

CAN INDIA DIGEST PROGRESSIVE JUDGEMENTS: A SOCIOLOGICAL PERSPECTIVE ON SAME SEX MARRIAGE

Author: Vani Gupta, 1 year of B.A.,LL.B. from Rajiv Gandhi National University of Law, Punjab

ABSTRACT

"The seat of life is love; anyone who does not have it is only a mass of bones encased by skin." The benefaction of love, consciousness and reproduction makes the human an essential species in the ecosystem, However, sometimes love overpasses all reasons and dogmas. Therefore, to illustrate the phenomenon of alienation with same-sex couple, this paper has been penned down. This paper traces the trajectory of events that have been illustrated in our ancient literature and culture showing evidence and supporting homosexual relationships. It highlights how different events of past during British Raj have shaped today's discourses. Further, it portrays the battle of love in the court of equity with the question whether the justice is truly served or not. Finally, it talks about different sociological theories including structural functionalism and symbolic interactionism to understand the construction of the concept of marriage.

Keywords

Same-sex marriage, Section 377, Structural functionalism, Symbolic Interactionism

INTRODUCTION

It was 23 years ago when the Dutch parliament approved a historic law enabling same-sex marriage by a vote of three to one, making itself the first country to legalize the practice. The law granted same-sex couples the ability to be married, get divorced, and have children. The legislation changed a single language in the current civil marriage statute, and it now states, "A marriage can be contracted by two people of different or the same sex."¹

Eigil Axlil, 67, married his partner on the day when the law was passed and proclaimed to the New York Times in 1989 that "the only way to be able to move anything is to be open about it, you have to admit that this is how I am for society to be accepting of you." This event will occur throughout the rest of the world if everyone in Denmark follows this

¹ DAVID MASCI, ELIZABETH PODREBARAC SCIUPAC & MICHAEL LIPKA, SAME-SEX MARRIAGE AROUND THE WORLD(Pew Research Centre, 2019)<https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>.

example, comes out of the closet, and accepts who they are as they are.² However, today, when more than 34 countries have legalized same-sex marriage, India is still struggling with the question of giving recognition to same-sex marriages.

A PIL submitted by Supriyo Chakraborty and Abhay Dang was among the batch. They had been together for about ten years, and in December 2021, they had a commitment ceremony where their parents, relatives, and friends blessed their union. They now want the Special Marriage Act to recognize their marriage. Parth Phiroze Mehrotra and Uday Raj Anand, who have been dating for the past 17 years, also filed a PIL in the group of PILs. They assert that they are now raising two children together, but because they cannot formally wed, neither of the petitioners can have a legal parent-child connection with each of their children.³

HISTORICAL TRACES AND UPHEAVALS ON SAME SEX RELATIONSHIPS

Kamasutra in 4th century A.D. mentions physical pleasure in male-male unions in vivid detail.⁴ A 14th-century Bengal folklore of Rama story 'Krittiviyasa Ramyana' tells the story of a sexual relationship between two widows in which a child was produced during a divinely blessed sexual encounter between two co-widows or co-wives.⁵

More than a thousand years later, this notion is rewritten in three mediaeval texts—one Sanskrit and two Bengali. A portion of the Padma Purana, written in Bengali script, was translated into Sanskrit in the fourteenth century. The Bengali manuscripts are two iterations of the Ramayana, an accretive epic credited to the poet Krittivasa. The hero, Bhagiratha, is born to two co-widows after their husband, King Dilipa, passes away childless, according to these sources. The gods orchestrate and approve of the sexual encounters between widows. In the Padma Purana, two widows express their worry that their husband's line has come to an end to a guru. Shiva visits the widows and tells them to make love together in one of the Bengali versions. According to the medical text's prediction, the boy is born without bones in

²EIGIL AXGIL, DANISH GAY LEADER, 71(*The New York Times*, 1995) <https://www.nytimes.com/1995/09/28/obituaries/eigil-axgil-danish-gay-leader-71.html>.

