

## CHOICE OR COERCE: A STUDY OF SEXUALITY AND DEMOCRACY IN INDIA

SUDIPTA GARAI

**Abstract:** India as the largest democracy is believed to reassure the universal core values and principles of the United Nations by respecting human rights and fundamental freedom of its citizens. But in the present scenario 'democracy' has just turned itself into an electoral phenomenon where the principles of 'inclusiveness' and 'freedom' seems to be at stake. Indian Constitution has the underlying principle as 'inclusiveness', and the Article 14 and 15 clearly declares equality before law or equal protection of laws within the territory of India, and also declares that the state shall not discriminate against any citizen on grounds of religion, race, caste, sex and place of birth, but it automatically contradicts with the Section 377 when it prohibits private consensual sex of the same sex adults. Prosecution of the consensual sex however thus makes the state powers accessible in the bedrooms and private space of these individuals, and thus creates apprehensions of arrest and assault among the gay, bisexuals and transgender people. This in consequence harm the individuals with the prosecution of the law by the police and court than to be protected by the state in order to live a life of dignity respecting the rule of privacy and choice. In this paper I wish to intervene in the notions of democracy and freedom in reference to law especially in the domain of sex and gender trying to see whether laws are democratic enough for its citizens to create a better life for themselves or being 'majoritarian', it automatically justifies the 'minorities' as a part of the state politics.

**Keywords:** Sexuality, Culture, Choice, Democracy, Coercion.

**Introduction:** Laws, in the Indian Constitution, are the expression of the ideas of secularism, federalism, minority rights or judiciary system which is filled with the essence of democracy in abundance. But in the post Foucauldian world, the dream of 'democracy' seems to be at stake where its nature of universality is being questioned to be made possible by the exclusion of the most for the few. With reference to this, Shefali Jha rightly questions whether democracy in the present scenario is 'merely a legitimating device to keep the subjects quiet by giving them the illusion of participating in their own governance? Or, can we still design institutions to successfully exemplify the democratic ideal of one person, one value. How does the institutional design that was put in place in India half a century ago measure up to its own democratic principle of one person, one value?' As law stands closely linked with justice and social change the practice of discrimination reflects an undemocratic and secretive nature in the legal processes.

With the emergence of queer consciousness in the Indian context, the focus was mostly on Section 377, as the locus of oppression of the sexual minorities. This law which was drafted in 1860 by Lord Macaulay as the part of the colonial project to control and regulate the Indian subjects mentions "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 also be liable to fine." The explanation says that penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. This law as reported

by the Peoples' Union for Civil Liberties and the Report on Human Rights Violations Against Sexuality Minorities seems to be enforced by the police through illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families which in turn creates a violence against the sexual minorities. In this context the questions which comes up is whether these laws forms a particular form of social reality which legitimizes the violence caused against the sexual minorities or does it reflect dominant ideology of the common man imagination? The implication of this rule permeates in different social settings from medical establishments, media family, schools, colleges, work places and obviously the state. As Foucault states that laws are not only external but also internalized as the way we behave is normalized in certain pattern through the process of socialization and thus whoever seems to deviate these hegemonic laws are not only seen as "deviants" by the society but also by their own selves and thus it becomes more difficult for them to speak out their minds and assert their choices. Moreover the people who come out of their closet to speak their choices are seen as abnormal and are forced in many ways to be in track with the law with the aim of converting them to heterosexual majority.

Though Indian Constitution has the underlying principle as 'inclusiveness', and the Article 14 and 15 clearly declares equality before law or equal protection of laws within the territory of India, and also declares that the state shall not discriminate against any citizen on grounds of religion, race, caste, sex and place of birth, but it automatically

contradicts with the Section 377 when it prohibits private consensual sex of the same sex adults. Prosecution of the consensual sex however thus makes the state powers accessible in the bedrooms and private space of these individuals, and thus creates apprehensions of arrest and assault among the gay, bisexuals and transgender people. This in consequence harm the individuals with the prosecution of the law by the police and court than to be protected by the state in order to live a life of dignity respecting the rule of privacy and choice.

