

# IS HINDU MARRIAGE ACT, 1955 HOMOPHOBIC OR ITS INTERPRETATION?

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## INTRODUCTION:

It was in December 2004 that the local Duty Magistrate had pronounced that the lesbian couple – Raju and Mala, could live together as a couple. These two local girls belonged to Sandhu Colony in the Vijay Nagar area on Batala Road, Amritsar. They had eloped on November 27, 2004 and had gone to temple in New Delhi where they got married.<sup>1</sup> The question that arises when one encounters such judgments from the Judiciary in India is that why can't couples that constitute of the same-sex partners enter into a marriage relationship under the Hindu Marriage Act, 1955. According to Section 5 of the Hindu Marriage Act, 1955:

### “5. Conditions for a Hindu marriage.-

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

- (i) neither party has a spouse living at the time of the marriage;
- 1[(ii) at the time of the marriage, neither party— ...”

The abovementioned excerpt from the Hindu Marriage Act, 1955 (henceforth written as HMA) nowhere makes a mention of the specific sex that the parties to marriage must belong to. But still it is argued that a marriage under HMA cannot be solemnised between same sex partners. Ramesh Chandra Nagpal argues that the purpose of marriage according to the Hindu view of life is sexual pleasure, procreation of children and religious rituals.<sup>2</sup> It is through such an understanding of the Hindu Marriage Act, 1955, where in the procreation of children is being held as one of the mandatory aims of the Hindu Marriage that Ramesh Chandra Nagpal and all

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<sup>1</sup> Varinder Walia, 'Love lost: Same-sex marriage ends after 3 yrs', *Tribune News Service* (3 April 2007).

<sup>2</sup> Ramesh Chandra Nagpal, *Modern Hindu Law*, ( 2<sup>nd</sup> Edition, Eastern Book Company 2008) 108.

other people who advocate this view say that a Hindu marriage can be solemnized between a male and the a female only. But this is mere interpretation of the law that these scholars have done based on what is Hindu way of life in their own regard.

Through this paper I shall try to widen the ambit of the Hindu Marriage Act, 1955, to an extent that it can easily constitute marriages performed between parties of same-sex. I shall do so by using evidences not only from the Hindu history but also from day to day lives of the people in Modern Hindu Society, which shall very clearly show the existence of the practise in the society not only in ancient times but also in the modern era. Homophobia is a colonial import to the Indian land. Under the persistent nature of this homophobic outlook the formulation of Indian Law took place. This Homophobia led to a homophobic reading of the law by the scholars like Ramesh Chandra Nagpal. Such an interpretation of law not only criminalised, but also out-casted the homosexuals from the purview of the society itself. This paper shall suggest a way of interpreting the Hindu Marriage Act, 1955, in consonance with the Hindu way of life as propounded by Hindu Scriptures to bring the homosexuals' lives and ties within the legality of law.

### **HOMOSEXUAL HINDUISM:**

The Hindu texts and traditions, be it written or oral, all of them present a tale with gods as characters and also various variations of that tale to put forward a suggested way of life according to Hinduism. As far as the hierarchy of these Hindu texts is concerned it varies from one Hindu group to another some regard Ramayana<sup>3</sup> and Bhagavad Gita<sup>4</sup> as the supreme

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<sup>33</sup> Lit. The Rama Story. Sanskrit epic by Valmiki. Dating disputed; scholars place it anywhere from the 5<sup>th</sup> century B.C. to 5<sup>th</sup> century A.D. Tells the story of the just king Rama of Ayodhya, incarnation of God Vishnu. Exiled for fourteen years by his stepmother's fiat, he is accompanied into exile by his wife Sita, daughter of the Earth Goddess, and brother Lakshmana. Sita's abduction by demon king Ravana leads to a war between Rama and Ravana. After Sita is rescued, she is subjected to a fire ordeal to test her purity. Although she survives this ordeal, Rama abandons her later, when his subjects doubt her chastity. When he finally asks her to return, she chooses to sink into the earth instead. There are many medieval *Ramayanas* in different Indian languages. Ruth Vanita and Saleem Kidwai, , *Same-Sex Love in India* "Introduction: Medieval Materials in the Sanskrit Tradition," (London: Palgrave Macmillan, New Delhi: Macmillan 2000).

