

[Review] Puri, Jyoti. 2016. *Sexual States: Governance and the struggle over the antisodomy law in India*. Durham: Duke University Press. ISBN: 978-0-8223-6043-8.

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Puri's *Sexual States* contributes to the growing body of work about conceptions of state power. It offers us a way of understanding sexuality's constitutive effects upon the state. She argues that, as the state seeks to define normal sexuality, to discipline bodies and to regulate sexual relations, the state itself becomes sexualized. Mundane institutions and routine practices of the state are "thoroughly imbued with considerations of sexuality." (p. 6).

The book enters the sexual state through s. 377 of the Indian Penal Code, 1860. While the provision is used to criminalize the non-vaginal sexual assault of women, sexual assault of men, and the sexual abuse of children, it has been elevated, the book argues, to the pre-eminent law that criminalizes homosexuality. The book tracks s. 377 through several moments – statistical agencies, the police, judicial precedent, and contemporary court practice – to tease out various manifestations of the sexual state. In providing an ethnography of government institutions and through a close textual reading of precedent, of the petitions and judgments that first decriminalized homosexuality and then recriminalized it, the book attempts to move an account of the sexual state away from the criminalization of homosexuality in particular to the management of sexuality, more generally. As a lawyer for one of the parties in the case before the High Court<sup>1</sup> and then in the Supreme Court<sup>2</sup>, and as scholar who also

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<sup>1</sup> *Naz Foundation v. Government of the National Capital Territory of Delhi & Others* 160 DLT 277.

<sup>2</sup> *Suresh Kumar Koushal & Another v. Naz Foundation & Others* (2014) 1 SCC 1.

engages in anthropological approaches to state and the law, I read this book with a great deal of interest, but ended on a note of some hesitancy – for reasons I note at the end of this review.

The book is divided into three parts that map out its conceptual concerns. The introductory part is concerned with mapping sexuality's effects on mundane bureaucratic practices. Sexuality, she argues, is at the heart of the enumerative functions of the biopolitical state. Puri tracks her forays into the National Crime Records Bureau and her efforts to obtain statistics about crimes recorded under s. 377 only to be told that these statistics were not worth the effort to generate, and that she would be better off studying crimes (including sexual assault) against women, for which statistics did exist. Puri understands this statistical silence with regard to crimes under s. 377 not as form of heteronormative reticence around homosexuality, but rather that crimes against women had been elevated as a social problem, which is not the case regarding homosexual sexual activity. The framing of sexual violence against women as an egregious social issue because of its frequency and its seriousness, meant that the biopolitical state sought to enumerate, evaluate and track the scale of the problem over time – hence the production of statistics. Puri argues this relative statistical silence as indicative of more subtle and diverse ways in which sexuality is policed, beyond s. 377.

Part II, comprising of chapters 3 and 4, looks at s. 377 in two other registers of governance: first, through complaints filed under section 377 and through its legislative history and judicial expansion; and second, in the imagination of police officials amongst whom Puri conducted fieldwork. The effort in both these chapters is to decouple s. 377 from the construction of the figure of the homosexual, and to open out the analytical sphere of regulation of sexuality by the Indian state, beyond this one

provision. In chapter 3, Puri notes, as many others have (Gupta: 2006; Narrain: 2004), that while the legislative intent of the provision may have been linked to Victorian horror of homosexual acts, the limited number of recorded cases under s. 377 reveals that its sparing use has been primarily targeted towards criminalizing child sexual abuse. As she and those authors have pointed out, the vast majority of the cases are cases of child sexual abuse and she joins them in pointing out that the vague phrasing that the provision employs (“carnal intercourse against the order of nature”) has meant that a growing number of sexual acts come to be brought under its ambit by judicial interpretation. Her point of departure however, is the way she reads the modest corpus of cases. Puri argues that some have taken an unnecessary Foucauldian turn in arguing that the corpus of case law under s. 377 is productive of the figure of the criminalized homosexual. She argues that one ought to read the precedent as primarily about child sexual abuse and not homosexuality and that the “archive does not evidence a clear-cut socio-legal history of persecution against homosexuals in India.” (p. 71). She makes a strategic point here – that instead of reading the judicial history of the section as one targeting homosexuals, but as one that inadequately targets child sexual abuse, then the existence of the provision is hard to justify (p. 70) and is a way of demonstrating the law’s irrationalities (p. 71).