Section 377 impacts deep into the mindset of its people pointing homosexuals as perverted, animal like behavior and thus it functions as the condemnation of Indian sexual minorities be it gays, lesbians, kothis or hijras. Thus this law is just not a simple law but an encroachment in individual's private choices and the wider mindset of the people. Nivedita Menon in her book "*Seeing like a Feminist*" tries to narrate how our society is intolerant about the diversities that it possesses. '*There is zero tolerance for those who breach the carefully produced 'natural' order of society by refusing to conform to norms of looks and behavior.*' (Menon: 2012:3) The family remains hugely responsible for making sure about how one is brought up in appropriate terms and in case the institution fails, medical and psychiatric helps are expected to bring those individuals in the directed "path" of the society. 'Non-heterosexual desires threaten the continuation of these identities since it is not biologically directly procreative; and if no-heterosexual people have children by other means, such as technological interventions or adoption, then the purity of these identities is under threat.' (Menon: 2012:4) She also quite rightly questions the existence of a 'family' and what is it that makes a family. Is it always a father-mother-children who defines a 'family' or there are possibilities of calling a group of friends, unmarried mothers, women living with their siblings, or a homosexual couples staying together could also be granted the status of a 'family'. However thus, the whole notion of 'love', 'marriage' and 'family' are dominantly heterosexual and accepted as the 'normal' norm, making any deviation to it as 'abnormal', 'deviant', unethical and unacceptable. Section 377 criminalizes any sexual behavior which is 'against the order of nature'. "The assumption is that 'normal' sexual behavior springs from nature, and that it has nothing to do with culture or history or human choices'. (Menon :2012:93) Individuals who chose to be 'gay'/homosexual' are tried to be normalized with 'violence', either by physical or mental, in most case forcing them to a "marriage". The disciplining act of society operates at all level clearly stating the desire for the same gender/sex love as unnatural and immoral which needs to be normalized at any cost.

With the debates on the Constitution, constantly in the background of this argument about a majority and several minorities, it was quite clear that democracy did not merely mean the government of the majority, but also that, whichever government it were, it was to be a limited and accountable government. After all, when we say, one person, one value, that applies first of all to the equality between those in government and those governed.

Democratic citizenship is supposed to be built on the lateral links holding the citizens together, with the citizens seeing themselves as bound to each other. But have the policies of the government succeeded in fostering this sense of 'allegiance' to each other, irrespective of certain sociological criteria like class, caste and religious affiliations. Given the persistence of severe inequalities between Indians, how is it possible to foster this sense of democratic citizenship? Democratic citizenship is based on the idea of equal citizenship, on equality in terms of rights. Whereas the rights enjoyed by subjects under a monarchy are assigned arbitrarily - it is the monarch who decides which ones of his subjects enjoy certain privileges till when - in a democracy on the other hand, citizens are entitled to equal rights. The modern idea of citizenship was the idea of democratic equality. There were many debates in the Constituent Assembly of India about the specific rights that Indian citizens were entitled to. Did the conception of equal rights require that the list of fundamental rights include not only civil and political rights but also economic and welfare rights? Did it require that not only individuals are considered as the bearers of rights, but that group rights be also made a part of the fundamental rights? If cultural rights given to minority groups were somewhat a novelty in the Constitution, the Indian Constitution also contains a listing of the standard rights to freedom. Article 19, clause 1, sub-clauses a), b), and c) grants all Indian citizens the rights to freedom of speech and expression, to assemble peaceably and without arms, and to form associations and unions. But clause 2) of the same article also lays down that nothing in sub-clause a) of clause 1) shall prevent the state from imposing, by law, reasonable restrictions on the right to freedom of speech and expression in a number of circumstances, including in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality. Similarly, clause 3) allows reasonable restrictions on the right to assembly in the interests of the sovereignty and integrity of India or public order. Finally, clause 4) allows reasonable restrictions on the freedom of association for the sake of the sovereignty and integrity of India, public order or morality. Of course, the Supreme Court has contested the reasonableness

of the restrictions on these rights that have often been imposed by the government, but, nevertheless to allow for these restrictions in the Constitution itself places these rights under threat.

In India, though transcendence of sexuality has always existed in its culture, mythology and also practice to a great extent, but yet in the present scenario what is seen is the intervention of the powerful 'state' and society in lives of the individuals to regulate and instruct their ways of living even when it (sexuality) is a matter of personal 'choice' and decision. The issue and the fight for the same sex relationships achieved a step forward after eight years of advocacy campaign in India with the 2<sup>nd</sup> July 2009 Delhi High Court judgment which decriminalized homosexual relationships providing legality for consensual sex among adults including gay sex. Naz Foundation India Trust with the collective voices of people against this law challenged the existing Penal Code 377. On 11<sup>th</sup> December 2013, the Supreme Court of India dragged back the step forward by striking down the decriminalization of Section 377 of the Indian Penal Code after four years of the Delhi High Court Judgment with a huge upsurge of protests from students and queer activist. Since last few decades in different democracies of the world, these archaic colonial laws were fought to be removed in realization of the fact that these laws are hindrance to the full development and ability of the lesbian, gay, bisexual and transgender people. The NALSA judgment on one hand guarantees freedom and equality for the 'transgender', which in real sense becomes contradictory with the Penal Code 377 and thus loses its implication.

