it remains a romanticised vision. William N. Eskridge also identifies disgust as the structuring feature of the legal system while addressing issues pertaining to sexuality. And disgust finds a lot of popular support as it also for maintenance of boundaries. Though "feelings of disgust are non rational responses to physical phenomena, yet they may be underlying motivations for our rational discourses"[54], of which law is one. The need to counter arguments based on disgust is, therefore immense. In this background, it becomes important to assert how sexual minorities have placed their claims of equality, by hinging on the concept of citizenship. Citizenship, both as a status and as an identity has the potential to allow sexual minorities to claim their status as equals. With growing visibility of the sexually marginalised, the politics of disgust will be confronted with a challenge that will place heterosexuality as one amongst the many forms of being sexual. The primary association of gays and lesbians as sexual beings legitimize their exclusion from citizenship. Sex, notes Nussbaum, "is an area of great human vulnerability and shame"[55] and laws around same-sex conduct and relationships are as reflections of such anxiety. It is worth noting that in the famous Hart-Devlin debate, the repulsion that 'the man on the

[52] Martha Nussbaum, *From Disgust to Humanity*: *Sexual Orientation and Constitutional Law*, New York: Oxford University Press, 2010, p. 10.
[53] Ibid, p. 13.
[54]William N. Eskridge Jr., 'Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion', *Faculty Scholarship Series*, Paper 1514. 2005, p. 1023.
[55] Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law*, New York: Oxford University Press, 2010, p. 261.

Clapham omnibus' feels is offered as a sufficient condition for criminalizing homosexuality by Lord Patrick Devlin.

The exclusion of lesbians and gay men from certain rights draws attention to the socially constructed nature of citizenship, highlighting both the heterosexual colonization of the public sphere and the normative construction of the citizen as heterosexual. The construction of the citizens in a heterosexual imaginary lays down the demarcations of who can be termed as citizens. In the traditional discourses of citizenship, the citizen is conceived as an abstract, disembodied, rational individual who can transcend the limitations of the body. In this account, women and LGBTs lag behind and, therefore, are treated as second class citizens.

Drawing from the feminist critique of citizenship, LGBT groups have argued that citizenship is another exercise in the power/ knowledge game and in terms of social relations it is both disciplinary and productive.[56] Lister holds that though "the patterns of exclusion from citizenship vary for women and LGBTs, their exclusion shares the same root: their association with the body and sexuality."[57] She explains that the citizenship pits the heterosexual male human as 'the citizen' through an othering that excludes women for their closeness to 'nature' and sexual minorities for their 'unnatural' acts. And therefore, when these two groups aspire to be recognized as citizens, their inclusion into the private realm is predicated on the relegation of such association to the private realm. That is, women must demonstrate that they can move beyond their reproductive functions and sexual minorities must keep their sexual practices outside of the public realm. In effect, citizenship for women and sexual minorities is predicated on successfully transcending the private realm. Feminist scholars have highlighted that the gender-blindness of citizenship obscures the way women are excluded from politics. Similarly, scholars of gay and lesbian studies have tried to show that the sexuality blind approach of citizenship is a veil to conceal the heterosexual bias of citizenship. This is powerfully stated by M. Jacqui Alexander who states,

---

[56] Tarrell Carver, 'Sexual Citizenship: Gendered and De-Gendered Narratives' in Tarrell Carver and Veronique Mottier (eds.) *Politics of Sexuality: Identity, Gender And Citizenship*, London and New York: Routledge , 1998, p. 14

[57] Ruth Lister, 'Sexual Citizenship' in Engin F. Isin and Bryan S. Turner (eds.) *Handbook of Citizenship Studies*, London: Sage Publications, 2002, p. 193

> "not just (any) body can be a citizen any more, for some bodies have been marked by the state as non-procreative, in pursuit of sex only for pleasure, a sex that is non-productive of babies and of no economic gain." [58]

In other words, citizenship is not just gendered but also heterosexualised.

The sexualisation of citizenship has been discussed comprehensively in the works of Diane Richardson. She asserts that "heterosexuality is constructed as the necessary if not the sufficient basis for full citizenship."[59] Richardson begins her critique of citizenship with the triad of civil, political and social rights presented in Marshall's account. The unavailability of marriage rights, the exclusion from the army and absence of anti-discrimination policies indicate that gays and lesbians have partial access to civil citizenship. As far as the political rights of lesbians and gay men are concerned, though there is no bar on their voting but it still remains circumscribed on two accounts: first, gays and lesbians who contest for political positions tend to be disadvantaged vis-à-vis a heterosexual candidate by virtue of their sexuality and second, that lesbian and gay concerns rarely find a space within mainstream politics. Social rights of lesbians and gays are curtailed because same sex relationships are not recognized, and by implication pension benefits, inheritance rights, and tax concessions are not available to them. Richardson also mentions there is a heterosexualisation of education, parenting, employment and housing rights. Moving beyond the Marshallian understanding, when Richardson looks at citizenship as social membership of a nation-state, she finds that lesbians and gays "are normally excluded from the construction of 'nation' and 'nationality'."[60] Across the world, homosexuals have been posed as a 'threat' to the heterosexual family and thereby to the nation itself. When the nation is cast in a heterosexual image it serves to expunge the lesbians and gays as legitimate citizens. Further, if citizenship is construed to mean social membership in a wider sense of 'belonging to a human race', the attribution homosexuality as 'an unnatural act' serves to rob lesbians and gay of their humanity. Richardson's argument that assignment of 'unnaturalness' to homosexuality is used as a justification to exclude lesbians and gays is used subsequently by Ruth Lister.

---

[58] M. Jacqui Alexander, 'Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas, Feminist Review', No. 48, *The New Politics of Sex and the State*, Autumn, 1994, p. 6

[59] Diane Richardson, *Rethinking Sexuality*, London: Sage Publications, 2000, p. 84

[60] Ibid, p. 78

When citizenship is re-cast to mean cultural citizenship, lesbians and gays continue to face exclusion with representations of same sex relationships being either absent or shown in negative light. Richardson notes that there has been a shift in the past few years, but these changes in representations are mainly in the backdrop of a pink economy. And therefore, gays and lesbians are incorporated only as consumers, which itself is a problematic proposition. The association of heterosexuality with citizenship remains unseen only when citizenship is understood as consumerism. This is because citizenship as consumerism emphasizes on the ability of lesbians and gays to participate in the market and while making such articulations glosses over the fact that lesbians and gay men are still denied their entitlements in other realms. Richardson, therefore, states that lesbian and gays are at best 'partial citizens'.

Shane Phelan's critique of citizenship emanates from grounds similar to Richardson. She says that "lesbians and gay men are not currently citizens in the full political sense…Understanding the extent to which heterosexuality is a prerequisite for modern citizenship illuminates the lives of all those who value and aspire to citizenship."[61] Phelan posits the 'heterosexual masculine political body' as a central to the project of excluding lesbian, gays, bisexual and transgender people from citizenship. In order to ensure that the 'heterosexual masculine political body' is not threatened, the strangeness of the lesbians and gays must be embossed in the discourses of citizenship. Within the United States, laws continue to discriminate against lesbian and gays rendering lesbian and gay men as 'marginal citizens'. The marginal status of lesbian and gay men does not come solely from the denial of civil rights but also from the lack of acknowledgment that lesbians and gay men face within the body politic. As citizenship "concerns the structures of acknowledgment that defines the class of persons eligible for those rights, offices and duties" which political membership accords, the lack of acknowledgment buttresses the marginality of their citizenship status.

Ruth Lister also provides a similar description wherein the labeling of lesbians and gays as 'unnatural' is motivated by the intention to underscore the model citizen as a rational, impersonal and disembodied self. She opines that, "homophobic attitudes and practices can undermine the exercise of citizenship rights and create an

[61] Shane Phelan, *Sexual Strangers*: *Gays, Lesbians, and Dilemmas of Citizenship*, Philadelphia: Temple University Press, 2001, p. 5

atmosphere that is not conducive to their enjoyment."[62] Therefore, Lister holds that it is not enough to look at citizenship as a gendered concept but to investigate its sexualized nature as well. The gendered as well as the sexualized nature of citizenship is uncovered not only when the citizen is revealed as male but also when the public-private delineation is questioned. When sexuality is brought into the public realm, Bamforth contends, that the public-private distinction is diluted or re-positioned. He quotes Cossman, in order to substantiate his argument, when

> "those who were once excluded—women, gay men and lesbians, amongst others—have demanded inclusion…they have contributed to the politicization of the once private sphere, claiming that issues once relegated to this sphere are themselves the proper subject of political contestation".[63]

Bamforth contends that when citizenship is criticized for its exclusionary propensities, it is no mere description of the problem but a desire to redraw the boundaries what citizenship constitutes. Effectively, therefore, when citizenship is critiqued for its sexualized nature it must be read as yearning to bring sexuality within the boundaries of citizenship, which for Bamforth is done by the accounts on sexual citizenship. According to him, sexual citizenship sits comfortably with Marshall's understanding of "citizenship as a form of equal adult entitlement in society."[64]

According to Lister, the concept of sexual citizenship treads on two lines, "the first signals a shift in the terrain of what is considered relevant to citizenship to include 'the intimate'. The second concerns sexuality as a determining factor in the allocation of the rights (and to a lesser extent, responsibilities) associated with citizenship." While Richardson, Alexander and Phelan, in this schema fall in the second, the first strand is reflected in works of Jeffrey Weeks, Ken Plummer and Anthony Giddens. The shift in the terrain to include the intimate is termed as 'new politics' in Plummer's work and "this new politics has one major axis in 'gender/sexual/erotic' politics, and is heavily dependent upon the stories invented about 'intimacy'."[65] Plummer holds that "the (late) modern period has made it increasingly possible to

---

[62] Ruth Lister, 'Sexual Citizenship' in Engin F. Isin and Bryan S. Turner (eds.) *Handbook of Citizenship Studies*, London: Sage Publications, 2002, p. 193.

[63] Nicholas Bamforth, 'Sexuality and citizenship in contemporary constitutional argument' *International Journal of Constitutional Law* 477, 2012, p. 489.

[64] Ibid, p. 482

[65] Ken Plummer, 'Intimate Citizenship and the Culture of Sexual Story Telling' in Jeffrey Weeks, Janet Holland And Matthew Waites (eds.) *Sexualities And Society: A Reader*, Polity Press: Cambridge, p. 38.

claim 'rights' in ways that could not be done until these stories were invented. The old (and still important) communities of rights spoke of political rights, legal rights or welfare rights of citizenship: the language of women's and gay communities certainly draws upon this…but takes it further. A new set of claims around the body, the relationship and sexuality are in the making."[66] That there is a shift in the way in which intimacies are being imagined is iterated by Anthony Giddens as well. In *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies*, Giddens states that the popularization of identities such as gay based on sexuality is an example of the reflexive process of self under modernity "whereby a social phenomenon can be appropriated and transformed through collective engagement."[67] For Weeks, "the sexual citizen exists - or, perhaps better, wants to come into being - because of the new primacy given to sexual subjectivity in the contemporary world."[68] This is an important insight because it talks about the changes which have occurred to bring about the emergence of a sexual citizen. He provides the following three aspects of social change as the context for the emergence of the sexual citizen (1) the democratization of relationships, (2) the emergence of new sexual subjectivities, and (3) the development of new sexual stories.[69] Collectively, Giddens, Plummer and Weeks are providing an account of the background-the tectonic shifts- that allow a sexual citizen to emerge, one who bypasses the neat distinction between the public and private realm.

It is revealing that despite the development of a notable wealth of scholarship on sexual citizenship, a coherent definition of the term is not yet available. Effectively, it remains a 'contested concept', with Lister characterizing it as "an oxymoron" and Weeks calling it a "contradiction in terms" which is "simply an index of the political space that needs to be developed."[70] While Diane Richardson considers sexual citizenship as "a work in progress",[71] in Brenda Cossman's analysis "sexual citizenship is not just about challenging the heterosexuality of conventional

---

[66] Ken Plummer, 'Intimate Citizenship and the Culture of Sexual Story Telling' in Jeffrey Weeks, Janet Holland And Matthew Waites (eds.) *Sexualities And Society: A Reader*, Polity Press: Cambridge,. p. 34

[67] Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism*, California: Stanford University Press, 1992, p. 14

[68] Jeffrey Weeks, 'The Sexual Citizen', *Theory Culture Society*, Vol 15, 1998, p. 35

[69] Ibid, p. 39.

[70] Ibid, p. 48

[71] Diane Richardson , *Rethinking Sexuality*, London: Sage Publications, 2000, p. 86.

belonging. It is about interrogating the sexual norms and practices that condition and constitute belonging more generally."[72] Though a conclusive definition of sexual citizenship is not found, the expanse of what sexual citizenship entails is clearly articulated in the works of both Weeks and Plummer. Plummer, who uses 'intimate citizenship' instead of sexual citizenship, contends that it is the fourth realm of citizenship that can be added to the Marshallian triad. He opines that intimate citizenship is about "the control (or not) over one's body, feelings, relationships; access (or not) to representations, relationships, public spaces etc.; and socially grounded choices (or not) about identities, gender experiences, erotic experiences."[73] In Weeks' account, sexual citizenship re-articulates old issues "about enfranchisement, about inclusion, about belonging, about equity and justice, about rights balanced by responsibilities" yet is different because "it is bringing to the fore issues and struggles that were only implicit or silenced in earlier notions of citizenship." [74] The move of sexuality from the margins to the centre is itself a powerful reformulation of citizenship. Unlike the citizen imagined in the traditional models of citizenship, the sexual citizen breaches the public-private dichotomy and thereby heralds "new possibilities of self and identity."[75]

The definition problem that beleaguers sexual citizenship can be attributed to the contested status of 'citizenship' and 'sexual'.[76] In fact, the difficulty in defining sexual citizenship is sexual citizenship is clearly visible in David Evans book 'Sexual Citizenship: The Material Construction of Sexualities' which is one of the first works on citizenship and sexuality.[77] While the book provides examples of what Evans delineates as different forms of sexual citizenship- including the experience of male homosexuals, bisexuals, transvestites, transsexuals and children- his main emphasis remains the commodification of sexuality, in effect posing itself more as a critique of the enterprise. With the exception of the work of Evans, Richardson clubs all the

[72] Brenda Cossman, 'Sexual Citizens: Freedom, Vibrators, and Belonging' in Linda C. McClain and Joanna. L. Grossman, (eds.) *Gender Equality*: *Dimensions of Women's Equal Citizenship* New York: Cambridge University Press, 2009, p. 291.
[73] Ken Plummer, 'Intimate Citizenship and the Culture of Sexual Story Telling' in Jeffrey Weeks, Janet Holland And Matthew Waites (eds.) *Sexualities And Society: A Reader*, Polity Press: Cambridge, p. 39
[74] Jeffrey Weeks, 'The Sexual Citizen', *Theory Culture Society*, Vol 15, 1998, p. 39
[75] Ibid, p. 36
[76] Diane Richardson, *Rethinking Sexuality*, London: Sage Publications, 2000, p. 86
[77] Ibid, p. 88

others as an approach that "rethinks citizenship and/or sexuality."[78] Such an approach is marked by a rights based language and lays an emphasis on intimacy.[79] Such an approach believes that the concept of citizenship can be extended to include all those who have been previously left out. Given the transformations that have taken place, this approach believes that citizenship as a concept has undergone change. However, such an approach to sexual citizenship has been criticized as being assimilationist or integrationist. The assimilationist approach primarily argues for 'equality of sexuality'. In this approach, discrimination based on sexual orientation is considered as conceptually similar to sex and race discrimination. The simple equality model is seeking "little more than homo conformity with hetero society…it is parity on heterosexual terms-equal rights within a framework determined and dominated by straights."[80] The most visible demands within this approach consist of access to same-sex marriage and the military.

As against the assimilationist model, Steven Seidman holds that "contestation should be over the basis of citizenship and the meaning of sexual and intimate citizenship."[81] Though the rights-based approach helps in protecting sexual minorities from discrimination and oppression, but it also runs into the danger of promoting a language of tolerance wherein the inclusion into citizenship is conditional, "lesbians and gay men are granted the right to be tolerated as long as they stay within the boundaries of that tolerance, whose borders are maintained through a heterosexist public/private divide."[82] Effectively, the challenge that sexual citizenship posed to the public privacy dichotomy is divested of its radical edge. In contrast, the *liberationist model* contends that the agenda of gays and lesbian movement can be "no longer equality or civil rights but sex and its place in society and individuals lives."[83] The liberationist model poses a strong challenge aspiration of citizenship because of it questions the utility of rights based approach for gay liberation. It, instead celebrates the transgressions that gay lives embody. As Altman says, "no longer is the claim

[78] Diane Richardson, *Rethinking Sexuality*, London: Sage Publications, 2000, p. 88
[79] Jeffrey Weeks, Ken Plummer and Anthony Giddens fall under such an approach
[80] Tatchell quoted in Nicholas Bamforth, *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law*, London and Washington: Cassell.1997, p. 251.
[81] Steven Seidman quoted in David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond. Cambridge: Polity*, 2000, p. 11.
[82] Richardson quoted in David Bell and Jon Binnie, *The. Sexual Citizen: Queer Politics and Beyond.* Cambridge: Polity, 2000, p. 26.
[83] John d' Emilio quoted in Nicholas Bamforth, *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law*, London and Washington: Cassell. 1997, p. 252.

made that gay people can fit into American society, that they are as decent, as patriotic, as clean living as anyone else. Rather, it is argued, it is American society itself that needs to change."[84] In effect, within the liberationist model, claims for marriage equality are debunked. In contradiction to advocates of sexual citizenship , Amy L. Brandzel proposes that "queer" and "citizen" are antithetical concepts and advocates that queers, especially those who are privileged and well off enough to do so, should refuse citizenship and actively subvert the normalization, legitimization, and regulation that it requires. Further, she elaborates that,

> "to be a citizen is not simply a matter of enjoying a special legal status; it includes the wide variety of practices and imaginings required by citizenship…Queers are seen as oppositional and/or antagonistic to U.S. community-building practices and institutions…Queer citizenship requires a critique of citizenship, of the nation-state, of normalization and heteronormativity."[85]

However, such criticisms overlook the fact that sexual citizenship is not cast in a homogenous mould. While the accounts of Weeks and Plummer de-eroticize intimacy, there are other accounts of sexual citizenship such as that of David Bell and Jon Binnie which seeks to "bring in the erotic and embodied dimensions excluded in many discussions of citizenship."[86] In their account, there are different spheres of sexual citizenship with "a naturalized, heteronormative modality of sexual citizenship; and set against this, there are myriad forms of what we might label dissident sexual citizenship. Different forms of sexual identity mark claims to citizenship status differently."[87]

David Bell postulates the figure of the 'citizen-pervert' to demonstrate the paradoxical spatial effect which is created if sexual citizenship is created through an emphasis on privacy claims. He argues if one looks at Operation Spanner if emerges that a citizen-pervert is created who is "the bad-enough citizen-bad enough to inhabit the space of neither/nor transgression, whose eerie body pushes up against the state and law's

[84] Quoted from Nicholas Bamforth *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law*, London and Washington: Cassell. 1997, p. 222
[85] Amy l. Brandzel, 'Queering Citizenship? Same-Sex Marriage And The State', *GLQ: A Journal of Lesbian and Gay Studies*, Volume 11, Number 2, 2005, p. 198.
[86] David Bell and Jon Binnie, *The. Sexual Citizen: Queer Politics and Beyond.* Cambridge: Polity, 2000, p. 20.
[87] Ibid, p. 33.

prescribed boundaries of citizenship."[88] Therefore, all such accounts of sexual citizenship which attempt to 're-privatize homosexuality' should be opened up for criticism.

Within Shane Phelan's conceptualization "citizenship for sexual minorities cannot simply mean being included under heterosexual rules, either as disembodied persons or as a clearly marked minority."[89] Since Phelan critiques the simultaneous valorization of 'heterosexual masculine political body' and the marginalized status accorded to lesbians and gays for their sexual strangeness, "bypassing the phallic citizen is essential for the citizenship of lesbians and gays."[90] This necessitates that lesbians and gay men no longer limit their struggles to institutional recognition but highlight that "conceptions of bodies and kinship must be challenged if citizenship is to become open to all."[91] Phelan emphasises on the sites of public culture because if citizenship is about acknowledgment, the marginality of gays and lesbians as citizens cannot be resolved through political/legal citizenship alone. Thus, she says, "queering citizenship, then, must be more than citizenship for queers- not because the latter is not good enough but because it cannot be achieved without the former."[92]

In Brenda Cossman's account sexual citizenship has itself undergone changes due to the challenge from lesbians and gay men, "heterosexuality no longer operates as a preemptive bar to all forms of citizenship. Gay and lesbian subjects have begun to cross the borders of citizenship, unevenly acquiring some of its rights and responsibilities and performing some of its practices."[93] The 'newly arrived sexual citizens' are constituted within a particular normative frame where sex is consensual, private and noncommercial and is posited against 'bad sexual citizenship' which involves children, harm, coercion, public, and/or commercial sex. The distinction that Cossman lays down shows that concept of the border is central to her analysis. She holds that "citizenship requires borders, and borders require exclusion; a border is only meaningful if there is also a subject, a non-citizen, to exclude or a bad citizen to

[88] David Bell, 'Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship', *Political Geography*, Vol. 14, No. 2, 1995, p. 150
[89] Shane Phelan, *Sexual Strangers*: *Gays, Lesbians, and Dilemmas of Citizenship*, Philadelphia: Temple University Press, 2001, p. 146
[90] Ibid p. 156
[91] Ibid p. 140
[92] Ibid p. 160
[93] Brenda Cossman, *Sexual Citizens*: *The Legal and Cultural Regulation of Sex and Belonging*, Stanford, California.: Stanford University Press, 2007, p. 9

punish…while some gay and lesbian subjects are incorporated into the folds of legitimate citizenship, others are abjected."[94] Thus, sexual citizenship is a 'work in progress' that which evolves in accordance with the ways in which border is being redrawn from time to time.

From the accounts presented above, it emerges that sexual citizenship has been proposed differently by the different scholars with one theme which ties all the accounts together: that sexuality has successfully breached the domain of privacy and placed its concerns before citizenship, and in effect citizenship has undergone drastic transformations. Lister proposes that sexual citizenship must be studied under the rubric of 'differentiated citizenship'.[95] The conceptualization of sexual citizenship as differentiated citizenship can also lead to a further investigation of whether sexual citizenship can be positioned in a differentiated manner. Such concerns have found place within the accounts of David Evans and Binnie and Bell. As noted above, Evans presents a differentiated account of sexual citizenship with focus on homosexual citizenship, dual citizenship (bisexual), female sexual citizenship, embryonic sexual citizenship and trans-citizenship.[96] Binnie and Bell, on the other hand, do not provide the exact categorizations and instead state that "there is a naturalized, heteronormative modality of sexual citizenship implicit in mainstream political and legal formulations; and set against this, there are myriad forms of what we might label dissident sexual citizenship."[97] By doing so, they leave open the frontiers of what might emerge in the future as different manifestations of sexual citizenship. In this regard it would be worthwhile to mention how such lesbian citizenship[98], transgender citizenship[99], intersex citizenship[100] and queer citizenship[101] have emerged as forms of differentiated sexual citizenship. The pluralisation of discourses on sexual citizenship

[94] Brenda Cossman, *Sexual Citizens*: *The Legal and Cultural Regulation of Sex and Belonging*, Stanford, California.: Stanford University Press, 2007, p. 197
[95] Ruth Lister, 'Sexual Citizenship' in Engin F. Isin and Bryan S. Turner (eds.) *Handbook of Citizenship Studies*, London: Sage Publications, 2002, p. 191.
[96] David Evans, *Sexual Citizenship: The Material Construction of Sexualities*, New York and London: Routledge, 1993.
[97] David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond*, Cambridge: Polity, p. 33
[98] See Shane Phelan, *Getting Specific: Postmodern Lesbian Politics*, Minneapolis and London: University of Minnesota Press, 1994
[99] See Surya Monro and Lorna Warren, 'Transgendering Citizenship', *Sexualities*, Volume 7, Issue 3, pp. 345-362
[100] See Emily Grabham, 'Citizen Bodies, Intersex Citizenship', *Sexualities*, Volume 10 Issue 1, pp. 29-48.
[101] See Steven Seidman, 'From Identity to Queer Politics: Shifts in Normative Heterosexuality and the Meaning of Citizenship', *Citizenship Studies*, Vol 5, Issue 3, 2001, pp. 321-328

leads to the conclusion that there is no sexual citizenship in the singular but there are 'sexual citizenships'.

Having discussed the proliferating discourses on sexuality and citizenship, it is imperative to discuss the emergence of 'sexual rights'. The centrality of sexual rights to the debates on sexual citizenship can be gauged from Ruth Lister who lists one of the strands of sexual citizenship literature as concerning "sexuality as a determining factor in the allocation of the rights (and to a lesser extent, responsibilities) associated with citizenship. This usage, in turn, takes two forms. One emphasizes access to the traditional triad of civil, political and social citizenship rights; the other, the articulation of new claims to 'sexual rights'."[102] Despite their cautious stand towards sexual citizenship, Binnie and Bell acknowledge that invoking the logic of citizenship is strategically helpful as it makes available the platform of rights and thereby making delivering certain kinds of sexual rights to the sexual dissidents.[103] For Eileen H. Richardson and Bryan S. Turner, sexual rights represent a seamless move towards extension of the Marshallian triad of rights. In their account, sexual rights are posed in two discrete terms

> "the demand of gay and lesbian communities to enjoy the same rights as heterosexuals (sexual citizenship proper), and the expectation of the diversification of sexual pleasure in a more open and liberal society (intimate citizenship)."[104]

But such separation creates a conceptual difficulty because, as has already been discussed above, the shifts in the terrain of the intimate are closely related to the ways in which demands from the sexual minorities have been framed.

Within the international human rights discourse, sexual rights have been termed as the "newest kid on the block."[105] Petchesky points out how sexual rights have attracted its supporters and opponents but remains unclear. This could be either because of its progressive edge as well as its potential to speak to different constituencies. Petchesky

---

[102] Ruth Lister, 'Sexual Citizenship' in Engin F. Isin and Bryan S. Turner (eds.) *Handbook of Citizenship Studies*, London: Sage Publications, 2002, p. 196. The first strand according to her is the terrain of what is considered relevant to citizenship to include 'the intimate'". This would include the insights of Plummer, Weeks and Giddens.

[103] Ibid, p. 191.

[104] Eileen H. Richardson and Bryan S. Turner, 'Sexual, Intimate or Reproductive Citizenship?', *Citizenship Studies*, Vol 5, Issue 3, 2001, p. 333.

[105] Rosalind Petchesky, 'Sexual Rights: Inventing a concept, Mapping an international Practice' in Richard Guy Parker etal (eds.) *Framing the Sexual Subject: The Politics of Gender, Sexuality, and Power*, Berkeley: University of California Press, 2000, p. 81.

argues that sexual rights need to be guided as a positive right that is informed by the principles of sexual diversity, habitational diversity, health and autonomy or personhood.[106] But in the international forums it has been difficult to reach at a conclusion regarding the contours of sexual rights. Another important intervention in the realm of sexual rights comes from Alice Miller. In her seminal article 'Sexual but not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights', Alice Miller argues against understanding sexual rights as a sub set of reproductive rights, as it would render people with non conforming sexual identities and persons engaged in non-reproductive practices invisible.[107] However, Petchesky and Miller's engagement with sexual rights comes from their human rights advocacy and therefore tend to relegate the question of sexual citizenship to the background.

One of the most comprehensive accounts where sexual rights are framed as central to sexual citizenship is by Diane Richardson, who considers it as "a set of rights to sexual expression and consumption."[108] Richardson points out that sexual rights can emerge as a middle ground for feminists, gay and lesbian movements as well as for the disability movement. Richardson's classifies sexual rights into the following sub streams:

a. conduct-based rights claims: Seeking rights to various forms of sexual practice in personal relationships, the right to sexual pleasure, and the right to sexual (and reproductive) self-determination
b. identity-based rights claims: Seeking rights through self-definition, the right to self-expression and the right to self-realization
c. claims that are relationship based: The right of consent to sexual practice in personal relationships, the right to freely choose our sexual partners, and the right to publicly recognized sexual relationships

Richardson's classification of sexual rights into conduct, identity and relationship-based claims is significant in the backdrop of the assertion that sexual citizenship can be understood as a system of rights. It accounts for the different directions in which sexual citizenship may proceed and also allows for conceptualizing alliances that can

[106] Rosalind Petchesky quoted from Ken Plummer, *Intimate Citizenship: Private Decisions and Public Dialogues*, Seattle and London: University of Washington Press, 2003, p. 134
[107] Alice Miller, 'Sexual but not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights', *Health and Human Rights Journal*, Volume 4, Issue 2, , 2000, p. 70
[108] Diane Richardson, *Rethinking Sexuality*, London: Sage Publications, 2000, p. 87.

be built among gays, lesbians, transgenders, queers, and heterosexuals. In short, it allows for a multiplicity of sexual citizenships to co-exist.

CONCLUSION

It can be discerned from the above discussion that sexuality has presented a veritable challenge to the concept of citizenship and has laid bare the ways in which citizenship tends to exclude the non-heterosexual. Sexual citizenship, in a way, can be claimed as a theorization with a standpoint epistemology. It is the outcome of the epistemological privilege that sexual minorities possess and from which the de-mystification of citizenship as universality has been made visible.

In this chapter, an attempt was made to interrogate the ways in which citizenship theory has been challenged by sexuality. The consolidation of a gay liberationist movement, after the Stonewall Riots of 1969 brought to the fore a new category of citizen who was no longer willing to remain in the closet. Jonathan N. Katz comments on the transformation, "we have been the silent minority, the silenced minority-invisible women, invisible men…that time is over…gay people are coming out-and moving on-to organized action against an oppressive society."[109] Within the realm of politics, this coming out has found a voice through the concept of sexual citizenship. Sexual citizenship exposes the way in which citizenship is construed in heterosexual terms and how access to rights is also predicated on the possession of a 'normative' sexuality.

The chapter proposes that sexual citizenship is the middle ground where citizenship theory and sexuality speak to one another, transforming the way in which the public-private dichotomy has been traditionally conceived. In effect, sexual citizenship is used to denote "the political aspects of erotics and the sexual component of politics."[110] In recent times, there has been an explosion of interest on contextualizing the concept of sexual citizenship and this is a testimony to the buoyancy of the concept. Moreover, as sexual citizenship belies a singular articulation, it has fostered the growth of theoretical interventions like lesbian citizenship, intersex citizenship, transgender citizenship and queer citizenship which can be termed as manifestation of a differentiated sexual citizenship.

---

[109] Nicholas Bamforth, *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law,* London and Washington: Cassell. 1997, p. 1,

[110] Gert Hekma, Sexual Citizenship, glbtq encyclopedia, 2015, p.1.

CHAPTER II

COLONIALISM, SEXUALITY AND LEGAL ORIENTALISM: PRODUCING THE SEXUAL SUBJECT

INTRODUCTION

Colonialism as a historic phenomenon has received widespread academic attention. Countries that have experienced colonial rule saw a profound transformation in the social and political life of the indigenous population. While colonialism was motivated by prospects of economic gain and led to the underdevelopment of these areas, its epistemic consequences have been no less significant. Colonialism introduced categories unfamiliar in the colonies and this had profound implications for posterity. That the project of colonialism re-aligns the consciousness of both the colonised as well as the coloniser has been brilliantly elaborated by Ashis Nandy in his famous essay 'The Intimate Enemy'. Nandy's elaboration emphasizes on sex along with age as the vectors through which the colonized in India were co-opted into the world view of the coloniser. He states, "colonialism is also a psychological state rooted in earlier forms of social consciousness in both the colonizers and the colonized. It represents a certain cultural continuity and carries a certain cultural baggage."[1] Accordingly, once Indians internalised the role definitions of the British, colonialism came to be etched in the mind forever.

Until the advent of colonialism in India, sexual categories and gender identity had been fluid. And this is not peculiar to India but was an occurrence common across South Asia.[2] Colonialism re-worked the pre-colonial understandings of gender and sexuality by making law work as a technology of surveillance. However, before law it was literary work by Orientalists which laid down the ground for it. Works by orientalists like Sir Richard Burton not only attempted to understand the East and make it comprehensible to the West; it also defined the East as an exotic, erotic place

[1] Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self under Colonialism*, Oxford University Press, Oxford, 1983, p. 2.

[2] See Walter Penrose, 'Hidden in History: Female Homoeroticism and Women of a "Third Nature" in the South Asian Past', *Journal of the History of Sexuality*, Vol. 10, No. 1,January, 2001, pp. 3-39; Indrani Chatterjee 'When "Sexuality" Floated Free of Histories in South Asia', *The Journal of Asian Studies*, Vol. 71, No. 4 , , November, 2012, pp. 945-962; Rosemary Marangoly George et al. 'Tracking 'Same-Sex Love' from Antiquity to the Present in South Asia', *Gender & History*, Vol.14, No.1, April, 2002, pp. 7–30.

marked by sexual excess where the European travellers could shed their sexual inhibitions. The sexual repressiveness in Victorian England as opposed to the sexually liberated East motivated a lot of travellers and adventurists to board the ship. Edward Said in his path-breaking work 'Orientalism' comments on the lure of "sexual experience unobtainable in Europe…. a different kind of sexuality"[3] that propelled travellers, soldiers, officers and writers to explore the East. Said points out how colonial scholarship is replete with descriptions of the penetration, silencing and possession of the Orient by the Europeans, which in itself shows the power asymmetry between the two. Though the projection of the East as an eroticised land where pornographic fantasies of the Europeans could be fulfilled pre-dates colonial conquest, once colonialism is established sexual domination and European supremacy go hand-in-hand. It is in this context of the 'excess' that legal regulations are framed. Specifically, legal regulation of sexuality is inserted by creation of categories of deviant sex, wrong sex, bad sex, and intercourse against the order of nature, natural and unnatural sex. Thus, as much as orientalism has contributed in entrenching the language of the civilizing mission, it has helped in transplanting an alien legal framework into the colonized territories.

This chapter works in tandem with such larger arguments and discusses how colonialism established current ways of thinking about sexuality in India. While discussing sexuality and its regulation establishes in law a form of legal orientalism, S377 is used as an instantiation to explore the same. It is noteworthy that provisions of the law such as S377 of the IPC and Criminal Tribes Act, 1871[4] are premised on a binary understanding of sexuality which is a western import.

Through a discussion of how such provisions were inserted in India, an attempt is made to show that notions of "what is and what is not the law, and who are and are not its proper subjects"[5] have been radically altered in the aftermath of colonialism. In order that such distinctions can be made, new categories had to be devised. And it is

[3] Edward Said quoted in Valerie Kennedy, *Edward Said: A Critical Introduction*, Polity Press, Cambridge, p. 190

[4] The Criminal Tribes Act has been repealed but as Narrain shows it continues to inflict violence. See Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004.

[5] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, Cambridge, MA, 2013, p. 5.

in this context that creation of categories such as deviant sex, wrong sex, bad sex, and intercourse against the order of nature, natural and unnatural sex has to be read.

The continued hold that legal orientalism has over the collective psyche of the colonised population is evident when laws framed during the colonial period are accepted as indigenous to the country. This is what is termed by Halder as "the power of Occidental legal systems".[6]

Therefore, when homosexuality is decried as a western import it is an illustration of legal orientalism itself. In brief, this chapter tries to argue that understandings such as sexual and gender deviance were the result of the colonial encounter and therefore S377 could easily be re-iterated as an 'alien legacy'.

The chapter is divided into three sections. The first section deals with the difficulties of reading sexuality in the pre-colonial times due to the alterations in vocabulary, which can be attributed to colonialism. Colonialism brings in changes in institutions and this erases pre-colonial ways of conceptualising sexuality. Literary sources remain the only exception and therefore this section discusses the Kamasutra, keeping in mind that its reading is also structured through Orientalist lens. Gender dimorphism enters into the text when 'tritya prakriti' is translated by Sir Richard Burton as 'eunuch', thereby transforming what was a fluid understanding of gender into a male/female dichotomy. The second section of the chapter deals with the way in which colonialism relates with sexuality. While it concurs with the scholarship that a sexual politics underpinned the colonial regime, it also introduces the idea that there is an equally strong 'politics of sexuality' in place. Sexual regulation happened not through laws that regulated prostitution, prohibited devadasi, introduced age of consent but also through other legal provisions like criminalisation of sodomy and surveillance over eunuchs. What ties together the sexual politics and politics of sexuality in the colonies is the attempt by the colonisers to maintain the precarious position that masculinity has. In this backdrop, the third section attempts to connect the previous two sections through the framework of 'legal orientalism'. This section lays down that due to the function of orientalism and legal provisions such as S377 and CTA, a sexual subject emerges. Thus, the emergence of sodomite, the

[6] Piyel Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus-Eaters*, Routledge, Cavendish, 2007, p. 13.

homosexual, the eunuch is discursive, it created and implanted into the Indian context as a result of what can be called as a "thicker notion of law as a social technology".[7]

Sexuality in Pre-Colonial Times

Historians have debated the difficulty in locating the history of sexuality in the pre-colonial times. In fact, reflecting back Ruth Vanita and Saleem Kidwai note in 'Same Sex Love in India' that when they began their work in 1990s it was mainly as a reaction to "the near-total silence of same-sex love in the Indian academy and media."[8] The difficulty in reading back sexuality into pre-colonial period was not only because of the absence of prior work on it but also because of the intervention of colonialism. As stated earlier, colonialism had a huge impact on the indigenous ways of knowing. And one of the ways of knowing the world- gender came to be radically altered under colonial intervention. Penrose's work has shown how gender variance was a common feature across South Asia but "British involvement in India spelled trouble for the gender variant."[9]

Colonialism introduced dimorphism into the understandings of gender and sexuality. Sexuality remained an ambiguous terrain in India, undefined and therefore beyond unregulated. But the difficulty in retrieving such histories of sexuality has led Indrani Chatterjee to hypothesise that "a century-long process of the disappearance and disregard of sets of linguistic and extra-verbal practices and ideals had also led historians of earlier period to forget the tools necessary to comprehend the multiple cadences of speech, song, dance and silence."[10] Chatterjee's critique of contemporary sexuality studies is rooted in its obsession to locate a particular time when sexual identity emerged. For Chatterjee this mission is complicated in the pre-colonial South Asian context where unlike Foucauldian governmentality, a monastic governmentality was in place. These arrangements that created its own lineages of students and teachers studied questions of human embodiment without looking into what is in

[7] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, Cambridge, MA, 2013, p. 36.
[8] Rosemary Marangoly George et al. 'Tracking 'Same-Sex Love' from Antiquity to the Present in South Asia', *Gender & History*, Vol.14, No.1, April, 2002, p. 24.
[9] Walter Penrose, 'Hidden in History: Female Homoeroticism and Women of a "Third Nature" in the South Asian Past', *Journal of the History of Sexuality*, Vol. 10, No. 1, January 2001, p. 31.
[10] Indrani Chatterjee, 'When "Sexuality" Floated Free of Histories in South Asia', *The Journal of Asian Studies*, Vol. 71, No. 4, November, 2012, p. 956.

contemporary times is delineated as sexuality, for sexuality could never be seen separately from a larger politics that they studied. The monastic arrangements were gradually eradicated and replaced with 'corporate and parliamentary institutions, codes and constitutionalism' and it is with the eradication of such institutions that we have lost the languages through which sexuality was conceptualised in pre-colonial period.

Elaborating how the monastic-ascetic order of pre-colonial times conceived of "pronouncements on desire, its domestication by various means, its location in households of different kinds, and its ephemeralisation" as a part "of a larger study of the human body as the seat of consciousness"[11] in contrast to the contemporary times where "the idea of sexuality has come to be naturalised, that is the relationship between the idea and the 'reality' has been placed beyond question. In turn this has meant that we now imagine our sexual universes in terms of types of people, who have different types of sexuality."[12] Thus, reading sexuality in the pre-colonial period is invariably a complicated and complex task as the shadow of colonialism hangs over it and gives it a different colour. The dimorphism of sexual categories that Chatterjee speak of is also accepted by Vanita and Kidwai who also argues on the same lines. By citing from Buddhist and Jaina texts Vanita and Kidwai show how gender has been conceptualised very differently in the South Asian context: as an illusion rather than a reflection of reality. This ambiguity with reference to gender classification is significant because it has implications for challenging the exalted position that heterosexuality enjoys today, "if the two categories 'men' and 'women' are not ultimate categories but are merely created by society to foster certain social roles, and to uphold institutions such as marriage, parenthood and matrilineal inheritance, then the heterosexual relation ceases to be the most important one."[13]

Considering then, the difficulty of reading sexuality in the pre-colonial period because of the erasure of indigenous institutions, the only alternatives available are textual representations. Texts that deal with sexuality have been clubbed as Kamasastras which includes the Kamasutra, the Nagarasarvasva, the Ratirahasya, the Pancasayaka,

[11] Indrani Chatterjee, 'When "Sexuality" Floated Free of Histories in South Asia', *The Journal of Asian Studies*, Vol. 71, No. 4, November, 2012, p. 945.
[12] Akshay Khanna quoted in Indrani Chatterjee, 'When "Sexuality" Floated Free of Histories in South Asia', *The Journal of Asian Studies*, Vol. 71, No. 4, November, 2012, p.953.
[13] Ruth Vanita and Salem Kidwai (Eds.), *Same-sex Love in India: Readings from Literature and History*, Macmillan, Delhi, p. 23.

the Anangaranga and the Ratimanjari.[14] Among these, the Kamasutra of Vatsyayana Mallanaga has been upheld as a sexual treatise par excellence and is considered as one the earliest works. The Kamasutra, assumed to be compilation, is attributed to Vatsyayana Mallanaga who worked on it in approximately in the second part of the third century of the Common Era. Though it is not explicitly stated, it is hypothesised that the author/compiler was based in North India. Jashodhara Indrapala, one of the earliest commentators of the text, suggests that it must have been written in Pataliputra. The text is divided into seven parts that pertains to: General Observations, Sex, Virgins, Wives, Other Men's Wives, Courtesans and Erotic Esoterica.[15] In all, the text has a grand total of 64 parts, having 1492 verses.

Since the text is actually an elaboration of the sixty-four arts that human beings are expected to learn in order to be sensuous and attractive to the opposite sex, Daud Ali argues for the Kamasutra should be read as a part of the 'kama' world: where sensual pleasure is understood as being enmeshed with aesthetic, ethical and cosmopolitan cultures.[16] This is in contrast to the popular perception of the as a text that deals exclusively on sexual positions. Ali and others[17] postulate the idea that the Kamasutra as a part of the Kamasastra tradition looks beyond sex and sexuality- it should be read as an aesthetic text. Even Wendy Doniger and Sudhir Kakar argue similarly that there is more to the Kamasutra than just sex.[18]

Though the Kamasutra remains the most popularly read and re-published amongst all known erotic texts from the East, in reality, the section that actually pertains to such

---

[14] See Laura Desmond, 'The Pleasure is Mine: The Changing Subject of Erotic Science', *Journal of Indian Philosophy*, Vol. 39, Issue 1, February, 2011, pp. 15–39; Daud Ali, 'Rethinking the History of the Kama World in Early India', *Journal of Indian Philosophy*, Vol. 39, Issue 1, February, 2011, pp 1–13; James McHugh, 'The Incense Trees of the Land of Emeralds: The Exotic Material Culture of Kamasastra', *Journal of Indian Philosophy*, Vol. 39, Issue 1, February, 2011, pp. 63–100.

[15] Wendy Doniger and Sudhir Kakar, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002.

[16] Daud Ali, 'Rethinking the History of the Kama World in Early India', *Journal of Indian Philosophy*, February, 2011, Vol. 39, Issue 1, pp 1–13.

[17] James McHugh, 'The Incense Trees of the Land of Emeralds: The Exotic Material Culture of Kamasastra', *Journal of Indian Philosophy*, Vol. 39, Issue 1, February, 2011, pp. 63–100; Laura Desmond, 'The Pleasure is Mine: The Changing Subject of Erotic Science', *Journal of Indian Philosophy*, Vol. 39, Issue 1, February, 2011, pp. 15–39; Sanjay K. Gautam, 'The Courtesan and the Birth of Ars Erotica in the Kämasütra: A History of Erotics in the Wake of Foucault', *Journal of the History of Sexuality*, Vol. 23, No. 1, January, 2014, pp. 1-20.

[18] Wendy Doniger, 'The "Kamasutra": It Isn't All about Sex', *The Kenyon Review*, New Series, Vol. 25, No. 1 Winter, 2003, pp. 18-37; Wendy Doniger And Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002, pp. xi-lxix.

acts is confined only to Book Two which is merely forty pages out of the one hundred and seventy five pages of the book.[19]

Stylistically, it is unlike the Manusmriti and the Arthasastra as it is written both in prose and verse. Moreover, it is a text which is accessible to female readership. Vatsyayana in Book One, Chapter Three categorically states that a woman should read the text (albeit with some help) before she reaches the prime of her youth, and this includes not only women intended for marriage but also courtesans de luxe (*ganikas)* and the daughters of kings and ministers of state. And as far as its elaboration on sexuality is concerned, the Kamasutra throws interesting insights which leads to the debate the appropriateness of clubbing the Kamasutra within the purview of ars erotica. Wendy Doniger and Sudhir Kakar have argued against the position that it is purely ars erotica because of the use of scientific methodology in the text as well as its use of syllogisms, encyclopaedic list and logical debates to substantiate this. Other translator's such as S.C. Upadhyay have also attempted at treating it as a book that deals with the "science of erotics".[20]

A significant position that the Kamasutra takes is the social construction of human sexuality. Vatsyayana states that though Kama, unlike dharma and artha, has been dismissed from the purview of legitimate scholarship because of its perceived 'naturalness' it is necessary to engage in its study as human sexual activity is not regulated by the cycles of nature but by social considerations. Thus, Doniger and Kakar iterate, "the Kamasutra's most valuable insight, then, is that pleasure needs to be cultivated, that in the realm of sex, nature requires culture."[21]

Moreover, it acknowledges the possibilities of sexual pleasure for women, that women "as a subject and full participant in sexual life, very much a subject in the erotic realm, not a passive recipient of the man's lust… The text both reflects and fosters the woman's enjoyment of her sexuality."[22] Though this has been challenged

---

[19] This is asserted by Kumkum Roy, 'Unravelling the Kamasutra', *Indian Journal of Gender Studies*, 1996, Vol. 3, pp. 155-170; Jyoti Puri, 'Concerning "Kamasutras": Challenging Narratives of History and Sexuality', *Signs*, Vol. 27, No. 3, Spring, 2002, pp. 603-639; Wendy Doniger and Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002.

[20] S.C. Upadhyay cited in Jyoti Puri, 'Concerning "Kamasutras": Challenging Narratives of History and Sexuality', *Signs*, Vol. 27, No. 3, Spring, 2002, p. 607.

[21] Wendy Doniger and Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002, p. Xlii.

[22] Ibid, p. xliii

by feminist critics who point out to the mere insertion of women's voices through the male compiler thereby leading to this illusion, it is nonetheless a significant move.

The Kamasutra's elaboration of the 'Tritya Prakriti' (the third nature) in Book Two is very significant and has made it an appealing text for queer advocates who see in it a potential to de-stabilise gender dimorphism and as well as to break free from arguments endorsing procreative sexuality. In positing a triangular analogy to understanding gender, the Kamasutra stands as a successor text to texts of ancient Hindu medical care or Ayurved. Thus, unlike the dominant Western binary understanding of gender, the Kamasutra lists down two normative sexualities (male and female) and a neuter sexuality. Interestingly, while Vatsyayana cites how women have been categorised as belonging to different categories by various scholars, for him there exists four categories of women. He is emphatic the third nature cannot be clubbed together with women: "the third nature is a fifth sort of woman who can be a lover, because she is different."[23] The text classifies the behavioural pattern (attire and manner, specifically) of tritya prakriti into two: those who display masculine qualities and those who display feminine qualities. Those who display feminine attributes are described as engaging in using the mouth as a sexual orifice while those who display masculine attributes live as shampooers and masseur. Interestingly, the position of the nagaraka engaged with the masseur is not compromised in any manner simply because he assumes the role of the active partner.

Another noteworthy feature of the Kamasutra is its acknowledgment of the practice of sex among women. Though the text makes it very clear that sexual activity among women is not desirable but it is still practiced due to the absence of men in the harems. Unlike the third gender who practices such acts out of personal choice, Vatsyayana contends that homoeroticism among women is done out of compulsion. He also mentions women practising oral sex on each other but attributes such 'oriental customs' to women who reside in distant parts of India.[24]

The popularity of the Kamasutra is not limited to the heterosexual population, in fact attractiveness of the Kamasutra among the queers has led to several revisions

[23] Wendy Doniger and Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002, p. 25
[24] Ibid, p. Xxxv.

prominent among whom are Jeffrey Hopkins and Colin Spencer.[25] This leads Doniger and Kakar to state that despite the fact that same sex acts and sex acts with persons of the third gender are mentioned only cautiously in the text "there are ways in which some parts of the Kamasutra might be read as a: text for homoeroticism. More precisely, it is possible to excavate several alternative sexualities latent in the text's somewhat fuzzy boundaries between homoeroticism and heteroeroticism."[26] Walter Penrose draws upon variously from different sources to articulate the presence of such alternate sexualities in South Asia, one of which is the Kamasutra.[27] From the Kamasutra, he lists 'svairini', 'purushayitva', 'kliba', 'kami', 'shandha', 'napumsa' as terminologies that have been used to describe gender variant sexual behaviour.[28]

Irrespective of the scholarly nuances of the Kamasutra, an undisputable fact remains that it is widely popular as a 'sex manual'. The popularity that Book Two has received is interesting because it throws light on how the East comes to be represented for the West. It can be argued that the Kamasutra of Vatsyayana remains the most widely known probably because of its 'discovery' by one of the most well known orientalists of the colonial period: Sir Richard Burton.[29] In fact once discovered by Burton, the Kamasutra came to be one of the defining texts through which the West looked at India- as an exotic land- a 'porno-tropic'.[30] It is in the backdrop of the orientalist discovery of the Kamasutra that it assumed the stature of a handbook of oriental sex practices. It is interesting that the Burton translation is the "most accurate in the sections that deal with sexual positions" which lead them to question his motivations for such precision only in one section of the book. Doniger and Kakar raise three probable questions for the same: firstly, that Burton probably cared most for the sex act itself (a concern shown by others too, considering Burton's own interest in homosexuality and his condemnation of the dubious nature of Victorian morality) and

[25] See Michel Sweet, 'Eunuchs, Lesbians, and other Mythical Beasts: Queering and Dequeering the Kamasutra' in Ruth Vanita (ed.), *Queering India: Same Sex Love and Eroticism in Indian Culture and Society*, Routledge, New York, 2002, pp.77-86.
[26] Wendy Doniger and Sudhir Kakar, *Introduction, 'Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002, p. Xxxvi.
[27] Walter Penrose, 'Hidden in History: Female Homoeroticism and Women of a "Third Nature" in the South Asian Past', *Journal of the History of Sexuality*, Vol. 10, No. 1, January, 2001.
[28] Ibid.
[29] See Ben Grant, *Postcolonialism, Psychoanalysis and Burton: Power Play of Empire,* Routledge, New York, 2009; Wendy Doniger and Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002.
[30] Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Conquest*, Routledge, New York, 1995.

therefore, being careful on translating those sections; secondly, that later Indian texts with elaborations of sex positions provided him useful guidance in this regard and; finally, that sex as an act being universal than the cultural meanings attached to it made it easier to work on this particular section.[31] Whatever be the motivations for Burton, one cannot but read Burton's "discovery" of the Kamasutra and the time of such discovery as separate narratives: its 'recovery' which happens at the intersections of national cultural boundaries and of the past and the present. By re-writing the Kamasutra as a representation of the exotic-erotic East, histories of gender and sexuality are glossed over and a romanticised image is created that is open to be ravished by the colonial adventurists. By depicting the wild, exotic imagery of the sexual practices of the East, the Kamasutra (specifically Book Two as translated by Burton) made it possible that the East is depicted as forever alluring to the West. Therefore, Orientalism provides a useful framework to look at how the politics of empire intersects with the politics of sexuality.

Prior to the translation of the Kamasutra in 1883, Burton along with his friend Fritzgerald F. Arthburnot also translated the Anangaranga in 1872 but it was not published due to the publishers' fear of censorship. Additionally, Burton's foray into translation of erotica was not limited to India. He also translated the Tunisian text 'The Perfumed Garden' of Sheikh Nefzaoui in 1886. While Burton is popularly acknowledged as the person who made the Kamasutra accessible to the West, by translating it, his degree of his contribution to the translation has been disputed. In fact, the Kamasutra was represented as Arthburnot's labour of love, a text that lay neglected by the Indians leading to its near extinction till a British pioneer came and rescued it from oblivion.[32] While there is a near acknowledgment that Arthburnot rather than Burton was the first to find the Sanskrit version of the Kamasutra, the names of the Indian scholars who worked on it: Bhagavanlal Indrajit and Shivaram Parashuram Bhide are glossed over. According to Grant, this has happened due to the way in which the roles these two Sanskrit scholars vis-à-vis Arthburnot has been represented. While Arthburnot is credited with recovering the text from anonymity, Indrajit and Bhinde were seen as mechanical adjuncts who did the task of translation

[31] Wendy Doniger and Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002, p.lviii.
[32] See Grant's critique of such representation in Ben Grant, *Postcolonialism, Psychoanalysis and Burton: Power Play of Empire*, Routledge, New York, 2009.

without any cognitive involvement. Indeed, their role in compiling the work is so seminal that Doniger and Kakar suggest that "it really should, therefore, be known as the Indrajit-Bhide-Arbuthnot-Burton translation, or perhaps the IBAB translation, but since Burton was by far the most famous member of the team, it has always been called the Burton translation."[33]

Burton's missionary zeal in translating these texts for a context in which sexual desire was considered as a taboo is evident in the way in which he inserted meanings into the text which did not exist in the original (lingam, yoni, eunuch, harem). A major motivating force behind Burton's engagement in translating 'erotic' texts from the East was to provide a critique of the prevalent Victorian morality that provided his immediate context. In contrast to the sexual explicitness found in the Kamasutra, Burton found the sexual mores of the Victorian society which laid stress on circumscribing women's sexuality highly repressive. One of Burton's stated objectives in translating the Kamasutra was the sexual emancipation of Victorian women.[34] The fascination of orientalists like Burton with understanding the East and making it comprehensible to the West has to be read parallel to the idea of the East as an exotic, erotic place marked by sexual excess where the European travellers could shed their sexual inhibitions. The sexual repressiveness in Victorian England as opposed to the sexually liberated East motivated a lot of travellers and adventurists to board the ship. Edward Said in his path-breaking work 'Orientalism' comments on the lure of "sexual experience unobtainable in Europe…. a different kind of sexuality"[35] that propelled travellers, soldiers, officers and writers to explore the East. Said points out how colonial scholarship is replete with descriptions of the penetration, silencing and possession of the Orient by the Europeans, which in itself shows the power asymmetry between the two. Though the projection of the East as an eroticised land where pornographic fantasies of the Europeans could be fulfilled pre-dates colonial conquest, once colonialism is established sexual domination and European supremacy go hand-in-hand.

---

[33] Wendy Doniger and Sudhir Kakar, Introduction, *Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text*, Oxford University Press, New York, 2002, p. li.
[34] Edward Rice cited in Jyoti Puri, 'Concerning "Kamasutras": Challenging Narratives of History and Sexuality', *Signs*, Vol. 27, No. 3, Spring, 2002, p. 614.
[35] Valerie Kennedy *Edward Said: A Critical Introduction*, Polity Press, Cambridge

The depiction of the mythical eroticised Africa, the Americas and Asia as "the quintessential zone of sexual aberration and anomaly"[36] has been described in MacClintock's work as 'porno-tropics'. That this idea of the East as 'porno-tropic' is framed within a heterosexual imagination can be argued as the "myth of the harem as a place of sexual adventure and intrigue found expression in art, poetry and prose, as well as, in pornography."[37] The orientalist's gaze into the impenetrable harem and depiction of the same, at once, establishes the sexual deviance of the colonised population which requires regulation as well as the moral superiority of the West. And for the colonial government, "the control of sexual practices was not only central; it was also definitive. Bad sex, wrong sex, deviant sex defined, described and characterised those in need of the civilising hand of colonialism."[38] Regulating the bodies and sexuality of the colonised population was also essential in order to establish the racial segregation between the colonisers and the colonised. Sexual relationships between the coloniser men and the colonised women evoked fears of fissuring the racial segregation that was necessary to maintain the colonial rule-"to the extent that European officials, settlers, and traders interacted sexually with colonised women, they threatened the 'racial purity' and opened up questions about the clarity of cultural conventions that secured male white supremacy through distinctions of class, race and gender."[39] Thus, regulations on heterosexual contact were inevitable. Similarly, it can be speculated that the introduction of Section 377 was partly motivated by the necessity to regulate sexual 'deviance' among the orientalists. Since engaging in homosexual encounters would erode the 'difference' in sexual morality between the coloniser and the colonised criminal prosecution could be the only way to deter it. As Srivastava points out, "it could be suggested that the sameness of some of the sexual practices of the rulers and the ruled was a key threat to claims of moral and

[36] Anne McClintock, *Imperial Leather: Race, Gender And Sexuality in the colonial conquest*, Routledge, New York, 1995, p.22. Though Mac Clintock uses it specifically while speaking about Africa and America, but one can definitely extend such analysis for the Indian context as well.
[37] Philipa Levine, 'Sexuality, Gender and Empire' in Philippa, Levine (ed.), *Oxford History of the British Empire Companion Series: Gender and Empire*, Oxford University Press, Oxford, Great Britain, 2004, p. 136.
[38] Ibid, p. 136.
[39] Frederick Cooper and Ann L. Stoler, Introduction, 'Tensions of Empire: Colonial Control and Visions of Rule', *American Ethnologist*, Vol. 16, No. 4, November, 1989, p. 610.

cultural superiority by colonial powers. Hence, the assertion of sexual difference became an important part of the discourse of European superiority."[40]

While translation by orientalists like Burton of the Kamasutra helped the West in scrutinising the supposed sexual practices of the East (albeit it being a problematic one), to locate the nature of sexuality in the pre-colonial times through this lens is fraught with difficulties. In fact, as mentioned earlier Indrani Chatterjee characterises the pre-colonial period as one where sexualities floated free from categorisations.[41] The fluidity of gender and sexuality categories in India is not singular; it was occurrence common across South Asia, as has been discussed elaborately in the work of Walter Penrose. However, it is noteworthy that while the Kamasutra mentions same sex relationship between women and the Tritya Prakriti, Burton's version is located within a heterosexual framework and this is evident from the way in which 'tritya prakriti' is translated as 'eunuch'. When Burton's translation presents 'tritya prakriti' as 'eunuchs' (understood as a castrated male) and not 'third nature' it implies that a dual axis of gender has been inserted.[42] A translational blunder helps in imposing a Western understanding of gender and sexuality into the Indian context.

The sexual excesses that orientalist writers and travellers commented upon, set up contrasting images of sexual morality in Europe and its colonies. This reminds one again of Burton's exercise in making the East comprehensible through his translations. In some way, Burton was the quintessential model of the Orientalist: a scholar as well as an enthusiast. Burton's extensive travel in the East made him a credible authority on the ways of the Orient and therefore like all other orientalists "what he says about the Orient is . . . to be understood as description obtained in a one-way exchange: as they spoke and behaved, he observed and wrote down. His power was to have existed amongst them as a native speaker, as it were, and also as a

[40] Sanjay Srivastava, Introduction, in Sanjay Srivastava (Ed.), *Sexuality Studies*, Oxford University Press, New Delhi, p. 7.
[41] As an illustration, one may cite the case of the *svairini* from the Kamasutra who is defined through her act but not as a particular kind of person (implying there is no identity with the category of *svairini*).Penrose disagrees with such an assertion. But his claim that the svairini is an identity category is based on her assertion of independence from her husband, rather than her sexual act of penetration. Ibid p. 16.
[42] While Kumkum Roy and Jyoti Puri accept Burton's translation as Eunuchs and proceed with their critical evaluation of the text, Wendy Doniger and Sudhir Kakar, Walter Penrose, Stephen J. Hunt and Kishalaya Mukhopadhyay use 'tritya prakriti' or 'third gender' as a semantically different category.

secret writer." [43] It is also worth mentioning Said's assertion that post 1800, 'oriental sex' was a matter which almost all European writers wrote about. And Burton's translation of the Kamasutra in 1883 has to be read in this backdrop. Not only is Burton said to have escaped the sexual restrictions of his society but also made sexual 'licentiousness' of the East visible to the West. His interest in unveiling sexuality of the East has been described by Fawn M. Brodie as, "he was fascinated also with all forms of heterosexuality— which most male homosexuals find utterly repugnant— and that an extraordinary amount of energy went into his 'field research' as well as into his translations on the subject."[44]

By rendering the text open to an audience in the West, Burton brought the East near it but by marking its sexual practices as distinctive he makes the distance stark at the same time. Grant comments, "the East is grafted onto the West as the location of an erotic culture."[45] Such representations enabled colonial legislators and jurists to justify imposition of provisions like S377 to penalise perverse sexual practices which remained outside the purview of native law. Thus, one could argue that Burton's text is not only emblematic of Orientalism but also lays down the skeletal features on which Occidental legality is built, specifically those laws that regulate sexuality.

Colonial Regulation of Sexuality

Having stated the convoluted ways in which 'ambivalent sexualities' of the pre-colonial period are altered to fit into a system of gender and sexual dimorphism through the act of translation, this section elaborates how it is entrenched further. Sexuality remained central to the colonial project and this is evident through the plethora of laws that were enacted to penalise all such transgressions which could de-stabilise the newly implanted system of conceptualising sexuality. Though "sex was a significant imperial issue and a key site of colonial anxiety"[46] it remained marginal in

[43] Edward W. Said, *Orientalism*, Random House, New York, 1979, p. 160.
[44] Brodie quoted in John Wallen, 'Burton and Said's "Gendered Axis'", *The Victorian*, May, 2015, p. 13.
[45] Ben Grant, *Postcolonialism, Psychoanalysis and Burton: Power Play of Empire*, 2009, Routledge, New York, p. 54.
[46] See Ronald Hyam, *Empire and Sexuality: The British Experience*, Manchester University Press, Manchester, 1990; Philipa Levine, 'Sexuality, Gender and Empire' in Philippa Levine (ed.), *Oxford History of the British Empire Companion Series: Gender and Empire*, Oxford University Press, Oxford, Great Britain, 2004.

studies on the history of empire. In 1986, Ronald Hyam's criticism that the history of sexuality and the history of empire have not moved together to locate the points of convergence, led to a wealth of scholarship being generated on the area. Hyam's book 'Empire and Sexuality: The British Experience' (1990) is itself significant in discussing the relationship between sexuality and colonialism. Earlier in, 1976, Hyam had claimed export of surplus sexual and emotional energy instead of surplus capital as the reason behind expansion of the British Empire. This, he empirically sought to justify through the widespread practise of having concubines among the soldiers who went overseas. Hyam modified this position in 1990 to hold that though sexual excess energy cannot explain motives behind colonial expansion, it does explain the motive behind its sustenance. In other words, sexual relationship helped in maintaining the grip over the colonies acquired. Provocatively, he claimed that "sexual…expression is likely to have been generally less exploitative than the records suggest."[47]

This claim by Hyam generated a flurry of responses in which scholars looked at various ways in which colonialism regulated sexuality and sought to refute his bold and controversial claim.[48] Linda Bryder creates a three-fold thematic categorisation of the growing literature on sex, race and colonialism- "sexual relations between the colonisers and the colonised, the organization and control of prostitution in the colonies, and the incidence and control of venereal diseases"[49]- which intersect with each other as the prostitute becomes the conduit of venereal diseases. The works Doughlas M. Peers (who has concentrated on the regulation of sexuality in the Indian Army) and Philipa Levine (whose work is on Venereal Diseases Act as a way of regulating sexual contact between the colonisers and the colonised) ultimately hinge on how prostitution remains central to the colonial enterprise. As the practise of

---

[47] Ronald Hyam, *Empire and Sexuality: The British Experience*, Manchester University Press, Manchester, 1990, p. 6.