<sup>4</sup> (literally, "Song of the Lord") In this part of the *Mahabharata*, (possibly interpolated later) when Arjuna hesitates to go to war against the kinsmen, Krishna instructs him on the nature of action, devotion, reality and the Self. Ruth Vanita and Saleem Kidwai, , *Same-Sex Love in India* "Introduction: Medieval Materials in the Sanskrit Tradition," (London: Palgrave Macmillan, New Delhi: Macmillan 2000).

sources whereas others regard Vedas<sup>5</sup> to be an authority over the others. But no one text can be used to invalidate what the other texts says. Most of arguments made about the Hindu way of Life lay emphasis on the procreation being the sole purpose of marriage and sex. But this is not always the case as in various other texts like *Kamasutra*<sup>6</sup>, a fourth century text, emphasis is laid upon pleasure and joy to be the aim of sexual intercourse.

There are various varieties of texts that talk about the same-sex relationships in the Hindu history, some of them like the ones which are much more legal or medical in nature look at such unions in a mildly distasteful light and in terms of purity and pollution, and are not so supportive of them whereas the others that are much more narrative based place such unions in the frame of emotional bonding and produce a much more nuanced picture of these relationships and regard them to be marriage-like.

Another homosexual union in the Hindu scriptures dates back to the fourteenth-century. It is about the birth of Bhagiratha to two women who made divine love to each other. The mention of this union is found in the medieval text called *Krittivasa Ramayana*. It is the Bengali version of Ramayana. According to the text the women were two widows of the king Dilipa. After the King's death lord Shiva comes to the two women and asks them to have sex. The child born out of this sexual union was boneless but then it is said that by the mystical powers of the god he was cured. Lord Shiva has always been known for his gender transformations and his association with varying eroticisms. He is known for his very famous form of *aradhnarishwara* (half man, half woman), it is his this form that establishes his connection with femaleness and Homoeroticism because he is said to have playfully transformed himself into female form for

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<sup>5</sup>(from the root *vid*, knowledge) Sacred Knowledge transmitted orally by a complex system of mnemonics and compiled later in four *Samhitas* or collections. Of these, the *Rig Veda Samhita* is the oldest and most important, the other three being the *Sama Veda Samhita*, the *Yajur Veda Samhita* and the *Atharva Veda Samhita*. The *Rig Veda Samhita* is a collection of 1028 hymns, composed approximately between 1500 and 1000 B.C. Ruth Vanita and Saleem Kidwai, , *Same-Sex Love in India* "Introduction: Medieval Materials in the Sanskrit Tradition," (London: Palgrave Macmillan, New Delhi: Macmillan 2000).

<sup>6</sup> Although probably a composite text, the *kamasutra* is attributed to Vatsyayana, who appears to have been a Brahman scholar residing in the city of Pataliputra (modern Patna) around the fourth century A.D., during the reign of the Gupta Kings. This was a period of great material and cultural prosperity of the region. Vatsyayana states that his *Kamasutra* is a compilation of several earlier texts on erotic science. Among the human scholars he names are the Babhravyas, or disciples of Bhabru, Charayana, Suvarnanabha, Gonardiya, Ghotakamukha. The section on courtesans in the *Kamasutra* purports to be a reproduction of the work by Dattaka, which he composed with the aid of a famous courtesan. <http://www.saheli-asia.org/Kamasutra/vatsyayana.htm?cv=1>

