
UNIT 9 STRATEGIC USES OF LAW BY GROUPS

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9.1 INTRODUCTION

This unit explains the struggles of marginalized queer people of India with regard to social and legal rights. As an acutely excluded group, there is dearth of literature on the queer community and its engagement with law, more specifically legal control over exercising sexual choices. What follows is a critical review of law's engagement with queer politics and the homophobic essence of law. The first section reviews the importance of re-examining meaning of equality, discrimination and justice. The second section reviews the engagement of queer question from the colonial to post-colonial period. The third section discusses the Naz foundation case to illustrate law's engagement with the queer question.

9.2 LEARNING OUTCOMES

After studying this Unit, you shall be able to:

- Map the broader discourse on sexuality
- Review of how homosexuality has been understood historically
- Understanding the struggle by queer groups for legal reform

9.3 BACKGROUND

Colonial and post-colonial India always had a rich tradition of aggressive assertions of antagonistic perspectives on several issues. While building a secular, democratic nation state, these diverse perspectives / ideas of developing a multicultural ethos formed the very basis of the Indian constitution. Kannabiran (2012) asserts Indian constitution has given space to challenge the hegemonic idea of justice through resisting the existing power structures and keeping the practice of argumentation alive. However, the

context in which this idea of equality and justice was introduced had its own internal contradictions rooted in colonial and precolonial social order of India. Different groups were not only diverse, but also unequal as emphasized by Dr. Ambedkar, and such inequality is often translated to restricting access of those lower in the hierarchy to freedom, equality and justice. To address such eventualities, it is important that the Constitution, law and civil society take conscious efforts to address these inequalities and introduce concrete provisions to dismantle the structures which perpetuate and consolidate the hegemony of those in power.

The understanding of law, justice, equality and citizenship has been challenged by many discourses, movements and legal battles. The legal discourse on equality, justice, rights and citizenship therefore routinely engaged with heterogeneity and intersectionality. The law always has a complicated relationship with those seeking justice, equality and citizenship rights exposing the limits of law and its potential to bring about transformations in the society. This is crucial as citizens of India are also part of different groups such as women, disabled, the marginalized caste groups, the transgender person, the tribals (notified and de-notified, and nomadic), the minorities and those who do reject compulsory heteronormative world (Kannabiran 2012).

The review of different struggles, legal battles and reforms in the post-independent India highlights that though the constitution of India guarantees equality for all, unequal hierarchies are most evident in accessing citizenship rights. Contemporary India continues to witness different forms of exclusion and formal / social disenfranchisement that reveal how the legal system, in much the same manner like the social structures, also upholds existing power structures of patriarchy, caste, heteronormativity etc. However, a review of struggles against different forms of discrimination, violence and violation of fundamental human rights, and constant engagement with the law and judiciary also emphasizes the importance of constitutional guarantee for equality and its potential for social transformation and elimination of all forms of discrimination. Kannabiran (2012) discusses the importance to have a comprehensive legal definition of discrimination and also how it intersects with ideas regarding equality and liberty especially personal liberty.

The predominance of caste, patriarchy and heteronormative ideology, increasing dominance of majoritarian groups in the post-independent India poses various challenges for Indian legal system to translate formal equality into substantive equality. Post-independent India continues to witness the marginalization, exclusion of voices of marginalized powerless groups and brutal suppression of the rights of those who are posing inconvenient questions to the state and the dominant group. To understand this phenomenon, it is important to review a few critical events in post-independent India.

