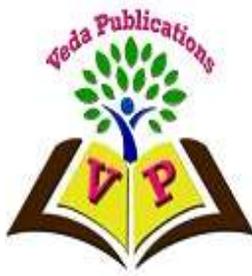


**SECTION 377 AND THE UNRESOLVED DILEMMA IN THE PUBLIC SPHERE**

Ms. Moumita Sarkar

(Assistant Professor, Dyal Singh College, University of Delhi.)doi.org/10.33329.joell.8.3.21.1**ABSTRACT**

The crux of this article is to interrogate the basic premise of the generation of controversies surrounding the alternate sexually oriented people which can be located in discourses on and about homophobia, and which plays a significant role in changing society's perception about the sexual minorities. What is also relevant is the legal issue mainly Section 377 of the Indian Penal Code and its implications and how the whole concept of alternate sexual orientation problematizes the judiciary and its various aspects. Dovetailed into the legal issue is a conventional treatment about how the sexual minorities are side lined and treated with disdain and repugnance, as power foregrounds the antipathy expressed towards those who are considered as the 'other' in the dominant culture and a heterosexual and hetero-normative society. The article looks at this aspect through a graphic novel and a documentary film both of which deal with the subject of homosexuality and homophobia.

Keywords: *Discrimination, Homophobia, Section 377, Sexuality, Society, Subalterns.*



INTRODUCTION

Before delineating the plethora of complexities associated with the legal issues, it is imperative to highlight the basic ideology of Section 377 of the Indian Penal Code, drafted by Lord Macauley as a part of the imperialist project for administering and regulating the Indian subjects. Section 377 specifies the definition of unnatural sexual offence. It says- "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 be liable to fine."¹ To put it thus, in banal words- "Section 377 can be described as the 'sodomy law' that criminalizes sexual practices-mostly oral and anal sex"² and is widely interpreted to make homosexual activities, even if they are consensual and in private between individuals, as being unauthorized by the law. The targets are mainly those who are specified through the insufficient and contested terminologies of 'gay', 'lesbian', 'bisexual', 'queer', 'transgender', 'kothis' and 'MSM'. Society as well as the state erroneously criminalizes alternate sexuality, thus perpetrating and perpetuating social injustices through law and its enforcements. "Section 377's egregious impact in India extends beyond physical violence to enabling a culture that defends discrimination of same-sex sexualities as public morality and supports intolerance and violence committed in intimate spaces of the family as maintenance of social order"³.

UNDERSTANDING THE DILEMMA

So, the inquisition as to why be the nation, the state and the society pejorative towards the alternate sexually oriented individuals? Why does the society preposterously presumes and prioritizes the heteronormative ideology to be the ideal and thus relegates the so called 'others' to the periphery or even outside the societal folds? The answer can be located in a news article in The Times of India, dated 24th of February 2012, where the Additional Solicitor General P.P. Malhotra construes homosexuality as 'immoral'. On being probed further, he unabashedly elaborates- "it is against the order of nature. The order of nature is that a man's genital is meant to be inserted in the female's biological genital. But if it is

to be inserted in another man's organ meant for excretion, will it be proper?"⁴

This phrase 'the order of nature' is reiterated very often, specifically in the context of homosexuality and Section 377 of the Indian Penal Code. It becomes indispensable to question what defines or what constitutes as the 'order of nature' and why is it so important? The answer can be traced back to the beliefs of the late 19th century revivalists who held the view that the "marriage is the country's last, infinitely precious and fragile site of autonomy, which would survive Western cultural onslaughts..."⁵. Though hyperbolic, yet it accrues to the fact that family forms the nucleus of any nation. Hence, we can derive that "the institution of family is at the core of the present extremely inequitable social order"⁶. So, the 'order of nature' envisages a society, or rather a patriarchal, heterosexual, normative society which believes carnal intercourse not as an act of recreation but procreation. This procreative, heteronormativity forms the basic framework of a stable, social order and that is why rules of 'normal' sexual behaviour should be practiced, generated and legitimized. Hence, it becomes so "crucial to ensure that men have legitimate sex only with women... and that women only have sex with the men they are married to..."⁷. Anything which is then alternate is seen as or equated to being 'unnatural' and 'disgusting' which has the potential to destabilize the central locus of the human civilization- the family. So, there are violent diatribes against these homosexuals which act as constant reminders that they have to abide by the societal norms and live by the cultural codes of the community. State laws and the judiciary thus constitute the best possible way of perpetual surveillance and prosecution. As Jyoti Puri mentions, "the law and its prohibitions may be said to be widely internalized to defend people's prejudices against same-sex sexualities and thereby, give false justification for violence against these sexualities"⁸.

