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**The Unhappy Marriage of ‘Queerness’  
and ‘Culture’: The Present Implications  
of Fixating on the Past**

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## ABSTRACT

In September 2018, the Supreme Court of India in *Navtej Johar v. Union of India*, decriminalised consensual same-sex sexual activities by reading down Section 377 of the Indian Penal Code. A significant aspect of the Court's reasoning was that Section 377 was an embodiment of 'Judeo-Christian' morality and a colonial imposition. In providing that reasoning, the judgment does not stand alone. For a long time, various revisionist accounts of religious texts and scriptures have been presented to argue that ancient 'Indian culture' had been tolerant towards non-normative sex and gender, and 'homophobia' was simply a British imposition. Such revisionist arguments had initially been put forth by Indian queer rights groups to nullify the orthodox homophobic attitudes, which rested on the claim that homosexuality is alien to 'our culture'. However, this article argues that there has been an increasing cooptation of such accounts by dominant Hindu Right groups for their political ends. This article also shows that such reliance on the past (through scriptures or otherwise) to confer legitimacy on the present can have the effect of constraining the radical potentialities of that past. At the end, this article argues for a turn towards the future, which, creating new solidarities, can become a horizon of possibilities.

## KEYWORDS:

cultural essentialism, gender, sexuality, India, colonialism

# The Unhappy Marriage of 'Queerness' And 'Culture': The Present Implications of Fixating on the Past

Arti Gupta

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## 1.0 INTRODUCTION

In the context of present-day India, what significance does the *past* have in our analysis of non-heteronormative sex and gender? If the past is any indication, we witness a changed trajectory. Perhaps we should start at a time that is not the central concern of this article—the time when claims that ‘homosexuality’ is ‘Western’ resounded in all corners. For instance, in 2006, the painter M.F. Husain drew some Hindu goddesses in the nude and faced protests on the pretext that such drawings reeked of an explicitly perverse attitude. After the release of Deepa Mehta’s film *Fire*, which hinted at same-sex desire between two sisters-in-law, the Hindu Right protested vehemently, on the reasoning that the depiction of same-sex desire between women (that, too, sisters-in law!) was a threat to the ‘Indian culture.’<sup>1</sup>

These protests surfaced as a result of two vital assumptions. First, they assume that culture is a society’s repository of the best(s) that have been known, seen, and thought.<sup>2</sup> Over time, culture also comes to be affiliated, quite decisively, with the nation or the state; it serves to extricate “us” from “them”, with more than just an undertone of xenophobia.<sup>3</sup> Accordingly, culture becomes a source of identity, and a rather combative one, visible in the pervasive calls for “returns” to culture and tradition.<sup>4</sup> Second, parallel to this lies the assumption of sex negativity, that sex, in contrast with culture, is ruinous and negative.<sup>5</sup> That sex can only be redeemed if it is performed within the confines

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<sup>1</sup> Arvind Narrain, ‘The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva’ (2004) 7(2) *Health and Human Rights* 142. Whenever we write or speak, we do so from a precise time and place, against the backdrop of a distinct history and culture. Hence, everything written or said is written or said in *context*, it is *positioned*. I was born and brought up in a country which, amongst a myriad of things, can be described as a post-colonial nation. Any analysis pertaining to ‘culture’ and ‘queer’ that I indulge in would be in the light of post-colonial theory. If my analysis seems too preoccupied with concerns of the ‘cultural identity’ of present-day India, it is because extricating ‘culture’ from its regional modalities is a difficult task, and, to borrow from Stuart Hall again, “the heart has its reasons”.

<sup>2</sup> Edward Said, *Culture and Imperialism* (Vintage Books 1994) 14.

<sup>3</sup> As above at 14.

<sup>4</sup> As above at 14.

<sup>5</sup> Gayle Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’, in Carole S. Vance (eds) *Pleasure and Danger: exploring female sexuality* (Routledge & Kegan Paul 1985) 267 at 278.

of marriage, and if its pleasurable features do not overshadow its procreative ones.<sup>6</sup> Sex is, hence, viewed with suspicion; it is presumed guilty until proven innocent. Any intermingling of culture and sex, it is believed, would lead to a defiling of the former. This is bolstered by the fact that several communities, including those in India, also function along tight patriarchal codes and moral boundaries.<sup>7</sup>

As we have been reminded, the times they are a-changin'. What we witness now is a strange crisscrossing between cultural politics and queer politics, where non-normative sex and gender, which had earlier been detested, are now being brought within the folds of culture.<sup>8</sup> Hence, we are being fed two assertions about the past now. *First*, that 'homophobia' is 'Western' and a 'British' import, owing to colonization. That it was 'Victorian morality,' imposed by the British on the native population, which led to the native's aversion towards non-normative sex.<sup>9</sup> *Second*, that ancient 'Indian culture' had been tolerant and accepting toward non-normative desires.<sup>10</sup> This article is a modest attempt to critique both these assertions, without any turn towards prescriptive solutions. To that end, the article shows that the supposed 'tolerance' of ancient 'Indian culture' towards non-normative sex and gender is being increasingly coopted by the Hindu Right, and manifesting as a kind of 'homoromanticism.' Through this homoromanticism, the Hindu Right marks the nation's 'Others' as intolerant and homophobic. While the Hindu Right's claims may have shifted over time, its quest for cultural purity and its horrifying xenophobia, as this article shows, continues. This article also shows that such reliance on the past (through scriptures or otherwise) to confer legitimacy on the present can have the effect of constraining the radical potentialities of that past.

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<sup>6</sup> As above at 278.

<sup>7</sup> This is exemplified by the brouhaha created by the Hindu and Islamic Right-wing groups after the reading down of Section 377 in 2009 by *Naz Foundation v Govt. of NCT of Delhi* 160 DLT 277 (2009) (High Court of Delhi); Oishik Sircar, 'New Queer Politics in the New India: Notes on Failure and Stuckness in a Negative Moment' (2017) 11(1) *Unbound: Harvard Journal of the Legal Left* 1-36.

<sup>8</sup> As above at 3.

<sup>9</sup> For a more detailed critique of the claim 'homophobia is Western,' see Rahul Rao, *Out of Time: The Queer Politics of Postcolony* (Oxford University Press 2020) 18-19, 44.

<sup>10</sup> See Madhavi Menon, *Infinite Variety: A History of Desire in India* (Speaking Tiger 2018).

The rest of this article proceeds as follows: Section 2 explains how Section 377 of the Indian Penal Code, which speaks of “unnatural sex” and had earlier criminalised consensual same-sex conduct (now decriminalised),<sup>11</sup> was an outcome of a range of complex factors and not simply a one-way British imposition of ‘Victorian morality.’ Thereafter, in Sections 3 and 4, it will survey certain arguments as to why one needs to be circumspect towards revisionist accounts of the past that offer ancient texts as ‘evidence’ of the presence of alternate sexualities during pre-colonial times. Section 5 argues that in the assertion that ‘homophobia’ is Western, there is an implicit reference to a specific *identity*, i.e. the ‘homosexual.’ Confining sex and gender to such fixed identities, and projecting these identities on the past, is a limiting endeavour. The article, in its conclusion, adds that the past cannot encompass all our current ‘sexualness,’ and what is required is not a harking back to the past, but a turn towards future solidarities.

