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The 2013 Indian Supreme Court decision on section 377: beyond the law

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While many LGBTQ activists across the globe expressed mourning, rage and sympathy with the Indian queers who lost the Supreme Court battle against Section 377 (the British colonial-era law widely understood to criminalize same-sex intercourse), some used the opportunity to express their criticisms of the anti-377 campaign. These critics – largely speaking from within Indian queer circles – alleged that the 377 organizers failed to adequately consider the impact of their activism on the most marginal queers in India: lower class/caste hijras, kothis, poor MSM to mention few. In the most biting version of the critique, the 377 campaign was portrayed as an elite middle class movement, fueled by foreign-funded NGOs, against a largely symbolic, immaterial enemy. Rather than fight 377, campaigners should have invested their energies on a number of other issues allegedly more important to marginal queer people.

No doubt the form of this critique, if not its specific content, will sound familiar to anyone with experience in leftist circles. At the end of the day, the critics of the anti-377 campaign share with many on the left a sense of frustration with the scope and style of activism that dominates contemporary rights-based campaigns. While I sympathize with this sentiment, I am often unimpressed by the rigor of their critiques. Oftentimes, these critics seem to effortless tally up a host of “problematic” aspects of a campaign – nearly always revolving around the implicit erasure of a marginalized social group – and use them as evidence of the sins of the organizers. This leftist deconstruction of an activist campaign feels motivated by a knee-jerk rejection of power. Any movement that achieves some measure of public influence, and therefore engages with the power imbalances that structure our world, is “not radical enough.”

Of course one must support the necessary scrutiny of any social movement. However, contrary to this rejectionist impulse on the left, I believe a more thorough analysis of rights-based activism is needed. What is the specific context in which an activist campaign has arisen? What are its structural limitations? What broader accomplishments are possible within the purview of a seemingly narrow, but winnable, demand?

The campaign against 377 is instructive here. While it is not possible to quantify the number of LGBTQ people who suffered as a direct result of Section 377, the campaign's horizon was broader than its demand to remove the penal code. The fight against 377 made legible the Indian LGBT community and the previously unrecognized violence committed against them. As Akshay Khanna observed (http://www.openthemagazine.com/article/nation/right-to-sexuality), the campaign facilitated collective consciousness-raising against LGBT oppression, bringing together otherwise disparate groups—such as hijras, kothis, middle class gays and lesbians — under a common banner. The effect was that, while other homophobic laws still remained on the books after the original "reading down" of the law by the Delhi High Court in July 2009 (Naz Foundation v. Govt of NCT of Delhi), LGBT Indians and their supporters were empowered to invoke the historic Naz judgment in their advocacy against homophobia, both in their daily lives and in larger struggles. And indeed they did: activists frequently used the decision as leverage against homophobic oppression or from defending their right to hold pride marches across the country or to protesting against a TV channel for its notorious "expose" on "gay culture in Hyderabad. The News Broadcasters Standards Association injunction against TV9 has directly invoked the Naz judgment to justify its condemnation of the inflammatory news broadcast.

Could a campaign against another law – one which the critics find more relevant to LGBT oppression- have achieved the same or better results? Perhaps. The making of a political decision, such as the one to focus on 377, involves a myriad of factors, from strategic legal considerations to geopolitical considerations and, indeed, the power imbalances amongst the different concerned parties. Naisargi Dave's recent book chronicles how some of these factors played out in the 377 campaign, demonstrating the always-unsatisfactory struggle to balance the "ideal of social justice and the reality of practical legal choices."

A couple important points in defense of the decision to fight 377, however, are worth noting. Firstly, many of the legal arguments against 377, and the broader public campaign, put the issue of violence against the most marginalized sexual minorities at their center. Secondly, article 377 of the Indian penal Code is a colonial vestige and plain example of cultural imperialism; a campaign against it combats the ever-popular nationalist belief that homophobic laws prevent foreign cultural invasion. Relatedly, 377 remains on the books in many other ex-colonies, where it is also used to justify homophobic violence. The Indian campaign served as inspiration, and a chance for solidarity-building, amongst postcolonial LGBT activists worldwide. Not surprisingly, numerous postcolonial activists across the globe expressed their disappointment in the Supreme Court judgment, viewing it as a setback for a worldwide cause.

We must also recall here the expansiveness, inclusiveness and moving eloquence of the Delhi High Court decision, and the road it paved for future instances of legal redress. As many have noted, the judgment didn't simply read down a bad law. The Naz judgment affirmed fundamental rights of dignity, equality, and the expression of sexuality; offered an innovative conception of "constitutional morality" against majoritarian oppression; and connected the

Indian judiciary to progressive human rights case law worldwide. As Khanna writes, “The Delhi High Court judgment generated the conditions for developing a far more nuanced and radical legal landscape for the rights of all minority communities, whether based on religion, ethnicity, caste, or gender and sexuality.” Against an alarming trend in the West wherein LGBT rights are protected at the expense or exclusion of other minority communities, the Naz decision offered a blueprint for a progressive legal alternative.

Another common criticism was levied against the petitioners’ embrace of the right to privacy. Sexual freedoms that hinge on the “right to privacy,” it is argued, apply only to those middle class people who possess private space within which to express their sexuality, implicitly excluding lower caste/class sexual minorities. This argument ignores the innovative way in which the petitioners defined the constitutional right to privacy, as both “zonal” and “decisional.” Whereas this criticism of privacy applies to the former “zonal” definition, the latter “decisional” definition is significantly more expansive, associated with freedom of choice and personal autonomy regardless of private property ownership. Indeed, the Naz judgment’s own words regarding what it understands as the right to privacy directly contradict the critics’ claims: ”The [right to] privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one’s sexuality is at the core of this area of private intimacy. If, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.” While there may be classist deployments of privacy in popular discourse, as far as the case law is concerned, the inclusiveness is crystal clear.

Despite these admirable accomplishments, it must be acknowledged, as the critics remind us, that the oppression and exploitation of the most marginalized of any community often remains unscathed following successful rights-based campaigns. Rather than condemn the organizers of these campaigns, however, we must confront the unsurpassable limit of sexuality and identity based activism, no matter how inclusive or broadly conceived. While gender and sexuality are key vectors of violence, the unequal distribution of wealth among queers (and society at large) enables some to live in relative safety and comfort over others, no matter the social/legal climate around queerness. The major problems facing socio-economically marginalized queer people cannot be solved by a queer movement alone. These problems –¬¬ which include lack of adequate shelter, food, healthcare and leisure time; exposure to police violence; severely restricted opportunities for education and employment ¬¬– cut across various groups (though they manifest in different ways) and demand a different kind of solidarity and struggle. This kind of struggle requires radically transforming the internal organization of socio¬economic life. Though I am speaking here about “class,” I deploy the category not as an “identity marker” equivalent to race or gender, but as the fundamental structuring principle of social reproduction. Each of us has a particular social identity, but all of us rely upon the prevailing economic order for our survival. (I refer here to Nancy Fraser’s excellent response to Judith Butler on role of cultural struggles within capitalism, or as Fraser puts it, the difference between misrecognition and mal-

distribution. Criticism against the 377 campaign for failing to adequately address this concern is thus misplaced. For, such a struggle is not one that rights-¬based movements, circumscribed as they are within the logic of liberalism, are equipped to wage.

Political intervention of any kind necessarily involves undesirable concessions and exclusions. One does not change a violent system without implicating oneself in its violence. It is important to make known the limitations and erasures involved in activism and organizing. However, it is equally vital to recognize when a political struggle, however flawed, deserves one’s (critical) support.

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