India’s queer politics after Section 377

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On this day, 5 years ago, the Supreme Court of India read down the anti-sodomy provisions of Section 377 of the Indian Penal Code.

Revisiting from Dec 2018, Ian Miller on the limits of the Supreme Court decision that decriminalised same-sex acts in India:

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India’s Supreme Court’s decision on 6 September 2018 to read down the anti-sodomy provisions of Section 377 of the Indian Penal Code was met with widespread celebration among the queer community and its supporters as the culmination of a long struggle by activists. The Raj-era law’s prohibition of same-sex sexual activity had hindered efforts for queer justice by treating queers as criminals before the law. Tempering the jubilation of a section of the activists, however, was an awareness of the verdict’s limited impact. As many activists and allies celebrated, others stressed the work that remained to be done. Yet, both supporters and critics of the verdict seemed sure that the Court’s decision marked a watershed moment in the politics and culture of sex in India. Rightwing opponents warned that it signaled the country’s descent into Western-inspired libertinism and sexual perversion. The left saw the decision as a rejection of Victorian sexual mores imposed by the British Empire.

How did a 150-year-old law with few homosexuality-related convictions become the focal point of queer politics in a country of over a billion? First, the paucity of actual convictions under the law belied its use as an instrument of widespread blackmail and intimidation. Its continued existence on the statute books ensured that, in the eyes of the law, queer people remained criminals with little ground to petition for rights and other protections. Also, for activist groups like the Naz Foundation Trust, challenging the validity of the law was a way of bringing the issue of queer rights into the national conversation. A legal victory, they hoped, would allow queer Indians to make themselves seen and known. Coming out of the shadows of a state-mandated closeting would be the catalyst to bring about much needed social change.

But now that Section 377 has been read down, it is worth asking what sort of social change is the legal reform capable of producing. Two facets of the reading down are unlikely to benefit those who most suffered from the law: first, the decision’s grounding in the newly-established right to privacy; second, the legal focus on the protection and legitimisation of sexual *identities* rather than sex *acts*.

Efforts to repeal Section 377 follow a ‘rising tide lifts all boats’ tradition of sexual activism. It was this model that propelled many campaigns for same-sex marriage in the West. Though some queer activists in the West had never fought for the right to marry – even vehemently contested its utility – proponents of the effort assured them that they, too, would benefit from the social acceptance for queerness that gay marriage would generate. But sexual identity cuts across all the other identities – class, caste, colour, ethnicity, gender and religion. And like with many instances of legislative or judicial gains, the benefits of social progress with regard to sexuality usually accrue to those that

occupy the top of these hierarchies.

‘A place to bonk’

While India’s queer movement can be traced back to the early 1990s, the current legal battles over Section 377 began in 2001. That year, Lucknow police arrested four sexual-health workers of the Bharosa Trust, who were distributing condoms in the city as part of their work, for conspiring to commit sodomy in a public park. The police raided their offices, confiscated educational materials, and held the four without bail for more than 45 days. Five years later in 2006, the Lucknow police once again arrested four gay men, again claiming that they were engaging in public sex. The men were eventually released, but only after feminist activists and lawyers had gone to great lengths to prove that none of the four men had in fact engaged in acts of public sex that were alleged against them.

While such legal tactics have been effective in defending queer persons in the court, the distance they create between mainstream queer politics and cruising and other forms of public sex end up indirectly affirming the ‘indecency’ of these acts. Public sex, both heterosexual and homosexual are crimes, but their criminalisation has a disproportionate impact on the queer community. Non-private sex – intimacy which occurs beyond the bounds of one’s private property – exerts a profound influence on queer life in India. Queer sex life has had to make use of spaces outside the household and bedroom. Parks, theatres, salons and other public spaces have become sites of queer sociality, places where queers can congregate to meet one another, create solidarity and, maybe, ‘get lucky’. The problem is more pronounced for the economically disadvantaged – for whom private space is a much more difficult commodity to acquire – and for queer sex workers, whose work frequently requires public solicitation. Given the preponderance of cruising in the lives of men who have sex with men (MSMs), the police’s accusations of public sex in a Lucknow park were, therefore, not quite outlandish. The Bharosa Trust workers took their work to public parks for a reason.

Naisargi Dave’s fieldwork among Indian lesbian activists, documented in her 2012 book *Queer Activism in India*, highlights the concern that the allocation of space exerts on the lives of queer people. “A place to bonk,” one of the activists interviewed argued, was a necessary requirement for the achievement of sexual justice. Without ‘a room of one’s own’, any formal right to sexual autonomy will remain unrealised in practice. Those who make do with less than private spaces in their sex lives will be effectively barred from the law’s protections.

Changing ‘privacies’

Much of the queer activism centred on Section 377, however, has not paid adequate attention to the problems of allocation of space and its impact on queer life in India. This is not because the right to privacy was ignored in these legal fights. In fact, the petition filed by the Naz Foundation Trust in 2001, which inaugurated legal battles over the constitutionality of the statute, made the right to privacy one of the planks of its claims. It argued for “consensual sexual intercourse between two willing adults in privacy to be saved and excepted from the penal provision contained in Section 377 IPC.” But the definition of privacy employed in these arguments was a shifting one.