## 2.0 ANXIETIES AROUND THE COLONIAL BODY: THE CONTEXT

This sanitization of culture and its extrication from sex, now seemingly entrenched, was an outcome of the colonial encounter. For example, the nineteenth century in Bengal was nothing short of the Age of Social Reform.<sup>12</sup> A substantial portion of these reforms came as a response to the ‘civilizing mission’ of the colonizer, and encompassed a reworking of gender relations within the family.<sup>13</sup> Uma Chakravarti and Mrinalini Sinha argue that an aspect of colonial politics in the Indian subcontinent had been that Hindu men were ‘effeminate,’ and hence, unfit to rule themselves.<sup>14</sup> The ‘civilizing mission,’ which framed colonial presence in the subcontinent, also rested on the notion of Indian men as being sexually promiscuous and the colonies were conceptualised as ‘porno-

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<sup>11</sup> *Indian Penal Code 1860 s 377*. The Section reads- “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with 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 the carnal intercourse necessary to the offence described in this section.” The Section had been read down in *Navtej Singh Johar v Union of India* to exclude consensual acts from within its purview. See *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (Supreme Court of India).

<sup>12</sup> Himani Bannerji, ‘Attired in Virtue: The Discourse on Shame (*lajja*) and Clothing of the Bhadramahila in Colonial Bengal’ in Bharati Ray (ed) *From the Seams of History: Essays on Indian Women* (Oxford University Press 1995) 67 at 68.

<sup>13</sup> As above at 70.

<sup>14</sup> Uma Chakravarti, ‘Whatever Happened to the Vedic *Dasi*?: Orientalism, Nationalism and a Script for the Past’ in Kumkum Sangari and Sudesh Vaid (eds) *Recasting Women: Essays in Colonial History* (Kali for Women, 1989) 27 at 34; Mrinalini Sinha, *Colonial Masculinity: The ‘Manly Englishman and the Effeminate Bengali’ in the Late Nineteenth Century* (Manchester University Press 1995) 1-32.

tropics.’<sup>15</sup> The colonial administrators feared that the sexual promiscuity of the native would entice white men, particularly those enlisted in the army, towards non-normative sexual possibilities. Accordingly, the prostitution apparatus was set up to specifically deter same-sex acts between men. It was preferred that men partake in sexual acts with prostitutes, rather than same-sex acts with other men.<sup>16</sup> Therefore, a coloniser, basing its superiority on its Victorian sexual morality was itself encouraging prostitution, a profession that it earlier believed to be practiced by diseased ‘native’ women, posing a threat to white men.<sup>17</sup> It was only later that Section 377 of the Indian Penal Code had been created to outlaw same-sex acts.

Therefore, Section 377 was simply an addition to the larger colonial milieu that intensified anxieties around lack of masculinity amongst the colonised men, especially the intelligentsia. Even though the Section specifically referred to ‘unnatural offences,’ it cannot be extricated from the anxieties around the supposed degeneracy of natives.<sup>18</sup> A reference to the Allahabad High Court’s decision of *Queen Empress v. Khairati*,<sup>19</sup> the first case to interpret Section 377, seems apposite. Khairati had been arrested for dressing in women’s clothes and singing amongst women of a family. On being examined, he was shown “to have the characteristic mark of a habitual catamite—the distortion of the orifice of the anus into the shape of the trumpet—and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.”<sup>20</sup> The High Court acquitted Khairati due to the lack of evidence as to the “exact time, place, and persons with whom these offences were committed,” even though the Judge believe him to be “clearly a habitual sodomite.”<sup>21</sup> Despite its lack of conviction, its stumbling over important issues of evidence, *Khairati* is still traced as *the* case for crimes against nature.<sup>22</sup> The reason,

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<sup>15</sup> Paola Bacchetta, ‘When the (Hindu) Nation Exiles Its Queers’ (1999) 61 *Social Text* 141.

<sup>16</sup> As above at 147.

<sup>17</sup> Janaki Nair, ‘Imperial Reason’, National Honour and New Patriarchal Compacts in Early Twentieth-Century India’ (2008) 66 *History Workshop Journal* 208.

<sup>18</sup> Aniruddha Dutta, ‘Section 377 and the Retroactive Consolidation of ‘Homophobia’ in Arvind Narrain and Alok Gupta (eds) *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011) 162 at 170.

<sup>19</sup> *Queen Empress v. Khairati* (1884) ILR 6 All 204 (High Court of Allahabad).

<sup>20</sup> As above.

<sup>21</sup> As above.

<sup>22</sup> Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Duke University Press 2009) 76.

Arondekar writes, is that *Khairati* serves as an example of the specific anxieties that had formed around the criminality of the colonial body, whereby even without evidence as to the time, place, and injured party to an offence, the case still holds a narrative of native sodomy.<sup>23</sup> It is through that narrative that ‘A nation of “habitual sodomites” is alerted to the inchoate promises of their own sexual criminalities.’<sup>24</sup>

Ultimately, these anxieties seeped into the self-perception of the native elites as they struggled to overcome their powerlessness against the British.<sup>25</sup> In the eyes of the Hindu men who were keen to dispel all notions of native promiscuity, suppression of their own sexual inclinations became the marker of virility. To counter the narrative of effeminacy and promiscuity, any kind of sexual “deviance” or “perversion” was, in turn, projected onto the West.<sup>26</sup> So, the binary of sexuality did not posit homosexuality against heterosexuality, rather it posited sexual abstinence against homosexuality and heterosexuality.

The higher morality of the imperial rule was also demonstrated by highlighting the abject position of the women of the subject population.<sup>27</sup> To counter that higher morality, the male intelligentsia, which had internalised the anxieties around sex and ‘civilised’ or ‘improved’ itself in accordance with western standards, now wished to extend this civilizational and improvement mission to its women. ‘Civilization’ became about conforming to notions of *shame*, and shame was to be the stark opposite of explicit sexuality.<sup>28</sup> Herein, civilization meant the denial of the body, particularly the female body. The confinement of the female body through shame entailed the contempt for and control of female sexuality.<sup>29</sup>

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<sup>23</sup> As above at 76

<sup>24</sup> Arondekar above note 22 at 76.

<sup>25</sup> Martha C. Nussbaum, ‘Disgust or Equality? Sexual Orientation and Indian Law’ (2016) 6 *Journal of Indian Law and Society* 1. Nussbaum specifically gives the example of Gandhi’s loathing of sexuality to show how the anxieties had seeped into native self-perception.

<sup>26</sup> Sinha above note 14 at 1-32.

<sup>27</sup> Chakravarti above note 14 at 34.

<sup>28</sup> Bannerji above note 12 at 80.

<sup>29</sup> Bannerji above note 12 at 88.



Thus emerged the necessity of controlling or sublimating female sexuality. The subduing of sexual potentialities was to be a marker of the woman's morality.<sup>30</sup> A man's character was determined by his home life, particularly his mother's example, and it was the man's character which formed the basis of the national progress.<sup>31</sup> This concentric argument, beginning at the mother's morality, delineated her life's purpose—raising sons and families that will contribute to the national progress. This is how female sexuality became enclosed within the institution of marriage as the question of alternate sexualities got merged with the idea of nationhood.<sup>32</sup> Consequently, through the colonial encounter, patriarchy normalised compulsory heterosexuality for its own survival.<sup>33</sup>

Hence, to summarise, it was, amongst other things, the anxieties surrounding the 'sexually promiscuous' colonial body, and the anxieties around white men enlisted in the army engaging in same-sex acts, which led to the prostitution apparatus, that contributed to the enactment of Section 377. Further, these anxieties, albeit given rise to by the British, were also added to by the colonial elites. The native elites gave weight to these identities in their self-perception too. The self-improvement' mission of the native elites, also extending to their women, was a consequence of this. Thus, the discussion above negates the unqualified claims that aversion to non-normative sex was an outcome of a one-way British imposition.