giving pleasure to his wife Parvati during the love-making process.<sup>7</sup> Shiva also fathered children with the help of other men.<sup>8</sup> There are several accounts of the birth of Kartikeya, one of the boys fathered by Shiva. All of these accounts are interconnected as they appear in different scriptures but come down to the theme of a child born out of a sexual union between Shiva and Agni.<sup>9</sup> The tale that these texts narrate is that during Mahabharata Agni, the god of fire, needed a commander to fight against the demon, Taraka. In order to produce this commander Agni discharged his semen into the hands of a sage's wife. She tossed it into a pond and it is from there then that Kartikeya springs. The account in Mahabharata links to this account in Shiva Mahapurana. In Mahabharata there is a mention of the mountain where Swaha used to live. That mountain is said to be made out of Shiva's semen and when Agni discharged his semen on that mountain it was due to the mixture of the semen of these two gods that Kartikeya was born. A later text in history, Shiv Purana, says that Kartikeya was born because Agni gulped Shiva's ejaculation. After swallowing the semen Agni suffered a burning sensation and this sensation is then relieved when Agni transmits this semen to Swaha who tossed it in Ganges. Here onwards the tale is identical to the one narrated by Shiva Mahapurana.

Kamasutra in Sutra 35 states a tale of young servants who wore earrings and floral headgears used to perform oral sex on men. There are various translations of Kamasutra that have happened overtime be it the one by Yashodhara or by Madhavacharya or by Danielou. All of them in their versions though use different words for the actual word 'yuva' that was used by Vatsyayana in his work, to denote these young servants who used to perform oral sex on men, but still mean the same. The word used by Madhvacharya is launda which is a modern day word for a boy in Hindi, the word also has an Urdu connection where in it is used as laundebaaz, which means pederast. There are instances of Narada, transforming into a woman, particularly a cowherd woman, to sport erotically with Krishna.<sup>10</sup> A mention of this erotic sport by Krishna

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<sup>7</sup>Ruth Vanita and Saleem Kidwai, , *Same-Sex Love in India* "Introduction: Medieval Materials in the Sanskrit Tradition," (London: Palgrave Macmillan, New Delhi: Macmillan 2000)55-68.

<sup>8</sup> Ibid 94-99.

<sup>9</sup>Translation from Pushpendra Kumar, *Shiva Mahapurana* (Delhi: Naga Publishers, 1981)

<sup>10</sup> Robert P. Goldman, "Transsexualism, Gender and Anxiety in Traditional India" [1993] 113(3) *Journal of the American Oriental Society*.

<http://www.jstor.org/stable/605387?Search=yes&resultItemClick=true&searchText=Transsexualism&searchUri=%2Faction%2FdoBasicSearch%3Fprq%3D%2522Robert%2Bp.%2BGoldman%2522%26amp%3Bfc%3Doff>

with Radha and the Gopis (cowherd-women), is made in a twelfth century vaishnava text called Padma Purana.

### **ANALYSING THE POPULAR NARRATIVES:**

Not just the narratives from the scriptures but also various priests hold a view in support of same-sex marriages. Like Shakuntala Devi in her work, “The world of Homosexuals” interviewed a priest from a Vaishnava temple, Srinivasa Raghavachariar, who married a couple made of two same-sex individuals. The priest justified the wedding by arguing that under the Hindu belief it is said that the relation is between two souls and it continues for ages and souls are not men or women. So he said that the sex may change but the soul one towards other irrespective of sex that the person with that soul possesses.<sup>11</sup> Also one of the prominent priests of Hinduism Mahant Ram Puri remarked: “There is a principle in all Hindu law that local always has precedence. In other words, the general rules and the general laws are always overruled by a local situation. I do not think that this is something that is decided on a theoretical level. We do not have a rule book in Hinduism. We have a hundred million authorities.”<sup>12</sup>

The swami’s understanding here is not only concurrent to the understanding of the Hinduism but also to the understanding of the legal historians. This principle that the custom should be regarded as supreme is also recognised by the Hindu Marriage Act, 1955 as it says a marriage performed according to the customs of one of the parties shall be a valid marriage irrespective of the fact that whether it has been registered under with government or not.<sup>13</sup> Following this line of argument a marriage solemnised between two women shall be valid if the custom of any of the two parties to the marriage confirms it.

