

Annual Review  
of  
Critical Psychology 11, 2014

*Gender  
and  
Sexuality*

## LEGISLATING (LESBIAN) SEXUALITY: COLONIAL LAW AND POST-COLONIAL IMPACT

Dyuti Ailawadi

Center for Social Justice in Ahmedabad, Gujarat, India

### Abstract

In the modern nation-state, law functions as an instrument to control and define human sexuality, in particular, women's sexualities. However, almost inadvertently, it also creates space for dialogue and democracies. Through this paper, I explore the of questioning by civil society (in particular by women of a certain social standing, i.e., from the LGBTI community in a selected urban centre in India) of the repression of female sexualities by the state through interventionist activities that "nudge" the state just enough to create space for more equitable representations and greater sexual democracies. The focus of my exploration are Section 377 of the Indian Penal Code (IPC), 1860 and Personal Laws and the related Universal Civil Code debate, and how the legal authority is compelled into negotiations of power by the voices and actions of a section of lesbian women who, speaking from the oppressed "below," become the voice of the subaltern.

**Keywords:** Sexuality, Lesbian, Public Space, Legal Space, Indian Penal Code

LEGISLATING (LESBIAN) SEXUALITY:  
COLONIAL LAW AND POST-COLONIAL  
IMPACT

In the modern nation-state, law functions as an instrument to control and define human sexuality, in particular, women's sexualities. However, almost inadvertently, it also creates space for dialogue and democracies.

Through this paper, I explore the of questioning by civil society (in particular by women of a certain social standing, i.e., from the LGBTI community in a selected urban centre in India) of the repression of female sexualities by the state through interventionist activities that "nudge" the state just enough to create space for more equitable representations and greater sexual democracies. The focus of my exploration are Section 377 of the Indian Penal Code (IPC), 1860 and Personal Laws and the related Universal Civil Code debate, and how the legal authority is compelled into negotiations of power by the voices and actions of a section of lesbian women who, speaking from the oppressed "below," become the voice of the subaltern.

Section 377 of the IPC deals with unnatural offences. IPC was introduced by the British crown in 1862. The said section was used in the course of time to deal with sexual offences. Over the years sodomy came to be central to Section 377. Women's sexuality though did not find a place in much of the discussion around Section 377 case in the High Court but the section has been used by families against their daughters who have shown interest in women.

Uniform Civil Code debate came into the public consciousness in India in the 1980s when a 73 year old divorced Muslim woman, *Shah Bano*, went to the court to demand maintenance under Section 125 of the Code of Criminal Procedure, 1973. *Shah Bano's* husband had divorced her using *triple talaq*<sup>1</sup>. *Shah Bano* approached the court after she stopped getting maintenance from her husband. She petitioned in the court that the criminal code should apply to all Muslims, and that she deserves more maintenance than she was given under Muslim Personal Law. What ensued was a series of debates within the autonomous women's movement supporting *Shah Bano's* claim. However the autonomous women's movement was forced to re-examine its position when they saw their stand to be in line with right-wing politics. The political right was advocating for a Uniform Civil Code (UCC) that was to be designed to retain many of the Hindu traditions and customs. Since then autonomous women's movement shifted away from UCC debate and argued hence for making personal laws gender-just<sup>2</sup>.

1 *Triple Talaq* refers to *talaq* when the husband divorces his wife unilaterally by saying 'I divorce you' three times. According to the Muslim personal law, a husband is entitled to give his wife maintenance for a certain stipulated period post the divorce.

2 In India Personal Laws exist for all religions- Hindus, Muslims, Christians etc. The debate that got played out during the 1980s focused more on the Muslim Personal Law.

Personal Laws and Section 377 of the IPC find their roots in the colonial-Victorian period. Their interpretation in the post-independence period seems to draw much from the mind-set of the colonial period. Through this paper an attempt is being made to look at negotiation of space by lesbian women both part of the autonomous women's movement and those outside it with respect to Personal Laws and Section 377. This paper develops a piece of qualitative research that I undertook in Bombay<sup>3</sup> in 2009 entitled, 'How lesbian women use popular cultural spaces to create a space for themselves in society.'

## Spaces

For the purposes of this paper, space is an arena physical as well as philosophical and theoretical defined by natural and constructed parameters. When seen as the arena of action for societal transactions and relations, this physical space, however, also becomes politicized, and provides a realm for philosophical and theoretical thinking.