³PADMAKSHI SHARMA, SUPREME COURT TRANSFERS TO ITSELF PETITIONS PENDING IN HIGH COURTS FOR RECOGNITION OF SAME-SEX MARRIAGE(Live Law, 2013)<https://www.livelaw.in/top-stories/supreme-court-transfers-to-itself-petitions-pending-in-high-courts-for-recognition-of-same-sex-marriage-218248>.

⁴Vinodh Rajan, *Male Homosexuality in India: A Close Reading of Kamasutra*(2020).

⁵ Tony K. Stewart & Edward C. Dimock, *Krttibasa's Apophatic Critique of Rama's King Ship*, BERKLEY OF UNIVERSITY PRESS, UNIVERSITY OF CALIFORNIA PRESS(2001).

these two versions of the story, but a wise man miraculously heals him—a possibility the medical book does not mention.⁶

In late eighteenth century, Rekhti, a new style of sensual Urdu poetry portrayed female-female relationships as institutionalized in a number of ways, that is, through unions akin to marriage. Rekhti writers such as Insha and Rangin openly wrote about male-male and female-female relations in the same tones as heterosexual relationships.⁷ Some speakers condemn and criticise such love; others rejoice in it; yet others grumble about it, and still others begin to see the poem suspiciously and critically.⁸

According to the *Mastya Purana*, Lord Vishnu assumed the appearance of a stunning woman named Mohini during the great churning of Samudramanathan to deceive the demons and allow the gods to consume all the amrut. (the immortal juice found from churning of ocean). While this was going on, Lord Shiva recognised Vishnu as Mohini and fell in love. The result of their union was the birth of Lord Ayyappa. Tamilnadu's transgender community commemorates the union of Krishna's Mohini avatar with the Mahabharata character Aravan.⁹

There are eight types of marriages that are recognized by Hindu text, one of them is 'gandharva vivha' or marriage by mutual consent,¹⁰ which has no requirements for witnesses, a ceremony, parental consent, or an officiant. ancient and medieval narrative literature, both holy and secular, frequently depict or even praises this type of marriage as the finest kind because it is based on choice, despite the fact that some ancient legal documents disapprove of it.

When the merchant Vasudatta first sees Pulindaka, a bandit chief, in the eleventh-century Sanskrit story cycle the *Kathasaritsagara*, he instantly feels incredibly pulled to him. Commenting, the narrator says: "Vakti jan maantarapritim manah snihyadakaaranam" (Affection [that arises] in the heart without a cause speaks of love [persisting] from a former birth).

⁶ Ruth Vanita, *Wedding of Two Souls: Same-Sex Marriage and Hindu Traditions*, 20(2) JOURNAL OF FEMINIST STUDIES IN RELIGION, 128-129 (2004).

⁷ Manjari Shrivastva, *Lesbianism in Niteenth century Erotic Urdu Poetry "Rekhti"*, 68(5), PROCEEDINGS OF THE INDIAN HISTORY CONGRESS, 965-988(2007).

⁸ Nairn, C.M. *Transvestic Word?: The Rekhti in Urdu*, UNIVERSITY OF WISCONSIN SYSTEM (2001).

⁹ *Mohini: the Enchantress*, GOOGLE ARTS AND CULTURE, AMERICAN INSTITUTE OF INDIAN STUDIES <<https://artsandculture.google.com/story/mohini-the-enchantress-american-institute-of-indian-studies/pQXBuABQJikpIg?hl=en>> .

¹⁰ S. K. MITRA, *MITRA ON HINDU LAW* (Orient 2000).