[48] See D. M. Peers, 'Privates off Parade: Regimenting Sexuality in the Nineteenth-Century Indian Empire', *The International History Review* , Vol. 20, No. 4, December 1998, pp. 823-854; Philipa Levine, 'Sexuality, Gender and Empire' in Philippa Levine (ed.), *Oxford History of the British Empire Companion Series: Gender and Empire*, Oxford, Great Britain, Oxford University Press, 2004.; Frederick Cooper and Ann L. Stoler, Introduction, 'Tensions of Empire: Colonial Control and Visions of Rule', *American Ethnologist*, Vol. 16, No. 4,November, 1989, pp. 609-621; Ann Stoler, 'Making Empire Respectable: The Politics of Race and Sexual Morality in 20th-Century Colonial Cultures', *American Ethnologist*, Vol. 16, No. 4, November, 1989, pp. 634-660; Kenneth Ballhatchet, *Race, Sex and Class under the Raj: Imperial attitudes and policies and their critiques* (1793-1905), St. Martin Press, New York, 1980; M. Berger, 'Imperialism and Sexual exploitation: A response to Ronald Hyam', *Journal of Imperialism and Commonwealth History*, 1988, p. xvii.

[49] Linda Bryder, 'Sex, Race, and Colonialism: An Historiographical Review', *The International History Review* , Vol. 20, No. 4, December, 1998, pp. 806-822.

concubinage gradually came to be discouraged by the regime, prostitution seemed to offer an alternative for releasing the sexual energy of the soldiers. Thus, it is within the colonial period that one witnesses growth of 'lal-bazaars' located near the barracks.[50] However, the spread of sexually transmitted diseases among the soldiers made it imperative that the sexual health of the prostitutes was regulated and those who suffered from such ailments were de-barred from their sex-work.[51] This in itself necessitated not just legal rules but generation of knowledge regarding the prostitute. The prostitute thereafter was to be medically examined and only if found fit allowed to practise her trade. This was just one instance of how colonialism generated taxonomical differentiation among the colonised populations, which Levine calls as 'orientalist sociology'. Levine elaborates that the function of Orientalist sociology was "constitutive in the making and the creation of sexualities which defined and labelled the colonised. 'Knowledge' of sexual habits, preferences and boundaries was all part of the way in which British colonialism constituted the need for certain kinds of authority in the colonial setting."[52]

Levine examines pre-existing sexual codes such as concubinage (its initial acceptance and subsequent disavowal), polygamy, child marriages, prostitution, clitoridectomy, homosexual relationship among men which seemed to the colonisers as indicators for the colonised people's savagery but was accommodated in some cases and in certain other cases the colonial authorities intervened to alter them.[53] This depended on whether sanctions against such practices alienated local chiefs and religious leaders and made colonial rule to difficult to function smoothly or not. To illustrate her argument, Levine uses the examples of the legality of female circumcision in Africa, child marriage in India and polygamy in several countries which shows how little the colonial authorities stressed at altering pre-existing sexual codes when they were challenged by the local leadership. In fact, such strategic negotiation between the colonial authorities and local leadership has been termed by Ashwini Tambe as

[50] Philippa Levine, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire*, Routledge, New York, 2003.
[51] Ibid.
[52] Philipa Levine, 'Orientalist Sociology and the creation of Colonial Sexualities', *Feminist Review*, No. 65, Summer, 2000, p. 7.
[53] Philipa Levine, 'Sexuality, Gender and Empire' in Philippa Levine, (ed.), *Oxford History of the British Empire Companion Series: Gender and Empire*, Oxford University Press, Oxford, Great Britain, 2004, p. 153.

'colluding patriarchies'[54] Interestingly, though such controls were exercised primarily over women's bodies, women were no more than mere subjects with no say whatsoever.

The interface of colonialism with sexuality is conceived differently by Ann Stoler who introduces the Foucauldian notion of power to look at colonial discourses of sexuality. She refutes Hyam's use of a repressive sexuality- the dichotomy between "an unrestrictive colony and a restricted west"[55]- as an explanation of colonial interest in sexuality. Following Foucault, Stoler asserts that "desire is not opposed to the law but produced by it."[56] Here the law has a productive function instead of a regulative one. And it is this task of colonialism which not only produces sexual categories but also the idea of desirable and deviant sexualities in the colonies. By juxtaposing a 'colonial sexuality' vis-à-vis European one, colonialism helped to make truth claims regarding a bourgeois sexuality that was in the making. As Stoler says, "that discourse on sexuality was binary and contrastive in its nineteenth-century variant always pitting that middle-class respectable sexuality as a defence against an internal and external other that was at once essentially different but uncomfortably the same."[57] The external other that remains central to this production of sexuality is the colonised subject. The entire project of colonialism was, thus, central to the creation of western sexuality, "the history of Western sexuality must be located in the production of historical Others, in the broader force field of empire where technologies of sex, self and power were defined as 'European' and 'Western'…"[58] Thus, what Stoler suggests is that not only was sexuality central to colonialism but colonialism was central to sexuality as well.

Antoinette Burton's work on the sexuality and colonial modernity, while accepting Stoler's framework moves beyond it, to look into those means which were used by the colonial state to regulate the bodies of the colonised population through "technologies of science, the law, ethnography, spirituality, motherhood, marriage, travel-writing

[54] Ashwini Tambe, 'Colluding Patriarchies: The Colonial Reform of Sexual Relations in India', *Feminist Studies*, Vol. 26, No. 3, pp. 568-600.
[55] Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and The Colonial Order of Things*, Duke University Press, London, 1995, p. 175.
[56] Ibid, p. 177
[57] Ibid, p. 193.
[58] Ibid, p. 195.

and the post-card"[59] in order to usher in modernity. That colonial modernity was closely tied with a certain cultural understanding of heterosexuality and as long as colonialism attempted to regulate sexuality in such direction, the colonised territory would move towards modernity was a widespread belief. But the colonial project might not have neared completion and it is in "the rifts and fissures which normalising regimes themselves created" that Burton argues "opens up new analytical possibilities for understanding how power can operate, can founder, and can sometimes be re-consolidated in new historical forms."[60] Burton's volume takes gender and sexuality to be foundational to the project of colonial modernity, thus, clearly locating her similarity with Levine's arguments.

Despite the theoretically sophisticated literature that has grown around the area of colonialism and sexuality, most of the works remain concerned primarily about the colonial regulation of women's sexuality. Even the feminist work that has grown around the operation of sexual control in India during the colonial period is marked by "a conspicuous absence of an analysis of sexuality itself."[61] Tambe highlights how a heterosexual framework is assumed in these seminal works, "sexuality is only understood in terms of marriage, and family: the age of consent, the status of widows, inheritance laws comprise a bulk of writing on sexuality."[62] Though these works provide a window to an enriched way of doing intersectional feminist research, its limitation lies in viewing gender and sexuality as collapsible categories.

While looking at the ways in which colonialism intersects with sexuality one could use Tim Edwards distinction of 'sexual politics' and 'politics of sexuality' because sexual regulation in the colonies treaded both these two arenas. Edwards defines sexual politics "as the study and practice of, or opposition to, gender oppression" and the politics of sexuality "as the study and practice of or opposition to the oppression of sexuality".[63] Though these are ideal types and overlaps are highly likely, the distinction helps because it uncovers the fact that while legal measures that were

[59] Antoinette Burton, 'Introduction: The unfinished business of colonial modernities' in Antoinette Burton (ed.), *Gender, Sexuality And Colonial Modernities*, Routledge, London, 1999, p.2.
[60] Ibid, p. 2.
[61] Ashwini Tambe, 'Colluding Patriarchies: The Colonial Reform of Sexual Relations in India', *Feminist Studies*, Vol 26, No. 3, Points of Departure: India and the South Asian Diaspora (August, 2000), p. 596
[62] Ibid, p. 597.
[63] Tim Edwards, *Erotics and Politics: Gay Male Sexuality, Masculinity And Feminism*, Routledge, London, 1994, p.37.

aimed at circumscribing the lives of Devadasis and Prostitutes work within the bracket of sexual politics, criminalisation of sodomy (S377 as an instance) and eunuchs (through the CTA as an instance) shows how a politics of sexuality was also simultaneously operating. Additionally, Edwards' distinction is also helpful because it reveals that while sexual politics under colonialism has been studied (after Hyam's provocative writing), politics of sexuality under colonialism has not been so intensively investigated. In other words, while perpetuation of gender based oppression by colonial authorities has received scholarly attention, study of sexuality based oppression remains scant. Thus, what Ronald Hyam said about the neglect of studying sexuality within the framework of empire in 1986 remains particularly true for the neglect of studying non-heterosexual sexuality within empire. Though colonialism encountered with what Levine calls as 'expansive sexualities' in the colonies, research based on archival resources stumble due to paucity of sources. It is only recently that scholars have turned their attention to the 'lack' in the archive regarding sexuality.[64]

This lacuna regarding non-heterosexual sexualities is also visible even in literary theory. Said's path-breaking work 'Orientalism' has been criticised for working within a "conspicuously heterosexual interpretive framework."[65] Hema Chari criticises Said's intellectual heirs such as Sara Suleri, Homi Bhabha and Gayatri Spivak for providing "sophisticated analyses of the complexities of colonial discourse and subjectivity. However, none of these theorists articulate the impact of colonial ambivalence in terms of same-sex desire."[66] This is an uncharacteristic oversight, as writings of Orientalist travellers are replete with descriptions of the 'oriental vice' which is presumably caused by the tropical climate-or to use Richard Burton's phraseology of 'sotadic zones'. Joseph A. Boone's 'The Homoerotics of Orientalism' which deals with "the numerous travel narratives and histories, dating from the early modern period through the long eighteenth century, that make mention of male homoeroticism in Islamicate cultures"[67] has made this evident. Despite the sexual

[64] A. Arondekar, 'Without a trace: Sexuality and the colonial archive', *Journal of the history of Sexuality*, Vol. 14 (No 1/2), 2005, pp. 10-27

[65] Joseph Boone, quoted in Robert Aldrich, *Colonialism and Homosexuality*, Routledge, New York, 2003, p.7.

[66] Hema Chari, 'Colonial Fantasies and Postcolonial Identities' in John C Hawley (ed.), *Postcolonial, Queer: Theoretical Intersections*, State University of New York Press, New York, p. 280.

[67] Joseph Allen Boone, *The Homoerotics of Orientalism*, Columbia University Press, New York, p. xxxii.

encounters that the orientalists had, homosexuality was attributed as a practice peculiar to non-Western world. Already the assumed authenticity of Orientalist writers' has led to the imagery of the non-Western world as a 'porno-tropic, with homosexuality also being attributed as widespread in these areas the colonies came to be viewed deviant sexual cultures. The eroticised excess of the Orient stood in stark contrast to the sexually restrained Christian West. Nevertheless, "the colonies provided many possibilities of homoeroticism, homosociality and homosexuality – a variety of perspectives and experiences by which men expressed attraction to other men (or male youths)."[68] Interestingly, the colonies not only initiated sexual encounters between men but also acted as secured havens for those who were fleeing persecution in their own countries due to their homosexual inclinations. Robert Aldrich's work on colonial homosexuality draws upon historical sources such as unpublished manuscripts, archival documents, court records, and literary sources like biographies and autobiographies, works of fiction and poetry, paintings and photographs to underpin the argument that colonial homosexuality though not openly proclaimed was an abiding reality.[69] Away from Europe "where life was full of dichotomies – respectable versus immoral behaviour, natural and unnatural sex, homosexual versus heterosexual acts"[70], colonial explorers, company soldiers, military men, writers, artists found themselves questioning the norms of their own culture: it made "Europeans question sexual norms at home, and suggested to some that 'unnatural' acts were actually very natural for many men."[71] However, Aldrich is also cautious to state that there is no simple model of colonial homosexuality.

Other than Boone and Aldrich, theoretical investigation on colonialism and homosexuality has been far and in between. Fleeting glimpses of homosexual encounters can also be found in the writings of Kenneth Ballhatchet, Ann Stoler, D.M. Peers and Philipa Levine. These works, however, deal with homosexual encounters while discussing the colonial regulation of prostitution. For instance, Levine states that "the constant haunting fear of homosexuality, the presence of which would undermine the manly adventure of imperial conquest, underscores the whole

[68] Robert Aldrich, *Colonialism and Homosexuality*, Routledge, New York, 2003, p. 3.
[69] Ibid, p. 404.
[70] Ibid, p. 410.
[71] Ibid, p. 410.

debate on prostitution throughout this era."[72] In fact, homosexuality so much remained the proverbial 'sin not to be named' that Peers study of the Indian army discusses the difficulty in finding records of trials and courts martial of sodomy from the archives, though the army had strict disciplinary punishments stated for engaging in the same. While records for conviction under sodomy accusations of soldiers are available for British army, the same is not the case for the Indian army (which is located in a colony). Moreover, wherever any instance of punishment was found it was very different to what was the punishment in Britain. While capital or corporeal punishment was levied on charges of sodomy, in India it entailed only transportation to Australia. This leads Peers to hypothesise that, "the different punishment combined with the silence surrounding the trials points to a difference cultural context. In Britain, society at large condemned homosexuality…To do the same in India was unthinkable because British rulers could not depend on public consensus. By punishing homosexuality, the British army would acknowledge the existence within its own ranks of a form of sexual behaviour at odds with the forms in which it laid out its claim to moral superiority."[73] Prevalence of circumstantial homosexuality among the soldiers was a cause of concern for the colonial authorities who believed that it posed a threat to the ideal of colonial masculinity. And therefore, prostitution (though regulated) was allowed to continue as it was supposed to serve in controlling the 'natural passions of man.' Any discussion on prohibition of prostitution (due to the increase in numbers of soldiers infected with Venereal diseases) led to vehement resistance and arguments supporting the availability of prostitution referred to the aggressive masculinity of the soldiers who "unlike their officer, were thought to be incapable of restraining their sexual urges: deprived of women, they would choose male sexual partners from among their colleagues."[74] Thus, the fear of homosexual encounters between men in the colonies is embroiled within a discussion of colonial masculinity. Caught in between their natural 'manly' sexual passions and a climate that encouraged the 'oriental vice' colonial authorities resorted to legally proscribing 'carnal intercourse against the order of nature'. That homosexual acts stood at the interface of racial and gender distinctions, both central to colonialism, and threatened

[72] Philipa Levine, 'Re-reading the 1890s: Venereal Disease as "Constitutional Crisis" in Britain and British India', *The Journal of Asian Studies*, Vol. 55, No. 3 (Aug., 1996), p. 596.
[73] D. M. Peers, 'Privates off Parade: Regimenting Sexuality in the Nineteenth-Century Indian Empire', *The International History Review*, Vol. 20, No. 4, December, 1998, pp. 823-854.
[74] Ibid, p. 841.

to dislodge it can be seen from Richard Burton's ambiguous responses to the sotadic zone. Elaborating on Burton's engagement with this climatic zone and the sexual acts which are supposed to represent it, Grant comments, "in the Sotadic Zone, the clear boundary between man and woman is thus broken down, and this, at the same time, troubles the division between dominant and subordinate racial types upon which imperial rule depends."[75] Thus, when the colonial rule introduced S377 in the Indian Penal Code and enacted the Criminal Tribes Act it was not motivated by the Christian ethics of the coloniser which makes it alien in the colonised context[76], but is also an outcome of desire to maintain masculinity as a stable category. It is noteworthy that anxieties about maintaining masculinity as a stable category is not an attribute of pre-colonial India. Gender-variance, as indicated above, marked not just the Indian context but entire South-Asia. In fact, the advent of a binary understanding of gender happens at the precise moment when the East first textually becomes available to the West and then is colonised through law. Enactment of the Criminal Tribes Act, 1871 and insertion of Section 377 in the Indian Penal Code (1860) served to eliminate all possibilities of gender and sexual transgression. Perversity was the dominant lens through which all non-heterosexual encounters were interpreted. Levine explains this as, "many a Briton regarded same-sex liaisons as another example of non-British perversity, claiming that Indians, Arabs and Africans were devotees of practices increasingly criminalised under British law, judgments resting on profoundly different ideas about the meaning and nature of human sexual relations….they were mystified, shocked, and often fearful of the more expansive sexualities they sometimes encountered, and were quick to condemn them as immoral or amoral."[77]

When Macaulay introduced the Indian Penal Code in 1837, the sodomy was criminalised under Clauses 361 and 362. Clause 361 read as,

> *Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished*

[75] Ben Grant, *Postcolonialism, Psychoanalysis and Burton: Power Play of Empire*, Routledge, New York, 2009, p. 165.
[76] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008.
[77] Philipa Levine, 'Sexuality, Gender and Empire' in Philippa Levine (ed.), *Oxford History of the British Empire Companion Series: Gender and Empire*. Oxford University Press, Oxford, Great Britain, 2004, p. 151.

> *with imprisonment … for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.*[78]

Cl. 362 read as,

> *Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment … for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.*[79]

While both the sections dealt with 'Unnatural offences', the presence (or absence) of consent distinguished the two. Cl.361 criminalises consensual sodomy but the punishment awarded for the act is lesser than in the case of Cl.362 where consent has not been given. Macaulay, however, was too reluctant to even discuss the sections in detail (which was to subsequently become Section 377) citing that as these sections relate "to an odious class of offences respecting which it is desirable that as little as possible should be said…the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed within greatest precision."[80] In the final draft, the distinction of consent was made irrelevant by having one section for the act of sodomy, that is Section 377 which reads as

> *Of Unnatural Offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.*
>
> *Explanation: Penetration is sufficient to constitute carnal intercourse necessary of the offence prescribed in the section.*
>
> *Comment. This section is intended to punish the offense of sodomy, buggery and bestiality. This offence consists in carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.*[81]

In comparison to the draft provision (Cl. 361 and Cl. 362), it is more rigidly framed. It clearly defines the offence, provides for the proof required to substantiate the offence

---

[78] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008, p. 9.
[79] Ibid, p. 9.
[80] Ibid, p. 8.
[81] Ratnlal Ranchhoddas and Dhiralal Keshavlal Thakoree, *The Indian Penal Code*, 27th ed., Wadhwa, Nagpur, 1992.

(penetration) and prescribes the punishment for the offence committed. By obfuscating consent, S377 levies the same punishment to those who are engaged in consensual sodomy as well as one who has been forcefully sodomised.

It is a noteworthy that while the punishment against sodomy in England was reduced from being a capital offence to one that lead to imprisonment in 1861, at almost the same time sodomy was introduced as 'a crime' in India (1860). Thus, while England witnessed some relaxation in the regulation of sodomy, in India an act which was never penalised came to be an offence under the law. At this point, it is important to re-iterate the expectation of eminent persons like Bentham, Mill and Macaulay of the Indian Penal Code on legal change in Britain. S377, actually brought changes into the prevailing British law on sodomy. Gupta states this as "the 1861 Offences against the Person Act dropped the death penalty for the "abominable crime of buggery," imposing a sentence modelled on that in the IPC."[82] This in itself is interesting because when such changes in the colony 're-acts' on the metropole it inverts the entire colonial claims about history.[83] In both the cases, however, consent remained irrelevant. The very act of sodomy was understood to constitute harm against the person. Moreover, as consent was not considered, even in the case of forced sex, the categories of victim and perpetrator remain irrelevant and fuzzy. Sodomy, thus, only challenges 'compelling state interest' though the crime is clubbed under Offences Against the Person.

Within a span of ten years from the passage of the IPC, the British authorities framed another legislation that can be said to be another derivative from 'Orientalist Sociology': The Criminal Tribes Act, 1871. By attributing criminality as an innate and identifiable trait determined by a person's birth into a particular group, this piece of legislation sought to regulate the lives of those tribals who were termed as dacoits and thieves. Schwarz asserts that, "after the institution of the Indian Penal Code and Code of Criminal Procedure in 1860– 61, incremental adjustments were made to stamp out "way of life" criminality seen as unfitting an orderly, settled colony

[82] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008, p. 10.
[83] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', *Law and History Review*, Vol. 23, No. 3, Fall, 2005, p 633.

governed by the rule of law"[84] and the CTA was part of such an endeavour. When the colonial authorities encountered nomadic tribes like the Sansis, Harnis, Bawarias and Yarlakulas (among others) who moved across borders, it raised concerns regarding enforcement of laws. The nomadic lifestyle of these people generated suspicions regarding their lifestyle and they were seen as akin to vagabonds. The state aim of the act was "registration, surveillance and control of certain criminal tribes and eunuchs." Thus, the CTA was another surveillance mechanism through which colonial state sought to regulate the movement of all those people who seemed mobile and therefore a lay in a fuzzy zone as far as enforcement of law was concerned. The Act laid down that all members of the 'criminal tribes' had to be registered with the government authorities and notify whenever they moved from one place to other. If caught in a place without notification, other than where they were registered, they could be punished under the law. Punishment was also likely in all such cases where a particular member is within the territorial limits but found in 'suspicious circumstance'. The CTA is illustrative of the complete hold that power can have over the lives of people- criminalising their existence, limiting their mobility and penalising behaviour where no harm to the other was involved. As Singha puts in succinctly, the CTA "clearly violated the liberal principles of due process and equality before the law."[85]

For Schultz, the CTA is largely derived from the campaigns to suppress thugee in the 1830s[86]; Alok Gupta, however, argues that it was inspired from the anti-vagrancy laws of Europe. The CTA and the Vagrancy laws are similar because they "target people whom officials see as wandering or loitering with no purpose… they make people criminal for what they rather than what they do."[87] Gupta's claim that the CTA's motivation was to control 'vagrants' is substantiated by the 1897 amendment to it when the sub-title 'An act for the Registration of Criminal Tribes and Eunuchs' was added. The conjunction of eunuchs with the criminal tribes was underpinned by

[84] Henry Schwarz, *Constructing the Criminal Tribe in Colonial India: Acting Like a Thief*, Wiley Blackwell, Oxford, 2010, p. 5.
[85] Radhika Singha, 'Punished by Surveillance: Policing 'dangerousness' in Colonial India, 1872–1918', *Modern Asian Studies*, No. 49, Vol. 2, 2015, p. 249.
[86] Henry Schwarz, *Constructing the Criminal Tribe in Colonial India: Acting Like a Thief*, Wiley Blackwell, Oxford, 2010.
[87] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008, p. 13.

the idea nomadism is associated with crime as well as sexual immorality.[88] And, therefore, the eunuchs would not only be a "distasteful nuisance"[89] not only by being "dressed or ornamented like a woman in a public street… or who dances or plays music or takes part in any public exhibition, in a public street"[90] but also because all eunuchs could be reasonably suspected of "kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code."[91] It is worth noting that in this case there is a comfortable fit between Section 377 and the CTA. As Gupta elaborates, this shows that "the vagrancy and sodomy provisions stemmed from the same motive: to place not just behaviours, but classes of people, under surveillance and control."[92]

Under the CTA, a eunuch was defined "to include all members of the male sex who admit themselves, or on medical inspection clearly appear to be impotent."[93] Being covered under the CTA, a eunuch was to be registered with the authorities and his movements were to be closely monitored. The curtailments of a eunuch's civil liberties were not restricted to this alone. Additionally, they were not allowed to draw a legal will and were liable for criminal prosecution if found if possession of boys under the age of 16 years, implying that guardianship rights were taken away from them: "magistrates removed children residing with eunuchs to prevent their castration and arranged for a surrogate parent."[94] The denial of basic civil rights to the eunuchs leads Narrain to state that "being a eunuch was a criminal enterprise."[95] In fact, all the British claims of establishing a rule of law seemed farcical in the face of the provisions of the CTA. Just like the Contagious Diseases Acts passed between 1864 to 1869 required prostitutes to register themselves and be subject to medical surveillance, the CTA required members of the supposed 'criminal tribes' and eunuch

[88] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008, p. 14.
[89] Lawrence Y. Preston quoted in Ibid, p. 14.
[90] Human Rights Violations Against the Transgender Community, quoted in Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2088, , p.14.
[91] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 59.
[92] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008, p. 14.
[93] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 59.
[94] Jessica Hinchy, 'Troubling Bodies: 'Eunuchs,' Masculinity and Impotence in Colonial North India', *South Asian History and Culture*, Vol. 4, No. 2, 2013, p.197.
[95] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 59.

to register themselves and be subject to police surveillance. Registration of the eunuchs was justified on the following ground: "first, the prevention of sodomy through the suppression of this 'institution' of 'professional sodomites'; second, the erasure of eunuchs' bodily difference and visibility as a socio-cultural category through the prohibition of performance and transvestism; and third, the gradual extermination of eunuchs, particularly *hijras*, through the prevention of castration, which was represented as the ultimate aim of the CTA"[96]

Particularly striking is the inconsistency of the colonial authorities in understanding the *hijras* (who were equated to eunuchs) as a group. While the CTA included them within the male gender category, their self representation was feminine. In fact, Jessica Hinchy points out that eunuch was used as a loose term to denote any gender and sexual 'deviants'. And deviance was understood in reference to the binary concept of gender. And as the eunuchs stood at the neither end of the binary, they were cast aside as figures of failed masculinity. [97] The 'linguistic strategy' of the colonial regime to re-cast eunuchs as men who are impotent is aimed at holding together the gender binary that the eunuch's existence challenge. Since the 1871 Act was vague with regard to suspicions which could be grounds for punishing eunuchs in March 1873 a General Order was issued which "established that there were two grounds upon which a eunuch could be 'reasonably suspected' of sodomy, kidnapping and castration: first, if they performed in public and second, if they wore female clothing."[98] That the criminalisation of the eunuch on the assumption of being a 'habitual sodomite' is an example of how orientalist sociology functions is evident from Hinchy's work which shows how doctors also acted as ethnographers to create the figure of the *hijra*: as impotent, a sodomite and as effeminate which "existed in a triangular causal relationship; impotence and sodomy both resulted in effeminate embodiment, while habitual sodomy often caused permanent impotence."[99]

That the seemingly innocuous act of cross-dressing by eunuchs was taken as an evidence of criminal transgression is an example of how colonial laws constructed understandings of sexuality and it can be easily asserted from a discussion of Section

[96] Jessica Hinchy, 'Troubling Bodies: 'Eunuchs,' Masculinity and Impotence in Colonial North India', *South Asian History and Culture*, Vol. 4, No. 2, 2013, p.197.
[97] Ibid p. 199.
[98] Ibid, p. 200.
[99] Ibid,, p. 204.

377 of the IPC and the CTA that "the construction of the queer person in colonial law has had profound impact in the post-colonial era."[100] In both the cases surveillance becomes the key through which the existence of the persons with same sex desires as well as the eunuch are defined. Ryan Goodman's argument on the force of anti-sodomy laws in the lives of gays and lesbians of South Africa remains true even with Section 377 of the Indian Penal Code: "The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs…a dispersed structure of observation and surveillance."[101] Similarly, with reference to the CTA "every aspect of the eunuch's existence was subject to surveillance, with surveillance itself being premised on the threat of criminal action."[102]

Mrinalini Sinha's 'Colonial Masculinity', however, sets the ball rolling for expanding the scope of work done on colonialism and sexuality. By locating the creation of colonised masculinity as the mirror image of the coloniser's masculinity, Sinha argues how the colonial enterprise was itself a sexualised one. Not only is the coloniser male but he is also masculine. The creation of the 'manly Englishman' and the 'effeminate Bengali' babu is central to the justification of colonial rule over savages who cannot govern themselves. It is in the colonised lands that the Englishmen revel in their masculinity. The centrality of differentiating the masculinity of the colonised vis-à-vis the coloniser was also reflected upon by Partha Chatterjee who states that, "the hyper-masculinity of imperialist ideology made to figure of the weak, irresolute, effeminate babu a special target of contempt and ridicule."[103] However, what separates Sinha's analysis from Chatterjee's is that she takes the construction of masculinity in the metropole and the colony within a single heuristic model-of imperial social formation. The construction of a particular form of colonialised masculinity helped in constructing the image of a colonial masculinity. Orientalist sociology created taxonomies based on 'supposed' physiological attributes such as the virile Sikh, the militant Pathan or Maratha, or the slight and weak Madrasi which were nonetheless

[100] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 46.
[101] Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics', *California Law Review*, Vol. 89, Issue 3, May, 2001, p. 643.
[102] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 59.
[103] Partha Chatterjeee quoted in Hema Chari, 'Colonial Fantasies and Postcolonial Identities' in John C Hawley (ed.), *Postcolonial, Queer: Theoretical Intersections*, State University of New York Press, New York, 2001, p. 282.

discursively created.[104] The concern with masculinity is significant because of the assumed correspondence between emasculated masculinity and aberrant sexuality, "stereotypes of unmanliness during colonialism reinforced the images and implications of anomalous sexual practices and vice-versa."[105] And, therefore, masculinity of the colonised population was to be closely monitored while the virile masculinity of the Englishmen was to be policed in order that it does not fall prey to the 'oriental vices'.

According to Douglas Peers, "masculinity became one of the several yardsticks used to mark out hierarchies: men over women, upper over lower classes, white males over non-white males, and heterosexuals over homosexuals."[106] Considering the centrality of masculinity to the colonial project, it remained imperative for the regime to prevent any blurring of the boundaries so created. As a discursive creation, masculinity is itself is prone to instability and therefore the colonialism government undertook steps to police it. Any possible public display of its collapse had to be guarded against. It is in this backdrop that insertion of provisions that criminalised sodomy (same-sex acts as indicative of unmanliness) and enactment of legislations that punished 'eunuchs' (which Hinchy argues was used as examples of 'failed masculinities') have to be located. These provisions in law were supposed to raise barricades against the frailty of masculinity. What was constructed discursively was to be maintained through (il)legality.

The Production of a Sexual Subject

Teemu Ruskola introduces legal orientalism as a concept which combines "a post colonial analysis with the constitutive view of law."[107] Within this conceptual framework, law is partly responsible for creating the world in which it is located but also creates the subject whom it then disciplines. While his study is located in a different context, it is an instructive one as legal orientalism puts in place the

[104] Hema Chari, 'Colonial Fantasies and Postcolonial Identities' in John C Hawley (ed.), *Postcolonial, Queer: Theoretical Intersections*, State University of New York Press, New York, 2001, p. 283.
[105] Ibid. p. 283.
[106] D. M. Peers, 'Privates off Parade: Regimenting Sexuality in the Nineteenth-Century Indian Empire', *The International History Review*, Vol. 20, No. 4, December, 1998, p. 841.
[107] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, Cambridge, MA, 2013, p. 5.

questions of "what is and what is not the law, and who are and are not its proper subjects."[108] Legal Orientalism performs an invaluable function because it "is the concept that names the cultural distance between East and West."[109] One only needs to look back at the differential ways in which matters of sexuality were addressed by the two in order to comprehend the significance of the concept. A glaring example of this the contrast between how homosexuality is treated within the Kamasutra and the silence which marks the commentary section of Clauses 361 and 362 of the Draft IPC which was to later become S377.[110] However, the hold of occidental legality is so alluring and convincing that it "works in a direction which sooner or later leads to a reduction in the differences both of social power and of conduct between colonists and colonised."[111] Therefore, the consequent disavowal of homosexuality as a 'Western import' in post-colonial India needs to be placed within this perspective where the colonial law constitutes a new subject, effacing all the vestiges prior to it.

The post colonial approach to studying law and the constitutive function of law informs the codification of law in the colonies as a marker of the colonial conquest, not just over the territories but over the collective psyche of the people. The civilising mission of the British was translated in the legal realm through an erasure of customary laws and putting in place a codified set of law, in the form of the Indian Penal Code. Introduced in 1860, the Indian Penal Code is a paradigmatic illustration of how legal orientalism operates. The justification of codifying laws in the colonies derived from an orientalist narrative that described the East by it 'lack' of a rule of law. Unlike the colonisers who were rule-bound, regimes in the colonies it was argued were depended on the whims of the despot. Kolsky points out how "Henry Maine declared that India was empty of laws before the British came."[112] In reality, however,

---

[108] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, Cambridge, MA, 2013,, p. 38.

[109] Ibid, p. 13.

[110] Macaulay says in the discussions that "Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. . . . We are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision." (quoted from J. Puri, (2016). *Sexual states: governance and the struggle over anti-sodomy law in India*. New Delhi: Duke University press, 2016)

[111] Norbert Elias quoted in Piyel Halder, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eater*s, Routledge, Oxon, 2007, p. 14.

[112] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', *Law and History Review*, Vol. 23, No. 3, Fall, 2005, p. 652.

it was the plurality of laws that confounded the colonisers and therefore it became imperative to have a uniform system of criminal justice. The uniform system that was created not only laid down what was the law but in its constitutive function had an even greater impact. The significance of law derives from the fact that "no subject stands outside the law, and interpreting legal categories is not just something that we do to law. In the process, law also aids-and limits-us in our process of "self understanding."[113] The grasp that such codified law exerts is visible not only through its geographical extant but also through its endurance across the centuries. In other words, not only was the Indian Penal Code acclaimed as a model penal code and smoothly travelled across continents, it also re-aligned subjectivities so intensely that "customs and indeed everyday life, become the products of imperial forms of law."[114] Halder discusses the essentiality of framing the East "as being the other side to law"[115] in order to rationalise the insemination and extension of occidental legality into the colonised territories. He states that "in its encounter with the East, law develops a seemingly more defined system (non-thaumatolatrous, non-charismatic, non-carnal) with apparition of universality."[116] And it is within this framework that the Indian Penal Code can be studied as an apparatus of colonisation.

When Thomas Babington Macaulay was appointed as the head of the first Law Commission "the legal system he inherited was complex, pluralistic, and in some respects unmanageable as it suffered from what James Fitzjames Stephen would later call "vices of vagueness."[117] Historically, when Macaulay set sail for India utilitarianism had begun gaining ground as a formidable political theory and British legal experts of the day had begun critiquing the common law tradition. Macaulay, being a follower of Bentham, asserted the principle which was going to guide the

[113] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, Cambridge, MA, 2013, p. 38.
[114] Piyel Halder, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters*, Routledge, Oxon, 2007, p. 13.
[115] Ibid. p. 2.
[116] Ibid, p. 15.
[117] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', *Law and History Review*, Vol. 23, No. 3, Fall, 2005, p. 639.

process of codifying criminal law in India: "uniformity when you can have it, diversity when you must have it; but, in all cases certainty."[118]

A historian by training, Macaulay headed the four member Indian Law Commission which was to prepare "a code of laws common (as far as may be) to the whole people of India, and having its varieties classified and systematized."[119] The commission decided to codify criminal law first, assuming (and correctly so) that it would not invite resistance from the indigenous population. On account of the illness of his fellow Commissioners, Macaulay had to single-handedly finish the project and therefore, the draft Indian Penal Code was completed only in 1837. Eventually, the Code was adopted only 1860, after a lapse of 22 years and with several revisions in between. Though reasons for the delay have not been conclusively asserted, its passage in 1860 is attributed by many to the Revolt of 1857. An alternate explanation is posed by David Skuy who places the English criminal law reform movement in the nineteenth century as the major motivation behind the passage of the IPC. He bases his argument on the ground that "the purpose of the Indian Code was to give India a modern legal system, not to pacify the population."[120] The Indian Code was to be a precursor to the British reforms and it success or failure in the colonies would pre-empt any adverse situations back in the domestic front. Since, the colonies allowed for quick legal reform with hardly any organised resistance, these could be a testing ground for changes to be exported back home. Kolsky observes that, "England's most renowned advocate of codification, Jeremy Bentham-along with many of his followers, including Thomas Macaulay and James Mill-openly hoped that codification of law in the colonies would have an impact on legal change at home."[121]

The process of codification was premised on the idea of 'colonial difference'-juxtaposing an essentialised idea of a lawless East vis-a vis- orderly West-that persistently justified colonialism. Kolsky cites how, "discussions about the mismanaged administration of justice in India repeatedly turned to this image of pre-

[118] Jeremy Bentham quoted in David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century', *Modern Asian Studies,* Vol. 32, No. 3, July, 1998, p. 517.
[119] A.C. Banerjee, *English Law in India,* Abhinav Publications, New Delhi, p. 120.
[120] David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century', *Modern Asian Studies,* Vol. 32, No. 3, July, 1998, p. 553.
[121] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', *Law and History Review,* Vol. 23, No. 3, Fall, 2005, p. 633.

colonial turmoil in order to justify new forms of colonial intervention."[122] Since the colonies were devoid of a 'rule of law' as part of the civilising mission, colonial jurists like Macaulay claimed to have "established order where we found confusion."[123] In contrast to Kolsky, Raman argues that Macaulay adopted an approach of incorporation and adaption rather than anglicization.[124] In fact, "the approach taken was a conservative one, not a Utilitarian exegesis. He proceeded from the reference point of indigenous tradition, and the code was hence informed by the spirit of preservation rather than renovation."[125] However, internal incoherence of such a position becomes evident if one returns to provisions aimed at abolition of the *devadasi* system, regulation of the age of consent, criminalisation of *hijras* and introduction of the crime of sodomy.

The shadow of occidental legality becomes evident, once again, in all the regulations that deal with sexuality of the colonised. The juxtaposition of the 'sexual excesses' of the East against the restraint Victorian ethics was necessary to justify the colonial conquest. The construction of the sexual and gender deviant was imperative for the perpetuation of the image of the coloniser as white, male, masculine, able bodied and most importantly heterosexual. Specifically, provisions like S377 and CTA generates a picture of the sexual subject emerges: one who was absent in the pre-colonial period but is now central to the sustenance of colonial domination. As Aniruddha Dutta comment, "the role and impact of Section 377 cannot be grasped within hoary India-West or modernity-tradition polarities but has to be understood within 'the crucible of colonial relations.'"[126] Criminalisation of homosexuality was as the necessary follow-up to the belief that, "the colonised needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, "native" viciousness and "white" virtue had to be segregated: the latter praised and protected, the former policed and kept subjected."[127]

---

[122] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', *Law and History Review*, Vol. 23, No. 3, Fall, 2005, p. 652.
[123] Macaulay quoted in Ibid, p. 652.
[124] Kartik Kalyan Raman, 'Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence', *Modern Asian Studies*, Vol. 28, No. 4, October, 1994, p. 788.
[125] Ibid. p. 778
[126] Dutta, A. (2011). 'Section 377 and the retroactive consolidation of 'Homophobia' in Narrain, A. and Gupta, A. (Eds.) *Law Like Love: Queer perspectives on Law*. Delhi: Yoda press.
[127] Alok Gupta, 'This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism', *Human Rights Watch*, December 17, 2008, p. 4.

Similarly, the disciplining of the figure of the eunuch through the Criminal Tribes Act 1871 was necessary to establish and perpetuate colonial masculinity as a coherent entity. When the questions of "what is and what is not the law, and who are and are not its proper subjects"[128] are posed before S377 and the Criminal Tribes Act a different subject emerges: one in which the imprints of both Burton and Macaulay is visible. It is a subject who inhabits the 'sotadic zones' that Burton portrayed and is then regulated through the laws framed by Macaulay and his heirs. Thus, while the subject is created within the law such creation is discursively facilitated from disciplines beyond the law. As Ratna Kapur says, Section 377 "marked the convergence of colonial, cultural and scientific discourse, to produce a subject where the sexual act was regarded as constitutive of the subject. Sodomy was the core identity of this subject who was driven by nothing other than sexual desire."[129]

Recalling Ruskola's framework, one can easily see that Section 377 and the CTA firstly creates the sexual subject, one who is characterised through sexual deviance and then lays down how this subject is to be disciplined. In 'Sexual States', Jyoti Puri also notes how the creation of a criminalised subjectivity based on sexuality is inextricable related to colonialism and codification. She states that, "Section 377 introduced the criminalization of non-procreative sexual practices in a way that did not have a precedent in pre-colonial India, and although the code does not overtly interpellate any specific persons or what have come to be identified as sexual orientations, the consensus is that it inaugurated the homosexual into legal history."[130] A similar argument is made by Aniruddha Dutta who says that Section 377 is one of the ways in which "the process of the re-mapping and re-figuring of extant categories of gender/sexual difference vis-à-vis modern taxonomy of sexual acts and subjects and allows for retroactive consolidation of phobic or resistant to such difference into a loose yet powerful assemblance of something like modern homophobia".[131] In other

[128] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, Cambridge, MA, 2013

[129] Ratna Kapur, 'Out Of The Colonial Closet, But Still Thinking 'Inside The Box': Regulating 'Perversion' And The Role Of Tolerance In Deradicalising The Rights Claims Of Sexual Subalterns', *National University of Juridical Sciences Law Review*,. Vol. 2, No. 455, July – September, 2009, p. 387.

[130] Jyoti Puri, *Sexual States: Governance and the struggle over anti-sodomy law in India*, Duke University Press, Durham and London, 2016, p. 57.

[131] Aniruddha Dutta, 'Section 377 and the retroactive consolidation of 'Homophobia', in Arvind Narrain and Alok Gupta (Eds.), *Law like Love: Queer perspectives on Law, Delhi*, Yoda Press, Delhi, 2011,p. 164.

words, Section 377 not only laid down categories like sodomy, unnatural sex, and homosexual but is also one of the ways in which an environment of homophobia was created.

CONCLUSION

The project of decolonisation, therefore, entails an engagement with how law imagines in the subject. For Halder, it is disturbing that occidental legal systems continue to occupy the exalted position "long after Western empires have ceased their administrative duties".[132] But such an articulation overlooks the fact that while "the law has been complicit in the violation of rights; it is also the very language which is being used to question the practices of power.[133]

In this chapter an attempt has been made to reflect on the impact that colonialism had on matters of sexuality. Borrowing Teemu Ruskola's concept of 'legal orientalism' this chapter has tried to name S377 as one complex intersection where colonialism, legality and sexuality met to create a new entity: a sexual subject. The necessity of looking at law as the site for creation of such subjectivity cannot be undermined, considering that it is law which is identified as the primary site of resistance for the LGBTQ movement in India. As Narrain states, "the emerging gay and lesbian communities paradoxically owe much to the operation of provisions such as S377 of the Indian Penal Code."[134] In either way, therefore, the law remains significant for the sexual subject. It is constituted by the law, so much so that not only its criminal status but also its resistance is framed within it.[135] The colonial encounters introduced different ways of thinking about sex and gender and this chapter has tried to show that these were motivated by an orientalist discourse. While stating the same, a word of caution needs to be re-asserted: that the chapter does not intend to imply that prior to colonialism there was a positive space for non-heterosexual sexualities. It only works

---

[132] Piyel Halder, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters*, Routledge, Oxon, 2007, p. 13.
[133] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 11.
[134] Ibid, p.66
[135] It is noteworthy that despite the adverse judgment in the Supreme Court, the LGBTQ movement still considers the legal strategy as the most appropriate one. In a personal interview conducted with Akshay, he laments that there should be irreverence to the law but that has not happened. See chapter 5 of the present thesis.

alongside Narrain's argument that what distinguishes the way in which non heterosexual sexualities experienced discrimination before and after the advent of colonialism is the institutionalisation of such discrimination.[136] While Narrain proposes both modern law and modern medicine as disciplines aiding such institutionalisation, this chapter deals only with the law.

The chapter proposes that orientalism is central to understanding sexual regulation within the colonies and here orientalism functions through the law. Any project of de-colonisation therefore is bound to engage with the law in general and Section 377 in particular. Replying to the question 'can the subaltern sex speak?' Kishalaya Mukhopadhyay says, "for the subaltern sexes to speak, they need to reverse the process of being silenced—of being ostracised from the mainstream."[137] For him, one of the ways is by re-investigating history. For this, chapter, it is through re-visiting the law. By doing so, this chapter is intended to be read as a precursor to next chapter which deals with the emergence of LGBTQ activism in contemporary India.

[136] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2004, p. 63.
[137] Kishalaya Mukhopadhay, 'Queering the Narrative Can the Subaltern Sex Speak?' *Economic and Political Weekly*, January 9, 2016 Vol II no 2, pp. 20-24.

CHAPTER III

LGBTQ MOVEMENT IN INDIA: ASSIMILATION AND DIFFERENCE

INTRODUCTION

Beginning from 1980s, dominance of the politics of redistribution has weaned and there has been a surge in recognition-based politics. This shift has occurred when identity based claims were finally acknowledged as a veritable presence. New social movements like the feminist movement, lesbian and gay movement, civil rights movement tend to gravitate more towards and identity based politics than a class based one.[1] Though identity based politics was initially cast off as primordial. However, social movements based around identities have increasingly shown that identity is not just a natural given but isimbibed with social meaning. Increasingly, there has been an acceptance that the dichotomy between what constitutes identity- biology or society, nature or nurture- is not neat and identity formation happens to be complex function of both.[2]

Stephen Engel explains that though a social movement's primary engagement is with the state, it also simultaneously develops a sub-culture. And he develops his hypothesis through an investigation of the lesbian and gay movement in the UK and the USA. There has been a proliferation of queer sub-cultureswhich are radically opposed to the heterosexual 'norm'. In contrast tosub-cultures, social movements seek social transformation and therefore engage with the state. However, this engagement with the state is fraught with tensions as the movement resists the state due to its hegemonic position and yet has to engage with it. For movements such as the LGBTQ this poses an additional challenge as sexuality (unlike gender, caste, ethnicity and race) has not yet been recognised as a politically salient marker of identity. The association of sexuality with the realm of private- a non political matter-renders it lower in a scale of hierarchy with issues like poverty, ethnicity, caste, religion being

[1] S.M. Engel, *The Unfinished Revolution: Social Movements Theory and the Gay and Lesbian Movement*, Cambridge University Press, Cambridge, 2001

[2] M. Bernstein, 'Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement, *American Journal of Sociology*, Vol. 103, No. 3, 1997, pp. 531-565.

given pre eminent position. This has in turn led to an under-theorisation of the LGBTQ concerns.

In consonance with other social movements, the LGBTQ movement is also positioned antagonistically to the state, not just over its claims to resources but also for recognition. In a sense, LGBTQ movements across the world are a paradigmatic case of how "struggles over distribution and classification"[3] can overlap with each other. While questions have been raised regarding the troubles that engagement with the state may pose for social movement politics, the state remains a behemoth whose presence cannot be ignored. One of the most significant ways in which the presence of the state is felt is through the operation of law. And therefore, when social movements seek structural changes they stand in confrontation with the law. As Barclay etal. remark, "concepts enshrined in legal institutions, such as rights, equality, and justice, represent persuasive and powerful symbols for movements for social change."[4]It is not surprising therefore that the LGBTQ movements across the world have been engaged in legal battles that span issues ranging from decriminalisation of homosexualityto recognition for same-sex relationships to protection from violence and also for extension of adoption and parenting rights. In other words, across the world LGBTQ movements have been making claims not to be discriminated on the basis of their sexual identity.

The LGBTQ movement's history has been a chequered one, varying across time and space. While in the USA important strides for LGBTQ rights has been achieved through strong collective mobilisation, in the UK such rights have been entrenched without much collectivisation happening. Though the trajectory of the movements varies across countries, there is one common feature that they share: the HIV/AIDS crisis. AIDS made the covert discrimination experienced by LGBTQ people explicit. LGBTQ groups were forced into activismbecause of the inaccessibility of health services.Though AIDS forced the LGBT movement into visible action, it must be re-iterated that the AIDS tragedy only helped in consolidating LGBTQ activism in countries such as the UK and the USA where gay and lesbian organisations were

[3]S.M. Engel, *The Unfinished Revolution: Social Movements Theory and the Gay and Lesbian Movement*, Cambridge University Press, Cambridge, 2001, p. 24.
[4]M. Bersntein, M.A. Marshall, & S. Barclay, 'The Challenge of Law: Sexual Orientation, Gender Identity and Social Movements', in Scott Barclay, Mary Bernstein and Anna Maria Marhsall (ed.), *Queer Mobilisations: LGBT Activists Confront the Law,* New York University Press, New York, pp. 1-17

already in existence. The impact of AIDS on LGBTQ movement was even more marked in countries like India where AIDS became the factor behind the growth of a visible LGBTQ movement. In the decade of 1980s, when AIDS arrived in India it had a paradoxical effect. On one hand, it stigmatised people who were afflicted by the disease and they tried to make themselves invisible, on the other hand it led to efforts which made visible populations who were already invisible on account of their sexualities. Effectively, it could be stated that in the HIV/AIDS discourse, gay rights activism in India found a footing. When confronted with the issue of HIV/AIDS prevention, health activists began to realise that AIDS was not the only challenge that they had to face. S377 of IPC which criminalised same sex activity was an additional obstacle. People who engaged in same-sex activities hardly came forward for HIV testing and condom distribution programmes because of the threat that S377 posed. And this in turn increased their vulnerability to the disease. It is in the unfortunate collision of the disease with the law that HIV/AIDS activists realised the inevitability of confronting the law so that health care could be provided to all, irrespective of their sexuality.

Based on these two factors, persecution on account of a stigmatised disease and the presence of a law that criminalises sodomy, a social movement politics has developed in the country that seeks to invoke sexuality as an axis of identity. Therefore, both the disease and the law are central to the movement. It is in the backdrop of this premise that the present chapter proceeds to present a historical trajectory of the LGBTIQ movement in India. By doing so, the chapter aims at understanding how the law became and has remained an important site for the LGBTQ movement. Further as the trajectory is mapped, it becomes evident that the engagement with the law has itself fuelled the movement.

While gay rights activism can be hinged around the HIV AIDS crisis, lesbian women's activism with the law comes from a different perspective and therefore when S377 becomes the visible agenda within the LGBTQ movement it marginalises lesbian women. The centrality that S377 has assumed within the movement is actually the reflection of an uneasy alliance between the gay and transgender activism on one hand and lesbian activism on the other. The chapter exercises caution, therefore, while talking about S377 as the central concern of the LGBTQ movement. The chapter is divided into three sections. The first section is an elaboration of the activities,

beginning in 1994, by organizations that came into existence in the aftermath of the AIDS crisis and which proclaimed to protect the rights of 'homosexuals'. Though gay support groups existed in a clandestine fashion even prior to that, the chapter is concerned with only such organizations which made public posturing against discrimination. In this regard, the chapter invokes the distinction that Naisargi N. Dave makes between queer activist groups and queer support groups.[5] Stated chronologically, this section intends to throw light on the kind of permutations and combinations that went on to consolidate what seems to be a LGBTQ movement today. The second section deals with the emergence of lesbian activism in India, which pre-dates gay rights activism in the first section. This section throws light on how the concerns that have plagued lesbian women are different from gay men. By doing so this section attempts to explain why the strategies for engaging with the law are different for the two. Though lesbian women have come out to support the demand of decriminalisation agenda, one cannot ignore that lesbian women were once suspicious of such a move. The single point struggle around de-criminalisation, with its emphasis on the privacy argument, had alienated lesbian women from the movement. While the lesbian activism and gay activism are fraught with internal differences the precarious position of lesbian activism within the women's movement also requires attention. Lesbian activists had to tread a lonely path, which was not only different from gay activism but also from the women's movement. The chapter concludes with insights from the previous two segments and throws light on the differences between lesbian activism and gay rights which indicates towards the multiple voices that inhabit the LGBTQ movement.

The Emergence and Growth of the LGBTQ Movement in India

Questions regarding the legality of S377 IPC were raised in 1994 when an organization called 'AIDS Bhedvav Vidhohi Andolan' (henceforth ABVA) filed a petition seeking its deletion. Though the use of S377 for criminal prosecution can be traced to the year 1884,[6] it came to be challenged only after a century. ABVA, which was working with HIV/AIDS prevention programmes encountered a stumbling block

[5]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016
[6]V. Bapoji Bhat, MysoreLaw Report, 1884, p. 280

while working in Tihar Jail.As has already been mentioned, the AIDS crisis brought together victims who formed support groups, due to the apparent apathy of the government in this regard and ABVA was one such early organization. While working around AIDS, it was inevitable that such organizations would have to engage with homosexual men who remained the most vulnerable group.

ABVA's political activity date back to 1992 when it had organised a demonstration outside the police headquarters in New Delhi. The demonstration was in protest against the harassment that suspected homosexual men faced in cruising places.[7] Subsequently, ABVA also placed an appeal to the Parliament for the repeal of S377. The appeal argued that S377 was at the root of discrimination that men suspected to be engaging in sodomy faced. Unfortunately, the strategy did not yield any result as ABVA was unable to gather support from members of the parliament.[8]

Subsequently, ABVA wanted to distribute condoms in Tihar Jail when it was reported in newspapers that homosexuality was actively practiced among prison inmates. hOwever, ABVA's proposal was turned down by the incumbent Inspector General of Jail, Kiran Bedi who argued that, "the number of homosexuals in jail is very small and the jail is too crowded for their acts to go unnoticed . . . we just need to sort out the gays by giving them medical and psychiatric help"[9]. Additionally, she also stated that if condom distribution is permitted by state authorities, it would be violative of S377 which criminalises 'carnal intercourse against the order of nature'. The jail authorities sought to curb the 'menace' by isolating the inmates. And it is in this failed attempt of ABVA to distribute condoms as part of its effort to prevent HIV/AIDS that the genesis of a health based argument against S377can be traced.

The Tihar Jail incident also led to another development which re-directed efforts against S377 towards the judiciary. While the jail authorities considered segregation

[7]Radhika Ramasubban, 'Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India' in Richard Parker, Rosalind Petchesky and Robert Sember (ed.), *Sex Politics: Reports from the Front Lines*, p. 97, available at http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf

[8]Bina Fernandes (ed.) *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, Mumbai, 2002, p. 165.

[9]Kiran Bedi quoted from Suparna Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/national Projects*, Palgrave Macmillan, New York, 2004, pp. 77-78

as an effective action to curb homosexuality, a private person Janak Raj Jai[10], filed a petition which argued that "condom distribution in Indian prisons would be tantamount to sanctioning antinational, immoral, criminal and unconstitutional behaviour."[11] He sought to invoke Gandhian aversion towards homosexuality as a valid ground for denouncing such western elitist gay rights activism.[12] Against this particular petition of Rai, ABVA filed the Civil Writ Petition No. 1784 of 1994 in front of the Delhi High Court.

The ABVA petition is significant not only because it was the first petition to be filed for protecting the rights of LGBTQ people but also because its argument framed the terms for future LGBTQ activism. The petition argued that S377 violates the right to privacy and the right to equality. Moreover, as S377 is applied, against a particular section of the population, it violates the principles of equality by creating two different classes of population and then treating them differently.Though the petition was admitted in the court it did not have a logical conclusion, as it died a silent death, waiting for hearings. And the only time when the court summoned, ABVA missed the date.

Meanwhile, another development took place. In 1997 All India Radio aired a programme conducted by Azadi Bachao Andolan that sought to spread awareness on homosexuality. The programme was sued by the metropolitan magistrate of Delhi with the allegation that it promoted homosexuality, which was a crime under the statute book. The events of the 1990s, though sporadic, and inconclusive remained significant for the future as it demonstrated the power that S377 exerted over the lives of homosexual people. It also laid the path for future LGBTQ struggles because it showed that engaging with the judiciary had a slight rippling effect (though inconclusive) while the legislature maintained an absolute indifference towards the issue. It can be argued that the reluctance of the LGBTQ movement to make the legislature as its focal point of engagement, even at present, is the fall out of this initial development.

---

[10]Janak Raj Rai was a lawyer and President of the Family Conciliation Service Center. See Suparna Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/national Projects*, Palgrave Macmillan, New York, 2004, p.78.

[11]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, p. 173

[12]Suparna Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/national Projects*, Palgrave Macmillan, New York, 2004, p.78.

Naz Foundation (India) Trust (henceforth Naz) workedin the field of HIV/AIDS prevention and became the singular name behind the development of the LGBTQ movement. Naz was formed in 1994, where it began working from New Delhi with the stated objective "to implement HIV/AIDS prevention programme among LGBT communities and act as a technical and financial support providing agency for local NGOs." [13]Its confrontation with S377 came when the Project manager of Bharosa Trust (an organization that Naz worked with since 1996), the Director of Naz in Lucknow and two of its outreach workers were arrested in July 2001, after a raid on both these offices. They were booked under Sections 377, 292, 120b, 109 of the IPC and S60 of the Copyright Act and S3 and 4 of Indecent Representation of Women Act. The situation was rendered grim not only from the arrest and inability to get bail for the activists but because NACO and Uttar Pradesh State AIDS Control maintained silence in this regard. It is noteworthy that NAz was a registered organisation that regularly had consultations with NACO and UPSAC. The 'Lucknow Four', as they came to be called, were in jail for 47 days and were subjected to torture while in custody.[14]But such human rights violation were not reported in the media instead the media revelled with reports that contained words like 'gay clubs', 'sex racket' and 'call boy racket'. To add to the agony public statements issued by the police stated that "the two organizations, Naz and Bharosa, were running gay clubs in contrast to the Indian culture and ethics under the garb of educating the masses about AIDS and HIV."[15]Such a hostile atmosphere had an impact on the bail plea- the magistrate rejected it, declaring that such organizations pose a threat to the society by abetting young men towards acts of sodomy. In a nutshell, the reaction of the media, the arguments of the prosecution and subsequently the grounds on which the bail application was rejected is reflective of what Rubin famously termed as 'sexual hierarchy'. Such events showed how the presence of an anti-sodomy law in the statute book constructed the image of a homosexual as sexual deviant and over rid the health rights ofmen who have sex with men (henceforth MSM), overlooking the fact that right to health is a part of Article 21. Aditya Bandopadhyay opines that the police

[13]Subir K. Kole, 'Globalizing queer? AIDS, Homophobia and the Politics of Sexual Identity in India', *Globalization and Health*, Vol. 3, No. 8, 2007, p. 6.
[14]Aditya Bandopadhyay, 'Where saving lives is a crime: The Lucknow Story!!' in Bina Fernandes (ed.), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, Mumbai, 2002, p. 107.
[15]Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Banglore, 2004, p. 70

made it clear that they "were to act as moral guardians of the public-no matter if they actually violated the basic human and fundamental and health rights of the arrested and thousands of MSM in the process."[16] For him, the Lucknow story is illustrative of an instance where saving human lives is not as important as entrenching sodomy within the net of criminality. Thus, in the initial years itself a health based paradigm became entrenched in the fight against S377.

Another significant incident which took place in 2001 made the pervasive nature of S377 apparent. In May 2001, a complaint (bearing no 3920) was registered in front of the National Human Rights Commission (henceforth NHRC) against a psychiatrist of AIIMS, New Delhi . The complaint came from a gay young man who fled from the conversion 'treatment' that he was forcefully made to undergo and sought refuge from the Milan Project, which is a subgroup of Naz. Milan approached the NHRC for intervention citing that Diagnostic And Statistical Manual of Mental Disorder (DSM) and International Classification of Diseases (ICD) had dropped homosexuality from its list as an illness in 1987 and 1990 respectively but the Indian Psychiatric society continued to label homosexuality as an ailment. The complaint sought to draw attention of the commission on the human rights violation that was occurring against a particular section of the population, based on the discretion of the medical practitioners. However, the NHRC rejected the plea on the ground that S377 of the IPC made homosexuality an offence and redressal was not possible till it remained in the law book.

In response to the lack of sensitivity shown by the NHRC, a signature campaign was started by National Law School, Bangalore in September 2001. It questioned the NHRC's decision on the following grounds. First, that S377 pertained to sexual acts which may be performed by anybody and it did not criminalise any particular sexual identity. Second, despite the fact that the NHRC's mandate can extend beyond national laws it choose to accept S377 as a barrier for LGBT persons from enjoying basic human rights, instead of challenging S377 itself. Third, the NHRC by refusing to hear the complaintshowed its unwillingness for being the "guardian of human

[16]Aditya Bandopadhyay, 'Where Saving Lives is a Crime: The Lucknow Story!!' in Bina Fernandes (ed.), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, Mumbai, 2002, p. 106

rights of all people in India"[17]. Effectively, the NHRC has abdicated its responsibility. Fourth, while its parallel in South Africa sought to protect the rights to equality, privacy and dignity of LGBT persons in their country, in India the "NRHC even refuses to acknowledge that the right to choose one's sexual orientation is a basic human right."[18]Specially, on the allegation of the NHRC that the LGBT campaign is funded by international organizations and has no domestic roots, the letter from NLS displays is dismay with the commission strongly. It says that there is "a sense of double failure: the failure of the sexuality movement to communicate its strong indigenous roots and presence, as well as the failure of the establishment to notice the increasingly articulate though marginal voice of people who identify as gay, lesbian and bisexual."[19] The signature campaign was a successful venture because it established that 'gay rights are human rights' and in the country S377 is an upfront to human rights.

These two events of 2001 made Naz Foundation India Trust to consider legal action against S377. With the help of Lawyer's Collective it placed before the Delhi High Court Writ Petition (Civil) No. 7455 of 2001. The Naz petition, as it came to be called, urged only for reading down of S377. By doing so it admitted that S377 had benefits for protecting children from sexual abuses. The crux of the petition was that S377 by criminalising private consensual adult sex breached the fundamental rights granted under articles 14, 15, 19 (1) (a-d) and 21 of the Constitution.

Interestingly, the petition came in for criticism from organizations working on LGBT issues on two fronts: the question of representativeness and the principles that it invoked.[20] As far as representativeness was concerned, criticism emerged from self support gay/MSM/Hijra/Kothi and lesbian groups who came together as the Coalition of Sexual Minorities Rights in 2000 and "accused Naz of failing to engage with them in a countrywide consultative process on the petition."[21] Since the petition

[17]Letter to the NHRC opposing Medical Treatment of Homosexuality in Nivedita Menon (Ed.), Sexualities, New Delhi: Women Unlimited, 2007, p. 309
[18]Letter to the NHRC opposing Medical Treatment of Homosexuality in Nivedita Menon (Ed.), Sexualities, New Delhi: Women Unlimited, 2007, p. 310.
[19] Ibid, p. 312.
[20]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016
[21]Radhika Ramasubban, 'Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India' in Richard Parker, Rosalind Petchesky and Robert Sember (ed.), *Sex*

emphasised on MSM it had problems on two fronts: first, transgendered persons/kothis/hijras do not identify themselves as men; second the obsessiveness with HIV/AIDS alienated the lesbian groups. As far as the principles that the petition sought to privilege are concerned, questions were raised on the desirability of using right to privacy. Privacy remained at the heart of the tussle because on one hand, it left poor gays, hijras and kothis vulnerable to criminalisation (as they inhibited public spaces) and on the other lesbian organizations had for a long time been critical of the private being made being isular from state action (as they came from a women's movement perspective).