### **3.0 CLAIMING AUTHENTICITY, FLATTENING THE PAST**

Numerous attempts have been made to uncover that which the colonial experience had suppressed. Scholars have endeavored to bring to light the presence of alternate sexualities, which were erased by the marking of the sexually restrained image as a kind of 'one true' depiction of the essential cultural identity, with static and uninterrupted meaning.<sup>34</sup> A few such attempts are *Same-Sex Love*

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<sup>30</sup> Chakravarti above note 14 at 53.

<sup>31</sup> Himani Bannerji, 'Fashioning a Self: Educational Proposals for and by Women in Popular Magazines in Colonial Bengal' (1991) 26(43) *Economic and Political Weekly* WS50

<sup>32</sup> Jyoti Puri, *Woman, Body, Desire in Post-colonial India: Narratives of Gender and Sexuality* (Routledge 1999) 182.

<sup>33</sup> Nivedita Menon, 'How Natural is Normal? Feminism and Compulsory Heterosexuality' in Arvind Narrain and Gautam Bhan (eds) *Because I Have a Voice: Queer Politics and Legal Reform in India* (Yoda Press) 32.

<sup>34</sup> Stuart Hall, 'Cultural Identity and Diaspora' in Patrick Williams and Laura Chrisman (eds) *Colonial Discourse and Post-colonial Theory: A Reader* (London and New York: Routledge 2013) 392 at 393.

in India by Ruth Vanita and Saleem Kidwai,<sup>35</sup> *Sakhiyani* by Giti Thadani,<sup>36</sup> ‘Homosexuality and Hinduism’ by Arvind Sharma.<sup>37</sup> As this Section shows, these revisionist accounts very simplistically pin homophobia to colonial legacies and Judeo-Christian morality, and offer scriptures and other ancient texts as ‘evidence’ of the presence of alternate sexualities in the pre-colonial past. The implication of such revisionist accounts is that they have argued for the prevalence of non-normative sex and gender in the past by depicting an essentialised past.

### **3.1 Reliance on Religious Texts**

Lata Mani argues that the reference to religious text as speaking the ‘truth’ about something is problematic. She writes that for the colonisers, one of the methods of governance was to establish the hegemony of the religious texts and an unobstructed obedience to the scriptures.<sup>38</sup> What did, or did not, form a part of any tradition or culture was always to be determined by the authority of the scriptures, for it was only scriptural authenticity that could sanction a practice. However, the interpretation of these scriptures, and their ordering in terms of significance, was always done by those belonging to the dominant caste groups.<sup>39</sup> Hence, the ‘meaning’ given to those scriptures was automatically exclusionary of certain realities and voices, in terms of gender, caste and class. To make claims about ‘Indian society’ on the basis of the same hegemonic scriptural sanctioning that the colonisers employed is to reproduce the same mechanisms of power.<sup>40</sup> Hence, using the authority of the scriptures and religious texts, what is claimed as culture is dominant caste culture.

So, here we are faced with two conflicting arguments. The earlier argument was that Indian culture is impervious to any invasion of sex and sexuality. Now, it is being argued that alternate

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<sup>35</sup> See Ruth Vanita and Saleem Kidwai, *Same-sex Love in India: Readings from Literature and History* (Palgrave 2001).

<sup>36</sup> See Giti Thadani, *Sakhiyani: Lesbian Desire in Ancient and Modern India* (Bloomsbury Academic 2016)

<sup>37</sup> Arvind Sharma, ‘Homosexuality and Hinduism’ in Arlene Swidler (ed) *Homosexuality and World Religions* (Valley Forge, PA: Trinity Press International 1993) 37-80.

<sup>38</sup> Lata Mani, ‘Contentious Tradition: The Debate on *Sati* in Colonial India’ in Kumkum Sangari and Sudesh Vaid (eds) *Recasting Women: Essays in Colonial History* (Kali for Women 1989) 88-126.

<sup>39</sup> Neeladri Bhattacharya, ‘Remaking Custom: The Discourse and Practice of Colonial Codification’ in R. Champakalakshmi and S. Gopal (eds) *Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar* (New Delhi: Oxford University Press 1996) 20 at 28-29.

<sup>40</sup> akshay khanna, ‘Us ‘Sexuality Types’: A Critical Engagement with the Postcoloniality of Sexuality’ in Brinda Bose and Subhabrata Bhattacharyya (eds) *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (Seagull Books, 2007) 159 at 171.

sexualities, specifically homoerotic love, has *always* been a facet of the culture. The intention, on both sides of the table, is to present a quintessential, authentic subject that can be solidified as a representation of identity and culture—something immutable, like a museum artifact to be unearthed and restored to its unadulterated purity.<sup>41</sup> In discussions around sexuality, the sexual subject provides a platform for cultural contestation, where cultural legitimacy is contingent on establishing *authenticity*. And this establishment of authenticity bases itself, however momentarily, on cultural essentialism.<sup>42</sup>

Cultural essentialism is most starkly visible in both positions' presentation of culture as fixed "pictures of history" that hide their own historicity, indicating that the Nation and its Culture are natural givens as opposed to historical inventions and constructions.<sup>43</sup> Both arguments have as their starting point a persistent search for some pure origin, a return to the values of a hoary Past—either a golden past of sexual repression or an ancient sex-positivism—without heeding to the fact that any such search is a voyage not of discovery but of erasure.<sup>44</sup> They suggest that an authentic sex-positive Indian-ness, untouched by the coloniser's Judeo-Christian morality, can be found by a mere repealing of Section 377. The Supreme Court of India took this approach, of reducing homophobia to the some simplistic imposition of 'Judeo-Christian morality,' in *Navtej Johar v. Union of India*.<sup>45</sup> Fernandes argues that there is no consensus on what the term "Judeo-Christian" actually represents, but in its reference to Christian morality, the judgment overlooks the complexities and contestations within the Christian traditions, and makes the mistake of seeing religious communities and their morals as monolithic and essentialised as well.<sup>46</sup>

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<sup>41</sup> Ratna Kapur, *Erotic Justice: Law and the New politics of Postcolonialism* (The Glass House Press 2005) 90.

<sup>42</sup> As above at 90.

<sup>43</sup> Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (Routledge 1997) 21.

<sup>44</sup> Gayatri Gopinath, *Impossible Desires: Queer Diasporas and South Asian Public Cultures* (Duke University Press 2005) 4.

<sup>45</sup> *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (Supreme Court of India).

<sup>46</sup> Jason Keith Fernandes, 'Interrogating the Freedoms of Queer Liberation in India' (2020) 13(3) *NUJS Law Review* <<http://nujlawreview.org/wp-content/uploads/2020/11/13-3-JKF-Interrogating-the-Freedoms-of-Queer-Liberation-in-India-.pdf>> (last accessed 29 December 2021).

Any re-telling of history that overlooks or erases complexities and looks at culture with only one angle of reference is feeding into cultural essentialism.<sup>47</sup> Scholarly reliance on religious texts to source non-heteronormativity overlooks the complexities of their class, caste and gender dynamics. For instance, the *Kamasutra* places sexual desire principally within the framework of heterosexual desires of upper-class men vis-a-vis all women and lower-class men.<sup>48</sup> Even within *Arthashastra*, the same penalty is prescribed for sexual acts between two men as is prescribed for minor robberies. Yet a higher amount of fine is prescribed for a woman who forces sex on another woman.<sup>49</sup> Similarly, in *Manusmriti*, there is little penalty for a man having sex with a man, the same as that for a man having sex with a non-human. On the other hand, there is heavy penalty for a woman who ‘deflowers’ a virgin maiden. Therefore, imposition of penalty is highly contextualized and draws from patriarchal and caste-based kinships.<sup>50</sup> In Islamic culture, same-sex acts between men cannot be read too simplistically as evidence of sexual freedom because same-sex relations between slave boys and noblemen is ‘not as expressive of individual sexual choices, but, like slave girls, as socially acknowledges and living symbols of the nobleman’s rank.’<sup>51</sup> Desire was, hence, infused by relations of power and moderated by aspects of class, age and gender.

