Section 377 of the Indian Penal Code and Queer Women in India

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“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."

According to this law, any kind of sexual activity that is not penile-vaginal intercourse ('intercourse' as used in the explanation usually means penile- vaginal intercourse in Indian law) is punishable. This law then criminalizes sexual activity between two consenting adults. A discussion of the interpretation and implications of the law is outside the scope of this specific paper.

Section 377 is also the only law in the Indian Penal Code that addresses child sexual abuse. We can clearly see, however, that a law that only includes penile-vaginal intercourse cannot be a comprehensive code to address child sexual abuse thus asserting the need for another law on the same

This law instituted in 1860 in British India, at the same time as in Britain itself, is common to many former colonies of Britain and thus is common to most countries in South Asia. It has historically been the anti-sodomy provision in the British imperial legal system. Ironically,

enough the section was removed from the British code but still remains in its former colonies[1].

This provision has been used mostly against gay men, men who have sex with men (MSM), hijras[2] and male sex workers in the public sphere. It has also been used against organizations[3] and ground level activists working on issues of sexual rights, LGBT issues and HIV/AIDS. It is significant to note here that from 1860 onwards there have been very few cases of arrest and prosecution under sec.377[4]. The section however, we know from testimonial evidence, has been used for harassment of gay, MSM and hijras in the public sphere by police officials and in the private by families and friends

This section also serves as a threat against lesbian and bisexual women within families, friends, educational institutions, workplaces and so on. But as the law is patently silent on 'carnal intercourse' and it has in its execution excluded sexual acts by women, the threat that queer women face under this archaic law is different from the experience of queer men.

As we know from history, women are more often than not, denied access to the public space as well as the right to articulate their being as including their body and sexuality. The freedom to leave one's paternal home and pursue one's own, relatively independent life, in the name of a job is in most cases allowed for men and denied to women. Further, women are conditioned to not think, speak or act based on any notions of themselves with sexual interests, preferences or choice. Given these factors, queer women share a common ground with all other women,

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[1] The law was removed from the British code in 1967

[2] Hijras can be called, for lack of a better term, transgender people. In India they are also a social, political and cultural community.

[3] Bharosa Trust, an organisation in Lucknow working on issues of HIV/AIDS was raided and accused of having in their possession 'pornographic' material. The material in question was that relating to sexual health. Employees were arrested under 120 (B) for criminal conspiracy and under sec. 377 of the Indian Penal Code

[4] Forty six cases in the high courts in British and Independent India from 1860 onwards, which is a modest number, compared to the instance of harassment of gay men and Hijras with or without direct mention of sec. 377.

while challenging even that common ground by their identification and life as queer persons.

How do queer women then claim rights provided by the constitution and international conventions when their identity per se is not included in the legal regime and if such an inclusion might be counterproductive would be questions that we hope to raise in this paper.

An analysis of this context based on empirical evidence is an almost impossible task in a situation where very few women are openly queer within their families/friends or at workplaces. The only source we can use to base and analyse our contentions, are testimonials of the cases of lesbian couples who have run away from home and of those who have committed suicide. This paper will be based on interviews with activists from some cities in India- Delhi, Bangalore, Trivandrum and Bombay. We hope to interview activists and lawyers who might have been involved in these cases to ascertain whether sec.377 was within the parlance of the families, police and lawyers that they have interacted with. We also hope to speak to the women involved to have discussions on the perception about the law as well as what they see as the repercussions of change in the same. A discussion on questions of legal change as part of the larger struggle for non-discrimination based on sexual orientation/preference will be woven through the paper.

The paper also hopes to bring in discussions about whether the law extends beyond the sphere of the courts and have an impact on interactions within various other social systems, such as the family, educational institutions, workplaces etc. Second, does public protest against such laws, which might have been previously lesser-known, increase the amount of harassment based on the law at the ground level? If yes, the how does one counter these short-term changes in a struggle that is spanning across years and in all probability decades?

The paper also proposes to validate the argument that one kind of legal change or legal change in isolation, does not lead to substantial social change. There is a need for multiple approaches both within the law

(such as articulations of a non-discrimination clause in the constitution) and outside the legal system. Lobbying around discriminatory laws has to be coupled with larger discussions and advocacy around changes in social perceptions as well as changes in other public structures such as policy-making, media, education etc.

Yet another significant aspect that comes with the perception of law as the center of social change and thus social movements is identity-based rights' demands and thus exclusion. In the case of the rights of queer people in this country, the execution of section.377 having a more visible impact on men has lead to focus on issues of queer men as compared to that on that of women. It is in campaigns outside of the legal lobbying that have involved women with a certain amount of centrality- such as campaigns against the fundamentalist outburst about the film 'Fire'. While separate identity based movements are significant, even a momentary association of struggles around Sec.377 as being viewed by others and articulated by some, as a fight for the rights of gay men (the one's who are claimed to be the 'most affected' by the law) might be dangerous in the long run. If one were to articulate demands both within the law and otherwise not just based on identities of Gay, Lesbian, Bisexual, Transgender etc but also on a larger concept of non-discrimination based on sexual orientation and/or choice, the probability of inclusion of women in campaigns and discourses might be more. We might even have more stories of queer women spoken about and written apart from those of runaway lesbians.

This entire discussion of queer women, we will argue in the paper, is a case in point about the challenge of creating inclusive and holistic struggles for social change across identities of class, caste, gender etc while critically recognizing the significance of certain kinds of identity based spaces. We will also argue that the law in its very essence does delegitimise both clearly named and unnamed people and communities but at the same time is not in any sense the crux of oppression but rather a tool.