The Naz Petition was up for hearing until 2008. While the proceedings in the court and the judgement itself remained extremely important the intervening period between 2001-2008 tells an interesting story about how S377 moved from a contested position to being the central point for the LGBT movement. This period also reveals how the Naz Foundation and Lawyer's Collective could successfully forged a coalition with possible allies. The petition itself is a testimony to the way in which the LGBTQ movement in India has managed to narrow down its internal differences and solidify itself as a coherent movement. The account presented subsequently show that the Naz petition moved from a position where there was "severe criticism from a new generation of alternative sexualities activists groups, who were beginning to develop their positions on the question of sexual rights"[22] to a strategic convergence phase where its critics acknowledged that the significance of supporting Naz came from "its usefulness as a mobilising tool."[23]

In response to the Naz petition, a counter-affidavit was filed in November 2002by lawyer, Ravi Shankar Kumar for Joint Action Council Kannur (henceforth JACK) which argued for retention of S377. It argued that S377 is necessitated to prevent HIV from spreading. The petition by JACK questioned the locus standi of Naz to file the petition. It portrayed Naz party to "an international network which was using HIV to

---

Politics: Reports from the Front Lines, p.101 available at http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf

[22]Radhika Ramasubban, 'Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India' in Richard Parker, Rosalind Petchesky and Robert Sember (ed.), *Sex Politics: Reports from the Front Lines*, p.101 available at http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf, p. 99.

[23] Ibid p. 119

push an agenda."[24]It is worth mentioning that HIV/AIDS was invoked by both the parties but the arguments worked in two directions. On one hand, while the AIDS crisis led to the creation of support groups like Naz, it also evoked backlash in the form of organisations like JACK which termed AIDS as "the effect of a conspiracy between the multinationals, the U.S. Central Intelligence Agency, politicians, police, NACO, government bureaucrats, and, not least, NGOs like Naz."[25]

The Government of India's filed its affidavit in response to the Naz writ in September, 2003. The affidavit argued that the legality of S377 cannot be challenged simply on the basis of its misuse. Misuse of law and question on policy of law are two separate issues which cannot be conflated. The affidavit opined that if the petitioners wanted a change in the law, they should have mobilised public opinion and approached the parliament, instead of bringing it to the court.[26]

Though the Government affidavit criticised the absence of public opinion on the issue of decriminalisation and thereby indicated how the petition had limited support, it had a unintended consequence. Arguments used in the affidavit such as "the deletion of the said section can well open flood gates of delinquent behaviour and be misconstrued as providing unbridled licence for the same"[27] exposed the state's homophobia. Such a stance coming from the state served to consolidate some amount of solidarity among the LGBT groups. The affidavit also continuously mentioned homosexuality/lesbianism in conjunction with each other. While technically, it was always held that S377 cannot be applied to lesbian acts, the affidavit's collapse of the two indicated the extreme necessity of lesbian women to join hands with the legal struggle.Meetings subsequently called by Naz in Delhi on September 13 and 16, 2003 and in Mumbai September 28, 2003 had more participation from the previously sceptical groups and consultations began to be a collective concern. to discuss the ways in which the movement ought to move forward.

[24]Ibid, p. 88
[25]Jyoti Puri, *Sexual States: Governance and the Struggle Over Anti-Sodomy Law in India*, Duke University Press, Durham and London, 2016, p. 183
[26]As mentioned in Chapter III, previous attempts by ABVA to engage with the legislature had failed and therefore, it may be considered as an unviable strategy.
[27]Affidavit by Home Ministry available at http://www.lawyerscollective.org/files/MHA%20Affidavit.pdf

Jyoti Puri argues that the choice of venue for the Delhi meeting (Saheli) indicated an emerging alliance between Naz and its fiercest critics.[28] The discussions held agreed on the necessity of leaving old differences behind and march together in front of the impending challenges, "to show India that there is a large community of queer people who want legal reform."[29] Since the government affidavit had disputed the applicability of S377 against individuals in an arbitrary manner, the possibility of filing additional interventions was considered. The additional interventions would document cases where S377 was used to harass people. A two-pronged tentative strategy was decided upon in which "one that would work closely with Naz on the petition itself (for example, soliciting and collecting affidavits), and one that would conduct a wider and public campaign on queer politics, more generally."[30]

In the light of the consensus that was arrived at, a coalition of 12 organizations came together in mid-November of 2003 under the name 'Voices against 377' (henceforth Voices).[31] Organisations that came under Voices worked on women's rights, child rights, human rights, sexual rights, right to health, and lesbian, gay, bisexual and transgender issues. Voices, as a collective worked with an intersectional perspective and acknowledged the relationships that existed between S377 and the larger struggles of women's rights, resistance to fundamentalism, and struggles around justice. For Voices, therefore the purview of S377 is beyond same-sex acts, it is a modus operandi of controlling sexuality. The process of consolidating solidarity in support of the Naz petition was further strengthened when consultative meetings by Lawyers Collective were called in Mumbai on March 10th, 2004 and in Bangalore on June 13th, 2004. Once again these series of consultations triggered by the government affidavit allowed a nascent LGBTQ movement to grow.

In the meantime, the Delhi High Court dismissed the Naz Foundation writ on 2nd September 2004 agreeing with the Government affidavit that Naz Foundation does not have any locus standi in the matter.And it held that "just for the sake of testing the

[28]Jyoti Puri, *Sexual States: Governance and the struggle Over Anti-Sodomy Law in India*, Duke University Press, Durham and London, 2016, p. 184
[29]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, p. 190
[30]Ibid.
[31]The organizations which are part of Voices against 377 are: Amnesty International India, Anjuman, Breakthrough, CREA, Haq, Jagor, Nigah Media Collective, Nirantar, Partners for Law in Development, PRISM, Saheli Women's Resource Centre, SAMA and TARSHI

legislation, a petition cannot be filed."[32]While this in itself was a setback, yet the dismissal order by belittling the writ as "an academic challenge" pushed the nascent movement to strategise further on becoming publicly visible. As in the case of 'Fire' when lesbian women had to emerge out of their invisible spaces to claim their existence, similarly in this case too LGBTQ groups like Voices against 377 in New Delhi and National Campaign for Sexuality Rights in Bangalore (among several others) emerged. They began articulating that the presence of S377 is not merely an academic issue but bore 'real' consequences in their lives.

Campaigns such as the Million Voices Campaign launched by Voices on 9th of December 2004 became effective ways to make LGBTQ issues visible. The express aim of the campaign was to put "forth the diverse opinions and experiences of sexuality as a response to S377, as well as to counter myths and taboos about issues of sexuality in society."[33] The campaignwas to draw responses from people on S377, sexual rights, sexual diversity and same sex desire on pieces of cloth. In semblance to their intersectional politics, these bits of cloth were to be switched together into a quilt like form, giving a tangible dimension to theoretical positions.

While coalitions like Voices started various initiatives to fulfil its objective of making queer issues visible in the public realm, Naz Foundation moved before the Delhi High Court on 15th October, 2004 with Review Petition 384 of 2004 seeking the dismissal of the High Court order and pleading for re-admittance of the writ. This plea too was rejected by the High Court on 3rd November, 2004. In this instance, however, a meeting had already held on October 24, 2004 (in between the filing of the review petition and the order of dismissal) in Mumbai which explored the possible alternatives that would have to be taken, in the event of the review petition being rejected. Two meetings were held after the dismissal, in Bangalore from December 12–13, 2004 and in Mumbai on January 9, 2005. Two options were considered: first, filing a Special Leave Petition in the Supreme Court and second, filing of writs in different High Courts of the country. Both the choices entailed difficulties because the first option might result in an adverse judgment which would effectively lend a death blow to the judicial struggle and the second option might lead to diverse

[32]Delhi High Court Dismissal Order available at http://www.lawyerscollective.org/files/Delhi%20HC%20Dismissal%20Order,%202004.pdf, p. 1

[33] Voices Against 377, '*Rights For All: Ending Discrimination Against Queer Desire Under Section 377'*, Nirantar, New Delhi, 2005, p. 40.

pronouncements across the country. Nevertheless, the first option was chosen and on February 16, 2005 the Naz Foundation filed SLP (C) No. 7217-7218 of 2005 challenging the orders of the Delhi High Court dated 02.09.2004 and 03.11.2004. It is noteworthy that the consultations graduallyhad become wider, with each step that was being taken in the legal battle. And it is because of such consultations that a sense of ownership in the struggle to remove S377 gradually emerged in the previously discrete groups.

Unlike the first instance where the government took twenty-one long months to file an affidavit, in SLP of 2005 it took only seven months to do so. In its reply filed on September 26, 2005 the government again argued that public morality was a compelling ground to retain S377 and the duty of the courts was only to adjudicate rather than determine the nature of offences. The Supreme Court issued its verdict on February 3, 2006 and ordered that "the matter does require consideration and… we set aside the impugned judgment and order of the High Court and remit Writ Petition (C) No. 7455 of 2001 for its fresh decision by the High Court."[34] This was a major watershed moment in the legal battle, the first step towards the Delhi High Court judgment had been laid.

In the 2003 affidavit, the Ministry of Home Affairs had not filed responses to Para 13(E)[35] and Para 42-53[36]of the writ petition stating that the National Aids Control Organization (henceforth NACO) was to respond to these paragraphs of the Writ. Responses to these paragraphs were filed by NACO in its reply affidavit dated July 17, 2006. The NACO affidavit remains crucial in the legal struggle because it de-mystified the state as a monolithic structure which is unequivocally homophobic. The NACO affidavit testified that there are about 25 lakhs MSMs in India and that more than 8% of the MSM population are affected by HIV, which is much higher than the general population. Unlike the affidavit of the Home Ministry, the NACO affidavit

[34]Supreme Court Order available at http://www.lawyerscollective.org/files/Supreme%20Court%20Order,%202006.pdf

[35]Para 13 (E) raised question on the violation of Right to Life under Article 21 by the presence of S377. It stated how the presence of S377 drove MSM population underground, making them vulnerable to HIV/AIDS and thereby infringing upon their right to health.

[36]Para 42-53 elaborated on the same aspect, while also throwing light upon the contradictions that exist between the state's avowed aim of preventing HIV/AIDS while retaining S377 on the law book. It further attests to the difficulties that NGOs working on HIV/AIDS prevention and its workers face while trying to reach the targeted population (which includes MSM) because of the operation of S377. Citing the Lucknow incident, it also raised concerns regarding the application of S377 on HIV/AIDS social workers who were arrested by the police on assumptions of engaging in sodomy.

stood with Naz Foundation's claim that "section 377 of IPC can adversely contribute to pushing the infection underground, make risky sexual practices go unnoticed and unaddressed."[37]This shift is a momentous one primarily because the judicial system is based on evidence and the NACO affidavit provides the numbers. Its importance also lies in the effect that it had on the movement

After the NACO reply,the Naz petition gained strength and this remained one of the most important moments during the journey. Another major watershed moment was when Voices filed anintervention application (henceforth I.A) in November 2006. While the NACO affidavit replied to the necessity of decriminalising same sex acts due to HIV/AIDS concerns, the Voices intervention was primarily aimed at responding to the claims made by the Home Ministry in its affidavits of 2003 and 2005. Debunking the claim of the Home Ministry that there wasno evidence of S377 being used arbitrarily, the Voices intervention provided a compendium of additional 51 documents which included affidavits, FIRs, judgments and orders, and scholarly research. These documents showed how S377 has been used as a medium of exploitation, torture, rape and violence towards LGBTQ persons. It must be re-iterated that 'lack of evidence' has been consistently used againt the Naz Petition to delegitimize the challenge to S377. The Voices intervention sought to respond this and made a strong statement that "the continuance of Section 377 on the statute books operate to brutalise a vulnerable, minority segment of the citizenry for no fault on its part. A segment of the population is criminalised and stigmatised on a point where individuals are forced to deny the core of their identity and vital dimensions of their personality."[38] The Voices petition was a turning point for the movement on two accounts: first, the composition of the organizations that called itself as the Voices was unique because it cut across several identities, categories and allowed for the practice of an intersectional politics; and second, its plea for decriminalisation moved beyond the health paradigm placing 'full moral citizenship' at the centre of its arguments.

The Delhi High Court heard the case from 18th September, 2008 to 7th November, 2008. While Anand Grover acted as the counsel for Naz Foundation Trust, Shyam

[37]Health Department affidavit, available at http://www.lawyerscollective.org/files/NACO%27s%20Affidavit.pdf

[38]Arvind Narrain and Marcus Eldridge, *The Right That Dares To Speak Its Name*, Alternative Law Forum, Banglore, 2009, pp. 31- 32.

Divan argued on behalf of Voices against 377 and Additional Solicitor General represented the Union of India, H.P.Sharma argued for B.P. Singhal and Ravi Shankar argued for JACK. While the judgment which was finally delivered on 2nd July, 2009 became one of India's most widely cited human rights judgments. In fact, the proceedings received a lot of attention on account of Justice A. P. Shah and Justice S. Muralidhar's "strong sense of empathy for the suffering of LGBT persons."[39] Arvind Narrain mentions three particular moments in the course of the proceedings as instances of 'judicial empathy': first, when apparently moved by the arguments of Justice Sachs of South African Constitutional Court, Justice Shah wished that Additional Solicitor General, P.P. Malhotra was present; second, when the judges asked the Additional Solicitor General to respond to the strong argument on dignity presented by Shyam Divan for Voices against 377 and third, when H.P. Sharma's statement that homosexual enjoyed group sex was countered with the source of such knowledge. According to Narrain, the judges, "through the art of empathetic listening, restored dignity to a section of society on whom the government seemed intent on pouring nothing but contempt and scorn."[40]

Prior to the judgement being delivered, an open letter expressing objection to the criminalising consensual sexual behaviour was sent to the Government of India, Judiciary and citizens of the country, in September 2006, by Vikram Seth and several other eminent personalities such as Swami Agnivesh, Aditi Desai, Nitin Desai, Siddharth Dube, Lakshmi Sehgal, Shohini Ghosh, Veena Das, Ramchandra Guha, Indira Jaisingh, Sunil Khilanani, Arjun Appadurai and one hundred and twenty eight other persons. Amartya Sen's statement of support read that "the criminalization of gay behaviour goes not only against fundamental human rights… but it also works sharply against the enhancement of human freedoms in terms of which the progress of human civilization can be judged."[41]It is noteworthy that the LGBTQ movement was gradually gathering support from the society was the legal battle was being sought. Such development have been open to multiple readings. Rahul Rao refers to the discursive role that the open letter performs. He argues that it "implicitly and somewhat contradictorily reinforces the narratives of communitarian authenticity and

[39]Arvind Narrain, 'A New Language of Morality', in Narrain, Arvind and Gupta, Alok (ed.), *Law Like Love: Queer Perspectives on Law*, Yoda press, Delhi, p. 266.
[40]Ibid. p. 270.
[41]Open letters against Sec377 available at http://www.nytimes.com/packages/pdf/international/open_letter.pdf?mcubz=2

cosmopolitan rescue."[42] Rao's criticism is based on the contradictory pulls of the letter: on the one hand it argues that S377 is alien to the Indian subcontinent and was exported by the British, and on the other it makes a human rights appeal based on the developed/ developing countries dichotomy (which in itself is a western import).Notwithstanding such discursive fallouts, the open letter made an impact- the then Prime Minister Dr. Manmohan Singh did come out in support of LGBTQ rights and spoke about the necessity to have tolerance towards the community.[43]

On July 2, 2009 the Division Bench of the Delhi High Court delivered a historic verdict. In thejudgment, the judges overturned the 149 year old statute law and held Section 377 of IPC is violative of Articles 21, 14, and 15 of the Constitution of India "insofar as it criminalizes consensual sexual acts between adults in private."[44]

The Naz judgment became significant for future adjudication and Pritam Baruah offers an interesting insight on why this is so. Unlike the land mark Lawrence V Texas case on decriminalisation in the United States which argued on the proper limits of criminal law and morality, this judgment invokes constitutional values like equality, privacy and dignity. Moreover, it also recognized that due to the operation of S377 a significant group of the population "are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do."[45]Hailed as "a powerful example of judicial craftsmanship" Pratap Bhanu Mehta argues that "it is, unusually amongst recent judgments that are constitutionally significant, clear and precise."[46] What makes the Naz Judgment congratulatory is not just its emancipatory power for those criminalised under S377 but the universal language of constitutional morality which it fore grounds. In Mehta's words, "what the court says is this. Under our Constitution no person ought to be targeted or discriminated against for simply being who they are."[47] It is this wider implication of the Naz Judgment that leads Kalpana Kannabiran to opine that, "the Delhi High Court judgment makes the articulation of

[42]Rahul Rao, *Third World Protests: Between Home And The World*, Oxford University Press, Oxford, 2010, p. 327
[43] Ibid.
[44]See Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del) available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf.
[45]Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del) available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf.
[46]Pratap Bhanu Mehta, 'Its about us all', in Arvind Narrain and Marcus Eldridge, *The Right That Dares To Speak Its Name*, Alternative Law Forum, Banglore, 2009, p. 115
[47]Ibid.

LGBT rights a torchbearer for the more general understanding of discrimination, oppression, social exclusion and the denial of liberty, on one hand, and the meaning of freedom and dignity, on the other."[48]Overriding a numerical argument to justify the retention of criminalisation of consensual adult same-sex acts, the court had held that, "moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, Constitutional morality must outweigh the argument of public morality even if it may be the majoritarian view."[49]By doing so, the court established its credential as a counter-majoritarian institution which entrenches the rights of all marginalised population.

The celebration around the judgment was, however, not unanimous. In fact, acrimonious reaction to the judgment can be seen from mixed reactions generated in the media.Soon thereafter, on the September 7th, 2009 the Supreme Court granted permission to file the first special leave petition by Suresh Kumar Koushal. In all an overwhelming number of fifteen SLPs came to be filed against the Naz judgment from groups such as the Apostolic Churches Alliance, S.D. Pratinidhi Sabha & Anr, the Krantikari Manuvadi Morcha Party, the Tamil Nadu Muslim Munnetra Kazhagam; the Utkal Christian Council; Joint Action Kannur; the All India Muslim Personal Law Board, Raza Academy; and Trust Gods Ministry; individuals such as SK Tizarawala; Bhim Singh; Ram Murti; B. Krishna Bhat; B.P. Singhal; and institutions such as the Delhi Commission for Protection of Child Rights. Of these, only two parties: Joint Action Kannur and B.P. Singhal were parties before the High Court.

In the Supreme Court, Naz Foundation and Voices against 377 remained as the main respondents, while five interlocutory applications (henceforth I.A.) were filed in support of the judgment by the following: Minna Saran and 18 other parents of LGBT persons; Sekhar Seshadri and12 other mental health professionals; Nivedita Menon and fifteen other academics; Shyam Benegal and; Ratna Kapur, Babu Matthew and other law academics. On 13th February 2012, when the hearing commenced S.D. Pratinidhi Sabha and Anr, the Tamil Nadu Muslim Munnetra Kazhagam, Raza

[48]Kalpana Kannabiran, 'India: From 'Perversion' to Right to Life with Dignity', in Arvind Narrain and Marcus Eldridge, *The Right That Dares To Speak Its Name*, Alternative Law Forum, Banglore, 2009, p. 101.
[49]Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del) available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf.

Academy and B. Krishna Bhat did not appear in front of the court. Bhim Singh was not heard by the Court as he did not represent his position while the petitioner's side was speaking. The matter was heard till 27th of March, 2012 for a total of 15 days, with the petitioners speaking from the 13th February, 2012 to 1st March, 2012 and the respondents taking up their plea from 1st March. The case was heard by a two judge division bench of Justice S.J. Mukhopadhyay and Justice G.S. Singhvi.

Initially, the Union of India did not file an appeal against the judgement and this led to a peculiar situation where the court had to instruct the union of India that it will not allow a neutral position and that it should file all relevant information on the case. The neutral stand of Union of India is noteworthy as it shows a reversal of its earlier position during the High Court proceedings also indicates towards a possible the impact that the LGBTQ movement had on the government's position. On 23rd February, P. P. Malhotra, Additional Solicitor General of the Ministry of Home Affairs argued that S377 ought to be retained in the light of societal disapproval towards certain sexual acts as well as the fact that this section was also used to convict cases of rape and child sexual abuse. The argument was largely similar to what was asserted in front of the High Court. However, on the very next day Mohan Jain, Additional Solicitor General representing Union of India addressed the court stating that no such position was taken up by the Union of India. Eventually, the court heard Jain's argument on the 1st of March 2012 and the Attorney General, Goolam Vahanvati appeared and argued before the court on the 21st of March2012. While Jain's arguments stressed upon how S377 impeded the HIV prevention work, the Judges asserted that the primary question which the Union of India was expected to reply was regarding whether S377 was violative of Article 14, 15 and 21. This question was replied when Vahanhati appeared and took the position that when Article 14 and 21 are read expansively S377 could be stated as violative of fundamental rights as it discriminated against a particular class of people. With regard to application of Article 15, he expressed doubts.From the above account it becomes evident that there was a visible shift in how the government looked at S377. While in 2003, when the Ministry of Home Affairs chided Naz for raising the issue without any visible support for the cause, in 2012 the Attorney General agreed that S377 is discriminatory. The strength and impact of the LGBTQ movement can be gauged from this pivotal shift. It is also interesting that another representation came from the

Government of the National capital of Delhi stating that they agreed with the Government of India's position. Effectively, this was an indication of the growing legitimacy that LGBTQ rights had gained over the years.

It must be recalled that in 2009, Voices against 377 was the only other party that aligned with Naz Foundation.But in 2012 five additional interventions were filed in support of the Naz Foundation. It came not only from academicians and concerned citizens (Nivedita Menon and fifteen other academics; Ratna Kapur and other law academics; and Shyam Benegal) but also from parents of LGBT persons and mental health experts. These momentous changes that indicate that the Delhi High Court judgment had appealed to the conscience of the country; not only have parties aggrieved by the operation of the law stood for decriminalisation (Voices against 377 and parents of LGBT persons) but also those who believed in the values of constitutional morality and inclusiveness of the Indian polity rallied in support of the judgment. The I.A. filed by parents of LGBT persons is another watershed moment in the legal journey of S377 because after the Voices petition, this was for the second time that 'real' stake holders had come forward to fight against criminalisation of homosexuality. The question of locus standi which had been raised in the initial period was now redundant.

It is important to note the significance of each intervention before the Supreme Court as a testimony to how the movement has grown in strength and built alliances with other sections of the population. This is visible from Shyam Benegal's I.A. which argues that S377 is applicable to all sections of the population and is therefore violative of the right to privacy of everybody. Benegal's application can be read as a successful testimony of alliance building between the LGBTQ movement and the heterosexual population. In addition two other interventions which came from the academic community add credence to this argument regarding successful alliance building by the LGBTQ movement. The I.A. filed by mental health professionals is another decisive moment as it represents the lone voice from 'experts' of the medical and mental health field. It is worth recalling the 2001 events when the NHRC had to be approached against the practises of Psychiatry department of AIIMS within a decade there had been such widespread changes that eminent members from the discipline of psychiatry intervened to act in support of the LGBTQ movement.

It can be conjectured that the visible strength that the LGBT movement was gathering over the years was not only the result of progresses in the legal realm but also because sexuality had entered into the public sphere as a legitimate matter. The mediascape had substantially changed in the new millennium and this enabled Naz to become what ABVA could only aspire to. What was till now a matter of closed door discussion, had become a topic for vibrant discussion. An overwhelming number of people, emboldened by the High Court judgment had come out to their families, friends and at their workplace. The Naz judgment laid down the foundations of change and its contribution can be succinctly summed up in the following words,"it is very rare for a judgment to have such an instantaneous social impact as to actually begin a national conversation. Therein lay the magic of the Naz judgment!" [50]However, celebrations around Naz were short lived as the Supreme Court delivered a body blow to the movement when it delivered its judgment on December 11, 2013. The Supreme Court judgment held that "Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable."[51] Justice Singhvi and Mukhopadhyay argued that it is only for the legislature to determine if S377 may exempt consensual same sex activity between adults. The judgment drew ire from across the country because it referred to the LGBT community as a 'miniscule minority' and refused to acknowledge that S377 victimised persons based on their sexual identity.

The Koushal Judgment has been equated to infamous judgments like ADM Jabalpur and Mathura, in terms of its denial of civil liberties. For Sheikh and Narrain, Koushal can be "accused of being a cowardly judgment, one that masks prejudice and law and is full of logical inconsistencies and short on legal reasoning."[52] One of the major tasks of judges while delivering their judgment is to offer reasoned arguments through which a particular conclusion was arrived at but as pointed out by Khaitan, "the judgment in Koushal fails even to perform the fundamental judicial task of providing reasons for its judgment. The judgment is a series of long quotations from previous cases, with little effort to explain how these cherry-picked precedents relate to the

[50]Arvind Narrain and Marcus Eldridge, *The Right That Dares To Speak Its Name*, Alternative Law Forum, Banglore, 2009, p. 4
[51]Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070.
[52]Danish Sheikh and Siddharth Narrain, Struggling for Reason: Fundamental Rights and the Wrongs of the Supreme Court, Vol - XLVIII No. 52, December 28, 2013, p. 14

case at hand or justify the conclusions that the judges ultimately reach."[53] In brief, the judgment has been criticised not just for its operative judgment but also for the lack of judicial reasoning. The Koushal judgment is problematic because across the world, courts have been engaged in providing an expansive reading of rights. Moreover, in this case, the state had shown no interest in appealing against the High Court judgment which implied that the state admitted that there is no compelling state interest for retaining S377. Yet the judges argued that "in considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles."[54]

By refusing to uphold the Delhi High Court judgment, the Supreme Court retracted back the step taken towards a positive sexual rights framework in India, which had started accepting sexual minorities into its purview. The Supreme Court verdict invited sharp criticism for what was apparently 'judicial abdication of duty'.[55]

The insensitivity of the judiciary to an important human rights issue sparked a nationwide (and even outside) display of protest and the 15th of December, 2013 was observed as 'Global Day of Rage' in 16 cities across the country. The slogan of 'No going back, 377' found support not just from the LGBTQ community but also from allies of the movement. Unlike the Pride Marches which have display flamboyance, the Global Day of Rage was a sober event with anger being the marked emotion. Reflecting on the significance that the day had on the movement,Gautam stated that "there is no going back. The case matters in a way much less now. 2001 till 2013 is a long time for people to come of age and change to happen. Young queer people have reinforcement elsewhere now."[56]

It also needs to be iterated that the landscape from 2001 to 2013 had changed drastically with the proliferation of internet usage. The effective use of social media site, Facebook in synchronising the Global Day of Rage across the country shows the impact that

[53]Tarunabh Khaitan, Koushal v Naz: ADM Jabalpur 2.0, December 14, 2013available at http://lawandotherthings.com/2013/12/koushal-v-naz-adm-jabalpur-20/
[54]Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070.
[55]Sujitha Subramanian, 'The Indian Supreme Court Ruling In Koushal v. Naz: Judicial Deference or Judicial Abdication?' *The George Washington International Law Review*, Vol. 47, 2015, pp. 711-762
[56]V. Kolmannskog, 'No Going Back: A Case study of Sexual and Gender Minorities in India and their Legal Mobilization', *Advances in Social Sciences Research Journal*, Vol. 3, No. 8, 2016, p.91

technology has on movement politics. The online community observed the Global Day of Rage on the evening of the judgment day itself.[57]

Paradoxically, 'inherent wrongfulness of the Koushal judgment' had a positive ramification on the movement. It forged the stronger bonds between the gay activists and lesbian activists. As has been mentioned earlier, the focus on sodomy laws had been a bone of contention between the two. However, the Supreme Court judgment casting doubts over the community's presence such differences were put on the backburner. And attempts have been made to show the LGBTQ movement a coherent whole.

Moreover, the judgment triggered several other forms of queer activism. For instancee-zines such as Gaylaxy and Gaysi were created to highlight LGBTQ presence, queer collectives in colleges mushroomed, more plays and literature around queer lives have become available. In a nutshell, popular culture has become the next big front on which LGBTQ visibility was now being pegged. Sukhdeep Singh sums up that , "The 2013 judgment had an opposite effect of the intended... Koushal only increased people's resolve."[58] Thus, it can be argued that despite discrimination, both legal and social, remaining pervasive, post-Koushal the LGBTQ community resistance to their marginalisation has become a veritable presence.The inherent wrongfulness of the judgment led to filing of review petitions against the judgement, Interestingly, the first review petition came from the Union of India and then followed by another 7 petitions. Apart from the Union of India, the other review petitions came from Naz Foundation, Voices against 377, Dr. Shekhar Seshadri and 12 other mental health practitioners, Ms. Minna Saran and 17other parents of LGBT persons, Prof. Nivedita Menon and 15 other academicians, Prof. Ratna Kapur and 10 other teachers of law, and film-maker Shyam Benegal.

Though the petitions were filed separately, these show the growing strength in the movement as there were mutual consultations among the parties. In fact, the review petitions found a lot of support as can be seen in the amount of interest that the media

[57]M. Tonini, *The Ambiguities of Recognition: Young Queer Sexualities in Contemporary India*, Lund University (Media-Tryck), Lund, 2016, p. 124.
Also see, Rohit K. Dasgupta, 'Articulating Dissident Citizenship, Belonging, and Queerness on Cyberspace', *South Asian Review*, Vol. 35, No. 3, 2015
[58]V. Kolmannskog, 'No Going Back: A Case study of Sexual and Gender Minorities in India and their Legal Mobilization', *Advances in Social Sciences Research Journal*, Vol. 3, No. 8, 2016, p.97

showed. Nanda and Minocha point out to that post-Koushal "the immense public outcry" are partly an "indication of rising public resentment against this legal fetter on expression of personality."[59]

The review petitions were considered in a closed hearing by Justice H.L. Dattu and Justice S. J. Mukhopadhyay on the 28th of January, 2014. As Justice Singhvi had retired, Justice Mukhopadhyay was present. As a second set-back to the movement, the judges quashed the review plea. Among the range of emotional outpourings that came from the community Orinam, a LGBTQ support group issued a statement on their website that rejection of the review petition "represents an abdication by the judiciary to protect the spirit of the constitution. It is a failure to assert that fundamental rights hold for all persons however "miniscule" their numbers are perceived to be."[60]For CREA, a human rights organization it was 'black day for human rights in India'.[61]

Unlike the Koushal Judgment which came as bewilderment to the community, in this case the community had kept the possibility of adverse judgment open. Though the rejection was a setback, but it shows the maturation of the movement as the legal struggle had proceeded.[62]This is reflected when the Orinam statement holds that "the LGBTQ community, however, is not disheartened. Regardless of the decision of the Court, our activism asserting the right to live without fear and discrimination, and indeed to live with pride, will remain undimmed."[63] Even Lawyers Collective issued a statement in its website that "these setbacks have only made the LGBT community stronger and more united in their struggle for a just and equal world. The fight against Section 377 in legal, social and political arenas will continue incessantly, until the law is removed from the statute book."[64]The way forward was through the filing of a Curative Petition, the penultimate mechanism for redressal of grievances through the judiciary. In all, seven Curative petitions were filed, against the impugned judgment.These were from Voices against 377, Naz Foundation, Minna Saran,

[59]Pranav Nanda and Vasundhara Minocha, 'The Indian Supreme Court's Investiture in the World Rainbow', *International Conference on Law, Management and Humanities* (ICLMH'14), June 21-22, 2014, p.6
[60]See orinam.net/377/supreme-court-refuses-consider-377-review-petitions/
[61]See http://www.creaworld.org/in-media/supreme-court-verdict-upholding-section-377-ipc
[62]This is visible through the posts in support group websites. Unlike in the previous instance, where there was a hope that the legal battle would be over, here the community was prepared for a long protracted battle.
[63]See orinam.net/377/supreme-court-refuses-consider-377-review-petitions/
[64]See www.lawyerscollective.org/updates/supreme-court-fails-lgbt-community.html

Shekhar Seshadri, Ratna Kapur and Shyam Benegal. On the 2nd of February, 2016 a three member bench of the then Chief Justice of India, Justice T.S. Thakur, Justice Anil R. Dave and Justice J.S. Dave held that the curative petition is admitted and it would be examined by a five-member constitutional bench. However, neither the dates for the case nor the composition of the five member bench has been listed as yet.Unlike the review petition, in this case there was an open hearing.

It is expected that the hearings on the curative petition on S377 will be a significant step forward in the equality and discrimination jurisprudence of the country as it will "opt for a comprehensive hearing of the arguments placed for the protection of the dignity and rights of the LGBT community"[65] which in itself is a departure from the principles laid down in the Rupa Ashok Hurra case. Although the course that the case will take is yet to be decided, the fact that the curative petition was accepted for hearing has ignited hope within the LGBTQ community of the legal battle eventually coming to a logical end. Print, electronic and social media was flooded with celebratory messaging signalling how far the LGBTIQ movement had travelled- from being a solitary voice of the ABVA in 1994 to being a marker of human rights in the country. Anjali Gopalan, the crusader activist behind the Naz Foundation Writ of 2001 was quoted by The Hindu, saying "it was a great relief as it could have possibly been the end of the legal road for us and we are happy that there seems to be a change in sentiment."[66]

In the meanwhile, an important development that has made the community hopeful about decriminalisation of consensual same sex among adults in private is the NALSA V. Union of India judgment (henceforth NALSA). In the NALSA judgment, delivered on the 15th of April, 2014,Justice K.S. Radhakrishnan and Justice A.K. Sikri held that under the ambit of Articles 14, 15, 16 and 19 transgender are to be treated as 'third gender', they would be free to choose their gender and provisions be made by the state to ensure that this 'marginalised section of the society' is not discriminated against.[67] It is noteworthy that while Koushal emphasised on the sanctity of separation of power, NALSA went on to provide directives to the state on how

[65]See http://www.thehindu.com/news/national/Five-judge-Constitution-Bench-to-take-a-call-on-Section-377/article14056992.ece
[66]See http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench-lgbt-community-lives-it-up/article8184886.ece
[67]See National Legal Services Authority v. Union of India, Writ Petition (Civil) 400/2012 (Apr. 2014), available at http://supremecourtofindia.nic.in/outtoday/wc40012. pdf.

transgenders are to be mainstreamed into the society. NALSA remains significant for the LGBTQ movement as hijras (it is not clear if NALSA can be applied to all FTM and MTF) constitute only a sub-set of the spectrum. Though S377 of the IPC impacts the lives of transgenders, the NALSA judgment in deference towards the Koushal judgment held that "we express no opinion on it (S377) since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation." The simultaneous grant of civil and political equality and the denial of sexual rights to the transgender community has invited the criticism because the Court fails to engage with the intersections between gender identity and sexual orientation. Thus, the judgment would effectively mean that while transgenders should be treated as equals on the basis of their gender, sexuality which is a part of their personality would continue to be criminalised. Conversely, it can also be argued that the courts visualise the transgender community as a asexual one, and by this logic engaging with S377 in this particular case is not necessary.

Nevertheless, LGBTQ activists remain inspired the development and have been using NALSA to take the conversation about LGBTIQ rights further. Legal scholar Chintan Chandrachud points out that the NALSA judgment (along with *Kirankumar Devmani v State of Gujarat,* 28th of February, 2014) might be the third way out to nullify the Koushal judgment. This was because though the Court did not engage with S377, it did mention that how S377 has been used against the transgender community. Moreover, it also contradicted the Koushal judgment on the test of numerical de minimus. While Koushal had held that since the LGBTQ population constituted a miniscule section of the population, and therefore the law should not be held ultra vires; NALSA acknowledged that though transgenders were 'insignificant in numbers' human rights cannot be held captive to such criteria. For Chandrachud, the arguments are significant because it shows "The silent disintegration of judgments – as an alternative to the more hard-edged options of judicial overruling or legislative repeal."[68]Infact, Chandrachud's analysis and prediction does seem to hold ground as Dr. Akkai Padamshali and Uma Umesh- two transgender activists- have filed a Writ Petition before the Supreme Court in July, 2016 arguing how the presence of S377

[68]See https://ukconstitutionallaw.org/2014/11/30/comment-on-india-chintan-chandrachud-koushal-v-naz-the-third-way-out/

will be fetters for the NALSA judgment.[69] Prior to this, another petition was placed by Navtej Singh Johar and four other emininent LGBTQ personalities in June 2016 arguing how S377 is an upfront to their fundamental rights guaranteed under Articles 14, 15, 16, 19 and 21.[70] Unlike the legal journey that the Naz Writ has travelled, these Writs are not driven by health based claims and are placed by individuals, not organisations. This is a significant moment of departure which the LGBTQ movement is witnessing at the present.

While the importance of the law to LGBTQ lives remains at the centre of the movement, queer activists like Dhrubo Jyoti argue how the movement has grown beyond the demand for decriminalisation. The battle, though not yet won in the legal field has already been won outside it with transformations taking place in popular culture: pride parades have started taking place in smaller cities as well, queer authors are scripting literature around desire and sexuality and most importantly schools and colleges have started talking about gender variance. Moreover, "the movement itself is trying to build solidarities with other struggles, talking about issues of caste, class, religion, disability, gender and trying to strengthen voices from the margins. Activists are fighting for increased access to health, education, jobs and sensitizing the law and order machinery, pushing for more inclusivity in the workplace."[71] These are no small transformations as they re-configure the traditional public-private distinction. And yet engagement with the law is far from complete.

The Marginalisation of Lesbian Activism from the LGBTQ Movement Narrative

The narrative behind coalition building among various constituents within the LGBTQ movement is complicated because of the divergent historical and ideological roots through which gay and lesbian activism has emerged. both develop. Unlike gay activism which emerged in the backdrop of HIV/AIDS epidemic and therefore is linked with a strong health rights perspective, lesbian activism emerged from an engagement with the women's movement. Yet, lesbian activism cannot be collapsed into the women's movement owing to the initial reluctant of the women's movement

[69]See https://clpr.org.in/dr-akkai-padmashali-ors-vs-union-of-india/
[70]See http://orinam.net/377/wp-content/uploads/2016/06/Johar-UoI-2016.pdf
[71]See http://www.hindustantimes.com/editorials/no-matter-what-sc-decides-india-s-on-its-way-to-embracing-lgbt-rights/story-1HIs3XTPBDUKxosDtLpDXP.html

to acknowledge lesbian women's concerns as important. Lesbian women have legitimately criticised the women's movement for prioritising issues like dowry, rape and sexual assault, domestic violence, and sexual harassment, thereby revealing how a heterosexual world view guides it. Giti Thadani points out that the women's movement cast aside lesbian rights as the concerns of "only a few westernised, individualistic, and economically independent women."[72] Despite this, lesbian women continued to struggle and create the spaces within the women's movement in which they could have autonomous discussions.[73] Lesbian women recognised that "women's groups could be the safe spaces in which women could open up, make contact and reach out… we laid claim over the women's movement and demanded that these movements in turn take up our struggle as a part of the larger struggle of all women."[74] Paola Bacchetta hints at how considerations of space determined the growth of such autonomous discussions around sexuality within the spaces of the women's movement. It was left to "only some homes, or parts of home, where the heterofamilial could be avoided... apartments and rooms of those living alone or bedrooms of those who did not"[75] for allowing lesbian groups to emerge. In other words, even within the women's movement lesbian women had to struggle for their existence. Infact in the Fourth National Conference on Women's Movement, lesbian women's issues were disguised under the category 'single women'. The usage of the word single women as a synonym for lesbian women was criticised by Giti Thadani as it confounds lesbianism with personal choice, while it is a political act.

Lesbianism could enter as a sub theme in the 1994 Women's Movement conference held at Tirupati. But an "inconclusive and acrimonious debate"[76] took place regarding the resolution on lesbian rights. Resolution 7 adopted in the Conference talked about the necessity of the Women's movement to acknowledge the problems of lesbian

[72]Giti Thadani quoted in P. Bacchetta, 'Rescaling Transnational 'Queerdom': Lesbian and 'Lesbian' Identitary-Positionalities in Delhi in the 1980s', in Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p.118.
[73]P. Bacchetta, 'Rescaling Transnational 'Queerdom': Lesbian and 'Lesbian' Identitary-Positionalities in Delhi in the 1980s', in Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p. 115
[74]C. Shah, 'The Roads that E/Merged: Feminist Activism and Queer Understanding', in Arvind Narrain & Gautam Bhan (ed.), *Because I Have A Voice: Queer Politics In India*, Yoda Press, New Delhi, 2005, p. 147
[75]P. Bacchetta, 'Rescaling Transnational 'Queerdom': Lesbian and 'Lesbian' Identitary-Positionalities in Delhi in the 1980s', in Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p. 115
[76]M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, p. 23

women. It read that "we attempted to understand the importance of sexual preferences of women and resolved that women's movement should create the space for lesbian women to share their frustrations and aspirations"[77] . But Maya Sharma chronicles that there was a note of dissent too. She argues that the ambiguity in the resolution is emblematic of the push and pulls within the women's movement with regard to the issue of lesbianism.

While the developments in the Tirupati Conference created a small opening for articulation of lesbian concerns such gains were made redundant when Vimala Farooqui (head of the women's wing of the Communist Party-the National Federation of Indian Women) sent an open letter to the then Prime Minister of the country, Mr. P.V. Narasimha Rao in which she urged him to ban the South Asian Gay Man's Conference being held in Mumbai. She argued that the conference was a reflection of 'decadent Western Culture' which has been imported to the country as a direct consequence of economic liberalisation. Further her letter stated that events such as these would "surely start a move of sexual permissiveness among urban youth who have become vulnerable to the vulgarity of Western culture."[78] The issuing of such statements made lesbian women along with other sexual minorities sceptical of women's organisation. This was a precarious argument, as pointed out by Dave, because Faroqui's argument has a resonance with the position adopted by K. R. Malkani- the Vice-President of BJP at that time- who had also asserted the perversity of homosexuality. The strange common ground that Faroqui and Malkani shared in this instance is succinctly pointed out by Ruth Vanita and Salim Kidwai when they argue that political parties, irrespective of their ideology, adopt similar lines on the issue of homosexuality. They are united in perpetuating "the myth that homosexuality is unknown in India."[79] Faroqui's position created uproar because it made apparent that there was distrust among women's activists and sexual rights activists (including lesbian activists though not limited to them alone). As a response to Faroqui, 'Jagori- A Women's Resource Centre' drafted a letter that not only question how NFIW's prioritisation of class as the only axis of discrimination. Jagori's letter argued in favour of the right to freedom of association of the sexually discriminated as well the

[77]Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p. 299
[78]Vimla Faroqui quoted in Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, p. 116.
[79]R. Vanita and S. Kidwai, *Same Sex Love in India: Readings from Literature and History*, Macmillan, New Delhi, 2000, p. 205.

rights of a person to choose their partners.[80] By doing so, Jagori laid down the first step towards consolidation of the gap between the women's movement and lesbian activism.

It must be noted that NFIW's position on homosexuality is not an aberration. It is just symptomatic of the narrow space that the women's movement in India has provided for lesbian women's issues. Swatija Manorama, et.al. observes that within the women's movement lesbian issues has evoked responses as varied as hostility, dismissal cautious acknowledgment. But "rarely has acknowledgment led to action...This has then led to a vicious spiral where on one hand, lesbian women do not come out because of lack of support or resources. On the other hand, because there are very few women who do come out their energies are expended in survival, leaving very little left for activism/ mobilization or organisation within the movement.[81]

Lesbian women started becoming visible from the latter half of 1980s, when a few courageous women started coming together in Delhi and formed collectives such as the Delhi Group (1989) and the Red Rose (1990). These small collectives began the first fluttering of change. Emerging in the backdrop of a spate of joint suicides by women which were being reported by the media[82] these groups began to discuss topics such as: "pressure to heterosexually marry, familial and societal lesbophobia, relations to the women's movement, and heterosexist law."[83] Sakhi- a Lesbian Resource Centre- emerged as successor to these groups in mid 1991. Sakhi's emergence can be metaphorically termed as 'the lesbian emergence' in India because it proclaimed itself as an openly lesbian group that aimed at engaging in "networking, research and documentation of lesbian images and history in South Asia"[84]. The significance of groups such as Sakhi lie in the fact that it heralds a change for lesbian visibility- from being cast under the rubric of single women to being considered as an

[80]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, pp. 116-117
[81]Manorama et al., 'Lesbian, Gay & Bisexual Rights in India: An Overview', in Bina Fernandes (ed.), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, Mumbai, 2002,
[82]Mallika and Lalitambika's Suicide in 1980, Jayashree and Jyostna's Suicide in 1980, Gita Darji and Kishori Shah's suicide in 1988 to state a few.
[83]P. Bacchetta, 'Rescaling Transnational 'Queerdom': Lesbian and 'Lesbian' Identitary-Positionalities in Delhi in the 1980s', in Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p. 116
[84]Dateline, Bina Fernandes (ed.), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, Mumbai, 2002, p. 183

autonomous subject whose concerns may or may not overlap with gay men as well as heterosexual women. This shift is also significant because Sakhi, by its very name exemplified "a female friend, lover, erotic relations between equals"[85] which remained obscured under the previous names. Moreover, Sakhi's contribution is unparalleled as it "created India's first lesbian archive and published the first out lesbian statement (in 1990) in the gay magazine *Bombay Dost*."[86]

Groups similar Sakhi began to emerge across the country, such as – Bangalore (Prerana), Calcutta (Sappho), Delhi (CALERI and Sangini), Mumbai (Aanchal, Humjinsi and StreeSangam), Pune (Olava) and Trivandrum (Sahayatrika). These organizations did multiple tasks: provided support services, crisis intervention, ran help lines, publish newsletters, documentation, outreach and advocacy campaigns on sexuality. A common purpose across these groups was to provide a platform for distressed lesbian women seeking relief. As Stree Sangam of Mumbai lay down that they "want to reach out to other lonely people, take this issue of rights forward" as they "know the loneliness, the silence, the hurt, the anger, the confusions, the guilt, the unspeakable joy…and want to make the roads for others less difficult and ours easier."[87]

The difficulty in reaching out to lesbian women remained a long standing one. Chayanika Shah points out that while others in the LGBTQ community were mostly engaged in demanding access to public spaces, for lesbian women's organization the issue was one about invisibility. In Akanksha and Malobika's words this invisibility is structural: "the system tries to deny the existence of those deviating from the 'norm'" and therefore lesbian women's organisations must rally "to break the silence. Our voices must be heard."[88]

The invisibility that lesbian women suffer can be illustrated through a reading of S377. Because of the requirement of penetration, it is believed that S377 does not

[85]Giti Thadani quoted in P. Bacchetta, 'Rescaling Transnational 'Queerdom': Lesbian and 'Lesbian' Identitary-Positionalities in Delhi in the 1980s', in Nivedita Menon (ed.), *Sexualities*, Women Unlimited, New Delhi, 2007, p. 116
[86]Ibid, p. 116
[87]StreeSangam, in Bina Fernandes (ed.), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, Mumbai, 2002, p. 148.
[88]Akanksha and Malobika, 'Sappho: A Journey by Fire', in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*, Seagull Books, Kolkata, 2007, p. 365

affect lesbian women at all, "since they do not exist in the eyes of law, they do not violate the law."[89] Paradoxically this does not place lesbians at an advantageous position. In fact this leads to the absolute erasure of lesbian women as legal subjects. It renders them bereft of any political and social rights. And, therefore, when lesbian women face violence from within the family, legal protection can hardly be sought. This is in stark contrast to situations where heterosexual women face domestic violence. The negligence towards sexuality based violence is emblematic of 'the heterosexual matrix' within which the law operates. Violence remains a persistent feature of lesbian women's lives, and mostly persecution comes from the home or the domestic or the familial space. Forms of violence that lesbian women have to face may however vary- "physical battering, formal or informal imprisonment, or citing 'family honor' to induce guilt, shame, anxiety and depression…Suicidal impulses, public stigma, loss of primary relationships of family and friends, and loss of economic support through the inability to hold down jobs or dismissal from employment"[90]Unfortunately, however, the gendered nature of violence hardly includes lesbian women's experiences and it has remained an understated human rights violation.

Lesbian activism found its footing in 1998, when a film by Deepa Mehta titled 'Fire' was released. The film depicted an erotic and romantic relationship between two sisters-in-law. The first screening of the movie took place in the month of April in the United States of America and it opened to Indian audience on the 13th of November. The initial days of its screening were uneventful and it ran successfully in cinema halls, across the country. But on the 3rd of December, Shiv Sena activists in Mumbai and Delhi attacked movie halls that were screening the movie. Protests eventually spread to other cities like Calcutta, Meerut, Surat and Pune. The so-called vanguards of tradition started pointing out how the movie was an affront to Hindu sentiments, not just because it showed homosexual relations among women within the family (which was 'allegedly' against the family values) but also because names of the two

[89]M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, p. 19. Also see Thangarajah, Priya and Ponni Arasu, 'Queer Women and the Law in India', in Arvind Narrain and Alok Gupta (ed.), *Law Like Love: Queer Perspectives On Law*, Yoda Press: New Delhi, 2011, pp. 325-337

[90]Radhika Ramasubban, 'Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India', in Richard Parker, Rosalind Petchesky and Robert Sember (ed.) *Sex Politics: Reports from the Front Lines*, pp.96-97, available at http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf

women in the relation were derived from iconic women figures of Hindu religion. The backlash against 'Fire' was actually due to the portrayal of female desire, and how such desires may pose a threat to the 'family'. This is testified when Meena Kulkarni of the Shiv Sena women's wing state that, "if women's physical needs get fulfilled through lesbian acts, the institution of marriage will collapse, reproduction of human beings will stop."[91] Kulkari's argument against Fire derives from the traditional model of women's appropriate role within the family and society.

The vandalism by Shiv Sena was protested against by people who gathered to support freedom of speech and expression. However, 'Fire' was not only about freedom of speech and expression, its significance lay in removing the silence and invisibility around lesbian lives. Fire provided the environment for debates on lesbian women to take place. It evoked passionate debate not only among those who proclaimed to be protectors of Indian culture and those who supported artistic freedom but also among feminists, making sexuality and female eroticism no longer a peripheral matter to the women's movement. The centrality of 'Fire' to lesbian activism can be gauged from Ashwini Suthankar's statement that "though individuals connected to the film claimed it was not a lesbian-themed work, we wanted to emphasise that the attacks on it were impelled by homophobia."[92]

There was an alternate reading of 'Fire' as well, by Madhu Kishwar who argued that 'Fire' made no positive contribution to lesbian women's lives. In fact it increased the vulnerability of lesbian women to homophobia by making them visible. She argues that in the Indian context, there has been tolerance towards homosexuals "provided people don't go around flaunting their sexual engagement with each other."[93] In Kishwar's account while covert relations among women have always been present within the families the movie by naming the relationship will deter women from expressing their affection to each other due to the fear of being labelled as 'lesbians'.[94]

---

[91]Kulkarni quoted from G. Patel, 'Fire: Sexuality and its Incitements', in Ruth Vanita (ed.), *Queering India: Same sex love and Eroticism in Indian Culture and Society*, Routledge, New York, 2002, p. 225
[92]Ashwini Suthankar quoted in M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, p. 14
[93]Kishwar quoted in M. Bachmann, 'After the Fire', in Ruth Vanita (ed.), *Queering India: Same Sex Love and Eroticism in Indian Culture and Society*, Routledge, New York, 2002, p. 236
[94]Ibid. p. 237

Kishwar's article evoked a prolonged debate with responses coming from Carol Upadhyay, Shreya Kishore and Bisakha Sen.[95] Kishore and Sen contest the picture of tolerance towards homosexuals portrayed by Kishwar. Upadhyay depicts 'Fire' both as a feminist and a lesbian text because it locates women's sexuality as autonomous of male control. In response to such criticism, Kishwar relies on a culture-based argument, which is also the ground used by Shiv Sena to attack the movie.

The 'Fire' controversy also revealed the feminist discomfiture with sexuality. Mary John and Tejaswini Nirajana express concerns around the developments surrounding 'Fire'. They contend that the controversy generated by Fire as well as the protest around it is "a waste of time and energy that could have been better spent on other significant issues."[96] Such generalisations were reading concerns of class, caste and violence against women as more important than women's sexuality. Such framing of the issue pits feminism against lesbianism and reminds one of the earlier discomfiture of the women's movement with lesbian women's issues.

An important fall out of the 'Fire' controversy was the creation of Campaign for Lesbian Rights (henceforth CALERI). Though CALERI was by no means the first lesbian rights organization, it definitely became the most visible one due to its catch-all nature and public stance. Naisargi. N. Dave documents that CALERI drew representatives from thirty-one progressive organizations, including a number of autonomous women's groups. This was a watershed in India's LGBTQ movement. In its own words, CALERI described itself as "a group of individuals-lesbian, gay and straight-and organisations who feel strongly that discrimination on the basis of sexual orientation/preference is a violation of basic human rights."[97] In contrast to previous lesbian women's organizations like Sakhi, Sangini, Women-to-Women, CALERI was distinct because of its modus operandi. It was involved not just in dissemination of information, but also actively engaged in public debates and protest actions. In doing so, CALERI had three primary objectives: first, making lesbianism visible and dispelling the myth that lesbians are not present in India; second, creating awareness

[95]See Shreya Kishore, Letter to the Editor, Manushi 112, September-October 1999; Carol Upadhyay, Counter-Fire, Economic and Political Weekly, May 22, 1999
[96]M. Bachmann, 'After the Fire', in Ruth Vanita (ed.), *Queering India: Same Sex Love and Eroticism in Indian Culture and Society*, Routledge, New York, 2002, p. 240
[97]CALERI, Lesbian Emergence: Khamosh! Emergency Jaari Hain. A Citizens Report, 1999.

about lesbian issues and concerns and finally, to develop public and state recognition of the rights of all lesbians to a life of dignity, acceptance, equality and safety.

The formation of CALERI is a unique development because it foregrounds lesbianism as a political identity rather than using ambiguous words like single women, women who loved women to describe lesbian women. Between December, 1998 to February, 1999 CALERI actively protested against the virulent attacks on 'Fire' and generated sustained public debate on lesbian rights. A report titled 'Lesbian Emergence: Khamosh! Emergency Jaari Hain. A Citizens Report' was published by it which also reflected its objective. By inserting the word 'emergence' the report, it refused to allow lesbian women from remaining hidden. This strategy of resisting silence has been powerfully elaborated in one of the pieces within the report itself,

> "We are supposed to have been dwelling in comfortable silence for so many centuries, silence about our existence, a conspiracy of silence... Silence that will protect you…This silence is not spiritual-it will not bring you inner peace. It is not powerful, it is the poorest of defences… It is forever a weapon in the hands of others…On December 7 we were breaking the social contract."[98]

With the emergence of CALERI, the invisibility that pervaded lesbian movement life was to some extent challenged. Dave in her book *Queer Activism in India* emphasises that the insertion of the word emergence is significant because it pushes an already existing group of people into the public glare. She clarifies that 'lesbian emergence' should not be read as the beginning of women coming together on the basis of their sexual orientation, but the 'public emergence' of already exisitng lesbian women whose existence was till now shrouded in silence, under the garb of 'protection.'

The other word in the report that gained a lot of attention was 'emergency jaari hain' which can be roughly translated as 'the emergency continues'. Dave points out that this choice of words was to draw immediate attention of the audience towards the emergency that was declared in India in 1975 and displaying the graveness of the situation. CALERI's report was directed not only at the state which by sending the movie back to the Censor Board was party to the 'emergency' but also at the larger collectives who stood by 'Fire' only on the ground of freedom of expression. At the same time they questioned "the same freedoms being extended to a minority in a

[98]Sandhya Luther quoted in M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, pp.12-13.

peaceful and democratic public protest…why did we have to be visible, how did we dare to use the word 'lesbian'…"[99]

The broad coalition that CALERI forged led to another set of problems. The use of the word lesbian continued to create hurdles. While CALERI's foundational assumption was hinged around raising visibility and a politics of utterance[100] organizations like Jagori that supported the mandate of CALERI adopted a different stand, where the category of lesbian was "recognised as a source of good, beauty and resistance". [101] This etymological problem would continue to haunt CALERI throughout: lesbian as a word was alleged to smirk of Western and elitist politics, which might alienate grassroots women's activism. At the root of such allegations, was the assumption that sexuality and poverty are polarised axes and their paths could never converge. In Maya Sharma's formulation these organizations worked with the assumption that poor women are unlikely to be in relationships with other women and women who were in relationship with other women were unlikely to be poor.

The second problem that plagued CALERI was that it sought to be a political campaign rather than a support group. While pushing for the visibility of lesbian women CALERI asked volunteers to engage in activities such as distributing pamphlets in public spaces and it alienated those women whose could not prioritise activism because of financial dependence, age, motherhood and marital status.[102] Dave's ethnographic research argues that there is a chasm between women who considered lesbianism as a political position and women who were looking only for a space where they could drop their inhibitions. While the former were motivated to form a politically visible community around sexual orientation, the latter were only looking for "the space and freedom to simply be alone with someone they love, and to realise whatever pleasure there is in what they too often experience as sorrow."[103]

---

[99]M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, p. 13

[100]Ibid.

[101]Jagori's statement quoted in Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, p. 156.

[102]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, p. 158. Dave lists Sangini as embodying one such group where women could look for companionship and patience rather than looking for ideological collaboration

[103]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016,p. 181

And it is in between the pulls and pressures of these two kinds of expectations that CALERI's silent departure from activism must be searched.

But before its eventual departure, CALERI could gather that the support that it had before was gradually weaning. While preparations for International Women's Day, 2000 were underway a debate ensued regarding CALERI's proposal to carry a banner with its full name. Mass based women's organization like NFIW and Akhil Bharatiya Janwadi Mahila Samiti resisted CALERI's proposal on the ground that, "a banner saying Campaign for Lesbian Rights will not only cause confusion about the issues we have agreed to highlight but will also divert attention from them…can be interpreted as sacrificing the issues of poor women."[104] While CALERI argued that carrying the banner would highlight the plight of lesbian women who suffered violence and were yet invisible, especially when the theme of the International Women's Day that year was Violence against Women. While autonomous women's organizations and NGOs like Nirantar, Ankur, Jagori, and Saheli came out in support of CALERI and threatened to boycott the march if CALERI's proposal was not accepted, but eventually CALERI acquiesced. Such events show that "the outrage at public right wing violence against lesbians had died down, and CALERI didn't seem to see that Lesbianism no longer enjoyed the wide, unproblematic, and temporary sympathy it had just after the Fire attacks"[105] The difference between the mass based women's groups and the autonomous women's groups in responding to CALERI's proposal is reminiscent of the same divisions that marked the period from 1980s when within the women's movement, lesbianism remained an unresolved matter. Dave explains what deters mass based women's groups from not standing with lesbian women, "it is not lesbophobia that animates leftist women's resistance to lesbian politics, but a desire to preserve the prestige and influence of their own organizations."[106]As can be seen, while lesbian activism is primarily based around the question of whether sexual identity can be raised as a political issue, the women's movement resisted such moves holding that "such politicisation should be postponed

[104]M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, p. 20
[105]Ibid. p. 120.
[106]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, p. 121

for a later time, presumably when there is a greater level of societal awareness and acceptance of homosexuality."[107]

CONCLUSION

From the above accounts it emerges that lesbian activism sits uncomfortably with the women's movement and the gay rights activism. One of the important departures that lesbian activism makes from the women's movement is with regard to the institution of heterosexual marriage. While the women's movement has pressed for laws that would reform the institution of marriage, lesbian organizations have decried the institution of marriage itself. A strong critique of the institution of heterosexuality emerges only from lesbian women's activism. For instance, Akangsha and Malobika argue, "people around us are actually instrumental in perpetuating the heteronormative societal structures that only defines and defends the rigid notions of what it means to be a man or a woman, how the two should relate to each other and the rest of the society and the family unit that should result from their union."[108] With regard to marriage, gay rights organizations have never problematized it because men (gay or otherwise) stand to gain from marriage. Moreover, as gay men can exercise discretion on whether to getting married or not, they have hardly acknowledged marriage as an issue of grave concern to lesbian women. Unlike in the case of gay men, instances where lesbian women have been forced into marriages by their families are quite common.

While lesbian activism moved beyond the women's movement because of the events described above, nevertheless the theoretical insights from the women's movements continued to inform their work. If on one hand the women's movements can be criticized for failing to consider the issues and concerns of lesbian women, gay rights activism on the other hand is even more distanced from lesbian women's concern. The differential location of gay men and lesbian women has given them different standpoints on the same phenomenon: homophobia. Certain areas of divergence

[107]M. Sharma, *Loving Women: Being Lesbian in Underprivileged India*, Yoda Press, New Delhi, 2006, p. 22

[108]Akanksha and Malobika, 'Sappho: A Journey by Fire', in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*, Seagull Books, Kolkata, 2007, p. 365.

between the two can be distinguished in support of this argument. First, while gay rights activism hinged around right to health and privacy, invisibility and violence were the pre-eminent concerns of lesbian activists. As has been already discussed, both the ABVA petition and the Naz petition were the outcome of the HIV/AIDS crisis that affected primarily MSM and therefore emphasis on health remained pivotal for gay rights activism. Across the world, gay men not only had to face a threatening death but also the discrimination that came along with the disease. It was only when gay support groups came together to resist such discrimination (which was also legitimised by the state) that the AIDS pandemic could be controlled. Lack of access to information and disgust that homosexuality evoked remained the reasons behind such discrimination. Therefore, gay rights organization had to work on two fronts: for claiming equal access to health care and to de-link homosexuality from perversity. The situation in countries such as India where anti-sodomy laws still prevailed was even more complex. It was necessary to demand that such laws be withdrawn before (or even alongside) any health based claims could be made. In contrast, the emphasis laid on health by gay rights activists, lesbian activism was informed more by the need to address gender based violence and reclaiming a positive affirmative of their presence. Women in general and lesbian women in particular have faced violence within the home. Lesbian women were subjected to beatings, confinement, and correctional rape. As has already been mentioned, there was a spate of joint suicides by lesbian women in the 1980s which have continued unabated. The focus on violence of lesbian activism re-directs sexual rights to be conceptualized as the right to bodily integrity, as against gay rights activists who posit the right to privacy as central to such a concept. While the suicides (along with other kinds of violence) were troubling in itself, there was another dimension to it. Media coverage of these suicides hardly named these women as lesbians, preferring to call them as friends. The veiling of such erotic and romantic relationships was a reflection of how silence is maintained around women's desires. This silencing of the voices of same-sex desiring women is in sharp contrast to how gay men's stories were represented in the media. Naisargi Dave refers to differential manner in which the emergence of gay subjectivity and lesbian subjectivity is represented: while interviews with gay men show them as courageous and unapologetic in their proclamation of being gay (as in the case of Ashok Row Kavi), stories about lesbian women hardly were written in the same

tenor.[109] Lesbian activism, therefore, had to simultaneously fight for visibility and reclaiming a positive affirmative of their presence.

Second, the issue of funding has created a gulf that always demarcated gay rights activism from lesbian activism. It must be emphasized that AIDS was a global threat and therefore it necessitated that gay rights groups of the developing countries work closely with gay rights groups of western countries. This not only enabled sharing of information but also made possible to address the challenge of adequate funding. Apart from international collaboration, gay rights organizations also started collaborating with AIDS control agencies of the state. In the case of India, it was NACO. This ensured that gay rights groups had access to funding, not only from external sources but also from the state. Funding was, therefore, not a constrain on gay rights groups. On the other hand, lesbian activism, which emerged from the spaces of the women's movement, was also faced with resource constraints. They have criticized the manner in which the funding received has been used by gay men. The funding helped in bringing gay men together but not in consolidating them into a group that unanimously stood for social change. In fact, other than being mobilised around the threat of HIV, gay men remained largely status-quoist. Moreover as has been argued, gay men, in the 1990s, who met mostly in parties and engaged in casual sex were leading a secret gay life while being married to women.[110] Unlike lesbian women who saw lesbianism as a political identification, most homosexual men did not attach any meaning to their sex act. In other words, while lesbian organizations have been politicized through its association with the women's movement, gay rights organizations remained ideologically unanchored. This is evident when the category MSM found more favor than the politically loaded 'gay'. Moreover, homosexual men frequented cruising places in search for potential partners. This, for the lesbian organizations, was problematic as it displayed casualness towards sex, especially when the threat of HIV/AIDS was the rallying point for gay activism.

