Socio-Legal Review

Volume 10
Issue 2 *Proceedings of the Conference on Gender and Sexuality Organized by the Law and Society Committee*

Article 2

7-1-2014

Transcript of Proceedings of the Conference on Gender and Sexuality Organized by the Law and Society Committee

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TRANSCRIPT OF CONFERENCE PROCEEDINGS

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The story started in 1994, with ABVA filing a petition questioning the legitimacy of Article 377, in the context of distribution of condoms in prisons (which was outlawed under Kiran Bedi because homosexuality allegedly didn't exist). There was consternation among groups at the filing of the petition because of the widespread effect it would have. There was a clear need for community representatives to come together and discus the issues highlighted in the petition. There was opposition from an organisation that believed things like HIV does not cause AIDS. There were contentions raised about how criminal law should reflect 'public morality', and that most people in India were against legalization of homosexuality. The petition was first rejected due to lack of *locus standi*, but it was allowed in 2006 to be heard on its merits. National AIDS Control Organization argued about the spread of HIV and the effects of homosexuality on that. Mr. B.P. Singhal asked for the preservation of Indian culture. There was one organization against all the others coming out in support of the law. There was a need for an intervention to support Naz, which was done by Voices Against 377. Shah and Muralidhar JJs gave the gave the judgement in Delhi High Court.

The first SLP challenging the judgement was filed on July 7, 2009 by Suresh Kumar Koushal. This was followed by fifteen other SLPs, from various organisations representing different religions and even the Delhi Commission for Protection of Child Rights. There was a need for specific arguments against the collapse of Indian culture and morality. Interventions were made supporting Naz by academicians, parents of LGBT persons, and even Shyam Benegal, who contended that homosexuality is not detrimental to family values, and that parents have lived happy family lives. They brought up the issue of fear that members of the LGBT community face– that they will be arrested or beaten up. Criminalising an intimate aspect of people's lives results in them being afraid of sharing an integral part of their lives and identities, impeding the enjoyment of family life. There were things that worked both inside and outside court. Some people and their family members, like their mothers, appeared contending that Section 377 was against family values. Mental health professionals and journals also gave

scientific testimony that homosexuality is no disorder. They expressed the fact that sexual intimacy is an integral part of who we are, and the ability to have intimate relationships with whoever we want is a very important part of our existence. Teachers saw it as part of an ongoing social struggle and discussed cases of students who were also LGBT and so on. Ratna Kapoor and other law academicians provided a legal perspective on why section 377 needs to go. The final arguments were given in the Supreme Court, and it has been reserved for judgement. It must be given by or before the 11th of December – before Singhvi retires.

The factual matrix of section 377 and its usage in nine cases helped reveal the problems with the section such as its status of a non-bailable offence. There was also the problem that a public scandal may be created. Small towns see people being outed as *koti* or homosexual in front of the entire community, causing shame and embarrassment. The arbitrariness on part of the State has its value as a metaphor. It shows that the law considers certain people to be second class citizens, considering a closely held personal characteristic as criminal even if it is an integral part of a particular grouping of sexual orientation and gender identity.

Prof. Baxi argues for an external judicial movement, and says that this is the second most important case after *Keshavnanda Bharti*, particularly from the perspective of the society as a whole apart from the person whose rights were violated. Two of the questions raised were on privacy. This right to privacy does not apply equally in the Indian context. The poor, who are homeless, who can only have sex in a public place, lack that right to privacy. There is a certain notion of privacy developed in *Naz* - zonal and decisional privacy. This was used by Blackburn J. in *Lowell v Hardwick*, starting from *Homestead* in Brendan J.'s dissent which recognises the right to do whatever you want in the privacy of your home in the pursuit of happiness. The only part of pain and pleasure are found in material goods, and that there are some beliefs, thoughts, emotions and sensations from which you derive pleasure. Is it a right to watch porn in your home, or is it a greater idea? In your home, you have freedom of belief, emotion and sensation and so on. This is the starting part for the development of a notion of privacy, which means when you take a decision about your intimate life, which are decisions that are life altering and defining. The point of the court is the

