JUSTICE TOWARDS LGBT: CREATING SPACE FOR LOVE

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INTRODUCTION

On 2nd July 2009, the Delhi High Court in *Naz Foundation V. NCT, Delhi & Ors.*[1], handed down the verdict reading down section 377 of the Indian Penal Code (IPC), 1860, decriminalizing consensual sex between adults. The judgement was more than just a legal verdict as it marked the beginning of the process by which queer people, from being targeted anti-citizens, became subject of rights. It recognized that sexuality was integrally linked to identity and that 'for every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes'.[2] The court concluded that 'the expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.'[3] The cultural and religious puritans have rallied with shrill hostility against the judgement calling queer people diseased, unnatural, against Indian culture and reprehensible[4].

However in the subsequent judgement by the supreme court of India in the case of *Suresh Kumar Koushal and Anr. V. Naz Foundation and Ors.*[5] AIR2014SC563 the judgement was overruled stating that sec.377 does not suffer from the vice of unconstitutionality, clearly, this means that the apex court of the country thought it not to be unconstitutional to criminalise the expression of love. Rather than taking a firm positive stance the court thought it would be fit

[1] Naz Foundation V. Government of New Capital territory of Delhi and Others, Delhi Law Times Vol. 160 (2009) 277.
[2] Ibid, page 277, para 47.
[3] *Ibid*.
[4] 'Baba Ramdev set to challenge HC verdict legalising gay sex', Indian Express, 7 July 2009.
[5] AIR 2014 SC 563.

to wash their hands off of the whole mess and instead advised the legislative bodies to take the matter into discussion.

What I discuss further in this paper is that in the mainstream discourse relating to this issue the exchange has been bland to say the least. Those in opposition have argued from an absolutist position condemning homosexuality to be a perversion and a disease and arguing that there has been no place for such deviant behaviour in Indian culture. Whether they even have proper knowledge about the term 'Indian' seriously comes into doubt. Those in favour for decriminalising homosexuality also take an absolutist position succumbing to the popular modern day liberalist ethic. Supporters have been disappointing in the sense that most of their discourse has been based completely within the modern law bracket; this has been detrimental to the LGBT rights movement as it completely ignores the crux of the LGBT issue – Love. I argue that working within the bracket of modern law which is based on a utilitarian framework there can be no justice. This issue gives us an opportunity to walk into, what is been up till now unchartered territory, I argue that it will be unrealistic of law not to take into consideration the emotional underpinning of the whole issue, it must take love into consideration. This sounds strange, how can an entity based on the principals of reason, rationality, precedents etc. take emotions into account as their guiding principal. Surely this is what one would call Queering the law.

With the ongoing proceeding in the Apex court for striking down section 377 of the Indian Penal Code, there has been a shift in jurisprudence from the *Suresh Kumar Kaushal* judgement, petitioners argue that the existence of the provision is in stark contrast to the values of the Indian Constitution and that the constitutional mandate of equality and fairness can only be met if the section is removed. A distinctive feature of the arguments put forward this time in Navtej Singh Johar and Ors. Vs. Union of India, is that the court now recognises that section 377 is not merely a law that criminalises an act per se, rather it criminalises and discriminates a whole class of persons. That is the core issue at stake, it is not a mere legal technicality, there is a human element to it all. In this article I attempt to cut through the legal discourse and present the human cost of what is at stake in decriminalising homosexuality.

CONSTITUTIONAL PERSPECTIVE

In the ongoing hearing about section 377 in the Supreme Court, various counsels on behalf of the petitioners have drawn upon the Constitution of India and how the section violates several provisions of Constitution. It is a hostile and archaic law, which is pointed towards discriminating against a particular class of individual. Creation of a class is allowed, but such classification must be rational and based on intelligible differentia having reasonable relation to the objects of the law and if the very object itself is found to be discrimination then all justification of rationality becomes immaterial[6]. This is one of the ground to hold that sec.377 is violative of Art.14. Sec.377 singles out individual qualities that are personally connected with the dignity and autonomy of individual citizens. As confirmed by the *Puttuswamy judgement*[7] :- "Equality demands that the sexual orientation of each individual in society must be protected on an even platform."

