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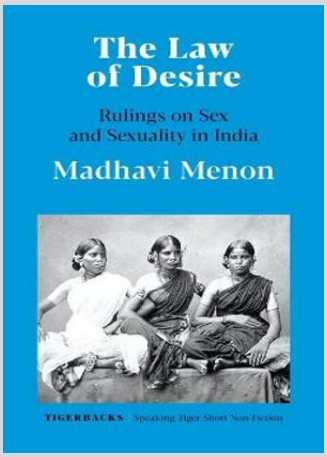

Madhavi Menon

The Law of Desire:
Rulings on Sex and Sexuality in India

New Delhi: Speaking Tiger, 2021
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reviewed by Kanav Narayan Sahgal

> Law defines the social, while desire threatens to disrupt it; the law of desire is, therefore, both a necessity and an impossibility.
>
> Madhavi Menon, p. 16.

Madhavi Menon's newest book on sex, sexuality and queerness is published at an opportune time when discussions around the legality of same-sex marriage seemingly take the centre stage of gay and lesbian rights advocacy in Indian courts. In *The Law of Desire: Rulings on Sex and Sexuality in India,* Menon presents us with a text that challenges these well-meaning activists' and lawmakers' intentions of using the law as a vehicle of social change. In doing so, she presents a hitherto ignored critique of the otherwise progressive *Navej* judgment that legalised consensual same-sex activity in India and paved the way for the ongoing conversations around same-sex marriage recognition in India.

The Law of Desire is a miscellany of important High Court and Supreme Court judgments that have shaped the way that desire is understood, interpreted and acted upon by not just the judiciary, but also the media, legislature and the executive. The book starts rather provocatively by stating that 'public adjudications have taken shape around four adjectives that define the law's relation to desire: Criminal, Immoral, Obscene and Unnatural' (p. 17). In saying so, Menon lays out the blueprint for the rest of the book by examining how Indian law has continuously criminalised, shamed, censored and pathologised particular sexual and gendered beings, acts and identities. Throughout the text, Menon reminds us that the constitutional guarantees afforded to all citizens in the Preamble and Part 3 of the Indian Constitution are routinely thwarted. These principles include, but are not limited to, those of justice, liberty and equality, as laid out in the Preamble, and the principles laid out in Articles 14, 19 and 21 in Part 3 of the Indian Constitution (also called the 'golden triangle.' For more, see *Minerva Mills v Union of India* and Aman Ullah and Samee[1]). On the issue of sex, sexuality and desire, interestingly, Indian Courts have passed progressive judgments in some instances, for example, with *NALSA, Navtej,* and *Joseph Shine,*[2] but not in others, for example, with *Fathima A.S* and *Ranjit D. Udeshi,*[3] and it is this inconsistency—almost confusion—that Menon eloquently foregrounds in her book. She very evocatively states that there cannot be one 'final Law of Desire' because the 'law cannot locate it' (pp. 16–17). This, in turn, raises the legitimate question of why the law is interested in policing something it cannot understand in the first place? Menon's chapters on criminality, immorality,

obscenity and unnaturality attempt to resolve this paradox.

The chapter on criminality is a discursive narration of the famous *Hadiya* case[4] in which the Supreme Court held that the freedom to make decisions about 'family, marriage, procreation and sexual orientation are all integral to the dignity of the individual' (p. 22). This case is wonderfully juxtaposed with the existence of *Love Jihad* laws in several Indian states, the tabling of the Surrogacy (Regulation) Bill, 2020 and the passage of the Muslim Women's (Protection of Rights on Marriage) Act, 2019. In doing so, Menon wonderfully articulates how the state machinery, through the use of the law, specifically targets queer and Muslim desires. Meanwhile, the Hindu Right, emboldened by ideals of Hindu nationalism (*Hindutva*), actually speaks the language of our erstwhile colonial oppressors by reading into the law outdated and reductive notions of masculinity, sexuality, morality and religion. Sadly, this trend continues even in 2022 in India under the political regime of the Bharatiya Janata Party.

Menon's chapter on immorality discusses two laws—The Suppression of Immoral Traffic Act, 1956 (SITA) and the Madras Devdasis (Prevention of Dedication) Act, 1947—in conjunction with how ideas of respectability and rehabilitation—however well-intentioned—hinge on casteist, classist and heteropatriarchal notions of women's 'rightful place' in Indian society (p. 49). The chapter on obscenity is more detailed, highlighting the law's confusion around defining 'obscenity' (i.e., demarcating 'good' depictions of sex from 'bad' ones, p. 66), containing it (through classist notions of censorship), and taming it (by restricting the free expression of sexual desire, unless it serves a social purpose). In doing so, the law complicates sexual expression even further by tossing it into an ambiguous grey area- waiting to be (mis)interpreted even further.

