

## A QUEER CHALLENGE TO SEC 377 OF THE IPC: A QUESTION OF POLITICS

I would like to title my presentation as a 'queer challenge to Sec 377 of the IPC: A question of politics. By the use of the word queer what I'm hoping to communicate is a form of politics which questions the norms of gender and sexuality and critiques the role that the normative understanding of both gender and sexuality plays in stabilizing existing societal relationships. I'm also trying to communicate that the word queer is an inclusive category encompasses all those who question the norms of gender and sexuality, be it hijras, kothis, lesbians, gays or those who prefer not to identify themselves.

I would like to address two questions

- 1) What does the existence of Sec 377 do ?
- 2) Three reasons why Sec 377 needs to go.

- 1) What is Sec 377 about?

Sec 377 was introduced by Lord Macaulay in 1860 as a part of the Indian Penal Code. A plain reading of the section makes clear that it punishes 'carnal intercourse against the order of nature' with either imprisonment of 10 years or life and fine. The provision reads,

### **Unnatural Offences.**

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 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."

The question which the judiciary has struggled with since 1860 is to determine what exactly 'carnal intercourse against the order of nature' meant. Over a period of time, the meaning of Sec 377 in 1884 was restricted to anal sex, by 1935 it broadened to include oral sex and the judgements in contemporary India have broadened it to also include thigh sex.

If we are to search for a principle which holds together these various sex acts it was laid down as early as 1935. The Court in *Khanu vs Emperor* laid down that,

"the natural object of sexual intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* [oral intercourse] is impossible". It then went on to define sexual intercourse as "the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary objective of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that [the] sin of Gomorrah is no less carnal intercourse than the sin of Sodom.

In defining what constituted 'carnal intercourse against the order of nature' in *Lohana Vasanthlal Devchand v. The State*<sup>1</sup> the Court noted that "the act of oral sex involves enveloping of penis by the mouth, thus creating an alternative socially unacceptable activity, which is against the order of nature."

This idea of sex without the possibility of conception was used by the judiciary over the last 140 years to characterize homosexuality as a perversion, despicable specimen of

humanity, abhorrent crime, result of a perverse mind and abhorred by civilized society. What judicial interpretation did was to include both acts of consensual sex as well as acts of sexual assault under its catch all category of 'carnal intercourse against the order of nature'.

Just one point to be made is that in the judicial understanding of Sec 377 has never been impacted by the Indian Constitution. Right since 1860 through 50 years of the Indian Constitution, the judiciary continues to follow the colonial justices of the Khanu era in continuing to characterize homosexuals as 'despicable specimens of humanity'. The right to equality, the right to dignity or the right to expression have never been seen fit to apply to lesbians, gay, bisexuals, hijras or others whose sexuality does not conform to the heterosexual mainstream.

The judicial understanding of Sec 377 only legitimizes and reinforces state power to persecute and harass those of an alternative sexual orientation or gender identity. This enormous power in the hands of the state to enforce its vision of morality finds frightening expression in the form of arbitrary and brutal state action.

I would just like to highlight two cases of how Sec 377 confers the state with uncontrolled power.

On 4 Jan, 2006, four men were arrested in Lucknow on the charge of having sex in a public park. A national level Fact Finding Team on visiting Lucknow found out that the FIR was an outrageous concoction and that in fact what happened was that one person's phone number was got off a gay website, he was then beaten and tortured and forced to reveal the names of his other friends and an FIR was registered against these 4 and 13 others. What is important to note about the case is that the police were confident that since these four were on the gay website, they were guilty of the offence of Sec 377. They unleashed a media blitz in which the key exhibit was the sexuality of the four accused. Though the Fact finding revealed that the most the four could be accused of was putting their profiles online, the police went ahead and concocted a fictitious case under Sec 377. The case illustrated the arbitrary powers in the hands of the state to periodically harass queer people in the confidence that it will never be a serious human rights issue. But what was interesting about this story of arbitrary state action in 2006 was that it resulted in protests across the country in Delhi, Bangalore and Bombay in which, the queer community asserted that, 'The state response is in effect a clear attempt to terrorize the sexual minority population, clamp down on the very expression of anything outside heterosexuality and is fundamentally dissonant with any tolerant pretensions the government might have. It is unacceptable that in a context where gays, lesbians, bisexuals, hijras, kothis and other sexual minorities are being increasingly vocal and articulate about rights, the UP State is attempting to push UP back to the dark ages, wherein individual autonomy was a casualty of the authoritarian State. '.