Furthermore it can be very well argued that the section also infringes on the rights guaranteed as per Article 15. The Supreme Court in the *NALSA*[8] judgement has held that the state has a positive duty towards the formation of an equal and just society, section 377 interferes with this duty.

A BRIEF LOOK AT THE HISTORY OF HOMOSEXUALITY IN THE 'INDIAN' SOCIETY

Vikram Seth became angry when advocates for the Section 377 law, which made homosexual sex in India illegal, stated that homosexuality is "unnatural" or "against Indian culture". "Look into our history before you say this is Indian and this is not Indian", says Seth. He and other Indians like himself consider homosexuality and sexual tolerance to have been an integral part

[6] Subramaniam Swamy v Director, Central Bureau of Investigation & Anr., (2014) 8 SCC 682,
[7] Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors. WRIT PETITION (CIVIL) NO 494 OF 2012
[8] National Legal Services Authority v. Union of India, (2014) 5 SCC 438, page 496 para 99.

of Indian history. It was British colonialism that brought the idea of sexual wholesomeness to India.[9]

Now in India we didn't have this concept of something being 'against the order of nature'. It was essentially a Western concept, which has remained over the years. Now homosexuality as such is not defined in the IPC, and it will be a matter of great argument whether it is 'against the order of nature'.

In another indicator of the liberal Hindu heritage, Kama Sutra, a classic written in the first millennium by Sage Vatsyayana, devotes a whole chapter to homosexual sex saying "it is to be engaged in and enjoyed for its own sake as one of the arts." Besides providing a detailed description of oral sex between men, Kama Sutra categorizes men who desire other men as "third nature" and refers to long-term unions between men. The Second Part, Ninth Chapter of Kama Sutra specifically describes two kinds of men that we would recognize today as masculine- and feminine-type homosexuals but which are mentioned in older, Victorian British translations as simply "eunuchs."[10]

It is also stated: "Citizens with this kind of homosexual inclination, who renounce women and can do without them willingly because they love one another, get married together, bound by a deep and trusting friendship."[11]

Medieval Hindu temples such as those at Khajuraho depict sexual acts in sculptures on the external walls. Some of these scenes involve same-sex sexuality[12]:

- An orgiastic group of three women and one man, on the southern wall of the Kandariya Mahadeva temple in Khajuraho. One of the women is caressing another.
- A similar group, also on the southern wall, shows a woman facing the viewer, standing on her head, apparently engaged in intercourse, although her partner is facing away

[9] Being a criminal in my own country: Vikram Seth on Sec 377, www.firstpost.com, Sandeep Roy, Jan 27 2014.
[10] Kama Sutra, Chapter 9, "Of the Auparishtaka or Mouth Congress", Richard Burton, 1883 Translation.
[11] The Complete Kama Sutra, Alain Danielou. Rochester, VT: Park Street Press, 1994.
[12] Available at http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-hinduism (last accessed on 26/07/2018)

from the viewer and their gender cannot be determined. She is held by two female attendants on either side and reaches out to touch one of them in her pubic area.

- Also at Khajuraho, a relief of two women embracing one another.
- From this it is easy to conclude that the religious puritans making cultural and historical claims of homosexuality being perverted behavior which has no place in Indian society have no idea of what they are talking about.

THE ANTI-CITIZEN

"Visibility is a Trap" – Michel Foucault

In this part I attempt to capture how through the formal and technical language of legal documents that is often hard to understand create the sexual 'anti-citizen'.

First up, who is an anti-citizen? A subject whose existence is antithetical to the notion of respectable/ compulsorily heterosexual citizenship and who has the potential to disrupt the peace with which this 'normalcy' operates. The status of the anti-citizen does not imply a position which is contra-citizen. As Oishik Sircar puts it "The anti-citizen is relegated to the sphere of illegality and thus not found worthy of full or equal citizenship rights."[13] However the anti-citizen is not made to disappear – his deviance is fine-tuned through legalese – to ensure that he can be spotted and targeted. In legalese the citizen and anti-citizen get constructed as binary figures: one whose access to rights is guaranteed through the law and the other who is denied citizenship rights when identified as a criminal. The anti-citizen remains invisible in the eyes of the law, as far as the rights guarantee are concerned but becomes hyper-visible when their actions need to be criminalized to 'save' society from 'degeneration'.