IN THE PUBLIC SPHERE

However, to conjecture homosexual relationship or even homosexual marriage as being unconventional is to treat the whole idea with glaring misconceptions. Ruth Vanita in her essay called



'Same-sex Marriage in India' writes about the historian "Greg Reed who has written about the ancient Egyptian tomb of two men, manicurists to the king, which uses conjugal iconography to represent them in an eternal embrace"⁹. Even in India, there are examples of same-sex marriages being solemnized. Yet society still interrogates these homosexuals with a condescending attitude as society is virulently homophobic. An exploration of this abstraction can be adjudged from *Kari*, a graphic novel by Amruta Patil and *My Friend Su*, a documentary film, directed by Neeraj Bhasin. Ranjan sir, Su's mother and his landlord in the documentary film, who are passingly referred to by Su are the custodians of a homophobic and heteronormative society which contemplates anything outside the norm as an aberration. Their concerns vary- from societal pressures to medical inferences. The same issue troubles Kari's mother for she too cannot align herself to her daughter's sexuality. "Mamma's concern has percolated into complete hysteria. I am glad that the assault happens in the form of a dismembered voice. 'This is not how I raised you', says Mamma. 'Of all the people in such a big city, you pick the smut and the degenerates'." What is also intriguing is the physicality of both Kari and Su. The physical portrait of Kari charts out a new territory with her new "2 mm buzz cut", "bring on the ladies" attitude and her constant proclivity to look like Sean Penn. Su, in Neeraj Bhasin's film too, feels that he does not "exist bodily". He presumes that he is a woman, trapped inside the body of somebody else. Needless to say then, the body itself becomes or engenders the transitional process of gendering the individual. It also suffices as the site of contestation for the society's archetypes and the individual's own personal desires. Society indoctrinates the masculine or the feminine attributes to the individual based on the gender of the body, and yet the same body desires to be the opposite, the other, through reconfiguration. Thus, in *Kari*, the hairdresser's repeated rejoinders- "Madam, won't looking good. I have lady's patterns", "Madam, face looking boy type" and similarly in the film, Su's constant struggle to correspond to his mother's expectations, "I have to pretend what she sees". Interesting to note that in

Kari, those who are supposedly the 'normal' do not adhere to the conventions of normativity and the clear divisions get blurred when Kari says- "there is no such thing as a straight woman". Also, what is highlighted is the fact that society obliterates the aspects of affection and companionship which also form a manifestation of the homosexual relationship and which both Kari and Su desire from their respected partners. The focus is on the act itself and hence, Su's obnoxious lamentation that- "the world is beautiful. I wish it was more real for me".

IS THERE A NEW HOPE?

Here, the attempts of NAZ Foundation assume symbolic importance and power. Lawrence Liang in his article – 'Is the NAZ Foundation decision the Roe v. Wade of India?' predicates whether "NAZ Foundation v. Government of Delhi is the first equivalent of a case whose name conjures up the history of particular struggle, celebrates the victory of a particular moment and inaugurates new hope for the future"¹⁰. Their resolve was to adopt a radical recourse to use the judiciary and also to try for an "innovative interpretations of the Constitution to settle a controversial area and establish rights for unpopular minorities or to establish a ruling against public morality as defined by the majority"¹¹. So, what was their demand which provoked "spontaneous outburst of emotion?"¹². NAZ Foundation had approached the Delhi High Court to 'read down' Section 377, i.e. "to exclude acts of consensual private sex, as opposed to asking for Section 377 to be struck down as a whole"¹³, in a way then paving the way for more courageous attempts to decriminalize homosexual practices and by extension homosexual subjectivities in India. Another significant endeavour was made by the *AIDS Bhedbhav Virodhi Andolan* (ABVA) which too, had filed a Public Interest Litigation (PIL) in the Delhi High Court. Arvind Narrain says- "the petition challenged the constitutional validity of Section 377 of the IPC and argued that the petition violated Articles 14-15 (Right to protection against discrimination), Article 19 (Right to freedom of speech and expression) and Article 21 (Right to life and liberty which encompasses the Right to privacy) of the Constitution