At some points in their argument, Naz Foundation construed privacy as the ability to freely make decisions regarding matters of personal importance: who one’s sexual partners are and what the nature of the relationship is. Naz argues that, “individual choices concerning sexual conduct, preference in particular, are easily at the core of the ‘private space’ in which people indeed decide how they become and remain ‘themselves’”. The state’s effective prohibition of same-sex relationships, the Naz Foundation Trust argued, violated this notion of privacy. At other points, privacy is defined not as personal choice, but about not being seen; private residence becomes the

outer-limit of the protections sought by the petitioners. But this logic came with a serious consequence: when same-sex sexuality spills beyond the bounds of home, it seemed to suggest, the state would be perfectly justified in intervening.

The Supreme Court's decision makes explicit the basis of the right to privacy on which it operates. The protection it confers is restricted to those acts which take place in private space – "so long as it does not amount to indecency or has the potentiality to disturb public order." The legal strategy pursued by the petitioners aimed for a reading down of some rather than all of the law's applications. The result was to preserve the ability of the provision to prosecute other acts "against the order of nature" that constituted legitimate harms – bestiality, pedophilia, and non-vaginal rape.

The effect of that reading down, combined with the decision's emphasis of spatial privacy, is to reaffirm the perversity, unnaturalness, and the perils of sex in public. It is to maintain the criminality of those who engage in sex outside their homes, a large section of the Indian queer community. Public sex, it should be noted, is not a feature of sex life solely among the queer community. Sex workers of all orientations are harassed and denigrated by actors governmental and civilian alike for the public solicitation their work requires. The September decision, therefore, leaves them as vulnerable to state prosecution as before.

But even if the text of the September decision fails to make queer rights applicable to as large a swath of that community as possible, could the validation of queer identity by the highest court in the land inspire a social change? Put otherwise, could the spirit of tolerance embodied in the changes to the law radicalise sexual norms in general? History is an imperfect guide to the future, but it can offer a few suggestions. As scholar Nicholas Bamforth documents, the decriminalisation of sodomy in the United Kingdom failed to reduce the legal harassment of queer sexuality. Instead, the state compensated for the decline in prosecution of sodomy offenses with a ramping up of prosecution of crimes of indecency. The number of people facing state persecution for 'deviant sexual acts' remained the same. Queer people continued to face state harassment, but under the aegis of a different law.

Politics of sexual identity

The text of the petitions, motions and decisions of the proceedings regarding Section 377 mark a clear direction taken by queer politics in India: a focus on sexual identities rather than sex acts. This is true of the September verdict as well, which justifies itself through an argument for the naturalness, dignity and acceptability of queer identities rather than those for queer sex acts. Drawing on the history of sexuality, clinical psychology, and behavioral biology, it argues for the transhistoricity of persons it calls gay, lesbian, bisexual, and transgender. Section 377 is an affront to the Constitution, it argues, because it treats queer identity as a criminal identity – not because it treats queer sex as a criminal act.

The difference is subtle, but has the important effect of affirming the dignity of queer persons without affirming the dignity of the sex in which they engage. A focus on identities at the expense of acts creates an artificial distance between people and sex in discourses of queer justice. It tries to drum up support for the former without speaking of the latter. It tells queer people that they are valued members of society, but that their ways of having sex are best left undiscussed. It is this distinction which allows the court's most recent decision to claim its protection of queer identities while at the same time affirming the illegality of a large spectrum of non-private queer sex acts. Queer intimacy is acceptable, but only if the public is thoroughly insulated from the possibility of confronting it. If the queer community is to change the way that the public perceives sex and sexuality, it must insist on the public's recognition of the validity of its sex acts. Leaning on 'identity' can only take the movement so far.

If, as Dave's interviewee suggested, everyone had 'a place to bonk', then the problem of privacy would be a small one. That would require enormous redistributive changes to a socio-economic order which deprives many queers – the poor, sex worker, woman, hijra, low-caste, Adivasi, migrant, or Muslim queer – of proper housing and safe employment. This kind of radical change seems unlikely to materialise any time soon. The law's beneficial effects for queer sex workers are similarly limited. Sex work in India is de jure legal, but the solicitation of sex work remains a crime. The changes to the law, relying on the notion of 'decency' which similarly justifies the criminalisation of sex-work solicitation, reinforces the basis of criminality sex workers already face.

How to reconcile this emphasis on privacy with struggles for queer justice remains an open question. It is a product of a Raj-originated legalism in which the abstract legal subject is implicitly a property-bearing, and hence privacy endowed, one. The roots of the problem extend to the very foundations of the legal system. Alternative strategies pursued in different countries are similarly lacking. Decriminalisation in both the United States and the United Kingdom relied on a similarly privacy-centred argument. But in India, where privacy remains harder to come by, the contradictions entailed in a privacy-centred right to sexual autonomy are more apparent.

These are the tensions that a robust queer activism must take up. The absence of public sex in popular discourse must not create the false impression of its marginality in the lived experience of queer people themselves. Politics must be reimagined to account for the existence and prevalence of non-private sex, the subject of queer politics brought out of the bedroom, not just into the courts. Sexuality must be a visible and celebrated part of any future campaign of queer justice. It is only in doing so that the historical blind spots of queer movements – blindspots of ethnicity, class, caste, religion and gender, to which a true queer politics are definitionally opposed – can be corrected.

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P.S.

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