A useful way of understanding the politics of location and control of deviance is through the Foucauldian Panopticon. If we place 'law' on top of the Panopticon, then it is clear that it operates not only through its enforcement but also, because of the mere existence of the letter of the law. In *Discipline and Punish*, Michel Foucault elaborated on Bentham's Panopticon

[13] The Fallacy of Equality, Osihik Sircar, State of Justice in India Volume II, Sage Publications, 2009.

(not that Jeremy Bentham is the father of utilitarian philosophy on which modern law is based). The Panopticon is an architectural contraption where you have an observation tower erected in the middle of an open courtyard, surrounded by prisoners. The idea being to ensure that the prisoners self-regulate their conduct because, in such a construction, the guards (law) inside the tower can see the prisoners (queers) but the prisoners can never make out of the guards are looking at them, or even if any guards are present.[14] In effect the prisoners 'behave themselves to avoid being censured or punished by the authority on top of the tower. Their deviance remains ever visible in the eyes of the authority.

The same applies to the Criminal Tribes Act 1879, also a colonial legislation, which targets the cultural community of Hijras as being existentially criminal. Though the Law has been repealed, it has permeated a popular imagination of Hijras as being people who extort money, steal children etc. which still operates to sanction violence against them because of their sexual identity.

Here I must point out to the subtle violence of law which criminalizes consenting sexual behavior, in effect criminalizing expression of one's love, exploration of one's self and making existence itself a crime.

DISSECTING 377

377. Unnatural offences.—whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

[14] Discipline and Punish : The Birth of the Prison, Michel Foucault, Penguin, April 1991.

Sec 377, couched in ambiguous terms of 'carnal intercourse against the order of nature', in other words, has been marked by a silence from its very inception and, until recently, has bot been a matter of public debate.

The core problem with Section 377 has been its blanket coverage of both coercive as well as consensual sex within its prohibition. The wording of 'carnal intercourse remains vague enough to encompass all sexual acts which are non-procreative in nature. The broad wording of the provision itself gives the police enough power to target queer people arbitrarily. The social stigma around homosexuality combined with the vague and general nature of Section 377, makes the provision akin to a blackmailers charter. Section 377 also acted as a significant marker of second class citizenship for queer people during both the colonial period and significant parts of the post-independence era when the queer voice was entirely absent.

CONCLUSION

Up till now we've seen that historically India had no taboo towards homosexuality, and instead it is a majorly colonial morality which is imposed on us today. We've seen how the violence of law produces the anti-citizen and how the subtle violence of law chokes the life out of human beings. Let us go a step further and move towards the conclusion, however even my conclusion is aimed at raising questions.

'Is the task of queer politics to press for the inclusion of citizens who are being discriminated against on the basis of their gender and sexuality within the existing democratic framework? Or can one take it a step further?'[15]

Is the imagination of a queer politics merely about access to rights for queer citizens or also about questioning structures which limit the very potential of human freedom? I argue that it must indeed go beyond the question of rights to critique fundamental structures in society. A queer vision is not merey about equal rights for LGBT persons but about loosening up the rigid structures of caste, gender and compulsory sexuality. It is about questioning the notions of

[15] Queering Democracy:, Arvind Narrain, Law Like Love, ed. Arvind Narrain and Alok Gupta, Yoda Press, 2011.

purity, muddying rigid boundaries and opening out a space for those at the margins of the hegemonic structures which make up our society.

"… It's amazing how millions of yellow and brown skinned people have absorbed victorian prudishness that even now, when their countries are independent – and they are all happy and proud they're free from the yoke of the British – they stoutly defend these laws… as the embodiment of the ancestral Asian values."[16]

So thinking from this perspective, then inter-caste marriages are really one way of rethinking community, kinship, sociality and relationality. They are a critique of both compulsory heterosexuality and the structures of caste in their privileging of love over convention.

[16] Quoted in The Presumption of Sodomy, Alok Gupta, ibid.

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