The unprecedented violence during partition in 1947 was the context in which ideas related to freedom, equality and justice were framed. The newly formed nation of India was dealing with arrested development and a sense of insecurity about the geographical boundaries, and at the same time nursed the

aspiration to build India based on modern, secular and democratic values. Chaudhuri (1999) therefore underlines that any inquiry in post independent India need to start with its colonial experience because India's journey to modernity, state and the idea of citizenship originate there. The historical past is a complicated part of modern nationalist consciousness (Chaudhuri, 1999). Feminist scholars such as Kannabiran (2012), Sundar Rajan (2003), Chaudhuri (1999) argue that the women's question needs to be understood in the context of the modern democratic project of building the Indian nation state along with retainment of old social order and privileges of the dominant groups. On the one hand, the attempt was to confer a liberal idea of liberty, autonomy and freedom; and on the other, the attempt was to negotiate with established power structures of caste, patriarchy and ideology of family (essentially patriarchal and heterosexual in nature).

The nature of the Indian state varies across time and space, and consequently its responses to the demands for inclusion, justice and freedom by those who were marginalized, excluded and who are fighting for the freedom also varies. In post-independent India of 1970s, different marginalized groups challenged the state and reminded it about its commitment to social justice and the promise of equality and liberty to all its citizens. By 1980s, India also witnessed the sustained visibility of the lower caste persons who were earlier considered as untouchables, minorities and woman who raised issues of caste-based violence, religion-based violence, gender-based violence and issues related to sexuality. This period also witnessed the secular upsurge of caste groups, rise of communalism and of Hindu majoritarianism (Thomas Blom Hansen, 2015). The latter proved a major setback to the establishment and strengthening of the secular democratic state. Amid this, law /legal mechanism had crucial role to play in cases of caste, religion, gender and community-based violence. The review of these cases of violence against women, minorities and lower caste person point out the discomfort of dominant groups in sharing the spaces with lower caste persons, minorities, women and others who were excluded.

9.4 UNDERSTANDING THE DISCOURSE ON SEX AND SEXUALITY

To put the discussion on homosexuality, queer politics and legal perspective in its context, it is important to understand the larger discourse on sex and sexuality and take historical review of sexuality. Several authors Kannabiran and Khanna argue that what has been understood as normal / normative or given / natural changed according to the time, space and context. Kannabiran argues the need to scrutinize the constitutional category of 'sex' in the context of histories of sex and sexualities. Before talking about sex in binary fashion, the need is to engage with diverse ways of expressing or articulating sexuality and explain mechanisms of power through which ideas about normal / normative are established.

The debate around sexuality in general and homosexuality in particular has existed for some time in the international sphere and in the context of socio-cultural context of a particular society. This chapter discusses how sexuality

has been discussed in the Indian context.

In Ancient times, the binary between sexes did not exist, but slowly more importance was accorded to sexual potency and virility. The emergence of heteronormativity as the norm is also connected to the issue of reproduction, and family became an important institution furthering this norm. The norms, values and practices which were inculcated through family play an important role in normalizing the notions related to what is 'normal', 'natural', 'appropriate' and 'prohibited' in the case of sexuality. Thus, any transgression of rules related to sexuality is seen as transgressing the norms and values prescribed by the family and it was considered as an insult to the honor of the family and notions of chastity and purity. Thus, family defines norms and practices related to sexuality especially, what is normative and legitimate, what is appropriate and non-appropriate, as well as what is desirable and what is to be penalized. Thus, heterosexuality becomes the norm, heterosexual parenting become the norm making non-heterosexual / transgender parenting inappropriate in the society, which is then criminalized in the legal framework (Kannabiran 2022). Religious scriptures also delegitimizes transgender or queer people as unnatural and ungodly, which strengthen their social and cultural exclusion and the legal aggression against them.

Family becomes an important site of bio-politics. As underlined by Foucault, it achieves the subjugation of bodies and the control of population. Menon (2007) argues that debates around law constructs sexuality in a very peculiar way causing non-normative sexualities and non-heterosexual family arrangements to be systematically disciplined into more rigidly redefined normative forms.

Discourses around the family, law and nationalism in India in the late nineteenth and early twentieth centuries, throw up the multitudinous ways in which the values of modernity were tied to certain articulations of sexuality. (Menon 2007). The next section undertakes a review of the queer perspective on law to understand how sexuality is an inevitable part of discourse on nation, community and family. It shows how different structures work towards reinstating the power of the dominant group.