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[%26amp%3Bfacet\\_journal%3Dam91cm5hbA%253D%253D%26amp%3Bwc%3Doff%26amp%3BQuery%3DTranssexualism%26amp%3Bswp%3Don%26amp%3Bhp%3D25%26amp%3Bso%3Drel&refreqid=search%3A4c263703e674f708bb8a2d4099a0fc82](#) accessed on 23 October 2017.

<sup>11</sup> Shakuntala Devi, *The World of Homosexuals* (New Delhi: Vikas, 1977) 155.

<sup>12</sup> R. Malik, “Discussions on dharma”, *Hinduism Today* (October-November- December 2004) 30-31, <https://www.Hinduismtoday.com/modules/smartsection/item.php?itemid=1300> (last accessed on 3 October 2017; 21:45)

<sup>13</sup> Ruth Vanita, “ Same-Sex weddings, Hindu traditions and modern India” (2009) <http://www.jstor.org/stable/40663979> (Accessed: 07-09-2017 07:24 UTC)

There are innumerable instances in the Hindu scriptures which very clearly prove the point that Hinduism was never against the same sex unions. These evidences are quite enough to challenge the view held by Ramesh Chandra Nagpal, as stated above, if one is to interpret the Hindu law based on the Hindu way of life that is suggested by the scriptures and texts.

### **HOMOSEXUAL SOCIETY:**

Not just the Ancient Hindu Society but also the modern Hindu society witnesses a number of instances of the unions between the people of same-sex. There are various examples of such unions that can be cited. In 1988, Leela Namdeo and Urmila Srivastava, entered into a same-sex wedding relationship. They had married each other according to Hindu ceremonies, after their marriage although they were ejected out of their jobs but their families and friends were very supportive of it. Both of them were working as policewomen. It is also interesting to note the outlook that their society had towards their marriage. For example a news reporter interviewed a neighbour from their vicinity named Sushila Bhawasar, during her interview she told the journalist “After all, what is marriage? It is a wedding of two souls. Where in the scriptures is it said that it has to be between a man and a woman?”<sup>14</sup> This outlook of the neighbour clearly puts out the outlook of the Indian society towards the same sex marriages. In 2002 at the wedding of Vega Subramaniam and Mala Nagarajan, done in Seattle, former's father read a poem (Tamil) that he had composed. In that he cited the words of the ancient Tamil soothsayer Valluvan: “The seat of life is love; anyone who does not have it is only a mass of bones encased by skin. Love is love and marriage is marriage, whether between a man and woman, two men, or two women.”<sup>15</sup> This is another example of a same-sex marriage in the Hindu society. Another is a relationship between a student and a college teacher. Ranu Mishra, 21, a teacher and Neetu Singh, 19, a college student, married each other by application of vermilion(sindoor) by the latter on the former's forehead. The news appeared in the Indian Express of 10 May, 2005. Although this union entered into by Ranu and Neetu might not be in consonance with the ceremonial requirements of the Hindu Marriage Act, 1955, but the point

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<sup>14</sup> Chinu Panchal, , "Wedded' Woman Cops to Challenge Sack", *Times of India* (23 February 1988)

<sup>15</sup> Ruth Vanita, "Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions(2004), <http://www.jstor.org/stable/25002506> (Accessed on 07-09-2017 07:23 UTC)

here is that the people in today's society do engage in such unions and it is not that the homophobic interpretation of the Act offered by various scholars is representative of the whole society. In October 2007, two young women, Kumari and Varalakshmi, got married in a temple in Vishakhapatnam in the presence of latter's mother and another witness. The two women belonged to the goldsmith community and used to work in a church and they also exchanged Bibles to solemnise the marriage with regard to the local Christian practice.<sup>16</sup>

From all these instances of homosexual unions not only in Ancient Hindu Society but also in the Modern Hindu Society it is well clear that the Hindu society is very much practising the homosexual unions and also the Hindu way of life evidently shows its presence in an individual's life to be a normal course of life. So what led the people today to believe that only heterosexual unions can today be solemnised under Hindu Marriage Act, 1955. This question shall be answered in the following section in the paper.