Having stated this I am here concerned with the emergence of space as a gendered category. The most commonly used paradigm of representation of gendered space is that of 'separate spheres', which entails an oppositional and hierarchical system consisting of a dominant public male realm of production and a subordinate, private, female realm of reproduction. It divides the man from woman, production from reproduction, public from private and city from home. And, significantly, it nudges social representation along an external (public) and internal (private) dichotomized axis.

David Harvey in his essay, 'Political Economy of Public Space,' describes public sphere as an area of political deliberation and participation, and therefore fundamental to democratic governance.

The public dominant domain constructs, legislates and oversees aspects of citizenship, decision making, economic exchange and governance (Zieleniec, 2008). The private realm was primarily for family and reproduction, assigned to an inner, hidden space. Social roles for men and women, of course, followed this public/private, external/ internal, outer/ inner spatial designations lending different values to each. This division of labour along gendered and spatial lines lends itself to "norms" such as the denizens of the private realm – women – not seen as worthy of, or valued enough for, citizenship, an identity belonging strongly to the public space.

Historically, public spaces are associated with the political process and engagement of individuals with the governance process. In India's history as an emerging and functioning nation-state, public spaces have played a crucial role in political and social processes and movements. Taking over the public space has been a "mark" of consciousness rising among people, signifying taking over of the space of economic, cultural, political and legal

---

<sup>3</sup> Bombay has been used as opposed to Mumbai which is now the official name of the city, because the author stands opposed to vernacular nationalism that Mumbai stands for. Further Mumbai denies the city a certain plurality that the former name suggests.

exchange, marking a conscientisation of people and space, since space is socially produced. In the context of the 'queer-movement' in the country, the pride marches, protests and commemorative events<sup>4</sup> have been about claiming the public space as well as articulating their presence.

Today the term 'lesbian' is socially more acceptable than it was a decade or so back. From occupying a position of enforced silence to being in a world where one is able to stand up on a roof top and scream out ones sexual orientation, our society has moved a great deal. However, despite the society being a different place, still the politics of silence continues to haunt the lives of many women who identify themselves as lesbians.

The release of *Deepa Mehta's* film 'Fire'<sup>5</sup> in December, 1998 was one of the major events in the history of the lesbian movement (if there is any) in India that brought lesbian women and queer community at large out on the streets. The campaign and the protest were in favour of the creative freedom of film makers and an assertion on part of a community of their existence. The protest around the vandalism that followed the release of the film, in an analysis, to large extent, were a result of a movement which started in the 1980s. It was then that efforts were being made from within the women's movement to push the boundaries of the women's movement to include and address issues pertaining to women who identified themselves as lesbian women.

For centuries women have never been seen to have either sexual desires or needs, and were largely seen and constructed as asexual beings (be it in the public realm or the private realm). Therefore, the whole idea of women having desires for women created much discomfort in society. Consequently, the lesbian threatened this construction of women and seemed to create discomfort at its very utterance. Even within the women's movement which was challenging the patriarchal structure it was not something people welcomed with open arms. It was an issue which took its time to create a space for itself. At an individual level however, many women and women's groups were supportive of individual cases of same-sex desire.

For the purpose of this paper, I am focusing my attention on the 'legal public spaces'. Here I seek to bring out the voices of lesbian women with respect to legal spaces. I interviewed five women belonging to two collectives. One of the lines of questioning centred around the Delhi High Court Judgment on Section 377 of the IPC and Personal Laws (both are discussed in further detail).

---

4 Post 2009 of the judgment. Prior to that of International Anti-homophobia Day and Anniversary of Stonewall Revolution.

5 Fire was a film released in December 1999. It explored physical and emotional relationship between two women protagonists. The release of the film saw the Hindu-right vandalising cinema halls showing the film, arguing that the film was against Indian culture and morals. This was met with protests, from both the LGBTI community as well as the autonomous women's movement, arguing not only for freedom of expression but also for expressing lesbian sexuality.

## Location of the study

The current paper emerges from a feminist qualitative research conducted in 2009 to explore the political use of popular culture by lesbian community to create a space for themselves— with respect to their desire and their identity. The study is located in Bombay city.