Check your Progress 1

- 1) *Discuss the arguments of Maitrayee Chaudhuri and Kalpana Kannabiran, on women's movement in your own words.*

9.5 LAW, CITIZENSHIP AND BEING QUEER

Tracing the history of queer / same sex love / queer perspective is difficult because historically, homosexuality has not only been invisibilised, but same sex traditions have been dismissed to assert heterosexuality as a norm. There have been recent attempts to recover the voices / stories about same sex love which have highlighted the oppression and exclusion of voices of individuals expressing different sexual orientation. In this regard the anthology published by Ruth Vanita and Salim Kidwai titled '*Same Sex Love*' that provides a

glimpse of history of same sex love is a first organized effort to document the issue historically. The anthology highlights that non-heterosexual people struggled against both the compulsory heteronormativity and homophobia. The pre and post-colonial period witnessed several such struggles which can be mapped through literature and agitations that took place over the period.

Narrain and Gupta (2011) points out that a review of mythology, literature and history shows that the silences, misinformation and the distortion of the queer part of India's past did not go unquestioned, but there is nevertheless a less engagement with or less work on engagement of the queer community with law. The review of law and queer people need to focus on two aspects - the impact of law on queer group and how have they agitated against it. There is thus a need to understand the legal journey from colonial period because major laws which have criminalized homosexuality have than its roots in a colonial period. The codification and writing of law began in the colonial period. Feminist historians have documented how in this process of codification, practices of dominant groups were codified into law and made applicable to all. Thus, roots of homophobia in the legal measures were largely drawn from dominant practices and a review of the colonial period is necessary to understand how heteronormativity became the norm and how the queer community was excluded from social and legal discourses.

Narrain and Gupta (2011) asserts the difficulty to document the resistance by the queer community to the heteronormativity established in the legal provisions and about their struggles as it is intertwined with resistance to social and cultural aspects. The first task therefore is documentation of how homophobia prevalent in dominant practices was inserted in the law. It will employ different methods and methodologies of reading the law and understanding it from the queer point of view. The difficulty in engaging in such an exercise is because of a complete absence of documentation of queer perspective in the colonial period that continued in postcolonial period. In post-colonial India, queer politics became visible post 1990s with a discussion on compulsory heterosexuality. Queer groups began asserting their sexual identities and critique the homophobia prevalent in the society. They mobilised queer people to assert their choice and make society conscious of injustice against homosexuals through different campaigns that aimed at legal, social and cultural transformation. The ignorance / hatred / suspicion about same sex issues was so deep rooted that queer movement needed strategies that involved struggle with the state, judiciary and society. The next section reviews legal battle waged by the queer movement and its social and political implications, particularly a review of the section 377 and writ petition filed by the Naz foundation, that outlines legal struggle and complexity of the issue.

9.6 LAW AND QUEER MOVEMENT

The colonial ssection of Indian Penal Code (IPC) 377 criminalises same sex love but the silence about the injustice of it continues through-out the post-independent India underlining the continued exclusion of queer voices. In ancient India, Rigveda / Manusmriti considers homosexuality as a

transgression and was punishable. The colonial period codification of law completely prohibited and criminalized homosexuality. Section 377, laws related to criminalizing tribes or laws on recovery of abducted women without their consent are some of the examples of marginalisation and exclusion of homosexuals, tribals and women respectively. These laws were introduced to civilise/ modernise the subcontinent, protect the 'honour' or prohibit what is considered as 'abnormal' in the name of public morality and prohibiting obscenity. Same sex love thus came to be criminalized and heteronormative sexual order enforced as 'natural'/'normal' bringing new notions of acceptable and non-acceptable norms related to sexuality.