#### **REASONING AND RECTIFYING THE HOMOPHOBIC INTERPRETATION:**

The Hindu nationalists were not Homophobic from the very beginning itself but after the advent of the British, who along with them brought an import of Victorian Ideals that also, had an idea of Homophobia entrenched in itself. There was already a distaste for sex in the pre-modern Hindu thinking this strand of distaste elevated to a level of hegemony over all the thoughts of that time and it was then that British enshrined Sec. 377 under the Indian Penal Code, 1860 that criminalises any sexual activity that is against the order of nature, which further strengthened the idea of Homophobia.<sup>17</sup> It after this instance of arrival of the Victorian morals into the Indian arena that the Indian nationalists internalised the idea of Homophobia and declared Homosexuality as an unspeakable crime. Before this point in time Homosexuality was never unspeakable rather it was made a mention of in the Hindu scriptures in a celebratory manner. This adulteration that was caused by the Victorian morals of the Indian outlook towards sex has to some extent continued till twentieth century. As Lata Mani puts it in her book, Contentious Traditions, that even if one were to argue that the law that British made for

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<sup>16</sup> Ruth Vanita, "Same-Sex weddings, Hindu traditions and modern India" (2009)  
<http://www.jstor.org/stable/40663979> (Accessed: 07-09-2017 07:24 UTC)

<sup>17</sup> Ruth Vanita, "Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions(2004),  
<http://www.jstor.org/stable/25002506> (Accessed on 07-09-2017 07:23 UTC)

the Indians was totally based on the foundations of Hindu scriptures, then still this line of argument can be challenged by saying that the British were never the natives to the country they came to the Indian sub continent from a foreign land and it was to understand the society that they chose to read the scriptures that were floating around when they came, and it was then based on these interpretations, that they did of the scriptures based on their own prejudices, they framed a law for the country. There are other scholars like Michael R. Anderson, who has authored pieces based on Islamic Law and its encounter with the British in India, also argues that British had been highly mistaken when it came to interpretation of sacred texts to frame law for the country. This introduction of Victorian ideals led to Indian population growing homophobic which further perverted their interpretation of law in a homophobic sense. It is this tendency of the Indian population to be homophobic that has tabooed the interpretation of law in a fag-hag sense. This brouhaha is not just about homosexuality but also about sexuality as a topic. An evidence of such a tendency of homophobia is as Kumkum Roy reports, that when she was looking out for the translated version of Kamasutra in the Indian libraries, she found that the book was to be kept under lock and key by the librarian. Not only this but she was also asked by one of the librarians to not to leave the book out on the table because she saw the other day that some girls were skimming through it.<sup>18</sup> Moreover it is also argued by Marc Galanter in his work, *The displacement of traditional law in Modern India*, that the Hindu code of 1955, was totally new form of Hindu code came forward in the modern legal system, it did not refer back to the Sastras. The Varna distinctions were done away with. The new law did away with the notion of inheritance only by males, the notion of joint families, notion of unbreakable marriages and brought about the equality amongst the people belonging to various Varnas. If one looks at all these features of the Hindu Code that come forward when one juxtaposes it to the Hindu scriptures, all these new alteration appear to be very progressive in nature. They indeed are and it one of the reasons that justify the use of the phrase “two Hindus” in the HMA, 1955 rather than “a Hindu man and a Hindu woman”. This usage very well is a beacon towards the legal acceptability of same sex unions, because would the lawmakers have been that keen on yanking the homosexuality out of Hindu culture they would have used the latter phrase from the aforementioned ones. But they did not do so. Hence, the law is not

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<sup>18</sup> Kumkum Roy, “Unravelling the Kamasutra”, (1996) *Indian Journal of Gender Studies*, vol. 3, <http://journals.sagepub.com/doi/pdf/10.1177/097152159600300202> (accessed on 14-10-2017 18:28 UTC)



homophobic, but it is just the way that people interpret it owing to a homophobic lens that colonial state affixed on their world-view.