Third, gay men also faced violence but in the hands of police and psychiatrists. As against this, lesbian women experience violence from within the family. Correctional rape is frequently inflicted upon lesbian women and therefore sexual assault has

[109]Naisargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics*, Zubaan, New Delhi, 2016, pp.42-44

[110]R. Raj Rao and Dibyajyoti Sharma,*Whistling in the Dark: Twenty-One Queer Interviews*, Sage, New Delhi 2009.

remained high on their priority list of lesbian women's activism. Here they coalesce with the women's movement, demanding the purview of rape laws be widened to cover all non-peno vaginal penetrative acts. It is noteworthy that S377 is invoked in all cases of sexual assault not involving peno-vaginal penetration because of such changes in rape laws.[111] Therefore, the contestation of S377 must be accompanied by the question of rape laws. However, on the amendments to the rape laws another caveat between gay rights activists and lesbian activists becomes visible. While gay rights activists proposed that gender neutrality be maintained at both ends (victim and perpetrator), lesbian organizations resisted such a proposal. This resistance emanates from their lived experiences as women, because in a patriarchal society gender neutral rape law may further harm the interest of the rape survivor. This disagreement also laid down another barrier to forging a closer alliance between gay rights activists and lesbian activist.

Fourth, gay rights activism and lesbian activism moved in different directions on the question of how to achieve social change. Because of the lesbian activism's umbilical ties to the women's movement it is geared towards working for legislative change and while doing so to intensively engage in consultation. This was in sharp contrast to the way in which gay rights activists have worked. As already discussed, in the initial days Naz Foundation was criticised for its failure to hold consultations with the other stakeholders. Even Anand Grover accepts that "unlike processes for legislative amendments or the drafting of bills, the legal process cannot be open and exhaustively consultative."[112] And herein lies the difference between a campaign and a writ petition challenge. Unlike CALERI which was consultative in its functioning, Naz Foundation had initially moved on its own.

From the divergences noted above, it can be clearly gauged that sexuality based discrimination impacts men and women differently and lesbian women's marginalization derives from her gender too. At the same time, this differential position has an impact on the strategies adopted in the course of a movement. In other words, the difference between how gay activists and lesbian activists engage with the state is a result of their epistemological positions. However, putting such differences

[111]This has been addressed through Criminal Law (Amendment) Act, 2013
[112]Jyoti Puri, *Sexual States: Governance and the Struggle Over Anti-Sodomy Law in India*, Duke University Press, Durham and London, 2016, p. 113.

aside, solidarity among the two was forged as the legal struggle against S377 faced one hurdle after another. It must be re-iterated that the coalition between lesbian and gay activists is driven more by pragmatic considerations that an acknowledgment of similar vantage points. Lesbian activists believe that decriminalization alone cannot be the focus of the movement but it was forced to ally with the decriminalization demand when the homophobic responses against the Naz petition revealed the necessity of putting up a consolidated defence of LGBTQ rights. This chapter attempted to map the trajectory of the contemporary LGBTQ movements with its focus on S377 while drawing attention to the fact that a 'politics of difference' lay hidden within it. Only when one chalks out the lesbian voices, it becomes apparent that the movement may actually be heteroglossic.

Lesbian activists have made a significant contribution to the LGBTQ movement as well as the women's movements. Within the LGBTQ movements its most enduring contribution is to bring in the question of the public/private dichotomy. Additionally, the lesbian women's intervention brought new questions such as unequal access to public spaces (cruising places, parties), the perils of privacy based arguments and the desirability of considering other forms of discrimination (beyond S377) into the LGBTQ movement. As far as the women's movement is concerned the intervention by lesbian women has laid open that sex and gender can be conceptualized in myriad ways. The category of 'woman' which was assumed be a natural one by the women's movement is now questioned, thereby foregrounding the question of how a feminist politics can engage with such a de-centred subject. Chayanika Shah who identifies herself as a lesbian feminist frames this very persuasively "is compulsory heterosexuality only about controlling desire or is it also about dictating that the world can have only two kinds of people-women and men?... And if we accept that there could be more ways in which people could define themselves, then what does this do to our understandings of feminism…?"[113]

[113]C. Shah, 'The Roads that E/Merged: Feminist Activism and Queer Understanding', in Arvind Narrain & Gautam Bhan (ed.), *Because I Have A Voice: Queer Politics In India,* Yoda Press, New Delhi, 2005,p. 152.

CHAPTER IV

QUESTIONING S377: ARGUMENTATIVE SHIFTS

INTRODUCTION

According to the statistics presented by International Lesbian Gay Bisexual Trans and Intersex Association (ILGA) in June 2016, 73 countries across the world still continue to criminalise consensual same sex activity, with 13 states imposing a death penalty for it. A survey conducted by Pew Research Centre tentatively proposes that religion, along with material affluence, remained central variable while explaining acceptance of homosexuality by countries and therefore, while secular and affluent countries have liberalised their legal system to accommodate homosexuality, in countries where religion is central homosexuality continues to be criminalised.[1] Global patterns on legal frameworks regarding homosexuality remains varied; while countries such as Brazil, New Zealand, Luxembourg, Ireland, the USA, Columbia and Finland have legalised same sex marriage after 2013, in the same period countries such as Uganda, Zimbabwe, Slovania, Armenia, Chad, Croatia, India and Nigeria made its laws against homosexuality stringent. Of particular interest are the two cases: of Solomon Islands which, in 2016, proposed that in the amended Constitution discrimination on the basis of sexual orientation is to be permitted and Sri Lanka, which in 1995, extended the application of anti-sodomy laws to lesbian women.

The World Health Organization (WHO) and The Joint United Nations Programme on HIV/AIDS (UNAIDS) have held that anti sodomy laws create the following problems, first, criminalization affects public health, especially as efforts to prevent the spread of HIV are hard hit; second, it also affects those human rights activists who support of lesbian, gay, bisexual and transgender (LGBT) rights, and; third, it also allows for discrimination on the basis of a person's dress or behaviour that runs against 'acceptable' gender norms.[2]

[1] The Global Divide on Homosexuality, June 4, 2013 available at http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/ accessed on May 14, 2016.
[2] Factsheet: Criminalisation available at https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf accessed on May 14, 2016.

The UN's special rapporteur on torture Prof Juan Mendez in his report (February 2016) talks about the impact that laws have on LGBTQ people. He says, "States are complicit in violence against women and lesbian, gay, bisexual and transgender persons whenever they create and implement discriminatory laws that trap them in abusive circumstances." [3] As recently as June 2016, the United Nations Human Rights Council also passed a resolution to appoint an independent expert on protection against violence and discrimination based on sexual orientation and gender identity. Debates around homosexuality have always been a charged one because it invokes competing conceptions of morality; it continues to evoke passionate responses from conservatives as well as from progressives. While, conservative forces would argue in favour of law playing the role of a deterrent to activities which could be potentially morally degenerating or which could weaken social cohesion. Progressives would demand that law steers away from interveneing with matters where consent is exercised.

Debates around homosexuality and criminal laws always fall back on the Hart-Devlin debate which took place in the backdrop of the Wolfenden Committee Report on sexual offences (1957). The Wolfenden Committee had recommended the decriminalisation of consenting same sex acts among adults, in private. Lord Patrick Devlin invoked threat to social cohesion as a ground to argue against it. In recent years, the ground of public morality was used by Justice Scalia in the Lawrence Vs. Texas case (2003) to justify his dissent. Largely, the question of whether homosexuality runs contrary to public morality is premised on the association of sodomy with 'carnal intercourse against the order of nature'. Therefore, a discussion on homosexuality begets the question of how nature ordained sexual intercourse to be. In effect, the struggles for homosexual rights have revolved around 'naturalising' homosexual behaviour and postulating the argument of sameness (with heterosexual behaviour) in order to claim such rights. Further, in liberal democracies, arguments for decriminalisation have also been pegged around the argument of privacy and its inviolability by the state. The debate on homosexuality has been complicated by the question of what constitutes homosexuality, with the correlation between the homosexual act and homosexual identity remaining unresolved.

[3] See https://www.theguardian.com/world/2016/feb/18/banning-homosexuality-fosters-hate-and-homophobia-says-un-report accessed on May 14, 2016.

It is in the backdrop of such developments and debates that this chapter works towards examining the arguments that have been deployed by the LGBTQ movement and judiciary in India during the course of the legal journey traversed. While the preceding chapter had already presented a sequential view of how the movement engaged with the law, this chapter can be seen both in continuity with and in disjunction from it. The present chapter is aimed at exclusively looking into the kind of arguments made and principles invoked, by the LGBTQ movement, its opponents and the judiciary. A threadbare examination of the principles help in identifying whether the moral compass of discrimination jurisprudence is wide enough to accommodate citizenship status of those who are marginalised on account of their sexuality. Effectively, it can bring the procedural claim of equal citizenship in direct confrontation with the substantive inequality that LGBTQ population experience.

An interesting feature of the Indian case is that unlike in the USA where an individual party moved to court seeking protection of their rights, there was no visibly harmed party before the court. The struggle for the decriminalisation of homosexuality arose out of the HIV/AIDS crisis and gradually amplified itself beyond the epidemiological argument to speak about sexual identity and the legitimacy of every form of desire. In a very appropriate manner, it has been described by Justice Mukhopadhyay that the Indian case is an ‘imaginary Lawrence’.

The present chapter is divided into three sections. The first section deals with the arguments used before the petitions filed from 1994 when Aids Bhedbhav Virodhi Andolan (henceforth ABVA) to 2009, when the Delhi High Court declared its judgment in response to the Naz foundation petition filed in 2001. The year 2009 is taken as the watershed between these two sections to highlight the historic importance of the Naz Foundation judgment when the Delhi High Court ‘read down’ S377 of the IPC. The second section begins with the arguments that were presented by private parties who challenged the High Court verdict before the Supreme Court. It discussed the argument presented by all the actors till 2013 when the Koushal Judgment was declared. The third section of the paper discusses the developments which have taken place in the aftermath of the Koushal judgment, that is the review petitions and the curative petitions which have been placed by the LGBTQ movement. In all the three sections, arguments presented by the petitioners, the respondents, the intervening parties as well as the court will be elaborated.

Deriving from the discussions in the three preceding sections, the conclusion of the chapter re-iterates how there has been a visible shift in the principles that the LGBTQ movement has invoked from 1994 to present day. While the initial focus of the movement was to argue along epidemiological lines and present right to health as a priority, of late the movement has shifted to the vocabulary of equal citizenship, which should be available to all irrespective of their sexual orientation. And it is in this sense that S377 is now opposed- not as a barrier in the access to health rights but as a barrier in enjoying equal citizenship (of which right to health is a integral part). Content analysis has been used as the method to reach the aforesaid conclusion. In all, a total of 45 legal documents were analysed through a process of deductive coding, assisted through Qualitative Data Analysis software, atlas.ti. Of the 45 documents which are analysed, 21 were from the LGBT community and its allies in the legal journey, 13 were from those who were opposed to decriminalisation, 4 from Union of India and its ministries and 7 from the judiciary.

Phase One: 1994-2009

As seen in the last chapter, the first legal challenge to S377 came from an organization that worked around HIV/AIDS and found that S377 was a major stumbling block in its work. When ABVA filed its writ petition before the Delhi High Court in 1994, it argued, among other things, for declaring Section 377 as unconstitutional and void, based on three main premises.

First, S377 did not take into consideration the question of consent and thereby treated consensual sex between adults at par with non consensual homosexual acts.

Second, the IPC does not criminalise homosexual identity but only the act of sodomy- which is applicable to both heterosexuals and homosexuals.

And third, the state had the responsibility of promoting HIV/AIDS prevention work and therefore S377 should be invalidated as it is an obstacle to HIV/AIDS prevention work.

The petition emphasised that S377 is violative of the fundamental rights that every citizen of the country is entitled to, irrespective of their sexual orientation.[4] Though the petition was never heard in the court, the reason why ABVA's intervention shall remain relevant is because this petition laid down the skeletal features on which the legal battle would be fought in the future: right to health, right to privacy and right to equality. Thus, when Naz Foundation (India) Trust filed the Writ petition in 2001, it looked like a seamless transition from the arguments put forth in ABVA petition. Claims to privacy and equality remained the bedrock for those discriminated against on the basis of their sexuality.

These two particular instances in 2001 propelled Naz Foundation India Trust and Lawyer's Collective to place before the Delhi High Court a Writ Petition. The petition by Naz argued that S377 breached the fundamental rights under Articles 14, 15, 19 (1) (a-d) and 21 of the Constitution. It used the following the following principles while challenging S377. First, S377 infringes upon an individual's right to privacy. Second, the distinction created between carnal intercourse against the order of nature and carnal intercourse in accordance with the order of nature is arbitrary, vague and unreasonable. Third, sex (under article 15(1)) as a ground of non-discrimination should be read to include sexual orientation because if it is not included, homosexuals as a class remain differentially treated under S377. Fourth, criminalisation of sexual acts does not stop them from occurring, it only drives them underground. This increases the risk of diseases that can be sexually transmitted like HIV/AIDS and is therefore a breach of the right to life and health. A broad reading of right to life would also entail that sexual preferences of individuals will be safeguarded from any interference. Fifth, restrictions imposed on certain sexual acts is in contradiction to an individual's freedom of expression, and violative of freedom of association and assembly along with right to move freely across the territory of India (article 19). This is detrimental for organizations that are working for the sexual minorities. In sum, the petition raised the question regarding how the presence of S377 violated the fundamental rights of privacy, dignity and personhood. The petition also argued that though the words of S377 are facially neutral and anybody engaging in acts of sodomy can be convicted but the history of its use reveals that it is primarily the

[4] Summary Of Civil Writ Petition 1784 Of 1994 In The High Court Of Delhi available at http://14.139.60.114:8080/jspui/bitstream/123456789/1150/1/020_Summary%20of%20Civil%20Writ%20Petition%201784%20OF%201994.pdf accessed on May 23, 2016.

homosexual population against which it has been mostly used. By falsely labelling homosexual acts as unnatural, S377 perpetuates a regime of surveillance that might not be high in terms of conviction rates but results in creating "class of vulnerable people that is continually victimized and directly affected"[5]

Unlike the petition by ABVA which sought that S377 to be declared as void and unconstitutional in entirety, the plea in this case was to apply the doctrine of severability, in order to safeguard the use of 377 for protection of children from sexual abuse, while decriminalising all consensual sexual acts in private.

As mentioned in the previous chapter, the Naz petition was filed without much noise around it, but once it was filed, the petition was faced with two serious criticisms: Firstly, the question of representativeness and the principles that it invoked. The question of representativeness arose because Naz foundation had decided on its own to be a crusader in this case. By emphasising on MSM it alienated two sets of people: transgendered persons/kothis/hijras who did not identify as men and lesbian groups who did not appreciate the obsession with HIV/AIDS. Secondly, the petition sought to privilege the right to privacy and argued against S377 primarily on this ground. The emphasis on right to privacy estranged gay men from lower class, hijras and kothis who have no access to so-called 'privacy' and the lesbian organizations who had always been critical of the private.

While the challenge from the Coalition of Sexual Minority Rights can be called as an internal resistance that Naz was faced with, the first external challenge came from Joint Action Council Kannur (JACK) in November 2002. JACK was founded by Purishottam Mulloli in the 1970s and as mentioned in the preceding chapter, its petition also invoked ideas of naturalness of particular sexual acts and the immateriality of consent in acts which involved 'unnatural sex'. Effectively, JACK was arguing that while heterosexuality is natural, homosexuality is not. This is exactly the opposite of what Naz was trying to assert.

The second external challenge came on the 6th of September, 2003 when the Government of India filed a 14 page long counter affidavit to the Naz petition. It

[5] Writ petition filed by Naz Foundation available at http://www.lawyerscollective.org/files/High%20Court%20Writ%20Petition.pdf accessed on May 28, 2016.

argued that the position of the government is in concurrence to the 42nd Law Commission of India Report which was published in the year 1971. It stated that S377 remains valid because "Indian society by and large disapproves of homosexuality and disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private."[6] The Law Commission's arguments were premised on the principle that there is a necessity and utility behind criminal law's regulation of morality. In a very Devlian sense, it favours state regulation of 'social vices'. Therefore, it focuses on the harm that will be caused to the society if the petition is granted, while remaining blind to the harm that S377 does to sexual minorities. Interestingly, the affidavit also cites the necessity behind retaining S377 as it helps in prosecuting rape charges and child sexual abuse; but it overlooks the fact that the Naz petition had never asked for a deletion of the same precisely because of the same reason.

Referring to the extent of state power, the petition stated that, "while the government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large. If this is not observed, whatsoever little respect of law is left would disappear, as law would have lost its legitimacy."[7] Such assertions in the affidavit make it ambiguous. Even sociologist Jyoti Puri refers to "the ambivalent, inconsistent nature of the government's reply"[8]. While this can be read as a reflection of the incompetency of the state, Puri explains that such ambiguity is the result of the heterogeneity of the state structures and the complex procedures involved in framing responses to such legal challenges led to ambiguous and contradictory positions. Moving further, it is noteworthy that the affidavit is not just ambiguous, it also does not address the main contention of the Naz petition: the right to privacy. When it does mention privacy, it says that "there is no violation of fundamental liberty as long as any act of homosexuality/lesbianism is practiced between two consenting adults in the privacy as in the case of heterosexuality."[9] This is baffling because it makes the affidavit come close to the

[6] Affidavit by Ministry of Home Affairs available at http://www.lawyerscollective.org/files/MHA%20Affidavit.pdf accessed on May 9, 2016.
[7] Ibid
[8] J. Puri, *Sexual states: governance and the struggle over anti-sodomy law in India*. New Delhi: Duke University press, 2016, p. 116
[9] Affidavit by Ministry of Home Affairs available at http://www.lawyerscollective.org/files/MHA%20Affidavit.pdf accessed on May 10, 2016.

position which has been made by Naz. These two propositions from the government affidavit is a reflection of how the government is a fractured entity.[10]

The Naz petition was dismissed by the Delhi High Court on 2nd September, 2004 following which, Naz foundation filed a review petition on 15 October 2004. It raised the same ground while seeking review of the dismissal. When the review petition was also dismissed, a SLP was filed before the Supreme Court for directing the Delhi High Court to hear the case.

In response to this SLP, the government filed the counter-affidavit within seven months. While the government still contested the material basis of the Naz petition (as no evidence of 'unjust' prosecution under S377 was provided by Naz), it made two significant departures: first, that concerns of public morality trump over right to privacy, and second, that it would be a case of judicial over-reach if the Court were to consider the question of what constitutes an offence. Cognisant of its previous inconsistency, in this affidavit the government categorically prioritised the public morality argument. The affidavit also propositioned a narrow reading of judicial review arguing that it was only the prerogative of the legislature to define a 'crime'. The Supreme Court however, deemed the matter important and directed the Delhi High Court to hear it.

When the Supreme Court instructed the Delhi High Court to examine the Naz foundation case, the Ministry of Health intervened through its agency- NACO. The significance of the NACO affidavit cannot be underscored as it testified that there are about 25 lakhs MSMs in India and that more than 8% of the MSM population are affected by HIV. NACO argued that its Targeted Intervention (TI) programme was adversely affected because information on safe sex practices could not be disseminated because of the presence of S377. S377 deters MSM from approaching NACO and its allied NGOs. Thus, in sharp contrast to the affidavit of the Home Ministry, the Health Department's affidavit stood with Naz Foundation arguing that S377 was an impediment to the HIV/AIDS prevention programme.

The next big leap that happened in the judicial journey of S377 was when Voices against 377 filed its intervention application in November 2006. In deference to its

[10] J. Puri, *Sexual states: Governance And The Struggle Over Anti-Sodomy Law In India*. New Delhi: Duke University press, 2016.

composition, the Voices petition sought to make S377 a universal issue that affects all, irrespective of their sexual orientation. Thereby it sought to establish a wider coalition with the population that did not identify as LGBTQ. Its wider appeal was based on the claim that sexuality forms a core identity and therefore denial of its expression is a violation of that particular person's dignity, "for every individual, be they LGBTQ or *not,* the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes."[11] By arguing on the lines of establishing a similarity between homosexuals and heterosexuals, the Voices petition emphasised on the sameness that exist across sexual orientations.

The Voices petition is also noteworthy as it fore grounded the argument of Constitutional morality. It argued that constitutional morality should trump over all other claims. Directed against the Home Ministry affidavit that argued on the lines of public morality being a compelling state interest, the Voices petition sought to entrench claims to equality by arguing that Constitutional principle could not be guided by the subjective morality of the population. The power of this argument was validated when the Delhi High Court, in the judgement declared constitutional morality as the yardstick to examine S377. Vikram Raghavan reflects on how the Voices petition "adroitly redirects the morality argument back at the government by deftly reasoning that stigmatizing and criminalizing homosexuals is against constitutional morality."[12]

Justice A.P. Shah and Justice S. Muralidhar delivered the Naz judgment on the 2nd July, 2009. The judgment was historic not only because it extended a rights framework to the sexually marginalised but also because of the way in which it reasoned. While considering the argument of the petitioner that S377 is violative of Article 21, the court considered an expansive idea of the right to life which encompassed the claims of privacy and dignity as essential to living a meaningful life. The judges noted that "the sphere of privacy allows persons to develop human relations without interference from

[11] Alternative Law Forum (2009). The Right that Dares to Speak its Name: Naz Foundation vs. Union of India and Other Decriminalising Sexual Orientation and Gender Identity in India. Bangalore: Alternative Law Forum. p. 39 available at http://orinam.net/377/wp-content/uploads/2013/12/The_Right_that_Dares_to_Speak_its_Name.pdf accessed on May 18, 2016.
[12] Raghavan, V. (2011). Navigating the Noteworthy and Nebulous in Naz, p. 410 available at http://nujslawreview.org/wp-content/uploads/2016/12/vikram-raghavan.pdf accessed on May 14, 2016.

the outside community or *from the state."*[13] (emphasis mine). The court goes to state that the law by criminalising a person's "core identity solely on account of his or her sexuality denies a gay person the right to full personhood which is implicit in notion of life under Article 21 of the Constitution."[14] This shows how the court considered sexual orientation as inalienable parts of one's identity. While emphasising on privacy, the court makes an association of privacy to dignity of the person. It does so by acknowledging that if an identity is criminalised it stigmatises and legitimises the discrimination. The judgment corresponded with the notion of privacy advanced in the Voices petition – that privacy is not only zonal but decisional as well. The court's assertion that "we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from outside community"[15] has been acknowledged as one of its finest articulations. By disassociating privacy from spatial dimensions, the judgment sought to establish privacy as a feature that a person carries along with himself or herself, allowing freedom from interference. It is important to reiterate how the privacy based argument had been criticised from within the LGBTQ community. By accepting such an innovation in conceptualising privacy, the judgement noted that S377 was an infringement upon individual autonomy, the freedoms guaranteed under Articles 19(1)(a) and 19(1)(d). This argument is significant not only because people are prosecuted under S377 for engaging in consensual acts but also because S377 impedes upon an individual's choice of partner in a consensual sex act. Decisional privacy in such a case can be a strong counter argument.

Since, right to privacy can be curbed only if there is a compelling state interest, the judgment considered in detail the question of what could possibly be a compelling state interest in criminalising consensual adult same sex activity. Mainly, the respondents (Ministry of Home Affairs and JACK) had argued that the legitimacy of having S377 on the law book is derived from two justifications: public morality and public health. The court quashed the public morality argument holding that "popular morality or public disapproval of certain acts is not a valid justification for restriction of the

[13] See Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del), available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf. accessed on May 19, 2016.
[14] Ibid.
[15] See Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del), available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf. accessed on May 19, 2016.

fundamental rights under Article 21. Popular morality, as distinct from constitutional morality, is based on shifting and subjective notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality."[16]

Further, the court found that the argument of public safety and health invoked by the Ministry of Home Affairs was contradictory to the arguments filed by NACO. The judges held that NACO as "a specialised agency of the government, entrusted with the duty to formulate and implement policies for the prevention of HIV/AIDS"[17] have filed substantial evidence to prove how HIV/AIDS prevention programme was harmed through S377, but contrary to such arguments the pathological assumptions of homosexuality propounded by the Ministry of Home affairs was found invalid in the light of emerging scientific evidence. The judges also questioned the submission of the Ministry of Home Affairs that S377 helps in preventing the spread of AIDS. In complete disregard to the Home Ministry's claims, the judges held that public morality and health cannot be grounds of compelling state interest in justifying infringement to the right to privacy of individuals who engage in consensual same sex relationships. Instead the judges held that "the compelling state interest rather demands that public health measures are strengthened by de-criminalisation of such activity, so that they can be identified and better focussed upon."[18]

Validating the claim of the petitioners that S377 makes on an unreasonable and arbitrary classification and is therefore violative of Article 14 of the Constitution, the court concurred stating that S377 does indeed fail to consider aspects such as: consent, absence of harm and age. Additionally, it also collapses the distinction between acts engaged in public and acts engaged in the private sphere. Therefore it fails the test of reasonable classification under Article 14. In taking forward discrimination jurisprudence of the country, the court also considered how

> "Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons,

[16] See Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del), available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf. accessed on May 19, 2016.
[17] Ibid.
[18] Ibid.

> namely the homosexuals as a class. Section 377 IPC has the effect of viewing all gay men as criminals."[19]

Another important argument for which the judgment was celebrated was the expansion of the word 'sex' under article 15(1) to include sexual orientation. By providing this broad reading of 'sex' under Article 15, the court has prohibited discrimination that occurs due to "not being in conformity with generalisations concerning 'normal' or 'natural' gender roles."[20] This is significant because by expanding the ambit of sex to include sexual orientation, the court has acknowledged the linkage that exists between sex, gender and sexuality. Such nuanced understanding of sex and gender has been rare within India judiciary. While describing sexual orientation as a ground analogous to sex, the court relied upon judgments from Canada and South Africa where sexual orientation has been held to be a ground analogous to sex. In effect, the judgement made S377 of the IPC a law that perpetuates sex-based discrimination.

Though the Naz judgement remained one of the most widely celebrated instances of discrimination jurisprudence, it also has its share of drawbacks.[21] The argument of the court that discrimination under S377 is directly linked to sex discrimination poses certain difficulties in the long term. It denies the possibility of sexuality standing alone as a ground of discrimination. While it is undeniable that sex, gender and sexuality are inter-related, it is also necessary to acknowledge sexuality as an autonomous realm. This is not done by the Naz judgment.

In its operative section, the judgment also does not consider the violation of Article 19(1)(a) to (d). While the petitioner drew attention to how S377 violates an individual's freedom of speech and expression, circulation and publication of materials on sexual preferences, rights of association and assembly of sexuality minority groups and the mobility of persons engaging in homosexual conduct. The judges held that "in the light of our findings on the infringement of Articles 21, 14 and 15, we feel it unnecessary to

[19] See Naz Foundation v. Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del), available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf. accessed on May 19, 2016.
[20] Ibid.
[21] For a general critique of a privacy based argument may carry please see Matha Nussbaum, 'Sex, Equality, Liberty and Privacy' in Zoya Hasan, E. Sridharan and R. Sudarshan (Ed.) India's Living Constitution, Delhi, Permanent Black, 2002; N. Bamforth, *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law*, London and Washington, Cassell, 1997.

deal with the issue of violation of Article 19 (1)(a) to (d)."[22] Though the scope of Article 21 is larger than Article 19, by deeming intervention into Article 19 as 'unnecessary', the court engaged only with the aspect of decriminalisation leaving behind the questions of civil and political freedom of sexuality minority groups. In a way, it leaves the aspect emphasised by the feminist strand within the community behind.

Phase Two: 2009-2013

In spite of the criticisms that can be made against the Naz judgment, one cannot overlook the fact that it has remained one of the most celebrated human rights judgments of recent times. It was widely acknowledged even outside the country as a landmark in LGBT struggles. The immediate backlash which the judgment provoked also demonstrates its liberatory potential. Within two months of its deliverance, the judgment was challenged before the Supreme Court.

The first Special Leave Petition was filed by Suresh Kumar Koushal who identified himself as astrologer by profession and as, a "citizen of India who believe they have the moral responsibility and duty in protecting cultural values of Indian society."[23] Eventually, 16 additional petitions were placed against the High Court judgment. All the SLPs were tagged together by the Supreme Court as Suresh Kumar Koushal v. Naz Foundation and Ors., which was numbered SLP (C) 15436 of 2009. The petitioners in this case can be classified into the following categories:

i. petitioners-in-person
ii. religious bodies
iii. organisations

Of all the four petitioners-in-person who appeared in the court, only B. P. Singhal was a party in the Delhi High Court case. There is an overlap in the arguments made by the four petitioners – B.P. Singhal, S. K. Koushal, Ram Murti and S. K. Tizarawala.

[22] See Government of NCT of Delhi (2009) 160 D.L.T. 277 (Del), available at http://lobis.nic.in/dhc/APS/judgement/02-072009/APS02072009CW74552001.pdf. accessed on May 19, 2016.
[23] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.

The parties appealed in front of the Supreme Court that homosexuality, if de-criminalised, may increase the chances of other socially sanctioned behaviour. They argued that a judgment in favour of de-criminalization would open the flood-gates of moral corruption. Other than this common ground, the arguments made had slight variations. While two persons (S.K. Koushal and B.P.Singhal) stressed upon how the judgment was an upfront to 'Indian' culture and society; three persons (S.K. Koushal, Ram Murti and B.P.Singhal) considered that homosexuality is an illness. Additionally, Koushal's petition raised concerns regarding the possibility of homosexual activity amongst army men and linked it to the threat of national security, if the decriminalisation judgment is upheld. He also argued how homosexuality is an import from the West and agreed with S.K. Tizarawala that AIDS was a consequence of engaging in unnatural sex. S.K. Tizarawala's petition argued that by overlooking the morality argument, the Delhi High Court have done a great disservice: it endangered public health as it encouraged the spread of AIDS epidemic. Interestingly, while Naz petition and the Delhi High court had placed a lot of importance on privacy claims, none of the petitioners except Tizarawala raised doubts on whether privacy could be a valid argument to protect sodomy from legal prohibition.

Of the wide spectrum of appeals that were made against the judgment, six came from religious parties and it remains significant that these organizations practiced three of the major religions of the country (Hinduism, Islam and Christianity). It is interesting to note that all the religious parties whether Hindu, Muslim or Christian (that is, the Krantikari Manuvadi Morcha Party, the All India Muslim Personal Law Board, Apostolic Churches Alliance, Trust Gods Ministry, and the Utkal Christian Council) invoked the 'public morality' argument as an overriding ground to contest the decision of the Delhi High Court. While Apostolic Churches Alliance and All India Muslim Personal Law Board invoked argument of sodomy being against their particular religious beliefs, Trust God Ministries argued how the judgment was contrary to 'Indian values'. The perceived threat that homosexuality possesses is linked directly to the fear of the demise of the family, which is uncritically held to be "the foundation and bulwark of Indian social structure."[24] Trust God Ministries also appealed that decriminalisation would make children vulnerable to homosexual acts,

[24] Proceedings of the case available at http://www.lawyerscollective.org/wp-content/uploads/2010/11/Proceedings-of-the-Final-Hearing-in-Section-377-Case.pdf accessed on May 10, 2016.

(ignoring the fact that the judgement de-criminalized only consensual sex among adults). Krantikari Manuvadi Morcha additionally argued that the judgment would lead to an increase in the number of male prostitutes. The arguments by the religious organizations sought to portray a situation of "moral panic". Even the Tamil Nadu Muslim Munnetra Kazhagam (which eventually did not appear in front of the Court) in its petition claimed that the judgment would lead to an increase in bestiality, drug addiction, adultery and sadism. The corroboration that all these parties made between homosexuality and other socially sanctioned behaviour can be attributed to their belief that homosexuality is a perversion and a disease. It is worth mentioning here that the intervention application filed by mental health professionals explicitly mentioned how homosexuality is no longer considered as an illness. The association of sin and disease had already been an accepted feature of Christianity and now it seems as if Hinduism and Islam were proceeding in the same direction.

Other than the broad overlap on the morality argument, another common thread which can be noticed is the argument on the scope of judicial action. Except Trust God Ministries and the All India Muslim Personal Law Board, all other parties questioned the legitimacy of the judiciary to step into a domain which they considered to be within the purview of the legislature. The majoritarian propensities of the legislature, the parties anticipated, would not allow S377 to be done away with. In sharp contrast to the trust that religious bodies have shown towards the legislature, the LGBTQ community have held that the legislative route has a bleak chance.[25]

Apostelic Churches Alliance and the All India Muslim Personal Law Board also expressed reservations on the expansive reading of Article 15 which after the Delhi High Court Judgment also included sexual orientation within the ambit of 'sex'. Two interesting reservations emerged against decriminalisation: first, Utkal Christian Council contests the claim of sexual minorities being recognised as a 'minority' group within the Constitutional framework; and second, the Apostelic Churches argued that if granted a minority status, claims for reservation might follow. This is interesting because the Voices petition very clearly indicated that sexual minorities were seeking no 'special rights'.

[25] As has been discussed in Chapter 3, ABVA had attempted to engage with the Parliament but had failed in getting a response.

Two organizations had also filed SLPs against the High Court Judgment: Delhi Commission for the Protection of Child Rights, henceforth, (DCPCR) and JACK. While DCPCR was not a party in front of the High Court, JACK was a petitioner before the High Court and its arguments remained the same. JACK argued that HIV/AIDS would spread virulently if homosexuality is de-criminalised and there will be an increase in male prostitution. JACK also raised reservations regarding Article 21 and how it could be used to protect the right to engage in 'unnatural' sex. The petitions by DCPCR and JACK show an overlap on two points: first, that morality is a ground sufficient to prohibit consensual same sex acts; and second, that Article 15 cannot be read to include sexual orientation within the ambit of sex. The additional objection that DCPCR raised was with regard to homosexual conduct being legitimatised within the ambit of privacy and how doing so could be used to indoctrinate young children. In this regard, the DCPCR's intervention is uncannily close to the argument of Trust God Ministry, a religious organisation. The idea here is that homosexual behaviour is not just undesirable but is also dangerous- a benign toleration of it could corrupt young impressionable minds. Homosexuality is also seen as a learnt behaviour and therefore can be passed on to children. This again stands in contrast to the intervention application of mental health practitioners which argued that homosexuality is innate. The wide range of SLPS that were filed against the High court judgment, cutting across religious as well as secular lines, bears an uncanny similarity to the backlash that feminism faced after its second wave.

The case before the Supreme Court also remained interesting on account of the position taken by the Union of India. While initially the position of UOI remained unclear with the arguments presented by P.P. Malhotra and Mohan Jain being apparently contrary to each other, the position became clear when Goolam Vahanhati, the Attorney General appeared before the court and took the position that with an expansive reading of Article 14 and 21 was acceptable, and S377 was violative of fundamental rights as it treated people unequally. He stated that the Council of Ministers had also referred to the alien origins of S377 and that the government did not contest the High Court decision. But with regard to application of Article 15, he expressed doubts.

Naz Foundation remained Respondent No 1 for all the petitioners. The submissions before the court in this instance is interesting as it not only drew upon the first petition

but also extended it further. From the writ petition, it retained the arguments on how S377 stood in the way of exercise of rights granted under Articles 14, 15 and 21 of the Constitution. It did not deal with Article 19. Additional arguments placed by Naz Foundation in this plea included the following assertions: first, though S377 appears neutral on the face, it also extends to discriminate against those who identify as homosexual; second, in this submission the ambit of right to health was widened beyond HIV/AIDS to include sexual and reproductive health issues and mental health which was compromised due to the operation of S377; third, it also brought to light the discrimination which is experienced with regard to employment and cited two cases as evidence of it; and fourth, it spoke about the culture of silence and intolerance around homosexual lives that is perpetuated due to the operation of S377. It is significant to note how the act and identity distinction was not present in the previous submissions of Naz foundation, but present in the Voices' submissions. In a way, this shift shows a widening of the grounds on which LGBTQ rights could be articulated. The move away from HIV centric language is an indication of how much the legal struggle has come to be couched in a human rights language. Notwithstanding the significance of HIV/AIDS in helping to secure the Delhi High Court judgement, the broadening of the claims is a mark of how far the journey has been made.

The other main respondent in this case, Voices against 377 made submissions which were broadly similar to the ones that were asserted in front of the High Court. In its written submission, Voices provided evidence to demonstrate the effect that S377 exercised over the lives of LGBTQ persons. It sought to argue that consensual acts among adults in private cannot be equated to carnal intercourse against the order of nature, as what constitute the order of nature is arbitrary. The submission argued that S377 constituted a violation of Article 21 as it did not recognise the right to privacy and dignity of individuals. By criminalising conduct that happened within the premises of the home and also by forbidding autonomous decision making with regard to choice of sexual partners, S377 stood in violation to the right of privacy which was available to all under Article 21 of the Constitution. Moreover, by rendering a person criminal for no fault of theirs, S377 was an upfront to a person's sense of self and dignity. The arguments submitted by Voices worked with the idea that homosexuality is innate and this being so S377 has to be looked at as a law that discriminates against a particular

class of people based on their identity and is therefore violative of the right to equality granted under Article 14. In a nutshell, S377 is inimical to the identity and dignity of homosexual persons not just because it invades their privacy but also because it perpetuates inequality. The submission argued that the state may invade the privacy of its citizens but there has to be a compelling state interest in doing so and in the case of S377, there is none. It submitted that although arguments of public morality are invoked in support of laws such as S377 but considerations of constitutional morality, as held by the High Court, can override it. Responding to the petitioners' claims that public morality is a reasonable restriction for restricting freedom under Article 19 (2), the Voices submission raised the pertinent question of how an act conducted within the confines of the home could be an upfront to public morality. Moreover, neither the government nor the appellants have been able to produce evidence of how consensual acts among adults in private can offend public morals. And therefore, the petitioner's claim that the High Court has erred in its judgment should be dismissed. Additionally, its submissions also appealed that the judiciary was duty bound to protect the rights of aggrieved groups by providing an expansive reading of rights. While doing so, the court could read Article 15(1) expansively to include sexual orientation within the category of sex. The prayer was, therefore, to read down S377 as violative of the right under Article 21, 15, 19 and 14. Unlike the Naz submission, the Voices submissions continued to use Article 19 as one of the grounds to declare S377 unconstitutional.

The Voices submission remained one of the most important legal interventions in the legal journey of S377 as it frames its claim within the discourse of citizenship. In its own words, the contestation around S377 is important because,

> "this case is about the emancipation of a large segment of our people. The Constitution of India in one of the great emancipatory charters, lifting as it does from the status of wretchedness and subordination -- communities, castes, tribes and women -- to full Citizenship. This case is about an invisible minority of Indians that seek to unlock the assured liberties enshrined in the Constitution, but denied to them in an aspect of life that matters most to them: their own identity; their own sexuality; their own self."[26]

Five new submissions were made in the form of intervention application when the Delhi High Court judgement was challenged and each of these remained important on account

[26] See http://www.law.hku.hk/hrportal/wp-content/uploads/file/Final-Arguments-in-Constitutional-Challenge-to-Section-377-0908.pdf accessed on May 11, 2016.

of the argument it presented. The I.A. by the 19 Parents of LGBT persons from New Delhi, Bangalore, Mumbai, Pune, Thrissur, Chennai and Kolkata which was admitted as I.A. No. 8 as Minna Saran and others on 7th February, 2011. As the locus standi of Naz foundation had previously been challenged, this I.A. was significant as it could claim locus standi (other than Voices) in the matter before the court. The main contention of this I.A. was that the placement of S377 within the chapter of the IPC is significant. Since it is included within the chapter on 'Offences Against the Human Body', instead of the chapter on morals, the matter should be open for prosecution only when there has been sexual assault and not sexual cohabitation. No adverse harm is caused by consensual sex among adults. The intervention also emphasised on the archaic language used in S377 which was not in tandem with the changing times. Since the language used was archaic, it made the section vague which implied that even non-procreative sexual activity between married heterosexual couples could be proscribed. Recognising that law should change with the times, the intervention asserted the need for judiciary to step in wherever justice was not being dispensed. S377 was not just unfair because it equated sexual cohabitation with sexual harm but also because the punishment under the section was much harsher than the act committed. Moreover, it created the possibility of harassment by the police. Thus, S377 violated Article 14 on account of its vagueness and arbitrariness and Article 21 on account of violation of privacy. Interestingly, this intervention also appeals to the idea of the 'family' which is threatened by the operation of S377. Yet, unlike the mythical family whose demise is feared by the petitioners, especially the religious organizations; in this case, the stigmatisation and marginalisation that 'real' families of LGBT persons face is emphasised upon. Since S377 allows the state to take cognisance of sexual acts that can occur within the confines of the home, it violates the rights of privacy of not only LGBT persons but also their family. Moreover, the stigma that criminalisation attaches to homosexual acts deters the creation of a safe and loving space for the LGBT person within the family. The prayer put forth in this I.A. was that if a declaration is made that S377 applies only to cases of sexual assault it would allow persons, homosexual or otherwise, to engage in sexual activities without the fear of violation of their privacy.

Eminent film maker and ex-member of Parliament, Shyam Benegal had also filed an intervention in support of the High Court judgment. The main contentions of Benegal's plea was that S377 must be read down as it violated the rights of privacy-not only of

homosexuals but also of heterosexuals. The words in S377 can be read to punish any non- procreative sexual acts. Emphasising on the wide scope of protection that Article 21 provides, it puts forth the case that sexual identity and the right to form sexual relations were an inalienable part of the right to privacy. Its objection towards S377 was mainly based around the power that it confers on the state to intrude into the bedroom, which cannot be condoned. This I.A. also placed on record a survey done by Outlook magazine in support of its argument that sexual practices were varied and not limited to procreation.[27] Moreover, the application also drew attention to the legacy from which S377 was derived-Victorian ethics, and how it remained oblivious of the Indian sexual mores. Like the other interventions, Benegal's plea also challenged the arbitrariness that is implicit in the application of S377. It also requested the court to include sexual orientation within the ambit of sex in Article 15.

Two I.A.s were filed from the academic community, one from Nivedita Menon and 16 other teachers from Delhi and Bombay and the other by Ratna Kapur and 9 other law professors. The intervention by Nivedita Menon and others relied on three major arguments in support of decriminalisation of same-sex relationships among adults. First, it showed that S377 is a manifestation of a religious belief and is in contradiction to the secular values espoused in our Constitution. As S377 was exported from Britain in a period when the Constitution had not yet come into existence and values such as secularism had not gained ground, but the presence of S377 in contemporary India could not be allowed. Second, it drew attention to S87 of the IPC which allowed for consent to be read into such acts wherein there might be a possibly of harm. Due to the operation of S87, in games like fencing, harm does not constitute an offence against the state because the parties involved have done an assessment of the risk involved. The intervention claimed that if S377 is to be read within the parameter of S87, consensual same sex conduct among adults cannot be held to be harmful. Third, since S377 has been hardly been used for prosecution of consensual same sex acts among adults, the doctrine of desuetude could be invoked as far as S377 is concerned. For this intervention, S377 is a 'dead letter law' that ought not to be working in a secular state.

The intervention by Ratna Kapur and other professors of law was based on a study conducted to assess the impact of the Delhi High Court Judgment on the levels of

[27] Available at http://www.mdraonline.com/Outlook_MDRA_Sex_Survey2012.pdf accessed on May 11, 2016.

harassment and stigmatisation faced by homosexual persons. Their study found that there has been substantial decrease in the same and based on such findings, the intervention sought to plead before the court to uphold the High Court judgment. Apart from using the argument from the study which demonstrated the positive impact, that respondents of the study reported the High Court judgment had in their lives, the intervention also argued for a suitable relief by the court from the effect of S377 on the basis of the following arguments: first, that there was no compelling interest of the state in retaining such a law; second, that the law was not in tandem with the changing times and third, that the language used in the law was vague since it had a religious origin. Since the law discriminated against certain people on the basis of their sexual orientation, it was an affront to their dignity and hence this particular law is also violative of article 21 and 14 of the constitution. The main focus of the interveners, however, remained the lack of compelling state interest in retaining such a law. S377 remained a law that was inspired from the idea of a sin and did not match with the changing contemporary morality.

I.A. no 9 was filed by Dr. Shekhar Seshadri and 13 psychiatrists and psychologists from different parts of the country who stated that they appeared before the court because the arguments of the appellants troubled them as false assertions were being masked as ‘scientific’ facts. The intervention sought to draw attention towards the changes that have been incorporated within the discipline of psychiatry. The main contention of the intervention was that homosexuality was no longer classified as a mental illness under Diagnostic and Statistical Manual of Mental Disorders-IV and International Classification of Diseases 9. Based on the experience with their patients, the mental health practitioners pointed out how the law had a detrimental effect on the psychology of homosexual people, driving them towards anxiety and mental stress. The application also drew attention to Article 51 A (h) of the Fundamental Duties that spoke about the necessity of developing scientific temper, and how the present petition against the Delhi High Court judgment was in contravention to such scientific spirit. It re-iterated that homosexuality is only one among the many manifestations of sexuality. Moreover, the petition also emphasised the immutable nature of homosexuality and therefore discrimination based on it was as unjust as discrimination done on the basis of one’s race or ethnicity.

However, in complete reversal to the expectations of the LGBT community, the Supreme Court judgment held that "Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable."[28] In the 98 page long judgment Justice G.S. Singhvi and Justice S.J. Mukhopadhyay hardly provide a sustaining argument on why S377 should be retained in the law book. Primarily, it held a conservative notion of strict separation of powers to argue that the legislature should "consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same"[29] and sidestepped the way in which the judiciary in India has emerged as "institutions of governance."[30] However, Gautam Bhatia argues that if the case is considered only "as an issue of judicial restraint and separation of powers" it would be "deeply misleading" because at the heart lies the issue of discriminatory legislation that the Court refuses to acknowledge and address.[31] In doing so the Court has diminished "an already deplete discrimination jurisprudence in India."[32]

Instead of looking into the human rights claims posed in the petition, the matter for the judges remained merely "the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC."[33] The rendering of a sensitive issue to a procedural and technical one is exemplified in the kind of questions that the judgment sought to answer. Contrary to the High Court decision which held S377 as violative of Article 14 because it creates a class of people and then discriminates against them, the Supreme Court judgment did not consider the creation of such a distinction unjust. Under Article 14, the Constitution grants all citizens right to equal treatment. The state, however, may decide to discriminate amongst citizens and create a classification for doing so. The classification has to follow a twofold criteria in order not to be invalidated by the courts: first, that the classification created must have

[28] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.
[29] Ibid
[30] Shyam Divan in Public Interest Litigation in Chowdhary, S., Khosla, M. & Mehta, P. B. (2016). *The Oxford Handbook of the Indian Constitution*. New Delhi: Oxford University Press, p. 678
[31] Gautam Bhatia, the Unbearable Wrongness of Koushal Vs. Naz Foundation, December 11, 2013 available at https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/ accessed on May 15, 2016.
[32] Shreya Atrey, Of Koushal v NAZ Foundation's Several Travesties: Discrimination and Democracy, December 12, 2013 available at http://ohrh.law.ox.ac.uk/of-koushal-v-naz-foundations-several-travesties-discrimination-and-democracy/ accessed on May 17, 2016.
[33] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.

a rational and objective basis and second, the classification created should have a rational relation to the object sought by the legislation. With regard to S377, the original petitioners (Naz Foundation) had argued that both these two criteria were not fulfilled. The contention was upheld by the Delhi High Court that not only did S377 create homosexuals as a class and discriminated against them but also that the classification created had no rational nexus with the objective sought to be achieved. This was thoroughly explained by the High Court with reference to how S377 overlooked consent, age and privacy as factors while discriminating against two classes of people. The Supreme Court, however, emphasised on what would constitute 'carnal intercourse against the order of nature'. While the judges held that S377 applies to all irrespective of their sexual orientation, the court was at pains to enumerate what would constitute 'carnal intercourse against the order of nature' and still maintain that procreation could not be the only way that 'carnal intercourse in accordance with nature' is conceptualised. Thus, the classification of 'naturalness'/'unnaturalness' was prioritised by the Supreme Court unlike the High Court. It is noteworthy that despite being unable to lay down the distinctness of the classification the court still held that the legislature is competent "to declare that the doing of certain acts shall constitute the crime against nature."[34]

The presumption of constitutionality applied, by the judges, to S377 even though it's a pre-constitutional law was argued on the ground that the Parliament has amended the IPC from time to time and yet has not deemed it sufficient to remove S377. And therefore, the judges argue that the doctrine of severability as used by the High Court remains inapplicable. In doing so, the court has shown its "how it uses, rather poorly, the theories of separation of powers, democracy, judicial self-restraint and deference, all within the smokescreen of presumption of constitutionality, for dogging a concrete legal analysis"[35] and the right to equality and right to life with dignity.

Disturbingly, when such evidence is produced regarding the discrimination that is perpetuated on the LGBTQ community through the operation of S377 the judges completely overlook it. The complete disregard shown to the responses filed by Voices

[34] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.
[35] Shreya Atrey, Of Koushal v NAZ Foundation's Several Travesties: Discrimination and Democracy, December 12, 2013 available at http://ohrh.law.ox.ac.uk/of-koushal-v-naz-foundations-several-travesties-discrimination-and-democracy/ accessed on May 14, 2016.

against 377 and the parents of LGBTQ persons is reflective of the lack of sensitivity from the judges. In fact, Pratiksha Baxi comments that "the language of the judgment is barely able to disguise the shudder of disgust that grips the judicial body"[36] and therefore turns away not just from the materials produced before the Court to show discrimination perpetuated as well as ignoring the fact that numerous incidents of blackmails, tortures harassment, and detention go unreported.

One of the significant challenges posed against S377 was that it is violative of privacy-dignity claims guaranteed under Article 21. While the High Court gave considerable importance to this claim, the Supreme Court's consideration of the same remained problematic. Though the Supreme Court judges accepted that the claim that privacy remains important, they maintained that curtailment of privacy could be justified when there is an important countervailing argument. It is worth mentioning that what the countervailing argument in this case could be was never dealt with by the judges. Without providing a reason again, the judgment held that "too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution."[37] Unlike the High Court judgment which understood privacy as both zonal and decisional, the Supreme Court's idea of privacy remained linked to the idea of space as evidenced by its reference to the space of home as the exemplar of private spaces. While the court did not elaborate on the compelling state interest, it did hold that S377 could not be invalidated on that ground of privacy as such infringement was done through a due process of law. In a way, the judges considered that S377 passes the test of procedural due process while ignoring that it would fail the substantive due process test. Turning a blind eye to such short comings, the court went to state that the violation of privacy for the LGBTQ community under S377 was not the direct fall out of the law but a consequence of the way in which it was enforced by authorities, and this could not be a ground to declare a law unconstitutional. Repeatedly, therefore, the Supreme Court's engagement with substantive Constitutional values shows a "poor judicial craftsmanship."[38]

---

[36] Pratiksha Baxi, Suresh Koushal V. Naz Foundation, December 18, 2013 available at http://www.outlookindia.com/website/story/suresh-koushal-v-naz-foundation/288895 accessed on May 21, 2016.

[37] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.

[38] Siddharth Narrain, We Dissent, available at https://kafila.online/2013/12/12/we-dissent-siddharth-narrain/ accessed on May 14, 2016.

Another important engagement that the Court overlooked was the matter of dignity and its centrality to Article 21. For Baxi, "dignity emerges in the narrative judicial strategy as the very ground of Naz"[39] but the Supreme Court hardly reflect upon it. In fact, in accordance with its convoluted way of arguing the court states that "every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live" but if any law infringes upon dignity it has to be "in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."[40] And since it does not find S377 as violative of dignity, one can only argue that the Court finds S377 to be a reasonable, fair and just procedure.

The Koushal judgment is also known for its contrary remarks on the use of foreign jurisprudence by the Delhi High Court. The text of the judgment read that,

> "often statements of law applicable to foreign countries as stated in compilations and learned treatises are cited without making a critical examination of those principles in the background of the conditions that existed or exist in those countries…While we should seek light from whatever source we can get, we should however guard against being blinded by it."[41]

The statement becomes significant as Justice Singhvi had never shown such aversion in the use of foreign judgments in his prior judgments. Arun K. Thiruvengadam's analysis of the refusal to admit the legitimacy of foreign judgments in the Koushal case, primarily by Justice Singhvi, finds such a stance surprising because "he has frequently cited foreign cases as authority for points of law on which sufficient precedents existed within Indian law."[42] Thiruvengadam elaborates that while the High Court had used judgments from other countries, these were related to the issue at hand- the criminalisation of consensual same sex acts- and no such precedents were available from the domestic cases, Justice Singhvi's reliance foreign judgments in his other judgments was avoidable as precedents from within the country were available. The contradictory position held by Justice Singhvi is also pointed out by Sahil Kher who points out to the liberal use of foreign judgments in the well known 2G judgment

[39] Baxi, U. (2011). Dignity in and up with Naz in Arvind Narrain and Alok Gupta (Eds.), *Law Like Love: Queer Perspectives On Law*. New Delhi: Yoda Press. p. 232

[40] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.

[41] Ibid.

[42] Arun K. Thiruvengadam, 2013, Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India, in Oscar Vilhena et al. (eds) *Transformative Constitutionalism: Comparing The Apex Courts Of Brazil, India, And South Africa*, p. 606.

delivered by Justice Singhvi in the month of February the same year. The Supreme Court of India has been known to rely on foreign judgments in its attempt to widen the ambit of constitutional rights. However, in this case by citing the inappropriateness of relying on foreign judgments, the attempt is to cover up for its own failings at reaching a logical conclusion of the issue at hand. For Madhav Khosla, the reasoning provided by the judges that foreign judgments should not be relied upon while dealing with the matter of constitutionality of S377 is a trivial one as "no one suggests that foreign decisions should be "applied blindfolded".[43] Khosla refers to how this contradicts the acknowledged principle that the content within foreign judgments have been counted as a permissive source of law.

The reluctance of the Court to admit foreign judgments in this case is linked with another very contradictory position on the separation of powers. Contrary to the increasing acceptance of judicial activism in recent times, in this case the Court referred to the doctrine of separation of powers and considered this case to be one in which judiciary should exercise restraint. It is noteworthy that Justice Singhvi who advised judicial restraint in this case had used it liberally across his career. In the judgment, the judges said that "if a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary,"[44] thereby implying that in this case the judiciary is reluctant to play the counter-majoritarian role that the judiciary is expected to play in a democracy. Significantly, Vikram Raghavan points out to how such a restraint was not observed by Justice Singhvi in the Red Beacons case whose judgment he delivered just two days before the Koushal judgment, instead he had proactively had overturned government regulations in this instance.[45]

While the Court argues for such strict separation of power, Khosla points out that "this claim cannot be made by courts where a Constitution vests them with the power of reviewing laws, and they routinely exercise that power." [46] Such an argument on one

[43] Madhav Khosla, 'The Courtly Way', the Telegraph, December 17, 2013 available at https://www.telegraphindia.com/1131217/jsp/opinion/story_17686133.jsp accessed on May 14, 2016.
[44] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.
[45] Vikram Raghavan, Taking Sexuality Seriously: The Supreme Court and the Koushal Case Part I, l. & other things http://lawandotherthings.blogspot.ca/2013/12/taking-sexuality-seriously-supreme.html accessed on May 14, 2016.
[46] Madhav Khosla, 'The Courtly Way', the Telegraph, December 17, 2013 available at https://www.telegraphindia.com/1131217/jsp/opinion/story_17686133.jsp accessed on May 14, 2016.

hand, shows how judges can prefer to remain blind to the fact that garnering numbers can be a difficult task for "discrete and insular minorities"[47] like the LGBT, and on the other hand it also exposes "how this attempt to shift responsibility to the legislature makes judicial review a matter of judicial convenience. In doing so, it illustrates how the court has abandoned all traditional constraints upon its institutional role."[48]

Moreover, the use of a numerical argument by the Court that only "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders"[49] created a furore among all those who stood in support of basic human rights. Chintan Chandrachud argues that the description used is a rare example of the application of a numerical de minimis test for a human rights PIL. In doing so, the court ignores the fact that "judicial activism obtains its legitimacy from the fact that the courts provide voice to those issues, interests and groups whose own voices would be drowned in the pell mell of majoritarian democracy. If these voices start to get silenced in judicial discourse then a major justification for judicial activism would stand defeated.… Judges do not need to add to their numbers."[50]

The supreme Court concluded that S377 is not violative of the constitution and therefore the High Court judgment is unsustainable. As mentioned earlier, the judgment had invoked the principle of separation of powers to justify the retention of S377 and because of such a stand had garnered some amount of support towards it. Such support mainly came from scholars such as M.P. Singh who proclaimed their support for LGBTQ rights but have maintained that in the Koushal judgment the judges have carried out their *dharma* as laid down under the existing Constitutional scheme unlike the Government which failed to do so. But the so-called deference of the court to the parliament has been termed as 'abdication of its duty' by Subramanian especially when seen in the backdrop of "the general hyperactivist nature of the Indian judiciary and the

[47] Danish Sheikh and Siddharth Narrain, Struggling for Reason: Fundamental Rights and the Wrongs of the Supreme Court, Vol - XLVIII No. 52, December 28, 2013.
[48] Madhav Khosla, 'The Courtly Way', the Telegraph, December 17, 2013 available at https://www.telegraphindia.com/1131217/jsp/opinion/story_17686133.jsp accessed on May 14, 2016.
[49] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.
[50] S.P. Sathe, 'Sexuality, Freedom and the Law' in Archana Parashar; Amita Dhanda, 'Redefining family law in India : essays in honour of B. Sivaramayya' New Delhi : Routledge, 2008.

activist background of the individual judges."[51] The general lack of judicial reasoning applied while taking this position is even emphasised upon by Subramanian who offers two probable reasons for it: first, that the judgment was crafted in a hurry, as Justice Singhvi was due to retire on the same day as the judgment was delivered; and second, the inability of the judges to

> "empathise with gay rights…The high degree of internal incoherency in the decision and the stark failure to follow the broader principles of judicial decision making exposes the Supreme Court, not only to reproach that it lacked impartiality, but even worse, makes the court vulnerable to criticism that it suffers from potential normative bias."[52]

Danish Sheikh also argues that the judgment conceals homophobia behind a mask of unreason. In fact, the critique of Koushal V. Naz has been so vehement that it has been equated with ADM Jabalpur which is infamous for legitimising the curtailment of civil liberties during the emergency period. One of the sharpest criticisms of the Koushal Judgment has also come from Justice A.P. Shah, who in the Ninth Tarkunde Memorial Lecture, has criticised it for turning away from the Court's progressive, rights-enhancing history. Justice Shah has pointed out towards three problematic points within the judgment: first, it shows excessive deference (through the presumption of constitutionality) towards a law that has a foreign origin; second, it only looks at prosecution as evidence and ignores all the other forms of undocumented persecution that LGBTQ people face; and third, it bypasses the important contention of S377 is incompatible with the Constitutional morality raised by the High Court. Justice Shah's criticism of the judgment stems from the fact that the Court in this case had failed to perform its role of a counter-majoritarian institution as well as protect the rights of minorities.

While most of the criticisms mentioned above have emphasised on the faulty reasoning used in the judgment, Tarunabh Khaitan focuses "on the deeper structural and institutional decline of the court that the judgment is merely a symptom of."[53] For Khaitan, the Supreme Court had re-invented itself after the emergency when it tried to fill up the space left uncovered due to legislative and executive inaction through PILs.

---

[51] S. Subramanian,. The Indian Supreme Court Ruling In Koushal v. Naz: Judicial Deference Or Judicial Abdication? The George Washington International Law Review; Washington 47.4 (2015): 711-762, p. 719

[52] Ibid.

[53] T.Khaitan, The legislative Court, December 23, 2013 available at http://www.thehindu.com/todays-paper/tp-opinion/the-legislative-court/article5495627.ece accessed on May 14, 2016.

Though the activism of the Court has been heralded within and outside the country as a progressive development, this has also made the Court take recourse to populism. In effect, the Court has become "a political actor, which wants to be judged as politicians are judged. Its legitimacy rests on popular acceptance, not constitutional mandate."[54] This leads the Court not to provide any reasoning for its judgments, which is also what the Court did in Koushal. Khaitan, therefore, names the Supreme Court as 'the Legislative Court'. Khaitan's contention is also seconded by Arghya Sengupta who writes that the Supreme Court is erroneously viewed "as an apolitical institution, acting when the recalcitrant political class fails to, saying the things that we want to hear."[55] That the Court had used labels such as 'so-called rights of LGBT persons' and 'miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders' not only reveals its prejudices against sexual minorities but also reveals its anxiety to distance itself from those who were seen as engaging in "an act of carnal intercourse against the order of nature". By doing so, the Court has made its majoritarian leanings evident. And the Court's populism has received wide support from various conservative sources.

Even as the judgment "does not make constitutional sense" Upendra Baxi points that, "one must thank the apex court for small mercies. It does not address the argument urged by a majority of petitioners that conferral of gay rights violates the fundamental right to conscience and freedom of religious belief and practice."[56] Therefore, even when the judgment did take the wheel of equality jurisprudence backwards in India it cannot be in any manner read as a validation of the various argument placed in the Koushal petition, viz. homosexuality as unacceptable by all religions, fear of AIDS epidemic due to legalisation of homosexuality, homosexuality as a mental illness and a western import, legalisation of homosexuality will pave the way towards legalisation of incest and homosexuality as a threat to national security. Effectively, the judges don't provide any reason on why S377 show be retained in the law book.[57] But the fact that S377 has been retained leads Nanda and Minocha to opine that, "the Supreme Court in the present case crumbled in the face of public morality and religious sentimentality and

[54] T.Khaitan, The legislative Court, December 23, 2013 available at http://www.thehindu.com/todays-paper/tp-opinion/the-legislative-court/article5495627.ece accessed on May 14, 2016.
[55] Arghya Sengupta, The wrongfulness of Deference available at http://www.thehindu.com/todays-paper/tp-opinion/the-wrongness-of-deference/article5464296.ece accessed on May 14, 2016.
[56] Baxi, U. (2014). Naz 2: A Critique. *Economic & Political Weekly,* XIIX(6). p. 12
[57] Coalition for Sex Workers and Sexuality Minority Rights, Dignity First: One year of Resistance to Re-Criminalisation of LGBT lives, December 2014, CSMR, p. 10.

departed from its role as champion of the downtrodden and weak sections of the society."[58]

Phase Three: Post 2013

The inherent wrongfulness of the judgment led to another round of legal recourse beginning with review petitions, the first of which was filed within 9 days. Interestingly, this was first done by the Union of India and then followed by the other parties. In all, eight review petitions were placed before the Court.[59] Review petitions have to be filed within 30 days of the judgment and can be made only when a case for 'error apparent in the face of the record' can be established. Accordingly, all the review petitions focussed on the lacunae that beleaguered the Koushal judgment. Additionally, the review petitions also appealed that there has a miscarriage of justice and its needs redressal. It is noteworthy that all the eight review petitions unanimously criticised the Koushal judgment on following five grounds:

First, that the Court had applied a numerical test while looking into claims based on Fundamental Rights. The Court's assertion that "the LGBT persons constitute a miniscule fraction of the country's population and only 200 persons have been prosecuted under Section 377 in the last 150 years"[60] has been objected to, in all the petitions. Turning the argument on its head, all the petitioners have criticised the judiciary for abrogating its duty to protect the LGBT community which as a minority needs protection.