In another case from Bangalore, twelve hijras were arrested under Sec 377. The police filed a case in Cr. No. 152/06 u/s 270, 294, 290, 377, 511 read with Sec 34 of IPC in which it is alleged that 12 hijras and kothis were engaged in unnatural sexual business which will affect citizens and tourists who visit Cubbon Park and that the behavior was embarrassing and disgusting. It was also alleged that those arrested were loitering with the intention to engage in unprotected, unnatural sex by standing in the shade of the trees and soliciting passers by. It was also alleged that they were committed unsafe, immoral sexual acts with the purpose of earning money and that these acts may have led to the spread of diseases like AIDS, causing severe harm to the general public.

Where the issue of the state unpredictably descending upon you in all its fury combined with the judicial abnegation of any constitutional responsibilities is frightening by itself, it is by no means the whole story of what Sec 377 means. Who grasped this truth very acutely is one of India's best known thinkers Amartya Sen, ( who had in his other works critiqued the Hindu right and made strong arguments for augmenting state spending in health and education) who in an open letter demanding the repeal of Sec 377 noted, ' It is some times argued that this indicates that Section 377 does not do as much harm as we, the protesters, tend to think. What has to be borne in mind is that whenever any behaviour is identified as a penalizable crime, it gives the police and other law enforcement officers huge power to harass and victimize some people. The harm done by an unjust law like this can, therefore, be far larger than would be indicated by cases of actual prosecution.'

Some clues as to what would be this ' far greater harm than actual prosecution' emerges from human rights documentation. The PUCL-K Report documents the pattern of everyday violence faced by the hijra and kothi community at the hands of the police. To a community which makes its living by both sex work and begging ( particularly in South India ) police violence is an everyday threat or reality. In this as a community they share a lot with women in sex work who face a similar pattern of brutal violence by the state. To take just one example of this form of violence,

Nasir, a 27 year old kothi, states: "the Sampangiramanagar police filed a false case against me under a wrong name (Saleem) and my father's name as Abdul, and put me in the lock-up. When I protested against this confinement, they told me we cannot do anything with you, so just be here. I was made to be there until 11 p.m. and after approximately an hour, three policemen came to me and asked me whether I have a penis or not, "let us see." When I didn't listen to them, they started hitting me in order to make me take off my clothes. One policeman put a stick into my arsehole saying you are a 'khoja' (derogatory term used for kothi/hijra). And then one policeman forcibly inserted his penis in my mouth and the other in my arse, and so did the others, one by one, till they all came out and left me.

The other aspects of the 'far greater harm than actual prosecution' would be the innumerable social effects which radiate out from the very existence of a stifling law such as Sec 377. To take just two examples,

Im coming from a meeting of the Female to male transgender community in Bangalore and the key concerns they have are the deep levels of social intolerance and active hostility to what society perceives as the very strange sight of women who dress and act like men'.

Similarly the social intolerance fostered by the legal regime of Sec 377, results in the unacceptable situation wherein lesbian couple after lesbian couple feels they have no option but to commit suicide when faced with the dire reality of the Indian norm of compulsory marriage. Deepa from Sahayatrika has documented the cases of 23 couples only in tiny state of Kerala who have committed suicide rather than be forced into marriage. Of course one also needs to understand that this form of extreme intolerance is also being combated by the emergence of queer activism, but for many women from small towns without any access to the queer community it remains a lonely struggle to keep alive the revolt against compulsory heterosexuality.

The queer struggle against Sec 377 must necessarily speak to these really diverse experiences, right from the story of the gay man being arrested under Sec 377 to the hijra being tortured and abused by the police to the lesbian who is forced by social

intolerance and legal indifference to commits suicide. Sec 377 is a visible symbol of all that is wrong with compulsory heterosexuality and it is within this context that a queer critique has to be framed.

