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QUEERING THE LAW

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Queering the Law : Towards Equity, Equality and Justice

This Joint Issue for December 2016 is dedicated to the memory of Priyadarshini Thangarajah (1982-2015) – friend, colleague, feminist researcher, activist and lawyer. Exploring a question that informed Priya’s intellectual and activist journey, this Joint Issue inspired by queer theory aims to problematize the heteronormative and heteropatriarchal framework of law in achieving equity, equality and justice. While many of the contributions in this issue critique heteronormativity, it is important to note that queerness allows for a much broader critique of power. As cited by Vijay Nagaraj and Shermal Wijewardene, *‘queering our approach to law... will reveal other questions and issues that are not just confined to being anti-normative or limited to sex/gender/sexuality politics alone*, and can become a ‘political and theoretical strategy’ (Jagose, 2015).

Discussing the gendered political economy of household, state and market relations in post-war Sri Lanka through the life story of Anuratha, Sarala Emmannuel describes the multiple burdens and risks faced by women in the North and East. Sarala argues that in fact women like Anuratha are not content with simple reform - they demand a new social contract that challenges narrow gendered stereotypes. The non-recognition of women’s domestic and care work, and exploitation of women’s labour is a result of gender hierarchies and binaries central to heteropatriarchy. By valuing productive work over reproductive work, public over private, women domestic workers, upcountry women workers, and women in the informal sector are made voiceless through socio-economic and legal structures that operate to preserve the status-quo. Prashanthi Jayasekara discusses the employment of upcountry plantation women workers in domestic work where their labour continues to be exploited. She points out that the non-recognition of domestic

work as ‘work’ is rooted in silencing and disregarding women’s contribution to the economy by way of domestic and care work. While addressing the gendered hierarchies of labour however, lawmakers should also pay attention to the links between poverty, class and labour relations. Labour law in Sri Lanka prioritises formal, skilled labour and provides no recognition to the informal sector in which nearly 60 per cent of Sri Lanka’s labour force work. The majority of those engaged in the informal sector have not completed their primary education and are thus unable to access opportunities of gainful employment within the formal sector.

Discussing the rise of authoritarian regimes, growing threats to hard won civil liberties and the demonizing of the ‘other’, Arvind Narrain emphasises the *‘necessity of cultivating the counterpoint to the politics of hate, namely the politics of love’*, based on *‘empathy for the suffering other’*. He also stresses the importance of looking beyond single issue politics to understand the suffering of different groups, and to interrogate all forms of inequality and injustice. In a similar vein, Danish Sheikh reflects on the advocacy surrounding Section 377 of the Indian Penal Code - which criminalizes “carnal intercourse against the order of nature with any man, woman or animal” - and the Supreme Court decision to reverse the 2009 landmark judgment of the Delhi High Court that removed consensual sex between individuals of the same sex from the scope of criminality. Danish points out that while emphasis on Section 377 is important and useful, it is necessary to also consider other laws that intersect with other identities such as class, that disproportionately affect queer persons of a lower socio-economic standing.

Adopting a critical discourse analysis framework,

Sandani Abeywardena points to the lack of neutrality in the manner in which the ‘female complainant’ is represented in Supreme Court judgments on rape. Her examination reveals how gender stereotypes of the female as revengeful, angry, deceitful or indecisive, are invoked in judicial decisions as a discursive practice. She argues that this raises the question of the *nature of justice that is dispensed, for the findings indicate that adjudication itself is also influenced by, and constitutes, gendered reasoning.*

This Issue also carries a review of *Maya*, a comedy and horror film that centers around a transgender woman seeking justice for crimes committed against her family and community. While the film attempts to disrupt heteropatriarchal stereotypes, Zainab Ibrahim and Jayanthi Kuru-Utumpala point to the limitations of confronting queerness in a horror comedy as it reinforces transphobic stereotypes of the ‘abnormal’.