Second, the judgment has been criticised as it has failed to apply the dual criteria test under Article 14. Under Article 14, the state can discriminate against a particular class of people under two conditions: i) rational nexus, which is fulfilled if the classification so created is not vague and has a rational nexus with the objective to be

[58] Pranav Nanda and Vasundhara Minocha, The Indian Supreme Court's Investiture in the World Rainbow, International Conference on Law, Management and Humanities (ICLMH'14) June 21-22, 2014, p.6

[59] As mentioned in the previous chapter the eight review petitions were from Union of India, Naz Foundation, Voices against 377, Dr. Shekhar Seshadri and 12 other mental health practitioners, Ms. Minna Saran and 17other parents of LGBT persons, Prof. Nivedita Menon and 15 other academicians, Prof. Ratna Kapur and 10 other teachers of law, and film-maker Shyam Benegal.

[60] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1 (India) § 63, available at http://judis.nic.in/supremecourt/imgs1.aspx?file name=41070. accessed on May 21, 2016.

achieve by a particular act; ii) legitimate objective, that is sought to be achieved by a particular act. The petitioners have pointed out how S377 creates an unreasonable classification because 'carnal intercourse against the order of nature' remains a vague proposition. Three petitions specifically argues that the vagueness of the classification is also evident from the judgment wherein the Court was unable to come up with a clear demarcation of what constitutes the order of nature. Moreover, the fact that the state did not contest the Delhi High Court judgment was seen as a validation of the argument that there could be no compelling state interest in criminalising consenting same sex acts among adults in private.

Third, the petitioners also demonstrated how the judgment did not address the question of S377 being in violation of the privacy-dignity claims guaranteed under Article 21 to everybody, irrespective of a person's identity. In addition, the judgment also does not cater to the arguments based on the right to health and substantive due process requirement, both of which are secured by Article 21.

Fourth, the judgment overlooks the contention put forth by the parties of providing an expansive reading of the category sex under Article 15 (1) to include sexual orientation. In this regard, the petitioners pointed out how similar strategies have been used by courts of other countries but even this claim was overlooked by the judges. The petitions specify how none of the arguments presented by the petitioners before the court remained in addressed.

Fifth, all the petitions also argued against the presumption of constitutionality which was applied by the Court for S377, which is a pre-independence legislation. While there have been several instances where the court has struck down such laws which were passed prior to the adoption of the Constitution, in this case the declaration that "S377 is not ultra vires of the Constitution" drew criticism from all the parties concerned.

Apart from the grounds mentioned above, seven of the eight review petitions (except Union of India) argued that the Court had failed to understand the position adopted by the Union of India, which had no opposition to the Delhi High Court judgment of 2009. By doing so, the petitioners argued that while the state had showed no aversion to LGBTQ persons being treated as equal citizens of the country, the Court had

supported the position of individuals who had no locus standi on matters of the validity and constitutionality of statutes.

The petitions from Union of India, Naz Foundation, Voices Against 377, Minna Saran, Shyam Benegal and Nivedita Menon also mentioned how the said judgment fails to consider the scope of judicial review granted to the court by the Constitution. The judges had mentioned that though social mores may have undergone changes, it does not warrant changes in the law and this also drew criticism. The argument that law and social change need to go in tandem with each other was specially emphasised in the petitions of Naz Foundation, Shyam Benegal and Ratna Kapur.

In addition, the judgment has also been appealed against on the ground that it does not take into account new legislative changes such as the Protection of Children against Sexual Offences, 2012 and the Criminal Law (Amendment) Act 2013. Since the retention of S377 has been pegged as necessary for preventing and punishing sexual offences related to children and women, the recent legislative changes makes S377 redundant. However, both these recent changes have been overlooked by the Court in the said judgment.

The petitions also assert how the evidence which was presented by Voices against 377 was swept under the carpet and the judges argue that there have been very few prosecutions under S377. Voices review petition argued that, "this Hon'ble Court has confused prosecution with persecution."[61]

While the court maintained that S377 criminalised only certain sexual behaviour, and not any particular sexual identity; five petitioners, viz. Union of India, Voices Against 377, Shekhar Seshadri, Minna Saran And Ratna Kapur have maintained that such a distinction is not maintainable. As made explicit through the petition of Minna Saran, "LGBT persons can never engage in 'carnal intercourse' which would be considered in conformity with the 'order of nature'. Section 377 creates a classification based on identity and not acts."[62]

[61] Review petition filed by Voices against S377 available at http://orinam.net/377/wp-content/uploads/2013/12/VoicesreviewFinallfiled_Jan102014.pdf accessed on May 22, 2016.
[62] Review Petition filed by parents of LGBT available at http://orinam.net/377/wp-content/uploads/2014/01/parentsreviewpetitionfiled2.pdf accessed on May 24, 2016.

The ‘alien legacy of 377’ which was again brushed over by the Court has been also asserted, in the petitions of Union of India and Ratna Kapur. An interesting aspect of the petition from Ratna Kapur is that it is the only one which mentions about the socially constructed nature of sexuality and thus draws attention to invoking the principle of freedom of choice. Moreover, along with Nivedita Menon, Ratna Kapur’s petition argues that in this particular instance instead of a division bench of two judges, a five member constitutional bench should have decided the matter as it ‘involved substantial questions of law as to the interpretation of the constitution.’

On 28th of January, 2014 Justice H.L. Dattu and Justice S. J. Mukhopadhyay considered all the eight review petitions in the confines of their chamber. The Court had denied an open hearing, though seven of the eight petitions had pleaded for it. As per the procedure for considering a review petition, Justice Mukhopadhyay as one of the judges who wrote the judgment also sat down for considering whether the review petition could be admitted or not. When the verdict was posted in the Supreme Court website in the evening, it struck a body blow to the aspirations of the LGBT community. The Supreme Court cited that there was no reason to challenge the impugned order. In the event of a rejection, conversations regarding the possibility of filing a Curative Petition as the penultimate step had already been making rounds.

Carrying the spirit of struggle alive, the first Curative Petition was filed on 31st of March, 2014 by Voices against 377. In all, six Curative petitions were filed. The other five parties were Naz Foundation, Minna Saran, Shekhar Seshadri, Ratna Kapur and Shyam Benegal. The Curative petitions invoked several similar grounds with the Special Leave Petitions and Intervention Affidavits filed in 2009 and the subsequent review petitions filed in 2014. Similar to the original grounds before the Supreme Court in 2009, the petitioners claimed that S377 of IPC violated Article 14 as it was vague worded and arbitrary in its application, violated the privacy-dignity claims and right to life and health under Article 21, violated the non-discrimination principle under Article 15, which if read expansively could read sexual orientation under ‘sex’ and the effect that 377 has on the lives and psyche of LGBTQ people. In addition, the curative petitions criticised the Koushal Judgment on the following grounds (which were also made in the review petitions): application of numerical test by the Supreme Court, questioning the locus standi of the parties who challenged the High Court judgment, the presumption of constitutionality, misreading the mandate of judicial review under the Constitution, overlooking of the recent legislative changes, neglecting evidence that was produced to show the persecution of LGBTQs, the

invalidity of Act-Identity distinction, position against deriving precedents from foreign jurisdiction, dissociating law from social change, and failing to recognise the position taken by the Union of India. However, there are also a few arguments that are unique to the curative petitions: assertion that LGBTQs are not as miniscule a minority as the court holds, that several of the petitioner's claims have not been considered (especially none of the grounds raised by Dr. Shekhar Seshadri had been addressed), explicit reference of violation of the principle of natural justice, and that after the 2013 judgment there has been an increase in instances of harassment of LGBTQ people.

When the Court considered the admissibility of the Curative petitions and held out a positive signal saying that "the issues sought to be raised are of considerable importance and public interest and since some of the issues have constitutional dimensions", it breathed a gush of fresh air into LGBTQ activism in India.[63]

CONCLUSION

As had been stated in the introduction, the present chapter intended to delve into the arguments that each actor in the legal journey of S377 presented. It has already been noted in the previous chapter that the movement had begun to become more broad-based with every challenge that came in front of it. In this chapter, after an analysis of the arguments, it is visible how closely arguments of the two leading spear headers of the movement: Naz Foundation and Voices against 377- resemble each other. It is extremely necessary to remember that these two organizations come from very different backgrounds and therefore had divergent view on issues. But the narrowing of the gap categorically indicates how they have impacted each other.

The argument presented has been arrived at by conducting a content analysis of the all the petitions that Naz Foundation and Voices had filed in the course of the legal struggle. Firstly, if one considers instance of how the words 'sexual act' and 'sexual identity' have been used across the movement's legal history it shows how the two have been swayed by each others perspective. Naz Foundation used sexual act 42 times in 2001, and it use increased to 53 times in 2012, then decreased to 22 times in

[63] See http://www.thehindu.com/news/national/Five-judge-Constitution-Bench-to-take-a-call-on-Section-377/article14056992.ece, http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench-lgbt-community-lives-it-up/article8184886.ece, http://www.thehindu.com/opinion/editorial/Hope-floats-again-on-Section-377/article14056799.ece accessed on May 30, 2016.

2014 and finally came down to 17 in 2014. Simultaneously, in the Voices petitions 'sexual act' finds mention 7 times in 2012, 4 times in 2014 and 3 times in 2014. It needs to be recalled that Voices as a coalition, unlike Naz, did not come from a background that delinked sexual act from sexuality and therefore, did not talk of MSM (which is a behavioural category). The decrease of emphasis on sexual act is significant for Naz which in tandem with NACO worked primarily with MSM. This decrease can be attributed to the impact that Voices had on Naz. Similarly, when one explores the usage of 'sexual identities' such as gay, lesbian, LGBT and homosexual identity in these petitions, a remarkable trend emerges. For Voices which emerged as the first party to demonstrate locus standi on the matter, one would expect that sexual identity remains the priority. However, its usage decreases from 259 times in 2012 to 166 times in 2014 and remains at 186 in 2014 curative petition. For Naz the corresponding numbers are: 60 in 2001, 59 in 2012, 32 in 2014 and 7 in 2014. It is worth noting that the number declines suddenly in 2014, which is also the time when support from several other allies had become stronger (particularly, the other six appellants). In fact, as mentioned earlier, Shyam Benegal's petition had emphasised on how S377 affects all and that it is not linked to a particular sexual identity. In addition, Ratna Kapur's petition also spoke about the social construction of sexuality, making it impossible to speak of sexual identity, while espousing for decriminalisation. It can be hypothesised that it was due to the influence of these two petitions that sexual identity became a under rated index for both Naz and Voices

The second significant shift that is noticed is how the emphasis on health and HIV has shifted, especially for Naz. While in 2001 it was used for 46 times, its use increased to 78 in 2012 but suddenly declined to 10 in 2014 and then 4 in 2014. At the same time health as a ground to claim rights increased from 10 in 2001 to 58in 2012, decreased to 39 in 2014 and 24 in 2014. Read together, it can be stated that while the emphasis on HIV declined, the same is not true for health (though HIV is a health issue). This is because, along the route of the legal struggle, Naz started expanding its argument to over other aspects of health such as mental health, sexual and reproductive health. This can definitely be called as a tectonic shift in the LGBTQ movement, the corresponding figures for health in Voices petitions are 15 in 2012, 30 in 2014 and 26 in 2014, and for HIV it was 22 in 2012, 24 in 2014 and 11 in 2014. It is worth mentioning that health has never been the primary focus for Voices.

The primary focus for Voices is the claim to 'full moral citizenship' and thereby claiming access to all procedural and substantive rights. Therefore, when the usage of

citizenship is examined, it is seen that the trend remains steady from 27 in 2012, to 36 in 2014 and 41 in 2014. Unlike Naz, whose HIV centric approach has changed over the course of time, Voices have maintained their primary ground on which they are seeking decriminalisation. The corresponding figures for Naz are also interesting here: 8 in 2001, 16 in 2012, 4 in 2014 and 3 in 2014. The peak which is seen in 2012 is in the aftermath of the Naz judgment. It is noteworthy that the Delhi High Court while reading down S377 did it on the grounds of Constitutional morality rather than on the basis of an epidemiological argument. Therefore, it can be hypothesised that emphasis on 'citizenship' increased in 2012 response. However, with the reversal in 2013, its use again declined.

As mentioned previously, the argument of privacy made in the Naz petition invited criticism from several corners. Privacy based arguments were central to both Naz and Voices. While the 2001 and 2012 Naz arguments mentions it 54 and 59 times respectively, Voices uses it 60 times in 2012. However, it decreases to 11 in 2014 and further to 3 in 2014 for Naz and similarly, it decreases from 21 in 2014 and 20 in 2014 for Voices. The criticism against privacy came from two main sources, as also mentioned in the previous chapter: the feminist discomfiture with the private and the class-bias that argument of privacy presumed. The drastic decrease in the usage of privacy argument by 2014 is a testament to the blurring of the ideological and class distinctions within the movement. Presumably, Naz and Voices sought to narrow the gulf between themselves and the parties who made the criticism. The initial skepticism towards the lesbian feminist critique may have given way to greater co-ordination with lesbian women, though increased consultations. Contrarily, it could also be the case that since a lot of opponents criticised the High Court judgment saying that public morality must regulate private conduct, both Naz and Voices realised the pitfalls of hinging on the privacy argument and hence the reluctant use (despite enough privacy based judgments being available).

The observations made in this part of the chapter, based on the previous sections, are tentative indicators of how the legal terrain is an uneven one - both in terms of progress as well as invoking principles. It can be seen that not only has the legal terrain been changed (albeit in a fluctuating manner) by the intervention of the LGBTQ movement, the nature of the LGBTQ movement has also been changed by the legal terrain.

CHAPTER V

UNEQUAL CITIZENS, DISCRIMINATION AND THE LAW: VOICES FROM THE FIELD - I

INTRODUCTION

Bolstered by the 2001 petition before the Delhi High Court, a vibrant LGBTQ movement has emerged in India. Though the movement initially fore-grounded the right to health, over the years it has amplified its ambit to develop a robust critique of discrimination based on sexuality. It can be deduced from the previous chapters that the LGBTQ movement has unveiled the masquerade of universalism that citizenship bears. In fact, throughout the legal journey the petitions filed in favour of decriminalising consensual same sex between adults provided testimonies that revealed the myriad ways in which LGBTQ people faced discrimination across their lives. By laying claims to 'full moral citizenship' the LGBTQ movement has refused to "remain literally and metaphorically unspeakable."[1] In fact, its resistance to such an unequal status has discerned Carver's contention that the state conceives, represents, polices, educates, regulates, defines, criminalizes and taxes different communities differently.[2]

The manner in which sexuality mediates access to citizenship has been the subject of several scholarly interventions.[3] The heterosexualisation of citizenship and the consequent marginalisation of non-heterosexuals reveals the normative bias that underpins citizenship. In her 1998 essay 'Sexuality and Citizenship' Diane Richardson had demonstrated that even when citizenship is conceptualised through the Marshallian terms, gays and lesbians could be best termed as 'partial citizens' as they remain excluded from enjoying the entire range of civil, political and social

---

[1] Jonathan N. Katz quoted in N. Bamforth, *Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law*, Cassell, London and Washington, 1997, p. 1.

[2] The differential treatment that is given to different communities, therefore, leads Carver to conceptualise the structure of citizenship as *gradations of esteem. See* T. Carver, 'Sexual citizenship: Gendered and De-gendered Narratives', in Terrell Carver and Véronique Mottier (eds.), *Politics of sexuality: Identity, gender, citizenship,* Routledge, London and New York, 1998, pp.13-24.

[3] See D. Richardson, 'Sexuality and Citizenship', *Sociology*, Vol. 32, No.1, 1998, pp.83-100; S. Phelan, *Identity politics: Lesbian feminist and the limits of community*, Temple University Press, Philadelphia, 1989; J. Weeks, *Sexuality and its discontents*: *Meanings, myths, & modern sexualities*, Routledge & K. Paul, London, 1985; A. Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change , Bangalore, 2004.

rights. The exclusions that LGBTQ people in USA face from law leads Shane Phelan to categorise them as 'marginal citizens'.[4] She highlights the exclusions from the military, absence in immigration law, anti-sodomy laws, unavailability of same sex marriage, absence of prosecution for discrimination and violence as instances to illustrate her argument. Both Richardson and Phelan note though the language of citizenship is appealing, it has its inherent shortcomings as "citizenship is inevitably a heterosexualized concept, such that rights claims based on citizenship status mobilized by lesbians and gay men must be moulded to fit this pre-existing heterosexual frame."[5]

The theoretical questions regarding citizenship raised by Diane Richardson and Shane Phelan form the backdrop of the present chapter. Based on field work conducted in two urban metropolitan cities of Delhi and Mumbai with 25 participants, the chapter seeks to highlight through the accounts of the participants that though there is an acknowledgment that LGBTQs are unequal citizens, there is an absence of a critique of the idea of citizenship itself. Barring two participants who noted the limitations of claiming equal citizenship status, the rest have reflected a yearning to be considered as equals. And this, therefore, corrodes the radical potential of LGBTQ politics. In other words, it emerged from the field work that the language of assimilation remains appealing for those who are engaged in the LGBTQ movement.

The participants of the study comprised of 25 individuals who have worked on the area of sexuality rights and have been involved with the LGBTQ movement in India. Since all the participants have been engaged with the legal struggle against S377 of the IPC their insights, it was hoped, could provide a perspective on how access to citizenship is regulated on the basis of sexuality. Moreover, keeping in mind that no sexual identification within the LGBTQ spectrum is equivalent to the other, the study sought to bring the voices of each category. And therefore, based on their sexual identification the study has incorporated the voices of following persons: heterosexuals (four), lesbians (five), gays (eight), bisexuals (two), transgenders (two FTM, one MTF and one person assigned gender male at birth) and queer (two).

---

[4] S. Phelan, *Identity politics: Lesbian feminist and the limits of community*, Temple University Press, Philadelphia, 1989.
[5] D. Bell, & J. Binnie, *The Sexual Citizen: Queer Politics and Beyond*, Polity Press, Cambridge, 2000, p. 27.

The chapter uses thematic analysis of the data collected through in-depth interviews. Issues of intersectionality was also sought to be addressed by keeping axes such as sex, gender and age varied. However, the sample is homogenous on account of their geographical location and educational attainment.

The chapter is divided into three sections. The first section deals with the accounts of discrimination presented by the participants. Based on the accounts, the discrimination faced by LGBTQ people can be categorised as both direct and indirect discrimination. Importantly, the accounts reveal that experience of discrimination is mediated by gender, visibility, class and age. In other words, discrimination must be placed in intersectional perspective. The second section focuses on legal discrimination as a particular instance through which LGBTQs are rendered partial citizens. Though the previous section dealt with the varying forms of discrimination, legal discrimination is the common thread that links the different sub-sets of the LGBTQ spectrum into a common unity. In particular, two instances of S377 and sexual rights emerge to reveal that there is legal inequality. However, unlike in the case of S377 where there is near unanimity among the participants regarding its undesirability, the narrative on sexual rights is fractured. The third section attempts to elucidate the issues around which the participants consider that the LGBTQ movement has and can coalesce: S377, anti-discrimination legislation and recognition of same sex relationships. A reading of the same reveals that a language of 'equality as sameness' is invoked by most of the participants. And this is revealing because while participants have criticised the present experience of unequal citizenship, it shows that citizenship as an ideal still holds an exalted status.

Discrimination and the Experience of Inequality

Discrimination as a concept has occupied simultaneous position with equality in our political imagination. Discrimination has been used in scholarly works to indicate a value-laden concept wherein members of a socially salient group are targeted, directly or indirectly, individually or institutionally, in order to marginalize and exclude them. Within India caste, religion and gender have been bought to the fore in the foregoing century as important markers which structure discrimination, and recently sexuality also has also emerged as another axis of discrimination. This development is also

corroborated through the narratives of participants interviewed. All the twenty-five participants asserted that the LGBTQ population invariably experienced discrimination.

Discrimination has been variously categorized as direct and indirect, individual and structural, de facto and de jure, intentional and non-intentional discrimination. Direct discrimination has been understood as intentional discrimination that explicitly aims to disadvantage the members of certain socially salient group. Direct discrimination may be practiced by an individual or an individuals firm as well as by the state. While an individual may practice direct discrimination by refusing access to members of a socially salient group into his premises, the state practices direct discrimination when it permits policies of racial segregation in schools, denies certain jobs opportunities to women and legalizes the practice of untouchability.

In contrast to direct discrimination, indirect discrimination is marked by the lack of explicitness. Here, discrimination emanates mainly from institutions rather than individuals. Indirect discrimination refers to the uneven consequences that flow from policies, which in the first instance appear to be free from any intentional discrimination. Discrimination, in this sense, arises from the lack of sensitivity that differential impacts may be produced even when the policy looks non-discriminatory, on the surface.

The distinction between direct and indirect discrimination is noteworthy because in the case of sexual minorities both forms of discrimination are experienced, as was seen from the accounts of the participants. Using the same categorisation, instances of direct discrimination cited in the account of the participants include criminalisation through the operation of laws such as S377, physical violence including forced marriages, exclusion from spaces, instances of indirect discrimination are non recognition of relationship, non availability of marriage, and silencing or absence of a space to articulate desire. The pervasiveness of discrimination has led to LGBTQ persons contemplate suicide. Participants interviewed also noted how discrimination is experienced due to inaccessibility of health facilities, lack of infrastructure such as toilets, experience of extreme emotional and mental stress, internalisation of inferiority, livelihood concerns due to lack of financial support with employment

opportunities being hugely circumscribed, social and cultural marginalisation, sexual harassment on the roads as well as at workplace.

Participants offered varied reasons for the experience of discrimination. Ten participants noted that the functioning of the gender binary led to discrimination.[6] Since a binary understanding of gender leads to rigid construction of masculine and feminine roles, any deviation from it was construed as abnormal and as a threat to the system of gender itself. That LGBTQ may engage in gender bending, they are seen as a threat to this gender binary and thus, face discrimination.

It is worth mentioning here that patriarchy and binary understanding of gender are inextricably related to each other.[7] As Pramada mulls over, "the notion that somebody might actually topple a patriarchal order or that men will have to give up their power, in a sense of taking on a feminine role is what they assume gay people are going to do" (personal communication, October 20, 2016). Pramada's argument also finds resonance in Sukhdeep and Rituparna's account, who also agree that discrimination is a response to the threat that LGBTQ people pose to the patriarchal structure. To quote Sukhdeep, "…the whole (patriarchal) hierarchy dictates that a woman has to be subjugated, a man has to dominate, a man can not have feminine traits or even traits identifiable as feminine like dancing, having long hair or something similar. So there is a kind of threat that the society feels. So, it's also a response to it" (personal communication, October 13, 2016). By displaying gender non-conformist behaviour,

[6] Similar accounts are found in Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, Scholarly Works, Paper 14, 2010, Liz Airton, 'From sexuality (gender) to gender (sexuality): the aims of anti-homophobia education', *Sex Education: Sexuality, Society and Learning*, Vol. 9, No. 2, 2009, pp.129-139. Both these accounts talk of the necessity to address 'genderism' / binary understanding of gender in order to address issues of LGBTQ discrimination. The theoretical framing of how gender binary entrenches homophobia is found in Judith Butler, *Gender Trouble Feminism and the Subversion of Identity*, Routledge, New York, 1990.

[7] Lesbian feminists were the first ones to assert that patriarchy as a structure relied not only on subordination of women but also enforcement of heterosexuality. See Adrienne Rich, *Compulsory heterosexuality and lesbian existence*, Onlywomen Press, London, 1981. Also see, Christopher N. Kendall, 'Homophobia as an Issue of Sex Discrimination: Lesbian and Gay Equality and the Systemic Effects of Forced Invisibility', *Murdoch University Electronic Journal of Law*, Onlywomen Press, Vol. 3, No. 3, September, 1996. available at http://www5.austlii.edu.au/au/journals/MurUEJL/1996/22.html; Gregory M. Herek, 'Beyond "Homophobia": Thinking About Sexual Prejudice and Stigma in the Twenty-First Century', *Sexuality Research & Social Policy*, Vol. 1, No. 2, April, 2004, pp. 2-24; Michael Kaufman, 'Men, Feminism, and Men's Contradictory Experiences of Power' in Joseph A. Kuypers (ed.), *Men and Power*, Fernwood Books, Halifax, 1999, pp. 59-83; Stephen Tomson & Gail Mason, 'Engendering Homophobia: Violence, sexuality and Gender Conformity', *Journal of Sociology*, Vol. 37, No. 3, 2001, pp.257-273; Angelique C. Harris , 'Marginalization by the Marginalized: Race, Homophobia, Heterosexism, and "the Problem of the 21st Century"' *Journal of Gay & Lesbian Social Services*, Vol. 21, 2009, pp.430–448.

LGBTQ people expose the socially constructed nature of gender and this is turn is not taken kindly by the society.

However, not all gender bending is treated similarly. Explanations invoked for being gender non-conformist also matter. Society, even if reluctantly, accepts transgenders because a biological argument can be presented for their existence.[8] As Pramada elaborates, "it's easier for people to understand trans-issues because in trans-issues you are very clear that you want a transition from male to female or female to male" (personal communication, October 20, 2016). But for gays, lesbians and bisexuals "we choose to be where we are" (personal communication, October 20, 2016). And unlike biology, choice remains unacceptable. Rituparna agrees with Pramada and adds "with regard to LBT, it's about choice, it's about who they want to be, how they want to be. But choice is not accepted, victimhood is accepted" (personal communication, October 20, 2016).

In addition to transgressing the gender binary, LGBTQs also transgress the norms of the heterosexist society.[9] One particular norm which is challenged by LGBTQs is the institution of heterosexual marriage which has been cross-culturally privileged. Rituparna explains how LGBTQ lives "challenges the marriage system, it challenges the family structure to a large extent. Because once you are a queer person, you are a lesbian for instance you will not get married and the relationship that you built will be outside marriage. It will not be that a man will be more powerful, a woman who is less powerful and the power balance will be such that a man will not be at the top and woman at bottom. And, that's exactly how a heterosexual family does not function" (personal communication, October 20, 2016). LGBTQs present an alternative model to the heterosexual family which is based on a gendered division of labour.[10] This

[8] See Serena Nanda, *Neither Male nor Female: The Hijras of India*, Wadsworth Publishing, Holborn, 1999. Interestingly, the Supreme Court also assumes the immutability of Hijra existence. See Aniruddha Dutta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights', *Journal Of Indian Law And Society*, Vol. 5, 2014, pp. 225-236.

[9] One of the earliest discussions on Heterosexism and its impact on LGBTQ was done by Joseph H. Nielsen. See Joseph H. Neisen, 'Heterosexism', *Journal of Gay & Lesbian Psychotherapy*, Vol. 1, No. 3, 1990, pp.21-35. On the impact of hetero-patriarchy on laws that affect LGBTQ see Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, Yale Journal of Law & the Humanities, Vol. 8, No. 1, Article 7, 1996. M. Jacqui Alexander uses hetero-patriarchy in her analysis of empire and nation-building. See M. Jacqui Alexander, *'Pedagogies of Crossing: Meditations on Feminism, Sexual Politics, Memory and the Sacred'*, Duke University Press, Durham and London, 2005.

[10] For more on the division of labour within same sex households see: Maureen Sullivan, 'Rozzie and Harriet? Gender and family patterns of Lesbian Co-parenting', *Gender and Society*, Vol. 10, No. 6,

challenge to the hetero-patriarchal social order leads to discrimination. As Chayanika sums up, the reason for discrimination is structural, "it's basically the structure of society which is about recognising certain kinds of people and certain kinds of relationships and allowing for only certain kinds of families to be recognised" (personal communication, July 22, 2016).

Pallab takes the analysis further and links how ignorance regarding same-sex relationship is widespread within the Indian context because the body and its related affairs are denied a legitimate space for discussion.[11] In his own words,

> "there is a certain level of discomfort with talking about same sex relationships and I think the issue has also got to do with our own discomfort with our own bodies….we have so many mental blocks about our own bodies and as a result of this-about sex or talking about sex-taking it as an extension from that then same sex relationship become far more stigmatised and far more misunderstood" (personal communication, July 11, 2016)

As a corollary of the body being denied its legitimate space for discussion, flows the fact that desire (of any kind) is policed and this adds more fuel to the fire of discrimination against LGBTQs. As Mehr explains, "forget sex, even as a straight women you can't talk about desire…the controls on our desire and sex are multiple" (personal communication, July 21, 2016).

Silence is not only discrimination in itself but also a reason behind discrimination. Since conversations around sex-gender-sexuality are almost negligible, it helps in perpetuating the stigma around non-heterosexual lives. It also ensures that the discrimination that LGBTQ people face cannot be articulated. Therefore, when LGBTQ people face different forms of discrimination such as: violence, work place discrimination, denied loans, denied a house on rent etc. they can't even publicly invoke their sexuality as a ground for such discrimination. Ashok calls this as the 'zone of silence'- silence regarding all things sexual, which prohibits even any discussion on why a particular person might have remained single. As Ashok points out, having a single person may not be a rarity in Indian households but nobody talks about the person's sexual orientation as a plausible reason for his/her decision to

---

December, 1996, pp.747-767; Abbie E. Goldberg, ‘‘‘Doing’’ and ‘‘Undoing’’ Gender: The Meaning and Division of Housework in Same-Sex Couples', *Journal of Family Theory & Review*, Vol. 5, June, 2013, pp.85-104.

11 Such an articulation resonates with Martha Nussbaum's position in *Hiding from Humanity: Disgust, Shame, and the Law*, Princeton University Press, Princeton and London, 2004.

remain single (personal communication, July 7, 2016). The hegemonic position that is accorded to heterosexual marriage and the socially/ritualistic devaluation of single people are the two sides of the same coin. These cause discrimination against LGBTQ persons.

The permeation of the distinction between what constitutes natural and unnatural sex in the social imagination can be majorly attributed to the presence of S377 of the IPC which is itself a form of legal discrimination. As seen in the previous chapters, law constructs social reality and therefore the presence of an anti-sodomy provision in the statute creates an atmosphere of hostility towards LGBTQ people. Sachin articulates such a position forcefully, "discrimination happens primarily on account of the anti-sodomy law… The presence of that law has ensured that what is defined as carnal intercourse against the order of nature is criminalised and this is used specifically by the state and the police and authority figures, including in the public and private sphere to discrimination against LGBT" (personal communication, July 9, 2016). S377 has been listed as a reason for discrimination categorically in the accounts of seven participants.[12] Criminalisation is not only discrimination in itself but also acts as a justification for other differential treatment. As Pallab explains, S377 has robbed LGBTQ people from establishing a human connect with the non-LGBTQ people. It sexualises LGBTQ persons, and overrides the possibility of conceptualising same sex relationship at the emotional level as opposite sex relationships. It also demolishes the right to privacy of LGBTQ persons and construes "everything from the purview of only sex-what goes where and what is natural" (personal communication, July 11, 2016).

Understandably "the law is one manifestation of discrimination" (Siddharth, personal communication, October 10, 2016), nevertheless it remains important and the most visible form of discrimination. As Akshay argues, discrimination "is contained in the law and this is visible when we look at the processes through which law comes up with an imagination of intimacy, of being" (personal communication, October 17, 2016). Akshay explains that within law there is a normative frame in which the family as is imagined and heterosexual and married. And this imagination de-legitimises "a

[12] For the others, though it remains unmentioned, one cannot conclude that it remains unimportant. This is because every participant in the subsequent question on S377 responds that irrespective of whether it should be read down or deleted, it should go from the law book, considering it ramifications of LGBTQ lives.

lot of our intimacies, of our ways of being which fall outside of that, militate against that. But again it's not only for people who are self identified as LGBT…there is similar kind of situation for people who choose not to get married and might be opposite sex" (personal communication, October 17, 2016). When the family is constituted as such within the legal register, it becomes an exclusionary structure in itself.

While participants noted that the discrimination experienced spanned across from family to school, to college, to workplace, it must be noted that the experience of discrimination is varied in both its degree and form. That is, not all in the LGBTQ spectrum experience the same kind and same amount of discrimination.

As has been stated in the beginning of the work itself, the research attempts to employ intersectionality as a tool while looking at a particular phenomenon. And during the course of the field work it emerged that variables such as gender, visibility, class and age, produce differing experiences of sexuality based discrimination. Stated differently, the field work revealed that it is difficult to speak about discrimination in a universal language because differences in location impact the experiences of discrimination.

Fernandes and Gomathy in their study on the violence faced by lesbian women had asserted that gender plays a crucial role in distinguishing gay men's vulnerability to violence vis-à-vis lesbian women. They argue that "lesbians not only have to contend with violence as women, but also as lesbians."[13] Similar conclusion is reached by a study done by Sappho for Equality which also concludes that LBT women or "the non-normative woman becomes the softest target, both for her gender and her sexuality!"[14] It is noteworthy that this study also considers the case of transwomen along with lesbian women while talking about the discriminatory treatment faced on account of gender. A report by PUCL-Karnataka also makes this angle of discrimination clear when it shows how hijras (who are a sub-set of transwomen)

[13] B. Fernandez & Gomathy N.B., 'The nature of violence faced by lesbian women in India', *Research Centre on Violence Against Women*, Tata Institute of Social Sciences, Mumbai, 2003, p.14.
[14] S. Ghosh, S. B. Bandopadhyaya & R.Biswas, *Vio-Map: Documenting and mapping violence and rights violation taking place in lives of sexually marginalized women to chart out effective advocacy strategies*, Sappho for Equality, Kolkata, 2011, p. 60.

experience further discrimination in comparison with gay men.[15] Such findings have been substantiated also in the present study. It was found that gender is a major determinant of how such discrimination is experienced.

All the participants interviewed acknowledged that lesbian bisexual and transgender women experienced discrimination differently than gay men, both in terms of degree as well as form. Sukhdeep lays this down very clearly when he says that lesbian and bisexual women are "doubly discriminated… as women you face discrimination on the first level then apart from being a women you belong to a sexually marginalised section, so there is second discrimination." (personal communication, October 13, 2016). There is an acceptance that by virtue of their gender, gay men are relatively privileged in comparison to lesbian and bisexual women. Reasons attributed for such an advantage are: mobility- physical and social and disposable income. Both these factors enable gay men to explore their sexuality as well as to form relationships. Unlike gay men, therefore, lesbian and bisexual women are confronted with a silencing of their desires. Koninika believes that the society is used to monitoring women's bodies- from how they dress to how they walk- and this is particularly enforced in the case of lesbian women who are seemingly butch. To quote her, "they have a habit of monitoring women's bodies…I feel, that at least gay men don't have to tolerate this" (personal communication, July 26, 2016). Compounded with all these factors, is the overriding fact that the society is patriarchal. Thus, while gay men (sometimes reluctantly) might carry on with their same-sex relationship while being married to a woman at the same time, lesbian women are first forced into marriages and then their physical mobility is even further circumscribed. While marriage is a trade off for gay men to continue with their same sex relationships, for lesbian women these are fetters.[16] Four of the five lesbian participants indicated how such factors make it difficult for lesbian women to find out about the community, leading to a conviction that they are alone in their experience of marginalisation. Gay men have, however, found it relatively easier to reach out to the community. The restraint on mobility that lesbian women face can be explained as a direct fall out of the public-

[15] PUCL, *Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore*, People's Union for Civil Liberties, Karnataka, 2001.

[16] Raj Rao and Dibyajyoti Sharma, *Whistling in the Dark: Twenty-One Queer Interviews*, Sage, New Delhi, 2009, note that gay men admit that they have no aversion to getting married as it would enable them to carry on with their same sex relationships without any interference from their families. However, all my gay participants have shown an avowed distaste to such a trade off. Nevertheless, this strategy is not rare among gay men.

private dichotomy. It works to the disadvantage of lesbian women by restraining their mobility, while allowing gay men to be physically mobile. Thus, as Ken comments, "gay men before they are gay, they are men." (personal communication, July 26, 2016) and therefore certain privileges are invariably available to them. However, Anuja maintains that one cannot compare the two. It can only be said that lesbian women's discrimination is different but not higher or lower than gay men's (personal communication, July 18, 2016). What makes gay men's experience of discrimination challenging is the exalted position that masculinity enjoys in a hetero-patriarchal society, "it's a higher position to fall from, there are so many expectations around that when they (gay men) falter they just have more ground to cover" (personal communication, July 18, 2016).

It is noteworthy that in a striking similarity to the study by Fernades and Gomathy, the field work revealed that violence remains as the central concern for lesbian women.[17] Of the five lesbian participants interviewed, overt physical violence was mentioned by four as an important form of discrimination. While violence from the family is also faced by gay men, the form that violence within the family assumes for lesbian women is different. Therefore, while for gay men violence from the family may involve beatings, ostracism, and disinheritance in order to enforce gender roles, for lesbian women confinement, forced marriages, correctional rape are also perpetuated in addition to the above. Moreover, even effeminate gay men are also able to negotiate their position when they relent to marriage but in the case of lesbian women (by virtue of their gender) the choice of whether to enter into marriage or not remains a distant possibility. As Mehr observes, "there is incredible violence within the family if you do not conform to norms of gender or sexuality" (personal communication, July 21, 2016). Fear of the natal family coming and estranging lesbian partners from each other has been validated by both Chayanika and Rituparna whose organizations had to approach the police for protection in two such cases (Chayanika, personal communication, July 22, 2016; Rituparna, personal communication, October 20, 2016). Ashok also discusses how one of the partners in a long term lesbian relationship was denied inheritance of the property after the death of the other partner even by the court which upheld the natal family's right over it (personal

[17] B. Fernandez & Gomathy N.B., 'The nature of violence faced by lesbian women in India', *Research Centre on Violence Against Women*, Tata Institute of Social Sciences, Mumbai, 2003.

communication, July 7, 2016). From the interviews, it has emerged that unlike gay men who frequently articulate about violence faced in the public realm (bullying in schools, harassment in the streets, violent behaviour from the police, workplace discrimination, ritualistic marginalisation, lack of access to spaces, lack of health care amenities etc.) for lesbian women violence within the family remains the primary concern. Their experiences reveal that power that the hetero-patriarchal society exercises permeate the private as much as the public sphere. Violence similar to what lesbian women face also finds space in the narratives of transpersons. Mainly, transpersons assigned male at birth face the blunt of this violence.[18] It is noteworthy that the devaluation of femininity is evident through the ways in which hetero-patriarchy tries to control and police the choices made by lesbian women and transwoman.

An overwhelming number of participants observed that visibility had a direct co-relation with increase in discrimination. This finding from the field is similar to the findings of a LABIA study on persons assigned gender female at birth in which respondents had stated that their physical 'difference' marked against a ideal gender type rendered them visible and vulnerable to discrimination.[19] In the present field work, participants noted how transgenders experienced discrimination differently in comparison to 'normative' looking gay men and lesbian women because of their visible difference. For Sowmya, transgenders experience the same form of discrimination as gays and lesbian but the frequency of such discrimination is more as "transgender community is visible. They are seen openly and therefore discrimination is also more" (personal communication, October 21, 2016). A further caveat can be added here: among the transgender groups MTFs tend to experience more discrimination than FTMs. Notably, while effeminate gay men are again the targets of such discrimination, lesbian women even those who are masculine in their behaviour don't face any such overt discrimination. Sonal notes how families respond to gender non-conformity, "if I am a transman or if I am a butch woman or a tomboy my family is more okay than had it been a sissy boy or a feminine boy…if I am a lesbian woman I can still pass off …., nobody will really attack me or things like that."(personal communication, July 23, 2016) Effeminate gay men and MTFs face teasing on the

[18] See A. Revathi, *The Truth about Me: A* Hijra *Life Story*, Penguin, New Delhi, 2010, Living Smile Vidya, *I Am Vidya: A Transgender's Journey*, Rupa Publications, Delhi, 2013.
[19] Chayanika Shah et. al., *Breaking the Binary*, LABIA, Mumbai, 2013.

roads, cat calls, sexual harassment, and punishments for gender non-conformity (Deepak, personal communication, October 17, 2016). It can be hypothesised, therefore, that the privileged position of masculinity and the devaluation of femininity leads to such a varied social response. FTMs note the sense of power which comes by virtue of their appearance as men, which is unavailable to MTFs. Ken narrates how a closeted fellow transwoman makes use of her assigned gender at birth (male) to have access to privilege, "(she said) when I am walking down the road, I feel people would make way for me because I am a tall manly man. I have the privilege, I feel it, I hate that aspect of my body but also love the privilege. I can feel it and I use it" (personal communication, July 26, 2016). Ken explains that the way society perceives individuals impacts upon day to day interactions and experience of discrimination. Thus, being perceived as male (as distinguished from self-identification as male) in a patriarchal society allows individuals to have access to power.

Participants claimed that the only sub-set within MTFs who are marginally privileged is of the Hijras. The cultural valorisation accorded to the hijras ensures that they are sought after for certain ritualistic purposes.[20] However, as Ashok explains this doesn't imply that they don't experience any discrimination, "the most visible part of the spectrum have faced contradiction. They are seen as holy, you know but they are treated very shabbily" (personal communication, July 7, 2016). Post the NALSA judgment, transgenders are to be recognised as third gender. While this in itself is a progressive step, Deepak notes how difficult and cumbersome it can become to prove that one is indeed a third gender. It becomes time-consuming as it involves running between hospitals (psychiatry department for certification) and courts (for affidavit) and therefore, a lot of transgenders do not complete the process (personal communication, October 17, 2016). Participants noted that all transgender persons who are visible, irrespective of whether they are MTF or FTM, face the following forms of difficulties: of availing facilities for sex realignment surgeries (SRS) (Siddharth, personal communication, October 10, 2016; Deepak, personal communication, October 17, 2016) , documentation regarding transition and change in gender identity (Siddharth, personal communication, October 10, 2016; Deepak, personal communication, October 17, 2016), pressure from family and schools to

[20] See Serena Nanda, *Neither Male nor Female: The Hijras of India*, Wadsworth Publishing, Holborn, 1999. Gayatri Reddy, *With Respect to Sex*, University of Chicago Press, Chicago, 2010; Revathi, *A Life in Trans Activism*, Zubaan, New Delhi, 2016.

conform with gender roles leading to escape from home and drop-out from education (Sukhdeep, personal communication, October 13, 2016) accessing public spaces such as toilets and train compartments (Ken personal communication, July 26, 2016).

In a paradoxical twist to the transgender experience, lesbian women's experiences of discrimination emanates from the invisibilisation that they suffer.[21] That is, while transgenders are discriminated because they are visible, the primary discrimination that lesbian women face is being invisible. Lesbian women have to be discreet about their relationship, covering their romantic relationships as friendship. While in some ways, this has been advantageous as it allows lesbian couples to "live without too much discrimination *up to a certain point*" (Prabha, personal communication, emphasis mine, October 12, 2016). However, this is a doubled edged sword. Since lesbian existence is not visible, Prabha cautions how such invisibilisation "makes it feel it's more abnormal, away from the norm…because there is silence and invisibility around them a lot of their concerns and needs are not, there is no space to express and talk about and seek help" (personal communication, October 12, 2016). For Deepak, who self identifies as a transgender, the invisibilisation of lesbian lives is not only advantageous but also legitimises their single status. She cites how lesbian women can hide under the cloak of caring for parents and therefore remain unmarried (while gay men and transwomen may be forced for marriage by their families). Though she agrees that this may lead to psychological harm but social discrimination may be avoided (personal communication, October 17, 2016). Her account stands in sharp contrast to the accounts presented by lesbian women interviewed, for whom the family itself remains the first frontier of discrimination (as already described earlier). The invisible nature of lesbian lives leads to two problems (among many others) which reinforce each other: difficulty in forming support groups and this in turn leads to related problems like lack of awareness regarding problems that lesbian women may face. For example, the scarce nature of lesbian support groups imply that the health problems that lesbian women might face are hardly known and intimate partner violence within lesbian relationships remain unacknowledged and unaddressed. It is

[21] See, PUCL, *Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore*, People's Union for Civil Liberties, Karnataka, 2001; B. Fernandez & Gomathy N.B., 'The nature of violence faced by lesbian women in India', *Research Centre on Violence Against Women*, Tata Institute of Social Sciences, Mumbai, 2003; Thangarajah, Priya and Ponni Arasu, 'Queer Women and the Law in India' in Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives On Law*, Yoda Press, New Delhi, 2011, pp. 325-37.

in this context of silence that generally affects LGBTQ lives, and more specifically lesbian lives that Anuja's initiative of generating visibility through her e-zine (gaysi) becomes important.

For those who are not visibly different, participants referred to passing as a strategy for escaping discrimination, especially by gay men and lesbian women who are 'normative' looking. Unlike gender identity which becomes mostly visible and works to disadvantage transgender individuals under the present social structure, gays and lesbians are placed at a advantageous position in this case as "sexuality ends up becoming very private and only exposed to few people around you" (Pallab, personal communication, July 11, 2016). As Vivek also frankly elaborates, "…someone like me who could often be, who used to be labelled certainly at one time as 'straight acting' for instance, can pass in public life, as someone who is not *necessarily* gay, or *obviously* queer, or whatever. But and so that's then something I can, I don't have to deal with discrimination about sex" (personal communication, emphasis mine, October 14, 2016). *Passing* is frequently used to escape direct discrimination (Sukhdeep, personal communication, October 13, 2016).[22] But this poses an inherent problem- of being untrue about who one is- to quote Pallab, "you have to constantly lie and the reason I think one lies is, not to be discriminated against" (personal communication, July 11, 2016). By using the existing gender stereotypes to their advantage, 'normative' looking gender non-conforming persons also demonstrate how gender is performed at a day-to-day basis. At the same, questions can also be raised regarding how *passing* perpetuates the gender binary and entrenches it instead of subverting the present structure.

However, it is to be noted that *passing* is itself a privilege, which is not available to all. As noted above, Sonal mentions how passing works for butch women but not for effeminate gay men. Similarly, Dhrubo argues that while *passing* is used by a lot of LGBT people to have access to public spaces, for those who are gender non-conforming, gender non-binary, effeminate men, kothi men, men who don't identify as top *passing* is not available to them. To quote him, "if you pass, it helps. So then one has the luxury to say, 'ok, today I am going to dress up and be a queer person, but tomorrow I can wear jeans and t-shirt and I can go to my office and no one will say

[22] See C. Johnson, 'Heteronormative Citizenship and the Politics of Passing', *Sexualities,* Vol. 5, No. 3, 2002, pp. 317-336.

anything. But that luxury is not available to a lot of people" (Dhrubo, personal communication, October 19, 2016). These accounts show how *passing* is not only dependent on physical markers but also the class location of a particular LGBTQ person.

Interestingly, not much emphasis was placed by the participants on how class intertwines with sexuality to entrench discrimination.[23] The only exceptions to this generalisation are found in the accounts of six participants. Pramada points out how the clubbing together of the acronym LGBTQ blurs the class distinction that exist within it. She specifically notes how marked this difference is if one looks into the class grouping of *hijras* as a group vis-a-vis lesbians as a group. One's class position affects that way discrimination operates and therefore the experience of discrimination for transwomen is different not only from gay men but also from lesbian women (Pramada, personal communication, October 20, 2016). For Vivek even, it is difficult to speak in one voice about the discrimination that LGBTQ face as "a lot of this is informed by class and caste" (personal communication, October 14, 2016). Pallab mentions how one's socio-economic class can be used as leverage against sexuality based discrimination. However, he does re-affirm that within each socio-economic class LGBTQ will continue to face discrimination (personal communication, July 11, 2016). Chayanika makes an interesting observation that class plays an important factor in how desire is expressed. Thus, a gay cis-identified man who has class privilege will have more freedom to articulate desire than a lower class heterosexual man. The same can also be said of how articulation of desire by lesbian women belonging to particular class will be very different when compared with gay men of the same class and heterosexual men of lower class (Chayanika, personal communication, July 22, 2016). Dhrubo and Akshay provide an even more integrated account- asserting that experiences of sexuality based discrimination are intertwined with class-caste and gender based discrimination and it is not possible to segregate one form the other (Akshay, personal communication, October 17, 2016; Dhrubo, personal communication, October 19, 2016). Class structures the way discrimination

[23] For an intersectional understanding of sexuality and class see Elizabeth McDermott, 'The world some have won: Sexuality, class and inequality', *Sexualities,* Vol. 14, No. 1, 2011, pp. 63-78. Preliminary remarks on sexuality and class in India is found in 'A Critical Examination Of Sexuality Discourses In India', Nirantar available at http://www.nirantar.net/uploads/files/A%20Critical%20Examination%20of%20Sexuality%20Discourses%20in%20India%20pdf.pdf but it also does not deal adequately with how class affects those belonging to LGBTQ. This is noteworthy as hijras and kothis mostly resort to sex work on account of livelihood concerns.

functions as well as facilitates/impedes any avoidance of discrimination. Prabha reflects upon how, whether a person prefers to *pass* or not, having an advantage/disadvantage of belonging to class will have ramifications on discrimination faced (personal communication, October 12, 2016). Undeniably, therefore, for those who exist at the intersection of the two it is impossible to segregate class based discrimination from sexuality based discrimination. That class is not acknowledged in most of the accounts also shows how privilege operates.[24]

Barring a few studies, discrimination experienced due to the intersection of sexuality and caste has again been an under-researched area[25] and during the field work sexuality and caste found elucidation only in the accounts of eight participants. For four out of the five lesbian women interviewed, caste is important marker of discrimination and it changes the way in which sexuality based discrimination is experienced by dalit individuals. Since, all the four come from an engagement with the women's movement possibly their previous experience has exposed them to the necessity of considering caste as integral to any analysis of discrimination in the Indian context. In addition, queer identified persons Vivek, Akshay and Dhrubo also caution against looking at sexuality independent of other identities including caste. As Dhrubo explains,

> "I think the mistake a lot of people make is to look at gender-sexuality as something that is detached from everything else. But that's not the case…Discrimination works on multiple registers… talking of gender-sexuality doesn't mean that all other registers have collapsed and that we need to think about how do we talk about gender and sexuality. It's impossible to do it without talking about employment, livelihood, sex work, begging, caste, creed etc" (personal communication, October 19, 2016).

Dhrubo points out how integral caste is in the division of tasks within the *hijras*, as elaborated in Living Smile Vidya's autobiography[26], with upper caste transpersons

[24] Also is reflective of the class bias in the study. As mentioned above, the participants for the study are located in urban areas, are activists primarily, speak English (primarily) and have completed their education at least till graduation.

[25] See, Aniruddha Dutta, 'Claiming Citizenship, Contesting Civility: The Institutional LGBT Movement and the Regulation of Gender/ Sexual Dissidence in West Bengal, India' *Jindal Global Law Review* Volume 4, Issue 1, August 2012, pp. 110-141; Gee Imaan Semmalar, 'Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India', *Women's Studies Quarterly*, Vol. 42, No. 3/4, Solidarity (Fall/Winter 2014), pp. 286-291.

[26] Living Smile Vidya's autobiography was not yet published when the interview was conducted.

assuming the position of naiks or gurus and the lower caste transperson being assigned to either beg or do sex work.

Akshay locates discrimination within the legal register as being mediated by configurations of caste, class, and gender: "the working class kothi's relation to law is very difference from say middle class lawyer or middle class professional brahmins" (personal communication, October 17, 2016). It is interesting to note that two participants who self identify as gay do refer to caste but it is with reference to how the dalit movement and the LGBTQ movement and its issues should remain separate, though participation in both is not decried. Prabha, who self identifies as a heterosexual cis-woman also considers caste as important for understanding discrimination based on sexuality and observes that it is difficult to talk about the nature of discrimination that LGBTQ face without any reference to their caste, class, gender and religion.

Discrimination is also experienced differently amidst LGBTQ persons along the axes of age.[27] For Ashok, age is an important variable while experiencing discrimination. As gay men age, their position within the family lowers on account of their unmarried status, "there is a consistent marginalisation that LGBT especially if you are single And single persons can be very badly treated; you are seen as a total waste" (personal communication, July 7, 2016). Ashok navigates through this by asserting his position as the eldest in the family, and says "I have imposed that I am the patriarch because I will not let go of that power. That's the only power I have…" (personal communication, July 7, 2016). Interestingly, no such position has been assumed by lesbian women as it is an acknowledged fact that women's position within the family is hardly an exalted one. That same sex relationships are not recognised and same sex marriage is not available is a concern for Ashok as he is aging and is worried that there would be nobody to care for him. The unavailability of any other model of the

[27] While a few studies on old age and LGBTQ people has been done for the USA, there is a paucity of corresponding research in India, making it appear as if all LGBTQ persons belong to a younger age bracket. For USA, see S.K. Choi, & I.H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, The Williams Institute, Los Angeles, 2016; Richard A. Friend, 'Older Lesbian and Gay People', *Journal of Homosexuality*, Vol. 20, No. 3-4, 1991, pp. 99-118 and http://www.huffingtonpost.com/2011/11/17/lgbt-seniors-difficult-old-age_n_1098131.html

family, apart from the biological one constricts the options of care being available to single elderly gay men.[28]

An interesting but under-rated variable that could determine how LGBTQs experience discrimination is geographical location. Cities have been known to be safer spaces for stigmatised groups.[29] However, this generalisation cannot be made without any contextualisation. As Sonal says, "I might feel that may be a city is positive space for LGBT but that might not be the case in a different city" (personal communication, July 23, 2016). Harish mentions how gender roles are understood differently in different geographical locations and therefore "most people in north India get more bullied on being effeminate" (personal communication, July 13, 2016). Thus, understandings of masculinity which vary culturally and geographically will also determine how discrimination against LGBTQ work out.

It can be seen from the discussion above that the nature of discrimination faced by the LGBTQ population varies, based on their gender, age, caste, class, physical markers and geographical location. Despite such variation, what remains constant is the fact that discrimination is pervasive.

Being Partial Citizens: Legal Inequality

The discussion in the preceding section on the various kind of discriminations that LGBTQs face establishes the contention that they can be easily be tagged as 'partial' and 'marginal' citizens of the country. It is revealing that none of the participants note that LGBTQ were treated as equal citizens in this country. Participants noted remorsefully with that they felt like second class citizens within their own country. Ashok observes emphatically, "LGBTQ people *are* unequal. Not that they are '*treated*

[28] For more on the family and LGBTQ people see J. Weeks, C. Donovan, and B. Heaphy, *Same Sex Intimacies: Families of Choice and Other Life Experiments*, Routledge, London, 2001, Mary Bernstein and Renate Reimann (eds.) *Queer Families, Queer Politics: Challenging Culture and the State*, Columbia University Press, New York, 2001.

[29] See Jen Jack Gieseking, *A Queer Geographer's Life as an Introduction to Queer Theory, Space, and Time* available at http://jgieseking.org/wp-content/uploads/2014/03/Gieseking-A-Queer-Geographer%E2%80%99s-Life-as-an-Introduction-to-Queer-Theory-Space-and-Time-Queer-Geographies-2013-14-21.pdf and Farhang Rouhani, *Anarchism, Geography, and Queer Space-making: Building Bridges Over Chasms We Create* available at https://www.researchgate.net/publication/266458217_Anarchism_Geography_and_Queer_Space-11making_Building_Bridges_Over_Chasms_We_Create

as' unequal, they *are* unequal" (emphasis mine, personal communication, July 7, 2016). This section by focusing on the legal discrimination that LGBTQs experience seeks to underline the contention further. When Rituparna says that "if the law and the Constitution does not allow us to be equal citizen, it does not matter what the society thinks about us" (personal communication, October 20, 2016) it is a telling story about the importance that is attached to legal equality by those who have been rendered unequal.

That the law scripts LGBTQ as criminals and treats them differentially has been objected to by all participants interviewed. Despite the fact that experiences of discrimination in the social, familial, economic, psychological realm vary among the LGBTQ population based on their gender, age, caste and class positionality, what unites all experiences of discrimination is the legal register. The most draconian law that affects all LGBTQ lives is S377. The significance of S377 and how it galvanised an entire movement has been already discussed in the previous chapter. This has also been substantiated through the field work where twenty-three participants testified that S377 has an important bearing on their lives. As Dhrubo says, "377 is an important issue because this is important for many people who want the state, want the country to acknowledge their right to live with dignity" (personal communication, October 19, 2016).

However, there are two noteworthy exceptions- Akshay and Pramada- who present a vital critique of how 377 came to occupy the space that it does in LGBTQ lives. Referring to the 2001 Naz petition, Pramada says "unfortunately in this country we ended up with this happening. With the case being filed, the entire sexual rights movement in this country became obsessed with 377. There are hundreds of other things that we have to do…Of course, it should not be in the statute…But should we be obsessed about it? No!..For many people, 377 is not even something they thought of, till the case was hitched" (personal communication, October 20, 2016). This counter-narrative is not only incisive but also important as it has implications on how the movement is conceptualised. While the driver behind the movement, till date has been the anti-sodomy statute, activists like Pramada believe that this should not be the singular focus of the movement and that, issues like livelihood should also find space for public articulation. For Akshay, the focus on law which has driven the movement till now should be shifted. Instead of a legal battle, ze emphasises on engaging in a

political battle, and cites newer forms of political struggles (cites Pinjra Tod campaign as an illustration) which do not look up to legal reform and are in fact irreverent to the law (personal communication, October 17, 2016).

Despite the robustness of such explanation, one cannot deny how the legal frontier has important bearings on LGBT lives. This is evident from the accounts of the other twenty three participants who accept that S377 does impact LGBTQ lives. Ashok asserts, "I will not think of S377 as anything but a sort of punitive law which punishes our sexuality" (personal communication, July 7, 2016). And therefore, removal of S377 is central to how LGBTQ persons can live their lives positively. Chayanika understands law as one instrument in social struggles, which can lead to structural changes. As she says, "law is, always has to be an instrument of struggle. It is not a solution" (personal communication, July 22, 2016). For Chayanika, the legal battle can be successfully fought only when "people who are marginalised come together, it cannot happen under the largess of those who have power. So, you can't wait for heteronormative society to make place for us and grant us our right" (personal communication, July 22, 2016). Explanations such as above clearly show how the struggle around S377 is also a political one.

S377 has a direct effect on the lives of gay men.[30] Pramada lays this down very clearly, "for gay men, yes! It's a *first absolute* threat" (personal communication, emphasis mine, October 20, 2016). Sonal refers to the evidence present with NGOs which demonstrate that S377 gives "enough power to the police to snoop on you and arrest you without a reason…it is being misused by the state" (personal communication, July 23, 2016). Though prosecutions may be rare, several participants noted that how their particular organization's had to intervene when S377 was used by the police as a technique to blackmail gay men venturing in cruising places.

While the impact that S377 has over gay men's lives is direct, the way S377 affects lesbian women's lives has been ambiguous. Technically, it has been argued that S377 cannot be applied to lesbian women as the clause requires penetrative sex as a pre-condition for prosecution. This in itself creates a paradoxical situation: while it safeguards lesbian women from being labelled as criminals, their erasure from the

[30] Aids Bhedbhav Virodhi Andolan, *Less than Gay: A Citizens' report on the status of homosexuality in India*, ABVA, New Delhi, 1991.

legal realm is also achieved simultaneously.[31] However, in reality twenty three participants noted that S377 affects lesbian, bisexual and transgender lives also though, the nature of its operation is sometimes different. Primarily, S377 has a psychological effect on LBT persons as it can be used to book a case and threaten them. Both Poushali and Chayanika point out that mostly it's the family which uses S377 as a threat. This is in sharp contrast to how S377 is used by the police against gay men. Chayanika says, "we have known cases where people are threatened not by the people outside or the police but by their families. It's a threat, it's used, it will never work in most cases. In most cases, it doesn't work. It doesn't go beyond the FIR. But it is the process…it is really scary" (personal communication, July 22, 2016). Ken, who was assigned gender female at birth and has transitioned to a male, talks about how he was threatened with S377 as a teenager (personal communication, July 26, 2016). Similarly, Vivek also testifies how attempts have been made to use S377 against lesbian women though in the final instance it has failed (personal communication, October 14, 2016). It is not the punitive power of S377 but the threat to use it that hangs as a Damocles sword over the lives of LBT persons as well. As already discussed in the previous section, lesbian women face violence most frequently from their families and this is another instance of such a phenomena. Sukhdeep cites how the recent NCRB data shows that S377 has been used in 10-15 cases against women. However, as the exact details are not available, he cautions against reaching a conclusion that in all these cases the women were involved in same sex relationships (personal communication, October 13, 2016). Poushali also admits of how the law can be invoked against LBT people, as the language in which it is construed is highly ambiguous and "anyone actually practicing non peno-vaginal sex can come under this law" (personal communication, July 16, 2016). Thus, from the forgoing discussion it can be easily seen that alliance building among lesbians and gay men over S377 may not be as conflict ridden as it could appear to be. However, it is important to mention that for LBT organizations like LABIA engaging with LGBTQ demands has never limited itself to the issue of decriminalisation alone.

That the decriminalisation debate affects lesbian women also is evident from the way in which things moved in Sri Lanka. In a total reversal of the demand of

[31] Thangarajah, Priya and Ponni Arasu, 'Queer Women and the Law in India' in Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives On Law*, Yoda Press, New Delhi, 2011, pp. 325-37.

decriminalisation, Sri Lanka amended its anti-sodomy legislation to include lesbian women. Sonal and Prabha cite this famous example as an instance of why engaging with S377 should remain important for LBT persons as well (Sonal, personal communication, July 23, 2016 and Prabha, personal communication, October 12, 2016). In other words, S377 is a reflection of homophobia, not just gayphobia though technically it might speak of penetrative non-peno vaginal sex only. The overwhelmingly negative effect that S377 poses towards LGBTQ lives is also because of the way in which S377 is construed in public imagination-as a law against homosexuality. Chayanika reflects on how even the movement is responsible for perpetuation of such an understanding. This in turn means that S377 assumes more power over LGBTQ lives "we see it as a law against homosexuality, we only have promoted it like that. Now it has become, everyone knows it, so then, whether it's man or woman, it doesn't matter" (personal communication, July 22, 2016)

Considering that S377 invariably leads to a circumscribed right to life, twenty three of the twenty five participants agreed that S377 should find no space in the law book. The only two exception, as noted above are Pramada and Akshay who believe that the movement should not get 'obsessed' with law in general and S377 in particular.

Apart from the discrimination perpetuated by S377, the unequal access of LGBTQ people to a framework of sexual rights also reveals that they can be termed as partial citizens. It emerged from the field that a majority (that is twelve) of the participants noted that sexual rights were unavailable to LGBTQs. Among the remaining participants while five noted that sexual rights were available, five said that it was available but not accessible while one noted that a discourse on sexual rights was emerging. In brief, responses from the participants were diverse on whether sexual rights were available or not for LGBTQs in India. That the majority of the participants noted the unavailability of sexual rights in noteworthy as it shows how certain rights remain circumscribed for certain people. The contrasting picture of unequal access to is even starker when compared with the issue of reproductive rights. Though reproductive rights have experienced its own highs and lows, there is nevertheless a constant monitoring of its availability, particularly because of concerted feminist interventions. The marginalised existence of a sexual rights claim can be conceptualised within the marginalised status which is accorded to sexuality as a legitimate ground for claiming rights.

The five participants who noted that sexual rights are available used a very wide language in conceptualising sexual rights. For instance, Pramada says "it is about, at the end of the day, bodily integrity and the right to choice. And whom can I choose, who I want to be with, whoever I choose to be with…it's really saying that any human being who whatever heterosexual, homosexual, bisexual, asexual, has a right to existence, having their rights enshrined within the Constitution" (personal communication, October 20, 2016). In the light of such conceptualisation, Pramada believes that the framework is available but must be claimed. For her, therefore there is a lot of common ground between inter caste and inter religious heterosexual couples seeking marriage and LGBTQ people seeking partnership rights. In a similar vein, Prabha and Vivek also articulate a broader understanding of sexual rights. While Prabha believes that space to talk about sexual rights "exists in certain pocket" which includes organizations that are working on sexuality, for Vivek there is shrinkage of the space in which such articulations could be made (Prabha, personal communication, October 12, 2016; Vivek, personal communication, October 14, 2016). Vivek explains that as abortion rights and other reproductive rights, rights against sexual assault, rights of sex workers become circumscribed, the opportunities for the LGBTQ community to stake a claim on sexual rights is eroded (personal communication, October 14, 2016). Chayanika cites feminism and the constitutional principles of equality and justice as the two sources from which sexual rights claims originated in the country. And as shown in the Naz Judgment these could cover the ground for asserting sexual rights in India (personal communication, July 22, 2016). Echoing Chayanika's tribute to feminism for laying the foundations on which sexual rights could be based, Pramada also refers to how the conversations within the women's movement about sexuality has provided the LGBTQ movement with a language to latch on to.

