

**UNRULY DESIRES, GAY GOVERNANCE, AND THE MAKEOVER OF SEXUALITY IN POSTCOLONIAL INDIA.\*\***

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This chapter analyses whether queer desire has been liberated from the postcolonial closet and, if so, how the processes of the market and law have combined to bring about the emergence and legibility of queer desire and the understandings of justice that inform such processes. I question whether these processes have produced an unequivocal victory in terms of bringing justice to highly stigmatized identities and the practices associated with them. I unpack how the effects of either a victory in the courtroom or greater visibility in and through the market result in instantiating queer desire into a linear, regulatory framework - designed to cabin and confine, rather than to liberate or emancipate. Justice is equivalent to nothing more than restraining homosexuals to the borders of heteronormativity. This restraint is partly produced in and through the discourse of tolerance in law combined with the makeover of homosexuality produced in and through the consumptive market.

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The contemporary moment in queer activism in postcolonial India is marked by two contradictory events. The first is the 2009 historic victory in the Naz Foundation decision where the Delhi High Court decided to read down the provisions of section 377 of the Indian Penal

Code, 1860, that criminalises sodomy, holding that it was inapplicable to consensual adult sexual relationships.<sup>1</sup> There was jubilation in the courtroom and celebration in the streets. In the days following the High Court's pronouncement, gays and lesbians around India openly declared their sexuality and interpreted the victory as enabling marriage. Couples began to take vows and exchange garlands in a ritual that marked their passage into acceptance and legitimacy.

At one level there seemed little to critique about the decision – homosexuality was finally out of the closet. However, within a short period various social and religious conservative groups expressed disapproval and disappointment over the decision. And some filed an appeal against the decision to the Supreme Court of India, arguing that the High Court's verdict eroded Indian cultural values and undermined governing sexual norms that are tethered to the very identity of the Indian nation (Kapur, 2005; Chatterjee, 1989; Mondal, 2002). In December 2013, the Supreme Court reversed the High Court decision, holding that not only was there insufficient evidence that the provision was used to target homosexuals, but that the community constituted a “miniscule fraction” of the population, implicitly suggesting that it was therefore either undeserving of constitutional protection or serious consideration given the small number of prosecutions under the provision. The constant references to “unnatural sex” and “unnatural means” in reference to sex scattered throughout the decision that was producing in the court's words a “sexual crisis”, reveals the normative assumptions about sex and sexuality on which the decision was based. The Court held that any change in the law was to be brought about by Parliament and not the courts. In the process, the Court re-criminalised homosexuals, putting a powerful tool of discrimination back into the hands of the law enforcement agencies. The precariousness of unruly desires is reflected in this process of re-criminalisation by the judiciary, where a liveable life is one that includes legal recognition and the juridical entitlements that flow from such recognition (Butler, 2004; 2009). However, outside the courtroom battles, representations of queer sexuality have continued to proliferate – in academic scholarship and public debates; in cinema; on the streets and in popular culture.

The varied responses to unruly desires have compelled a deeper interrogation of understandings of justice. Is the legal domain the primary site through which justice can be secured? What role do non-legal sites such as the market, family, culture and religion play in the pursuit of justice? How do we know whether the justice sought has been secured: through the acquisition of rights? Social and cultural recognition and acceptability? Participation in the market as legitimate consumer subjects? Is normative acquiescence a primary condition for securing justice? How does normative sexuality operate to produce a hierarchy of citizens – those who belong and those who do not, or who are designated as lesser citizens entitled to few rights and denied access to justice? (Cossman, 2010; Bell and Binnie, 2005). Does justice rest in excavating normative sexuality and unmasking its exclusionary boundaries and fixed understandings of male/female, masculine/feminine, against which it operates? The celebration following the 2009 Naz Foundation judgment contrasted with the displays of anguish and disappointment after the 2013 reversal, seemed to acknowledge the law as emblematic of justice for sexual minorities. Yet what exactly was “won” or “lost” remains contested.

The opening up of the market in postcolonial India has witnessed a proliferation of sexual representations in celluloid and the public space. Representation in and through the market may be offering one of a number of competing sites for securing justice that sits in contrast to the one offered in and through law. But the move towards the market has its risks. In the search for greater public displays of non-normative sexuality and sexual identities comes the pull away from the state, greater reliance on self-governance and responsibility, together with a de-politicization and privatization of non-normative sexualities. As Jamila Mascat argues in this collection, consumption and commodification of the sexual and racial “other” may lead to the disempowerment of the erotic. Gays and lesbians are moving towards a new normativity that is not necessarily disruptive or transformative, nor is it generative of a counter-public sphere.