Presenting a queer wish list for 2017, ‘Marini Fernando’ highlights critical demands to further the rights of sexual minorities as citizens who have been ignored thus far. This includes for example calling for the repeal of Section 365 and 365A of the Sri Lankan Penal Code; recognizing the crime of male rape; ensuring that sexual minorities are not discriminated against in transitional justice and reparation processes by the rigid application of a traditional and narrow definition for the family unit.

In their article discussing an interview with Priya herself, Shermal Wijewardene and Vijay Nagaraj highlight the importance of *‘engaging in conversations about the broader ideological implications of an ‘issue’ prior to and even while mobilising the law’*. In many ways, the law as it operates in Sri Lanka has failed to acknowledge and challenge heteropatriarchal, heteronormative and normative frameworks.

The implementation of the Prevention of Domestic Violence Act is one such example. Despite the progress made with the Act, women continue to

struggle to obtain relief. Avenues for legal redress have little or no value within a system that is itself heteropatriarchal and heteronormative, unless specific steps are taken to address this, in addition to legal reform. As Chulani Kodikara (2012) points out, in Sri Lanka domestic violence is viewed as lasting ‘only till the rice is cooked’ – a temporary disruption, that will pass quickly. Domestic violence is viewed as merely a private disagreement between parties. Thus, women who make police complaints of domestic violence are often dismissed by the police, who are reluctant to ‘interfere’ in what they see as a ‘family matter’ – not a matter for the law. Victims who are referred to counselling are traumatized yet again with having to face their abuser in this setting, no consideration having been given to the mental and emotional effects of the abuse suffered. Furthermore, colonial laws such as the Vagrants Ordinance continue to be used as a means of discrimination against sex workers, with the law being enforced primarily against street based women sex workers as opposed to high end escorts, procurers and male clients.

The current debate on reforming the Muslim law is another example of an opportunity to queer our approach to law reform. The question concerns reform of the minimum age of marriage in the Muslim Marriages and Divorce Act, and repealing Article 16 of the present Constitution, which stipulates that existing laws, which include personal laws such as the Muslim Law, continue to be in force notwithstanding inconsistency with the fundamental rights chapter of the Constitution. The current debate has been framed in terms of individual rights – specifically women’s rights – versus community rights – in this case the Muslim Community. Given Sri Lanka’s history with race and ethnicity, the issue is proving to be an increasingly controversial one, with calls for reform being decried as attempts to violate the rights of an ethnic minority by foisting westernized human rights standards on the community. Proponents of this position fail however, to account for the fact that calls for reform are coming from within the community itself – from Muslim women. Queering

the debate in this instance would be to recognize that 'community rights' must take into account the community as a whole, and not merely the voices of its most powerful. The question then is not one of individual vs. community, but rather of the rights of some vs. the rights of all – and there can hardly be any debate concerning that.

An approach to queering the law requires that legal and social standards and norms are interrogated and transformed - reimagining the law for greater equity, equality and justice.

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On Queering our Approach to the Law: A Conversation with Priya Thangarajah

VIJAY K. NAGARAJ AND SHERMAL WIJEWARDENE

This essay is dedicated to the memory of Priyadarshini Thangarajah (1982-2015), a researcher-activist, and lawyer. Inspired by a conversation with Priya in 2014 about her approach to the politics of human rights work and the law, this essay attempts to examine the use of queering for not merely engaging with the law but also for activist political engagement. The essay reflects on the way we engage with and think about the law through Priya's perspectives and critiques.

The memory of Priyadarshini Thangarajah (1982-2015), a friend, fellow researcher-activist, and lawyer, is the inspiration behind this issue of the *LST Review*. Priya was actually in conversation with the Law and Society Trust to build its research programme when she left us. Drawing on a long conversation we had with Priya in 2014 about her approach to the politics of human rights work and the law, this brief essay attempts to underline the value of queering as an analytic for engaging with the law as well as for activist political engagement more generally. We begin with a short introduction to the idea of the queer analytic, and, drawing on Priya's insights and reflections, then elaborate what queering our approach to the law may mean in terms of praxis. For us, recalling Priya's perspectives, convictions, hesitations, and critiques are an invitation to reflect on and question the way we engage with and think about the law, very much in keeping with the spirit of the *LST Review*.

