ADOPTING A DEMOSPRUDENTIAL APPROACH FOR THE EMPOWERMENT OF SEXUAL SUBALTERNS IN INDIA: IMPERATIVES AND IMPEDIMENTS

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ABSTRACT

At a time when countries across the globe are increasingly recognizing the importance of accepting alternative sexuality as a manifestation of human diversity, sexual subalterns continue to remain culturally fragmented, economically confounded and socially sequestered in a country that has traditionally been hailed as a gold standard in diversity. The term ‘sexual subalterns’, coined by Ratna Kapur, refers to all groups that can be characterized as sexual minorities in India. This article uses this term, instead of the more commonly used ‘LGBTs’ in recognition of the fact that the term ‘LGBTs’ does not fully capture the diversity that exists within sexual minorities. In India, which is home to one of the world’s largest LGBT populations, estimated to be between 50 and 100 million, alternative sexuality is widely viewed as a disease which must be cured; a vice which must be curbed. Against this backdrop, this article explores how Lani Guinier and Gerald Torres’ theory of demosprudence can pave the way for a transition from criminalization and legal prohibition of homosexuality to the creation of a societal and legal framework that recognizes and protects the dignity of sexual subalterns. More specifically, it examines how the strategic use of a distinct identity through the use of democracy-enhancing tools, such as organizing mass mobilization efforts and citizen-driven movements, coupled with a push for wider citizenship, can fundamentally transform unfair and unequal laws and societal perceptions in ways that purely court-based strategies simply cannot.

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I. Why Court-Centred Strategies Aimed at Empowering Sexual Subalterns Are Bound to Fail

During the last decade, the primary focus of LGBT advocates in India has been to work towards the abolition of Section 377 of the Indian Penal Code, 1860 which punishes ‘carnal intercourse against the order of nature’ with a maximum term of life imprisonment. That this provision has been widely used as an instrument of blackmail and extortion against sexual minorities is a platitude. In 2009, a two-judge bench of the Delhi High Court effectively decriminalized consensual homosexual intercourse by holding that Section 377 is violative of the Indian Constitution insofar as its application to consensual sex between adults is concerned. However, the Supreme Court reversed this decision four years later, on the ground that there was no compelling evidence to show that the provision was being used as a tool of oppression against sexual minorities and left it to Parliament’s wisdom to repeal this retrograde provision.

It is submitted that this court-centered strategy has not yielded expected results and has led to wastage of substantial resources because of three important reasons. First, as Ratna Kapur has rightly noted, it is wrong to assume that decriminalizing homosexuality will ipso facto lead to “liberation and incorporation into a space of freedom and happiness.” Instead, it would merely pave the way for the release of sexual subalterns into a heteronormative order that seeks to cabin and constrain nonconformist sexual desire. Favourable court decisions, which are predicated upon the virtue of tolerance, merely reinforce the difference and otherness of that which is tolerated. Second, as Gerald Rosenberg has argued, the inherent limitations of courts render them incapable of offering anything more than a “hollow hope” – a battle won, but a war lost. Court victories, which can only ensure formal fairness, often lull activists into a false sense of security and can actually have a detrimental impact on the overall success of a movement. Finally, judges are very conscious of the delicate relationship that they enjoy with other branches of government and do not want to contravene perceived preferences of other governmental branches, by acting in ways that threaten the delicate nature of the relationship. In sum, Bruce Ackerman’s example of courts being like brakemen sitting in the last car of a train, who are able to make it stop but not able to make it go, perfectly encapsulates the fundamental flaw in any strategy that relies principally on courts to effectuate social change.

II. Relevance of Demosprudence in the Struggle for Acceptance of Alternative Sexuality in India

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236 Naz Foundation v. Government of NCT and Ors., 2010 Cri LJ 94 (Delhi).