Winds of Change

Only in 1860, when Thomas Macaulay enacted Section 377 of the Indian Penal Code, which was based on the English Buggery Act of 1533 and made anal and oral intercourse a crime, did homosexuality start to be seen as a crime "against the order of nature." Ironically, the British considered India to be a "backward" civilization because of its openness to sex and sexuality. Indian nationalists in reaction claimed that Indian culture was "respectable," adopting traditional Victorian attitudes towards our own non-heteronormative customs.¹¹

On May 31, 1924, the Calcutta fortnightly "Matvala" published Pandey Bechan Sharma "Ugra's short story "Chocolate." Ugra consolidated conflicting linguistic, ethnic, and cultural determinants of homosexuality. Before India gained its independence, the movie "Chocolate" launched a protracted public discussion on the subject that was defined not by hypocrisy but rather by ambiguity. According to Ugra, the publication of the narrative had two outcomes: "lined of worry appeared on the grave's brow; frivolous laughter coloured the shallow's cheeks."

There were several letters to the editor of Matvala and Ugra praising and criticising the portrayal of homosexual desire. Ugra was prosecuted with sedition in December 1924 and given a nine-month prison term under section 124A of the IPC for editing the Swadesh triumph issue.¹²

However, in 1967, the country that ignited the anti-sentiments in Indians against the queer community passed a law legalizing same-sex relations but the Victorian view that portrayed homosexuality as unnatural had become entrenched and an integral part of Indian values. For instance, in 1998, when Indo-Canadian filmmaker Deepa Mehta's lesbian love story 'Fire' was released in Indian theatres, it led to large-scale protests by Indian political parties.¹³

¹¹ Amit Raj & Pallavi Ranjan, *Section 377: Against Indian Culture or Victorian Sensibilities?*, 4, INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, 2116-2127(2021).

¹² ROHIT CHAKRABORTY, THE STORY OF 'CHOCOLATE', (Scroll.in, 2023). <https://scroll.in/author/16825>

¹³ SHOHINI GHOSH, FILM FLASHBACK: 'FIRE' WAS THE FIRST INDIAN FILM TO BRING WOMEN IN LOVE OUT OF THE SHADOWS (Scroll.in, 2019) <https://scroll.in/reel/911448/film-flashback-fire-was-the-first-indian-film-to-bring-women-in-love-out-of-the-shado>.

THE BATTLE OF LOVE IN THE COURT OF EQUITY

Princeton has defined same-sex marriage as “a union between two people who are of the same gender or biological sex.”¹⁴

The marriage of Leela Namdeo and Urmila Srivastava, which took place in a Hindu ceremony in a small town in central India in early 1988, is arguably the most well-known same-sex union in contemporary India. The police suspended the two from their positions, but their friends and family stood by them. A number of pair suicides, primarily involving women from circumstances similar to those of the women who marry, have been published in the news since 1980. These couples write in their letters that they would rather be united in death than apart.¹⁵

The legal fight for LGBTI people began in 2001. The Lawyers Collective filed a suit in the Delhi High Court challenging the constitutionality of section 377 on behalf of the Naz Foundation. An organisation named AIDS Bhedbhav Virodhi Andolan, which focused on HIV/AIDS, made the first attempt to challenge it in 1994; however, their petition was not actively pursued. The Naz Foundation, which was actively assisting the gay community, then launched a public interest litigation (PIL) in 2001¹⁶. Numerous persons were detained after a police operation in Lucknow on suspicion of homosexuality.

Finally, in *Navtej Singh Johar & Ors. v Union of India*,¹⁷ Section 377 was decriminalised. A group of citizens presented the Law Commission of India with a draft of a replacement Uniform Civil Code in October 2017 with the goal of legalising same-sex unions.

According to this Act, marriage is defined as "the legal union between a man and a woman, a man and another man, a woman and another woman, or a transgender person and either a man or a woman." Everyone who is married or living together as a couple is eligible to adopt. The ability of the married couple or partners to adopt should not be hindered by their sexual orientation.

The Supreme Court's *NALSA*¹⁸ decision made clear that the transgender minority in India is entitled to constitutional fundamental rights and for the first time acknowledged the violence

¹⁴PRINCETON,(2011)<http://wordnetweb.princeton.edu/>: <http://wordnetweb.princeton.edu/perl/webwn?s=same-sex%20marriage>.