1. Towards Queering our approach to the Law: A Brief introduction

To put it simply, 'queer' derives from protesting against the heteronorm, as much of its intellectual and activist history would show. Heteronormativity refers to there being naturally only two sexes (male and female) expressed through oppositional and complementary genders (masculine and feminine); only one form of sexuality is privileged, i.e. 'oppositional' attraction or heterosexuality (Butler, 1990). This (hetero)norm is reproduced through patriarchal relations of power, and is therefore often referred to as heteropatriarchy. Queering resists the dominance of the heteronorm. It confronts how heteronormativity and heteropatriarchy a) construct sex, gender and sexuality and b) organise our psycho-social, socio-cultural,

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political-economic and legal worlds.

This development of queerness as a theoretical framework is often credited to Teresa de Lauretis's (1991) conceptualisation that,

homosexuality is no longer to be seen simply as marginal with regard to a dominant, stable form of sexuality (heterosexuality) against which it would be defined either by opposition or homology. In other words, it is no longer to be seen either as merely transgressive or deviant vis-à-vis a proper, natural sexuality (i.e., institutionalized reproductive sexuality), according to the older, pathological model, or as just another, optional "life-style," according to the model of contemporary North American pluralism.

Queering our approach to the law entails questioning legal meanings and practices for inherent heteronormative and heteropatriarchal bias and its effects. Its ideal is to "help promote egalitarianism and equality broadly--as an overarching principle of law and as a non-negotiable fact of life...of replacing debasement and subordination with respect and opportunity" (Valdes, 1995, 364-5). But as Annemarie Jagose (2015) points out, queering as a political and theoretical strategy often produces more than just the anti-normative stance. Picking up on her insights, we also argue that queering our approach to the law, while it constructs explicitly anti-normative positions in relation to law and legality, often raises other questions and issues that are not just confined to being anti-normative or to sex/gender/sexuality politics alone.

2. Reflections on Praxis

Our conversation with Priya was one of a series of interviews with those engaged in human rights work for a study in the practice of human rights in Sri Lanka.

That interview introduced us to Priya's perspectives on how she used a queer analytic. She began by

saying, "I don't particularly like being labelled as a human rights activist. I would go as a feminist and all of what I do, in terms of disappearances, or torture or LGBT or land, all of that comes from my queer feminist perspective." This essay is our attempt to understand queering in relation to the law and the relevance of such a perspective for struggles for justice, drawing also from our conversation with Priya.

Law has become the 'go-to', a default point of reference for thinking about justice. As Priya put it, most "human rights work does centre around the law, no matter what the issue is...most of our activities [involve] asking for better laws, for certain laws to be taken away, for ensuring that law is used in the right way." Similarly, challenging the existence of discriminatory laws, especially Section 365 and 365A of the Penal Code, and the Vagrants' Ordinance, dominates lesbian, gay, bisexual and transgender (LGBT) debates and struggles over access to justice in Sri Lanka.

When we call for queering our approach to the law, we are asking mainly for two things: a) to question if we are invoking the law almost as a matter of reflex, and to ask what makes us make it a dominant imagining of justice, and, b) to think critically about what we do when we do reference the law. If we have been preoccupied with calling for the reform of bad laws and for the enactment of better ones, does this work have an impact on transforming how the law as a social institution, a system and a practice is undergirded by heteronormative and heteropatriarchal assumptions? Do we engage in our legal advocacy with an awareness of the very terms on which we engage, especially how we could also be leaving intact (and even endorsing by engaging) a discriminatory *system* of laws by only tinkering with the bits that we can see need to go? Are we sufficiently sensitive to how our legal advocacy is informed by the politics from which it emerged?