From a queer perspective , Sec 377 is to be opposed as

- 1) Its unacceptable that in 21century India we still have a law which denies basic constitutional rights to a section of the Indian population. As J Albie Sachs put it in another context, ' it is only in the most technical sense { that this law} is about who can penetrate whom and where. At a practical and symbolic level it is about the status, moral citizenship and sense of self worth of a significant section of the community.' So if we believe that like all heterosexual martial couples , homosexuals too should have the freedom to engage in intimate sexual acts without being subject to state harassment, then this law needs to go. The simple logic being that the Constitution cannot know or tolerate classes and there cannot be a law which is based on pure animus towards one section of the community. This point is made eloquently and powerfully by a whole range of people the latest of whom are Amartya Sen and Vikram Seth. As Seth puts it, the problem with Sec 377 is that By presumptively treating as criminals those who love people of the same sex, Section 377 violates fundamental human rights, particularly the rights to equality and privacy.' Prof Sen eloquently notes, 'It is surprising that independent India has not yet been able to rescind the colonial era monstrosity in the shape of Section 377, dating from 1861. That, as it happens, was the year in which the American Civil War began, which would ultimately abolish the unfreedom of slavery in America. Today, 145 years later, we surely have urgent reason to abolish in India, with our commitment to democracy and human rights, the unfreedom of arbitrary and unjust criminalization.'
- 2) However beyond the understanding of Sec 377 as a question of equal rights is the role of Sec 377 as a tenacious metaphor for all that is wrong with our sexual universe. As Shefali Vasudeve of Outlook magazine put it , 'in conversation and writing, it is now a metaphor- straight out of the imaginary thesaurus that lists new meanings in the New India.' The new meaning which the challenge to Sec 377 embodies is the fact that sex is a form of politics as serious as caste or class or gender. The challenge to the law asserts the point that erotic injustice is a form of injustice which has for too long been ignored as 'frivolous, bourgeois or simply as something not meriting serious human rights attention. What the political challenge to Sec 377 attempts to bring to public view is the point that sex like caste and class and gender too creates hierarchies and divisions which constitute a political system much like the categories of race or gender. As Gayle Rubin notes, ' a radical theory of sex must identify, explain and denounce erotic injustice and sexual oppression'. Some of the elements of this theory would be
  - a) Understand sex not as a biological force but rather as something which is constituted in the course of human history. A history which at points in time has seen it fit to embody a whole range of prohibitions against sexualities which it sees as non normative. Among the key elements of this treatment of sex include
    - i) Sex negativity, Even till today sexuality is seen as a negative force in wider culture and expression of sexuality is frowned upon. Sex has to be expressed within a procreative, marital sex and any sex outside that framework is unfailingly seen as negative or ringed with societal and legal prohibitions.

ii) Sex hierarchies. Sex is not seen as a neutral biological entity but is once again seen within a system of good and bad. What is good and respectable is sex which is procreative and marital and what is seen as sex which is bad is all other forms of sex, ie sex for money and sex for pleasure. Even within the forms of sex which are considered bad there are hierarchies with the gay married couples inching their way towards respectability, with promiscuous gay people and hijra sex workers condemned to occupy the lower reaches of this system.

What the political challenge to Sec 377 is about is ultimately this view we have about sex. The fundamental question which the campaign should raise is that the political system of sexuality with its sex negativity as well as its own inbuilt system of sexual hierarchies needs to go. This means that a whole series of laws right from Sec 377 to adultery laws, to laws on sex work to the law of marriage need to be rethought.

Why the perspective of Gayle Rubin is so important is because even when we talk about sex, we tend to connect it up to an emotional and relational context before we are able to see it in terms of rights violation. The best example is really the US Supreme Court decision in *Lawrence vs Texas*, where the majority opinion of J. Kennedy in striking down the Texas sodomy statute, waxed eloquent about, 'The liberty protected by this Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.' The implication of the judgement is that sex is put within a relational and emotional context. The judgement does not consider the (very likely fact) that the John Lawrence a older white man and Tyron Garner (younger black man) might very well have engaged in sex which might not ever have had anything to do with a relationship. The question which comes to mind is if John Lawrence and Tyron Garner were having sex for money would the Supreme Court have been able to come up with a similar judgment? If we take the politics of sex seriously and if we take the fact that sex by and of itself, needs to be defended, then we must have the courage to say that regardless of whether it was one off casual sex encounter or sex for money, the right is really one of sexual autonomy. The principle of sexual autonomy is a human good, in and of itself and needs to be defended on its own terms regardless of whether one chooses to have sex with other consenting adults for pleasure, money or in the context of an intimate relationship.

