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## PRIVACY AND CONSENT: PUBLIC MORALITY IN INDIA

DEBJANEE GANGULY

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**Abstract:** In recent times we have witnessed a surge in moral policing of the Indian youth that seeks to reinstate the heterosexual matrix in society. Any threat to the 'natural' or decent creates a moral panic that brings back the 'errant' youth forcibly within the 'acceptance zone' of the community or state. It poses a problem for young adults who chose to marry contra these norms. They often face the diktats of the Khap, the State or society at large. Women are eve teased when they step out in western attire and homosexuals are denied a space in the public realm. The infantilizing of consenting adults in acts that remotely challenge the norms has begun to be oppressive where one is denied the Right to Life and Liberty. The Right to Privacy that lies embedded in Article 21 has to be resuscitated outside of the given heterosexual matrix. Constitutional morality must be the key factor in judging the obscene, morally reprehensible or socially unacceptable.

**Keywords:** Constitutional Morality, Consent, Privacy, Public Morality

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**Introduction:** The Age of Consent bill first passed in 1891 raised the age of consensual sex/marriage to 12 years from the earlier 10 years of age. This law came in the background of the Phoolmonee's death at the hands of her 35 year old husband who raped her [1]. Under the Majority Act of 1875 a person domiciled in India remains a minor till attaining the age of 18 years. Therefore marriage is not legal while still a minor. However, the Khap panchayats time and again strike, to remind us that by-laws will dictate, even to adults, whom they should or should not marry. Since the Khap enjoys the legitimacy of community, the law of the land falls through and community laws based on Izzat or honour take precedence. Honour killing has taken the lives of several young adults who chose to marry inter-caste, inter-religion or within the same gotra. While honour killing is an extreme form of moral policing, there are several instances of regulating the behavior and 'decency' of the public space that takes the shape of public lynching, verbal and physical harassment of young adults who choose to celebrate Valentine's day or express other sexualities. In the milieu what is not acknowledged is the role of consent between the parties involved per se.

Recently the Supreme Court of India has re-opened the case on homosexuality. In the Naz Foundation Judgment of 2013 the Supreme Court upheld the clause of Section 377 that criminalizes homosexuality. This was done to prevent acts of child sodomy and exploitation of children that clearly falls within the domain of unnatural sex. However this judgment does not give space to consensual same-sex acts between adults. In the Delhi Sessions Court judgment of 2009 this Section was read down stating that, 'popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong [2]. While the 2009 judgment reflects the contemporary standards of society, the 2013 judgment

reverses the progressive bill returning the marginal community of homosexuals and other genders to the illegitimate frays of heterosexual matrix. There is an attempt to infantilize adults who defy public morality. It is apparent in both cases of the khap and the homosexuals in India that there is a tussle over propriety that overshadows the consensual element of these acts. That it becomes the moral duty of the public to bring even the marginal voices into mainstream marriages/lives/society. This is done by delegitimizing their space and voice in the public.

**Privacy and Consent:** Central to this debate is the attack on Article 21- Protection of Life and Personal Liberty. It states that no person shall be deprived of his life and liberty except according to the procedure established by law. Thus it introduces into the Indian constitutional jurisprudence, the Right to privacy of an individual. Privacy is understood as freedom from unwarranted search and seizure, informational privacy, bodily integrity and personal autonomy among others.

Martha Nussbaum's study of the law in restitution of conjugality rights shows how privacy arguments validate the subordinate position of the woman in the sphere of the private which is the home and marriage [3]. Judgments regarding the conflicting values in restitution laws and Article 21 have been debated, at one time declaring that forcible restitution goes against personal identity which includes marital privacy. And at others, stating that law on restitution was serving a social purpose of saving a marriage and not forcing sexual intercourse. What is made clear is that privacy and marriage somehow must go hand-in-hand. Such connotations make it imperative that the space of the private be opened up to introspection by law which does not operate through privacy rights at all.

It is further argued that privacy often becomes a tool of the heterosexual society to reinstate heteronormativity by protecting the space of the

private only, wherein public expression of gay or lesbian desires is not protected. J.S. Mill's self-regarding act (those that do no harm to others) and other regarding act (those that may impact the audience) distinction is based on the private/public sphere separatedness where acts in the private are considered consensual and those in public are open to censure and is considered not necessarily consenting [4]. While blanket assumption of consent has been questioned in the study of restitution of conjugality rights one also is forced to question the less protectedness of harmless acts in the public space. On this note, Nussbaum questions the regulation or banning of gay sex/publics or bar dancing. These bans do not take into account the consent of the parties involved.

When it comes to other regarding acts, one has to take into account public morality and obscenity. Obscenity as understood through the Miller test states that it should be judged according to the contemporary community standards. Nussbaum brings out the linear connection between disgust/what is truly obscene. Obscene is understood as "[o]ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, and loathsome." In the study of disgust one sees that it emanates from a fear of one's own animality which is projected on the object that disgusts as well as a fear of female sexuality (the untamable whore, impure) and therefore can hardly be a fair objective measure of community standards.