Both Sukhdeep and Harish regard the conservative nature of the Indian society responsible for such a lacuna (Sukhdeep, personal communication, October 13, 2016; Harish, personal communication, July 13, 2016). The largely sex negative attitude which permeates the society is reflected through the absence of a language in which conversations around sex could take place. In the want of such a vocabulary, sexual rights would be unattainable. Harish says, "in India, we don't have a language. Forget sexual rights, we don't have a language at all… the language of body parts doesn't

exist, which is the basic of sexuality or gender education. That doesn't exist, so how are we going to get to that stage…we need to remove the shame about our body parts" (personal communication, July 13, 2016). It would only be when conversations around the body are enabled that sexuality education, sex education and gender education could take place, thereby allowing for an articulation of sexual rights.

Five participants stated that though sexual rights remain unavailable, the scope for such articulation is present. Four out of the five identify the Constitution as the source from which sexual rights claims can be derived. As Poushali comments, "Indian Constitution gives us many things, the state does not give us any sexual right" (personal communication, July 16, 2016). Sowmya also believes that such rights are derivable but the state does not allow it. In recent times, the language of sexual rights has become stronger because of the work done by organizations like Lawyers' Collective (personal communication, October 21, 2016). In a striking similarity with Poushali, Sonal explains " if I look at our Constitution, the way it has been written, I can always say I have rights-call them sexual rights or whatever. At the end of the day my rights are enshrined. So, if I am granted the freedom of expression and the right to equality in some sense my sexual rights are also granted" (personal communication, July 23, 2016). Sachin also points out to Articles 15, 19 and 21 of the Constitution as the grounds for anchoring sexual rights (personal communication, July 9, 2016). Ken refers to the principles enshrined in the Preamble of the Constitution as the guiding lights for sexual rights (personal communication, July 26, 2016). Thus, the ones who are asserting that sexual rights are available but not enforced invoke such rights from the Constitutional principles of liberty, equality, and justice.

The participants who argued that sexual rights were available but inaccessible attributed different reasons for it. While Sachin explained it as a consequence of acts of omission and commission which are overlooked by the state, towards the LGBTQ; Poushali explained that there are political reasons behind it. Elaborating on what would constitute 'acts of omission and commission' constitute, Sachin explains that while acts of omission would require that S377 needs to be omitted, certain other measures or acts of commission such as anti-discrimination legislation, provisions for same sex domestic partnerships, adoption, equal age of consent etc needs to be put in place if sexual rights have to become accessible (personal communication, July 9, 2016). The political motivations that Poushali refers to are the controls that the state

wants over the bodies of its citizens. Control over the sexual lives of the citizenry is important because it would also regulate the caste and class boundaries. If, however, no such controls are exercised the entire edifice (laws, institutions and policies) that support the state will collapse. And this deters the State from making sexual rights accessible to its citizens (personal communication, July 16, 2016). For Ken, it is the failure to understand gender in its complexity which is the reason behind why sexual rights are inaccessible (personal communication, July 26, 2016).

In marked divergence to such views, an overwhelming number of ten participants argued that sexual rights were not available to the LGBTQ in India. And this view cuts across persons who identify as lesbian, gay, bisexual and transgender. The most frequently cited reason for such a lack is the presence of S377. Koninika points out, "I don't think the rights language encompasses sexuality in any way…S377 criminalises us, our sexual behaviour…As such we don't even have legal personhood, we don't exist at all, even in the Constitution" (personal communication, July 26, 2016). Similarly, Anuja also replies, "that sexual rights exist? No, nothing! ...There is nothing and there will be nothing until we are recognised as equal citizens… your government has to acknowledge your existence before they grant you rights" (personal communication, July 18, 2016). Unsurprisingly, therefore, the presence of S377 is a direct obstacle in the path of sexual rights. Deepak and CJ also offers the same explanation- that the presence of S377 and its application is the reason why sexual rights are unavailable in India (personal communication, October 17, 2016; CJ, personal communication, July 26, 2016). Pallab, Mehr and Sukhdeep also cite S377 as one of the reasons why sexual rights are a distant possibility for the LGBTQ community in this country. The fact that marital rape, Mehr points out, is not recognised as a crime reflects that sexual rights are not available even within heterosexual relations. In such a backdrop, the possibility of LGBTQ availing sexual rights is a near impossibility. Ze explains that other than S377, the additional reason why sexual rights are unavailable is because "the state has to keep control, in a very cis-hetero-patriarchal manner-over caste, over class, over gender, over sexuality" (personal communication, July 21, 2016). And since availability of sexual rights would deter the State from exercising such controls, the unavailability is a logical calculation. Sukhdeep's explanation converges with Mehr on the issue of S377 but diverges on the issue of heterosexual people and sexual rights. He points out to recent

legislative changes that recognise heterosexual live-in relationships as legitimate while recognition of same sex relationships still remain missing. He hinges on the argument that Indian society is conservative and therefore sexual rights are unavailable, especially for the LGBTQ population (personal communication, October 13, 2016). For Pallab, it is the combined effect of three factors that explain the unavailability of sexual rights: S377, absence of the right to privacy, and the uneasiness with bodily matters. He points out how the notion of privacy in India is not just gendered but also heterosexualised. In his words, "I think, a certain degree of demarcation as to what is, to what extent the right to privacy is valid and where does it go, needs to be defined…and this is not clear…technically, sexual rights is being determined only within the purview of marriage and not outside it. And that in itself is a problem because then what happens is the sexual right is given some degree of infinity, so even if the woman is getting violated nobody questions. As it is happening within the purview of marriage" (personal communication, July 11, 2016). Moreover, he explains how all bodily matters, especially those related to sex are lower order priorities for those at the helm of affairs. To quote him again, "anybody who talks anything connected with sex technically is a bad person…It's all about pleasure, you see, sex is seen as pleasure, not essential of your self…There is a meritocracy or an order of what should get precedence over other things and I feel that also is a problem" (personal communication, July 11, 2016).

Three participants viz. Ashok, Rituparna and Siddharth noted that sexual rights are not available at the present but are in the process of emergence. Siddharth narrates how the sexual rights discourse is evolving differently for different sections of the population. He creates a threefold classification on whether the framework is availability or not: heterosexual population (who have used the discourse), organizations engaged in rights based activism (who are using it in their discussions and advocacy sessions) and LGBTQ (for whom it is not available because of S377). To quote him, "if you talk about sexual rights broadly, as encompassing sexual rights for all, then definitely there is an emerging discourse which is backed by the individual right to liberty…There's huge contestation going around of people wanting to live together or marry each other, especially they are inter-caste or inter-religious…if you transpose this now to particularly at the LGBT community, on that front I would say there is a huge debate and there is a huge understanding of this in

the rights groups, about this. But it is not being transposed into the law because you have certain roadblocks. Because you have a law which actually criminalises unnatural sex…but I would say there is a vibrant framework if you are talking about discussions, advocacy, people's understanding of these issues" (personal communication, October 10, 2016).

Ashok regrets that though a sexual rights framework is evolving, its primary shortcoming is that it is "so-based around women… the sexual rights movement has not yet focussed on the main parameters- their engagement has to be with men and male sexuality" (personal communication, July 7, 2016). For him, engaging with male sexuality is central because within the context of sexually transmitted diseases, men are the carriers of the disease and pass it on to their wives. So, while Rituparna, Pramada, Prabha, Vivek, Chayanika eulogise the contribution of the women's movement is laying down the foundations to build a vocabulary of sexual rights, for Ashok the excessive emphasis of feminism on women's sexuality is the reason why men remain marginalised in the sexual rights discourse. Similarly, Harish (who believes that sexual rights are unavailable) also reasons that the sex negativity which permeates feminism is also a factor which hinders pleasure and sex being discussed.

What emerges from the discussion is that there is an overwhelming acceptance that S377 stands in the way of discussing sexuality within the framework of rights. Thus, any discourse on sexual rights must engage with the issue of S377.

What also emerges from the interviews is that certain political principles can be used to frame the language in which sexual rights can be couched. Primarily, participants invoked equality, liberty and justice as the core values. While queer participants like Akshay postulate justice over equality, for most participants' equality remained a coveted value. Other than equality, freedom of expression was also used as a claim to anchor the legitimacy of sexual rights. For participants like Pallab, it is the right to privacy that has to be the cornerstone for sexual rights. It needs to be mentioned here that privacy had been in the eye of the storm from the beginning of the legal journey. However, he notes that as the framework has not yet clearly emerged, "we know what would be the elements but right now it's very sketchy. They are only the basic elements. I think for that, a larger consultation would need to happen, for sexual rights discourse and creation of a framework" (personal communication, July 11, 2016).

The Appeal of Equalityand Language of Assimilationism

Since the experience of discrimination, especially legal discrimination, is noted by each participant correspondingly there is also an undivided agreement that such discrimination cannot be accepted (with the exception of Akshay). The accounts presented below present the reflections of the participants on the language deployed while they speak about the issues that the LGBTQ movement should engage with: S377 of the IPC, same sex marriage, anti-discrimination legislation and the question of special rights. Despite some variations in these accounts, a desire for equality becomes visible for all the four issues. It is only in the accounts of Akshay and Dhrubo that the ideal of equality is problematised.

As it has already been discussed in the preceding section, all the respondents concur that S377 of the Indian Penal Code establishes a code of hierarchy on the basis of sexual acts. And therefore, repeal of the section is almost unanimously accepted by all the participants (with the exception of Pramada and Akshay who believe that the movement should get over its 'obsession' with S377. Barring them, all the others participants emphasise on the regime of inequality created by the categories of natural/unnatural sex. For Pallab, deletion of the sections is important as only that would ensure terminologies such as 'natural'/ 'unnatural' sex being removed. In his words, "as long as words such as natural, unnatural stay in the judicial system people will keep going to it, to address 'this is natural', this is unnatural'…in reading down we speak of 'as long as it is consensual sex..' it is not removing the reference of natural/unnatural within the judicial system" (personal communication, July 11, 2016). In demanding that this distinction is done away with and consensual sex among adults is de-criminalised, the movement is actually putting forth a demand of being treated equally. It is worth re-iterating that the movement has also highlighted that S377 affects not only LGBTQ persons but any form of non-procreative sex that even heterosexuals engage in. This is important because an assertion of this kind seeks to emphasise on the essential similarities of the heterosexual population with the LGBTQ population and seeks to underplay difference.

Other than section 377, same sex marriage has also emerged as an important issue for the LGBTQ movement.[32] The issue of same sex marriage and its place within the LGBTQ movement evoked passionate responses from all the participants. It is important to note that from the responses of the participants it emerged that a strong polarisation is visible between those who believed that same sex marriage should be important for the LGBTQ movement and those who decry it. In all, 13 participants believed that same sex marriage should be an important concern for the LGBTQ movement and 11 participants were against it. However, on the question of whether same sex marriage rights should be available (as opposed to important) 15 participants replied in the affirmative. It is revealing that even those participants who did not consider that marriage should be as an important issue for the LGBTQ movement offered 'civil unions' as an alternate to marriage, so that partnership rights are available to everyone irrespective of their gender identity and sexual orientation.

The weight that is accorded by the LGBTQ community to the issue of marriage is explained by Siddharth "there is something about same sex marriage which touches a chord with the larger population. If you're talking about campaigns, when you say same sex marriage, people are able to understand it in a way I think even criminalisation is not" (personal communication, October 10, 2016). The demand for same sex marriage has the potential to galvanise the LGBTQ movement. Harish too, looks at the instrumental value that same sex marriage demand could have on the movement "it can't be that LGBTQ community is totally focussed on getting people married. That can't be *the focus*; it can be *a case in focus which will spin* the movement" (personal communication, emphasis mine, July 13, 2016). While such responses emphasise on the attractiveness of such a demand, few participants also pointed out to the possible the flip side of the demand. The demand for same sex marriage may also create factions within the community and generate stiff resistance from the other members of the society. Sonal points out that with regard to the issue of same sex marriage, there are two clear divisions within the community: one "which feels that the queer community should not push for marriage because that is being regressive and then there is one which is completely disconnected or those who want only marriage rights, nothing else" (personal communication, July 23, 2016). It would

[32] This is primarily because the movement in India seeks to replicate the model of LGBTQ rights in the USA where recognition of same sex marriage has followed after decriminalisation.

be dangerous to posit same sex marriage at the centre of the movement, according to Dhrubo, because "the movement will necessarily alienate or leave behind people who simply do not have the wherewithal or the inclination to marry, because marriage is a privilege" (personal communication, October 19, 2016). Chayanika opines that it is necessary to look into the composition of those who consider same-sex marriage as the most important issue. For her, it is "essentially gay men because they have everything going for them, other than the fact that they are gay. From that upper caste, upper class whatever this category of men, they want to have a family like everyone else. They want to live a capitalist life like everyone else, they want to have children, adopt children" (personal communication, July 22, 2016). Though Vivek is one of the participants who do not think that same sex marriage should be a demand for the LGBTQ movement, even he who says that "same sex marriage is inevitably going to be a battle. It's going to be a much bigger threat to society and so-called protectors of society than decriminalisation. Because you are fundamentally questioning patriarchy" (personal communication, October 14, 2016). It can be easily surmised that resistance from outside the community to the issue will also be strong. With S377 being in the law book, participants agreed that the demand for same sex marriage will have to be kept in waiting. However, an important fact that emerges from the responses is that same sex marriage is definitely an emotive issue, one that can pull in both directions.

The appeal that same sex marriage enjoys is primarily on account of the rights and privileges that accompanies the institution of marriage. Marriage may bring in social recognition (Prabha, personal communication, October 12, 2016), companionship (Sowmya, personal communication, October 21, 2016; Deepak personal communication, October 17, 2016), bestow a sense of dignity (CJ, personal communication, July 26, 2016) but it is the legal benefits and monetary security that marriage provides which is acknowledged by the majority of participants. And this is the overriding justification used by majority of the participants for emphasising on marriage rights. Participants noted that marriage provided 'privileges' such as joint insurance cover, property rights, possibilities of adoption, spouse immigration, visitation rights, recognition as legal heir etc. or in Anuja's words "everything that heterosexuals want" (personal communication, July 18, 2016). An important observation is made by Deepak who points out that making marriage accessible to

LGBTQ people is desirable because it will ensure that legal protection is available in cases of desertion (personal communication, October 17, 2016). Sachin is emphatic that all the above mentioned benefits should be called as 'rights', not 'privileges' (personal communication, July 9, 2016). So, marriage and the consequent benefits in couched in the language of rights, which should be extended to same sex couples as well. Ken observes that marriage should not be an LGBTQ issue but "it is a human rights issue. Marriage should be available to everybody who wants it" (personal communication, July 26, 2016). In a similar vein, Harish recommends that instead of the LGBTQ movement focussing on marriage, there should be a parallel movement on matrimony itself. And the LGBTQ movement could align itself with it (personal communication, July 13, 2016).

Participants who argued that same sex marriage should be available to LGBTQ people, not just mentioned the 'rights' that marriage provided but also used 'equality' as the principle as justification for the same. For Koninika demand for same sex marriage "has to be on the agenda because *if everyone has it*, then I *also* want the equal right" (personal communication, emphasis mine, July 26, 2016). Prabha's comment adds to this strand of argumentation , "if there are certain privileges that are accorded to heterosexual married couples then certainly *the same* privileges need to be accorded to same sex couples" (personal communication, emphasis mine, October 12, 2016). Similar reasoning is also found in Sowmya's account who says that "everyone has the right to live, which comes from the fundamental rights, right? Right to equality is also there, so the right to marriage should also be there, equally *for all*. That's all" (personal communication, October 21, 2016). One cannot escape noticing that reference to heterosexual population is taken as the standard while demanding equality for the LGBTQ. It is also noteworthy that the equality argument is also found in the accounts of those who believe that same sex marriage should not be important for LGBTQ movement (though it should be available to LGBTQ). As Mehr puts it, "if straight people can access marriage, no reason why queer couples shouldn't be allowed. So, if somebody wants to get married, go ahead. I would support that right because if straight people have their rights, so should queer people" (personal communication, July 21, 2016). Resonating the same views, Chayanika opines "till there is marriage, everybody should have access to it…why should only some people be excluded from it?" (personal communication, July 22, 2016). Mehr and

Chayanika's stance on the issue is striking because both of them display distrust towards the institution of marriage. Looked at from another vantage point, it also shows how compelling the argument of equality can be.

The strongest criticism against same-sex marriage comes from four participants, who believe that neither should same sex marriage be an important issue for the movement, nor does it matter if it becomes available or not. Rituparna provides a strong feminist critique of the institution of marriage and argues that 'choice' should not be used as argument to promote the demand for same sex marriage. She says, "when we use the word queer, it means challenging heteronormativity. So, when we call ourselves queer, why I have to be following the whole pattern of being in a relationship where the state has to sanction it…you should not articulate it as free choice, as free choice doesn't exist… marriage is the first patriarchal institution, and you are actually getting into that patriarchal institution" (personal communication, October 20, 2016). For Akshay, same sex marriage is the first among the set of demands which de-radicalise the queer movement and ultimately make it a part of the same institutions which sustain capitalist patriarchy. Therefore, ze argues that in the USA and Europe there is no longer a queer politics but a LGBT politics in its place (personal communication, October 17, 2016). For Sukhdeep, same sex marriage is problematic because it is likely to promote homonormativity by just replicating the heterosexual model (personal communication, October 13, 2016). Pallab's objection to the institution of marriage emanates from his conviction that "the whole concept of marriage should be annulled – whether heterosexual or homosexual. I don't see heterosexuals having a great time with the concept of marriage that homosexuals should take it as a vestige of the heterosexual…I feel that heterosexual people themselves are dealing with redefining it and I personally don't feel that we should take what is there in the West blindly and apply it here" (personal communication, July 11, 2016). It is interesting that there is a convergence of views between lesbian, gay and queer activists on the necessity to contradict same sex marriage demands. Vivek, who would ideally not like same sex marriage to be on the agenda of LGBTQ movement, agrees reluctantly that it will be symbolic victory but a problematic one. He says that when such a demand is taken up by the LGBTQ community, the movement moves further away from queer world view: "queer world is a world where

we really question ideas of family. And I don't think we'll do that enough by claiming gay marriage" (personal communication, October 14, 2016).

The chequered baggage that marriage carries with it has prompted participants to conceptualise alternate ways in which intimate relations may be recognised by the state. Participants cited civil unions/partnerships as an alternative to same sex marriage which would address the financial and inheritance issues, which marriage allegedly takes care of. Simultaneously, this would also ensure that the hierarchical underpinnings of heterosexual marriage are not transposed to same sex relationships. Moreover, unlike the institution of marriage, civil partnerships would also bring about a structural change in the way intimate relationships are thought about and recognised. As an alternative to marriage, several participants also pointed out to the necessity of recognising single status. Rather than emphasising on marital status for grant of loans and taxation relief, single status should also be equally recognised in the law. This implies that when such alternatives to marriage are sought, the family is also radically re-conceptualised. As Pramada says, "people want to do partnerships, so, people will have to find out ways in which the notion of alternate families develop…I think we can *work* on the family, if you promote those ideas" (personal communication, emphasis mine, October 20, 2016). What Pramada is suggesting entails a de-mystification of the family as a 'natural' unit and opens up the space to talk about 'families of choice'.[33] In her account, Sonal also re-iterates the necessity of recognising alternate family structures, which move beyond the heterosexual model of husband-wife-children. She is critical of how adult siblings are excluded in financial matters from the notion of the 'family', which is indicative of how deep seated the heterosexual bias is (personal communication, July 23, 2016).

As seen from the discussion above, the issue of same sex marriage pulls in two directions. While it is an absolutely important concern for thirteen participants, for fifteen participants (including the ones who consider it as important) it should be available. Thus is a telling story when one considers that only four participants provide a critical critique of marriage. As already noted above, the language deployed by the participants is that of equality. And therefore (barring the few who oppose it) there is a desire to achieve the same privileges that heterosexual marriages accord.

[33] Janet Holland, Jeffrey Weeks and Val Gillies, *Families, Intimacy and Social Capital. Social Policy and Society*, Vol. 2, 2003, pp. 339-348.

Anti-discrimination legislation emerged as another noteworthy issue for the LGBTQ movement in the accounts of the participants.[34] All the participants, with the exception of three, advocated that the LGBTQ should rally around the demand for an anti-discrimination legislation. Ashok and Sonal believe that the constitutional safeguards that already present can be used to protect the rights of LGBTQ. While Sonal says that under the right to equality sex should be read expansively to include sexuality, Ashok believes that "there are enough Constitutional safeguards: the right to privacy, the right to be treated equally. Why are we piling these things on?" (personal communication, July 7, 2016). Akshay's resistance to the idea of anti-discrimination legislation emanates from hir general disenchantment with engaging with the site of law. Ze comments, "we should step away from the law whether it be in terms of litigations or be in terms of specially in terms of law form and legislation etc." (personal communication, October 17, 2016).

In stark contrast, Pallab emphasises the necessity of it: "In India anti-discrimination bill is the need of the hour which has to protect, not just LGBT but various other levels of discrimination, it needs to be an umbrella framework… Over a period of time, as a country we have woken up to realising that these are discriminations not addressed in the constitution" (personal communication, July 11, 2016). Pallab is not alone in arguing on such lines. He is joined by Vivek who states that "an anti-discrimination legislation which is about varieties of identities and marginalization is the way to go… The reason we need anti-discrimination law is because the constitution only protects discrimination on certain grounds in the public sector. So, we anyways need to cover the private sector, to cover other grounds" (personal communication, October 14, 2016). Participants noted that consultation within the community on this front has already begun. It is noteworthy that Chayanika mentions how LABIA was one of the first collectives to identify the necessity of an anti-discrimination legislation besides decriminalisation and recognition of same sex relationships (personal communication, July 22, 2016).

The importance attached to an anti-discrimination legislation by the participants shows that law would continue to be an important site of engagement for the LGBTQ movement as law has material consequences. As Rituparna says, "the law actually

[34] The NCT of Delhi has initiated academic discussions around an anti discrimination legislation discussions.

helps a lot", it acts as a background condition for all other related demands that can then be put forward (personal communication, October 20, 2016). For Pramada, the demand for anti-discrimination has a more 'composite' character than the demand for repeal of S377. She says that "it takes into account many of the things that we are all struggling with… I do think that is probably the better way to go then saying repeal 377, then repeal some other law, then repeal some other law" (personal communication, October 20, 2016). Similar to Pramada is Harish's response who also considers that the anti-discrimination will enable the LGBTQ population 'positively' (personal communication, July 13, 2016). Prabha notes that the demand for anti-discrimination legislation would also provide a ground for strengthening the alliance of the LGBTQ movement with the HIV movement and sex workers' movement (personal communication, October 12, 2016). It is easy to surmise from the above account that there has been a visible shift in the movement, from the sole demand of repeal of S377 now the movement is gearing towards an anti-discrimination framework.

The issue of anti-discrimination legislation is exceptional because of two reasons: first, it shows the willingness of the movement to shift the focus from the route of judicial redressal to the domain of legislature and second, it allows for the LGBTQ movement to align itself with other groups which experience discrimination. In the demand of an anti-discrimination framework, the intersectionality approach advocated by a number of participants finds a concrete outline. The wide appeal that anti-discrimination legislation has is an instructive to note because here again there is appeal to equality that drives such a demand.

The model of differentiated citizenship has been posed as the antidote for the exclusionary tendencies inherent in 'universalist' models of citizenship. In order that citizenship no longer marginalises those who are different, the model of differentiated citizenship proposes special rights. Special rights by allowing communities to retain their differences would help in resisting assimilation. Thus, special rights are seen as the remedy for the discriminatory treatment. Interestingly, though all the participants of the study accepted that LGBTQs faced discriminatory treatment, on the question of whether special rights should be available or not for LGBTQ people mixed responses were received. While eleven participants noted that there was no necessity for any special rights for LGBTQ people, nine participants advocated the same and the

remaining participants stated that they had not thought about it. While the figures might seem to be pulling in two directions, the narratives open up to an interesting feature when the participants provide a detailed description on the issue. It emerges, then, that only two persons among the nine who argue for special rights advocate it for all in the LGBTQ spectrum. The remaining seven argue for special rights only for the transpeople and exclude the LGB out of such claims. In other words, only two people stand in support of special rights claimed on the basis of sexual orientation while an overwhelming majority of eighteen participants oppose it. Such responses can, therefore, be read as a narrative that seeks to emphasise on the essential sameness, rather than highlighting difference.

The desire for sameness is explicitly stated in the accounts Deepak and CJ (CJ believes in special rights only for Transgender persons) who believe that asking for special rights would be self-defeating as it would mean remaining separate while LGBTQ aspire assimilation (personal communication, October 17, 2016; CJ, personal communication, personal communication). On the other hand, Sachin one of the two participants (the other person being Sonal) believes that the entire LGBTQ spectrum should have special rights[35] because of the "systemic discrimination that many of these communities face" (Sachin, personal communication, July 9, 2016). For Sonal, the main concern that special rights could address is the inability of the LGBTQ people to access spaces such as the legislature. She says that special rights are needed "so that they can start accessing those spaces and should be available to such a time when they don't feel the need for that" (personal communication, July 23, 2016). But she acknowledges the difficulty of achieving the task considering that even the Women's Reservation Bill has been languishing for years.

Nine participants noted that they advocate special rights only for transgender population. As already stated in the section on discrimination, the physical visibility of the transgender population also increases their vulnerability to experience discrimination and consequently the availability of certain special rights could tilt the scales in their favour. As Mehr states, "finding a job itself with a varying gender presentation may itself be impossible… There's much greater marginalisation for the T or the TIQ you can say than for the L and the G" (personal communication, July 21,

[35] Note that after the NALSA judgment, transgenders in India have been provided with certain affirmative action policies.

2016). Similarly, Rituparna says, “with regard to transperson definitely we want special privilege because transpeople are marginalised to a large extent…Transpeople are more visible because they are out there, like no one will know if I am lesbian or not. Because I don't look like a ‘transperson’. Transpeople are more visible so they definitely need more protection, more rights, more reservation in schools and colleges then LBG population” (personal communication, October 20, 2016). Sukhdeep also agrees with such a stance, based on the fact that the transcommunity has historically faced social discrimination (personal communication, October 13, 2016). Koninika and CJ re-assert that since transgender people are visible, they require special rights to counter such overt discrimination (Koninika, personal communication, July 26, 2016; CJ, personal communication, July 26, 2016).

Though Koninika and CJ stand in support of transgender persons having special rights, they don’t advocate it for LGB persons. As Koninika says, “LGB exists across caste, class, language, region” and therefore special rights are not required (personal communication, July 26, 2016). CJ frames the requirement of special rights around the strategy of passing that can be used by LGB people to fight discrimination which makes special rights for them unnecessary (personal communication, personal communication). For Vivek, the situation is complicated. While he considers the case that “a T or I person *might* require special rights in certain regards because their situations are unique” but says “I don't believe in special rights based on SO, on GI it's *complicated*”. He explains that several transexuals come from affluent backgrounds and therefore to make a blanket provision for all is fraught with difficulty (personal communication, October 14, 2016). Similarly, Chayanika also contemplates on the issue of special rights “whether all transpersons need this, don’t know; whether all LB women need it, definitely no. There are specific needs for a specific set of people… There could be transwomen who are lesbian so apply it there, for them. But why would it apply to a cis women from an upper class… How can I say that all transpersons are equal? How can we say that all LGBT people are equal?” (personal communication, July 22, 2016).

While Vivek and Chayanika argue that intersectionality makes it difficult to advocate a blanket availability of special rights for LGBTQ, Poushali, and Ken use the same argument to state that special rights are not required. To use Poushali’s words, “when you are a LGBT person you are coming from an economic background, you can

already be a SC, you can already be a OBC, so from there you can already exercise affirmative action" (personal communication, July 16, 2016). Ken also articulates his position on a similar line, indicating the since not only oppression but privileges can also intersect it would be tough to speak about special rights for LGBTQ. Intersectionality of privilege is used as one of the justifications to argue against availability of special rights.

Another justification that found articulation against special rights is the concern about determination of LGBTQ status. Ken asserts that if special rights would be granted, implementation is going to be problematic because it would bring in the question of certification of authenticity as an LGBTQ person. To quote him, "there could be opportunistic persons. So, how does one really then ascertain whether genuine case is present or not?" (personal communication, July 26, 2016). Sowmya also points out that she fears that provisions for special rights can be misused because of the certification process and without certification the question of availing such rights will not arise. Moreover, she adds that a person is not able to ascertain their gender and sexuality conclusively before they reach the age of eighteen and this poses difficulty for accessing such special rights, even if such rights are made available (personal communication, October 21, 2016).

Harish's resistance to the idea of special rights comes from his argument that belief that there is a qualitative similitude among all forms of discrimination, irrespective of whether it is based on caste, class, language, religion or SOGI. And therefore having special rights based only on SOGI would be a wrong remedy. As he says, "how is an LGBT person who is getting discriminated at work different from a dalit person who is getting discriminated at work? It is all the same" (personal communication, July 13, 2016).

Dhrubo raises the issue of internal divisions within the categories. While distinguishing the differences in the lived realities of Laxmi Narayan Tripathi and Livingsmile Vidya due to their caste locations, he says "if trans people are getting quotas then that quotas would internally have to be divided on caste" (personal communication, October 19, 2016). Prabha considers the issue of special rights for LGBTQ as a 'theoretical' one. This is not just because "each of us has multiple identities" but also because she conceptualises gender and sexuality as fluid. And therefore says that it would be difficult to make it work on the ground (personal communication, October 12, 2016).

Related to the issue of whether special rights should be granted to LGBTQ persons, is the question of whether a basic human rights framework would suffice for the LGBTQ community. The idea of a basic human rights framework also ties with the question on anti-discrimination legislation. It is worth re-iterating that while claims to special rights are premised on difference, sameness is invoked as a ground for claims to basic human rights claims. Harish says, "we are trying hard to be a part of the world, and to be included in the world. What if we get included in the world and we form fragments and we exclude everyone out of it… Just have SOGI included in everything you are doing. A basic human rights framework which is extended to LGBT, that's what we are asking…We should not ask for any kind of special rights" (personal communication, July 13, 2016). Similarly, Deepak says, "I feel if we want to remain in the same society we should just talk about basic human rights, not special rights…having different sets of rights for transgenders, for gays, for general population would mean fragmentation of society" (translation mine, personal communication, October 17, 2016).

Especially in the case of LGB people, most participants noted that the right not to be discriminated would be enough. Drawing a similarity between HIV positive people and queer people, Vivek comments, "I think they, lot of queer people need, a lot of what even HIV positive people need is equality of opportunity, certainly. So that's not special, that's just asking for equality of opportunity…But equality is not a special right. It should be available to everyone" (personal communication, October 14, 2016). The demand for equality is expected to be the antidote to discrimination. While talking about LGB people, Koninika emphatically says that "we don't need special rights. You just give us equal rights" (personal communication, July 26, 2016). However, such a simplistic formulation is resisted in the sole account of Akshay who no longer looks at law as the platform for bringing about change (personal communication, October 17, 2016). But as already discussed law remains an important ground for engagement, and legal equality remains an aspiration for all those who are marginalised by law. This is made evident by CJ's response, "what is given as a human right, fundamental right to each human being, to heterosexuals should also be given to us. The right to live" (translation mine, personal communication, July 26, 2016). While CJ defines the right to life as the defining contour of such a basic human rights framework (personal communication, July 26, 2016), three participants (Mehr, personal communication, July 21, 2016, Pallab personal communication, July 11, 2016; Prabha personal communication, October 12,

2016) invoke the Yogyakarta Principles[36], and Dhrubo pegs "dignity, and respect, and rights" as the three pillars for what he calls as "universal basic minimum" for LGBTQ lives (personal communication, October 19, 2016).

From the above account it emerges that most of the participants showed a propensity towards 'the equality agenda' as against 'a liberation agenda'.[37] However, such as agenda by the LGBT movement is fraught with problems as it entails "little more than homo conformity with hetero society. *We* comply with *their* system. It is parity on heterosexual terms-equal rights within a framework determined and dominated by straights."[38] Akshay and Dhrubo's criticism of equality stems precisely from such an understanding. Akshay says, "equality cannot be the framework for queer politics, it's got to be something else. It's got to be justice…it's got to be other political imagination that deals with patriarchy, caste, class, political economy, race. It's got to be about all these things. And once you do that, equality is meaningless" (personal communication, October 17, 2016). But such voices are again scarce.

CONCLUSION

Since the project of citizenship is entangled with equality, it seeks to even out differences. Nevertheless, as has emerged from the accounts citizenship remains a cherished status: one that can remove the stigma of criminality attached to non-heterosexual sexuality. The angst at not being accorded the status of equal citizenship is made clear through Sachin, who says "why should we forego the rights which come with being equal citizens of the country, when we have rights given by the Constitution, do our duties and pay our taxes? Why should we accept being second class citizens in our own country?" (personal communication, July 9, 2016). And it is in such strong statements that the naming law as the site of discrimination happens. It is precisely in such acts of naming that the power of the movement is validated.

This chapter, by using the narratives of participants interviewed, attempted to provide an account of the experiences of discrimination faced by LGBTQs, focussing specifically on the way legal discrimination works to create the status of 'partial citizenship' for the LGBTQ people. The narratives are an acknowledgement to the

[36] The Yogyakarta Principles are available at http://www.yogyakartaprinciples.org/
[37] Sanders' distinction in Parmesh Sahani, *Gay Bombay: Globalization, Love and (Be)longing in Contemporary India*, Sage, New Delhi, 2008, p. 46.
[38] Tatchell quoted in Nicholas Bamforth, *Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law*, Cassell, London and Washington, 1997, p.251.

fact that citizenship status is not equally available to all. In fact, the questions raised demonstrate that sexual minorities add another angle to the "hollowing out a universal notion of citizenship".[39] The chapter also attempts to throw light on the language deployed by participants while reflecting on the issues that they consider as important for the LGBTQ movement in India. Though an unanimous picture does not emerge, a dominant language revolving around claims to equality is visible. And this is validated across a range of issues spanning from demand of repealing S377, availability of same-sex marriage, demand of an anti-discrimination legislation and the disinclination towards claiming special rights. The accounts also reveal that law remains an important site of engagement for the LGBTQ people. While law is recognised as a site of discrimination, it is also the law to which participants turn in the expectation of redressal of such inequalities. It is important to underscore this point as it shows an uncritical acceptance of the language of equality, assumed to be desirable as well as achievable, through the means of a legal intervention.

Through a discussion of the accounts derived from the interviews, the chapter makes visible three contentions. First discrimination faced by the LGBTQs render them unequal citizens of the country and also reveals that citizenship is not equally available to all. Second discrimination not only emanates from the social realm but is also institutionally entrenched, with the help of law as the agent of discrimination. Third, the language of equality retains its appeal and therefore citizenship as a status continues to enjoy its exalted position.

Through the field work it became apparent that attainment of equal citizenship status is a desirable goal for the LGBTQ movement in India. By making the claim of citizenship visible this chapter prepares the preliminary ground for the subsequent chapter which intends to discuss the LGBTQ movement as a paradigmatic case of a social movement. Though the discussions have been split up into two chapters, the division attempted is merely for coherence. Since both the chapters are drawn from the responses of the same set of participants, as will be seen, overlap in the narratives is visible.

[39] V. Verma (ed.), *Unequal worlds: Discrimination and social inequality in Modern India*, Oxford University Press, New Delhi, 2016, p.12.

CHAPTER VI

SEXUALITY, STATE AND SOCIAL MOVEMENT: VOICES FROM THE FIELD-II

INTRODUCTION

The preceding chapter had attempted to show that attainment of equal citizenship status was articulated as a desirable objective for the LGBTQ movement. Despite the pitfalls that a simple equality model invokes, the sweeping appeal of equality cannot be derided. Attainment of equal citizenship has been sought through repeal of S377, an anti-discrimination legislation, and emergent pull towards claims of same sex marriage. From the previous discussion conclusions might be made that the LGBTQ movement relies excessively on law. However, such conclusions belittle the significant changes that the movement is ushering in. It has been argued that the realm of law, and in turn citizenship, offers little potential for a radical politics.[1] But care must be exercised when such conclusions are read because such articulations assume that law would have a disciplining effect on movements while ignoring the fact that the legal realm might get radically altered through the intervention of the movement. Additionally, law can also be used as "a symbolic resource for advancing social change."[2] Commenting on the need for the legal struggle to move together with socio-political transformation, Narrain states that "the legal outcome should not be the focus of the campaign but, rather the process of questioning itself."[3] And it is this process of questioning the heteronormative order that has been accelerated through the LGBTQ movement's engagement with law.

Across the world, the achievement of LGBTQ rights has entailed an engagement with law. Adam etal. opine, "lesbian and gay groups almost universally direct their activities towards achieving the abolition of criminal penalties for homosexuality and

[1] J. Josephson, 'Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage'. *Perspectives on Politics*, 3(2), 2005, pp. 269-284.
[2] Barclay, S., Bernstein, M. & Marshall, A. M. (Eds.) *Queer Mobilisations: LGBT Activists confront the law*. New York: New York University Press. 2009, p. 11
[3] Arvind Narrain, Rethinking Citizenship, *Indian Journal of Gender Studies*, Vol 14, Issue 1, 2016, p. 41.

other discriminatory legislation that marginalises lesbian and gay men."[4] And in their attempt to do so, they have engaged with the organs of the state. While the legislature has been an organ that decriminalised sodomy in Britain, it has been mostly the judiciary through which the LGBTQ movement has found a space for its rights. In India, as has already been seen, the favourable judgment by the Delhi High Court in 2009 had ushered in a period of equal rights for the LGBTQ people but the Supreme Court reversal proved that the LGBTQ movement's struggles are more than over. Though the setback has been huge, as has been mentioned in Chapter III solidarity has grown among the constituents with each setback. Such developments corroborate the contention by Adam et al. that "a certain level of legal adversity facilitates political mobilisation, as it provides a real or symbolic *enemy*."[5]

The present chapter is situated in this particular milieu. Drawn from the accounts of participants interviewed in Delhi and Mumbai, this chapter attempts to discuss the nature of engagement that the LGBTQ movement seeks with the state. From the field work, it emerged that the state remains central for the LGBTQ community. All except five of participants interviewed, displayed a belief that engagement with the state (whether legislature or the judiciary) was imperative. And, this is despite the fact that majority of the participants also considered the state as oppressive and as a supporter of heterosexism. In other words, the narratives exhibit that the LGBTQ movement in India is a quintessential social movement, one that perceives "the state both as an objective and an antagonist"[6] in its attempt to bring about structural change. And while trying to bring about such structural changes, the LGBTQ movement is no longer limiting itself to engaging with the judiciary but, as the interview data reveals, is open to the idea of engaging with the legislature. Additionally, the chapter also attempts to explore the question of identity as found in the narratives and throw some preliminary light on the ramifications of such conceptualisation on the movement. In tandem with the preceding chapter, this chapter is also based on a thematic analysis of

---

4 Adam, B. D., Duyvendak J. W. & Krouwel A., 'Gay And Lesbian Movements Beyond Border? National Imprints of a Worldwide movement', in Adam, B. D., Duyvendak J. W. & Krouwel A., (Eds.) *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement,* Temple University Press, Philadelphia, 1999, p. 367.

[5] Adam, B. D., Duyvendak J. W. & Krouwel A., 'Gay And Lesbian Movements Beyond Border? National Imprints of a Worldwide movement', in Adam, B. D., Duyvendak J. W. & Krouwel A., (Eds.) *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement,* Temple University Press, Philadelphia, 1999., p. 361.

[6] Sidney Tarrow quoted in S. M. Engel, *The Unfinished Revolution: Social Movements Theory and the Gay and Lesbian Movement*. Cambridge: Cambridge University Press, 2001, p. 12.

the interview data collected from 25 participants who are engaged in sexuality rights activism and have been involved in the legal struggle against S377.

The chapter is divided into three sections. The first section deals with the responses of the participants on engaging with the judiciary and the legislature as the sites for redressal of their status as unequal citizens. This section also discusses the reactions of the participants to the Naz and Koushal judgement, in order to make it clear that despite the setback in Koushal, faith in the judiciary runs strong. It was found from the account that though the judiciary remains the most favoured organ of the state for engagement, there is an increasing acceptance that engaging with the legislature must also begin. Participants explained that though they did not expect the legislature to usher in the change, such engagement was necessary as it was another manifestation of 'the process of questioning' the bias against the LGBTQ community. The second section lays down the ways in which the participants have questioned the state for being oppressive towards the LGBTQ people and for its hetero-normativity. Participants have noted that the heterosexual bias of the state is visible directly-through its acts and policies and significance accorded to marriage and indirectly through the criminalised status of persons engaged in consensual same sex relationships. This section also goes on to talk about the ways in which the LGBTQ movement has engaged with issues beyond the state - health, education and the family, to begin a conversation on the issues faced by LGBTQ people. By doing so, this chapter intends to show the LGBTQ movement's central point of confrontation is the state but as any other social movement it also has to wider its field to enter discursive realms. The third section explores the way the participants reflect on the nature of the LGBTQ movement and also discusses how sexuality as an identity is conceptualised by the participants. By throwing light on how sexuality is understood this section seeks to demonstrate how the conceptualisation of the movement is affected. Thus, this section discusses the participants' reflections on various matters such as the nature of the movement, the possibility of an intersectional politics and the emergence of SOGI (sexual Orientation and Gender Identity) as an identity category. It emerges from the field work that there is a diversity of issues and concerns that face the LGBTQ movement in India and it is difficult to cast it in a monolithic image. The debates that are visible within the movement make it a robust one as it allows the movement to be open-ended.

The State as an Objective: Engaging with the Judiciary and the Legislature

Across the world, LGBTQ movements have had to 'confront the state'. Confrontation with the state varied ranged on issues as diverse as decriminalisation, protection from discriminatory treatment, recognition of intimate relationships and availability of adoption. The centrality of the state to the LGBTQ movement can be gauged from the fact that twenty one participants asserted the necessity of engaging with the state with only four participants noting that the movement should step away from engaging with the state. Engaging with the state has primarily occurred through two routes: either the judiciary or the legislature. While in the USA the judiciary emerged as the organ which was most amenable to LGBTQ rights through the famous *Lawrence V. Texas* case, in Britain decriminalisation was an endowment of the legislature. In India, the judiciary that had emerged has the most important site of engagement for the LGBTQ movement. Though the judicial passage has been fraught with setbacks[7] it emerged from the accounts of the participants that faith in the judiciary is still largely intact. Ten of the participants noted that they considered judiciary as the most amenable organ of the state to LGBTQ rights. In addition, another eight participants noted that both legislature and judiciary could be the platforms for change. Therefore, in all eighteen participants held that there is hope in continuing the engagement with judiciary, despite the setback in Koushal. For Ashok the inclination towards judiciary emanates from the historical experiences of the LGBTQ movements across the world. He notes, "nowhere in the world have the homosexual rights being given by parliament, they have always been interpreted under the umbrella of equality by the courts" (personal communication, July 7, 2016). The faith in the judiciary is justified by invoking the constitutional scheme. Vivek, Sachin and Ashok point out to the constitutionally mandated duty of the judiciary to protect the rights of the citizens. Vivek simply states that, "it is the duty of the judiciary" and therefore there is an expectation from it (personal communication, October 14, 2016). Sachin remarks that when the Supreme Court shifts the onus to the Parliament to legislate on S377 "it is grossly unfair to expect them (the Parliament) to essentially do what is the constitutional duty of the judiciary" (personal communication, July 9, 2016). In the Koushal judgment, the Supreme Court abandoned the position of being the 'last resort', the 'last custodian' of minority rights (Sachin, personal communication, July

[7] This has been previously discussed in Chapter 3 of the present study.

9, 2016). While critiquing the Supreme Court for the Koushal judgment Ashok talks of how this was an abdication of their responsibility because “parliament makes laws, it doesn’t interpret them…it’s your job to protect the Constitutional rights, your job is not to throw the ball into the parliament’s court” (personal communication, July 7, 2016). Ken also echoes similar views (personal communication, July 26, 2016).

For Sukhdeep, the faith in the judiciary emanates from his personal experience of how the Naz judgment made social acceptability available to gay men like him. He states, “social change has happened, if you compare it to five years back. There has been a lot of acceptance when the 377 judgment happened. It kind of hastened things a lot” (personal communication, October 13, 2016). The judiciary here is seen as an institution that has the potential to bring in social transformation. And such hopes were shattered when the judiciary delivered the Koushal judgment in 2013.

Siddharth comments that the belief in the fairness of the judicial system emanates from “the framework for human rights. There is already an understanding of judiciary as an anti-majoritarian institution. There is a long tradition and history of rights jurisprudence, constitutional rights jurisprudence in the courts of the country” (personal communication, October 10, 2016). And the belief was strengthened because of the Naz judgment delivered in 2009. Participants recalled that Naz was “an emotional moment” (Prabha, personal communication, October 12, 2016), “powerful moment” (Vivek, personal communication, October 14, 2016; Pramada, personal communication, October 21, 2016), “happy moment” (Sowmya, personal communication, October 21, 2016) and “positive moment” (Sonal, personal communication, July 23, 2016). In sharp contrast to this, the reactions to the Koushal judgment show how deeply ‘the abdication of judicial duty’ had impacted them. Sachin says, “the dignity and respect that had been accorded to us by the 2009 judgment was also effaced in the sort of disparaging tenor of the remark, which was to call it a so-called community- that erased its very existence, called into question its existence. And the use of 'so-called' for rights, that too coming from a senior figure, so it also disparaged the community which had been fighting for it. So that was a very low moment.” (personal communication, July 9, 2016). Similarly, Mehr remarks “at that point all of us were really shell shocked. It just felt like a huge betrayal” (personal communication, July 21, 2016). The expectation that the judiciary would protect the rights LGBTQ people was so entrenched that an overwhelming number of eighteen

participants never pictured the possibility that the Supreme Court giving an adverse verdict in Koushal (2013). Sowmya mentions that "it was so depressing a moment…Because it was the Supreme Court which directed the Delhi High Court to hear the case, we never thought that it will not accept our plea" (personal communication, October 21, 2016). While talking about the development in 2013 Akshay cautions that "the Koushal judgment is the most dangerous judgment, in that, it places the question of rights of the so-called minorities as a question to be settled by the parliament rather than by the Constitution" (personal communication, October 17, 2016).

Despite the broad consensus that the Koushal judgment was unexpected, participants vary in assessing the impact of the judgment on the movement. For Harish, Poushali, Koninika and Dhrubo though it was an unexpected verdict, the judgment created an environment which fostered consolidation of the LGBTQ movement. For Dhrubo, the judgment had a personal effect: due to the angst that it generated he decided that the work around LGBTQ visibility which he was doing privately should be done publicly that is, "to then constantly publicly talk about it" (personal communication, October 19, 2016). Harish, Poushali and Koninika highlight the momentum that the judgement provided to the movement. Harish provides a compelling account: "sometimes, when you are pushed too much to a point of desperation, you also built some kind of positive sympathy wave which is what happened. What was earlier limited to a few articles in newspapers, received twenty times more attention. There was the global day of rage. In a way, hate is a great unifier, so this judgment gave us a hope in believing that goodness is also there" (personal communication, July 13, 2016). Poushali talks about how activism has been positively affected by the judgment "as it has brought so many new people-activists on different issues. Feminists, who were not much interested in sexuality rights, have come with us" (personal communication, July 16, 2016). Koninika mentions about the positive space which has been created in the media for LGBTQ rights after the 2013 judgment and believes that "at least people have recognised that it is not an insignificant matter" (translation mine, personal communication, July 26, 2016).

As against this version, Sachin, Sonal and Deepak point out to the adverse effects that the judgment had. Sonal mentions that the judgment was principally hard for all those younger LGBTQ people who came out of the closet after 2009 and were suddenly

confronted with the situation of being rendered criminals. Additionally, she talks about how opportunities to work on sexual rights advocacy narrowed down after the 2013 judgment. To quote her, “I found that a lot of doors started shutting, it was not easy to talk about sexuality, it was a bit more challenging” (personal communication, July 23, 2016). She also mentions that blackmailing under S377 has increased after 2013. Sonal’s contention of the negative impact of the judgment on younger people is seconded by Sachin who says that it was sad that these young people “were presented with the option of having to go back into the closet and it was really hard on those people to negotiate this new reality” (personal communication, July 9, 2016). However, he notes that on retrospect there was also a positive impact of the judgment: it triggered him and Sukhdeep to form an e-zine ‘Gaylaxy’ in order to de-bunk the misconception that LGBTQ are a ‘miniscule minority’. For Deepak, the Koushal judgment broke her heart as it had a personal impact: the possibility of familial acceptance which had emerged after the 2009 judgment was now foreclosed. Apart from the immediate personal impact that it had, Deepak also mentions that the judgment increased the vulnerability of LGBTQ persons to violence from the family as it became apparent that the courts would no longer provide protection (personal communication, October 17, 2016).

As against such distressing accounts on the Koushal judgment, the narratives around the Naz judgment evoke a contrasting picture. Participants spoke about it either as a tribute to the previous struggles or about the way in which it enabled their lives. Sachin recalls that the judgment accorded dignity and respect to LGBTQ who till then were deprived of it (personal communication, July 9, 2016). Poushali talks about the recognition that it bestowed to “many people who have been struggling, doing so much work for so long, for the community…” (personal communication, July 16, 2016). Stories are also narrated by Sukhdeep, Pallab, Anuja and Rituparna describing the way in which Naz impacted them personally. As stated above, Sukhdeep held the judgment in high regard for the positive effect that it had on his personal life (personal communication, October 13, 2016). It ensured that his friends were more forthcoming in accepting his sexual orientation. Similarly, the judgment made a favourable and decisive impact on Pallab and Anuja’s lives as it hastened the process of returning back home and for Rituparna, it enabled her to come out to her parents

(Pallab, personal communication, July 11, 2016; Anuja, personal communication, July 18, 2016; Rituparna, personal communication, October 20, 2016).

Three participants noted that the beauty of the judgment lay in its ability to speak to different movements. As Chayanika explains, "it has the potential for many struggles, not only LGBT. That was the important thing. The concept of Constitutional morality…the way they wrote about privacy…in that's sense it was an excellent judgment" (personal communication, July 22, 2016). Mehr and Rituparna echo similar opinion on the scope of the judgment. Rituparna adds, "the 2009 judgment was so good, it does not talk about sexuality only, it talks about inclusiveness. It's a beautiful judgment…people from all other countries were saying- we have not heard of any judgment like this, in any other court of law" (personal communication, October 20, 2016). Moreover, the judgment opened up the space for people to speak about sexuality. Thus, for Harish it paved the path for greater visibility (personal communication, July 13, 2016), for Sonal it allowed to advocate for LGBT inclusion in the corporate (personal communication, July 23, 2016), for Pramada it meant access to institutional spaces for sexuality workshops (personal communication, October 21, 2016), and for Rituparna greater willingness of the media to listen to LGBT voices (personal communication, October 20, 2016).

In contrast to such descriptions, Ashok hold that Naz was "only one step" because decriminalisation of consensual sex among adults has a very limited expanse. He explains that when homosexuality was decriminalised in the UK, it had the paradoxical effect of increased surveillance of homosexual people in public spaces. The limitation of the privacy argument is strongly found in Ashok's account. He says, "according to the judgment…you are like an autonomous atomic model which has its own space, influence around it. 'That is my area, don't come near it'-which is wonderful but that doesn't work in India…there are more people in this country. And so, I call the privacy argument in the judgment as 'artefacts of axiomatic situation', which really don't matter, which are unenforceable. Like many other laws and judgments" (personal communication, July 7, 2016).

Dhrubo provides a nuanced picture on the Naz judgment by bringing in the aspect of class location and how the judgment affects a person. He acknowledges that "what the judgment did for me personally was that it gave me confidence" but for a lower class

kothi, who engages in sex work, the judgment might not have a similar impact (personal communication, October 19, 2016). This is a significant intervention as it puts in the picture of the uneven impact that legal outcomes have on people, based on their location. Nevertheless, all the accounts (including even Akshay, who shows scepticism towards law) concede that the Naz judgment was a watershed moment for the movement.

The shift from 2009 to 2013 has been tremendous for the LGBTQ community. While participants noted the 'liberatory appeal' of Naz Foundation judgment (Prabha, personal communication, October 12, 2016), Koushal has been accused of being a 'dangerous judgment' (Akshay, personal communication, October 17, 2016). Chayanika and Pallab note that the Supreme Court verdict opened their eyes to the fact that "there is a different faction within the judiciary which thinks very differently, which we were not exposed to" (Pallab, personal communication, July 11, 2016) in the preceding period. Chayanika calls this "a shift in the judiciary" in which judges were successfully swayed by conservative, religious voices instead of human rights language (personal communication, July 22, 2016). Similarly, Mehr adds, "I don't think that the judiciary is independent and certainly, not now. It's not been" (personal communication, July 21, 2016). Ashok argues that the Court "doesn't show any sensitivity to individual rights and it has become a very elitist, patriarchal, heteronormative institution which doesn't understand at all gender and sexuality issues, it doesn't understand the difference between sexual orientation and gender variance, it doesn't understand the difference between sexual behaviour and sexual orientation, it doesn't even understand the politics of desire" (personal communication, July 7, 2016). The above accounts shows that there has been a dissonance between what was expected from the judiciary and what was received.

Participants noted that the shift which happened in 2013 was the reflection of a backlash, a measure to offset the 'threat' that having equal rights for LGBTQ people might pose to the existing social structure. Pramada mentions that within the judicial circles Naz was not a popular judgment, "many of us at judicial spaces had heard people saying that this was A. P. Shah's way of gaining fame… it was popular for the queer communities, popular for people working on rights, but it was not popular from the judicial point of view" (personal communication, October 21, 2016). Prabha also uses the backlash hypothesis to explain the reversal in 2013. She says that the banding

together of conservative forces worked to convince the judges that the country is not yet ready for LGBTQ rights (personal communication, October 12, 2016). Deepak, however, holds that the community itself is partly responsible for such a backlash. According to her, in the interim four and half years, there was a substantial increase in sex work by transwomen, MSM and gays and this made the Supreme Court considered re-criminalisation as a remedy to the this trend (personal communication, October 17, 2016). Deepak's comments are a case in point to show how a 'politics of respectability' has entered into the LGBTQ movement, a self-disciplinary regime that slants toward the language of sameness.

The Koushal judgment was a reflection of the backtracking of the history of discrimination jurisprudence that the judiciary in India had embarked upon. Dhrubo reflects that the Koushal judgment convinced him that the faith in the judiciary as the protector of rights of everyone is misplaced and one must not have a "romantic view of the law". He says, "we must remember that this is the same Supreme Court that had given judgments like Mathura" (personal communication, October 19, 2016).

A common thread ties account provided by Dhrubo with that of Chayanika, Pallab, Ashok and Mehr. These five participants argue that a judgment like Koushal could come about only because of the judiciary as an institution is inherently gendered and heterosexist. In other words, these five participants provide an institutional explanation for the Koushal judgment. In departure from such an explanation, the remaining participants consider the personal inclination of the judges as the over-determining factor. They attribute the Koushal judgment to the biases of the individual judges sitting for this case (Justice Singhvi and Justice Mukherjee). Prabha sums up her view as "it was the combination of judges at that time" (personal communication, October 12, 2016). This position is also made clear in Sukhdeep's words who says "a lot of these judgments in the Court depend on the way judges are, personal bias of the judges. So, for this case both these judges were socially conservative. Also, if you follow the court proceedings they said we don't know where are these people (LGBTQ). They personally did not know" (personal communication, October 13, 2016). In contrast to the judges in this case, participants reflected on how the Delhi High Court judgment was possible only because there was a bench that was progressive in its outlook. To quote Pramada here, "I think Shah and Muralidharan were both progressive judges… if you see Shah's previous judgments

he clearly has an understanding of movements…it is common sense which says that people have the right to live with dignity but clearly in Singhvi's case, common sense did not prevail" (personal communication, October 21, 2016). Moreover, Vivek also mentioned how sensitisation workshops for judges organized by Lawyers' Collective regarding LGBTQ issues helped in removing the biases and prejudices that a lot of the judges had. And unlike Justice A.P. Shah who had attended such workshops, Justice Singhvi and Justice Mukherjee had never been to such workshops. And therefore, they were uncomfortable with engaging with matters of sexuality and human rights. As Vivek ruminates, "they were so squeamish; they couldn't even use the word sexual intercourse"(personal communication, October 14, 2016). This makes it evident that engagement with the judiciary has to happen outside the Courtroom as well. After all, "judges are people too, no matter who they are or how they are. They are conditioned, even not being conditioned makes a lot of difference" (Harish, personal communication, July 13, 2016). And as much as prejudices may stand as an obstacle for a progressive judgment, sensitisation and awareness workshops can help in uprooting such prejudices.

Mehr introduces the word 'crusader judges' to refer to judges who could be the drivers for change and cautions that unless such judges emerge , it will be a difficult journey for LGBTQ rights (personal communication, July 21, 2016). Sukhdeep also mentions that in the USA, the progress and setbacks regarding LGBTQ rights have depended on whether the judge for the particular case was liberal or conservative in his/her outlook (personal communication, October 13, 2016).

Despite the fact that the composition of the bench affects a judgment, it would be wrong to locate the judges as autonomous from the political context. While still retaining the belief that judgments are impinged by individual judges, Akshay remarks that "I am not saying that there is no relationship between judges and political structure…but we have to look at the disposition of the individual judges." (personal communication, October 17, 2016). Ze explains that this is so because judiciary itself is not a monolithic structures and there are various fissures within it and therefore to look for a coherent narrative would be futile. Instead, looking into the motivations and disposition of individuals judges could be the thumb rule for such an analysis (personal communication, October 17, 2016).

Despite the extensive regret, which emerged from the field work, regarding the Koushal judgment it is interesting that there is buoyancy regarding the curative petition. This was observed in the accounts of Ashok and Sonal who hoped that in the curative petition hearings the judiciary will assume it's responsibility (Ashok, personal communication, July 7, 2016; Sonal, personal communication, July 23, 2016). Similarly, Rituparna also hopes that the judiciary will "put its act together in the curative petition hearings" (personal communication, October 20, 2016). However, the accounts Akshay and Anuja belie such optimism. For Anuja, the Koushal judgment is "about losing faith in the entire judicial system altogether...when this is about something that is so basic human rights…it's just scary" (personal communication, July 18, 2016). For Akshay the implications are even more far reaching, it leads him to the conviction that the movement needs to step away from law and engage in a political battle (personal communication, October 17, 2016).

The narratives which emerged from the interviews reveal that the judiciary enjoys a towering stature despite the highs and lows of the judicial expedition. As already stated, other than Anuja and Akshay, all the other participants continued to hope that the injustice done by the Supreme Court in the Koushal judgment would be reversed in the curative petition.

The jolt that the Koushal judgment gave to the hopes and struggle of the LGBTQ community has forced it to consider engaging with the legislature, not only seeking repeal of S377 but also by posing the necessity of a comprehensive anti-discrimination act which would prohibit sexuality based discrimination, among others. But this is a pragmatic approach, born out of the disenchantment with the judiciary. Ashok voices it as, "we can't ignore the fact that they represent us in some form or the other. But it is going to take a long time for our people's representatives to understand sexuality, gender" (personal communication, July 7, 2016).

Whether to engage with the legislature or remain committed to the judicial route alone remains a contested question among the LGBTQ community.[8] This has been found in the field work as well. While seven participants unequivocally displayed distrust on the legislature as the platform to bring in LGBTQ rights, two other participants stated

[8] As has been noted through the failed attempt of engaging with the Parliament that ABVA made in the initial years of its being. See Chapter 3.

that the legislature remains the most desirable organization and therefore attempts should be made to "capacitate legislators". For the remaining sixteen participants the emphasis was varied. While some stated that engagement was to be strategic and inevitable under the present circumstance, others believed that the legislature was as significant as the judiciary, and some others stated that though it was the most desirable route it would be utopian to expect the legislatures to be positive towards LGBTQ rights.

Among the participants who held that the legislature is least likely to be the platform for LGBTQ rights is Rituparna. She believes that under no circumstance would the legislature be amenable to the idea of repealing S377 on account of the number game (personal communication, October 20, 2016). The majoritarian propensity of the legislature is also noted in the accounts of Poushali, Anuja, Chayanika, Mehr, Akshay and Ken.

In contrast, Pallab and Deepak believe that legislature is the platform through which LGBTQ rights must be entrenched. Pallab says, "every time you go through the judicial route, it's actually not a democratic process…we go to the judiciary when we feel that the parliamentarians are not capable of doing something like this and then we should capacitate legislators to doing this rather than going to the judiciary to circumvent the process…I know the parliament takes longer and invokes a difficult process but it will be everlasting" (personal communication, July 11, 2016). In this regard, he suggests how LGBTQ persons should enter into different political parties and work at highlighting the issues of the community. Similarly, Deepak says that since the judiciary has pushed the matter to the legislature in the Koushal judgment, it is now imperative for the parliament to consider merits of the case. And for her, the numerical status of the LGBTQ should not be the worry for the parliament as the community is neither as invisible nor as small as the judges of the Supreme Court believed. She suggests that survey of same-sex dating sites (like Grinder, Planet Romeo) would reveal the LGBTQ population as a sizeable constituency (personal communication, October 17, 2016).

Ten participants argue that engagement with the legislature is not guided by their faith in the institution but only because it has become unavoidable, after the Koushal judgment. They hold that engagement with the legislature is not likely to result in

repeal of S377 but this needs to be done. Harish says engaging with the parliament will lead to increase of awareness among parliamentarians on LGBTQ issues, which in itself is a goal to be pursued. He says, “I know that legislature might not be the right route…I am quite sceptical about it but that doesn’t mean that we can’t work that way, even if there is one percent possibility we should use that. In the bargain if we can build allies, if the prejudice can come lower among parliamentarians, we have to try” (personal communication, July 13, 2016). Pramada’s motivation to engage with the parliament is, however, different. She fears that if the initiative does not come from the community “some political party to gain brownie points is going to do it” (personal communication, October 21, 2016). The hurdle in the path is that no clear understanding of how this is to be done. Vivek (who considers the judiciary as the faster route) also concurs with Pramada on this account. He frames this problem as the “how should we do this, how should we frame this” question. For him the question of whether to engage with the legislature or not is an issue that divides the community as there is no coherent answer as yet (personal communication, October 14, 2016). Both Vivek and Pramada point out how the community was never consulted when Shashi Tharoor raised the issue of S377 in the parliament (Vivek, personal communication, October 14, 2016; Pramada, personal communication, October 21, 2016). Therefore, the activists from the community are now open to the idea of engaging with the legislature but this engagement is instrumental. For Sachin too, the engagement is necessary but “it is unfair and unviable to expect a legislature in a country of this size, nature, diversity and complexity as India to make a judgment about something as complex and as vital as 377”. He reminds of the majoritarian proclivities of the legislature because of which parliamentarians “may not necessarily do what is right but they may do what is convenient” (personal communication, July 9, 2016).