ability to define one's identity is fundamental to liberty, and that the ability to form his own emotional and physical attachments for enrichment is essential for that. Privacy means having the freedom to create ties or attachments to other persons, or even give birth. This is linked to the notion of health of the (heterosexual) family and so on. There is the ability to derive a larger principle. Family is a method of emotional enrichment, which means family can be left out and replaced with emotional enrichment with any person. US courts later held that the right to privacy does not include homosexuality. Blackburn says it is about the most comprehensive rights given to a person to be left alone, the idea to develop your thoughts, notions and all that, and the right to form associations with whoever you want, homosexual or heterosexual. Individuals define themselves with intimate sexual relations, and the richness of the relationship comes from the ability to determine the form and nature of sexual relationships, which is fundamental to the idea of human happiness, which is why the state should not criminalize homosexuality.

In India, the Constitution does not recognize the right to privacy, but common law, through Justice Iyengar's opinion in *Kharak Singh* and *Gobind Singh* provides such a right, dealing with surveillance and not really homosexuality. Impact of surveillance is on intellectual health by engendering inhibitions and fear relationships which leads to restriction of physical freedom. Justice Mathew says privacy is a sanctuary where you drop a mask which displays values you want to display to the public and be free to do what you want and be who you are and be accepted regardless of the values of your peers. This, though probably not intended, strikes a chord with the LGBT community.

There is no talk about sexual orientation in Indian case law. The judges bring in case law from US, *Kharak Singh* and psychological constraint from surveillance, and develop the idea that as far as people are concerned, gender and sex. Identity is embedded so deeply that persons carry it wherever they go and cannot separate it from themselves. The Indian Constitution does not believe people are socially disconnected, and recognises that they live in society norms and values. The State does not have the right to determine your partner; this must be done by the people themselves. This is added to the idea of dignity from the Preamble. Making your own decisions freely and without compulsion is a measure of dignity.

The decision is intersectional since it draws from other social histories and cultures to reach its judgment. The usage of constitutional morality is taken from Ambedkar, who differentiated it from national sentiment as Indian soil is fundamentally undemocratic. This was in context of the domination of dalits by the majority. Constitutional morality thus says that regardless of what the majority says the minority must have their rights protected.

The reasoning from *Virginia Board of Education* was drawn on. Here, it was held that the purpose of the Bill of Rights was to take certain issues, such as fundamental rights, beyond the majority and make them unavailable to vote. The case arose out of Jehovah's Witnesses refusing to salute the flag, and that the decision to necessarily salute the flag was reversed. Thus, the majority cannot compel the minority to submit to its ideas.

The strong social history underlining each of these concepts is reflected in Naz. The struggle for dignity and against humiliation is part of the Preamble, but where does it come from? In my mind there are two sources. The first being Ambedkar's autobiographical story of using a gunny sack and not being able to draw water unless a peon agreed to open the tap, humiliating him. Thus dignity comes from knowledge of indignity. The other story is from My Experiments With Truth where Gandhi was thrown out of the train. He basically went to Durban on another coach and was forced to sit outside. When a man asks him to move because he needs to smoke, he beats him up for refusal.

Dignity is not static, and develops from generation to generation with its own meaning and the constitional meaning. The Naz justices have taken dignity and interpreted it in their own way, dealing with LGBT rights, which is why Naz has extraordinary value.

Nitin Manayath

We need to discuss the engagement of issues relating to hijraness in the contemporary context and what it means to all of us. We start with a separation of homosexuality and hijraness. In a magazine article, Dr. Vinod Chetty, in response to a reader who couldn't come to terms with his orientation, said 'even if you are gay, it is possible for you to be successful. Many hijras have led successful

lives.' An email from an old LGBT group in response to this said, should the doctor not have elaborated? What has been the impact of such an idea? Will the boy think of himself as one of the people who kidnap men, run around in sarees and so on. Attending a meeting of gay people, there is naive curiosity about who a hijra is, and a definitional response of how hijra and kothi is different from homosexuality, even though terms like chakkha and gandu are used to express deviation from sexual behaviour. Their being called hijras would be seen as a revelation of what is supposedly to be hidden.