237 Suresh Kumar Koushal and Anr. v. NAZ Foundation and Ors., A.I.R 2014 S.C 563 (India) [hereinafter ‘Suresh Kumar’].


239 Ratna Kapur, supra note 238 at 394.


242 Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453, 546-547 (1989) [hereinafter ‘Bruce Ackerman’].
The theory of demosprudence, developed by Lani Guinier and Gerald Torres, problematizes the facile notion that favourable judicial decisions can offer a panacea to historically deprived minorities. Instead of expecting lawyers to solve all their problems, Guinier and Torres argue, those who demand durable social change must recognize that such change can only result from sustained collective action and must become “advocates in themselves and for themselves.” Put simply, demosprudence is an “acid bath to remove the corrosion that has isolated the realm of the state from the legitimizing power of the people.” It is submitted that the failure of the judiciary to adequately address the concerns of sexual subalterns, coupled with the inability of the Indian Government to foster respect for and acceptance of alternative sexuality, makes Guinier and Torres’ theory the only logical alternative to put an end to the ostracization of sexual minorities and to do so in ways that aim at substantive equality, and not just formal fairness. According to Guinier and Torres, three important components form the bedrock of most successful social movements:

A. Shifting the rules that govern social institutions;
B. Transforming the culture that controls the meaning of legal changes; and
C. Affecting the interpretation of those legal changes by working towards naturalizing those changes into the doctrinal structure of law and legal analysis.

A brief word about each of these three components would be in order. The first component refers to the need to question the inarticulate premises that inform the manner in which sexual subalterns are treated by the existing social institutions in which they operate. It recognizes the principle that deep and pervasive change cannot be effectuated until such time as the rules that inform the conceptualization of sexuality by existing social institutions are fundamentally altered. In the same way, the second component is based on the idea that seeking legal change before altering the culture within which laws operate would be equivalent to putting the cart before the horse. As a result, it is aimed at questioning the manner in which alternative sexuality is viewed in the existing culture and changing these existing norms in a manner that helps promote the interests of sexual subalterns. Finally, the third component is concerned with the ways in which this enlightened perspective on alternative sexuality can be translated into favourable court rulings and legal norms that are favourable for sexual subalterns.

243 Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 YALE L. J. 2740 (2014 [hereinafter ‘Lani, Gerald’]).
244 Lani, Gerald, supra note 243 at 2749.
245 Lani, Gerald supra note 243 at 2750.
246 Lani, Gerald supra note 243 at 2755.
It would be apposite to examine how these three components can be pressed into service in the context of the Indian LGBT movement to transform and reshape popular notions of alternative sexuality, sexual freedom and substantive equality.

III. Transforming Social Institutions and Cultural Norms

Those who argue for the empowerment of sexual subalterns in India primarily use the human rights rhetoric to make the claim that criminalization of homosexual intercourse undermines India’s commitment to secure to all its citizens a set of inalienable rights and provides a legal sanction to gender-based discrimination. However, this human rights-based approach has been unable to yield concrete results, because even though human rights are something that ‘we cannot not want’, there is very little that these rights can do until we address the biased notions about alternative sexuality that continue to inform interactions with sexual subalterns in cultural and social settings.\(^\text{247}\) Therefore, the gravitational pull of heteronormative sexuality can only be resisted by calling for critical reflection about the meaning of justice, gender equality and personal autonomy.

LGBT activists must seek to contextualize the grievances of sexual subalterns by asking deeper questions about what it means to be human, to be Indian and to be a part of a democracy committed to the rule of law. Instead of reducing their struggle to a battle of sexual minorities for legal recognition, they must seek to make non-movement actors feel invested in this cause by explaining how their struggle, in principle, is a struggle for deepening the meaning of Indian democracy. Only by situating their struggle within a broader social context will they be able to offer a persuasive response to the argument that developing countries, like India, should focus on bread-and-butter issues instead of attaching undue importance to the interests of a minuscule minority. Similarly, the construction of a narrative that expresses the hopes and aspirations of sexual subalterns can go a long way in restructuring public discourse on alternative sexuality. More specifically, as Guinier and Torres argue, three kinds of narratives can be especially powerful in raising public consciousness:\(^\text{248}\) the meta story, which should lay down a broad vision of how sexual subalterns conceptualize justice and how the injustice meted out to them eviscerates an important strand of that conception; the micro story, which should highlight the concerns of specific individuals who are forced to live under the shadow of criminality; and the resonant story, which should be a call to action to the society at large to right the wrongs of this form of social stigmatization.

The 2005 Bollywood movie, *My Brother Nikhil*, which depicts the homophobia and discrimination that a homosexual HIV patient has to grapple with and the 1998 movie, *Fire*, which explores a same-sex relationship between two married women, are excellent examples of the role that well-structured narratives can play in reshaping public opinion in a positive way.\(^\text{249}\) A recent example of this phenomenon is the 2016 movie, *Aligarh*, which throws into sharp

\(^{247}\) Suresh Kumar, *supra* note 237.