¹⁵ESHENA BENEGAL, WHO WERE THE FIRST LESBIANS TO GET MARRIED IN INDIA?(Fifty-Two Blog, 2022) <<https://fiftytwo.in/blog/who-were-the-first-lesbians-to-get-married-in-india/> .

¹⁶ Naz Foundation v Government of NCT of Delhi and Others, (2009) 111 DRJ 1.

¹⁷ Navtej Singh Johar & Ors. v Union of India (2018) 10 SCC 1.

¹⁸ National Legal Services Authority vs Union of India (2014) 5 SCC 438.

and prejudice that it experiences. The ruling served as a crucial stimulus for the organisation of the transgender movement in the nation. This decision also caused various government agencies to add the gender choice "TG" or "Other" to official documents including passports, driver's licenses, PAN Cards, and so on. In many respects, this decision marked the beginning of the organised transgender rights movement in India.

Today, the trans community is under a dilemma as government argues that in 2018 *Navtej Singh Johar case*, it has decriminalised sexual intercourse between same-sex persons but has not yet legitimatised this conduct. Due to incomplete laws on the legitimacy of the relationship and marriage between LGBTQ community, the community is facing difficulty in the adoption, divorce and separation issues.

Prof. V. Rajyalakshmi in an interview with Sansad TV, pointed out the distinction between marriage and relationship, highlighting the fact that a relationship is a private affair based on the choice of the individual, on the other hand, marriage is a public affair. According to Malinowski, "Marriage is a contract for the production and maintenance of children." From a sociological point, Marriage has been defined as a universal institution between two opposite genders to fulfil social, biological, psychological and religious aims based on mutual rights and obligations. It is not a bond between two individuals but between two families. Marriage is a social institution that has to be decided in consonance with the public view.

Also, Senior Advocate of Supreme Court Desh Ratan Nigam pointed out that "law can't be made ahead of the time, till the time there is not enough call by society for law, it won't be accepted by the people." In *Animal Welfare Board Of India vs A. Nagaraja & Ors*¹⁹, Hon'ble SC legitimized the practise of Jallikatu, as it caused grave cruelty to animals. However, the same didn't applied in the ground reality, there are constant debates in the Tamil Nadu legislature for protecting the practise as it represents their culture and identity.²⁰

Similarly, in the case of the *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.*²¹ The court allowed the entry of all age women in temple. After the judgement, millions of Ayppan devotees opposed the judgement. In one instance when ten female activists made an attempt to enter the temple, the temple priests and authorities shut down the temple down for purification. Harish Iyer, an Equal Rights activist opposed him by

¹⁹Animal Welfare Board Of India vs A. Nagaraja & Ors, 2014 SCC OnLine SC 433.

²⁰PERSPECTIVE: LEGALISING SAME-SEX MARRIAGE, (Sansad TV, 2022)
<https://www.youtube.com/watch?v=YooWX0-Nzhk>.

²¹ Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors, (2019) 11 SCC 1.

questioning “when is the right time to make the law, if not now. Our constitution can’t be preferential, it has to be uniform for everybody.”²²

On January 6, the Supreme Court of India transferred to itself a batch of petitions seeking recognition of same-sex marriages, the petitions were pending before the Delhi and Kerala High Courts. On April 18, Supreme Court started with the hearing of more than 20 petitioner clubbed together for the recognition of same-sex marriage.

SOCIOLOGICAL PERSPECTIVES ON SEX AND SEXUALITY

The construction of sexuality has a considerable impact on perceptions, relationships, and outcomes, and scholars acknowledge that sexuality continues to be a crucial and defining social location. The researcher analyses different sociological theories of Structural Functionalism and Symbolic Interactionism to analyse the concept of marriage.