These provisions strengthened colonial states' authority over its citizens and mark populations that did not fit in the existing norms as criminal and classify them under the medico-legal category of "physiologically perverse". Though labelling citizens expressing desires other than heterosexual were forbidden in the courts, there was no consideration of consent or of age of the individual involved while dealing with such cases. The irony is in the fact that citizens are otherwise free to express their opinion, to choose and defend their acts as adults but in some cases such as women abducted and recovered at the time of partition and people professing sexuality other than heterosexual were treated by law as 'minors' incapable of making and defending their choices. Gupta (2012) calls this a moral proclamation singling out certain people about whom there are some preconceived notions and prejudiced and undermining their citizenship rights guaranteed by the constitution.

In 1825, the first law commission of India was established under the chairmanship of Macaulay who drafted the Indian Penal Code. There was clearly some discomfort to talk about the same sex love or what is noted as sodomy and was therefore avoided. There was a belief that discussing it will cause more harm to the society and have degenerative effect on the moral of the society without helping in drafting the law. It was against this background that in 1860 the draft of the Indian penal code was finalized in which same sex love / sodomy was termed 'unnatural offences.' It became a basis for defining the offence of 'sodomy' (Gupta). Till 2018, section 377 was used ruthlessly against homosexuals by homophobic institutions such as police and judiciary.

Section 377: 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 10 years, and shall be liable to fine.

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

Gupta (2012) summaries queer activists problems with the section 377 as follows:

1. There is no clarity about what is the meaning of - 'the order of nature'.

2. No distinction has been made between consensual and non-consensual sex. Thus, not trying to treat consensual sex differently and leniently while taking decisions.
3. The same punishment has been given to consensual and non-consensual same sex but due to lack of records there is no way to check the difference in the punishment given, which enhances the possibility of intensifying the punishment.

As underlined by queer activist, these laws, apart from punishing homosexuals also strengthens the exclusion of homosexuals. It leaves homosexuals dealing with many micro level impacts - such as feelings of insecurity and being maligned in society as transgressors / criminals which increases their vulnerability and makes it difficult for them to express their identity in the larger society. Thus, the effect of section 377 is graver than only punishing those who are transgressing the boundaries, it affects how society looks at /understand homosexuality and non-heteronormative sexualities. Queer scholars suggests that colonial era section 377 became more an instrument of social control and served as a tool for society and state to keep homosexuals under surveillance.

The resistance to and movement against section 377 was fueled by the injustice of the law that supports cultural discrimination against non-heteronormative sexualities and endorses intolerance and violence committed in intimate spaces of the family in the garb of maintenance of social order and public morality. The next section reviews efforts at reforms in section 377.

Check Your Progress 2

- 1) *Explain the relationship of law and citizenship*

9.7 STORY OF REFORM OF THE SECTION 377

The struggle against the section 377 is placed in the larger context of reforms in sexual assault laws of section 375 / 76 (Puri 2011). The Mathura rape case in late 1980s led to a nationwide campaign initiated by women's movement with two demands - justice for Mathura and reform in the rape law. The campaign was successful in bringing reform to the existing rape law on the one hand and on the other, it pushed the women's movement to seriously engage with the issue of sexuality. An unanticipated impact of this campaign was that it brought the issue of sexuality / sexual abuse in public discussions. The reforms suggested by the women's movement had a larger goal; they highlighted that while looking at rape, it is important to understand rape beyond physical harm or social stigma and have located it in the discourse on bodily integrity and autonomy of women.

After a long struggle, major reforms were made in the rape law. Not all reforms suggested by the women's group were accepted but the 2013 amendment to the criminal laws related to rape went beyond forced peno-vaginal definition of rape. However, discussing sexual assault away from a moral framework is a continuous task for the women's group. The history of

struggle by the women's movement on this issue is long and therefore not explored in this section. However, it is important to note the relatedness in the campaign against rape law and against the section 377 to understand the context of discourse on sexuality and how state, judiciary and civil society in different ways strengthen patriarchal, homophobic ideas about purity/ natural / unnatural/ normal / abnormal.