The story of sexuality in contemporary India needs to be framed within the logic of the colonial encounter and contemporary economic processes. I discuss how this framing helps in understanding the issue of homosexuality within a postcolonial context, namely India, and the

tensions produced in the area of queer desire between the potentially liberating influences of the market in the public arena and the continued constraints imposed by dominant cultural, sexual, and familial norms that inform the legal regulation of sexual subjectivity. The modern state has its antecedents in the colonial encounter, which was not structurally designed to secure justice for the colonial subject, but to govern the subject in a specific way (Haldar, 2007:1-17). Its civilizing zeal was tied to a notion of justice that was linked to the capacity to reason and civilizational maturity that complied with a Eurocentric understanding of the rational subject (Mehta, 1999; Goswami, 2004).

This chapter analyses whether queer desire has been liberated from the postcolonial closet and, if so, how the processes of the market and law have been implicated in bringing about the emergence and legibility of queer desire. I explore the understanding of justice that informs such processes and how these processes have produced equivocal victories in terms of bringing justice to highly stigmatized identities and the practices associated with them. While the re-criminalisation of homosexuality exposes the precariousness of the sexual subject and unruly desires, I discuss how either a victory in the courtroom or greater visibility in and through the market are results that cannot necessarily be understood within the discourse of emancipation or liberation. They have resulted in instantiating queer desire into a linear, regulatory framework - designed to cabin and confine, rather than to liberate or emancipate. In both instances, justice operates to restrain homosexuals to the borders of heteronormativity. This restraint is partly produced in and through the discourse of tolerance in law combined with the makeover of homosexuality produced in and through the consumptive market.

This essay is divided into three parts. In the first part, I briefly set out the various discursive framings of counter-heteronormative unruly desires in postcolonial India, through a distinct set of terms: LGBT, queer, and sexual subaltern. The discussion sets out some of the conceptual tangles encountered in discussions about desire through the terminology and argues in favour of the adoption of more critical framings for the purposes of conceptual clarity and pursuing the subversive possibilities of unruly desires. In the second part, I briefly discuss the

proliferation of homoerotic imagery, sexual representations, and sex talk that has occurred with the opening up of the market as well as the various legal challenges pursued in and through counter-heteronormative desire in postcolonial India ( John 2008: 560-566; Vanita and Kidwai 2000; Bose and Bhattacharyya 2007). I argue that these processes at one level provide a liberating moment for the emergence of queer sexualities, while at another level operate to contain and confine such desires within governing norms. In the third part of the paper I draw attention to some of the contradictory results produced in the sexual subjects' engagements with the market and law. I argue that the market with its focus on self-governance and responsibility, and the focus on tolerance in legal advocacy, as well as the ever present fear of re-recriminalisation combine to regulate and discipline rather than liberate sexual desire or bring about justice in terms of securing legibility on the same terms as non-queers. While the possibility of full legibility continues to exist, it can only be achieved through what Lisa Duggan has described as the new homonormativity (2002: 179). According to Duggan, this possibility is secured through compliance with heteronormative assumptions and institutions, and participation in the market as consumers. The result is the de-politicization, privatisation and domestication of the gay constituency, rather than the production of a transformative understanding of justice (Bell and Binnie, 2004; Halberstam, 2005).

### **LGBT, SEXUAL SUBALTERNS, OR QUEER DESIRE**

A distinct set of terms has framed contemporary debates on non-normative sexualities: LGBT, queer, and sexual subaltern. In this section, I argue how the terms adopted are implicitly linked to a particular vision of justice. During the course of the 1980s and 90s there was a good deal of writing on homosexuality mostly in the form of anthologies, memoirs and fictions designed to validate the existence of lesbians and gays in Indian history and Indian culture through the mode of excavation (Rati 1993; Vanita, 2002; Sukthankar 1999; Pattanaik 2002).<sup>2</sup> Ensuring that homosexuality emerged as legitimate, familiar, and respectable required excavation work and a tracing of this subject in some long lost ancient Indian cultural past. The

work of Ruth Vanita and Salim Kidwai was foremost in locating lesbian and gay identity within the historical context of India drawing on what they describe as a 2000 year old tradition of homosexuality. The authors consciously chose not to deploy the term queer in their work because it was too wide, including behaviour ‘from fetishism to exhibitionism,’ and also associated with unconventional or strange sexual behaviour (Vanita and Kidwai 2001:xxi). Their work focused on identity and the recuperation of lesbian and gay identities within the context of Indian culture as something that was admirable and respectable.