3) Even as we defend sex as a value of and in itself, it remains vital and important that we also understand what is the wider socio-political framework within which sex is implicated. Interestingly a strong defence of how sex in an emotional and relational context had the power to disturb existing societal relations was raised by Foucault in an interview with a French gay magazine. Foucault noted, "One of the concessions one makes to others is not to present homosexuality as anything but a kind of immediate pleasure, of two young men meeting in the street, seducing each other with a look, grabbing each other's asses and getting each other off in a quarter of an hour. There you have a kind of neat image of homosexuality without any possibility of generating unease, and for two reasons: it responds to a reassuring canon of beauty, and it cancels everything that can be troubling in affection, tenderness, friendship, fidelity, camaraderie, and companionship, things that our rather sanitized society can't allow a place for without fearing the formation of new alliances and the tying

together of unforeseen lines of force. I think that's what makes homosexuality 'disturbing': the homosexual mode of life, much more than the sexual act itself. To imagine a sexual act that doesn't conform to law or nature is not what disturbs people. But that individuals are beginning to love one another—there is the problem.'

Within a Foucauldian framework obviously sex is connected to existing social relations of power and the approved as well as the despised modes of sex tell us a lot about how power is organized in society. Within society where sex is bound up with social relations of power, the forms of what society considers 'illegitimate sex' are really forms of sex which are deeply subversive of the existing social order.

EM Forster also seems to have instinctively grasped this point as he famously noted, in *Two cheers for democracy*. "If I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country." subtly indicating how when 'people are beginning to love one another' it is a starting point for the critique of the ideology of nationalism. Apart from EM Foster, the other figure is the 19 century vociferous homosexual rights advocate, anti imperialist Edward Carpenter who embodied the connections between forms of radical politics be it homosexual rights, anti imperialism or animal rights ( his work was referred by Gandhi, though we have no clue what Gandhi thought about the homosexual part of it ) Leela Gandhi in her recent book, *Affective Communities* makes these connections thereby invoking a more political way of thinking about sex.

Another great illustration of how the fact that ' individuals are beginning to love one another can be a problem' is best illustrated by reference to George Orwell's great dystopic novel, 1984. The connection of ' subversive sex' to the act of questioning wider political frameworks is best embodied in George Orwell' dystopic novel 1984. To most people it is a dark brooding novel about an irremediably dsystopic future. However the one space which the anti hero Winston has to question the totalitarian frame is his love affair with Julia.

This otherwise mundane fact of the 'affair', gets invested with extraordinary significance in the world of 1984. Winston sees himself as a rebel who desires a world outside the control of Big Brother. In Winston's thoughts, he sees himself as 'a lonely ghost uttering a truth that nobody would ever hear. But so long, as he uttered it, in some obscure way the continuity was not broken. It was not by making yourself heard but by staying sane that you carried on the human heritage.'<sup>1</sup>He empathizes with the Party enemy Goldstien and 'his heart went out to the lonely derided heretic on the screen, sole guardian of truth and sanity in a world of lies.'<sup>2</sup>

Julia by contrast to the more intellectual Winston, instinctively grasped the nature of the control of Big Brother. 'With Julia everything came back to her own sexuality. As soon as this was touched upon in anyway she was capable of great acuteness. Unlike Winston, she had grasped the inner meaning of the Party's sexual puritanism. It was not merely that the sex instinct created a world of its own which was outside the party's control and which therefore had to be destroyed if possible. What was more important was that sexual privation induced hysteria, which was desirable because it could be transformed into war fever and leader worship.'<sup>3</sup>

---

<sup>1</sup> George Orwell, *1984*, Signet, New York, 1981, p. 26

<sup>2</sup> Ibid. p.16.