### 3.2 *Essentialism as a Strategy*

Admittedly, the essentialist tracing of a historical past that accepted same-sex sexual conduct can be a useful political strategy to counter homophobia.<sup>52</sup> As Spivak writes, the call is to ‘... become vigilant about our own practice [of essentializing] and **use it as much as we can** rather than make the totally counter-productive gesture of repudiating it....’<sup>53</sup> Therefore, revisionist accounts had actually been submitted to the Court for the hearing in *Naz Foundation v. Government of NCT of*

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<sup>47</sup> Kapur above note 41 at 89.

<sup>48</sup> Kumkum Roy, ‘Unravelling the Kamasutra’ in Mary John and Janaki Nair (eds) *A Question of Silence? The Sexual Economies of Modern India* (Kali for Women 1998) 52 at 56.

<sup>49</sup> Dutta above note 18 at 167.

<sup>50</sup> Dutta above note 18 at 167.

<sup>51</sup> Indrani Chatterjee, ‘Alienation, Intimacy and Gender: Problems for a history of love in South Asia’ in Ruth Vanita (eds) *Queering India: Same Sex Love and Eroticism in Indian Culture and Society* (London: Routledge 2002) 61 at 63.

<sup>52</sup> Puri above note 32 at 183.

<sup>53</sup> Gayatri Chakravorty Spivak, ‘Criticism, Feminism, and the Institution with *Elizabeth Grosz*’ in Sarah Harasym (ed) *The Post-colonial Critic: Interviews, Strategies, Dialogues* (Routledge 1990) 1 at 11.

*Delhi & Others*,<sup>54</sup> to affirm the existence of homosexuality in ancient past of the Indian subcontinent. The reasons were two-fold. *First*, to nullify the orthodox homophobic attitudes which rested on the claim that homosexuality was alien to our culture. Hence, from the perspective of gays and lesbians in India, the principal strategy was to insist on a prevalence of homosexuality as *inherent* to Hindu and Islamic traditions.<sup>55</sup> *Second*, to anticipate the bench's lack of understanding of complex queer sexualities, and the fixedly held beliefs on the binaries of homosexuality and heterosexuality.<sup>56</sup> Moreover, the bench in *Naz* asked the petitioners to 'contextualize Wolfenden [Committee Report] in the **context of Indian society and culture**' (emphasis mine).<sup>57</sup>

It can also be argued that getting Section 377 read down was important as an end, and any uneasiness over the means of essentialism is better left in the academic/activist debate circles. Thus, locating homosexuality in ancient past, despite its cultural essentialism, becomes a valid strategy, a *strategic use of essentialism*.<sup>58</sup> The strategic use of essentialism can have uses in other contexts as well. For instance, in the context of the rights of the aravani community,<sup>59</sup> activists make references to transgender women featured in ancient texts like *Silappadikaram* and *Mahabharata*. This is done to show the aravani's historical presence, and thereby argue for their civil rights in the present.<sup>60</sup>

However, it is significant to note that we can look at strategic essentialisms not as *descriptions* of how things *were*, but as a way of *critiquing* something.<sup>61</sup> In queer politics, reliance on essentialised accounts of the past had been done not to make out of context blanket assertions about what the past *actually was*, but to *counter* the popular narrative that the past holds no evidence

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<sup>54</sup> *Naz Foundation v Government of NCT of Delhi & Others* 160 DLT 277 (2009) (High Court of Delhi).

<sup>55</sup> Several lesbians in India attempted to reterritorialize lesbianism as India. See Paola Bacchetta, 'Rescaling Transnational "Queerdom": Lesbian and "Lesbian" Identitary-Positionalities in Delhi in the 1980s' (2002) 34(5) *Antipode* 947. Similarly, see Puri above note 32 at 183;

<sup>56</sup> Ratna Kapur, 'Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law' (2013) 4(1) *Jindal Global Law Review* 36.

<sup>57</sup> Siddharth Narrain, 'The 377 TRANSCRIPTS: A Brief History of the Naz Foundation Judgment' <<https://pad.ma/documents/OM>> (last accessed 2 January 2022).

<sup>58</sup> Gayatri Chakravorty Spivak, 'Practical Politics of the Open End with Sarah Harasym' in Sarah Harasym (ed) *The Post-colonial Critic: Interviews, Strategies, Dialogues* (Routledge 1990) 95 at 109.

<sup>59</sup> Aravanis are Tamilian transgender women.

<sup>60</sup> Padma Govindan and Aniruddhan Vasudevan, 'The Razor's Edge of Oppositionality' in Arvind Narrain and Alok Gupta (eds) *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011) 84 at 94-95.

<sup>61</sup> Gayatri Chakravorty Spivak, 'The Problem of Cultural Self-representation with Walter Adamson' in Sarah Harasym (ed) *The Post-colonial Critic: Interviews, Strategies, Dialogues* (Routledge 1990) 50 at 51.

of homoeroticism. Reliance on strategic essentialism, therefore, must leave room for a certain degree of cognizance—cultural identities are not located in some essentialised past, but entail a process marked by complex multiplicities, pluralities, and often overlapping categories. Culture is an outcome of a constant interaction of history and power, amongst other things. Cultural identities are always *constructed* through memory, fantasy, narrative and myth. Identities do not revolve around a mere excavation of the past, waiting to be found. There is, hence, no *one* shared cultural code with continuous frames of reference. There is a simultaneity of continuity and difference.<sup>62</sup> Any critique of essentialism must consider by *whom* and in what *context* a politics based on essence is being employed. If adopted as a means of contesting the dominant ideology, it can be persuasive. However, as the next section shows, when utilised by a hegemonic group, essentialism can perpetuate domination.<sup>63</sup>

#### **4.0 HOMOROMANTICISING THE PAST**

The imposition of universalised narratives about the ancient past gives us no insight into the *current* experiences of queer, trans, and gender non-conforming persons, especially if they are marginalised through intersecting axes of caste, religion, nationality, class, etc.<sup>64</sup> Although it might have been a strategic manoeuvre for the queer rights movement to reclaim Hinduism through the aforementioned narratives, it has now become a strategy for those on the Hindu Right to entrench the superiority of Hinduism by portraying it as being accepting of alternate sexualities, and at the same time, showing homophobia as a mere colonial inheritance.<sup>65</sup> This has led to a kind of misplaced romanticism towards the past, i.e. homoromanticism.

##### **4.1 *Homoromanticising by the Hindu Right***

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<sup>62</sup> Hall above note 34 at 394.

<sup>63</sup> Annie Bunting, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies' (1993) 20(1) *Journal of Law & Society* 6.

<sup>64</sup> Nishant Upadhyay, 'Hindu Nation and its Queers: Caste, Islamophobia, and De/coloniality in India' (2020) 22(4) *Interventions: International Journal of Postcolonial Studies* 464.

<sup>65</sup> As above at 466.