A central underlying impulse informing the mode of cultural excavations of same-sex desire in India is the effort to disassociate or delink homosexuality from its western moorings and to situate it within the national and historical consciousness of postcolonial India (Puri 1999: 176-183). Homosexuality is not a western contaminant, but the phobias associated with homosexuality are western imports introduced through legal codes and medical texts as well as a Victorian sensibility (Puri 1999:184). This mode of recovery is located within a heterosexual/homosexual binary, and seeks to recuperate a distinct homosexual voice within the historical narrative of the Indian nation.

However, in the contemporary moment a politics and scholarship based on the mode of recovery is confronted with the challenge of hegemonic Euro-American signifiers for same sex love/non-heterosexual desire that are fast becoming the prescribed blueprint across the world. Massad refers to this move as the production of the “gay international” (Massad 2002:361). The prescriptive gay subject is based on a specific assumption including the idea that this subject exists in opposition to heterosexuality and that the fulfilment of same-sex desire and identity can be found through public visibility and a departure from the heteronormative structures and the patriarchal institutions of the family. This powerful articulation of the end goals of same-sex desire marginalises and de-legitimises other articulations and subjectivities in non-Euro American contexts (Rao, 2011:43-66). The ultimate performance of this identity rests in an 'out of the closet' LGBT identity pursued by LGBT human rights advocates that is prescribed as the antidote for all Third World settings. A strategy based on the recovery of same-sex desire is not

necessarily up to the task of countering the newly emerging hegemonic, colonising queer. Its quest for a gay subject may serve to legitimate homosexual identity within the national narrative. While this perspective is culturally positioned against Eurocentricism, it is unable to distinguish itself from the prescriptive gay international that is framing the conversation on same sex desire in the international legal arena. It is both distinct and not.

The term 'sexual subaltern' seeks to capture understandings of counter-heteronormative desire in a postcolonial context (Kapur 2005:20-28). The subaltern is a theoretical device derived from subaltern studies, which is a particular form of historiography that has emerged in South Asia, and gives voice to those who have been left outside of historical narratives produced by colonial or nationalist writers (Sarkar 1997:82-108; Guha 1982). The project, as it emerged in India, was initially based on the position and location of the subaltern subject and of writing history from below (Guha 1982: vii–viii; Sarkar 1985). In the 1980s a new focus sought to challenge all traditions and disciplines defined within the logic and rationale of the Enlightenment project, including unmasking the universal subject of liberal rights discourse (Chakrabarty and Bhabha 2002; Chakrabarty 1995; O'Hanon, 2000; Mignolo 2000; Bhabha 1994: 171–97).

The term sexual subaltern as situated within this later tradition is intended to bring together the disparate range of sexual minorities within postcolonial India without suggesting that it is either a homogenised or stable category. The term is at one level intended to capture the extraordinary range and diversity of the counter-heteronormative movement in India, which includes a vast array of non-lgbt sexual identities: *kush*, queer, *hijra*, *kothis*, *panthis*, and many more (Sherry 2005; Khan 2001). It also includes sexual practices and behaviours such as adult and consensual pre-marital, extra-marital, non-marital, auto-erotic/masturbatory, promiscuous, and paid-for sex, as well as msm (men who have sex with men). This fluidity and diversity of identities and practices cannot be captured within the LGBT (lesbian, gay, bisexual, transgender) framework based on fixed and essentialised identities. The sexual subaltern performs a

normatively disruptive role and brings into crisis the architecture of normalized and naturalized sexuality, exposing its contingency in a postcolonial context.

Similarly, the term 'queer', which has its origins primarily in western scholarship, has been used in a number of complex and contradictory ways (Sedgwick, 1990; Butler 1990; Rubin 1993:3-44).<sup>3</sup> Its use has become increasingly visible and prominent in legal advocacy as well as in a number of postcolonial scholarly and theoretical texts. In India, there is no consistent meaning ascribed to the term queer. For example, Narain and Gupta present an argument for recovering 'queer' voices from a putatively more tolerant pre-colonial era when it was ostensibly not subject to official disciplinary regulation. They deploy the term interchangeably with LGBT, which is associated with fixed notions of identity (Narain and Gupta 2011:xi-lvi; Narain 2011: 253-257). At the same time, these scholars also invoke the term queer in ways that are intended to perform a more critical function - through queer intersections - where queer aligns with other excluded subaltern voices (Narain and Bhan 2005:3-6; Narain , 2011:1-25, at 15-17,21-22). Queer is thus delinked from the subject and is viewed in practices that seek out alternative ways of living, without subjectivity being expressive of an internal preference or orientation, or a political program that advocates on how to live (Sedgwick,1993;Giffney, 2004). The critical capacities of queer have relevance within a postcolonial context as its critical guise is closely aligned with postcolonial theory and the subaltern project. It is the critical features of queer as a politics of love transgressing social norms and dominant heteronormativity that inscribes it with disruptive and transformative possibilities.