STRUCTURAL FUNCTIONALISM

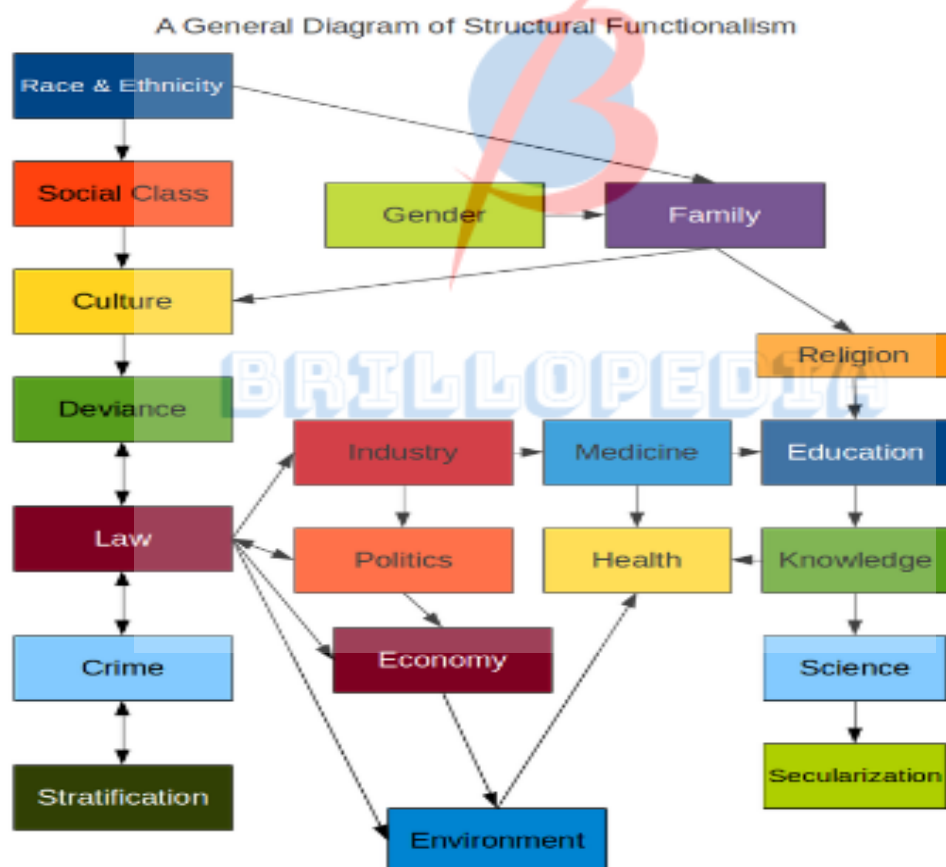
According to structural functionalism, society is made up of interconnected components that are intended to meet the social and biological requirements of its members. Functionalists emphasize the significance of controlling sexual behavior to preserve marital harmony and family stability when it comes to sexuality. They maintain a rigorous focus on the family unit at all times since they believe it to be the most important element of society. They also argue in favour of societal structures that support and guarantee family preservation.

For a long time, functionalists like Talcott Parsons (1955) have claimed that the family plays a significant role in controlling sexual behaviour. Traditional social standards surrounding family life have supported sexual behaviour within the family unit (marriage) and have opposed conduct outside of it (premarital and extramarital sex). From a functionalist perspective, encouraging sexual activity within the boundaries of marriage serves to deepen the link between couples and ensure that procreation takes place inside a stable, legally recognised relationship. The provision of essential resources and the best possible opportunity for optimal socialisation are provided to offspring by this system. Parsons have also argued that there exist complementary roles to gender i.e. boys and girls are socialised to

²²PERSPECTIVE: SAME SEX MARRIAGE, (Sansad TV, March 2023), <https://www.youtube.com/watch?v=TH2CX2kPY-g>.

take on traits that are complementary to each other, to make it easier to maintain stable, productive family units.