Chapter 4 is based on fieldwork conducted at HIV/AIDS informational and sensitization programs conducted at police stations in Delhi. (p. 80) She argues that although gay men, men who have sex with men, and lesbians are not immune from invasive policing of their sex lives, that s. 377 is most likely to imperil communities that are seen as hypersexualized – Muslims and Hijras. Puri argues that the constables she interacted with at these programs, argued that crimes under s. 377 – ranging from child sexual abuse, to sex with animals – were more likely to be committed by

Muslims or Hijra's. Puri persuasively argues that we should not see this as a form a prejudice based on community, but rather on the idea of race. Racial characteristics, as opposed to religious or communal characteristics, are seen as phenotypically coded, inherent and passed down from one generation to the next. According to her, this reflects is the "queering of racialized religious minorities and the insistence on their association with criminality." (p. 90). This idea of criminal sexuality as inhering in a racial type is reflected in the criminalization of Hijras under the colonial-era Criminal Tribes Act - which was premised on the idea that certain groups of people were biologically predisposed to committing certain types of crime. Puri's ethnography also reveals that several other statutes – such as anti-trafficking, and public decency laws – were used by the police to regulate Hijras.

Part III is concerned with the court case filed by an NGO, the Naz Foundation, about the constitutionality of s. 377. Here, the book tracks the initial petition before the High Court, the subsequent High Court and Supreme Court judgments, the government responses and the reaction from sections of the queer movement in India.

Chapter 5 looks at the period of the case from when it was initially filed in 2001 to the period of when it was first dismissed by the High Court on a technicality in 2006. Puri notes that there were several criticisms of the initial petition – the fact that there was little community involvement in the decision to go to court; the framing of the initial petition around an HIV/AIDS argument rather than a fundamental-rights one; that the petition should not have been thought as an end in itself, but rather as a campaign tool. While the book does not delve deeper into what these criticisms and anxieties might tell us about the investments in the state and law, it does point out the efforts that Naz foundation undertook to make the process more open and democratic.

In analyzing the government's reply opposing the petition, the chapter is particularly insightful as it argues that sexuality here emerges, not only as a locus through which regimes of discipline come to operate, but also as providing a *raison d'être* for the state. The inflammatory language used that highlighted the perils of unbridled sexuality, affirmed the state as a crucial source of governance (p. 117). The state comes to represent itself as "protecting the natural and social order."

Building on attempts to de-centre s. 377 in its previous chapters, the book also criticizes the petition for reinforcing the view that s. 377 "was the primary instrument of the state's symbolic and material persecution of the homosexual." (p. 124.) Puri argues that not only did the petition foreclose the possibility of reading s. 377 as an inadequate child sexual abuse law rather than an anti-homosexual statute, but it also ignored the myriad of other laws and practices that were used to police sexuality.

Chapter 6 then moves into a close comparative reading of the High Court's judgment in 2009 decriminalizing consensual sexual acts and the Supreme Court's 2013 pronouncement overturning this ruling. The book argues that though the judgments come to wholly divergent conclusions, both are responses to the neo-liberal moment that India finds itself in. Puri argues that the High Court's judgment represents an attempt to limit the field of the state and does so by deploying a neo-liberal rights regime premised on the primacy of the individual and a territorialized right to privacy. The Supreme Court's ruling reaffirms the role of the state in regulating sexuality in the context of a state imperiled by neo-liberalism.