The struggle against the section 377 was primarily confined to legal reform. In 1992, AIDS Bhedbhav Virodhi Andolan filed a petition before the Parliament's Petition committee to repeal section 377, but no member from the Parliament came forward to present it and was therefore never tabled. In the 1993 draft for the reform in rape law, repeal of section 377 was included. The most recent is the Naz writ (Civil Writ Petition No. 7455 of 2001) which was filled in the Delhi High Court. (Puri 2011)

Following is the legal trajectory of the section 377 in post-independent India:

- In July 2009 some aspects of the section 377 with respect to gay sex were struck down as unconstitutional by the Delhi High court. Ironically this judgement was overturned by the Supreme Court on 11th December 2013 in Suresh Kumar Koushal vs, Naz foundation case on the grounds that repealing of law can only be done by the Parliament.
- On 6th February 2016, a five-member constitutional bench was appointed to review the petition filed by the Naz Foundation and others. Finally in 2018, after decades of activism and socio-legal battle, applying section 377 of the Indian Penal Code to private consensual sex between consenting adults was ruled as unconstitutional by India's Supreme court decriminalising homosexual activity.

Queer academicians and activists continue to highlight the complexities in the struggle against Section 377 particularly the institutionalized violence against queers in family and judiciary insisting for justice for those who are victims of the sexual assault. Because the review of section 377 and proposed demand to repeal was also paying attention to the fact that while addressing problems with the section 377 there is a need to have some law which will address the sexual assault committed on boys as they cannot be addressed under rape law as section 377 is needed as the definition of section 375 is only applicable to heteronormative relations.

Thus, the Naz writ was not demanding that the section 377 need to be deleted, the problem which was identified by the queer groups reviewing the section 377 is that how by legal definition section 377 is relevant to the all-unnatural sexual practices regardless of heterosexual or same sex sexual relations. However, while in implementation it was more often used to penalize same sex sexual subjects, this as Puri (2016) argues made this section an impending threat to same-sex sexual subjects. In addition, section 377 promotes social stigma which also gives excess authority to police and as pointed out by the Naz writ it is important that constitutional validity of the section 377 needed to be challenged because it violated fundamental rights which are guaranteed by the state such as Article 14 (Equality before Law), Article 15 (Prohibition of Sex Discrimination, argued to include) and Article

19 (Fundamental liberties) and Article 21 (Right to Life and Privacy). As writ underlined that sexual relations are very private and intimate part of the individual's life which is jeopardized in case of same sex subjects.

An important aspect that queers activists/scholars in the Naz Foundation petition highlighted that 'living with dignity' was read into in the light of Right to Life, Right to Full Personhood and to be true to the core identity of a person. Baxi (2012) explains that full personhood requires that intimate relations need to be outside the gaze of the sovereign and right to privacy is essential to live with dignity. Naz petition successfully argued how IPC imposes collective humiliation and allows brutal exercise of force by the police and demanded that State and judiciary that is constitutionally required to uphold citizens' right to dignity and life does not reinforce social and cultural prejudice and discrimination.

A queer perspective on law can inform political engagement, the process of legal change and the way legal history is perceived. A queer perspective thus encompasses both, a different form of political engagement and different ways of reading the history of laws controlling desire and sexuality. It is a call to recover lost voices through a re-reading of the law from the viewpoint of the queer subaltern and paying attention to new voices that have emerged in the process of political engagement.