Queering, in other words, is also a call for a critical legal perspective, i.e., how ideas of the law and legality condition our imagining of injustice and

redress, and shape approaches and processes to achieving justice and social change. It is an invitation to question the very terms in which the law requires us to respond to it, including asking, “Where does law come from?”, as Priya asked, and indeed what it legitimises. Thus even in engaging with the law, in critiquing or reforming it, it “constantly *makes* you negotiate with the state” and hence “directly and indirectly you legitimise the state, even the state that you critique, and you find it problematic and you want to take it to Geneva”—another locus of law, albeit international not domestic.

The call, then, is to eschew an uncritical and superficial mobilising around the law and to be mindful about using it, i.e., instrumentalising the law, while being conscious of how it acts on us. As Priya argued, using the example of the Prevention of Domestic Violence Act (PDVA), the focus often falls on effective implementation of the law, but in reality “the problem might be that law is never going to be able to provide the answers you are expecting for these issues, because, for me, law is a very patriarchal structure.” This is not to suggest that the law is not important or ‘useful’; as Priya maintained, again with reference to the PDVA, “it is there and I’ll use it as a tool because I need to use it right now for certain kinds of things I need to do.”

Queering our approach to the law is also about resisting the reductive narrowing and segmenting of complex and intersecting struggles into particular rights claims. For Priya this was reflected in how “sometimes we talk about issues absolutely disconnected” from each other. By way of example, she underlined how the rights of Tamil detainees or language rights are often framed in complete isolation from claims for self-determination. Letting the categories of the law frame political praxis without due attention to the integrity of the struggles on the ground implies a narrowing of the praxis, a retreat from the “larger picture” into being “just issue based”.

In queering our approach to the law, we may become aware of how lived experience pushes against and

leaves an impression on the law in its attempts to contain it. This is captured in Arvind Narrain’s contribution in this volume, which is interested in displacing the law and according instead a centrality to insurgent voices. This is the impulse to resist framing or reducing lived experience to suit the terms of the law and its mechanisms—national or international. It acquires special salience in Sri Lanka, given the unfolding transitional justice context, in which mechanisms and their constructions of harms and remedies loom large over the complexity of people’s lived experiences of suffering and survival.

This echoes another major concern in relation to queering our approach to the law, namely, that of restoring the political connections of an issue while mobilising the law around it. A key element of this is acknowledging that a conversation about the broader ideological implications of an ‘issue’ has to take place prior to and even while mobilising the law. The need for this was echoed by Priya who said, “either we are fire-fighting towards something and then there is no time to talk about a larger framework of ‘Does it lead to privatisation? Does it lead to capitalism? Does it enhance patriarchy?’ That’s not the conversation we are having. Two, I actually don’t think sometimes there is that political connection.” Political situations and our responses to them can be factors in our inability to keep broader frameworks in mind. In the case of Sri Lanka, ethnicity became a core axis as a result of the conflict, to the extent that “we were ethnicised bodies”, as Priya put it, while a focus on class, sex/gender, and political economic dimensions fell away, along with the intersections and co-constitution of ethnicity with those dimensions. For Priya, restoring *political connections* also meant recognizing the “political aspirations of people whose human rights are violated and who are looking for a certain justice”. And this means embracing ideas of justice that exceed what the law can offer because people often “have a huge connection with politics, even party politics” and “that is also a mode of accessing justice or accessing resources.”

Even while seeking change through the law, Priya drew our attention to the importance of recognising the profound tensions between, on the one hand, securing “small victories” or “micro-level successes” that are about making the system “work better”, and, on the other, seeking a fundamental overhaul of the system itself, i.e., structural transformation. The former, in her own words, “becomes very convenient, just working within the system so you can get these small victories”, which however is not to suggest their significance. “Small victories” are, as Priya maintained, important, not only for affected individuals or communities but also for sustaining activism. The point Priya stressed though is that such legal victories cannot become end points because they often also mask the system’s ability to assimilate struggles for justice, neutralise them politically and normalise existing structures and relations of power. As she observed, reducing the period of detention prior to production in court from say 48 to 24 hours is important to fight for, but we must simultaneously question the powers of detention itself and through that the character of state power itself.