of India¹⁴. At that time, state agents including the then superintendent of the Tihar Jail, Dr. Kiran Bedi prevented the dissemination of condoms to protect the Jail inmates against sexually transmitted diseases, like AIDS. Jyoti Puri also mentions- "for NAZ (India), the hindering of much-needed HIV/AIDS outreach efforts due to the criminalization of same-sex sexualities was the primary motivation against Section 377"¹⁵. But inclusive in it is also an indubitable concern about the conditions of the homosexuals. The PIL filed by NAZ takes into consideration the plethora of sufferings of the alternate sexualities. In a way, then, it investigates and devalues society's insipid insouciance and strives to emphasize as well as sensitize the otherwise inertia of the society to mobility, action and change. To put it approximately, the PIL registers an inducement to understand law's ability to deconstruct and rectify social fallacies. As Gautam Bhan says in his essay titled 'Challenging the Limits of Law- Queer Politics and Legal Reform in India'- "we must challenge the idea of hierarchies in themselves, not just the one hierarchy that victimizes us. We must not only protest the right of queer people to live lives free of violence, we must challenge the thinking that allows many people to see such violence as legitimate"¹⁶. It is essential to note that the NAZ Foundation demanded a 'reading down' and not a complete dissolution, as Section 377 is also used to prosecute cases of child sexual abuse. There are many cases pending in India and reports and documentation show that Section 377 becomes the groundwork for prosecuting in cases involving continuous violence against children. What is required then is a thoroughgoing scrutiny and analysis and a renewed re-interpretation, so that consensual and private homosexual act between individuals is not counted as a criminal offence.

CONCLUSION

The role of the state is exigent in this context. The NAZ (India) PIL acts as a cogent indication about sexual and gendered subjectivities and also the examination of state policies that promote sexual violence. It presages numerous inconsistencies that are a part of the law and also directs the society

towards the cognizance of the role of the state as the arbiter of rights. To quote Jyoti Puri again who has used the Foucauldian concept of sexuality as a transfer point of power- "The Foucauldian sexuality is based on the premise that sexuality is not a biological drive but instrumental to the enactment of power through formation of knowledge and the incitement of discourses of subjectivity, control and resistance"¹⁷. Hence, the regulation and administration of alternate sexuality so as to reinforce state's power over delinquent and anomalous behaviour. Sexuality foregrounds the division or assimilation of power and therefore it becomes necessary to gain hegemony over those who threaten the exactitude of the state. State laws itself draw support from public conventions as well as from the conveniences of the majority. So a threat to power by any sexually disenfranchised group is evocative of a threat to the stability of society. The NAZ PIL then evinces an important question- will legal amendments in the IPC indicate a social amendment i.e. a challenge to deviate from the dominant conventions and an inclusion of those who are categorized and disapproved as homosexuals? Will a reformulation of laws proceed towards the empowering of the subalterns and recognize sexual violence as a violation of human rights too? The question remains.

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ABOUT THE AUTHOR

Moumita Sarkar is an Assistant Professor in Dyal Singh College, University of Delhi since 2015. Her areas of research and interest include Dalit Narratives, Subaltern Studies and Translation Studies. Her publications include "Natyashastra and Theories of Performance" (co-written with Ranjana Nagar) in *Essays on Text and Performance*, Book Age publications, 2017, "Gendering Caste through Ambedkar's Writings" and "Redefining Dalit

Women's Autobiographies" in *Women and Empowerment in Contemporary India*, Worldview Publication, 2016. She has presented a paper in a National Conference in BITS PILANI, Hyderabad in 2013. She has published three research articles in peer-reviewed journals.