9.8 LET US SUM UP

In this unit you learn about the campaigns for law reform on provisions of IPC criminalizing homosexuality were not limited to a struggle for the right to choose in matters of same sex love, but to be able to live a life of dignity without fear of arrest, detention and harassment. No country can defend its anti-sodomy laws on the basis of cultural, moral or religious arguments if they otherwise commit themselves to human rights. Criminalization of consensual sex between adults goes against the core of human rights and dignity. In the debates and mobilizing for the reforms in the section 375/376 and 377, it seemed as if there is a split along the lines of women's issues versus queer issues. There were other debates, agreements and disagreements about which issue needs urgent attention and also whom these organisations are addressing. Puri (2012) explains that despite this split between queer and women's movement, there were numerous organizations who have mobilized against both section 375/6 and 377 like Saheli, PRISM, LABIA, SAPPHO and many others have tried to bridge queer and women's issues. The overall response by the media, social movement activist was positive to repealing of the section 377 was good. Naz foundation petition did receive hostile reactions from the orthodox groups, religious leader and organizations who find it unacceptable. It indicates that battle is not over yet and highlights the need to create awareness about it, fight against the prevalent stigma and prejudice against same or alternate sex subjects. There is also a need to further complicate discourse on sexuality by underlining how it intersect with caste, gender and other hierarchies. Queer scholar and activists highlight that queer or homosexual is not a homogenous category. They are also divided in different class, caste and gender groups which impacts their struggle to assert

their identity and also the privileges which they are deprived off or enjoy.

9.9 UNIT END QUESTIONS

- 1) Write a note on significance of reading down of section 377 is significant step in furthering the queer politics in India.
- 2) Why queer struggle was for reading down of the section 377 and not for the striking down it.
- 3) How queer struggle to legitimize same sex love throws light on state's control over sex and desire of its citizens.

9.10 REFERENCES

- Baxi, Upendra (2011). "Dignity in and with Naz" in Narrain, Arvind and Gupta, Alok, *Law Like Love Queer Perspectives on Law*. New Delhi, Yoda Press.
- Chaudhuri Maitrayee (1999). "Gender in the Making of the Indian Nation-State", *Sociological Bulletin*, 1999, Vol. 48, No.1/2.
- Gupta, Alok (2011). "The Presumption of Sodomy" in Arvind and Gupta, Alok, *Law Like Love Queer Perspectives on Law*, New Delhi, Yoda Press.
- Hansen, Thomas Blom (2015). "Communalism, democracy and Indian capitalism" In Seminar, retived dated 02/11/2020.
https://www.indiaseminar.com/2015/674/674_thomas_blom_hansen.htm
- Kannabiran, Kalpana (2012). "Tools of Justice: Non-Discrimination and the Indian Constitution" *In Honour of K.G. Kannabiran*, New Delhi, Routledge.
- Menon, Nivedita (2012) *Seeing Like Feminist*, New Delhi, Penguin India.
- Puri Jyoti (2011) 'Gender Queer Perspective' in Narrain, Arvind and Gupta, Alok, *Law Like Love Queer Perspectives on Law*, New Delhi, Yoda Press.
- ----- (2016) *Sexual States: Governance and Anti-Sodomy Law in India*, Durham, NC: Duke University Press.
- Sunder Rajan Rajeshwari (2003). *Scandal of the State: Women, Law and Citizenship in Postcolonial India*, New Delhi, Permanent Black.
- Vanita Ruth and Kidwai Salim (2008). *Readings from Literature and History*, New Delhi, Penguin Books.

9.11 SUGGESTED READINGS

- Baxi, Upendra (2011) "Dignity in and with Naz" in Narrain, Arvind and Gupta, Alok, *Law Like Love Queer Perspectives on Law*, New Delhi, Yoda Press.
<https://main.sci.gov.in/jonew/judis/41070.pdf>
- Menon, Nivedita (2012) *Seeing Like Feminist*, New Delhi, Penguin India.

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Law**

- Narrain, Arvind and Gupta, Alok, *Law Like Love Queer Perspectives on Law*, New Delhi, Yoda Press.
- Vanita Ruth and Kidwai Salim (2008). *Readings from Literature and History*, New Delhi, Penguin Books.



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