The critical capacities of the terms 'sexual subaltern' and 'queer' reflect a rejection of the mode of 'recovery' or excavation' in the literature. As a number of scholars have argued, the mode of recovery fails to engage with the complexities of nationalist as well as the neo-colonizing moves that enact erasure of same-sex desire in the postcolonial context. Arondekar's work on the search for the voice of the sexual subject in the official archives argues that such retrieval is impossible (Arondekar, 2009). Gayatri Gopinath also dislodges the fixed, prescriptive understandings of same-sex desire using a 'queer diaspora' framework and her specific focus on



queer female diasporic subjectivity in popular culture (Gopinath, 2005:6-7). She deploys queer to disrupt homonormative imaginings and prescriptions of same sex desire or the 'Rainbow Flag' worldview, which erase possibilities of understanding the relationship between the diaspora, nationalism, and the processes of transnational capitalism. She illustrates how such formations are both capable of migrating and pollinating other cultural spaces in ways that do not fit within a homosexual/heterosexual, male/female binary and an uninterrogated, identity-centered LGBT politics.

Similarly, Jasbir Puar's work also complicates the deployment of queer in relation to assemblages as opposed to binaries or excavations. Puar tracks how queer can be deployed in ways that are complicit in dominant formations of sexuality (Puar 2010:121-122). She proposes the term queer assemblages, both hetonormative and homonormative, for analysing the indoctrination of the sexual subject into the belief in the superiority and exceptionalism of the US as a nation and a culture. Puar moves away from understanding the construction of postcolonial sexual subjectivities as based on a thesis of sexual repression versus sexual liberation.

The work of these scholars mark important interventions in how queer has been and can be deployed in a critical manner in a postcolonial context. They trace the ways in which the techniques of gender and sexuality operate within the matrix of power arrangements and use a queer lens to understand the work that is being done by these techniques. In the remainder of this paper I use the terms queer and sexual subaltern in their critical guises. These terms offer possibilities for framing desire in ways that are provocative and disruptive, while also complicating our understandings of justice beyond a pursuit of more law and more rights for sexual minorities.

### **REPRESENTING UNRULY DESIRES**

Within postcolonial India sexuality and sexual desire have also always been a site of cultural contests. Culture and sexuality have both been sutured together as a result of the colonial encounter. In the 19th century, nationalists safeguarded women's sexual purity and confined it to

the home, opposing any attempts by the colonial power to intervene in this space. The home and women's sexuality represented the purity of Indian culture and was constitutive of the emerging Indian nation (Chatterjee 1989:233-253; Mani 1989:117-148; Sarkar 1997). This backdrop informs the contemporary controversies and explains why sexual controversies invariably also erupt as cultural controversies.

In the 1990s, as India began pursuing a package of neo-liberal reforms to become a global player, there was heightened anxiety over the emerging and proliferating discourses of sexual desire and agency that implicated the very identity of the Indian nation and its distinction from the West. The Hindu nationalists, who seek to reconstitute India as a Hindu State, routinely attacked heterosexual couples celebrating Valentine's Day or stores selling Valentine's Day cards for being western contaminants. Police raided the new culture of cyber cafes for clients surfing for pornography, or routinely launched 'clean up' operations in parks visited by heterosexual couples in large urban centres as well as to harass gays. There were attacks against public displays of affection and celluloid representations of the 'kiss' sequence, (which has displaced the wedding as the climactic moment in Bollywood cinema) as well as increased surveillance of female sexual conduct in public (India Today: 30 January 2009; Times of India: 3 February 2009). The Hindu nationalists, key players in the movement to purge India and Indians of sexual agency and sex talk, are intent on degrading sexuality and banishing any overt expression of it outside the model of the good Hindu wife and heteronormative arrangements. In the process, it has projected outward expressions of this degraded sexuality onto its 'Others', such as Muslims, sex workers, migrants and homosexuals (Bacchetta 1999). And it has used the legal provisions of obscenity, and the constitutional restriction on the right to free speech and expression that involves offending public morality to pursue their agenda.