\(^{248}\) Bruce Ackerman, *supra* note 242 at 2775.

\(^{249}\) Ratna Kapur, *supra* note 238 at 394.
focus the discrimination that a professor at the prestigious Aligarh Muslim University faced on account of being gay, culminating in his suicide. It is also critical to establish decentralized structures such as student groups and LGBT taskforces at the local level who must debate and question prevailing gender norms and work towards mainstreaming LGBT issues in development discourse. The success of a Delhi-based student collective, called *Queer Campus*, which seeks to restructure the meaning of gender and sexuality, perfectly epitomizes the transformational role that such groups can play.\(^{250}\) Lastly, but most importantly, only when sexual subalterns stop looking upon themselves as the ‘sexual other’ will they be able to translate the rhetoric of diversity and inclusion into durable change.

**A. TRANSLATING CULTURAL NORMS INTO LEGAL CHANGE: BOILING THE FROG**

Even though it is critical to challenge prevailing social and cultural conceptions of alternative sexuality to create an enabling environment, the ultimate goal of the LGBT movement has to be to work towards the creation of a legal architecture that can concretize those transformed conceptions. To this end, LGBT activists must seek to effectuate ‘incremental’ as opposed to ‘exponential’ legal change. Judge Richard Posner has used the analogy of boiling a frog to describe the importance of incremental legal change – the underlying idea is that, if you put a frog into boiling water, it will jump out at you immediately, but if you put it into warm water and gradually increase the temperature, you can boil it effectively.\(^{251}\) In the U.S. for example, after the U.S. Supreme Court upheld the constitutionality of anti-sodomy statutes,\(^{252}\) LGBT activists through a carefully crafted strategy of state-court activism, coupled with favourable narrow rulings, were able to create a socio-legal environment in which the decision in *Lawrence v. Texas*,\(^{253}\) which held anti-sodomy statutes unconstitutional, seemed all but inevitable. Therefore, sexual subalterns in India must adopt a threefold strategy to give a concrete shape to their aspirations of decriminalization and legal recognition. Recently, the Indian Supreme Court recognized transgender as the third gender and held that they are entitled to the same substantive rights that are enjoyed by the other two genders.\(^{254}\) Therefore, the first goal of LGBT activists has to be to build upon this judgment as also the plurality opinion in the nine-judge bench right to privacy judgment, which recognizes the rights of sexual minorities to freely express their sexuality within the confines of their homes.\(^{255}\) This can be done by demanding that transgenders be provided the same privileges and immunities, such as reservation in education, employment, public health policies, etc., that other historically deprived sections are entitled to. Second, LGBT advocates must make a concerted effort to seek judicial pronouncements against many subtle forms of discrimination that sexual subalterns face which courts would be willing to strike down without having to take a strong moral position. A good example of this


\(^{254}\) National Legal Services Authority v. Union of India and Ors., A.L.R. 2014 S.C 1863 (India).

would be the recent case of *Kirankumar Rameshbhai Devmani v. State of Gujarat*,\(^{256}\) in which a state high court held that the state’s refusal to grant tax concession for a film depicting the life of a homosexual was unconstitutional, as it was a common practice to grant such concessions for other films. Third, it is vitally important for LGBT activists to organize themselves into a powerful constituency and to forge partnerships with policymakers at the local level which can be leveraged for removing smaller structural and legal barriers. While this cannot be an exercise in expediency, for concrete legal changes can only be effectuated once favourable social norms are deeply embedded into the Indian social fabric, it can nonetheless provide a socio-legal foundation which sexual subalterns can build upon for the actualization of their conception of justice.

**IV. Conclusion**

The underlying assertion of this article is twofold: First, only by recognizing the importance of contextually situated grievances, new patterns of cooperation and tactical and ideological experimentation can sexual subalterns create a favourable environment for implementing their broader reform agenda. Second, because of the inherent limitations of court-centered strategies, not only must the expectations of sexual subalterns be tempered by the constraints of the judicial process, but they must also actively engage in larger social conversations to secure their rights on firmer legal moorings. To be sure, this strategy will require tremendous grit and perseverance and its success will largely be determined by the ability of actors to make tough choices and act creatively. However, it has the potential of heralding a new era of activist citizenship and fundamentally restructuring the meaning of Indian democracy.

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