A deep problem with traditionalist invocation of the past is that this invocation does not challenge the marginalization of certain alternative sexualities and genders in ancient Hinduism itself. If one is not willing to contemplate the aversions to non-normative sexual possibilities in the precolonial past, then it has the effect of romanticizing the precolonial as a period of free-flowing acceptance and tolerance, leading to what Rahul Rao refers to as ‘homoromanticism.’<sup>66</sup> However, reliance on such scriptural authority prevents an honest view of the oppressive aspects of this social system by simply according it the gloss of harmless tradition.<sup>67</sup> For instance, In *NALSA v. Union of India*,<sup>68</sup> both Justice Radhakrishnan and Justice Sikri indicate that trans persons were treated with ‘respect’ till the advent of colonialism. This is done by reference to Vedic and Puranic literature, as well legends in *Mahabharata* and *Ramayana* that suggest the presence of non-binary characters. However, such projection of alternate sexualities on culture, albeit as a strategy, can be blind to its own exclusionary sides. Within *Manusmriti*, the histories of trans persons are traced to terms such as ‘eunuchs’, which continue to find their place in government documents.<sup>69</sup> Gee Imaan Semmalar writes,

relying on Hindu myths to affirm our identities gives rise to ... a regressive kind of trans identity politics that does not take into account the brutality of the caste system that finds its origin and sanction in the same Hindu religion.<sup>70</sup>

In the case of ancient Hindu tradition, the exclusion of same-sex desire between women is also rampant. In the epic *Valmiki Ramayana*, the women in Ravana’s harem are sketched as making love to one another to taste the essence of Ravana on one another’s body.<sup>71</sup> Further, in a later day *Purana*, in the aftermath of the death of a king, two queens create a child through a sexual union. Both these examples are not a representation of female sexual desire, but a presentation of a second-

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<sup>66</sup> Rao above note 9 at 33-34, 43-49.

<sup>67</sup> Govindan and Vasudevan above note 60 at 95.

<sup>68</sup> *NALSA v Union of India* (2014) 5 SCC 438 (Supreme Court of India).

<sup>69</sup> Shane Gannon, ‘Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic Representations of the “Eunuch”’ (2011) 20(1) *Journal of the History of Sexuality* 1.

<sup>70</sup> Gee Imaan Semmalar, ‘Why Trans Movements in India Must Be Anti-Caste’ *Feminism in India* (online) 28 December 2017 <<https://feminisminindia.com/2017/12/28/trans-movements-india-caste/>> (last accessed 27 October 2022)

<sup>71</sup> Devdutt Pattanaik, *The Man Who Was a Woman and Other Queer Tales From Hindu Lore* (Routledge 2012) 14.

hand substitute to heterosexual intercourse.<sup>72</sup> The myth of the romantic past ignores the Muslim cultural context wherein multiple *hijra gharanas* (household) flourished beyond the moral-cultural restrictions of Hinduism.<sup>73</sup>

Therefore, revisionist narratives often show themselves as tracing the factual, objective, and descriptive features of the cultural past. However, they neither present an account of ‘one culture’ nor of ‘one people,’ but are political inclinations circumscribed by the account of those who command power within the culture.<sup>74</sup>

#### **4.2 Ignorance of Multiple Axes of Oppression**

The Hindu Right’s recent support for decriminalisation of sodomy draws from the reasoning that decriminalisation would be a ‘decolonizing’ move because it overturns a law externally imposed by Judeo-Christian morality. However, such claims of ‘decolonisation’ also demand scrutiny. As explained above, such claims are being supplemented by arguing that ancient Hinduism has always been tolerant of same-sex acts. A problem with such an invocation of the past is that it does not challenge the marginalisation of alternate sex, sexualities, caste, and genders and their intersectionality. In failing to challenge such marginalization, this invocation of the past serves to further it.

The traditionalist disapproval of non-normative desires is a corollary of the ideology of demonizing and stigmatizing *difference*, whether religious or sexual.<sup>75</sup> On the contrary, the queer subject’s agency is conditional upon a contestation of differences.<sup>76</sup> Group interests are not advocated for on the basis of likeness; instead, the dissent that sprouts from negotiating varying ethnicities, sexual orientations, genders, etc. pave a way for the alteration of the currently available

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<sup>72</sup> As above at 14

<sup>73</sup> Gee Imaan Semmalar, ‘Gender Outlawed: The Supreme Court Judgment on Third Gender and Its Implications’ *Round Table India* (online) 19 April 2014 <[https://roundtableindia.co.in/index.php?option=com\\_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications&catid=120:gender&Itemid=133](https://roundtableindia.co.in/index.php?option=com_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications&catid=120:gender&Itemid=133)> (last accessed 2 January 2022).

<sup>74</sup> Narayan above note 43 at 15.

<sup>75</sup> Narrain above note 1 at 157.

<sup>76</sup> Lisa C. Bower, ‘Queer Acts and the Politics of “Direct Address”’: Rethinking Law, Culture, and Community’ (1994) 28(5) *Law & Society Review* 1009.



forms of identity and their eventual acceptance.<sup>77</sup> However, in most revisionist accounts, which refer to ‘homophobia’ as Western, or ‘India’ being accepting of non-normative sex and gender, sexuality is being reduced to a single point of intersection, i.e. the nation. The intersection of sexuality with varying axes of oppression and privilege are effaced.<sup>78</sup> It ignores that contemporary Indian non-heteronormative sex and gender identities are constructed out of the varying effects of tradition, modernity, colonisation and globalization, which are usually in conflict with each other.<sup>79</sup>

In such revisionist accounts, which reductively trace non-normative sex and gender to ‘Indian tradition,’ there is a tendency to reduce ‘Indian’ to Hindu, wherein Hindu mythology is referred to as ‘Indian mythology,’ and Hindu gods and goddesses are referred to as Indian gods and goddesses.<sup>80</sup> This “Otherizing” of Sikhs and Muslims continues in the Hindutva framework, where Sikhs and Muslims are rendered as queerphobic, oppressive, and violent.<sup>81</sup> This is perhaps an addition to what Paola Bacchetta identified as ‘queerphobic xenophobia,’ which is a specific kind of xenophobia in which Others of the Hindu nation, especially Muslims, are viewed (often metaphorically) as queers.<sup>82</sup> This is most starkly visible in the assertion of police constables who believe that “unnatural sex,” of the kind earlier prohibited under Section 377, occurs amongst Muslims and Sikhs.<sup>83</sup> Thus, the Hindu nation’s queerphobia merges with xenophobia. But in the current political climate, where Hindutva discourse wants to show itself as tolerant, Muslims and Sikhs face the double charge of being queer as well as queerphobic.<sup>84</sup> This is similar to the popular discourse in United States wherein respectability is shored up for white homosexuals, against the ‘perversity’ of the nation’s racialized Others, i.e. Muslims.<sup>85</sup> At the same time, the nation is imagined

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<sup>77</sup> As above at 1011.

<sup>78</sup> Jasbir Puar, ‘Transnational Sexualities: South Asian (Trans)nation(alism)s and Queer Diasporas’ in David L. Eng and Alice Y. Hom (eds) *Q & A: Queer in Asian America* (Temple University Press 1998) 405 at 412.

<sup>79</sup> Rohit K Dasgupta, ‘Queer Sexuality: A Cultural Narrative of India’s Historical Archive’ (2011) 3(4) *Rupkatha Journal on Interdisciplinary Studies in Humanities* 651.

<sup>80</sup> Puar above note 78 at 412-414.

<sup>81</sup> Upadhyay above note 64 at 468.

<sup>82</sup> Bacchetta above note 15 at 143-144; Gyanendra Pandey, *The Construction of Communalism in Colonial North India* (Oxford University Press 1990) 201-232. Another example of this could be the narrative, popularised during partition, of the ‘hyper-sexuality’ of the Muslim man, acting as a sexual threat to Hindu women.