Sex per se invites cries of 'Indian culture being in danger or under threat of extinction' especially when it comes to women. One well-known example involved the public controversy in 1998 over the diasporic film *Fire*, which rendered same sex desire intelligible through the performance of queer femininity between two women married to two utterly resistible and

undesirable men in the postcolonial domestic space (Gopinath 2005: 155). The film cleared the Censor Board without any cuts, but the mobs of the Hindu Right disrupted screenings in a number of major cities in India through an alarming destruction to the property of cinema houses where the film was screened as well as attacks against members of the viewing audiences.<sup>4</sup> Despite judicial intervention, many cinemas did not subsequently screen the film for fear of inviting further destruction to their property or harm to their patrons.

Celluloid and popular culture remain an important site on which queer desire has emerged to challenge some of the dominant sexual, familial, cultural norms that have defined the borders of sexual legitimacy as well as to counter some of the state and non-state efforts that seek to confine or censor alternative sexual expression and representations. Some serious representations include *My Brother Nikhil* (2005), a small budget film sympathetically depicting the discrimination and homophobia experienced by an HIV patient in contemporary Indian society as well as *PhirMilenge* (We Will Meet Again), a 2004 Bollywood portrayal of a single woman who contracts HIV after a one night stand of unprotected sex.

In 2008 the Bollywood blockbuster *Dostana* (Male friendship) pulled gay sexuality from its erratic margins, and served up a full frontal gay performance. We witnessed the makeover of two of the hottest superstars in Bollywood cinema – Abhishek Bachchan and John Abraham - into the most unlikely 'queer folk'. In the film, Sameer and Kunal, two straight guys present themselves as a gay couple in order to secure a lease in a penthouse apartment in downtown Miami, which they share with a hot, ambitious and high-powered editor of a glossy high end fashion magazine – Neha, played by Priyanka Chopra, who oozes the confident sexuality of the 'desi (Indian) girl' or the 'new Indian woman' in the global market. They also learn that their gay façade makes them eligible to be fast-tracked through the US immigration process and claim that ever coveted green card. Through a series of twists, this queering of the Bollywood hunks receives its ultimate seal of approval from Ama, Sameer's mother, who after much hand wringing expressed in the song 'Mama's boy has gotten spoilt', blesses the relationship in a Hindu wedding choreographed through one of Bollywood's signature song and dance sequences.

While inclusion and assimilation appeared to be the end goal for the two superstars, the pursuit of these goals involves a complete makeover of heterosexuality during the course of the film.

Throughout the film the two actors are on the frontlines of defending masculinity. Beef and brawn are on display for the heroine and no doubt also for the spectator, male and female. These men are not sexual strangers in this celluloid universe. Their sexuality is centred on screen, as familiar, loveable, and even desirable. Ultimately they are forced to confess their betrayal and reveal their 'true' sexuality credentials to Neha. She forgives them only after they perform a very public thirty-second lip-locking kiss sequence with one another. The film closes with a pleasurable recollection of the kiss by both heroes putting into question the certainty of their heterosexual status.

The explosion in sexual imagery has been accompanied by a simultaneous proliferation of rights talk in favour of greater sexual expression in public, as well as recognition of more heterogeneous sexual identities. In 2009 the Delhi High Court stayed criminal proceedings against a young married heterosexual couple charged with criminal obscenity for kissing in public holding that such conduct amounted to nothing more than an 'expression of love' (Garg 2009). Attacks by right wing activists on women drinking in bars gave rise to an internet driven pink *chaddi* (underwear) campaign, calling on women of all ages, class, religious and sexual dispositions to inundate the headquarters of the Hindu Right with pink underwear (Kapur, 2012).<sup>5</sup> Transgendered persons have successfully lobbied some regional state governments to include the category of 'other' on official forms requiring applicants to state their sex. And in 2009, gay and lesbian groups successfully challenged the scope of Section 377 which criminalised sodomy, limiting its application only to non-consensual sex.<sup>6</sup> While the Supreme Court reversal of the 2009 decision has diminished the space for sexual subalterns by continuing to subject them to the surveillance mechanisms of the criminal law, the intellectual, cultural and representational spaces continue to proliferate.