In the present times when individualism and democratic rights are the main concerns of the human existence, criminalizing the behavior of a group of people for no justifiable reasons other than their unpopularity violates the principle of largest democracy of India. These laws penetrate and curtail the ability of the LGBT people to function autonomously and freely undermining the ability to express their own gender identities and sexual desires. The decision of the Indian Supreme Court has driven millions of the LGBT Indians towards injustice and pushed them into a dark life of indignity and falsehood.

As it is noticed that inspite of the rich cultural heritage, the situation of India in recent times is hostile which force them to be within their closets and not to speak about their choices and sexualities freely in the fear of being victimized. The fiery protests against Deepa Mehta's lesbian film *Fire*, and strong denunciation of Karan Razdan's film *Girlfriend* were some examples of this hostility. Literature in this genre, which as mentioned earlier is rather scant, is sought to be suppressed, as was Ismat

Chughtai's first lesbian story "The Quilt": (*Lihaaf* in Urdu) published in 1941, which was considered obscene and a case was filed against it, as has been done in recent years to Shobha De's novels, viz., *Strange Obsession*, (1992) *Starry Nights*, (1991) and *Snapshots* (1995). A mainstream novel by Manju Kapur, *A Married Woman* (2003) is one of the recent lesbian novels, which inscribes and at the same time outlaws lesbian experience in order to validate patriarchal social structure of family and prioritize heterosexuality. It must also be mentioned here whether in films or literary works, the representation of gays/lesbians projects them as borderline bugs, criminals, mentally sick, or deprived of heterosexual coition.

A broad range of representations and narratives has always been present in the Indian imagination in different scriptures and religion, literature, sculptures, paintings, songs etc. Thus transcending gender notions are not a new concept that is usually thought to have travelled through the Western world. The stories of Mahabharata about Shikhandi and Mohini and the temple sculptures of Khajuraho and Konark are some of the common examples of the numerous others. Vanita and Kidwai (2000) examine the uncharted territory of the Indian archive on homoerotic love. Queer scholar, Ruth Vanita's work on Indian sexualities is both prolific and covers a wide range of queer representations, from historical to the literary and popular culture. Yet the Hindu Rights activists sees the queer as aliens and threats to the Indian Culture and values and could never to tolerant about the presence of homosexuality as a part of the Indian culture. The present BJP government is thus not expected to look at the sexual rights of these individuals respecting their choice.

The notion of "choice" of an individual and their 'space' to exercise their own freedom which quite often is being questioned by the state and society is also to be critically looked at. The whole notion of "individual" choice and 'agency' lacks its meaning being gazed and surveilled continuously by the moral policing of the state law and societal interference. Foucault would say that we live with certain notions of 'banal' sexuality which is defined and constrained by different system of rules and prohibitions. Historically sexuality has always been seen as constant and thus the "desire" or the "subject" of desire was never taken into account in the study of sexuality. The "desire" of an individual was judged according to the prescribed body of knowledge prevalent in the popular consciousness to be termed either as "natural" or "fallen". Thus sexuality always had a moral domain associated with it. There was an association of 'evil' in sexual activities between individuals of the same-sex, whereas there was a glorification of self-restraint and the rule of

procreative monogamy was the norm. The fear of “stigmatization” was always there within those who would deviate from these so called normative accepted notions of “body”, “desire”, “sexuality”. The ideal code of conduct was either the conjugal virtue or the power of restraining oneself from the untimely enjoyment and sexual abstinence. Foucault would say the “in nineteenth century texts there is a stereotypical portrait of the homosexual or invert: not only his mannerisms, his bearings, the way he gets dolled up, his coquetry, but also his facial expressions, his anatomy, the feminine morphology of his body, are regularly included in this disparaging description. The image eludes both to the theme of role reversal and to the principle of a natural stigma attached to this offense against nature.” The society measures an individual as an “ethical” subject with the reference in relation to its moral conduct and his/her mastery of own desires. One however tries and follows the tradition as they intrinsically imbibe the responsibility to carry forward the spiritual tradition one is subject to. Foucault would also clearly state that he is not supposing these codes as

unimportant but when it creates subjugation there might be a sense of trouble. The whole question of Foucaultian ‘biopolitics’ becomes immensely relevant in this context to understand one’s social and political power over one’s own self and ‘body’. Agamben however extends this discussion and identifies the state of exception with the power of decision over life. “The body is a model which can stand for any bounded system. Its boundaries can represent any boundaries which are threatened or precarious.” The series of questions posed by Foucault still stands significantly relevant to reflect on, in reference to the exercise of the power, the mechanisms which operate as repression in many instances. Prohibitions, censorship, denial are the forms in which these powers operate and was there really a rupture between the age of repression and the critical analysis of repression? Thus in the present scenario we can only think of a petition and a silent movement against this arbitrary law but what needs to be changed is the mentality and imagination of the people which might bring about the real change in this respect.

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SudiptaGarai, Ph.D Scholar, Jawaharlal Nehru University, New Delhi