Central to queering the law then is restoring the political. But central to this is queering the approach to the subject of the law and in particular the sex/gender binaries and the policing of desire that does not conform with the heteronorm. The defence of same-sex and counter-heteronormative desire is central to queering but given the positioning of desire itself outside of rationality, queering the law also calls for “engaging the law beyond the limits of (legal) rationality.” (Valdes 1995, 369)

It is, therefore, important to note that Priya also spoke in an affective register about queering in relation to struggles for justice. “I found queerness through love”, she said while referring to her own activist work in *Our Struggles, Our Stories*.² This statement touches us because it reflects how Priya approached the personal-relational in the political. As we see it, Priya is inviting us to see that love has a politics to it, stemming from the potential to be radical and transgressive. Love mobilised in terms

of queerness, and vice versa, is an insurrection against binaries that form the core of structures of authority and domination, including the law.

Anchored not in fixed identities but in relationalities that are guided by an ethics of love and solidarity, this is a notion of queering that goes beyond anti-normativity. One such powerful invoking of queering in this way is reflected in how Sub-Commandante Marcos from the Zapatista movement in the Chiapas, Mexico, responded when asked if he was gay. “Yes, Marcos is gay,” he said, “Marcos is all the exploited, marginalised, oppressed minorities resisting and saying ‘Enough’. He is every minority who is now beginning to speak and every majority that must shut up and listen. He is every untolerated group searching for a way to speak. Everything that makes power and the good consciences of those in power uncomfortable this is Marcos.” Queering then embraces not only a dissidence that challenges the “obsessive, righteous, grotesqueness of traditionalist sex/gender tyranny” (Ibid, 369)—a foundational oppression—but it can be, as Priya argued elsewhere, “a platform to challenge all forms of oppression and to build a movement that is truly intersectional.”

NOTES

- 1 See Wijewardene, S & Nagaraj, V. 2014. Human Rights Practice in Sri Lanka: Towards a Thick Description. Colombo: International Centre for Ethnic Studies.
- 2 Thangaraja, P. 2014. Forging feminist alliances: a front line struggle of war affected northern women. In: S. A. Saroor, ed. *Our Struggles, Our Stories*. Colombo: Shreen Abdul Saroor, pp. 67- 94.
- 3 Priya Thangarajah, Marriage Equality and Queer Struggles, Options, October 2015, available at <http://options.womenandmedia.org/2015/10/marriage-equality-and-queer-struggles/>. Accessed on 15 December 2016.

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Queer Politics for the Trump Era

ARVIND NARRAIN

This article examines the need to address economic inequalities that fuel hatred and anger in the post Trump era while discussing ‘the equally important task’ of cultivating the counterpoint to the politics of hate, namely the ‘politics of love’. In doing so the author discusses the lives of ‘remarkable queer individuals who have played a role in expanding homosexual politics into a broader queer politics.’ The author focuses on the issues of broadening the notion of freedom and moving beyond single issue activism.

Arvind Narrain is currently Geneva director of ARC International, an NGO which works on advocacy on LGBTI rights at the level of international law and policy. His most recent publication is a co-authored volume with Saumya Uma titled, ‘Breathing life into the constitution: human rights lawyering in India.’

1. Introduction

In the aftermath of the election of Donald Trump as the President of the United States, social justice struggles have become more arduous and even more important. Rights that were won after bitter and hard struggle suddenly seem on precarious ground. In this more authoritarian world, led by Putin in Russia, Duterte in Philippines, Modi in India, Edrogan in Turkey, Sisi in Egypt and presided over by Trump in the US, the fragility of rights could not be more underscored.