Boys are taught 'instrumental qualities' that include confidence and competitiveness which prepare them for the labour force. Meanwhile, girls are taught 'expressive qualities', such as empathy and sensitivity, which prepare them to care for their families. Therefore, to have a successful family, people need to have complementary skill sets and gender gives us a way of pairing off these skills, which encourages society to inculcate gender conformity in people by making them feel that they have to fit in these molds if they want to be romantically desirable. Homosexuality cannot be widely promoted as a viable alternative to heterosexuality, as procreation would eventually stop if this happened. So, if homosexuality is prevalent in the population, society will suffer as a result.²³



"General Diagram of Structural Functionalism" by Rcragun is licensed under [CC BY-SA 3.0](https://creativecommons.org/licenses/by-sa/3.0/)

²³THEORETICAL PERSPECTIVES ON SEX, INTRODUCTION TO SOCIOLOGY, (lumen learning)<https://courses.lumenlearning.com/wm-introductiontosociology/chapter/theoretical-perspectives-on-sex/>.

There exist various loopholes in this theory, more recent anthropological work suggests that gathering, fishing and small game hunting - all of which were also performed by women played a much larger role in providing food in these societies. Though, this theory was influential in mid-twentieth century, it's fallen out of favour for a few reasons. First, Parsons was basing his theory on a division of labour that was specific to middle class white America in the 1940s and 50s. It assumes a heteronormative and Western perspective on what a family is. However, not all families are nuclear units with one man, one woman, and a gaggle of children. When you expand the definition of family to include same-sex couples, single parents, multi-generational families or childless adults, it becomes less obvious that the person would assume a man working outside the home and a woman working inside the home.

Second, the ideas of complementary gender rests on there being two distinct and opposite genders. The idea of binary isn't universal and it ignores all those whose identities don't conform to a two-gender system. Third, Parson's theory ignores the personal and social costs of maintaining rigid gender roles. Critics argue that the idea that men need to be the ones working outside the home to maintain family stability is arbitrary, and it reinforces gender dynamics that give men power over women. Lastly, it ignores the fact that same-sex marriage is becoming more accepted legally and that more gay and lesbian couples are choosing to have and raise children using a variety of services.²⁴

SYMBOLIC INTERACTIONISM

Like all human action, sexual behaviour has symbolic meaning. Both men and women employ symbols and live in the universe of meaning those symbols have produced. According to Laumann, Gagnon, Michael, and Michaels (1994), sexual behaviour is linked to a wide range of activities, each with a distinct meaning, such as having children, obtaining physical pleasure, having fun, fostering intimacy, gaining spirituality, and exercising power.

In contrast to experimentally specified variables, Blumer advocated the use of "sensitizing concepts" to guide social research. Blumer examined society as a process rather than a structure and believed that reality was socially produced. This method offered a strong and critical voice of resistance to the functionalist and conflict theories that dominated

²⁴THEORIES OF GENDER, CRASH COURSE SOCIOLOGY (Youtube, 2017)https://www.youtube.com/watch?v=CquRz_cceH8.

mainstream sociology, especially in the late 1960s when sociological sex research was beginning to gain acceptance in academic circles.

Blumer's theory argues that people who are socially unrestful always try to seek something but don't know what it is. They show erratic behaviour and become vaguely excited and vulnerable to the apprehension of the future and rumours. Consequently, they develop "disrupted routines, unstable spans and irritable tendencies."²⁵ An *active crowd* develops collective behaviour in five steps. First, the *acting crowd* attention is grabbed by an 'exciting event' due to which their further behaviour is regulated.²⁶ The second stage involves milling where people are constantly walking and talking about the event, reciprocating and reproducing each other's behaviour known as '*circular reaction*'.²⁷ As the participants are inclined to give their answers quickly, unwittingly, and directly, it leads to the maintenance of a common mood.