*“...Bombay is a cruel city but it’s also is a city which welcomes you with open arms. It gives you that anonymity that you need as a queer person but it can also be very-very cruel in terms of if you don’t have work, if you don’t have something to get you by in your daily bread then you can be really be left on the way-side...”*

*G, member of Labia*

For this study I interviewed members of two collectives and looked at the individual narratives of five women. Among these two collectives, one is a lesbian-feminist collective that emerged in the 1990s by the name of *Stree Sanagam*. The root of this collective is the autonomous women’s movement. The impetus of coming together as a collective was to both find a space (social and political) for women who loved women and use it to push the boundaries of the autonomous women’s movement. Following the Gujarat pogrom in 2002, the collective saw huddling together and reassessing its politics and positions, it is now known as Labia (Lesbian and Bisexual in Action).

On the other hand, the other, collective part of the study was *Azad Bazaar*, a commercial venture started by two women. The idea of starting a venture like *Azad Bazaar* came from one of the participants because she felt that, in a country like India, where there are so many cultural symbols adorning individuals it is hard to identify someone as ‘queer’ or ‘queer supporter’ simply by looking at them- unless the person is either extremely butch or extremely femme<sup>6</sup>. The idea was, then, to make accessories and clothes that would enable people to spell themselves out as either ‘queer’ or ‘queer-friendly’ like a rainbow-coloured flag, a key chain, earring, t-shirt etc.

*“...if you were looking. Or if you walked into a new office. And somebody had a mug somewhere on their table you’ll immediately know that person might just be somebody you could talk to.”*

*--Shreya<sup>7</sup> of Azad Bazaar*

*“...would either mean that they are queer friendly or queer! It could mean either thing is a good enough to know.”*

*--Swati<sup>8</sup> of Azad bazaar*

---

6 The argument here is spelled out as India specific since the participant to the study described it as such. The author recognises that this is a pan-world phenomenon.

7 Name changed.

8 Name changed

Legislating  
(lesbian)  
sexuality

D. Ailawadi

In the paper I first delineate legal spaces, locating the two legal aspects that I am focusing my argument on. Following that, I draw on the narratives of these women and collectives in and their negotiation with, the legal spaces in the post colonial period we are supposed to be occupying.

## Legal spaces: colonial construction

Laws enacted by the modern nation-state are placed externally in terms of the body enacting, upholding and maintaining them, governing both the private and public life of individuals. The legal is also the domain wherein much contestation in people's movement at large, and the women's movement, in particular has taken place for gender-just laws, equality, empowerment, autonomy etc. This struggle is based on the rationale that legal changes will be followed by social-cultural-economic changes. It is a contested space, where the different actor(s), state, non-state, civil society, come together to seek structural changes. This current trend actually started during the British colonial rule of the pre-modern nation-state of India.

The defined and definitive, legal tradition in India as followed today is a colonial legacy<sup>9</sup>. The system of governance prior to the colonial rule lay in the hands of the provincial rulers who decided on matters of the state. This codified, systematized structure of judiciary (as introduced during the colonial period) is a result of the functioning of the capitalist society, which took power of legislation out of the hands of kings and put it in the hands of an external body to work by these written codified laws. As a colony of the British Empire, India provided both for a laboratory for legal experiments as well as convenient space wherein the laws as practiced in Britain, could be applied without much thought. The (colonial) State, being unaware of, and indifferent to religious-cultural practices didn't take them into account while formulating these laws.

The Indian Penal Code is a comprehensive code intending to cover all substantive aspects of criminal law. It was drafted in 1860 and came into force in British India in 1862.

In fact, the two legal aspects under discussion as sites of contestation were introduced under British Colonial rule in India. Section 377 of the Indian Penal Code makes consensual sexual acts between same-sex adults illegal. The efforts and movement of LGBTI people and supporters led to the law being, after almost 150 years read down by the Delhi High Court Judgment in the year 2009<sup>10</sup>. The second legislation under discussion allowed private spaces of family and conjugality to be governed by the respective religions and their codes. These two acts together, while sharing common ground of codified social and sexual space, also contributed to preserving the public/private dichotomy.

---

9 The colonial here refers to the period when the rule of India was directly under the Crown. Following the Revolt of 1857, the political and economic rule of India passed from East India Company to the Crown.