Social movements are in danger of seeing all their hard fought gains being washed away in this new climate. Nowhere is this better illustrated than in the countries which have elected authoritarian governments. Edrogan in Turkey, under the cover of the military coup, has sought to crush all opposition—both Islamist and secular. Sisi’s Egypt similarly has clamped down on religious rights and civil liberties activists and has imprisoned more homosexuals than his predecessors did. With the election of Trump, the danger of all rights being under threat is even closer.

In this precarious climate, what can queer politics contribute? Queer politics has a wider remit than LGBT politics and is marked by a disregard for what we now know as “identity” or “single issue politics”. A politics, which is queer, is ‘marked by a capacity for radical kinship’ and the queer becomes the site on which the ideological scope of LGBT politics is expanded to include ‘unlikely affinities with foreigners, outcastes and outsiders’ (Gandhi 2006, 35).

As far as the election of Trump was concerned, the base of his victory was built on economic disaffection

and the ‘political emotions’ driving it were fear and hatred of ‘the other’ - be it the Mexican, Muslim or LGBT persons.¹

We will have to work on addressing the inequalities which fuel hatred and anger and at the same time cultivate the ‘political emotions’ of love and empathy. Addressing the question of inequality means a return to the message of that most important thinker about the evils of capitalism, Karl Marx, that inequality of the kind the world is currently experiencing is not a sustainable status quo.

While acknowledging the importance of this analysis, this article will focus on the equally important task of the necessity of cultivating the counterpoint to the politics of hate, namely the politics of love. It is not enough to state that one must move beyond single-issue politics. The base of this form of queer politics has to be a form of political love, based on empathy for the suffering other (Nussbaum 2015). We have to tell the inspiring stories of people who have - against all odds - embodied these values. There are many such remarkable queer individuals who have played a role in expanding homosexual politics into a broader queer politics.

2. Addressing the Question of Economic Inequality

What the election of Trump throws into sharp focus is that ignoring the question of economic inequality can have ramifications on a range of rights. One of the reasons for the triumph of Trump, including against an overwhelming elite opinion that he was unacceptable as president, was the fact that there was a significant section of disaffected white voters who violently disagreed with the elite opinion as they saw their jobs disappear under the rubric of globalization promoted by the self same elites.

The counterpoint to the emotions that Trump gave voice to was a bland assertion that all is well with the USA and voting for Hillary Clinton was voting

for stability and continuity. What was missing in Hillary Clinton’s campaign (unlike Bernie Sanders’ remarkable campaign) was a passionate defense of the ideals of love and empathy combined with an honest acknowledgement that America had failed its most disadvantaged citizens. What was clearly required was the articulation of a politics that acknowledged the failures and ravages of neoliberalism along with a commitment to making America work for the most marginalized. In the absence of that commitment, the pain and anger produced by globalization was harnessed by Trump to ride to victory.²

Voters were asked to choose between a candidate who at the level of powerful rhetoric vowed to address the pain and anger of being left out by globalization but was racist and sexist, and a candidate who was neither racist nor sexist but who could not address the question of those disaffected by globalisation. Voters preferred a flawed candidate who articulated their rage over globalization over a candidate whom they perceived as being the architect of their impoverishment.

The lesson is not that people are inherently racist and sexist, but rather that the condition in which prejudice thrives is economic disaffection. So unless queer politics takes on board a strong economic analysis and a commitment to addressing economic inequality, there is no answer to the Trumps of the world. It is also important that the hard task of political education must begin again. This is a need to go back to the Lenin of *What is to be done?*³ who stresses the importance of political education. As Lenin puts it, the role of the party is to ‘develop the political consciousness of the worker’ and it is quite clearly the absence of this form of concrete work, which results in racism, sexism and homophobia taking root in working class communities.

Going back in history, the one person who understood the Trump phenomenon in his own time was Karl Marx. Marx in his brilliant essay, *Eighteenth Brumaire of Louis Bonaparte*,⁴ analyses the reasons why someone like Napoleon III, who

he describes as ‘a grotesque mediocrity’, ends up playing ‘a hero’s part’. In Marx’s scathing prose, Napoleon III was nothing more than an ‘adventurer who hides his trivial and repulsive features behind the iron death mask of Napoleon’.