<sup>83</sup> Jyoti Puri, *Sexual States: Governance and the Struggle over the Antisodomy Law in India* (Duke University Press 2016) 81.

<sup>84</sup> The term ‘queerphobia’ has been used by both Paola Bacchetta and Nishant Upadhyaya.

<sup>85</sup> Jasbir Puar, ‘Homonationalism as Assemblage: Viral Travels, Affective Sexualities’ (2013) 4(2) *Jindal Global Law Review* 26;

as progressive in the context of queer rights and ‘gay marriage,’ while the figure of the Muslim migrant is constructed as one that drags these rights back.<sup>86</sup>

There are parallels between the Hindu Right’s invocation of the past and the analysis seen in the *Navtej Johar* decision, where references to the intersection of sexuality and caste are absent. In *Navtej Johar*, caste is mentioned to the limited extent of arguing that same sex relationships are analogous to inter-caste and inter-religious relationships, as both defy social conventions.<sup>87</sup> Caste hegemony is maintained by regulating caste respectability,<sup>88</sup> and in creating a discourse sanitised of caste, the battle for sexuality rights has not been shorn of respectability either. In *Navtej Johar*, respectability gushed in through the caste and class privileges of certain petitioners, while the voices of *dalit* sex workers and transgendered persons were not foregrounded in those petitions and they were asked to either tone down or leave.<sup>89</sup> Here, the disgust towards transgender or sex workers is the ‘disgust that respectability always reserves for the figure of the flaneur,’<sup>90</sup> Nevertheless, the articulation of the upper caste-class agenda is done off the backs of the subaltern image of the transgender Indian, who is adopted as a symbol of the movement, despite meagre reference in the judgment to the kind of police violence, harassment and extortion that transgender persons suffer.<sup>91</sup>

Ignoring intersectionality and viewing ‘homophobia’ and anti-sodomy laws through the single lens of the nation, by viewing homophobia as a ‘British’ import, also functions as a manoeuvre for postcolonial elites to evade their own responsibility in retaining such laws and continuing to stigmatise non-normative sex, even now.<sup>92</sup> The queer movement in India, however, continues to retain its upper-caste-class agenda and dismisses or suppresses references to caste in the public

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<sup>86</sup> See reference to Gloria Wekker’s theory of ‘homonostalgia’ cited in Jin Haritaworn, *Queer Lovers and Hateful Others: Regenerating Violent Times and Places* (Pluto Press 2015) 54. Wekker refers to homonostalgia as nostalgia for a white benevolent nation that is devoid of any homophobic people of colour.

<sup>87</sup> *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (Supreme Court of India).

<sup>88</sup> Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press 2009) 235.

<sup>89</sup> Dhiren Borisa, ‘Hopeful Rantings of a Dalit-Queer Person’ (2020) 1 *Jindal Law and Humanities Review* 91.

<sup>90</sup> Akhil Katyal, ‘No ‘Sexuality’ for All: Some Notes from India’ (2010) 2 *Polyvocia - SOAS Journal of Graduate Research* 21.

<sup>91</sup> Saptarshi Mandal, ‘Section 377: Whose Concerns Does the Judgment Address?’ (2018) 53(37) *EPW Engage* <<https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment>> (last accessed 26 August 2021).

<sup>92</sup> Rao above note 9 at 114-115.

sphere so as to produce a localised form of liberal politics.<sup>93</sup> Even when caste is mentioned, it is only viewed narrowly as a kind of primitivism best shed, an aspect that only messes up secular spaces.<sup>94</sup> At Pride marches in India, the anti-caste flag is viewed disdainfully, as a dilution of the agendas of gay suicides, adoption, etc., as if all of these remain isolated from caste vulnerabilities.<sup>95</sup>

In viewing ‘homophobia’ as a ‘British’ import, the flipside of the British ‘atoning’ for anti-sodomy laws also needs to be evaluated. Within such British discourse of atonement, there is an acknowledgment of guilt for the imposition of anti-sodomy laws.<sup>96</sup> However, at the same time, this guilt is automatically projected onto a historical self, which is seen as distinct from the contemporary United Kingdom by virtue of decolonization and United Kingdom’s own decriminalization of sodomy. Therefore, atonement is being done for actions that had been undertaken by an unrecognizable self, i.e., a past self. In this discourse of atonement, Britain’s own decriminalization of sodomy, which happened before it happened in many postcolonial nations, adds a sense of superiority and triumph, while at the same time deeming the postcolonial states as inferior and requiring of Britain’s ‘helping hand.’<sup>97</sup>

## **5.0 LIMITS OF ROOTING LEGITIMACY IN THE PAST**

Revisiting the past remains a conservative endeavour when it seeks to rediscover something that was present earlier, but is now absent. This conservativeness is increased when the spatiality of remembrance is restricted by the divisive lines of nation.<sup>98</sup> What if this past, that we revisit, cannot help us assert the need for contemporary legitimation of sexuality?<sup>99</sup> If any validation for a sexual

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<sup>93</sup> Radhika Radhakrishnan, ‘How does the Centre appear from the Margins? Queer Politics after Section 377’ (2019) 12(3) *NUJS Law Review* <<http://nujlawreview.org/wp-content/uploads/2020/01/12-3-4-Radhika-Radhakrishnan.pdf>> (last accessed 29 December 2021).

<sup>94</sup> Vivek Dhareshwar, ‘Caste and the Secular Self’ (1993) 25-26 *Journal of Arts and Ideas* 115.

<sup>95</sup> Borisa above note 89 at 94.

<sup>96</sup> Rao above note 9 at 110-118. Rao gives the example of how after British LGBT activist Peter Tatchell called upon the then British Prime Minister David Cameron to apologise for the homophobic prosecution inflicted by Britain on its colonies, Cameron responded by stating that financial aid given by Britain would be linked to respect for LGBT rights in the recipient countries. Rao writes that this again evinces the belief that the Western intervention is indispensable. Earlier, the intervention was in the nature of a ‘civilizing mission’, now this intervention is in the nature of an attempt to mitigate the damage caused by the erstwhile civilizing mission.

<sup>97</sup> Rao above note 9 at 118.

<sup>98</sup> Rao above note 9 at 23.

<sup>99</sup> Nayan Shah, ‘Sexuality, Identity, and the Uses of History’ in Rakesh Ratti (ed) *A Lotus of Another Color: An Unfolding of the South Asian Gay and Lesbian Experience* (Boston: Alyson Publications 1993) 113 at 121.

identity in the present is unequivocally contingent on that sexual identity's acceptance in the past, it would lead us nowhere. We come across a wide range of sexual acts across time and continents. How those acts culminated into a social identity, and the corresponding condemnation of that identity, is an outcome of historical and cultural conditioning.<sup>100</sup>

As argued above, the increased reliance on the past is accompanied by the assertion that 'homophobia is Western', and an imposition on the otherwise tolerant Indian culture. However, it is significant to note that even in the assertion 'homophobia is Western,' multiple complicated underpinnings are present too. When one speaks of 'homophobia,' it rests on the presumption that 'homosexuality', a *specific sexual ontology*, exists. However, the singling out of a sexual conduct as 'homosexual' and its stigmatization is a construction of changing religious beliefs and an overhauling of morality, which, in turn, are an aftereffect of a constructed culture. Hence, if homophobia corresponds to a specific ontology of sexuality, i.e., homosexuality, it would not be able to encompass all the aversions towards non-normative sexual possibilities that existed in precolonial times before the term 'homosexual' itself came into existence. If we look back at the ancient same-sex acts, it would be incorrect to conclude that those engaging in those acts identified as *homosexuals*.<sup>101</sup> Thus, Section 377 had nothing to do with the 'homosexual,' a term which had not even been coined when Macaulay drafted the Indian Penal Code. Section 377 only envisaged a sodomite, a man with wayward sexual morality and preferences.<sup>102</sup> Baset writes:

A sodomite indulges in sexual acts that invite religious condemnation and legal proscription whereas a 'homosexual' is a person with an aberrant sexual identity. Sodomy connotes acts of transgression whereas the homosexual is constituted with a transgressive subjectivity.<sup>103</sup>

Hence, as the U.S. Supreme Court reiterated in *Lawrence v. Texas*,<sup>104</sup> the modern terms of 'homosexuality' and 'heterosexuality' cannot apply to an era that had not enunciated these

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<sup>100</sup> Lisa Duggan, 'Queering the State' (1994) 39 *Social Text* 1.