These moments have shifted the goal posts on what constitutes good sex and bad sex, legitimate and illegitimate desire (Rubin 1993:3-44). Eroticism and unruly desires are claiming a

space in law, celluloid and on the streets, and efforts to eliminate or incarcerate these are being seriously challenged as violations of human rights. The question is whether sexual subalterns in India are getting closer to realising the promise of justice – a goal that seemed unrealisable only a decade ago? Yet this teleological progressive reading of how sexual subalterns are in the process of becoming full and equal members of the Indian polity in the process of globalisation makes invisible the heavy costs inflicted in securing membership, including at the expense of transgression as well as the precariousness of legal victories. In the remainder of this essay, I revisit and unpack these moments to trace the complex trajectory of justice in relation to unruly desires and examine what work justice does and the terms on which it is secured.

### **GAY GOVERNANCE**

The question arises whether the legal challenges, rights advocacy, civil dissidence, and increased sex talk have actually furthered the cause of sexual subalterns? Are unruly desires being liberated through such recognition or are they being subjected to greater self-regulation, self-discipline and responsibility through the market that is re-privatising the domestic arena and calling for greater self-governance and responsibility as legible subjects or citizens (Cossman, 2007:14-20)?

This model of governance was on display in *Dostana*. The apartment that Sameer and Kunal shared with Neha was exquisitely modern, adorned with all the accoutrements of stylish living. They drove a flaming pink vintage Chevrolet convertible, owned Harley Davidson motorbikes, and their clothes and cell phones were all branded, luxurious, and exquisite. Almost all the characters in this film were rich and consumption oriented. These gay men and women inhabited the universe of private enterprise: from the glitzy bars to the fashion magazine offices or the swimwear shoots that Kunal clicks away as a fashion photographer. The gay subject emerges as a privatised consumer of all these spaces and services.

In many ways the film was a performance of the emerging consumer citizen in India, encouraging the queer subject to participate in a shopping spree of luxury brand names, latest

gadgets and haute couture fashion styles. The marketised space produces the status and identity of each of the participants, where consumption rather than performance of a subversive sexuality is the core feature. Those who critiqued the film for reinforcing gay stereotypes missed the broader discursive significance of the film and the new models of citizenship that it represents - that is -the perfect queering of gay desire in the neo-liberal moment - as tamed, well-groomed, reliable and responsible. And this form of representation is partly brought about by an LGBT politics that as Binnie in this volume discusses has focused on an assimilationist politics that has ignored the economic component of sexuality and sold out to the market.

The critical capacities of the queer are lost in the translation of this potentially disruptive sexual subject into a consumer citizen. It reflects a homonormative pursuit where success is assessed not necessarily by ones sexual location, but also wealth accumulation and the practices of responsible citizenship. The metamorphosis of the rogue sexual subject into the neo-liberal market order represents perhaps justice for those who are perpetually relegated to the fringe. It is simultaneously part of the project of disciplinarity that is a technique of modern power and a condition for legibility (Foucault: 1995). In this process, the sexual subject is relocated into a universe designed to push economic and social responsibility away from the state and onto the private arena.

In contrast to the market, the law is producing less legible and more cabined sexual subjects. A critical look at the 2009 High Court ruling in the Naz Foundation case reveals that it cannot be claimed as an unequivocal victory. The actual decision was less of an outright victory than a grudging tolerance of consensual sexual conduct between homosexuals. The decision read down the sodomy provision under the Indian Penal Code as inapplicable to consenting adults. While it eloquently set out the need to recognize the fundamental rights of gays and lesbians, these rights were not conferred as a result of the reading down of the impugned provision. The decision fell short of conferring juridical entitlements on a fully legible subject. While the government accepted the decision, there was no subsequent move on its part to confer greater recognition on gays and lesbians. This position of tolerance is a cause for concern as it serves as a device for

social and political control, rather than empowering the groups being tolerated. The implicit outcome of the 2009 decision was to bring about a resolution by deploying the discourse of tolerance to recognise the entry of homosexuality into the public domain, while also seeking to cabin and contain it.

In India, the discourse of tolerance has operated as a way of reinforcing dominant norms, while at the same time sustaining an antagonistic posture towards difference and sustaining the perception of that difference as contaminating, uncivilised, threatening, or toxic. This discursive aspect of tolerance challenges the normally benign understanding of tolerance as a universal transnational norm or tool to protect the weak against the strong. An example of the working of this concept in India can be seen in relation to the treatment of religious minorities. Tolerance in India has had a deeply religious mooring (Cossman and Kapur 2001:117-135). The judicial and constitutional discourse as well as the propaganda of the Hindu nationalists have emphasised that the principle of tolerance is derived from the cultural traditions of Indian society – cultural traditions that more often than not are equated with Hindu traditions and Hinduism. Thus tolerance has been informed by a majoritarian sensibility that is used to cast Muslims as intolerant either because of their treatment of women or propensity to proselytize. Hinduism in contrast is cast as truly tolerant because unlike other traditions it does not proselytize and also because it is committed to promoting gender equality where Muslim women are to be treated the same as Hindu women, omitting any argument in favour of treating all women equal to Hindu men. Tolerance is both communalised and also used to demonise the Muslim ‘other,’ while keeping dominant religious, gender and sexual norms in place.