10 Naz Foundation (India) Trust vs. Government of India &Ors WP (C) No.7455/2001

These codified laws upheld the public/ private dichotomy. Additionally, the laws were introduced by the colonial-Victorian as ideals of sexuality and sexual norms. Feminist historians have questioned the centring of colonial legislation on women's sexual practices. They also point out that the colonial state helped constitute the female, private realm, which the Indian nationalists later celebrated in their efforts to counter the colonial domain. The colonial state made the demarcation between the public and the private realms, holding back from the private realm on the grounds of respecting local customs.

## Section 377 of IPC

In 1860, Lord Macaulay, drafted Section 377 of Indian Penal Code, which reads, “377. *Unnatural Offence- 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.*”

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

*[Section 377 IPC]*

Colonial legislators and jurists introduced the law, with no debates or “cultural consultations,” with the native people as they believed that laws could inculcate European morality into resistant masses. Additionally, they thought that “native” cultures did not punish “perverse” sex enough. Therefore, the uncivilized and the colonized people needed compulsory re-education in sexual mores. In line with their “white man’s burden,” the Imperial rulers held that the “native” viciousness and “white” virtue had to be segregated: the latter praised and protected, the former policed and kept subjected. The continuation of laws such as Section 377 into the modern Indian-nation state, independent of colonial rule, highlighted the fact that the legal system and state was handed down from the white man to an ‘English-educated’ brown man, who felt obligated to uphold the sentiment and the action of separating the acceptable from the deviant, and the ruler from the ruled.

Section 377 was, and continues to be a model law in more ways than one—a) It was a colonial attempt to set standards of behaviour, both to reform the colonized and to protect the colonizers against moral lapses; b) It was also the first colonial “sodomy law” integrated into a penal code—and it became a model anti-sodomy law for countries far beyond India, almost everywhere the British imperial flag flew.

The Section was a basis for routine and continuous violence against, the sexual minority by the police, the medical establishment and the state—as shown by numerous studies, anecdotal and documented evidence (Forum 2009).

Women are spoken of in two contexts, in paragraphs 19 and 20 of the Delhi High Coury Judgment, as adult lesbian lovers, and while elaborating on the phrase ‘LGBT’. The conceptualization of lesbian women’s bodies and desires is not addressed throughout the

*Legislating  
(lesbian)  
sexuality*

D. Ailawadi

judgment. Furthermore married women and children (seen as spouses and children of 'MSM'<sup>11</sup> men) are only spoken of in the context of being passive recipients of HIV/AIDs via adulterous husbands falling in the category of MSMs.

If the understanding of the dynamics of the body as reflected in the judgment is summarised, we find that it makes a distinction between two kinds of bodies: the violated, which was hardly spoken of comprised of the *Hijara* and *Kothi* and the 'sexed bodies',<sup>12</sup> which comprised primarily of gay men. The lesbian body made a presence as a silent body and that of the married woman as a passive recipient.

Furthermore in the judgment the body was predominantly the body of the 'gay' man and the 'MSM.' The latter is a loose category that is not really an identity, but a funding category that emerged in the post 1990 period with the influx of funding in the field of HIV/AIDs. These bodies got 'framed' in the context of being a 'high-risk' population vulnerable to HIV/AIDs and were subject to intervention for HIV/AIDs which were affected as a result of the presence of Section 377 of the IPC. The *Hijara* and *Kothi* bodies absent for most part of the judgment were the signifiers of discrimination and stigma denying them sexuality. Lastly in this conceptualisation of the 'queer' the women have been absent from the very discourse around sexuality.

According to *Bina Fernandez* Section 377 is often used by parents and police to coerce women to get back to their families. It is used against a possibility of existence of female homosexuality. Section 377 has been known to be used as a mechanism of coercion by women and their families to separate them from their lovers and forcibly get them married. (N.B. B. Fernandez, 2005).

## Personal laws

The British colonial rulers felt that interference in local religious issues would lead to explosive consequences, and thus did not meddle with rules relating to family, (such as marriage, divorce, maintenance, succession to property, inheritance and custody guardianship of children as well as adoption). These were left for each religion to decide for themselves based on their practices and rules. The rules that were thus formed came to be known as 'personal laws'.

During the 19th century, the legislative measures empowered the courts to recognize and apply hegemonic local customs uniformly over an area irrespective of important variations in the local culture. In some cases they were less liberal than religious laws, especially in

---

11 MSM, refers to Men who have sex with Men. It is an encompassing category to include married gay and bisexual men, men who have casual intercourse with men, transgender community etc. It is a category that emerged as a result of funding for HIV/AIDs and related activities.