CJ, Koninika, Sowmya and Siddharth fall into the cluster of participants who state that engaging with both the legislature and judiciary is equally important. CJ and Koninika explain how their organization-The Humsafar Trust- is now doing a post card campaign- addressed to all the parliamentarians, seeking to create awareness on LGBTQ issues and also trying to fix appointments so that a dialogue can begin. This simultaneous engagement with both the organs has been emphasised by CJ because “if we can’t take the legislature along with us, somewhere or the other we will have to

face discrimination" (personal communication, July 26, 2016). Thus, there is a practical concern behind the preference to engage with both. Similarly, Sowmya argues that there are loopholes in both-the legislative process as well as the judicial process, therefore engaging exclusively with one can spell danger (personal communication, October 21, 2016). Siddharth says, "different stakeholders need to engage with difference arms of the government. I don't think it can be just one or the other because while we are waiting for the legislature to make up their mind, we can't let the judiciary not be engaged" (personal communication, October 10, 2016).

Sukhdeep is the lone voice when he says that "the best route is via the parliament or the legislature, but we have seen that politicians are too scared to touch it, so we kept it on the judiciary" (personal communication, October 13, 2016). It would be appropriate to recall that in 1992 when ABVA (Aids Bhedbhav Virodhi Andolan) had appealed to the parliament for the repeal of S377 it remained unaddressed. It is no wonder, therefore that scepticism abounds when the question of engaging with the legislature is raised among LGBTQ activists.

Dhrubo notes how much the movement has changed in the past ten years: with the legislature not even being considered as a potential platform for LGBTQ rights to a stage when a parliamentarian (Shashi Tharoor) has attempted to talk about it in the floor of the House (personal communication, October 19, 2016). Such a change can be attributed to the positive outcome seen from the engagement of transgender activists with the parliament. The act is a testimony of the successful lobbying by transgender activists. Developments such as these may have encouraged LGBTQ activists also to follow the same path. However, Dhrubo cautions that "for sexuality related work, the legislature has not proven to be a fertile ground" (personal communication, October 19, 2016). His comment is derived from the disjuncture that is present between the Transgender Persons (Protection of Rights) Bill, 2016 and the NALSA judgment. Thus, it can be noted that the legislative route has started receiving attention not only under the compulsion of the Koushal judgment but also on account of the welcome step of a bill regarding transgender persons being introduced in the parliament.

From the responses presented above, a continuum can be imagined with disavowal of the legislature on one extreme and whole heartened acceptance of the legislature on

the other, and the middle segment being populated with the nuanced explanations on how and why the LGBTQ movement must engage with the legislature. The hesitant acceptance of the legislature as a site of engagement for LGBTQ rights is in sharp contrast to the neat picture which emerges with regard to the judiciary. Combining the two pictures together, it becomes evident that all the participants (with Akshay being the sole exception) consider engagement with the state inevitable, though there may be differences on whether the judiciary or the legislature ought to be favoured.

The State as an Antagonist: Reflections on Oppression by the State and its Heteronormativity

The preceding section had attempted to demonstrate that an overwhelming number of participants in the study consider engaging with the state as important. The all pervasive nature of the state makes it inevitable that any movement which is geared towards claiming rights has to engage with it. As Dhrubo says, "the state is important because the state gives you a lot of endowments, state gives you benefits, state gives you privileges and these privileges are important for a lot of people…there are millions of people in this country who cannot live without their ration card and in that engagement with the state is important" (personal communication, October 19, 2016). However, the engagement with the state does not imply that there is a whole hearted admiration of the state. To quote Dhrubo again, "engagement with the state needs to be conscious…Because the state is, will always be majority, the state will be brahminical, the state will be patriarchal" (personal communication, October 19, 2016). It emerged from the interview narratives that, like Dhrubo, most participants advocate a cautious approach while engaging with the state. From the narratives, interesting variations in the way the LGBTQ community perceived the state emerged.

While majority of the participants held that the state is largely oppressive in its disposition towards the LGBTQ community, Pallab and Sachin hold that the nature of the state interaction with the LGBTQ community will vary according to the kind of people who populate the state. Pallab states, "at the end of the state, people who are sitting at the government are humans and if you appeal to that human side and explain to them in a honest way then things are fine" (personal communication, July 11, 2016). In a similar vein, Sachin remarks "whether the state is repressive of the

LGBTQ community or not depends on who is populating the state at that point of time" (personal communication, July 9, 2016). Sachin notes that it is particularly difficult to argue that the state is oppressive in unequivocal terms as "in many ways, in the lived reality there are aspects of the state which is supporting the LGBTQ community in its self expression" (personal communication, July 9, 2016). He cites the examples of HIV/AIDS outreach programmes which are funded by the state, police protection to pride parades, magazines and online publication that speak to the LGBTQ population to substantiate his argument. At the same time, Sachin is wary of fact that "many statements which have come from various people in the government which have been inimical to LGBT rights. So, in that it is by shutting its eyes and putting its head in the sand that the state is being an oppressor of LGBTQ people" (personal communication, July 9, 2016). While Sachin talks about the circuitous approach of the state towards the LGBTQ people which makes it oppressive, Chayanika is more forthright. She says, "the face of the state is more of repression, across board. It's extremely difficult to think of it as humane" (personal communication, July 22, 2016). Sukhdeep agrees with her and adds that the state's repressive nature is most visible when seen through the life experiences of minorities (personal communication, October 13, 2016).

For Sonal, the state is oppressive because of its myopic vision: the binary way of looking at gender. For example public spaces still remain inaccessible to gender variant people. To quote from her, "if you look at the larger picture, it is very oppressive but there are some breakthrough also…they are trying to be inclusive, at least for transgender…but this is very limited" (personal communication, July 23, 2016). The limited nature of inclusion that Sonal refers to is what Harish also points out, "gender identity might be regarded but not sexual orientation from SOGI…so GI is the thing, SO is not. So, that's what they have come up with, that too some forms of GI, not all of GI. If it's a MTF who is a *Hijra* it is considered alright but not others" (personal communication, July 13, 2016).

While both Sonal and Harish assert that oppressiveness of the state is more visible with regard to sexual orientation rather than gender identity, Pramada believes that the state is indifferent to any concerns around SOGI. It responds only when the case concerned raises matters of violence and victimhood (personal communication, October 21, 2016). Thus, Pramada offers a very different way of looking at the state.

Few other interesting ways of how the LGBTQ community looks at the state emerged from the interviews. One such variant is found in the elaborations of Siddharth and Prabha, both of whom refer to the difficulty in looking at the state as a monolith. This is because of the federal structure as well as the different organs of the state. Both of them observed that some states (provinces) may not be as hostile to the LGBTQ community as certain other states. Similarly, the three different organs of the state will exhibit varying attitude towards the LGBTQ population (Siddharth, personal communication, October 10, 2016; Prabha, personal communication, October 12, 2016).

Rituparna and Akshay's characterise the present state as "fascist" and this is a noteworthy account as it lays emphasis on violations being faced, not only by LGBTQ people but also by all kinds of minorities: caste, class, religious, gender and sexual (Akshay, personal communication, October 17, 2016; Rituparna, personal communication, October 20, 2016). Such an articulation imagines the possibility of all minorities to align together and challenge oppression. Akshay articulates this as "at least for now, queer politics has to be a part of the much larger formation which brings together the anti-caste movement, the various feminist movements and the left. It has got to be part of a larger process through which a true intersectional politics engages with fascism" (personal communication, October 17, 2016). Thus, the engagement with the state will be fraught with difficulties.

One of the reasons participants advice caution while engaging with the state is because of the heteronormative inclinations of the state. In a much predictable stance, all the participants agreed that the state perpetuates heterosexism. Participants' responses varied only on the way in which the state promotes heternormativity. While five participants noted that the state does it directly, two participants stated that it happens through an indirect route. For the rest, the way in which it was done is not as significant as the all pervasiveness of heternormativity. They point out that heternormativity is so ingrained that the state is only one among the entire panoply social institutions that promotes heterosexism.

The dominance of heterosexuality emerges clearly from the accounts of the participants. For example, Sukhdeep says, "of course, there is no doubt about it" (personal communication, October 13, 2016); Anuja says, "the state does promote

heterosexism, over anything else. It's just the norm" (personal communication, July 18, 2016) and Mehr says, "the state definitely promotes heterosexism. Absolutely" (personal communication, July 21, 2016). What is noteworthy is that participants argued that the state not only promoted heterosexism but a particular variant of it: married, monogamous, reproduction directed, intra-caste, intra-class and intra-religious. This is emphasised by Pramada and Mehr. To quote Pramada, "even the heterosexism they (the state) propagate is probably of a particular kind. It is within your religious identity, within your caste identity, within your *gotra* identity, whatever the permutations are. It is also within your class identities" (personal communication, October 21, 2016).

The privileged position accorded to heterosexuality is not natural, extreme care is taken to maintain its position.[9] As Koninika says, "our society rewards heterosexuality" (personal communication, July 26, 2016) and the rewards are as varied as financial exemptions like tax benefits for married couples to symbolism manifested in the form of marriage celebrations. The privileging of heterosexuality in the society has a direct effect on the state because "largely the state is going to reflect society" (Ken, personal communication, July 26, 2016) and unsurprisingly, therefore, the state is also governed by heteronormative standards. This immediately acts to the detriment of all those who do not identify as heterosexuals.

One of the visible markers reflecting the state's heternormativity is through the assumptions it makes about the family while framing laws and policies. Chayanika provides an elaboration of the same through a reference to the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (personal communication, July 22, 2016). Pramada's account also argues on similar lines. She points out that the Protection of Women from Domestic Violence Act, 2005 and the Assisted Reproductive Technology (ART) Regulation Bill, 2014 cater to only the heterosexual family (personal communication, October 21, 2016). Sonal points out how the definition of the family within law is heterosexual. The fact that application forms, of any kind, require the details of father's and mother's name assumes that every child is coming from a heterosexual family. This eradicates the possibility of conceptualising

[9] N. Menon, 'How natural is normal? Feminism and Compulsory Heterosexuality' in Gautam Bhan and Arvind Narrain (eds.) *Because I have a voice: Queer Politics in India*,. Yoda Press, New Delhi:. 2005 pp. 33- 39.

the family in any other form, there by not only making lesbian and gay parenting options foreclosed but also generating inconvenience for children raised by a single parent, a grandparent or a guardian (personal communication, July 23, 2016). As far as policies are concerned too, the state remains seeped in its heterosexual bias. As Poushali comments, "policies are very much heteronormative, because they assume heterosexual families. So, it's the basis by which the state functions" (personal communication, July 16, 2016). Pramada mentions particularly the education and health policies as being handmaidens of the state in promoting heterosexism (personal communication, October 21, 2016). One of the ways this is done is through imposition of gendered tasks, such as needle work, which is noted by Anuja (personal communication, July 18, 2016).

The privileged position that the heterosexual family enjoys is consolidated because of the overwhelming social approval that heterosexual marriage enjoys. Marriage, however, is not only a social affair; it receives legitimacy from state through legalities like marriage registration, provisions for divorce and maintenance, social security measures, taxation reliefs etc. This is made amply clear by Mehr who says, "the institution of marriage provides rewards for people who choose to enshrine, may be a romantic or an intimate relationship, with the state by signing legal papers. So, there are barriers to enter it, there are barriers to enter it, there are barriers to exit it and then there are rewards to stay in it" (personal communication, July 21, 2016). The concern regarding how the privileging of heterosexual marriage acts to the detriment of non-heterosexual couples is also expressed by Pallab, Sukhdeep, Ken and Sonal. Sukhdeep mentions how even getting a home loan is difficult on account of his non-marital status (personal communication, October 13, 2016). Sonal states how the denial of partnership rights to same sex couples imply that insurance benefits, joint property rights, adoption rights are exclusive available only to married heterosexual people (personal communication, July 23, 2016). Ken also iterates the same argument, " if I want to with my partner and we want to jointly buy a house or we want to jointly take a loan, we can't do that. Each and every step of the way, state control comes and that's not equality centric at all" (personal communication, July 26, 2016).

While the five participants mentioned above indicate that the state directly promotes heternormativity by encouraging marriage, Pallab and CJ believe that the state does so indirectly: by dissuading homosexuality. Both of them argue that since

heterosexuality is taken as the 'normal', the sanctions against homosexuality are logical (Pallab, personal communication, July 11, 2016; CJ, personal communication, July 26, 2016). To quote Pallab, "the state promotes heterosexism but without knowing because heterosexuality is what they know…I think putting it as promoting heterosexism is a wrong way, rather saying it dissuades homosexuality would be a better way of putting it" (personal communication, July 11, 2016). Thus, the presence of S377 is re-iterated again, this time to argue how the privileged position of heterosexuality is established by the state.

Other than the ways in which heternormativity is promoted, participants interviewed also noted that the state is not alone in perpetuating heterosexism; every institution that regulates our social life also does the same. In Dhrubo's words, "I don't think it is up to the state. I think every single one of us promotes heterosexism…The state acts in active collision with the community, with the kind of people who build our movements, who run our schools and colleges…it's so steeped in our sub-conscious" (personal communication, October 19, 2016). Even Prabha speaks in a similar tone, "it's not only the state but every institution: marriage, religion, schools, colleges, hospitals, wherever. I mean it's all so pervasive, so why only single out one thing?" (personal communication, October 12, 2016).

The acknowledgement that the state is not alone in perpetuating heternormativity is a powerful one and has important bearing on the participants' understanding of how the LGBTQ movement must extend its arena of engagement, to go beyond the state.[10] In this respect, it is noteworthy that participants noted that the LGBTQ movement must engage with the education and the health system.

Participants had noted that LGBTQ children face a lot of discrimination in their educational institutions which eventually leads to dropping out of schools. It is imperative therefore that instances of bullying is addressed. And in this regard, having an anti-discrimination legislation could be of great help. More importantly, engaging with the issue of education implied an overhauling of the curriculum and education system which is geared towards promoting heterosexuality. Poushali explains that, "queer people drop out because they can't adjust. Changing the policies of school

[10] S. M Engel, *The Unfinished Revolution: Social Movements Theory and the Gay and Lesbian Movement*. Cambridge University Press: Cambridge. 2001, p.126.

dress, like the uniform, building awareness in school level, building awareness in the colleges, in the entire education system and changing texts, changing books and may be channelizing this for sex education" (personal communication, July 16, 2016). Mehr reasons that "everything that you learn in school is that there is a binary system of gender" and therefore, it is important that there is an 'overhauling' of the curriculum (personal communication, July 21, 2016). Ten participants particularly mentioned the necessity of sex education in school syllabi. Sachin cautions that simply ensuring that sex education be introduced would not be enough, "the situation of 'heterosexual' sex education is so much bad and there is so much shame and secrecy is surrounding it…and the problem is that a lot of the people who may potentially impart sex education have very alarming views and ignorant about same-sex relationships. So while you may be bring sex education in the realm of the school but it may be creating even a worse situation where that person imparts a very homophobic, transphobic and biphobic world views to these very impressionable minds" (personal communication, July 9, 2016). Sachin's comment shows how structural reforms will have to be accompanied by changes in the social set up.

The issue of health rights has been pivotal for the LGBTQ movement in India in the backdrop of the HIV/AIDS epidemic and continues to be so. Ashok opines that health as the most important issue for the movement, "I think the direction that we should all go is health…we are saying remove S377 but suppose out of hundred, sixty are dead, who are you talking about? One keeps saying human rights but can it be human rights for a sick population? Of a population that is dying? With no access to health?…Removing only S377 will not help; one of the important issues is health. If you are healthy, you can fight tomorrow; if you are not healthy, you can't" (personal communication, July 7, 2016). Even Siddharth lays emphasis on the 'right to health' within the ambit of human rights as one of the priority issues (personal communication, October 10, 2016). Despite the urgent necessity of health care among LGBTQ, the medical field is one arena that blatantly displays its abhorrence towards LGBTQ people. Deepak and Sachin articulate the difficulties that transpeople face in accessing health care facilities, especially because doctors are not sensitised to deal with the health concerns of transpeople.[11] In such a context, sensitisation of the

[11] See Revathi, *Truth about Me: A Hijra Life Story*, Penguin, New Delhi: 2010; L. N. Tripathi, *Me Hijra, Me Laxmi*. Oxford University Press, New Delhi, 2015.

medical fraternity on sex-gender-sexuality becomes necessary. Additionally, both of them mention about the necessity of subsiding sex re-alignment surgeries for the transpeople who want to undergo transition (Deepak, personal communication, October 17, 2016; Sachin, personal communication, July 9, 2016). Chayanika and Mehr mention that mental health epidemic should become a point of engagement for the LGBTQ movement (Chayanika, personal communication, July 22, 2016; Mehr, personal communication, July 21, 2016). Chayanika makes the incisive point that since medical education is populated with myths around normal/abnormal, healthy/unhealthy it is necessary that question of "how the health system looks at bodies" is also probed into. She says, "the health system also needs a lot of education and change" (personal communication, July 22, 2016). What is therefore is being asked is not just accessibility towards the existing health system but also a new way of imagining the medical education.

Stephen Engel explains that the attempt to "remove homosexuality's listing as a mental illness, the proliferation of sexuality studies programs at universities, and the increased discussion about gay marriage"[12] must be understood as an acknowledgement that power is no longer concentrated in the hands of the state alone. And as a result, even the LGBTQ movement in India has begun to engage with the health and education system and the institution of marriage in order to bring about the structural changes that it yearns for. In this context, it becomes necessary to re-visit the question of same-sex marriage, which has already been discussed in the previous chapter. As has been seen, same sex marriage was an emotive issue for the participants and had the potential to pull in both directions, with almost equal supporters and dissenters of such claims. While same sex marriage was argued as an important concern for thirteen participants, eleven participants considered it unimportant. It is revealing that even those participants who did not consider that marriage as an important issue for the LGBTQ movement, offered 'civil unions' as an alternate to marriage so that partnership rights are available to everyone irrespective of their gender identity and sexual orientation. In effect, not only is the movement re-

[12] S. M. Engel, *The Unfinished Revolution: Social Movements Theory and the Gay and Lesbian Movement*. Cambridge: Cambridge University Press, 2001, p. 126.

imagining the structure of the family but also proposing that such 'families of choice' are legally recognised by the state, with consequent rights being made available too.[13]

Even though forays are being made into the areas mentioned above, the significance of the engaging with the state cannot be undermined, primarily because as an institution the state is has a universal appeal. Thus, recalling the importance of the state to the lives of several people from Dhrubo's account, it can be easily surmised that engagement of the LGBTQ movement with other domains can only be a way of expanding the reach of the movement; it cannot be a substitute for engaging with the state.

The LGBTQ Movement as a Social Movement: Reflections

From the preceding discussion it can be surmised that the state emerges at once as an antagonist as well as an objective for the participants. This narrative is present in all the accounts except four participants who note that an oppositional politics is more favourable than an engagement with the state for bringing about change in the unequal citizenship status of the LGBTQ people. Another seven participants held that oppositional politics is as significant as engaging with the legislature or the judiciary.

The importance assigned to movement politics can be evaluated through Anuja's account who cites the example of America and then explains, that in the Indian context too it would be favourable that LGBTQ rights "it does not start with the judiciary, it doesn't with legislation. It starts with people shouting on the streets and then one by one the government realises to give you equal rights…visibility is the only reason anyone is going to listen to us. In my opinion, of course the movement is the basis of any change" (personal communication, July 18, 2016). Chayanika believes that, both structural change and change in mindset are necessary for attainment of equal citizenship. And structural change "cannot happen unless the marginalised come together, it cannot happen under the largess of those who have power" (personal communication, July 22, 2016). What emerges from such accounts

[13] See Janet Holland, Jeffrey Weeks and Val Gillies, 'Families, Intimacy and Social Capital'. *Social Policy and Society*, Vol 2, 2003, pp 339-348.

is the assertion that a 'rights-based' language is emerging within the LGBTQ community that believes in the power of collectivity.

From the account above if one concludes that eleven participants note the efficacy of movement politics in bringing about equality, it would be an extremely simplistic reading of the narratives. Instead, a nuanced reading of the accounts reveals that several other related themes emerge which are equally significant. First, participants showed a deep sense of reflexivity on trajectory of the movement till date. Chayanika who believes movement politics to be as essential as engaging with the organs of the state laments that, "no struggles are happening" (personal communication, July 22, 2016). Three participants noted that a major factor behind the grim judgment delivered in the Supreme Court was the visible absence of enthused and sustained community involvement, after the 2009 judgment. To quote Pramada, "I think, many of us were very complacent after 2009. Because it actually happened so smoothly we assumed that was what was going to happen. And when it did happened in 2013 we were completely shocked of the system"(personal communication, October 21, 2016). Similarly, Anuja also notes that, "a lot of people took advantage of it (the Delhi High Court judgment) like they placed too much importance on it. They thought, Naz has happened, now Supreme Court will also go in that direction, so everyone slept for about next four and half years" (personal communication, July 18, 2016). Deepak also refers to how the community involvement had decreased after 2009 (personal communication, October 17, 2016). Together, these four participants argue there is a co-relation between the uneven visibility of the LGBTQ movement and the adverse judgment of the Supreme Court (2013).

Second, several participants noted that the LGBTQ movement is also marked by deep divisions from within. This is because unlike other minority identifications like those of religion, caste, gender, region and language the LGBTQ population cuts across all of these markers. To quote Pallab, "we are far too different and that is going to happen by virtue of the families we are born in, the education, the regions that we are born in, the regional language that we speak" (personal communication, July 11, 2016). In addition to that, there is also the question of ideological affiliation which again splits the movement. The ideological rift within the movement is indicated not only by Pallab but also by Ashok and Vivek. Referring to the ideological diversity within the movement Vivek says "you have right winged fundamentalists LGBT to

very alternative thinking to left wing, to this, to that and the other, or to middle of the road capitalist or whatever you want to call it" (personal communication, October 14, 2016). Pallab noted that even voting preference among LGBTQ population varied widely and therefore formulating it as a consolidated vote bank (unlike what happens in the USA) becomes implausible (personal communication, July 11, 2016). And, even within the spectrum the identification is not complete. As Deepak points out that lesbian women and transwomen on one hand and gay men and transmen on the other do not completely identify with each other. She says, "discrimination is also present within the community, for example even if I am from the LGBT community, if I am a lesbian or I am a gay, the transpopulation may not be comfortable with me. And this happens, has happened. Transwomen also are averse to the feminine behaviour of some gay men, because while they dress up in female attire, gay men might not" (personal communication, October 17, 2016). This reflection of the participants on the internal divisions present within the community is noteworthy because it might seem to make the movement weaker but in reality it offers the movement an opportunity to negotiate and locate the common grounds for a unified struggle. Vivek says, "it's not great for a movement building kind of exercise because it just doesn't bring us together in cohesive way. But I think it's a great thing in terms of maturation of a community and it puts into question along a lot of stuff around identity" (personal communication, October 14, 2016). Moreover, the absence of a coherent identity also allows the movement an opportunity for building allies. In other words, the LGBTQ movement can contemplate on aligning itself with other social movements that are engaged in challenging the repression of the state. One common ground which has been uncovered by the LGBTQ movement is the issue of fighting for an anti-discrimination legislation. The demand of an anti-discrimination legislation is a fertile ground which allows for strategic alliance building not only among the various constituents of the LGBTQ spectrum but also allows for coalition formation with other movements. Therefore, what might seem like a fragmentation for the movement due to the absence of a homogenous identity is actually an opportunity for building a broad based movement.

As has already been noted above, participants had noted the internal diversity of the LGBTQ population and this has implications for the movement. Participants in the study therefore, offered different conceptualisation of the LGBTQ movement and this

constitutes the third theme. In view of the differences present, from the accounts of the participants, three positions emerge on how the movement should be conceptualised. The pre-dominant position which emerged was that since citizenship is experienced unequally due to a number of intersecting factors, the movement should also follow an intersectional politics and align itself with other movements. Rituparna explains that collectives like LABIA and Nazariya have meetings when there is caste based discrimination as much as when there is sexuality based discrimination (personal communication, October 20, 2016). Participants who fall into this position argue that it is difficult to imagine a movement that will only address sexuality based inequality because though sexuality may be an axis of identity it is impossible to segregate it from all the other identities that a person is enmeshed in. Akshay comes across as the strongest votary of an intersectional politics. Ze says, "at least for now queer politics has be a part of much larger formation which brings together the anti caste movement, the various feminist movements and the left. It has got to be the part of a larger process through which a true intersectional politics engages with fascism" (personal communication, October 17, 2016). In complete contrast to Akshay's position is the position adopted by Pallab and Ashok, who argue that it is necessary for the LGBTQ movement to maintain its isolation from other movements. Pallab cautions that "sometimes those (other) axis of identities may tend to interfere with the LGBT politics and tend to dictate to LGBT politics… When we are already saying we are divided already on basis of political identity and then you get more angles of feminism, dalit etc into the picture you are further disintegrating the movement. Because then you are already creating divisions, before you are actually moving forward" (personal communication, July 11, 2016). In other words, aligning with other movements is fraught with the danger of losing the primary identification as LGBTQ. For Pallab, SOGI has not yet emerged in India as an axis of identity because of the hindrance that 'other axis of identities' cause. Similarly, Ashok also states the difficulty in consolidating the LGBTQ coalition. He says, "it is a very lonely fight. Neither religious minorities or cultural minorities will accept you because they still think that we have made a choice, they call it preference" (personal communication, July 7, 2016). A question that both of them raise is "do the other minorities want you?" This question is significant because it throws open the question of marginalisation of the LGBTQ movement by the other identity based politics. While an intersectional perspective opens up possibilities to explain the lived realities

of people, the marginality accorded to questions of non-heterosexual sexuality within other social movements is now being critically examined. Harish offers a middle ground between these two contrasting positions. He recognises that the LGBTQ movement must show its alliance with other movements but should restrain itself from completely identifying with it. In his words, “alignment with other movements but disaligning with other movements also, when it is required. When I go to a dalit lives matter event, I will mention I am queer but I will not possibly make it about queer rights in a dalit movement and when they come over here, they can say I am a dalit and queer but just as I will not take to overtake their movement, I will not appreciate they will take this movement” (personal communication, July 13, 2016). The above accounts make Vivek’s comment about, the internal incoherence within the movement and its maturity, reverberate at the background.

The question of identity predicates any discussion on movement politics and therefore a discussion on how the participants of the study conceptualise sexuality becomes necessary. Across the world, LGBTQ movements have been embroiled in the essentialism versus social constructionism debate. In contemporary times, however there is an acknowledgement that sexuality is neither dictated by biology nor by the society alone. Shades of these three positions also emerged from the field work, though most participants held that sexuality must be held as the interplay between biology and society. Sukhdeep and Sonal hold that though sexual orientation can be construed as biological, the expression of the orientation is determined by the social milieu (Sukhdeep, personal communication, October 13, 2016; Sonal, personal communication, July 23, 2016). To quote Sonal, “a social influence can happen when I wanting to talk about my feeling for a person of the same sex, and not feeling shameful about it” (personal communication, July 23, 2016). Dhrubo emphasises that sexuality should be understood as desire and because desire cannot play out in an absolute vacuum, one can never talk about sexuality only in biological terms (personal communication, October 19, 2016). Ashok is elaborate in his explanation on what constitutes sexuality. He distinguishes between sexual desire, sexual orientation, sexual behaviour and sexual identity. While he deems sexual desire as biological and sexual identity as social, he talks about the indeterminate nature of sexual orientation and sexual behaviour which are impacted by biology as well as society (personal communication, July 7, 2016). Chayanika confesses that across her years of activism

with the women's movement and the queer movement there has been a shift in her understanding of sexuality. While she began with underplaying the importance of biology, at present she has re-worked her understanding to emphasise on both biology and social factors. She says, "how I come to see myself is socially constructed; it is layered by many parts of me and my surroundings and where I come from. But there is also something that I feel and I can't deny that." However, she notes that one must not fall back on the biological explanations excessively as it runs the danger of falling into the trap of the 'gay gene' (personal communication, July 22, 2016).

The danger of emphasising on the biology argument is also pointed out by Vivek. He says that though sexuality for him is innate, and such an explanation is "strategically important" he has "never thought of this as particularly important beyond a point" (personal communication, October 14, 2016). This by-passing of the essentialism versus constructionism debate, Vivek points out, was also consciously adopted during the legal proceedings. This is despite the fact that biological arguments make it easier to convince people. The trade off that could happen between the legal gains and the genome project made the activists' device the strategy to avoid such arguments.[14] Along with Vivek, Pallab, Anuja and Harish provide biological explanations of sexuality. In sharp contrast, Prabha, Deepak, Rituparna, Mehr, Pramada and Poushali consider sexuality in constructionist terms. Mehr argues that just like gender "your sexuality is a project which is taken up by the state and any other kind of vehicles of institutionalisation like the family, schools... everyone is taught to be cis-hetero" (personal communication, July 21, 2016). Rituparna and Pramada indicate how sexuality is governed by rules which itself shows that there is no biological basis to sexuality (Rituparna, personal communication, October 20, 2016; Pramada, personal communication, October 21, 2016).[15] Rituparna says, "there are rules to do with sexuality, the five W's of sexuality. That's what I call- with whom can you have sex, with what can you have sex, where can you have sex, when can you have sex and why can you have sex" (personal communication, October 20, 2016). These are important insights which enrich the narratives on sexuality by questioning how procreative heterosexuality is privileged. For Prabha, sexuality cannot be understood as sexual

[14] Only in the petition from Ratna Kapur there is a clear articulation on sexuality, and it is a constructionist position.

[15] Similar to N. Menon, 'How natural is normal? Feminism and Compulsory Heterosexuality' in Gautam Bhan and Arvind Narrain (eds.) *Because I have a voice: Queer Politics in India,*. Yoda Press, New Delhi, 2005.

orientation alone, “it’s about gender roles, fantasy, erotica, inter personal relationships, self esteem, body” and therefore it is bound to be conditioned by the surroundings (personal communication, October 12, 2016). Deepak makes another significant contribution. She uses the distinction between sexual orientation and gender identity in her account and contends that while gender identity is innate, sexual orientation is learnt (personal communication, October 17, 2016). The diversity in the positions is another indicator of the ‘maturity of the movement.’ The way in which sexuality is conceptualised also has ramifications on the nature of the movement. It is likely that support for developing alliances with other movement would come from those who foreground the social constructionist position along with the ones who emphasise that sexuality has to be understood as an interplay biology and social environment.

Related to the debate of whether sexuality needs to be read in essentialist or constructionist terms, is the matter of whether sexual orientation and gender identity (henceforth SOGI) has emerged as a viable axis of identification in India. Internationally, SOGI has emerged as the new identity category while exploring cases of discrimination.[16] It is noteworthy that only six participants of the study held that SOGI has emerged as an axis of identity formation in India. Of these two participants noted that while gender identity has emerged, sexual orientation has been unable to gain strong grounds.

Sukhdeep believes that the passage of the Transgender Bill is an example of how gender identity has been able to mark itself as a legitimate marker of identification but “there is a lot of uneasiness around sexuality because somehow sexuality is associated with sex” and therefore sexual orientation has not emerged on the scene successfully (personal communication, October 13, 2016). Vivek explains that though some people would like to believe that SOGI has emerged, “I don't think it sits together well necessarily. Some people will talk about the SO and other people will talk about the GI but not the SO and the GI. I think some people's vested interest is only SO and not GI at all. I think there's a lot of transphobia amongst the SO people and I think there's a lot of fear of the SO by the trans people” (personal communication, October 14,

[16] Arvind Narrain,Sexual Orientation and Gender Identity: A Necessary Conceptual Framework for Advancing Rights? Available at http://arc-international.net/global-advocacy/human-rights-council/sexual-orientation-and-gender-identity-a-necessary-conceptual-framework-for-advancing-rights/ accessed on January 3, 2017.

2016). In a very insightful manner, Vivek points out that some amount of consolidation has taken place around SO while some amount of consolidation has taken place around GI. He refers to the exclusion that bisexuals and queers face vis-à-vis gays and lesbians when the question of SO comes, and the marginalisation that non-hijra MTF and all FTM face vis-à-vis hijras when the question of GI is raised (personal communication, October 14, 2016). Such accounts problematise the movement by revealing the ruptures within the LGBTQ configuration.

For Poushali a sexuality based identity politics has already emerged and draws it strength from both the feminist legacy as well as HIV/AIDS based activism. She says that such identity based politics is important as "this is needed for negotiations, for voicing out, for projecting and steering one's own needs" (personal communication, July 16, 2016). Prabha describes that the emergence of SOGI as an identity is highly uneven. She says, "yes, it has emerged; it is emerging in certain pockets more than in others. We can't say that it is not there at all, but nor is it all pervasive in that sense" (personal communication, October 12, 2016). Three participants held that though SOGI has not yet emerged as an axis of identity, it is underway. Ashok, Pallab and Anuja fall into this classification. Ashok cites the increasing participation in different pride parades across the country as evidence for such a trend (personal communication, July 7, 2016). Anuja reflects back on the impact that the 2013 judgment had on consolidation of identity based on sexuality "when the Supreme Court raised S377 as valid, there was suddenly a host of younger people who were so angry about this judgment that they were suddenly wanting to come out of the closet; which then obviously made this movement and identity larger" (personal communication, July 18, 2016).

All the remaining participants, however, note that SOGI has not yet emerged not is it in the process of emergence as an axis of identity in India. This is primarily because sexuality as an axis is cut across by various other identity categories that makes the task difficult. Pramada notes how difficult it can become to segregate one identity from another, "because it is about identity and it is about asserting a particular identity, without making any other connections to anything else. It is a challenge!" (personal communication, October 21, 2016).

It becomes apparent from the discussion on sexuality and SOGI, neither is there an unanimity regarding how sexuality is to be understood nor is there a unison is thinking about sexual orientation and gender identity as an axis of identity. And therefore it can easily be deduced that since sexuality as an identity is not monolithic, the LGBTQ movement also cannot be conceived in a monolithic image. As Pramada says, “there are multiple queer movements, and any of those multiple queer movements are going to work in multiple ways” (personal communication, October 21, 2016). And though it is difficult to grasp the nature of the LGBTQ movement in its entirety on account of the multiplicity of voices within it, it is the diversity of the movement which is its strongest point. The internal divisions indicate that the LGBTQ movement in India is a dialogic one and its impreciseness allows it to cater to all the constituencies. The movement is united, for the present, through the demand for repealing S377. By mobilising around law, the LGBTQ movement has not only challenged the state but has also had a vibrant engagement with it. As the movement has progressed, it has moved beyond the purview of the state and has started questioning the institutions of education, health and family. With the prospective repeal of S377 in the curative petition, the movement’s enduring impact will fall back on these domains. For now, it is important for the movement to keep the state as the focal point of engagement.

CONCLUSION

As social movements are aimed at bringing about structural transformation, engagement with the state is inevitable. But such engagements have to be a cautious one wherein the movement retains its antagonistic stance and does not get co-opted by the state. Viewed through such a conceptualisation, it can be easily deduced that the LGBTQ movement, across the world as well as in India, is a ‘quintessential social movement’. The present chapter is an attempt at laying down the LGBTQ movement in India as a social movement despite its polymorphous composition which affects it nature and concerns. From the discussions above it can be seen that the LGBTQ movement is not predicated on a shared understanding of sexuality. This is despite the fact that at present sexuality as an axis of identity is under consolidation. At present, a coherent LGBTQ movement emerges only through the contestation of law, which

joins all the constituents of the spectrum together. In other words, how the state is positioned towards the sexual minorities and how the sexual minorities perceive the state remains central for the LGBTQ movement.

This chapter uses the narratives of twenty-five participants interviewed in Delhi and Mumbai while trying to discuss such concerns. The narratives provide a window to understanding how and why engaging with the state is important for the LGBTQ movement. Though the centrality of S377 to the development of a visible LGBTQ movement has already been noted in Chapter III, this chapter uses the responses from the field work to re-examine the same. The narratives raise important questions regarding the nature of identity politics itself and how social groups can be conceptualised. Based on the accounts, the chapter attempts to throw light on two seemingly disparate themes: the nature of engagement of the LGBTQ movement with the state and the varied ways to understanding sexuality. But as the chapter shows these two themes are linked to each other through the idea that a social movement is aimed at bringing about social transformation and while doing so it only places the state as an objective and an antagonist but also widens its scope to go beyond the state. That a majority of the participants do not hold on to an essentialist notion of sexuality indicates that the LGBTQ movement is open to forming coalitions with other social movements and is also geared positively towards those who identify as allies.

Through a discussion of the accounts derived from the interviews, the chapter puts forth three arguments. First, the LGBTQ movement has started contemplating on engaging with the legislature. Though the emphasis on the judiciary remains, this is an interesting revelation because it shows the intention of the movement to broaden the confines of the movement. What emerges from such accounts is that there is no widespread dissonance towards engaging with the state. Second, though the movement acknowledges the centrality of the state, it still retains a critical stance while engaging with the state. The antagonism towards the state emerges on account of its oppressive character as well as its inherent heteronormativity. The accounts reveal that any engagement with the state is fraught with dangers and therefore caution needs to be exercised. Third, despite a seeming visible LGBTQ movement emerging, there is no unanimity on how sexuality is to be understood and whether sexuality as an axis of identity has already emerged. The divergence on such issues

makes the course of the LGBTQ movement open ended and this is where the radical politics of the LGBTQ movement ought to be located.

Through the field work it became apparent that a simplistic rendering of the LGBTQ movement in India is difficult on account of the multiple voices that inhabit it. Though sexuality is emerging as an axis of identity politics, an intersectional approach is necessitated because of the multiple realities within which the lives of sexual minorities are situated. Therefore, the LGBTQ movement has to engage with all forms of discrimination, of which sexuality is one. The enduring contribution of the LGBTQ movement would be in its strategy of building coalitions with other movements, so that sexuality comes to be placed as a pertinent axis of discrimination for these movements as well.

Seen in continuity with each other, this chapter along with the previous one, is not just tied together by the fact that the participants remain the same but more significantly by the fact that it emphasises on intersectionality – whether it be through the experiences of discrimination or through the way in which the such experiences guide the movement into multiple paths. Additionally, the two chapters also maintain continuity with each other through concepts of law, state and citizenship. While the preceding chapter poses the question of unequal citizenship and investigates the language used by the LGBTQ movement in its claim to citizenship, this chapter takes the discussion forward by talking about the ways in which the movement has sought to achieve equal citizenship status. Additionally, this chapter also talks about the way the movement is conceptualised by the participants and it is noteworthy that the advocacy of an intersectional politics is a logical outcome not only because sexuality is conceptualised in a nuanced manner but also because (as seen in the previous chapter) discrimination based on sexuality is intermeshed with other forms of identity as well.

CONCLUSION

The forgoing chapters have tried to provide an account of the manifold ways in which sexuality determines access to citizenship and rights, especially in the context of India where the existence of a law that criminalizes consensual same-sex conduct among adults is present. Though the law is not the sole source of discrimination against sexual minorities, the ubiquitous nature of law determines that discussions on sexuality in India cannot escape it. Law legitimizes and constructs notions of sexual deviance and therefore sexuality can be termed as a litmus test for access to and denial of rights. Citizenship, conceived as 'horizontal camaraderie', is therefore ruptured when the issue of sexuality is fore grounded.

In recent years, sexual minorities have contested their status as 'partial citizens' by appealing to the judiciary. Though the rights invoked initially came from the narrow perspective of epidemiology, it soon appropriated the claim to citizenship. This is a significant departure as it demonstrates the normative appeal that citizenship possesses. The appeal to citizenship that is made in the Indian case is, however, not exceptional. While Jeffrey Weeks lauds the 'moment of citizenship[1]' as a logical move for struggles around sexual rights, Carl Stychin displays a skeptical stance towards such a turn. Nevertheless, Stychin states that "appropriation of citizenship speaks to the power of citizenship, and to the lack of alternative languages which express both a desire for rights and participation."[2]

The inclination of movements towards equal citizenship status derives not only from the normative appeal that citizenship has but also from the material consequences which flow from being recognized as citizens. Carver contends that citizenship is based not only on the distinction between citizens and non-citizens but also to create a hierarchy which he terms as 'gradations of esteem' within the categories as well. Boundaries are used not only to mark out the alien from the citizen but also to distinguish people within the gradation of esteem. Carver's scheme helps in spelling out why sexual minorities are 'partial'/ 'marginal' citizens within the polity. Sexuality

[1] J. Weeks, 'The Sexual Citizen', *Theory. Culture and Society*, 15 (3-4), 1998, pp.35-52.
[2] Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* Oxford: Hart, 2003, p. 12.

is used as boundary that delineates the 'citizen-pervert' from the normative citizen who is not only male but also importantly heterosexual. The state's interest in criminalizing consensual same sex among adults is telling because in this instance there is no harmed party, the crime is in fact against the state. Thus, when sexual minorities contest their position as unequal citizens, it is a challenge to the way in which the state has created gradations of esteem.

The claim of equal citizenship status by the sexual minorities was validated when the Delhi High Court had read down S377 of the IPC as an affront to constitutional morality. However, with the subsequent reversal in 2013 by the Supreme Court, not only has discrimination jurisprudence of the country received as set back but, dangerously, the rights claims made by sexual minorities have been belittled and their physical presence challenged. In this context, this study is an attempt to situate the centrality of citizenship claims made by those who are marginalized on the basis of their sexuality. By doing so, the thesis highlights the sexualized nature of politics and the politicization of sexuality. Through an investigation of the legal contestation of S377 and the arguments used during the course of the legal battle, the thesis notes how citizenship emerged as a core concern for the LGBTQ movement in India.

The framework of sexual citizenship informs study. Sexual citizenship is understood in two ways: in the first account, it recognizes the ways in which access to citizenship and rights is structured by sexuality and in the second, it acknowledges how citizenship is transformed when sexuality transcends the realm of the private to become a matter of public cognizance. From the fieldwork conducted in the two urban locations of Delhi and Mumbai the study presents an account of how unequal citizenship status is linked to discrimination based on sexuality. The metamorphosis of sexuality from a private issue to a publicly cognizable identity, which signals a shift in the topography of understanding citizenship, is presented through the chapters that deal with the legal struggle around S377. Additionally, the study also moves beyond this framework as it incorporates an intersectional approach to not only feature the difference of emphasis in lesbian activism vis-a-vis gay activism but also by taking into consideration the gender difference while collecting as well as analyzing narratives from participants. By inserting the gender lens into the study of the LGBTQ movement, the study affirms how the radical agenda of lesbian activism that fore grounded the right to freedom was overshadowed by the restrained demand

for ‘reading down’ based on right to privacy. Moreover, the gender dimension is also visible in the narratives specifically on the issues on discrimination and same-sex marriage, thereby implying that singular articulation of sexual citizenship is problematic. Effectively, therefore, the framework of sexual citizenship may be sensitized to take into account the differences that exist within the spectrum termed as LGBTQ. This study, therefore, is an attempt to spell out the necessity of theorizing towards differentiated forms of sexual citizenship, in the Indian context.

Despite the difference over what would constitute valid grounds for contesting inequalities based on sexuality, gay and lesbian activists have found in S377 the median around which the movement can proceed. In other words, engagement with the law is one of the most visible aspects of the movement. And therefore, a concern with the law remains central for this study. It is, in fact, the law which creates and inserts the idea of sexual deviance through the project of colonialism. And again, it is the law which emerges as the site of resistance, fostering thereby a sense of commonality, among the discrete sub-groups within the LGBTQ formulation. The centrality accorded to law is visible not only through the continued legal petitioning against the Supreme Court Judgment but is also reinforced, as discussed in the study, when (barring two) all participants held a firm belief in the judicial route. The pre-occupation with law is inevitable in a context where the lived reality of people desirous of same sex relationships is affected by criminal law.

At its core, this study is concerned with citizenship theory and its confrontation with sexuality. Debates on citizenship in the decade of 1970s were structured around claims of cultural difference and the necessity of acknowledging diversity. The emergence of differentiated citizenship as the alternative model against the presumed universality of citizenship is a watershed moment. The debate on differentiated citizenship has been enriched through the intervention of feminists and disability rights activists who have brought the question of embodiment, and this has been further taken forward by gay and lesbian activists. This study can be read within this schema because it is informed by how certain bodies are demarcated as ‘unnatural’ and the way such categorizations are deployed in structuring exclusion from citizenship. As this study focuses on the criticisms made by sexual minorities, it works to show how the LGBTQ movement has challenged the heterosexual framework by arguing that the legal discourse should not speak about ‘acts against the

order of natural' in abstraction. By producing evidence of how S377 is used for prosecution and persecution, the movement has produced before the judiciary a tangible 'body' who stand discriminated because of this provision. In a way, therefore, this study argues that a robust theory of citizenship must not be blind to the question of embodiment. The sexual citizen can, therefore, be re-framed as one of the variants of embodied citizens.

Scholars on sexual citizenship have displayed their skepticism towards the assimilationist terms and normalization that the turn towards citizenship involves. It has been alleged that citizenship runs into the danger of de-radicalizing the transformative potential of movements that mobilize around sexuality. In this regard, a distinction is also made between gay and lesbian movements, on one hand and queer movements, on the other. While gay and lesbian movements, it is argued, predicates a stable sexual identity and moves towards the inclusion into citizenship; queer movements conceptualize sexuality as a fluid and gravitate towards a radical politics which aims towards deconstruction of the gender order. However, such straitjacketing of movements is problematic in contexts where discussions around sex are considered as taboo and muted. The radical edge in such contexts is the ability of the movement, whether labeled as gay and lesbian movements or queer movements, to place sex as a political issue. In this sense, this study can be posed as intervention that seeks to direct attention towards contextual specificities when politics of normalization is offered as a critique of citizenship. The thesis, through the field-work, re-directs attention towards the allurement that formal equality has for all those who experience discrimination at different levels. As is also substantiated from the analysis of the legal documents, claims to equality and citizenship remain worthwhile pursuits. In a nutshell, it emerges from the study that it is too early to debunk the significance of citizenship, despite its problematic articulation.

Further, the study also throws light on the significance of using equality as the framework for advocating rights of sexual minorities. It is worth re-iterating that the legal challenge to S377 hinged on a claim to equality. Equality also emerged as potent political principle during the field work. While the argument of sameness manifests itself in the course of the legal struggle through assertions that deny essential difference between sexual orientations (as was done by the Voices petition); during the field work sameness emerges as an argument against special rights for sexual

minorities. The positing of sameness as a ground for equality has been criticized by theorists, especially feminists, who draw attention to diversity. Within the context of citizenship, the feminist debate on sameness vs. difference has led to a chasm between gender-neutral and gender differentiated citizenship. Pateman formulates this as Wollstonecraft's dilemma.[3] This close reading of the study also reveals how the contemporary LGBTQ movement is also embroiled in the same dilemma. Re-phrasing the Wollstonecraft's dilemma in the context of LGBTQ it can be said that while demanding equality is to strive for equality with heterosexuals, which implies that non-heterosexuals must become like heterosexuals. And to insist on the distinctiveness of non-heterosexuality is to legitimize the very grounds on which exclusion of non-heterosexuals is justified. The emphasis on sameness, found in both the legal petition and the narratives, is necessitated by the insistence of the opponents of decriminalization on 'difference'. The struggle around law of the LGBTQ movements in India provides an interesting insight on how the sameness vs. difference debate must be carefully considered, with regard to the context in which the debate is being placed. It is also worth re-iterating that most participants steer away from providing a clear articulation of sexuality in either/or terms of biology and society. This is also found in the legal struggle where there is no apparent engagement on the question of whether sexuality is biological or social. Though the LGBTQ movement in India is still in its nascent stage, the sidestepping of this debate indicates that it strategically maneuvers questions of identity, in its quest for citizenship. By indicating towards such moves, this study wishes to tip-off how Bernstein's model of 'identity deployment' may be used to study the LGBTQ movements in India.

Furthermore, the study also points out towards questions on how an identity politics around sexuality might have to be re-phrased when arguments of sameness are accentuated. In other words, how can we talk about LGBTQ as a social class that suffers from political inequalities without relying upon essentialised notions of sexuality? The study has tried to show that sexuality, in the Indian context, has not emerged as a standalone marker of identity. As stated from the field work, the question of sexuality as an identity is affected by an acknowledgment that there are differences within the spectrum called as LGBTQ as well as other axes of identity. In

[3] Carole Pateman, 'The Patriarchal Welfare State : Women and Democracy' in Amy Gutman (Ed.) 'Democracy and the Welfare State', Princeton: Princeton. University Press, 1988.

this context, alternative propositions about group differentiation which do not take recourse to essentialised explanations need to be explored. One such framework may be located in Iris M. Young's postulation of 'social group'[4]. By focusing on the experiences of LGBTQ people, this study tries to locate the formation of a group identity among the gays and lesbians as an outcome of oppression to which they are subjected. Drawing from Young's schema of five faces of oppression, the accounts presented from the field work, elucidates in a preliminary manner how LGBTQ people experience systematic violence, marginalization, exploitation,[5] powerlessness,[6] and cultural imperialism.[7] It would be interesting to place such a framework for research in the future. Engaging the concept of 'social group' can help consolidate the movement further, making the path clear for affirming a politics of difference.

The present study also opens up the space to discuss heterosexuality. In fact, heterosexuality remains severely under theorised as it remains entrenched as 'natural'. Sexual citizenship, by fore grounding social constructionism may aid in de-constructing heterosexuality itself. And it is here that queer theory's intervention becomes imperative.

[4] Iris Young calls a 'social group' involving 'first of all an affinity with other persons by which they identify with one another and by which other person identify them… many group definitions come from outside, from other groups that label and stereotype certain people. In such circumstances, the despised group members often find their affinity in their oppression'. See Iris Marion Young, Justice and the Politics of Difference, Princeton: Princeton University Press, 1989:, p.259)

[5] In Young's book refers to the steady process of the transfer of the results of the labor of one social group to benefit another.

[6] In Young's book refers to, a position in the division of labor and the concomitant social position that allows persons little opportunity to develop and exercise skills," as well as the lack of power in relation to others.

[7] In Young's book refers to, the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it out as the Other.

BIBLIOGRAPHY

A.P. Shah, (2015) Love and Law, Tarkunde Memorial Lecture, available at https://apargupta.com/tarkunde-memorial-lecture-2015-love-and-law-b063b712ab0c accessed on February 20, 2017.

Adam, B. D., Duyvendak J. W. & Krouwel A., (1999)'Gay And Lesbian Movements Beyond Border? National Imprints of a Worldwide movement', in Adam, B. D., Duyvendak J. W. & Krouwel A., (Eds.) *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement,* (pp. 344-371) Philadelphia: Temple University Press.

Ahluwalia, S. (2013). Scripting Pleasures and Perversions: Writings of Sexologists in the twentieth century in Sanjay Srivastava (Ed.), *Sexuality Studies* (pp. 24-45) New Delhi: Oxford University Press.

Aldrich, R. (2003). *Colonialism and Homosexuality*. New York: Routledge.

Alexander, M. J. (1994). Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Post- coloniality in Trinidad and Tobago and the Bahamas. *Feminist Review*, 48, 6

Alexander, M. J. (2003). 'Not Just (Any)Body Can Be A Citizen: The Politics Of Law, Sexuality And Post-coloniality in Trinidad and Tobago and the Bahamas' in Jeffrey Weeks, Janet Holland And Matthew Waites (Eds.) *Sexualities And Society: A Reader* (pp.174-182). Cambridge: Polity Press.

Ali, D. (2011). Rethinking the History of the Kama World in Early India. *Journal of Indian Philosophy*, 39(1), 1–13.

Altman, D. (1996). Rupture or Continuity? The Internationalization of Gay Identities. *Social Text*, 48, 77-94.

Altman, D. (1997). Global Gaze/ Global Gays. *GLQ: A Journal of lesbian and gay studies*, 3, 417-436.

Altman, D. (2007). ‘Sexuality and Globalisation’, in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 149-158). Kolkata: Seagull books.

Arasu, P. & Thangarajah, P. (2012). Queer Women and Habeas Corpus in India: The Love that Blinds the Law. *Indian Journal of Gender Studies*., 413–435

Arondekar, A. (2005). Without a trace: Sexuality and the colonial archive, *Journal of the history of Sexuality*, 14(1/2), 10-27.

Arondekar, A. (2015). In the absence of reliable ghosts: Sexuality, Historiography, South Asia, Differences. *A Journal of Feminist Cultural Studies*, 25(5), 98-122.

Assister, A. (1999). Citizenship Revisited In Nira-Yuval Davis and Pnina Werbner (Eds.), *Women, Citizenship and Difference* (pp. 41-53). London: Zed Books.

Editorial (2008). Denial of Rights to Sexual Minorities. *Economic and Political Weekly*, 43(43), 6-7.

Bacchetta, P. (1999). When the (Hindu) Nation Exiles its Queers. *Social Text*, 17(4), 141.

Bacchetta, P. (2007). Rescaling Transnational ‘queerdom’: Lesbian and ‘lesbian’ identitary-positionalities in Delhi in the 1980s in Menon Nivedita (ed.) *Sexualities* (pp. 103-127). New Delhi: Women Unlimited.

Bacchetta, P. (2013). Queer formations in (Hindu) Nationalism in Sanjay Srivastava (Ed.) *Sexuality Studies* (pp. 121-140). New Delhi: Oxford University Press.

Bachmann, M. (2002). After the Fire, in Ruth Vanita (Ed.) *Queering India: Same sex love and Eroticism in Indian culture and Society* (pp. 234-244). New York: Routledge.

Balasubrahmanyan. V. (1996). Gay Rights in India. *Economic and Political Weekly*, February 3, 257-258

Ballhatchet, K. (1980). *Race, Sex and Class under the Raj: Imperial attitudes and policies and their critiques, 1793-1905*. New York: St. Martin Press.

Bamforth, N. (1997). *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights Law*, London and Washington: Cassell.

Bamforth, N. (2012). Sexuality and citizenship in contemporary constitutional argument 10, *International Journal of Constitutional Law 477,* 482-489.

Bamforth, N. (2012). *Sexuality and citizenship in contemporary constitutional argument 10 International Journal of Constitutional Law 477*, 477-492

Bandopadhyay, M. & Pandey, J. M. (2017). *A gift of Goddess Lakshmi: A candid biography of India's first transgender Principal*. New Delhi: Penguin Books.

Barbalet, J. M. (1988). *Citizenship*. England: Open University Press

Barclay, S., Bernstein, M. & Marshall, A. M. (Eds.) (2009) *Queer Mobilisations: LGBT Activists confront the law*. New York: New York University Press.

Baruah, P. (2009). Logic and Coherence in Naz Foundation: The Arguments Of Nondiscrimination, Privacy, And Dignity. *NUJS Law Review* 2, 455, 505-524.

Basheer, S., Mukherjee, S. & Nair, K. (2009). Section 377 And The 'Order Of Nature': Nurturing 'Indeterminacy' In The Law? *NUJS Law Review 2*, 455, 433-443.

Basheer, S., Mukherjee, S. & Nair, K. (2009). Section 377 And The 'Order of Nature': Nurturing 'Indeterminacy' In the Law? *NUJS Law Review 2*, 455.

Basu, S. (2013). Beyond Equivalence: Body and Language in family courts in Sanjay Srivastava (Ed.), *Sexuality Studies* (pp. 73-93). New Delhi: Oxford University Press.

Baudh, S. (2008). *Human Rights And The Criminalisation Of Consensual Same-Sex Sexual Acts In The Commonwealth, South And Southeast Asia*, Working Paper. The South and Southeast Asia Resource Centre on Sexuality

Baxi, U. (1986). From Human Rights to Rights to be Human-Some Heresies. *India International Centre Quarterly*, 13(3/4), 185-200

Baxi, U. (2011). Dignity in and up with Naz in Arvind Narrain and Alok Gupta (Eds.), *Law Like Love: Queer Perspectives On Law* (pp. 231-152). New Delhi: Yoda Press.

Baxi, U. (2012). Postcolonial Legality: A Postscript from India, Law and Politics in Africa, Asia and Latin America, 45(2), 178-194.

Baxi, U. (2014). Naz 2: A Critique. *Economic & Political Weekly*, XIIX(6).

Beasley, C. & Bacchi, C. (2000). Citizen Bodies: Embodying Citizens – A Feminist Analysis, *International Feminist Journal of Politics*, 2 (3), 337-358.

Bell, D. & Binnie, J. (2000). The Sexual Citizen: Queer Politics and Beyond. Cambridge: Polity Press

Bell, D. (1995). Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship. Political Geography, 14(2), 150.

Berger, M. (1988). Imperialism and Sexual exploitation: A response to Ronald Hyam. *Journal of Imperialism and Commonwealth History*, XVII.

Bernstein, M. (2002). Identities and Politics. Toward a Historical Understanding of the Lesbian and Gay Movement. *Social Science History*, 26(3), 531-581.

Bernstein, M. & Olsen, K. A. (2009). Identity Deployment and Social Change: Understanding Identity as a Social Movement and Organizational Strategy. *Sociology Compass*, 3/6, 871–883

Bernstein, M. (1997). 'Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement. *American Journal of Sociology*, 103(3), 531-565.

Bernstein, M. (2005). Identity Politics. *Annual Review of Sociology*, 31, 47-74.

Bernstein, M., Marshall, A. M. & Barclay, S. (2009). The challenge of Law: Sexual Orientation, Gender Identity and Social Movements, in Scott Barclay, Mary Bernstein and Anna Maria Marshall (Eds.) *Queer Mobilisations: LGBT Activists confront the law* (pp. 1-17) New York: New York University Press.

Bhan, G. (2005). Challenging the Limits of Law: Queer Politics and Legal Reform in India in Arvind Narrain and Gautam Bhan (Eds.) *Because I have a Voice: Queer politics in India* (pp. 40-48). New Delhi: Yoda Press.

Bhaskaran, S. (2002). The Politics of Penetration: S377 of the Indian Penal Code in Ruth Vanita (Ed.) *Queering India: Same sex love and Eroticism in Indian culture and Society* (pp. 15-29) New York: Routledge.

Biswas, R. (2007). The lesbian Standpoint in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 263-290). Kolkata: Seagull books.

Boone, J. A. (2014). *The Homoerotics of Orientalism*. New York: Columbia University Press.

Bose, B. & Bhattacharyya, S. (2007). *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India.* Kolkata: Seagull books.

Bose, B. & Bhattacharyya, S. (Eds.) (2007). *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*. London: Seagull.

Bose, B. (2006). Long Arm of Colonial Rule. Index on Censorship 4, 162-166

Bower, L. C. (1994). Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community. *Law & Society Review*, 28(5), 1009-1033.

Boyce, P. (2013). The Object of Attention: Same sex sexualities in small town India and the contemporary Sexual subject in Sanjay Srivastava (Ed.) *Sexuality Studies* (pp. 184-204). New Delhi: Oxford University Press

Brandzel, A. (2005). Queering Citizenship? Same-Sex Marriage And The State, *GLQ: A Journal of Lesbian and Gay Studies,* 11(2), 198.

Bristow, J. (2007). Sexuality, The New Critical Idiom, London: Routledge

Brooks, A. (2007). Feminist Standpoint Epistemology: Building Knowledge and Empowerment through Women's Lived Experience in Sharlene Nagy Hesse-Biber and Patricia Leny Levy (Eds.), *Feminist Research Practice* (pp. 53-82). New Delhi: Sage Publishers.

Bruce-Jones, E. & Itaborahy, L. P. (2011). State-sponsored Homophobia: A world survey of laws criminalizing same-sex sexual acts between consenting adults. An ILGA Report. ILGA.

Bryder, L. (1998). Sex, Race, and Colonialism: An Historiographical Review. *The International History Review*, 20(4), 806-822.

Bucholtz & Hall (2008). *Lesbian Discourses: Images of a Community by Veronika Koller*. New York: Routledge.

Burton, A. (1999). Introduction: The unfinished business of colonial modernities in Burton, Antoinette (ed.) *Gender, Sexuality and Colonial Modernities* (pp 2). London: Routledge.

Butler, J. (1991). Imitation and Gender insubordination in Diana Fuss (Ed.) Inside/Out: Lesbian Theories, *Gay Theories* (pp. 13-31). New York: Routledge.

Calhoun, C. (1994). Social Theory and the Politics of Identity in Craig Calhoun (Ed.) *Social Theory and the Politics of Identity* (pp. 9-63). Massachusetts: Blackwell Publishers.

Carver, T. (1998). Sexual citizenship: Gendered and De-gendered Narratives, in Terrell Carver and Véronique Mottier (Eds.), *Politics of sexuality: Identity, gender, citizenship* (pp. 13-24). London and New York: Routledge.

CEHAT (1998). International Conference on Preventing Violence, Caring for Survivors:Role of Health Professionals and Services in Violence. Mumbai:YMCA.

Chakravarty, B. (2007). Rights for the third gender: probems of identity and recognition in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 369-390). Kolkata: Seagull books.

Chandiramani, R., Kapadia, S., Khanna, R. & Misra, G. (2002). Sexuality and Sexual Behaviour -A Critical Review of Selected Studies (1990-2000). New Delhi: WOHTRAC and CREA.

Chari, H. (2001). ‘Colonial Fantasies and Postcolonial Identities’ in John C Hawley (ed.) Postcolonial, *Queer: Theoretical Intersections* (pp. 277-304). New York: State University of New York Press.

Chatterjee, I. (2012). When "Sexuality" Floated Free of Histories in South Asia. *The Journal of Asian Studies*, 71(4), 945-962.

Chatterjee, P. (1989). Colonialism, Nationalism and Colonised Women: The contest in India. *American Ethnologist*, 16(4), 622-633.

Chowdhary, S., Khosla, M. & Mehta, P. B. (2016). *The Oxford Handbook of the Indian Constitution*. New Delhi: Oxford University Press.

Ciotti, M. (2011). After Subversion: Intimate Encounters, the Agency in and of Representation, and the Unfinished Project of Gender without Sexuality in India. *Cultural Dynamics*, 23(107).

Citro, B. (2009). Naz Foundation v. Govt. of Delhi: Dignity, Privacy and Equality in the Realm of Sexual Relations and Identity, *The Lawyers Collective.*

Cooper, F. & Stoler, A. L. (1989). Introduction Tensions of Empire: Colonial Control and Visions of Rule. *American Ethnologist*, 16(4), 609-621.

Cossman, B. & Kapur, R. (1997). Secularism's Last Sigh? The Hindu Right, the Courts, and India's Struggle for Democracy. *Harvard International Law Journal*, 38(1).

Cossman, B. (2007). *Sexual citizens: The Legal and cultural regulation of sex and belonging*, Standford: Standford University Press.

Cossman, B.(2009). Sexual Citizens: Freedom, Vibrators, and Belonging in Linda C. McClain and Joanna. L. Grossman, (Eds.) *Gender Equality: Dimensions of Women's Equal Citizenship* New York: Cambridge University Press. 289-306

Currah, P. & Minter, S. (2000). Transgender Equality: A Handbook for Activists And Policymakers, National Center For Lesbian Rights and Policy Institute of the National Lesbian and Gay Task Force. Retrieved from the National LGBTQ task force website:

http://www.thetaskforce.org/static_html/downloads/reports/reports/TransgenderEquality.pdf

d'Emilio, J. (1983). *Sexual politics, sexual communities: the making of a homosexual minority in the United States 1940-1970,* London: University of Chicago Press.

d'Emilio, J. (1986). Making and Unmaking of Minority: The tensions between Gay history and Politics. *Review of Law and Social change,* 915-922

Das, A. (2009). Gay and Transgender Rights in India: Naz foundation v. Government of NCT of Delhi. Hyderabad: NALSAR University of Law. Retrieved from website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701077

Dasgupta, R. K. (2011). Queer Sexuality: A Cultural Narrative of India's Historical Archive. *Rupkatha Journal on Interdisciplinary Studies in Humanities*, 3(4), 651-670.