From all the above-mentioned arguments and evidences it is very well clear that the present day interpretation that has been given to the Hindu Marriage Act, 1955, to include only the marriages amongst the cross-sex couples is a consequence of the colonial understanding and is alien to the Hindu way of life and to the Hindu society of the country. It can well be interpreted based on the emphasis laid on custom to take into its jurisdiction the marriages solemnised between the same-sex individuals. For example there are many communities in the country that recognise *Gandharva* form of marriage which is solely based on mutual love (*anuraga*) between the two parties, it is also held supreme form of marriage under *Kamasutra*, under this form of marriage even same-sex marriage is regarded as valid.<sup>19</sup> Moreover, the HMA, 1955 nowhere makes a mention of a man or woman all it says is two Hindus are required to solemnise a valid marriage. A similar effort of bringing the same-sex marriages under the jurisdiction of marriage laws has been also made by various organisations like AIDS Bhedbhav Virodhi Andolan.\* All these various organisations are demanding an amendment in the way that the marriage and divorce laws in the country have been framed so that they also include the same sex marriages within them.

### CONCLUSION:

To answer the question that the paper began with, 'Is it the Hindu Marriage Act, 1955 that is Homophobic or Its interpretation?', it shall be safe to say, based on the evidences given above, that it is not the Hindu Marriage Act, 1955, but the way that it has been interpreted, in the name of Hindu way of life, is homophobic. The understanding of the phrase 'Hindu Way of Life' that these scholars have followed while interpreting the Act is itself flawed because as noted in the above examples homosexual unions were considered to be normal and were very much a

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<sup>19</sup> Ruth Vanita, "Same-Sex weddings, Hindu traditions and modern India" (2009)  
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\*In its 1991 report *Less Than Gay: A Citizens' Report on the Status of Homosexuality in India*, the ABVA demanded, among other things, that the government amend the marriage laws to recognize same-sex marriage. It reiterated this demand in "For People Like Us", its 1999 report on the attempted suicide of two women, Mamata Rani Mohanty and Monalisa Mohanty, whose families were trying to separate them.

part of life. Hindu way of life is nothing else but a lifestyle based on the examples from the lives of various gods and goddesses. These examples aim to show what kind of unions did these gods enter into and hence such unions should be considered proper for a Hindu to enter into. It is well evident from the examples from the lives of deities like Shiva and others that same sex unions are very much a Hindu way of Life. A positive step can be seen to be taken by today's society in consonance with the law making bodies of the country. In July 2016, the centre asked a panel of the members of the Law Commission and members from the civil society to prepare a draft for the Uniform Civil Code\* regarding the personal laws on Divorce, Marriage, Child Custody and Inheritance. The draft submitted on 11<sup>th</sup> of October, 2017 said that personal laws are “not always equitable and fair and do discriminate on the grounds of sex, gender and sexuality”. Hence demands a law that takes into consideration the rights of same sex couples.<sup>20</sup>

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\*The draft was written by lawyer Dushyant (who goes by only one name) and signed by activist Bezwada Wilson, actor Gul Panag, journalist Nilanjana Roy, retired Major General S Vombetkere, historians Mukul Kesavan and S Irfan Habib and vocalist TM Krishna.

<sup>20</sup> “Allow gay marriages, give couples police protection if needed, suggests draft Uniform Civil Code” <https://scroll.in/latest/853850/allow-gay-marriages-give-couples-police-protection-if-needed-suggests-draft-uniform-civil-code> (accessed on 14-10-2017, 18:50 UTC)