The legal interventions of the sexual subalterns have attempted to delink tolerance from its religious and majoritarian moorings through a concept of political tolerance, which begins from the most basic premise of accepting people and their practices despite our disagreements and disapproval. Yet this approach does not get the sexual subject out of the trap of Indian culture and normative sexuality that police the borders of tolerance. It is the inability to disrupt the

gravitational pull of normative sexuality on which tolerance is based that ultimately de-radicalises the subversive potential of rights claims by sexual subalterns.

In the context of sexual desire and sexual subalterns, tolerance becomes a supplement to equality, a tool for handling that difference that formal equality is unable to accommodate or address. It operates as a compromise as it permits membership into society even though this acceptance is just barely able to contain its revulsion of the difference. Tolerance does not operate to dissolve or resolve the hatred (Brown, 2006: 28). It plays no counter-hegemonic role. It is depoliticised and does not offer any vision of transformation.

It may be that tolerance is the best that can be hoped for in the current political and cultural climate in India, and certainly seems to be better than the move towards re-criminalisation. The Naz case can be read as a case of what Spivak has called “strategic essentialism” where the subjectivities pursued in the legal proceedings were intended to be tactical rather than disruptive (Spivak, 2006:63). Locating sexual subjects within the trajectory of a linear, ancient, and glorious history, in some instances, provides potential for social and legal recognition. In the Supreme Court, the bench repeatedly called for evidence of the scriptural recognition of sexual alterity, implying that it was a critical consideration in deciding upon legal recognition. At the same time, there is a risk that attends such a strategy, that results in essentialising sexual difference as freakish and abnormal (Govindan and Vaudevan,2011: 84-112).

A number of counsel representing the different sexual minorities in the Naz Foundation case before the Supreme Court argued precisely from this essentialist position that homosexuals cannot help themselves and hence should not be penalized for what is for them a natural orientation. The unruly desires as well as complex choices that inform the live of the sexual other risks erasure as their legal claims reduce them to essentially abnormal and deviant subjects who need to drawn into the sphere of state regulation and discipline. This process of harnessing deviancy without conferring full citizenship rights produces a de-radicalised, de-politicised subject.

## **CONCLUSIONS: BECOMING DESIRES**



Both inclusion and exclusion take a toll. Involving identities once excluded by law or from the public domain brings about a reconstitution of those once excluded identities into newly inscribed regimes of governance. At the same time, while exclusion can remain somewhat subversive, it also has its costs in respect of the continuous process of struggle that accompanies living on such terms. As Brenda Cossman argues, to understand and focus on the process of 'becoming' introduces a politics that cannot be captured in terms of assimilation or transgression, exclusion or inclusion, but rather, focuses on the spaces somewhere in between (Cossman 2010: 9). It is never either/or.

I adopt the proposal to stop thinking in terms of normalising or transgressing, integrating or transforming. This chapter highlights how normalisation and subversion go hand in hand. Focusing on how legitimate or illegitimate sexual subjects come into being; on how some desires are desirable, while other desires are not, draws us into the messiness of desire production. We can understand the transformation that takes place in the process of becoming.

So what does a strategy that focuses on the process of becoming require? Tracing desire and how it subverts while in the process of becoming and also how it is normalized in the process of subverting, provides a more complicated understanding of how desire operates and what work it seeks to accomplish. While *Dostana* at one level represents how subject constitution occurs in and through the processes of the market, it also reveals that sexual subjectivity is incapable of being wholly disciplined. It is disorderly, chaotic, and messy. When *Dostana* ends, both heroes daydream about the kiss, recollecting it with some pleasure and delight. Their heterosexual credentials remain troubled - remember that they are after all married. The process of becoming is incomplete, uneven and bumpy. But it is nevertheless underway.