However, this classification has many slips and various forms hijraness do not fit in these imperative standards, such as hijraness resulting from being castrated or being a dancer, performer or sex worker or something of that sort. Identities are varying, such as kothis hiding their 'nature' under the veneer of 'gayness'. Gay men try to separate themselves from hijras as much as possible, shying away and calling themselves merely homosexual.

A hijra guru, in a casual conversation, stated that she may not have gone through castration if she knew men could have sex with men as men. This may be seen as confusion over sexual identity, but might be much simpler: that gayness is the most dominant idea that could include her (earlier it was 'hijraness'), which she would have gone in for if she had that knowledge. What we have here is a descriptive splitting of categories of hijraness: the gay man's separation of description as hijras, separation in the hijra-kothi framework. How is it official 'kothiness'?

When one makes a statement like 'I came into the field in 1998', it leads to NGOs asking you to further define yourself as gay or hijra. What this field, as they experienced it at a particular point of time, which made their life very different? They may be taken to be ignorant. Why do they call it a field? It may be a truer experience being embedded within same-sex cultures, that of entering fields. The idea of a field is the domain of erotic sociality which may be differentiated from a domain of non-erotic sociality. They are figured in time and not bound in space. They are particular experiences. The domain of social eroticism and its accretion into our lives is important. This does not hold in Indian society and the context, for it fails to explain a lot of things. This separation is necessary

to explain away some inconveniences in explaining erotic sexuality both in the Indian context and in general.

Examples abound, such as masti videos on YouTube, which have men doing horseplay, and stripping in front of each other (titled some variation of masti or kaand), and are uploaded by the men who are in the video. People comment on their bodies being hot, and in some instances wherein the uploader thanks. When someone comments on it being so gay, the uploader gets upset, even though he was the one showcasing homoerotic desire. It is kind of like the difference between gayness and hijras, wherein the secretive domain of the erotic exists as long as there is no mention of gayness, which takes it into the domain of the public (from private). This makes it a problem. Some Yahoo groups will allow discussion of gay fashion, but would prevent people from soliciting sex. This is due to the configuration of places as erotic or non-erotic, which is due to our status as cultural actors, which is the idea of separation.

One must look at its relevance to LGBT politics in section 377. There is a literal domain of separation and an actual domain of separation. Hijras may be, living in a space as small as two tables put together, wherein they may belong to different 'mane', with them having different duties, such as being blessed or solicitation. Hijraness is not a space of radicalism, but that the idea of separating domains is there. There is the refuge of 'globally recognized frames of exclusion', which is used to create a non-sexual domain, with representation in media frames being restricted to non-sexual depiction. The strict policing of drag in parties, lack of narratives, charges of media sensationalism, the masculinist idea in gay fashioning are other performative modes of non-sexual domain delineation. State uses contradictory ideas to identify with hijra population, such as their inclusion in the Backward Classes category, while terming them as criminals which must be registered in police stations. For the legislature, the idea of hijras as victims is fine as long as they are non-sexual, but this difference means poor negotiation of the ideas of hijraness.

Privacy within the Naz judgement is very, very broad, but there is a lack of understanding how it translates to police work and life, and how it operates under the idea of how it operates on women. For instance, hijras have in some way

asked to be called as mangalmukhis, which allows for a creation of a non-erotic domain of sexuality. There are jamaats for dispute resolution, which are understood as non-erotic domains of function. The implication is that hijraness and gayness does not correspond to some material difference, same binds of state fabrication. While contemporary negotiations work well for urban gay men, unlike those who invest in public sexuality.