In the Indian context separation of the public and private has often happened through a steady control of sexuality of the woman. The space of woman and her sexuality has been deified and an intrusion of the private space (marriage and home) by colonial law or Indian law was treated as a challenge to the sacred space; a vilification of the godly status of the woman. The woman is dociled within the image of the diety/private and thus kept in check. Though there has been a slow constitutional as well as social move from this sacredness to expressions of female desire in movies, books and social media this debate often takes the shape of the Western obscene culture versus the pure Indian culture which is clearly problematic. Sexual and bodily autonomy of the woman in the space of the public pans out through an ambivalent logic of consent.

In 2010 *Khushboo versus Kanniammal* case forced open a deliberation on the limits to article 19(a) to freedom of speech and expression and thereof the 19(a)(1) the clause on decency, morality and public order [5]. Her opinion on the acceptance of pre-marital sex and girls not being virgins at the time of marriage brought the private sphere squarely into the face of the public via women's sexuality. The Supreme Court defended the appellant *Khushboo* based on the

harm principle wherein here speech act did not effectively endanger community interest. More importantly the court specified that personal autonomy must be not tampered with. Implied here is that an act of consent between adults must be kept out of the purview of the law.

Kissing in public as an offense is charged under the IPC section 294 which makes this harmless other regarding act a punishable offense. Such behavior is taken as an attack on Indian culture by certain sections of the society. In the *Richard Gere-Shilpa Shetty* case where kissing in public was adjudged not offensive, the court remarked that such lawsuits put the name of the nation in bad light. Here there is an obvious attempt to keep up with international standards rather than a focus on consent. In a *Dwarka* case where two adults were charged under the same section for the similar offence of kissing in public the court said that this case should not have been made because the two were married. Here consent is implied because they are tied in legal matrimony! The space of the public is often marred with nonconsenting offensive acts of harassment especially after hours and most of these instances go unreported; no obscenity charges are filed. A case has been filed against *Snapdeal*, an online store, for selling sex toys, or in other words, unnatural sex. That the buyer and the seller are consenting adults, seems to be of little importance.

Often one hears from politicians, lawyers and society that the suppression of such freedom is for the safety of the woman. Beating of girls in pubs, attacking a house party of young adults, attacking a brother and sister mistakenly thinking them to be an unmarried couple, are a few instances of police and community moral policing that have taken place in the recent past which deny the consent or agency in the act in entirety. The Hindu space of the public is essentially de-sexualized (in effect the expression of only the fierce masculine gender). The suppression of women and her expression of her sexuality, desires, her autonomy definitely goes against Article 21 and Article 19. The suppression of other genders and sexualities is an offence against the freedoms that the Indian constitution stands for. The acceptance of a consensual speech act or private act in public, especially, that of a woman, is yet to gain legitimacy. This was made clear in the uproar caused by a condom ad that featured a seductive *Sunny Leone* voraciously enjoying the pleasure of sex or the mere thought of it. The family man is upstaged by the open display of consensual sex on national TV. It is bad enough that *Leone* is a porn-star but to have her portrayed as a 'person' (not object) who is desirous of sex has appalled some who complain that they cannot watch TV without feeling embarrassed about such ads being on display in the company of their wives

and sisters etc. The problem seems not only to be that one is talking of sex, indeed safe sex, but that the women is talking of it too!

**Conclusion:** How in this tussle between community interests and the rights over one's body (movement, expression) does the law decide where consent begins and where decency ends?

The lines of the public and the private are contested by varied stakeholders, including, Right Wing activists, feminists, political leaders, Khaps, the family etc. With the invasion of global culture, Satish Deshpande forewarns that the upper caste middle class woman has taken over the women's movement and has led to a recolonization of women where new bodies are delegitimated [6]. Thus the new spaces that women seek to occupy tend to push out other subjectivities or create new marginal voices in the fray. Neoliberal feminism reprivatizes personal experiences—a departure from the 'the personal is political' slogan of earlier decades—and emphasizes "individual choices comprising one's consumer-modeled identity.

According to Judith Butler the connotations of the obscene and one's right to life and liberty work as one of the many foreclosures determining the moral of code in a specific cultural context. Foreclosures of the public space like eros, women in the work place, women drinking in pubs, not wearing the Hindu symbols of being married, pride walk are among the many ways they are performing their gender thus breaking away from the heterosexual matrix. With this there is a rethinking of the public and private

and the sharp divisions separating them. Contending notions of public morality and public good will define how we understand the space of the public and the private.

Stepping away from the premise of what is obscene and morally reprehensible in the public sphere the Naz foundation for gay rights declares that the Constitution of India celebrates diversity. As Rohit Sharma has stated, it "takes the debate beyond tolerance to acceptance and demands equal rights of the gay community based on constitutional morality [7]."

The thrust of correctly judging what is unacceptable to relies on the harm principle (any act that is invasive of free acts of others) and in this principle lies an implied consent of adults in an act that might be other regarding though but is harmless and therefore constitutional acceptable. A balance between privacy rights and community interests is sought through contesting the individual rights to privacy and public spaces. This re-contesting will occur each time there is a moral panic within society. Without prescribing a particular morality, and certainly without outlining all the answers to living with diversity, Jeffery Weeks proposes an ethics of love based on four principles: care, responsibility, respect, and knowledge. A responsible love, for example, is based on the recognition that what one does has consequences for others [8]. At the end of the day if there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality.

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Debjanee Ganguly/Ph.d Research Scholar/ Center for Political studies/Jawaharlal Nehru University/Delhi/