12 The term here is used to highlight the fact that the homosexual community as defined in the judgment came to be largely seen only in terms of their sexual orientation denying them other related identities.

cases pertaining to Muslim laws. This led to the passing of *Shariat* Law according to which Muslims in India were to be governed by Muslim religious laws in matters pertaining to family, marriage, property etc. In the post-independence period this religious freedom was recognized by the framers of the constitution and they too saw the necessity of continuing to recognize personal laws. At the same time, moved by the secular impulse, the framers declared as a directive principle of state for an adoption of a uniform civil code.

In the following years, the Hindu personal laws caught up with the British codification system, codifying its personal laws in 1955. The Muslim personal laws continued to be governed by the *Sharia* Law. This mixed legal system which variegated along the public and private realms, demonstrated its inherent fissures in the '80s in the debates following the *Shah Bano*. The debate of interest to my presentation argues for making the personal laws themselves gender equitable – thus bridging the span between public/private realms and all their accompanying dichotomies - and making the language open-ended allowing for queer couples to also be read in its interpretation.

Foucault's analysis of the panopticism (Foucault: 1975) contextualizes both these legal traditions and their ramification. What Foucault discussed through a discussion of panopticon was a mechanism by which power is exercised to conform to a dominant idea of normality which is exercised through an exercise of power. These laws were put in place by the colonial "civilizers" in their different colonies to extend the colonial rules of normativity, to discipline people to adhere to hetero-normativity, principles of monogamy, institutionalization of marriage, legitimacy extending the understanding of right and wrong as existing in the mother country to reciprocate in colonies.

These laws were reflective of not only the state being homophobic but privileging experiences of certain sexual orientation over others; it is a means of supervising desire and sexual orientation.

Penal laws were imposed as a means of repression. The existence of section 377 in the Indian Penal code can be located within this discourse on repression. Sexuality came to be associated with reproduction which was seen as a service to be exploited. "Sex got placed on the agenda of future". (Foucault, *Discipline and Punishment: The Birth of Prisons*, 1977) The underlying logic around which the personal laws were sanctioned was also based on the idea of repression and control, which were influenced by the Victorian ideals of sexual normativity and monogamy.

Therefore, there emerges an underlying relationship between sexuality and power. Power with regards to sexuality were in hands of two people namely the man to whom the woman is attached (father, husband, brother, head of community) who controlled the sexual activity of the wife and the transgressors who by transgressing was upsetting the law (which is hetero-normative) and in doing that anticipate freedom. Woman does not have control over her sexuality or expression. Single women, lesbian women and trans-women questioning this often fall in the latter category.

*Legislating  
(lesbian)  
sexuality*

D. Ailawadi

Foucault defined sexuality as a realm wherein power is exercised. The ordering of sexuality ensured that people would conform to rules and sexuality of people would be controlled. Control over sexuality translates itself in control over the desire and sexual behaviour between men and women. The ordering and controlling of sexuality was more with regards to the woman than to the man.

In feminist analysis sexuality is analysed to be socially constructed. It translates itself in male dominance of female which manifests itself in control of female sexuality (desire and behaviour) through submissive roles of women. Sexuality thereby gets linked with the gendered analysis and hierarchy of male and female.

## Post colonial impact

In 2001 *Naz* foundation filed a case in the Delhi High court to decriminalize homosexuality and on July 2009 the verdict came out in the favour of the community. Legalization of homosexuality has meant different things to different women. It is not just about getting the status of a decriminalized being but also opens up a future possibility of questioning and deliberation. The laws have provided with a basis for a continuous discussion and debate and a possibility of pushing the boundaries.

*“...actually it is very liberator; one did not realize that decriminalizing would mean so much. But the way in which it has been interpreted, but also the way in which the judgment has been written, and all the things, the way in which there was some sort of coming together, some sort of voicing, of some understanding of the queer-lives in the activism prior to the judgment, what happened in the hearings, and what is written in the judgment, each one of them independently kind of, gives you a sense of much more than being decriminalized. Because reading it in terms of the constitution, making it feel that somehow somebody in this large hierarchy, in this large institutionalized hierarchy, understands. You know, maybe there are only, two judges in the judiciary who understand but the way in which they write, they understand what the issues of discrimination are. And they place it in the right context, and they also see a possibility of reading it within the context of constitution of India, something you feel very proud of actually. And then you use the same language. They have given you a language in some sense, an additional language, which is really nice. I think it is also the kind of visibility it gave and the kind of space that it gave is huge.”*