The language and practices of LGBT men restricts possible erotic action due to its formation of boundaries and undivided public space. The gay rights idea reduces it to a non-sexual act reduces the open space for erotic sexuality in the public domain. This idea is co-constitutive of a culture of shame, as there is a performance of something not supposed to be in that domain. Encountering the erotic in a field regimented as a field of non-erotic sexuality. This is how queer politics is shaped, how they counter public humiliation through shamelessness, which allows me to exist very differently from the idea of intersectionality, which I consider useless. There are experiences of shame through transgression of domains and how this shaming happened shapes my perspective, which is not to undermine other ways of looking, but that intersectionality can be understood as occupying a certain marginal position from which you are able to critique the dominant.

Notions of critical queerness include this idea of hijraness, and shamelessness in the non-sexual domain of public consciousness can be considered one of the best examples of political activity. However, LGBT activism has been unable to do the same in the field of sexual activity. Some questions in the Naz timeline were about why the petition was being filed. Section 377 is not a question of hijra lives, whose concerns are very different, as most of the cases were being filed were false in nature. This intervention is very, very violent, and that cops arresting a hijra had no idea about 377 because it is not part of the tactical policing of the state. These modes have nothing to do with 377, but with this idea of a domain.

KUNAL AMBASTA

Naz could have been a platform for debating incredibly important issues in the public and in the eye of the media. There were questions of criminal liability. However, the decision also deals with issues of constitutional law such as dignity, privacy, etc. These issues are mainstream, and so must be discussed accordingly.

Naz presented these issues as constitutional law issues, and so there is a need to deal with them in constitutional law classes. Similarly, criminal law must also look into these facets of desuetude, consent etc. Have we taken that opportunity?

There has been much academic writing on these issues. For instance, in the NUJS law review, Upendra Baxi wrote an article called Law Like Love, which presents a compendium of legal history starting from *Khariahati* to Naz. This proliferation of academic interest has been sustained by the fact that most people who write are those who identify with the movement. The same interest has not been reflected in the classroom. It has no place in a standard constitutional law or criminal law course, not even in National Law School. The debate only occupies the same space that it did before the decision came up. It is discussed in courses like Family Law. It is branded as 'pseudo' and there is no proliferation in the mainstream discourse.

This true potential has not been explored first because there is homophobia among faculty members. Law teachers refuse to acknowledge Naz as an abstract legal decision. It is projected only as a 'gay' decision which is a huge fallacy in itself. The ratio of the case is not equal to facts. Law professors claim that Naz has done nothing new and merely recognised the same rights as earlier. This is an incorrect position. There was no clarity on desuetude or strict scrutiny prior to the judgement. This bit is not acknowledged at all. Faculty fail to see the true potential of Naz since they cannot make the facts irrelevant since it is about 'gay people'. There is potential for critiquing the judgment on the grounds that it is class based. Most homosexuals are constrained and required to display intimacy in places that aren't private. Such criticism require some primary engagement in the classroom and there is great potential in this regard that has been missed. It perhaps will change with the Supreme Court decision coming up. It may not, but it hopefully will.

Harshavardan Goel

I'm going to be speaking about what it is to be queer in college. One thing that sets Law School apart in the discussion of queer rights is the people. People define the place. Students come from the perspective of expecting faculty to be competent in terms of dealing with the law, which is the foundation of critical

thinking. Students and faculty here worked on the Naz Foundation case, preparing the foundation for the discourse. It also results in a really well equipped system of mentorship in additional to formal institutional mechanisms such as SHARIC.

In addition to this, NLS has discussions and support structures as well as conferences which deal with these real life issues. There is an often repeated criticism that the NLS community is too 'legal' within the LGBT community but that is what we do best. In 1997 there was a path breaking letter by Prof. Babu Matthew where he asked questions about human rights, values, discrimination etc. all of which are important in light of the Naz judgment.

It is also important that many people are willing to come out in Law School and feel safe to do so. Other colleges have forums that are far too academic or extra-institutional measures such as Queer campus, etc. which are very constricted. There is the problem that this focuses only on privileged individuals and perpetuates elitism. A way to increase awareness would be to include readings on queer theory in various courses. Including such books in course packs and engagement between students and faculty will lead to the spread of knowledge regarding the rights, or in some instances the existence, of queer individuals.