Similarly, the challenge to section 377 in the Delhi High Court weakened, albeit minimally, the heteronormative logic. Post the 2009 decision, the public discourse on the part of many gays and lesbians not only claimed that homosexuality was not illegal, but they promptly plunged into discussions about same-sex marriage and many even married before deities, priests or through the exchange of garlands. The sexual subaltern was transcending the disciplinary limits of the

decision. Yet is the objective of sexual subalterns primarily to acquire respectability and participate in the rituals of familial domesticity? Through becoming desires do sexual subalterns want to pursue everything that straight people have in order to prove their own humanity and sense of belonging? Perhaps we need to give greater acknowledgement to the moments of disruption rather than focus on the slippery slopes that constitute the boundaries of the precipice where these moments are enacted. It is after all in these small moments, in the minutiae of everyday life where power is bureaucratised and most immediately exercised and felt.

The implications of marriage, adoption or consensual sodomy can be disruptive. Two men or women who perform the cultural rituals of marriage while not legally recognised, are mimicking marriage and gesturing towards assimilation. At the same time they are also disrupting the normative understandings of marriage. The 2009 decision became a mechanism for triggering performances of marriage. As Cossman argues, the subversive and intimate erotics of sodomy becomes the basis of the claim for marriage and the performance of ‘sodomy as consummation’ unravels the tight seams of what constitutes marriage legally and culturally (Cossman 2010:165). Justice can perhaps then be traced to such disruptive moments rather than exclusively to either a victory or loss in the courtroom.

But the legal challenge is fragile and uneven. The courts have to grapple with the idea of who and what constitutes a citizen subject in India entitled to rights. The criminalised sodomite became a tolerated subject - an unbecoming outlaw – only to become a criminalised sodomite again.<sup>7</sup> In both situations this subject is not quite a full-fledged sexual citizen. The borders managing these seismic shifts are continuously policed. Crossing over from criminality needs to be managed and these subjects will ultimately be subject to the same regulatory norms that govern private domestic relationships

The line between good sex and bad sex has shifted but has not been demolished. There is an expanded space for the representation of sexual subaltern relationships and unruly desires which are at times challenging the boundaries of normative sex and desires. And there remain spaces available for the expression of unruly desires outside the discourses of governance discussed in

this paper. They reside in the frenzied trances of the transgendered persons who wed the god Iravan once a year under the full moon in May in a south Indian state. Or in the homoerotic desires expressed in Sufi poetry or music, an immanent as well as transcendent experience of desire between the subject and her inner self. The potential of such spaces calls for a more robust and engaged conversation that can produce more imaginative and creative possibilities for desire than has hitherto been either permissible or possible.

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<sup>1</sup>Naz Foundation v Government of the National Capital Territory of Delhi and Others, Delhi High Court, July 2, 2009, MANU/DE/0869/2009

<sup>2</sup> See however, one exception in the Rati edited collection by Nayan Shah, who challenges an excavation mode of engagement with the colonial archives as a way to legitimise the existence of homosexuality in India(Shah 1993: 113-132, at 122-124)

<sup>3</sup> For example, Judith Butler discusses how queer has historically been deployed as a homophobic expression for the purposes of shaming. She interrogates queer's capacity to be

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taken up and reclaimed, and critiques the ways in which the term ends up enforcing overlapping divisions between who is entitled to use the term and with what meaning (Butler 1993).

<sup>4</sup>‘Fire Makes Shiv Sainiks see Red’ (1998) *Times of India*, December; ‘PatitPavan Targets Fire in Pune’ (1998) *Express News Service*, December 4; ‘Ban Fire, says SenaMahilaAghadi’ (1998) *Express News Service* December 1.

<sup>5</sup> See ‘Pink Panty’ Women Target Extremist Right Wing Indian Leader, 9 February 2009, <http://www.foxnews.com/story/0,2933,490690,00.html> (accessed January 12, 2012)

<sup>6</sup>Section 377 states as follows: *Unnatural sexual offences* :Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment.... 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.

<sup>7</sup>The outrage expressed over the Supreme Court decision by all sectors of the media and in intellectual and activist spaces, speaks to the seismic shift that has occurred over the years in favour of LGBT recognition. This shift has not emanated from a single source, but from multiple arenas including the market and popular culture and facilitated by the 2009 Delhi High Court decision. It is also not delinked from the global processes, which demonstrates that the recognition of LGBT rights is being pulled in different directions: either in the direction of homonormativity or in the direction increased criminalisation. LGBT rights in India stand in the centre of this tension. The re-criminalisation of homosexuality by the Supreme Court in 2013 is now the subject matter of a “curative” petition. This process enables parties to file such a petition when the Court has failed to take into account changed societal perceptions and hence has resulted in a gross miscarriage of justice. The Court has the power to correct the holding in the interests of due process and ‘to do justice’ between the parties.