The third stage involves the '*emergence of a common object*' and collective excitement in the audience, as they are attracted by the power of excitement shown by the group. Further, the fourth stage involves the stimulation and fostering of the common impulses that correspond to the crowd objective. The reason for this stage is a social contagion, that is, as they lose their ability to interpret and behave according to circumstance they are caught up by the excitement and impulses passed the group.²⁸

Finally, the result is that people who were in starting merely passer-by or onlooker gets attracted and infected by the behaviour of the *acting crowd*. As a result, Blumer's "genuine" acting crowds exhibit a variety of collective behaviours that have been described as "queer, vehement, and surprising," "strange, forbidding, and occasionally atrocious." Crowd participants are open to whatever proposals complement their raging common urges and dispositions to act because they lack the powers of interpretation and self-consciousness and are caught up in the circular response of collective excitement and social contagion.²⁹

²⁵ Clark Mc Phil, *Blumer's Theory of Collective Behaviour: The Development of Non-Symbolic Interaction Explanation*, 30(3), THE SOCIOLOGICAL QUARTERLY, 401-423 (1989).

²⁶*Ibid*, pp. 409.

²⁷*Ibid*, pp. 409.

²⁸*Ibid*, pp. 409-411.

²⁹*Ibid*.

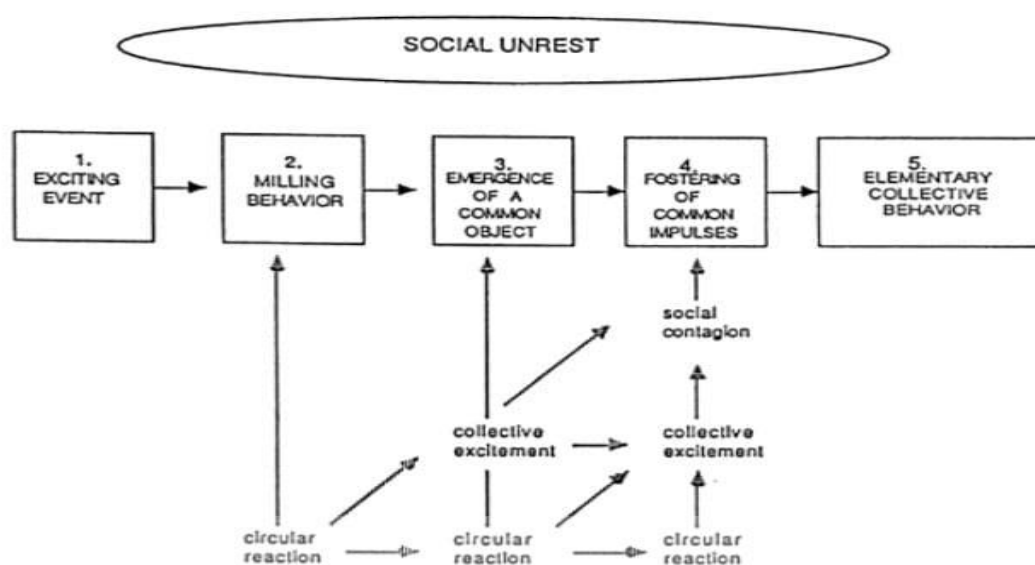


Figure 1. A Rendition of the Steps in and Underlying Mechanisms for Blumer's Explanation of Elementary Collective Behavior

This method emphasises how sexuality is a socially constructed reality that is different for each individual.

CONCLUSION

According to the Sociological perspectives, firstly, structural functionalism, the concept of same sex marriage is distorted and irrational as marriage can only take place between heterogeneous couples. Secondly, the symbolic interactionism approaches portrays how a crowd that lacks the power of interpretation and self-consciousness develops a tendency to replicate the behaviour of the strong influencing group. In India, the social structure has been transformed from supporters of same-sex marriage to opponents in contemporary times. After, going through the historical facets where India has witnessed the acceptance of same-sex marriage in social structure is strong to reason to deliver a judgment that legalizes same-sex marriage. However, the social construct has been changed by the Britishers, who acted as an influencing group in the crowd of India and inculcated the anti-sentiments with respect to transgenders and their rights of marriage, adoption, and divorce. Therefore, there exists a dire need to bring out the progressive judgment that would remove the veil of ignorance from the eyes of the Indian diaspora and would lead to acceptance of their marriage in the social construct.