<sup>101</sup> Shamus Khan, 'Not born this way', *AEON* (online) 23 July 2015 <<https://aeon.co/essays/why-should-gay-rights-depend-on-being-born-this-way>> (last accessed 2 January 2022).

<sup>102</sup> Zaid Al Baset, 'Section 377 and the Myth of Heterosexuality' (2013) 4(1) *Jindal Global Law Review* 89.

<sup>103</sup> As above at 95.

<sup>104</sup> *Lawrence v Texas*, 539 U.S. 558 (2003) (US Supreme Court).

distinctions to begin with. This is not to say that the ancient laws and beliefs always approved of acts now perceived as ‘homosexual,’ but only that earlier such acts were not thought of as discrete from similar acts by opposite-sex couples.<sup>105</sup>

The legal system works on the assumption that one’s sexual orientation—homosexual, heterosexual, bisexual—remains fixed, to be signified by one’s choice of sexual partner. However, in some cultures, same-sex desire can simply be a matter of *conduct*, and not *identity*.<sup>106</sup> Hence, the conflation of sexual conduct, sexual orientation and sexual identity that the Western legal thought presumes can simply collapse when seen in a cross-cultural framework.<sup>107</sup> Therefore, expressions of sexual desire for members of the same-sex is not necessarily a marker of homosexual identity. Such desires do not correspond to any specific juridical subject, and hence, no ‘homosexuality’ or ‘homophobia’ per se could have existed in the past before such terms even came into existence.<sup>108</sup>

When we project the sexual identities of the present (like ‘homosexual,’ ‘gay,’ ‘lesbian,’ etc.) onto the past, it can also have the effect of constraining the radical potentialities of the past itself. This idea is exemplified by Ismat Chughtai’s short story *Lihaf* (‘The Quilt’),<sup>109</sup> originally written in Urdu around 1940. *Lihaf* is frequently posited as an example of a text from the past containing undercurrents of same-sex desire in the subcontinent. *Lihaf*’s conceptualization of female homoerotic desire counters the colonial construction of Indian women through the single lens of oppression. Further, it challenges the extant category of “lesbian” that is usually used to define female homoeroticism.<sup>110</sup> The story limns a child’s take on something she cannot fully comprehend. Two characters in the story, Begum Jan and her domestic help Rabbo, are narrated doing *something* underneath a quilt, but the child narrator doesn’t understand what. The female desire and pleasure

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<sup>105</sup> *Lawrence v Texas*, 539 U.S. 558 (2003) (US Supreme Court).

<sup>106</sup> Sonia Katyal, ‘Exploring Identity’ (2002) 14 *Yale Journal of Law and Feminism*, Vol. 14 (2002) 97.

<sup>107</sup> As above at 100.

<sup>108</sup> Dutta above note 18 at 167.

<sup>109</sup> Ismat Chughtai, ‘Lihaaf’ (M. Asaduddin trans.) *Manushi* (online)

<[https://archive.org/stream/LihaafTheQuiltIsmatChughtai/Lihaaf%20%5BThe%20Quilt%5D%20-%20Ismat%20Chughtai\\_djvu.txt](https://archive.org/stream/LihaafTheQuiltIsmatChughtai/Lihaaf%20%5BThe%20Quilt%5D%20-%20Ismat%20Chughtai_djvu.txt)> (last accessed 27 October 2022).

<sup>110</sup> Gopinath above note 44 at 144.

in *Lihaf* is sketched through devouring of food, not only literally, but also metaphorically.<sup>111</sup> The child narrator recalls the rustle underneath the quilt as “the sounds of a cat slobbering in the saucer.”<sup>112</sup> The text’s unwillingness to utter the precise truth of “sex” is what permitted it to circumvent the obscenity laws of the time. According to Chughtai,

The obscenity law prohibited the use of four letter words. *Lihaf* does not contain any such words. In those days, the word ‘lesbianism’ was not in use. I did not know exactly what it was. I knew no more at that time than the child knew. My lawyer argued that the story could be understood only by those who already had some knowledge. I won the case.<sup>113</sup>

When sex in any form is compelled to non-existence and silence, even speaking about it becomes an act of transgression, and the person who speaks so destabilises law.<sup>114</sup> Chughtai’s emphasis on “not knowing” became a strategy of *disarticulation*. It paved the way for female homoeroticism to dodge the law, which only operates through compartmentalization and enumeration.<sup>115</sup> *Lihaf* lays out the intricate sexual subjectivities which cannot be seen through the lens of a strict ‘gay’ or ‘lesbian’ reading.<sup>116</sup> Hence, had *Lihaf* been seen through the singular lens of the now entrenched lesbian identity, it would have restricted the story’s full charge. Lisa Bower, similarly, frames it as *articulation of “non-identity.”*<sup>117</sup> Legal rules are phrased in a manner which gives the impression that those rules are detached, that they transcend the specificities of any particular case.<sup>118</sup> To neutrally apply those rules to future cases, the law must determine *a priori* a definitive list of differences and commonalities between groups. Hence, when a sexual subject stands before the law, they, too, are assessed on the scale of these pre-determined differences and commonalities, forcing their categorization. However, when the legal discourse’s definitions and categories meet sexual subjects who cannot be captured by those definitions and categories, it can

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<sup>111</sup> Gopinath above note 44 at 147.

<sup>112</sup> Chughtai above note 109.

<sup>113</sup> Ismat Chughtai’s interview, in Gopinath above note 44 at 151.

<sup>114</sup> Michel Foucault, *The History of Sexuality Volume 1: An Introduction* (Random House 1978) 6.

<sup>115</sup> Gopinath above note 44 at 151.

<sup>116</sup> Ratna Kapur, ‘De-radicalising the rights claims of sexual subalterns through tolerance’ in Robert Lecky and Kim Brooks (eds) *Queer Theory: Law, Culture, Empire* (Routledge 2010) 37 at 38.

<sup>117</sup> Bower above note 76 at 1029.

<sup>118</sup> Ann C. Scales, ‘The Emergence of Feminist Jurisprudence: An Essay’ (1986) 95(7) *Yale Law Journal* 1377.

force a reassessment of law's narrow thinking, can accentuate the interpretive nature of law.<sup>119</sup> Thus, the uneasiness between legal definitions of sexual identities and persons whose difference always exceeds those definitions can lead to a reevaluation of binary thinking.<sup>120</sup>

## 6.0 CONCLUSION: LOOKING TOWARDS A HORIZON OF POSSIBILITIES

In this article, I have argued that there are many pitfalls to rooting legitimacy of non-normative sex and gender in the past. This manoeuvre becomes a way for more conservative groups to subsume the cause of sex rights. Further, it provides leeway for postcolonial elites to evade their own responsibility in stigmatizing sexual and gender minorities. This article also argues that the move to root legitimacy in the past is restrictive because it tends to project sexual identities of the present onto the past.