The book productively offers the idea of sexuality as an important additive to our idea of biopolitics, and shows the ways in which sexuality is constitutive of state power. Further, the book makes an important contribution to theories of community in the Indian context, by first racialising it, and then queering it. While it does not situate

judicial wrangling over s. 377 amidst critical scholarship of the Indian judiciary's public interest jurisprudence, the book is an important contribution to this field as well. To my mind, however, the book misses out on several key moments during the court hearings (A pivotal moment was when the Ministry of Health opposed the government's stand and supported the petition in the High Court). More importantly, it lacks, in my opinion, in three methodological and theoretical aspects.

Firstly, chapter 3 argues that the judicial precedent under s. 377 does not lend itself to the narrative of the criminalized homosexual and that this archive ought to read as one pertaining to child sexual abuse. This points to the fact that while book looks through law to examine the nature of the state, it fails to look at the techniques of drawing connections and analogy that the law itself employs (Riles: 2005). Merely because the vast corpus of the cases factually pertains to child sexual abuse, does not mean that it was inaccurate to draw out the image of the criminalised homosexual. At a certain level of abstraction, it becomes difficult to discern whether a statement, like "the natural object of sexual intercourse is that there should be the possibility of conception of human beings,"<sup>3</sup> applies to homosexuality or child sexual abuse – simply because the process of legal analogy asks that it apply to both (Latour: 2002/2009; Riles: 2005). Further, the book's thin understanding of legal techniques means that it cannot understand the petition beyond its immediate object of decriminalizing homosexuality. Had the High Court judgment stood, could it not have been cited to undermine these other laws that Puri rightly argues also regulate sexuality? It was cited in the case of Dr. Siras – one that the book mentions – regarding the suspension of a male University professor for having sex with another man. In that case, the court specifically relied upon the right to privacy to temporarily

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<sup>3</sup> *Khanu v. Emperor* AIR 1925 Sind 286.

stay the suspension<sup>4</sup> – an outcome that would have been doubtful, had it not been for the Naz Foundation case.

Secondly, while the petition is faulted for focusing on s. 377 alone, this is also the book's primary drawback. It repeats the well-taken point that there are other laws that impact upon sexuality – laws from anti-trafficking statutes, to vagrancy ordinances to public decency laws. But the book's focus on s. 377, has occluded from its vision that the same lawyers, organisations and activists involved in efforts to decriminalize homosexuality, are also involved in issues pertaining to these other laws. While the book rightly points out that s. 377 was the petition's main point of attack, it does not situate the petition within its wider milieu of sexuality rights activism more generally. The movement against s. 377 arises from everyday visceral interactions with police around trafficking, sex work and vagrancy laws. Had the book provided a more rounded view of the struggles around sexuality in India through its text, and not just at the introductory and concluding chapters, we might have seen a more thorough understanding of the sexual state.

Third, while the sexual state is an enticing idea, the book frames the idea of the state through a paradox: it is “the primary site of injustice and then as the arbiter of justice” (p. 22). While the book productively argues that the state is produced through the everyday and emerges as a fragmented and messy entity (p. 10), it is unclear why approaching the state is seen as a paradox. Since it understands the state only as a sign of an ever-present threat, the book offers no way to understand why the petition was filed in the first place. Several anthropologies of the Indian state have argued that the state can manifest a number of potentials – from care, to compassion, to violence, to

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<sup>4</sup> Order dated 01.04.2010 in Writ Petition (Civil) No. 17549 of 2010, before the High Court of Allahabad titled *Dr. Shrinivas Ramchandra Siras & Others v. The Aligarh Muslim University & Others*.

neglect (Singh: 2015; Gupta: 2012; Das: 2007; see also Fassin: 2005). Following this, if a state can be, as the book argues, contingent and inconsistent, why is it a contradiction to see the state as “the site of injustice toward same-sex sexualities *and* also the wellspring of justice”? (p. 71) (emphasis mine) Chapter 6 reads the High Court’s decision as diminishing the power of the state (p. 139), while the Supreme Court’s judgment is seen as re-entrenching the expanse of the state. Could this not be equally read as a caring state (in the High Court) and a violent one (the Supreme Court)? Undoubtedly engaging with the state is a risky business, but had the book understood the state more than just the inevitable site of danger, it could have seen other affects and desires that emerged through the sexual state.

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