Dave, N. (2011). Ordering Justice: Fixing Dreams in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 325-37). New Delhi: Yoda Press.

Dave, N. (2016). *Queer Activism in India: A story in the anthropology of ethics*. New Delhi: Zubaan..

Dave, N. N. (2011). Activism as Ethical Practice: Queer Politics in Contemporary India. Cultural Dynamics, 23(3).

Desmond, L. (2011). The Pleasure is Mine: The Changing Subject of Erotic Science. *Journal of Indian Philosophy*, 39(1). 15–39.

Dewey, S. (2009). "Dear Dr. Kothari . . .": Sexuality, violence against women, and the parallel public sphere in India. *American Ethnologist*, 36(1), 124–139.

Dietrich, G. (1987). Reconstructing Sexual Relations, in Bhate, Kamakshi; Menon, Lakshmi; Gupte, Manisha et al (1987) (Eds.), *In Search of Our Bodies: A Feminist Look at Women, Health and Reproduction in India,* Shakti: Bombay.

Doniger, W. & Kakar, S. (2002). *Introduction, 'Vatsyayana Mallanaga's Kamasutra: A new, complete English translation of the Sanskrit text.* New York: Oxford University Press

Doniger, W. (2003). The "Kamasutra": It Isn't All about Sex, *The Kenyon Review, New Series*, 25(1), 18-37.

Drew Borten, L. (2002). Sex, Procreation, and the State Interest in Marriage. *Columbia Law Review*. 102(4), 1089-1128.

Dreyer, Y. (2007). Hegemony and the Internalization of Homophobia caused by Heteronormativity. *HTS*, 63(1).

Duggan, L. & Hunter, N. D. (2006). *Sex Wars: Sexual dissent and political culture*. New York and London: Routledge.

Duggan, L. (1990). From Instincts to Politics: Writing the History of Sexuality in the U.S. *The Journal of Sex Research*, 27(1), 95-109.

Duggan, L. (1994). Queering the State. *Social Text*, 39, 1-14.

Dutta, A. (2011). Section 377 and the retroactive consolidation of 'Homophobia' in Narrain, A. and Gupta, A. (Eds.) *Law Like Love: Queer perspectives on Law*. Delhi: Yoda press.

Dworkin, A. (1981). *Pornography: Men possessing Women*. New York, Perigee Books

Editorial (2008). Denial of Rights to Sexual minorities, *Economic and Political Weekly*, October, 6-7.

Edwards, T. (1994). *Erotics and Politics: Gay Male Sexuality, Masculinity and Feminism*. London: Routledge.

Engel, S. M. (2001). *The Unfinished Revolution: Social Movements Theory and the Gay and Lesbian Movement*. Cambridge: Cambridge University Press.

Engel, S. M. (2016). *Fragmented Citizens: The changing landscape of gay and lesbian lives*. New York: New York University Press.

Epstein, S. (1987). Gay Politics, Ethnic Identity: The Limits of Social Constructionism. *Socialist Review*, 93, 9-54.

Epstein, S. (1991). Sexuality and Identity: The Contribution of Object Relations Theory to a Constructionist Sociology. *Theory and Society*, 20(6), 825-873.

Eskridge, W. N. Jr. (2005). Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion. *Faculty Scholarship Series*. 1514, 1023.

Evans, D. T. (2004). *Sexual Citizenship*: *The Material Construction of Sexualities*. New York and London: Routledge.

Fernandes, B. & Gomathy, N.B. (2003). Voicing the Invisible: Violence faced by Lesbian women in India in Arvind Narrain And Gautam Bhan (Eds.) *Because I Have A Voice: Queer Politics In India* (pp. 155-163). New Delhi: Yoda Press.

Fernandez, B. & N.B., Gomathy. (2003). *The nature of violence faced by lesbian women in India.* Mumbai: Research Centre on Violence Against Women, Tata Institute of Social Sciences.

Flick, U. (2009). *An Introduction to Qualitative Research.* New Delhi: Sage.

Foucault, M. [1976] *The History of Sexuality Vol. 1: The Will to Knowledge*. London: Penguin.

Frank, D. J., Boutcher, S. A. & Camp, B. (2009). The Reform of Sodomy Laws from a world society perspective in Scott Barclay, Mary Bernstein and Anna Maria Marshall (Eds.) *Queer Mobilisations: LGBT Activists confront the law* (pp. 123-141). New York: New York University Press.

Freedman, E. B. (2006). *Feminism, Sexuality and Politics.* Chapell Hill: The University of North Carolina Press.

Fuss, D. (1950). *Essentially Speaking*: *Feminism, Nature and. Difference*. London: Routledge

Fuss, D. (1991). *Introduction in Diana Fuss (Ed.) Inside/Out: Lesbian Theories, Gay Theories* (pp. 1-12). New York: Routledge.

Gamson, J. & Moon, D. (2004). The Sociology of Sexualities: Queer and Beyond. *Annual Review of Sociology*, 30, 47-64.

Gautam, S. K. (2014). The Courtesan and the Birth of Ars Erotica in the Kämasütra: A History of Erotics in the Wake of Foucault. *Journal of the History of Sexuality*, 23(1), 1-20.

George R. M. et al. (2002). Tracking 'Same-Sex Love' from Antiquity to the Present in South Asia. *Gender & History*, 14(1), 7–30.

Ghosh, S., Bandopadhyaya, S. B. & Biswas, R. (2011). *Vio-Map: Documenting and mapping violence and rights violation taking place in lives of sexually marginalized women to chart out effective advocacy strategies*. Kolkata: Sappho for Equality.

Giddens, A. (1992). *The Transformation of Intimacy: Sexuality, Love and Eroticism.* California: Stanford University Press.

Goodman, R. (2001). Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics, 89 Cal. L. Rev. 643 (2001). 643-740

Govindan, P. & Vasudevan, A. (2011). The Razor's Edge of Oppositionality, in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 84-112). New Delhi: Yoda Press.

GPD (2007), Sexuality in Politics, *Economic and Political Weekly*, August, 3192.

Grabham, E. (2016). Citizen Bodies, Intersex Citizenship. *Sexualities*, 10(1), 29-48.

Grant, B. (2009). *Post-colonialism, Psychoanalysis and Burton Power Play of Empire*. New York: Routledge.

Griffin, P. (2007). Sexing the Economy in a Neo-liberal World Order: Neo-liberal Discourse and the (Re)Production of Heteronormative Heterosexuality. *British Journal of Politics and International Relations*, 9(2), 220-238.

Grover, A. (2009). *The Challenge to 377 IPC: Lessons from the Road to Success*. Retrieved from the website: http://www.lawyerscollective.org/magazine/august2009/cover-story

Grover, A. (2011). Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Grover, A. (2013). HIV, Jonathan Mann Memorial Lecture. London. Available at http://www.iapac.org/tasp_prep/presentations/TPSlon13_Memorial_Lecture_Grover.pdf accessed on September 23, 2015.

Gupta, A. (2008). *This Alien Legacy: The origins of 'Sodomy Laws' in British Colonialism*. Human Rights Watch available at: http://www.refworld.org/docid/494b5e4c2.html accessed on April, 2015

Gupta, A. (2006). Section 377 and the Dignity of Indian Homosexuals. *Economic and Political Weekly*, November.

Gupta, A. (2011). 'The Presumption of Sodomy: Section 377 in India and Beyond', in Arvind Narrain And Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 115-161). New Delhi: Yoda Press.

Gupta, C. (2002). (Im)possible Love and Sexual Pleasure in Late-Colonial North India. *Modern Asian Studies*, 36(1), 195-221.

Haenfler, R. (2015). *Subcultures: the basics.* London and New York: Routledge

Halder, P. (2007). *Law, Orientalism and Post-colonialism: The Jurisdiction of the Lotus Eaters*. Oxon: Routledge.

Hall, C. & Said, E. (2004). *History Workshop Journal*, 235-243

Halperin, D. M. (1995). *Saint Foucault: Towards d Gay Hagiography* (pp 112-113). New York: Oxford University Press.

Halperin, D. M. (1998). Forgetting Foucault: Acts, Identities, and the History of Sexuality. *Representations*, 63, 93-120.

Halwani, R. (2006). 'Prolegomena to any future Metaphysics of Sexual Identity: Recasting the Essentialism and Social Constructionism Debate' In **Satya P. Mohanty, Paula M. L. Moya (Eds.)** *Identity Politics Reconsidered* (pp. 210-227).Palgrave Macmillan

Hames-Garcia, M. (2006). What's at stake in "gay" identities? In Satya P. Mohanty, Paula M. L. Moya (Eds.) *Identity Politics Reconsidered* (pp. 78-95). In **Satya P. Mohanty, Paula M. L. Moya (Eds.)** *Identity Politics Reconsidered* (pp. 210-227) Palgrave Macmillan,

Harding, R. (2011). *Regulating Sexuality: Legal Consciousness in Lesbian and Gay lives*. New York: Routledge

Hartsock, N. (1997). *Citizenship: Feminist Perspective* by Ruth Lister (pp. 72). Hampshire: Palgrave Macmillan.

Heater, D. (1999). *What is Citizenship?* Oxford: Polity Press.

Hesse-Biber, S. N. & Yaiser, M. L. (Eds.) (2004). *Feminist Perspectives on Social Research*. New York: Oxford University Press.

Heyes, C. J., (2003). Feminist Solidarity after Queer Theory: The Case of Transgender. *Signs*, 28(4), 1093-1120

Hinchy, J. (2014). Deviant Domesticities and Sexualised Childhoods: Prostitutes, Eunuchs and the Limits of the State Child "Rescue" Mission in Colonial India, in Hyaeweol Choi and Margaret Jolly (Eds.) *Divine Domesticities,* Moorebank: ANU Press, pp. 247-279.

Hinchy, J. (2013). Troubling bodies: 'eunuchs,' masculinity and impotence in colonial North India. *South Asian History and Culture,* 24(2), 196–212.

Hinchy, J. (2014). The Sexual Politics of Imperial Expansion: Eunuchs and Indirect Colonial Rule in Mid-Nineteenth-Century North India. *Gender & History*, 26(3), 414–437.

Hines, S. (2009). (Trans)Forming Gender: Social Change and Transgender citizenship in Elz'bieta H. Oleksy (Ed.), *Intimate Citizenships: Gender, Sexualities, Politics* (pp. 79-99). New York: Routledge.

Hirschman, N. J. (1999). Difference As An Occasion Of Rights: A Feminist Rethinking of Rights, Liberalism And Difference in S. Hekma (Ed.) *Feminism, Identity and Difference*, 27- 53 London: Routledge.

Hubbard, P. (2001). Sex Zones: Intimacy, Citizenship and Public Space. *Sexualities*, 4(1), 51-71.

Hyam, R. (1990). *Empire and Sexuality: The British Experience*. Manchester: Manchester UP.

Isin, E. F. & Turner, B. S. (2002). Citizenship Studies: An Introduction' in Engin F. Isin and Bryan S. Turner (eds.), *Handbook of Citizenship Studies* (pp 2). New Delhi: Sage Publications.

Isin, E. F. & Wood, P. K. (1999). *Citizenship and Identity*. New Delhi: Sage.

Isin, E. F. (2008). 'Theorizing Acts of Citizenship' in E. Isin and G. Nielson (Eds) *Acts of Citizenship* (pp. 15–43). London: Zed Books.

Isin, E. F. (2009). Citizenship in flux: the figure of the activist citizen, *Subjectivity*, 29, 367-388.

Jackson, S. (2003). Heterosexuality, Heteronormativity and Gender Hierarchy: Some Reflections on Recent Debates, in Jeffrey Weeks, Janet Holland And Matthew Waites (Eds.) *Sexualities And Society: A Reader* (pp. 69-83). Cambridge: Polity Press.

Jackson, S. (2006). Gender, Sexuality and Heterosexuality: The Complexity (and limits) of Heteronormativity. *Feminist Theory*, 7(1), 105-121.

Jackson, S. (2006). Heterosexuality, Sexuality and Gender rethinking: The intersection in Diane Richardson, Janice McLaughlin and Mark E. Casey. (Eds.), *Intersections Between Feminist and Queer Theory* (pp. 38-58). New York: Palgrave Macmillan.

Jaffrey, Z. (1996). *The Invisibles: A Tale of the Eunuchs of India*. New York: Pantheon Books.

Jaggar, A. M. (2005). Arenas of Citizenship. *International Feminist Journal of Politics*, 7(1), 3 - 25

Jagose, A. M. (1996). *Queer Theory: An Introduction.* New York: Melbourne University Press.

Jayal, N. G. (2013). *Citizenship and its discontents: an Indian history.* New Delhi: permanent Black.

John M. E. & Nair, J. (2000). *A question of Silence? The sexual economies of modern India* New Delhi: Kali for women.

John, M. (2008). *Women's Studies in India: A Reader*. New Delhi: Penguin Books.

John, M. E. & Nair, J. (1999). Sexuality in Modern India: Critical Concerns. Voices for Change. *A Journal on Communication for Development*, 3(1), 48.

Johnson, C. (2002). Heteronormative Citizenship and the Politics of Passing, *Sexualities,* 5(3), 317-336.

Joseph, Jasmine (2009). Divided Laws In A Unified Nation: Territorial Application Of High Court Decisions. *NUJS Law Review 2*, 455, 471-480.

Joseph, S. (1996). Gay and Lesbian Movement in India. *Economic and Political Weekly*. August.

Joseph, S. (1998). The Law and Homosexuality in India. International Conference on Preventing Violence, *Caring for Survivors: Role of Health Professionals and Services in Violence* (pp. 150-154). Mumbai: YMCA

Josephson, J. (2005). Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage. *Perspectives on Politics*, 3(2), 269-284.

Joshi, B. K. & Koshy, N. M. (2009). Judicial Interpretation Of Article 21 In The Naz Foundation Case: Privacy - A Moral Right Or A Creature Of An Amoral Constitution? *NUJS Law Review 2* NUJS L. Rev. 455, 541-552

Kakar, S. (1989). Intimate Relations: Exploring Indian Sexuality, New Delhi: Penguin Books.

Kalyan, K. (1994). Raman Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence. *Modern Asian Studies* , 28(4), 739-791.

Kannabiran, K. (2009). India: From 'Perversion' to Right To Life With Dignity. The Hindu, July 6.Retrieved from website: http://www.sacw.net/article992.html

Kaplan, C. (2001). Wild Nights: Pleasure/Sexuality/Feminism in Mary Evans (Eds.), *Feminism: Feminism and the Enlightenment* (pp. 357). London: Routledge.

Kaplan, M. B. (1997). *Sexual Justice: Democratic Citizenship and the Politics of Desire.* New York: Routledge.

Kapur, R. (2005) *Erotic Justice: Law and the New Politics of Postcolonialism*. New Delhi: Permanent Black.

Kapur, R. (2007). The Prurient Postcolonial: The Legal regulation of Sexual Speech, in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp.235-254). Kolkata: Seagull books.

Kapur, R. (2009). Out Of The Colonial Closet, But Still Thinking 'Inside The Box': Regulating 'Perversion' And The Role Of Tolerance In Deradicalising The Rights Claims Of Sexual Subalterns. *NUJS Law Review 2*, 455, 387.

Katyal, S. K. (2010). Dissident Citizen, The Symposium: Sexuality and Gender Law: Assessing the Field, Envisioning the Future, 57 UCLAL. Rev. 57. 1415-1478

Katz, J. (1990). *The Invention of Heterosexuality.* Chicago: University of Chicago Press..

Kavi, A. R. (1996). Gay and Lesbian Movement. *Economic and Political Weekly,* 31(41/42), 2770.

Kavi, A. R. (2007). Kothis versus other MSM: Identity Versus behavior in the Chicken and Egg paradox in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 391-398). Kolkata: Seagull books.

Keating, C. (2007). Framing the Postcolonial Sexual Contract: Democracy, Fraternalism, and State Authority in India. *Hypatia,* 22(4), 130-145.

Katz, J. (1990). *The Invention of Heterosexuality*. Chicago: University of Chicago Press..

Khaitan, T. (2011). Reading Swaraj into Article 15-a New Deal for all minorities in Arvind Narrain and Alok Gupta (Eds.), *Law Like Love: Queer Perspectives On Law* (pp.278-294). New Delhi: Yoda Press.

Khan, S. (2001). Culture, Sexualities, and Identities: Men Who Have Sex With Men in India. *Journal of Homosexuality*, 99.

Khanna, A. (2005). Beyond Sexuality(?) in Arvind Narrain And Gautam Bhan (Eds.), *Because I Have A Voice: Queer Politics In India* (pp. 89-103). New Delhi: Yoda Press.

Khanna, A. (2007). Us 'sexuality Types': A critical Engagement with the post-coloniality of sexuality in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 159-200). Kolkata: Seagull books.

Khanna, A. (2011). The social lives of 377 in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives on Law* (pp. 174-202). New Delhi: Yoda Press.

Khanna, A. (2016), Sexualness, New Delhi: New Text

Khanna, R. (2008). *Assessing the Conditions and Quality of Counselling Related to Sexuality and Sexual Health*. New Delhi: TARSHI and KIT.

Khanna, R., Gurbaxani, S. & Sengupta, K. (2002). Sexuality and Sexual Behaviour - An Annotated Bibliography of Selected Studies (1990-2000). New Delhi: WOHTRAC and CREA.

Kim, H. S., Puri, J. & Kim-Puri, H. J. (2005). Conceptualizing Gender-Sexuality-State-Nation: An Introduction, *Gender and Society*, 19(2), 137-159.

Kitzinger, C. (2005). Heteronormativity in Action: Reproducing the Heterosexual Nuclear Family in After-hours Medical Calls. *Social Problems*, 52(4), 477–498.

Kolsky, E. (2005). Codification and the Rule of Colonial Difference: Criminal Procedure in British India. *Law and History Review*, 23(3), 631-683.

Krishnaraj, M. (2008). Between Public and Private Morality. *Economic and Political Weekly*, 40-43.

Kymlicka, W. & Norman, W. (1994). Return of the Citizen: A survey of recent work on citizenship theory. *Ethics*, 104(2), 352-381.

Lee, J. C. H. (2011). *Policing Sexuality: Sex, Society and the State*, London And New York: Zed Books.

Levine, P. (2004). Sexuality, Gender and Empire in Levine, Philippa, ed. *Oxford History of the British Empire Companion Series : Gender and Empire*. Oxford, GB: OUP

Levine, P. (1994). Veneral Disease, Prostitution and the Politics of Empire: The Case of British Empire. *Journal of the History of Sexuality*, 4(4), 579-602.

Levine, P. (1996). Re-reading the 1890s: Venereal Disease as "Constitutional Crisis" in Britain and British India. *The Journal of Asian Studies*, 55(3), 585-612.

Levine, P. (2000). Orientalist Sociology and the creation of Colonial Sexualities. *Feminist Review*, 65, 7.

Levine, P. (2003). *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire.* New York: Routledge.

Levine, P. (2004). Sexuality, Gender and Empire in Levine, Philippa, ed. Oxford History of the *British Empire Companion Series: Gender and Empire*. Oxford, GB: OUP Oxford.

Liang, L. & Narrain, S. (2009). Striving for Magic in the City of Words. Retrieved from website: http://www.himalmag.com/Magic-in-the-city-of-words-_nw3197.html

Liddle, J. & Rai, S. (1998). Feminism, Imperialism and Orientalism: the challenge of the 'Indian woman'. *Women's History Review*, 7(4), 495-520.

Lister, R. (1997). *Citizenship: Feminist Perspective*. Hampshire: Palgrave Macmillan.

Lister, R. (2002). 'Sexual Citizenship' in Engin F. Isin and Bryan S. Turner (eds.) *Handbook of Citizenship Studies* (pp. 191-208). London: Sage Publications.

Lister, R. (2007). Inclusive Citizenship: Realizing the Potential. *Citizenship Studies*, 11(1), 55.

Lorber. J. (1999). Crossing Borders and Erasing Boundaries: Paradoxes Of Identity Politics. *Sociological Focus*, 32(4), 355-370

Loutzenheiser, L. W. & MacIntosh, L. B. (2004). Citizenships, Sexualities, and Education, *Theory into Practice*, 43(2), 151-158.

Luibhéid, E. (2008). Sexuality, Migration, and the Shifting Line between Legal and Illegal Status. *GLQ*, 14(2 – 3), 281-315.

Mackinnon, C. A. (1989). Sexuality, Pornography, and Method: "Pleasure under Patriarchy". *Ethics*, 99(2), 316-318.

Mahajan, G. (2002). *The Multicultural Path: Issues of diversity and Discrimination in democracy*. New Delhi: Sage.

Mahajan, S. (2008). Questioning norms and bodies. *Seminar*, 583.

Mahendra P. S. (2009). Decriminalisation of Homosexuality and the Constitution. *NUJS Journal*, July-September.

Mandal, S. (2009). Right To Privacy' in Naz Foundation. Retrieved from the website: http://www.lawyerscollective.org/magazine/august2009/features/feature-1

Marshall, T. H. (1973). Citizenship and Social Class in T.H. Marshall (ed) *Class, Citizenship and Social Development* (pp 71). Westport, Connecticut: Greenwood Press.

McCarl, N. J., Walden, G. & Kunkel, C. A., (2000). Gendered Heteronormativity: Empirical Illustrations in Everyday Life. *The Sociological Quarterly*, 41(2), 283-296.

McClintock, A. (1995). *Imperial Leather: Race, Gender and Sexuality in the colonial conquest.* New York: Routledge.

McHugh, J. (2011). The Incense Trees of the Land of Emeralds: The Exotic Material Culture of Kamasastra. *Journal of Indian Philosophy*, 39(1), 63–100.

Mclaughlin, J. (2003). *Feminist Social and Political Theory: Contemporary Debates and Dialogues.* New York: Palgrave Macmillan.

McLaughlin, J., Casey, M. E. & Richardson, D. (2006). 'Introduction: At the Intersections Between Feminist and Queer Debates' in Diane Richardson, Janice McLaughlin and Mark E. Casey. (Eds.), *Intersections Between Feminist and Queer Theory* (pp. 1-18). New York: Palgrave Macmillan.

Menon, N. (1999). *Gender and Politics in India.* New Delhi: Oxford University Press.

Menon, N. (2005). 'How natural is normal? Feminism and Compulsory Heterosexuality' in Gautam Bhan and Arvind Narrain (eds.) *Because I have a voice: Queer Politics in India* (pp. 33- 39). New Delhi: Yoda Press.

Menon, N. (2006). Nation, Identity, Citizenship: Feminist critiques in Contemporary India in V.R. Mehta and Thomas Pantham (ed), *Political ideas in Modern India: thematic explorations*. New Delhi: Sage Publications.

Menon, N. (2007). How Natural is normal in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*, (pp.339-341). Kolkata: Seagull books.

Menon, N. (2007). Outing Heteronormativity: Nation, Citizen, Feminist Disruptions in Menon Nivedita (ed.), *Sexualities* (pp. 3-51). New Delhi: Women Unlimited.

Menon, N. (ed.) (2007). *Sexualities*. New Delhi: Women Unlimited.

Menon, N., 'How Natural Is Normal: Feminism and Compulsory Heterosexuality', in Narrain, A. and Bhan, G. (eds.) *Because I Have a Voice: Queer Politics in India* (pp. 33-39). New Delhi: Yoda Press.

Meyers, D. T. (Ed.) (2014) Feminist Social Thought: A Reader, Routledge.

Miller, A. (2000). Sexual but not reproductive: Exploring the Junction and disjunction of sexual and reproduction rights, *Health and Human Rights*, 4(2), 68-109

Miller, A. (2000). Reproductive and Sexual Rights. *Health and Human Rights Journal*, 4(2), 70

Miller, A. et al. (2015). Sexual Rights as Human Rights: A Guide to Authoritative Sources and principles for applying human rights to sexuality and sexual health, *Reproductive Health matters*, 23(46), 16-30.

Miller, A. M. & Roseman, M. J. (2011). Sexual and reproductive rights at the United Nations: frustration or fulfilment? *Reproductive Health Matters*,19(38), 102–118.

Mishra, G. & Chandramani, R. (Eds.) (2005) *Sexuality Gender and Rights: Exploring Theory and Practice in South and South-East Asia*, New Delhi: Sage Publications.

Misra, G. (2009). Decriminalising Homosexuality in India. *Reproductive Health Matters*, 17(34), 20-28.

Monro, S. & Warren, L. (2004). Transgendering Citizenship. *Sexualities*, 7(3), 345-362.

Monro, S. (2005). *Gender Politics*. London: Pluto Press.

Morgensen, S. L. (2010). Settler Homonationalism: Theorizing Settler Colonialism within Queer Modernities. *GLQ: A Journal of Lesbian and Gay Studies*, 16(1-2), 105-131.

Mottier, V. (2008). *Sexuality: A very short introduction*. New Delhi: Oxford University Press.

Murthy, S. & Mohan, S. (2011). 'Crisis Intervention in LesBIT' in ArvindNarrain And Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 554-62). New Delhi: Yoda Press

Nag, M. (2001). Anthropological Perspectives on Prostitution and AIDS in India. *Economic and Political Weekly*, October, 4025-4030.

Nagel, J. R. (2003). *Ethnicity, and Sexuality: Intimate Intersections, Forbidden Frontiers*. Oxford: Oxford University Press.

Nair, Janaki (2008). 'Imperial Reason', National Honour and New Patriarchal Compacts in Early Twentieth Century India. *History Workshop Journal* , 66, 208-226.

Namaste, K. (1994). The Politics of Inside/Out: Queer Theory, Poststructuralism, and a Sociological Approach to Sexuality. *Sociological Theory*, 12(2), 220-231.

Nanda, S. (1994). Hijras: An Alternative Sex and Gender Role in India in Gilbert Herdt (Ed.) *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* (pp. 373-417). New York: Zone Books.

Nanda, S. (1999). *Neither Man Nor Woman: The Hijras of India*. Belmont CA: Wadsworth.

Nanda, S. (2000). *Gender Diversity: Crosscultural Variations.* Prospect Heights IL, USA: Waveland Press, Inc.

Nandy, A. (1983). *The Intimate Enemy: Loss and Recovery of Self under Colonialism.* Oxford: Oxford University Press.

Narrain, A. & Bhan, G. (Eds.) *Because I have a voice: Queer Politics in India*. New Delhi: Yoda Press.

Narrain, A. & Chandran, V. (2005). 'It's Not My Job To Tell You That It's Okay To Be Gay, Medicalisation Of Homosexuality; A Queer Critique' in Arvind Narrain And Gautam Bhan (Eds.) *Because I Have A Voice: Queer Politics In India* (pp. 49-69). New Delhi: Yoda Press.

Narrain, A. & Gupta, A. (Eds.) (2011). *Law Like Love: Queer Perspectives On Law.* New Delhi: Yoda Press.

Narrain, A. (2004). *Queer: Despised Sexuality, Law and Social Change.* Bangalore: Books for Change.

Narrain, A. (2004). The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva. *Health and Human Rights,* 7(2), 142-156.

Narrain, A. (2007). No Shortcuts to Queer Utopia: Sodomy Law and Social Change, in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 255-262). Kolkata: Seagull books.

Narrain, A. (2007). Queer Journey. *Indian Journal of Gender Studies*, 41-61.

Narrain, A. (2007). Queer Struggles around the Law: the Contemporary Context in Menon Nivedita (ed.) *Sexualities* (pp. 52-90) New Delhi: Women Unlimited.

Narrain, A. (2011) Queering Democracy, in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives on Law* (pp.3-24). New Delhi: Yoda Press.

Narrain, A. (2011). 'A New Language of Morality' in Arvind Narrain And Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 253-277). New Delhi: Yoda Press.

Narrain, S. (2003). In a Twilight World. *Frontline,* 20(21)

Narrain, S. (2009). Crystallising Queer Politics - The Naz Foundation Case and Its Implications for India's Transgender Communities. *NUJS Law Review 2*, 455.

Narrain, S. (2011). Persecuting Difference in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives on Law* (pp. 535-553). New Delhi: Yoda Press.

Nussbaum, M. (2010). *From Disgust to Humanity*: *Sexual Orientation and Constitutional Law*. New York: Oxford University Press.

Nussbaum, M. C. (1999). *Sex and Social Justice*. New York: Oxford University Press.

Nussbaum, M. C. (2004). *Hiding from Humanity: Disgust, Shame and the Law.* New Jersey: Princeton University Press.

Okin, S. M. (1996). Sexual Orientation, Gender, and Families: Dichotomizing Differences. *Hypatia,* ,11(1), 30-48.

Voices against 377 (2005). Rights for All: Ending Discrimination Against Queer Desire Under Section 377. *A Compilation by Voices Against 377,* New Delhi: Nirantar.

CREA (2006). Sexual Rights and Social Movements in India Working Paper. Delhi: CREA

PUCL-K (2009). Cultural Policing in Dakshina Kannada, Vigilante Attacks On Women And Minorities People's Union For Civil Liberties, Karnataka (PUCL-K), 2008-09 March, 2009. New Delhi: Nirantar

ALF (2009). The Right that Dares to Speak its Name: Naz Foundation vs. Union of India and Other Decriminalising Sexual Orientation and Gender Identity in India. Bangalore: Alternative Law Forum.

SIDA (2010). Poverty and Sexuality: What are the Connections? Overview and literature review. Retrieved from the Sida website: www.sida.se

ICJ. (2011). Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook. 2011.International Commission Of Jurists, Geneva. Retrieved from the ICJ website: http://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/

Padriana, N. (2009). Intimate Equality: The lesbian gay bisexual and transgender movements' legal framing of sodomy laws in the Lawrence V. Texas Case in Scott Barclay, Mary Bernstein and Anna Maria Marshall (Eds.) *Queer Mobilisations: LGBT Activists confront the law* (pp. 52-75). New York: New York University Press.

Pandey, V. (2009). *Even NCW Hedges on Section 377*. DNA. Retrieved from website: http://www.dnaindia.com/india/report_even-ncw-hedges-on-section-377_1271159

Parasar, A. (2010). *Homosexuality In India – The Invisible Conflict*. Retrieved from website: http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf

Parker, R., Petchesky, R. & Sember, R. (Eds.) (2004). *Sexpolitics: Reports from the Front Lines*. Sexuality Policy Watch. Retrieved from website: www.sxpolitics.org/frontlines/book/index.php

Patel, G. (2002). Fire: Sexuality and its incitements, in Ruth Vanita (Ed.) *Queering India: Same sex love and Eroticism in Indian culture and Society* (pp. 222-233). New York: Routledge.

Pateman, C. (2005) Equality, Difference, Subordination: The Politics Of Motherhood And Women's Citizenship in Gisela Bock and Susan James *Beyond Equality and Difference: Citizenship, Feminist politics and Female Subjectivity* (pp. 17-31), London and New York: Routledge.

Pateman, C. (1988). *The Sexual Contract*. Cambridge: Polity Press.

Peers, D. M. (1998). Privates off Parade: Regimenting Sexuality in the Nineteenth-Century Indian Empire. *The International History Review*,20(4), 823-854.

Penrose, W. (2001). Hidden in History: Female Homoeroticism and Women of a "Third Nature" in the South Asian Past. *Journal of the History of Sexuality*, 10(1), pp. 3-39,

Petchesky, R. (2000). Sexual Rights: Inventing a concept, Mapping an international Practice in Richard Guy Parker et.al (eds.) *Framing the Sexual Subject: The Politics of Gender, Sexuality, and Power*, (pp 81). Berkeley: University of California Press

Petchesky, R. (2003). Intimate Citizenship: Private Decisions and Public Dialogues by Ken Plummer, (pp. 134). Seattle and London: University of Washington Press.

Phelan, S. (1989). *Identity politics: Lesbian feminist and the limits of community*. Philadelphia: Temple University Press.

Phelan, S. (1994). *Getting Specific: Postmodern Lesbian Politics*. Minneapolis and London: University of Minnesota Press.

Phelan, S. (2001). *Sexual Strangers*: *Gays, Lesbians, and Dilemmas of Citizenship.* Philadelphia: Temple University Press.

Plummer, K. (1991). Sexuality and Identity: The Contribution of Object Relations Theory to a Constructionist Sociology by Steven Epstein. *Theory and Society*, 20(6), 832.

Plummer, K. (2003). Intimate Citizenship and the Culture of Sexual Story Telling in in Jeffrey Weeks, Janet Holland And Matthew Waites (Eds.) *Sexualities and Society: A Reader* (pp. 33-42). Cambridge: Polity Press.

Prokhovnik, R. (1998). Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness. *Feminist Review*, 60, 84-104.

PUCL. (2001). Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore. Karnataka: People's Union for Civil Liberties.

PUCL. (2003). Human Rights Violation against the Transgender Community: A Study of the Hijra and Kothi Sex Workers in Bangalore, India. Karnataka: People's Union for Civil Liberties.

PUCL. (2009). Cultural Policing in Dakshina Kannada: Vigilante Attacks on Women and Minorities 2008-2009, Karnataka: People's Union for Civil Liberties, March.

Puri, J. (1999). *Women, Body, Desire in Post-Colonial India: Narratives of Gender and Sexuality.* New York: Routledge.

Puri, J. (2002). Concerning "Kamasutras": Challenging Narratives of History and Sexuality, *Signs*, 27(3), 603-639.

Puri, J. (2006). Stakes and States: Sexual Discourses from New Delhi. *Feminist Review*, 83, 139-148.

Puri, J. (2011) Gender Queer Perspectives in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 203-227). New Delhi: Yoda Press.

Puri, J. (2013). Decriminalisation as De-deregulation: Logics of Sodomy Law and the state in Sanjay Srivastava (Ed.) *Sexuality Studies* (pp. 141-160). New Delhi: Oxford University Press.

Puri, J. (2016). *Sexual States: Governance And The Struggle Over Anti-Sodomy Law in India*. New Delhi: Duke University press.

Purvis, T. & Hunt, A. (1999). Identity versus Citizenship: Transformations in the Discourses and Practices of Citizenship. *Social and Legal Studies*, 8 (4), 457.

Raghavan, V. (2011). Navigating the Noteworthy and Nebulous in Naz in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives on Law* (pp. 295-322). New Delhi: Yoda Press.

Rai Chaudhuri, P. (2007). Wrapped in a Cocoon: Sexual Minorities in West Bengal. *Economic and Political Weekly,* 42(11), 928-931.

Raman, K. K. (1994). Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence. *Modern Asian Studies* , 28(4), 788.

Ramasubban, R. (2008). Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India. Retrieved from website: http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf

Ramkrishna, L. (2007). Putting the B back in LGBT: Bisexuality, Queer Politics and HIV or AIDS discourse in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 291-300). Kolkata: Seagull books.

Ranchhoddas, R. & Thakoree, D. K. (1992). *The Indian Penal Code*. Nagpur: Wadhwa.

Rayaprol, A. & Ray, S. (2010). Understanding Gender Justice: Perceptions of Lawyers in India. *Indian Journal of Gender Studies,*17(335).

Raychaudhuri, T. (2000) Love in a Colonial Climate: Marriage, Sex and Romance in Nineteenth-Century Bengal. *Modern Asian Studies*, 34(2), 349-378.

Reddy, G. (2007). Sexual differences and their discontents: Shifting contexts of thirdness in Hyderabad, in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 301-322). Kolkata: Seagull books.

Rege, S. (1996). Homophobia in the Name of Marxism. *Economic and Political Weekly*, June.

Reinharz, S. (1992). *Feminist Methods in Social Research*. New York: Oxford University Press.

Revathi (2016). *A Life in Transactivism*. New Delhi: Zubaan,

Revathi (2010) *Truth about Me: A Hijra Life Story*, New Delhi: Penguin.

Richardson, D. & Munro, S. (2012). *Sexuality, Equality and Diversity* New York: Palgrave Macmillan.

Richardson, D. & Robinson, V. (2008). *Introducing Gender and Women's Studies*. New York: Palgrave Macmillan.

Richardson, D. (2012) Citizenship and Sexuality: What do we mean by Citizenship? *Counterpoints*, Vol. 367, 219- 228

Richardson, D. (1998). Sexuality and Citizenship, *Sociology*, 32(1), 83-100.

Richardson, D. (2000). *Rethinking Sexuality*. London: Sage Publications

Richardson, D. (2000). Claiming Citizenship? Sexuality, Citizenship and Lesbian/Feminist Theory, Sexualities, Vol 3 (2), 255–272

Richardson, D. (2005). Desiring Sameness? The rise of a neo liberal politics of normalization, *Antipode*, 515-535

Richardson, D. (2006). Bordering Theory in Diane Richardson, Janice McLaughlin and Mark E. Casey. (Eds.) *Intersections Between Feminist and Queer Theory* (pp. 19-37). New York: Palgrave Macmillan.

Richardson, E. H. & Turner, B. S. (2001). Sexual, Intimate or Reproductive Citizenship? *Citizenship Studies*, 5(3), 333.

Richardson. (2000). The. Sexual Citizen: Queer Politics and Beyond by David Bell and Jon Binnie (pp. 26). Cambridge: Polity Press

Rinchin. (2005). Queering Marriage and Family. *Economic and Political Weekly*, 718-20.

Rollins, Neil J., & Hirsch, H. N. (2003). Sexual Identities and Political Engagements: A Queer Survey Social Politics. *International Studies in Gender, State and Society*, 10(3), 290-313.

Rosenblum, D. (2009). Queer Legal Victories: Intersectionality Revisited in Scott Barclay, Mary Bernstein and Anna Maria Marshall (Eds.) *Queer Mobilisations: LGBT Activists confront the law* (pp. 38-51). New York: New York University Press.

Roseneil, S. (2000). Queer Frameworks and Queer Tendencies: Towards an Understanding of Postmodern Transformations of Sexuality. *Sociological Research Online*, 5 (3). Retrieved from website: http://www.socresonline.org.uk/5/3/roseneil.html

Roy, A. (2005). *Gendered Citizenship*. New Delhi: Orient Longman.

Roy, A. (2013). *Gendered Citizenship: historical and conceptual explorations*, New Delhi: Orient Blackswan.

Roy, A. (2016). *Citizenship in India*, New Delhi: Oxford University Press.

Roy, K. (1996). Unravelling the Kamasutra. *Indian Journal of Gender Studies*. 3, 155-170.

Roy, S. (2007). Double Minorities: The experience of the lesbian gay bisexual and transgender Indians in the Diaspora in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp.323-338) Kolkata: Seagull books.

Rubin, G. (1984). Thinking Sex: Notes for a Radical theory of the Politics of Sexuality in Parker, R. and Aggleton, P (Eds.) (1999) *Culture, Society and Sexuality: A Reader* (pp.143-178). UK: UCL Press.

Ruskola, T. (2013). *Legal Orientalism: China and the United States and Modern Law*. Cambridge: Harvard University Press.

Sabala, M. G. (2010). Body, Gender and Sexuality: Politics of Being and Belonging. *Economic & Political Weekly*, XLV(17).

Sachar, A. & Hirschl, R. (2007). Citizenship as Inherited Property. *Political Theory*, 35 (5), 253-287.

Sahani, P. (2008). *Gay Bombay: Globalization, Love and (Be)longing in Contemporary India.* New Delhi: Sage.

Said, E. (1977). Orientalism. *The Georgia Review*, 31(1), 162-206.

Sarkar, O. (2008). Issue in Focus. *Plainspeak*, 2.

Sarkar, T. (1996). Colonial Lawmaking and Lives/Deaths of Indian Women: Different Readings of Law and Community, in R. Kapur (ed.*) Feminist Terrains in Legal Domains: Interdisciplinary Essays on Woman and Law*, New Delhi: Kali for Women.

Schwarz, H. (2010). *Constructing the Criminal Tribe in Colonial India: Acting Like a Thief*. Oxford: Wiley Blackwell.

Seidman, S. (2000). The. Sexual Citizen: Queer Politics and Beyond by David Bell and Jon Binnie (pp. 11). Cambridge: Polity Press

Seidman, S. (2001). From Identity to Queer Politics: Shifts in Normative Heterosexuality and the Meaning of Citizenship. *Citizenship Studies*, 5(3), 321-328.

Sen, R. (2009). Breaking Silences, Celebrating New Spaces: Mapping Elite Response to The 'Inclusive' Judgment. *NUJS Law Review 2*, 455, 481-503.

Seth, S. (2013). Nationalism, Modernity, and the "Woman Question" in India and China. *The Journal of Asian Studies*, 72, 273-297.

Shah, C. (2005). The roads that E/Merged: Feminist activism and Queer understanding in Arvind Narrain And Gautam Bhan (Eds.) *Because I Have A Voice: Queer Politics In India* (pp. 143-154) New Delhi: Yoda Press.

Shah, C. (2011). 'Celebration of Perversion' in Arvind Narrain and Alok Gupta (Eds.) *Law Like Love: Queer Perspectives On Law* (pp. 563-573). New Delhi: Yoda Press.

Shah, C., Merchant, R., Mahajan, S. & Nevatia, S. (2015). *No Outlaws in The Gender Galaxy*. New Delhi: Zubaan.

Shah, S. P. (2013) True Sex and the Law: Prostitution, Sodomy and the politics of Sexual minoritisation in India, in Sanjay Srivastava (Ed.), *Sexuality Studies* (pp. 161-183). New Delhi: Oxford University Press.

Sharma, A. (2008). Section 377: No Jurisprudential Basis. *Economic and Political Weekly*, November.

Sharma, J. (2011). Bringing Together Pleasure and Politics: Sexuality Workshops in Rural India. IDS Practice Paper 6. Brighton: IDS

Sharma, M. (2006). *Loving Women: Being lesbian in underprivileged India*. New Delhi: Yoda Press.

Sharma, R. (2009). The Public And Constitutional Morality Conundrum: A Case-Note On The Naz Foundation Judgment. *NUJS Law Review*, 455, 445-454

Sharma, S. (2014). Decoding Justice Singhvi's Judgments – Without Contempt. *Economic & Political Weekly*, XIIX(18).

Sheikh, D. & Narrain, S. (2013). Struggling for Reason Fundamental Rights and the Wrongs of the Supreme Court. *Economic & Political Weekly*, 14(52).

Sheth, D.L. (2006). *Micro-Movements in India: Towards a New Politics of Participatory Democracy*. Economic and Political Weekly, XXXIX(01).

Showden, C. R. (2012).Theorising Maybe: A Feminist/Queer Theory Convergence. *Feminist Theory*, 13(1), 6.

Singh, M. P. (2009). Decriminalisation of homosexuality and the constitution. *NUJS Law review*, July-September, 361-380.

Singh, S., Dasgupta, S., Patankar, P. & Sinha, M. (2013). *A people stronger: The collectivization of MSM and TG groups in India.* New Delhi: Sage.

Singha, R. (2015). Punished by Surveillance: Policing 'dangerousness' in Colonial India, 1872–1918. *Modern Asian Studies*, 49(2), 249.

Sinha, M. (2000). Mapping the Imperial Social Formation: A Modest Proposal for Feminist History, *Signs. Journal of Women in Culture and Society*, 25(4), 1077-1082.

Sircar, O. (2011). Some Paradoxes of Human Rights: Fragmented Refractions In Neo-Liberal Times. *Journal of Indian Law and Society*, 2, 182. Retrieved from website: http://jils.ac.in/wp-content/uploads/2011/12/Oishik-Sircar1.pdf

Sircar, O. (2012). Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse. *Osgoode Hall Law Journal*, 49(3), 527-573.

Skuy, D. (1998). Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century, *Modern Asian Studies*, 32(3), 513-557.

Snitow, A. et al. (1983). Introduction in Ann Snitow, Christine Stansell and Sharon Thompson (Eds.) *Powers of Desire: The Politics of Sexuality* (pp.37). New York: Monthly Review Press.

Squires, J. (2004). *Gender in political theory*. Cambridge: Polity press.

Srikanth, H. (1996). Natural Is Not Always Rational. *Economic and Political Weekly*, April.

Srikanth, H. (1997). Marxism, Radical Feminism and Homosexuality. *Economic and Political Weekly*. November.

Srivastava, S. (Ed.) (2013). 'Introduction' in Sanjay Srivastava (Ed.), *Sexuality Studies* (pp. 1-23). New Delhi: Oxford University Press.

Stein, A. & Plummer, K. (1994). I CAN'T EVEN THINK STRAIGHT: Queer theory and the missing sexual revolution in Sociology. *Sociological Theory*, 12(2), 178-187.

Stoler, A. L. (1989). Making Empire Respectable: The Politics of Race and Sexual Morality in 20th-Century Colonical Cultures. *American Ethnologist*, 16(4), 634-660.

Stoler, A. L. (1995). *Race and the Education of Desire: Foucault's History of Sexuality And The Colonial Order Of Things*. London: Duke University Press.

Stoler, A. L. (2002). Colonial Archives and the art of governance, *Archival Science*, 2, 87-109.

Stychin, C. F. (2003). *Governing Sexuality: the Changing politics of citizenship and law reform*, Oxford and Portland: Hart Publishing.

Sullivan, A. (1996). *Virtually Normal: An Argument about Homosexuality* New York: Vintage Books.

Sunder Rajan, R. (2003). *The Scandal of the State: Women, Law and Citizenship in Postcolonial India.* New Delhi: Permanent Black.

Suneetha, A. (1996). Homosexuality: Against Hubris. *Economic and Political Weekly* November.

Suresh, M. (2011). 'I'm only here to do *Masti'*, in Arvind Narrain And Alok Gupta (Eds.) *Law Like Love: Queer Perspectives on Law* (pp. 466-480). New Delhi: Yoda Press.

Sweet, M. J. (2002). Eunuchs, Lesbians, and other Mythical Beasts: Queering and Dequeering the Kamasutra' in Ruth Vanita (Ed.) *Queering India: Same Sex Love and Eroticism in Indian Culture and Society* (pp 77-86). New York: Routledge.

Tambe, A. (2000). 'Colluding Patriarchies: The Colonial Reform of Sexual Relations in India, Feminist Studies. *Points of Departure: India and the South Asian Diaspora,* 26(3), 568-600.

TARSHI. (2001). Common ground sexuality: Principles for working on sexuality. Delhi: TARSHI.

TARSHI. (2005). A Conversation On Sexual Rights In India. New Delhi: CREA SANGAMA

TARSHI. (2007). Talking About Sexuality A Report Of Preliminary Findings From The TARSHI Helpline. New Delhi: TARSHI

Tarun (2007). Heteronormativity in Educational Institutions in Menon Nivedita (ed.), *Sexualities* (pp. 128-138). New Delhi: Women Unlimited.

Nicholas Bamforth (1997). *Sexuality, Morals And Justice: A Theory Of Lesbian And Gay Rights* Law. London and Washington: Cassell.

Thangarajah, P. & Arasu, P. (2011). 'Queer Women and the Law in India' Arvind Narrain and Alok Gupta (Eds.), *Law Like Love: Queer Perspectives On Law* (pp. 325-337). New Delhi: Yoda Press.

Tiwari, E. (2014). Distortion of "Tritya Prakriti" (Third Nature) By Colonial Ideology in India. *International Journal of Literature and Art (IJLA),* 2, 19-24.

Todd Weiss, J. (2001). The Gender Caste System: Identity, Privacy, and Heteronormativity. *Law & Sexuality 123*, Tulane Law School

Tonini, M. (2016). *The Ambiguities of Recognition: Young Queer sexualities in Contemporary India.* Lund: Lund University.

Tripathi, L. N. (2015). *Me Hijra, Me Laxmi*. New Delhi: Oxford University Press.

Turner, B. S. (1990). Outline of a Theory of Citizenship. *Sociology*, 24(2), 189-217.

Vance, C. S. (1980). Gender Systems, Ideology, and Sex Research: An Anthropological Analysis *Feminist Studies*, 6(1), 129-143.

Vance, C. S. (1991). Anthropology rediscovers Sexuality: A Theoretical Comment. *Social Science and Medicine,* 33, 878.

Vanita R. (Ed.) (2002). *Queering India: Same sex love and Eroticism in Indian culture and Society*. New York: Routledge.

Vanita, R. & Kidwai, S. (2000). *Same Sex Love in India: Readings from Literature and History*, New Delhi: Macmillan.

Vanita, R. (2005). *Love's Rite: Same sex marriage in India and the West.* New Delhi: Penguin,

Vanita, R. (2007). "Living the way we want": Same sex marriage in India in Brinda Bose and Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 342-362). Kolkata: Seagull books.

Vanita, R. (2009). Same sex weddings, Hindu traditions and modern India. *Feminist Review*, 91, 47-60.

Verma, V. (2012). *Non-Discrimination and equality in India: Contesting boundaries of social justice*. New York: Routledge.

Verma, V.(Ed.) (2016). *Unequal worlds: Discrimination and social inequality in Modern India*, New Delhi: Oxford University Press.

Vivek, P.S. (2003). Living and working conditions of (Hijra) Transgender Community in Mumbai: A Sociological Study, *Research Project Report*, University of Mumbai.

Wallen, J. (2015). Burton and Said's "Gendered Axis". *The Victorian*, 13

Walter, F. (2014). *Law and Gay Rights Story: The Long Search for Equal justice in a Divided Democracy*. New Bernswick: Rutgers University Press.

Weeks, J. (1981). *Sex, politics and Society: The regulation of sexuality since 1800.* London and New York: Longman.

Weeks, J. (1985). *Sexuality and Its Discontents: Meanings, Myths & Modern Sexualities*. New York: Routledge.

Weeks, J. (1986). *Sexuality*, London and New York: Routledge.

Weeks, J. (1991). *Against nature: essays on history, sexuality and identity.* London: Reverse Oram press.

Weeks, J. (1991). Invented Moralities. *History Workshop*, 32, 155.

Weeks, J. (1998). The Sexual Citizen, *Theory, Culture and Society*, 15 (3-4), 35-52.

Weeks, J. (2007). *The world we have won: The remaking of erotic and Intimate Life*. Oxon: Routledge.

Weeks, J. (2010). Making the Human Gesture: History, Sexuality and Social Justice. *History Workshop Journal*, 70, 5-19.

Weeks, J. (2012). Queer(y)ing the “Modern Homosexual”. *The Journal of British Studies*, 51(03), 523 – 539.

Weigman, R. (2006). Heteronormativity and the Desire for Gender. *Feminist Theory*, 7(1), 89-103.

Weinrich, J. D. (1987). *Sexual Landscapes: Why We are, What We Are, Why We Love Whom We Love*. New York: Scribners.

Whelehan, I. (1995). *Modern Feminist Thought from the second Wave to ‘Post-Feminism’*. Edinburg: Edinburg University Press.

Whitehead, J. (1998). Community Honour or Sexual Boundaries: A Discursive Analysis Of Devdasi Criminalization in Madras, India, 1920-1947 in James E. Elias (Ed.) *Prostitution: Whores, Hustlers, and Johns* (pp. 91-106), New York: Prometheus Books.

Wintemute, R. (2011). Same-Sex Love And Indian Penal Code §377:An Important Human Rights Issue For India. *NUJS Law Review 4*, 31.

Young, I. M. (1989). Polity and Group Difference: A Critique of the Ideal of Universal Citizenship. *Ethics*, 99(2), 250.

Zacharias, U. (2001). Trial by Fire: Gender, Power, and Citizenship in Narratives of the Nation. *Social Text 69*, 19(4).

APPENDIX I

LIST OF DOCUMENTS USED

Phase One: 1994-2009

1. ABVA Writ Petition, 1994
2. Naz Writ Petition, 2001
3. JACK submissions, 2002
4. Government of India, Counter Affidavit, 2003
5. Dismissal of The Naz petition by the Delhi High Court on September, 2004
6. Review Petition filed by the Naz Foundation, October 2004
7. Delhi High Court rejected the review petition, November 2004
8. The Naz Foundation filed a special leave petition, challenging the orders of the Delhi High Court dated 02.09.2004 and 03.11.2004, February 2005
9. The government files its counter-affidavit, 2005
10. NACO affidavit, 2006
11. Voices against 377 filed its intervention application, November 2006
12. The Division Bench of the Hon‟ble Delhi High Court delivered its final order and judgment, July 2009

Phase Two: 2009-2013

1. Fifteen special leave petitions came to be filed against the judgment of the Delhi High Court, September 9, 2009
2. Intervention applications were allowed both in support of the High Court decision and against the judgment, February 2, 2011
3. Written submissions of Mr. Goolam E. Vahanvati, attorney general for India, March 1, 2012
4. Koushal Judgment, December 11, 2013

Phase Three: Post 2013

Review petition filed

1. Union of India, December 20, 2013
2. Naz Foundation. December 24, 2013
3. Voices against 377, January 10, 2014
4. Mental health practitioners, Parents of LGBT persons, Nivedita Menon, Ratna Kapur Shyam Benegal January 24, 2014

Review petition dismissed

5. January 28, 2014

Curative Petition filed

6. Voices against 377, Naz Foundation March 31, 2014
7. Parents of LGBT persons, mental health professionals April 02, 2014
8. Curative Petition accepted for a five member constitutional bench February 02, 2016

APPENDIX II

CLASSIFICATION OF PARTICIPANTS ON THE BASIS OF SEX, GENDER, SEXUALITY, AGE AND EDUCATIONAL ATTAINMENT

SEX BASED CLASSIFICATION	TOTAL NUMBER
MALE	10
WOMAN	12
QUESTIONING	3

GENDER BASED CLASSIFICATION		TOTAL NUMBER
CIS-PERSONS	MAN	7
	WOMAN	9
TRANS		3
GENDERQUEER		5
ANDROGYNOUS		1

SEXUALITY BASED CLASSIFICATION		TOTAL NUMBER
HETEROSEXUAL		4
HOMOSEXUAL	GAY	8
	LESBIAN	4
BISEXUAL		2
TRANS		4
QUEER		3

AGE BASED CLASSIFICATION	TOTAL NUMBER
20-29	8
30-39	8
40-49	5
50-59	3
60-69	1

EDUCATIONAL QUALIFICATION BASED CLASSIFICATION	TOTAL NUMBER
GRADUATE	12
POST GRADUATE	10
ABOVE POST GRADUATION	3

APPENDIX III

BIO-NOTE ON THE PARTICIPANTS

- Ashok self-identifies as a gay cis-man, approaching his 70s and is based in Mumbai. He is a health care practitioner who earlier used to work as a journalist. He is the founder-director of the Humsafar Trust, a sexual health initiative primarily for MSM.

- Sachin self-identifies as a gay cis-man, in his 40s and is based in Mumbai. He is a teacher by profession and is a founder-member of Gay Bombay, a gay-men collective. He also runs Gay Housing Assistance Resource (GHAR). He is the editor of the Hindi segment of the LGBTQ magazine 'Gaylaxy' which he formed as a creative response to the Koushal judgment's belittling of the community on the basis of its so-called miniscule numbers.

- Pallav self-identifies as an androgynous gay cis-man, in his early 40s and is based in Mumbai. He is a management professional who has worked in both the corporate and development sector. He has co-authored of the book 'A People Stronger: the collectivisation of MSM and TG groups in India' which was published by Sage.

- Harish self-identifies as a gay cis-man, in his late 30s and is based in Mumbai. He is also an animal rights activist. Harish's mother is a strong ally of the movement and is assisting him in lobbying with the parliamentarians through a post-card campaign.

- Poushali self-identifies as a lesbian cis-woman, in her late 20s and is from Kolkata but presently based in Mumbai. She is a research scholar and a member of Sappho for Equality.

- Mehr self-identifies as queer and non binary, in hir mid 30s and is based in Mumbai. Ze is self employed and is associated with LABIA. Ze is also an animal rights enthusiast.

- Anuja self-identifies as a lesbian cis-woman, in her 30s and is based in Mumbai. She works in the retail sector and is the founder of the e-zine 'Gaysi: The Gay Desi.

- Chayanika self-identifies as a lesbian cis-woman, in her mid 50s and is based in Mumbai. She is an academic and a founder-member of Lesbian And Bisexual women In Action (LABIA), which was earlier known as Stree Sangam. She has authored several books, of which the most recent one is 'No Outlaws in the Gender Galaxy', published by Zubaan.

- Sonal self-identifies as a bisexual cis-woman, approaching her 30s and is based in Mumbai. She is an activist associated with Project Umang under the Humsafar Trust. She is also an amateur but talented film-maker.

- CJ self-identifies as a trans-sexual male, who was assigned gender female at birth, is in his mid 20s and is based in Mumbai. He is an activist working with the Humsafar Trust.

- Koninika self-identifies as a bisexual cis-woman, in her early 20s and is based in Mumbai. She works with the Humsafar Trust and is presently engaged in the Humsafar Trust's initiative of lobbying with parliamentarians for de-criminalization of homosexuality.

- Ken self-identifies as a queer trans-sexual, who was assigned female at birth, is in hir early 30s. Ze is questioning hir sex and is based in Mumbai. Ze is an editor and is running an innovative campaign for allowing people travelling across the city of Mumbai access to private toilets of families.

- Prabha self-identifies as a heterosexual cis-woman, in her mid 40s and is based in Delhi. She works in TARSHI and is an ally of the LGBT movement. TARSHI was a part of the Voices against 377.

- Vivek self-identifies as a queer cis-man, in his mid 40s and is based in Delhi. He is a lawyer and was associated with the Voices' intervention of 2006. He shifted base for some time to Amsterdam and New York. But is back in the country now and hopes to work towards strategising on how to mobilise the LGBTQ community into visible action again.

- Sukhdeep self-identifies as a gay cis-man, in his late 20s and is based in Delhi. He is an engineer by profession and is the founder-editor of the LGBT magazine 'Gaylaxy' along with Sachin.

- Akshay self-identifies as a GenderQueer, in hir 40s and is based in Delhi. Ze is questioning hir sex. Ze was working with Lawyer's collective and was associated with the Queer organization PRISM.

- Deepak self-identifies as a transgender woman who was assigned gender male at birth, in her mid 20s and is based in Delhi. She is a social worker with Pehchaan, an organization that works on HIV and Transgender.

- Dhrubojyoti self-identifies as a GenderQueer, in hir late 20s and is based in Delhi. Ze is questioning hir sex and works as a journalist. Ze is well known for hir Dalit Queer perspective.

- Rituparna self-identifies as a queer lesbian feminist, in her mid 30s and is based in Delhi. She is the founder-Director of Nazariya: A Queer Feminist Collective. She used to work with Nirantar which was a part of Voices against 377.

- Sowmya self-identifies as a trans-sexual woman, who was assigned gender male at birth and is in her late 30s. She is based in Delhi and is the project manager of project Shasakt under the Humsafar Trust office in Delhi.

- Gautam self identifies as a cis gay man and is in his late twenties. He works with HIV/AIDS alliance is has been living with AIDS since he turned nineteen.

- Pramada self-identifies as a queer heterosexual cis-woman, in her early 50s and is based in Delhi. She is the founder-Director of CREA, a human rights organization which was a part of Voices Against 377.

- Anjali self-identifies as a heterosexual cis-woman, in her late 50s and is based in Delhi. She is the founder-Director of Naz Foundation India Trust, the organization which filed paved the way for the consolidation of the LGBTQ movement in India by filing the second petition against S377 in 2001.

- Siddharth self-identifies as a gay cis-man, in his late 30s and is based in Delhi. He is a legal researcher and a lawyer by training. He has worked with Alternative Law Forum and is a oft-cited scholar on the S377.

- Anushka self-identifies as a hetrosexual cis-woman, in her early 20s and is based in Mumbai. She is self employed and conducts workshops on sex, gender and sexuality for the organization No Country For Women, of which she is a co-founder.

APPENDIX IV

INTERVIEW SCHEDULE

1. Do you consider LGBTQs as discriminated by in the society?
   i. Yes
   ii. No

2. What is the nature of such discrimination?

3. Why do you think the society discriminates?

4. In effect, are you saying that sexual orientation and gender identity is an axis of minority identification?
   i. Yes
   ii. No

5. What is your position on sexuality?
   i. innate
   ii. socially constructed
   iii, Others, please specify

6. How do you understand sexual rights?

7. Are sexual rights available in India?
   i. Yes
   ii. No

   (If yes) Please elaborate.

   (If no) Why do you think such rights are not available in India?

8. Are sexual minorities treated as equal citizens in India?
   i. Yes
   ii. No

   (If no) How, do you think, sexual minorities are unequal citizens in India?

   (If no) Why are sexual minorities not considered as equal citizens?

   (If no) Should sexual minorities strive for equal citizenship rights?
   i. Yes
   ii. No

   (If yes) How can sexual minorities strive for equal citizenship?
   i. Approaching Judiciary,
   ii. Pushing for anti-discrimination law-legislature,
   iii. Generating support through social movement politics
   iv. Other, please specify

9. What is your position on Section 377 of the IPC?
   i. Read Down
   ii. Delet it

(If reading down) How does it help if Section 377 is read down?

(If Deleting it) How do we prosecute for same sex rapes, then?

(If Deleting it) Are you suggesting then, that, rape laws should be made gender neutral?
i. Yes
Ii. No

10. Do you believe that the state promotes heterosexism?
    i. Yes
    ii. No

(If yes) Please elaborate how the state promotes heterosexism

11. Is the issue of same-sex marriage important for LGBT movement In India?
    i. Yes
    ii. No

(If yes) Why is it important for LGBTQ movement to push for same-sex marriage?

(If Yes) How is it going to help the LGBTQ community?
i. Securing recognition only
ii. Will it help in redistribution process too

(If no) Why is the issue of same sex marriage not important for LGBTQ movement in India?

12. What else do you think should be part of the LGBTQ struggle?

13. What do you believe should be agenda of the LGBTQ movement?
    i. A minority rights discourse
    ii. A Human rights discourse
    iii. Others (please specify)

If you say that it is minority rights discourse do you think that pursuing a special rights agenda will help?
i. Yes
ii. No

What would it include?
i. representations in government
ii. employment benefits
iii. Others, please specify

Or would the extension of basic human rights be enough for LGBTQ?

i. Yes
ii. No

14. How do you conceptualize the nature of the state?
    i. as repressive,
    ii. as a facilatitator
    iii. others, please specify

15. Which organs of the government do you think can effectively further the interests of the LGBTQs?
    i. Legislature
    ii. Judiciary
    iii. Executive

16. What has been your interaction with the police like?

17. Have you found instances where the police has arrested people because of their sexuality?
    i. Yes
    ii. No

18. Do you think if will be a viable path to approach the legislature for advancing the rights of the LGBTQ community?
    i. Yes
    Ii. No

    (If yes) How do you believe legislators can bring about such changes?

    (If no) Why do you think it will not be beneficial to approach the legislators?

19. What has been your interaction with Judiciary like?

20. Can you reflect on the feelings with which Naz Judgment was received?

21. In what ways were such feelings changed when the Koushal Judgment came?

22. . Did you expect such changes in the judiciary's attitude?
    i. Yes
    ii. No

    (If yes) Why did you expect shifts in Judiciary's attitude? (whether the shift is related to a certain incidence or could it be the individual judge's position?

    (If no) Why did you not expect such changes?

23. How do you explain this shift in the judiciary's position?

24. While the Health department appealed (Along with Naz Foundation) for reading down S377 in front of the Delhi High Court in the 2009 Judgment, the Home department argued against it. How do you read this variance among government departments?

25. Is this because the Health department is pragmatically motivated to make TI available for HIV/AIDS intervention? Or, does this show that the position of the state is not always coherent towards sexual minorities?

26. What, in your opinion, should be the next strategic move of the LGBT movement?

27. Finally, what kind of policies (areas) that you think can bring changes into the lives of LGBTQ people