<sup>3</sup> Ibid. p.110.

Winston through his affair with Julia begins to understand Julia's point. 'That was very true he thought. There was a direct intimate connection between chastity and political orthodoxy. For how could the fear, the hatred and the lunatic credulity which the Party needed in its members be kept at the right pitch except by bottling down some powerful instinct and using it as a driving force? The sex impulse was dangerous to the Party and the Party had turned it to account.'<sup>4</sup>

Both Winston and Julia in their understanding of what they are doing, empty the 'affair' of its conventional meaning and take pride in the transgressions which it signifies.

Winston- 'Listen. The more men you've had, the more I love you. Do you understand that?'

Julia -'Yes perfectly.'

Winston- 'I hate purity, I hate goodness. I don't want any virtue to exist anywhere. I want everyone to be corrupt to the bones.'<sup>5</sup>

Based on this shared understanding of the meaning of sex, perhaps the most powerful act of rebellion by Winston and Julia was the acts of love between them which Winston describes as 'a magnificent gesture by which a whole civilization seemed to be annihilated.' In Winston's analysis, 'their embrace had been a battle, the climax a victory. It was a blow struck against the Party. It was a political act.'<sup>6</sup> In Orwell's brilliant analysis there is a close connection between the sexual puritanism insisted upon by the party and the political orthodoxy embodied by the party. Purity is the essence of totalitarian power.

To take another example of the Foucauldian formulation that 'individuals are beginning to love one another – there is the problem, are the thoughts of Dr B.R. Ambedkar in Annihilation of caste, wherein Dr Ambedkar argues that 'I am convinced that the real remedy is inter-marriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of kinship, of being kindred, becomes paramount, the separatist feeling- the feeling of being aliens- created by Caste will not vanish. When society is already well knit by other ties, marriage is an ordinary incident of life. But where society is cut asunder, marriage as a binding force becomes a matter of urgent necessity. The real remedy for breaking caste is intermarriage. Nothing else will serve as the solvent of caste.'

Recent human rights documentation particularly by PUDR has in many ways corroborated the point made by Ambedkar. There is a history of terrible violence against those couples who decide to violate caste and gender sanction and choose to fall in love with another of the wrong caste. These lovers across caste have been beaten, tortured, separated and even killed by their own families who are unable to tolerate a love which questions the established hierarchy of caste and gender.

PUDR contends that 'love marriages should be at the heart of the democratic rights movement. From this perspective, it examines the questions of the rights of women, of dalits, of violations within the family and community, and of the involvement of the state and its functionaries who share the same biases.'<sup>7</sup>

---

<sup>4</sup> Ibid. p. 111.

<sup>5</sup> Ibid. p. 104.

<sup>6</sup> Ibid. p.105.

<sup>7</sup> People's Union for Democratic Rights, op. cit. p.1.

Taking from these experiences ranging from George Orwell to EM Foster to Ambedkar and the history of cross caste love marriage in India, what is clear is that the opposition to Sec 377 should embody a wider social and political struggle against the oppressions of caste, class and gender. The opposition to Sec 377 has to be legal, ethical, social and political. It has to be waged in the court room, the workspace, family space and the media space. It has to be an everyday struggle against established norms of gender and sexuality. In effect the struggle against Sec 377 is not only a demand for equal citizenship for queer people, but it is simultaneously against a world in which sexual hierarchies are taken for granted and a world in which the oppressions of caste and gender operate.

If I have to put it in three lines what I am saying is that :

We oppose Sec 377 because

1. It is intolerable that even today in India some people purely on the basis of their sexual orientation or gender identity are treated as second class citizens
2. The challenge to Sec 377 is at the same time an attempt to place sex within the framework of politics and an attempt to denounce erotic injustice
3. There is the potential of ' illegitimate sex to be a form of subversive sex which can question existing relations of power based on caste, gender and nation. (EM Foster's eloquent point in two cheers for democracy, ' If I'm given a choice between betraying my country and betraying my friend, I'd hope that I'd have the courage to betray my country.'

---

<sup>i</sup> AIR 1968 Guj 252.