However, the inadequacy of relying on the past does not play out only in relation to sexual identities. If we speak of 'queerness' as a *positionality* vis-à-vis the *normative* and as a horizon of possibility,<sup>121</sup> we cannot limit our analysis to compartmentalised identities. On the contrary, we must always question our very understanding of gender and sexual categories and open new spaces, which transcend any fixed sexual identity.<sup>122</sup> The opening up of new spaces cannot take place when we look at the past as a vantage point. Nayan Shah writes, 'While the project of reclaiming and reconstructing the past is critical for our present struggles, let us not read too much of "us" today into our past. We may trap ourselves in the need of a history to sanction our existence.'<sup>123</sup> Hence, when a possibility, whose contours have not yet been drawn, is our aspiration, any kind of validation through the past alone is absurd. If the recourse, however, is to validate only those subcategories of 'queer' which have garnered acceptance in the past, then our methodology would not be to challenge systems of exclusion, but to only ensure that we do not end up on the unfavourable side of them.<sup>124</sup>

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<sup>119</sup> Bower above note 76 at 1029.

<sup>120</sup> Bower above note 76 at 1029.

<sup>121</sup> David Halperin, *Saint Foucault* (Oxford University Press 1995) 62.

<sup>122</sup> Alexander Doty, *Making Things Perfectly Queer: Interpreting Mass Culture* (University of Minnesota Press 1993) xvii.

<sup>123</sup> Shah above note 99.

<sup>124</sup> Gautam Bhan, 'Challenging the Limits of Law: A Queer Perspective' in Arvind Narrain and Gautam Bhan (eds) *Because I Have a Voice: Queer Politics in India* (Yoda Press 2005) 38 at 43.

Therefore, the past cannot exhaust descriptions of human ‘sexualness,’ i.e. expressions of desire and idioms of behaviour that *exceed* the framework of ‘sexuality.’<sup>125</sup> People can rely on multiple idioms (which are constantly changing) at the same time to refer to themselves and their desires.<sup>126</sup> The shaping of these idioms depends heavily on the regional context as well.<sup>127</sup> And most importantly, these idioms might not have anything to do with one’s ‘sexuality’ or ‘personhood.’<sup>128</sup> ‘Sexuality,’ most often, is used to refer to something that is inside a person that defines their identity, and something that can be categorised. Sexuality as a concept enables people to connect their desires to their ‘selves.’<sup>129</sup>

Akhil Katyal gives an example that disrupts this relationship between sexual acts and sexuality. The Hindi term *loundebaaz* refers to sex between men within an idiom of *habit*. This is not the same as the category ‘homosexual’ or any other aspect of ‘sexuality.’ He adds:

...you might have an addictive love of stamps, but no excessive coming-out stories were ever written about it. This love was never accounted for or traced back to the hoary rhythms of your childhood, never considered an attribute of your unconscious and, no etiology was ever consciously produced for it as it has been done by Freud for same-sex desire.<sup>130</sup>

However, this does not mean that by using a culturally specific term (instead of ‘gay’ or ‘lesbian’ or ‘homosexual’), the drawbacks of this identity construct can be remedied. As I have previously argued, the usage of a culturally specific identarian term still leads to an assertion of one’s sexual *orientation* or gender, which are used to refer to something *inside* a person and very much a part of one’s own identity.<sup>131</sup> However, Katyal is referring to cases in which the *constitution* of the self may be conceived as entirely separate from one’s sexual activities.

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<sup>125</sup> akshay khanna, *Sexualness* (New Delhi: New Text 2016) 12.

<sup>126</sup> Katyal above note 90 at 21.

<sup>127</sup> Paul Boyce, ‘Moral Ambivalence and Irregular Practices: Contextualizing Male-to-Male Sexualities in Calcutta/India’ (2006) 83 *Feminist Review* 79.

<sup>128</sup> khanna above note 40 at 167.

<sup>129</sup> khanna above note 40 at 163.

<sup>130</sup> Katyal above note 90 at 21.

<sup>131</sup> Author, ‘Human Rights as a Metric of Progress’ (unpublished manuscript, draft available on request).



Another example is that of *masti*, meaning ‘fun’ or even ‘intoxication.’ It refers to sex, flirting and sexual ‘play’ among boys in certain parts of the country.<sup>132</sup> What this idiom echoes is that sex is about *mazaa/masti*, i.e. enjoyment or pleasure. In this, the ‘sex’ of the person one chooses to have sex with is not the defining characteristic of the experience. Most importantly, this idiom does not necessarily adjudicate upon ideas of personhood.<sup>133</sup> However, such idioms of sexualness ought not to be seen as mere remnants of the pre-modern that are soon to be displaced by the ontologies of the modern. khanna relies on Partha Chatterjee to argue that these idioms are “new products of the encounter with modernity itself.”<sup>134</sup> Therefore, ‘sexuality’ and ‘sexualness’ are not to be in a relationship of chronology whereby one precedes the other, but in a relationship of simultaneity.<sup>135</sup>

Problematizing identity this way is not to be seen as the exclusive domain of progressive politics, nor should it be seen as a technique to avoid any kind of gay/lesbian/queer activism itself.<sup>136</sup> It is not the condescending progressivism that is of relevance, but the critical insight that can be valuable even beyond the restricting rhetoric of liberal gay rights.<sup>137</sup> The shift away from emphasis on identity can foreground, as Scott Long writes, new solidarities:

...a qualified common ground, in which LGBT activists can actually cooperate with embattled Muslims against police misconduct and policies of repression. After all, a dress code that can be used against a woman in *niqab* can target a drag queen next. Failing to recognise such potential understanding is not only a lapse of imagination; it is a collapse of politics – a failure to be political, to think beyond identity into possibility.<sup>138</sup>

It is now a question of establishing new relations. Thus, we need to unsettle queer historical analysis, which relies on the past for an evidencing protocol. Such evidencing protocols only confine themselves to reinstating what is already known. They begin with a knowledge of what they *want* to

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<sup>132</sup> khanna above note 40 at 163.

<sup>133</sup> khanna above note 40 at 163.

<sup>134</sup> Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (New Delhi: Permanent Black 2004) 7.

<sup>135</sup> khanna above note 125 at 351.

<sup>136</sup> Paul Boyce and Rohit K. Dasgupta, ‘Alternating Sexualities Sociology and Queer Critiques in India’ in Sanjay Srivastava, Yasmeen Arif and Janaki Abraham (eds) *Critical Themes in Indian Sociology* (Sage 2019) 330 at 336.

<sup>137</sup> Duggan above note 100 at 5.

<sup>138</sup> Scott Long, ‘Unbearable witness: how Western activists (mis)recognise sexuality in Iran’ (2009) 15(1) *Contemporary Politics* 119.

find and find just that.<sup>139</sup> This selective culling out from the past that only prioritizes retrieval can also have the effect of foreclosing political imagination.<sup>140</sup> Hence, let us imagine ‘queerness’ as a utopian formation that is intermingled with economies of desire. This desire, however, is always to be projected at something ‘that is not yet here,’ always animating objects and moments with anticipation and promise.<sup>141</sup> Even when one grasps the past, it should not lead to stasis. Even when one interrogates what preceded us, it should not foreclose the possibilities of the future.

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<sup>139</sup> Arondekar above note 22 at 171-175.

<sup>140</sup> José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York University Press 2019) 27.

<sup>141</sup> As above at 28-29.