*--Chandni<sup>13</sup> a member of Labia*

*“it’s a very vexed question, see I think as a woman 377 is not my immediate concern, to be very honest with you because we are totally invisible-ised by the law, it doesn’t even acknowledge the fact that there can be anything, and if it acknowledges it will acknowledge it as a criminal offence. Not as something which existed prior to this. So for me 377 is a very vexed space. But I understand for a Kothi or a Hijira or even a gay man how this*

---

13 Name changed.

*can be a really important thing and I support it totally with my whole heart and head. I also feel that somewhere they need to understand that there are other issues people are grappling with like forced marriages. That should become the next campaign, unfortunately it's not. And that's where my contention lies, you know, look beyond 377 boss it's not the only thing. Like please support us in other things... . . . The larger canvas needs to emerge very soon. Because 377 is very great and I totally understand the importance of it not being a criminal offence. But just because it is decriminalized doesn't mean people are going to start loving you tomorrow, you need to work on dialoguing with people. Police men are not going to hit you because 377 is not there, in fact so many of them did not even know that it existed, they were beating you up anyways.."*

*--Gracy a member of Labia*

*"(talking about the Azadi t-shirt) This has also got the Delhi Verdict date on it. If you see the est. date when we are doing reprints clearer. But the est. date is the date of Delhi verdict date. It was a mock t-shirt we wanted to do rather than, like we have some political stuff, some fun stuff. We are also capable of looking at the lighter side at the fun side of things."*

*--Swati of Azad Bazaar*

*"... it's the date. It's the date. It doesn't matter. After this there are going to be many other dates but that's the one that matters. (Pause) And it was a mock, a fun t-shirt we wanted to do. Like we have some political stuff we have some fun stuff. We also are capable of looking at the lighter or the fun side of things. We are not so serious and bog down by everything; ultimately you have to enjoy it also. We cannot be all fighting. Then we'll be a generation of queer people who didn't enjoy it, what's the point."*

*--Swati of Azad Bazaar*

With respect to personal laws, efforts were made by Stree Sangam (now Labia) in its early years when they sought to add a component of people of same-sex desire living together or married in the conventional sense. They question monogamy which in feminist analysis is the cornerstone of patriarchy through which people's lives are controlled. Monogamy was argued in the debates around UCC versus personal laws vehemently since there were differences in the two personal laws and their dealing with the idea of monogamy- Hindu code bill upholding monogamy while Muslim personal laws allowing for second marriage with the consent of the first wife.

Additionally, there were discrepancies within the Hindu practice, between actual practice based on local customs and the written law.

*"...early 1995. So in the debates in '95, we spoke about much more explicitly about same-sex relationships. And we did a greater exploration of the difference between a heterosexual and a homosexual relationship, but we also shifted somewhere that marriage not necessarily had to be about opposite sex. So it is more about care, nurture, companionship, property, living together etc. etc. it was about all of that and doesn't have anything to do with sex. So in these discussions we discuss a lot about monogamy actually. And critiqued monogamy but we wrote down because we were talking of today's*

Legislating  
(lesbian)  
sexuality

D. Ailawadi

*scenario, we wrote primarily about relationships between two people at best serial relationship but not multiple relationships. But now in this document there were two sections...*

*--Chandni a member of Labia*

With reference to *Humjinsi* a resource book on locating rights of lesbian and gay people within the legal system and personal laws that *Stree Sangam* published with Forum Against Oppression of Women (a feminist collective in Bombay) coming together leads to the writing of one of the member has to say,

*"... called Gender-Just Laws. Because now we are not using the language of Uniform Civil Code, so now we are using the language of gender-justice and personal laws. Gender-just document now has homo-relational realities and hetero-relational realities. So we use the term relational which is also crucial. Then you recognize, when a man and a woman get into a relationship the power equations are much more explicit so the protection of a woman needs to get are very different where as if you have two people coming in, two women living together, then there are other power differentials but not of gender. So you don't have to clearly say who has to be protected and define it terms of class and in terms of age. So there are two separate things and the second thing that we since people have not yet, since there haven't been these conversations people really do not know what we need the state to intervene in when there are homo-relational reality. But we put it all down and that document is there somewhere..."*

*--Chandni a member of Labia*

## Conclusion

The society in which we live can then be divided into public and private spaces— based on the Marxian understanding which divides the two spaces based on area of production and area of reproduction. The images signify a concept and meaning whose understanding is based on hetero-normative principles. The creation of space within this is then about examining the meanings attached to these spaces and in the process giving them new meanings. Therefore in the process collapsing the distinction between centre and periphery that creates hierarchies is also collapsed.