Menon's chapter on unnaturality is perhaps the most fascinating, for it looks at four categories of people—transgender people, adulterers, menstruators and homosexuals—to explain how the law creates artificial labels like 'unnatural' to categorise those who it deems deviant and then reinforces these categories. Interestingly, the Indian Supreme Court recently passed progressive judgments for all groups of people (*NALSA* on the issue of Transgender rights,[5] *Joseph Shine* on the issue of adultery,[6] *Indian Young Lawyers Association* on the issue of menstruation and temple entry,[7] and *Navtej* on the issue of homosexual rights[8]) yet fell short of questioning the laws—the insistence of placing undue centrality around cis-normative and heterosexist marriage—an issue taken up in the final chapter of the book, 'Amendment' which presents a critique of same-sex marriage in India.

Despite being a non-lawyer, Menon displays great acuity in delineating the complexities of Indian law. Moreover, her ability to draw connections between legal judgements years apart is a testimony of her perspicacity as a social theorist adequately attempting to 'queer' the law. That being said, a topic as vast as desire merits more than 148 pages of interrogation. It should have at least dedicated some space to discussing disability. Cases like *Suchita Srivastava & Anr v Chandigarh Administration* (which determined that mentally ill women had the right to refuse abortion)[9] speak volumes about how the law interprets motherhood and femininity in the context of disability. Interestingly, the absence of literature on the treatment of queer desire in the context of disability tells us that there are still some spaces where the law has not yet reached, and it is uncertain whether this should be read as a sign of hope or concern. Indeed, the scope of expanding our horizons of 'non-normative' desire is limitless.

Certain functional statements that Menon makes deserve greater security (e.g., 'Law defines the social, while desire threatens to disrupt it,' p. 16). But does the law really define the social or does society define the law? In the context of queerness, do queerphobic laws rise in a vacuum? Or do they rise only after to the enablement of social, religious and moral codes, which in turn, catalyse the law to invisibilise, criminalise, penalise and stigmatise queer desire? In Gramscian terms, do

heterosexism and transphobia hegemonise law, or is it the other way around?[10] Moreover, is desire always disruptive, as Menon points out? What if desire does not wish to be subversive, and instead, wants to placate normative tendencies? Scholars like Sharon Marcus remind us that while *queer* symbolises sexual fluidity, *gay and lesbian* denote a kind of stability of identity.[11] Thus, demands for legalising same-sex marriage could be read as both queer and lacking subversiveness. Perhaps because this issue lies in a sociological grey area, it is critiqued by liberals and conservatives alike.

Indeed, desire is a tricky beast to tame and define, let alone categorise and universalise. Given the multiplicities of castes, religions, dialects, sexualities, genders and (dis)abilities in India, there is truth to Menon's supposition that Indian Courts cannot possibly ever promulgate one common law of desire. However, given that Indian courts are bound by precedent, there exists a problem when social mores and values change with time, but our judicial understanding of desire does not. How do the courts, then, justify legal precedent that narrowly reads desire as obscene, criminal, unnatural and immoral in a modern twenty-first-century India? One that still refuses to criminalise marital rape for example?

Menon seems to advocate for an interpretivist reading of the law and one calls upon judges and lawyers to better understand the complex dynamics that undergird sexual and gendered politics in contemporary India. Perhaps only then, will the judiciary find itself capable of adjudicating complex cases like *Hadiya* and *Navtej* even more effectively and justly.

Notes

[1] *Minerva Mills v Union of India* AIR 1980 SC 1789; Aman Ullah and Samee Uzair (2020). 'Right to Life as Basic Structure of Indian Constitution,' *South Asian Studies,* 26(2). (2011): 393–99.

[2] *National Legal Services Authority v Union of India* AIR 2014 SC 1863;*Navtej Singh Johar & Ors. v Union of India thr. Secretary Ministry of Law and Justice* AIR 2018 SC 4321; *Joseph Shine vs Union of India* W.P.(Crl.) 194/2017.

[3] *Fathima A.S v The State of Kerala* Bail Appl.No. 7320 of 2018, Crime No. 2405/2018 of Pathanamthitta Police Station, Pathanamthitta; *Ranjit D. Udeshi v State of Maharashtra,* Criminal Appeal No. 178 of 1962.

[4] *Shafin Jahan v Asokan K.M. and Ors* AIR 2018 SC 1933.

[5] *National Legal Services Authority v Union of India.*

[6] *Joseph Shine v Union of India.*

[7] *Indian Young Lawyers Association v The State of Kerala* (2019) 11 SCC 1.

[8] *Navtej Singh Johar & Ors. v Union of India.*

[9] *Suchita Srivastava & Anr v Chandigarh Administration* (2009) 14 SCR 989, (2009) 9 SCC.

[10] T.J. Jackson Lears, 'The concept of cultural hegemony: Problems and possibilities,' *The American Historical Review* 90(3) (1985): 567–93, doi: 10.1086/ahr/90.3.567.

[11] Sharon Marcus, 'Queer theory for everyone: A review essay,' *Signs: Journal of Women in Culture and Society* 31(1) (2005): 191–218, doi: 10.1086/432743.

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