As a means on interim conclusion, the colonizers didn't leave back the laws and the codes, and the courts but also set the tone for the contours of the debate. In case of Section 377 of the IPC and personal laws the state and society inherited the Victorian ideals of normalcy and accepted sexual expression, monogamy and homophobia.

Even though the Judgment referred to women in passing or as being silent recipient to HIV/AIDs which dominated much of the argument, the feeling of liberation and freedom shared by these women was much to do with the recognition by the judgment of 'dignity'. Article 21 of the Constitution of India gives every citizen a right to dignified life. The main argument of the petitioner was that Section 377 of IPC as it stands violates the fundamental right to life and dignity.

The Court adopted a view on human dignity privileging the ability of people to think freely and to make choices for one's life. The judgment redefined dignity under Article 21 of the constitution. To quote the words of the Court, "At its least, it is clear that the

constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others." (Para 26 of the Judgement).

## References

- Ardener, S. (2000). The Partition of Space. In B. P. Jane Rendell, *Gender, Space, Architecture* (pp. 112-117). London: Routledge.
- Bandopadhyay, S. (2007). Approaching the Present: The Pre-Text: The Fire Controversy. In Bose, Brinda & Subhabrata Bhattacharyya, *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (pp. 17-90). Kolkata: Seagull Books.
- Fenton, L. (2005). Citizenship in Private Space. *Space and Culture* 2005; 8; 180 , 180- 192.
- Fernandez, B. (ed.) (1999), *Humjinisi: A Resource Book on Lesbian and Gay and Bisexual Rights in India*. Mumbai: Combat Law Publications. (pp. 6-18,93-99,117- 121,124-134,143-150,161-164,167-168)
- Foucault, M. (1977). *Discipline and Punishment: The Birth of Prisons*. Penguin Books.(pp.195-228)
- Foucault, M. (1980). *History of Sexuality Volume-1 Introduction*. New York: Vintage Books.
- Gopal, M. (2007). Affirming Diversities, Resisting Divisiveness. *Seventh National Conference on Women's Movements in India*. Retrieved December 17th, 2009
- Gupta, A. (2008). *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*. New York: Human Rights Watch.
- Gomanthy, N.B & Bina Fernandez. (2005). Voicing the Invisible: Violence Faced by Lesbian Women in India. In K. Kannabiran, *Violence of Normal Times* (pp. 224-265). New Delhi: Zen Books/ Kali for Women.
- Narrain, G. B. (2002). *Because I have a Voice*. New Delhi: Yoda Press.
- Naz Foundation vs Government of India & ORS, WP(C) No.7455/2001 (Delhi High Court July 2, 2009).
- Vanita, R. (2005). Aspiring to Union: Twentieth Century Cinema. In R. Vanita, *Love's Rite Same-Sex Marriage* (pp. 209-224). New York: Palgrave Macmillan.
- Vanita, R. (2002). Homophobic Fiction/ Homoerotic Advertising . In R. Vanita, *Queering India* (pp.127-148). New York: Routledge.
- Vanita, R. (2002). Introduction. In R. Vanita, *Queering India* (pp. 1-10). Vanita, R. (2002). Introduction. In R. Vanita, *Queering India* ,-- 207-220/ 111-1260
- Vanita, R. (2005). *Same-Sex Marriages in India and the West*. New York: Palgrave Macmillan. (pp.1-46, 183-207,209-224)
- Zieleniec, A. (2008). David Harvey: The political economy of space. In *Space and social theory*. (pp. 98-125). London: SAGE Publications Ltd.

Legislating  
(lesbian)  
sexuality

D. Ailawadi

*Gender  
and  
Sexuality*

Correspondence

Dyuti Ailawadi

Email address: [dyuti.ailawadi@gmail.com](mailto:dyuti.ailawadi@gmail.com)

Author Information

Dyuti is a young feminist researcher-activist from India. She is currently associated with Center for Social Justice in Ahmedabad, Gujarat.