The question Marx asks is what accounts for this ‘grotesque mediocrity’ becoming the leader of France? The answer lies in a close analysis of the class forces that the phenomenon of Napoleon III represents. If the focus is on the class forces underlying Napoleon III’s rise, then as Engels in his preface notes, one ‘did not even need to treat the hero of this coup d’etat otherwise than with the contempt he so richly deserved.’ The class forces which Napoleon III represents are a combination of a section of the peasantry combined with the lumpen proletariat. In the final analysis, even the bourgeoisie ends up backing Napoleon III. The bourgeoisie party, which Marx calls the ‘party of order’, was unable to guarantee order under which business could thrive. This results in the bourgeoisie deserting the ‘party of order’ and throwing their support behind Napoleon III. It is a combination of these class forces that results in the ‘adventurer’ successfully seizing power by a bloodless coup d’etat.

Similarly today, over a hundred and fifty years later, a man many dismissed as a clown and joker, has become the President of the most powerful country in the world. The lessons that Marx outlines are still relevant. What is the combination of class forces underlying the Trump triumph? How did he triumph against an elite consensus that he was unfit to become the President?

One lesson queer politics will have to take away is that to build a progressive future, one has to have a political vision that addresses the question of inequality squarely. As Rosa Luxemburg so powerfully put it, “Bourgeois society stands at the crossroads, either transition to Socialism or regression into Barbarism”.⁵ The tragedy of Trump’s election is that voters were not even offered the

choice between socialism and barbarism. Their choice was between barbarism and an unacceptable status quo. They preferred a leap into the uncertain future instead of voting for more of the miseries of a certain neo liberal future.

3 Towards a Politics of Love: The Remarkable Life of Chelsea Manning

Philosophers who shun the autobiographical must find another route to philosophical authority, to, let's say, the a priori, to speaking with necessity and universality (logic, as Kant says, is such a route), and find another interpretation of its arrogance (philosophy's inherent superiority, in intelligence or purity, is always a convenient such route). Not to shun the autobiographical means running the risk of turning philosophically critical discourse into clinical discourse. But that has hardly been news for philosophy since its taking on of modern skepticism, since Descartes wondered whether his doubts about his existence might not class him with madmen, and Hume confessed that his thoughts were a malady for which there is no cure. If the following autobiographical experiments are philosophically pertinent, they must confront the critical with the clinical, which means distrust both as they stand, I mean distrust their opposition. (Reductive clinical discourse is as fashionable as cynicism). The autobiographical dimension of philosophy is internal to the claim that philosophy speaks for the human, for all; that is its necessary arrogance (Cavell 1994, 8).

Can biography be a route to developing a deeper understanding of politics? This section will argue that one way of thinking about the future is by paying close attention to biographies of ordinary people who have had extraordinary impact on the world. By listening with empathy to such voices,

the contours of a different world based on different values can emerge.

Roger Casement, who we know now was homosexual, in what were perhaps some of the first human rights reports, documented the brutal violence inflicted by King Leopold's men against the Congolese, and the suffering inflicted upon Indian tribes of the Amazon by colonial powers in Peru. He also embodied the struggle of the Irish against English colonialism. Another noteworthy figure is Edward Carpenter who not only initiated the homosexual rights struggle but was also a lifelong opponent of colonialism, and a supporter of women's rights as well as animal rights. Bayard Rustin who was a homosexual man is another figure from the queer archive who was a key part of the civil rights movement under Martin Luther King.

One contemporary figure whose life embodies the values of empathy and love and who has been imprisoned for 35 years for acting on those values is Chelsea Manning. This section will focus on the remarkable story of Chelsea Manning.

Manning moves from being a loyal soldier of the US army to becoming one of its most courageous dissenters. Private Manning was an information analyst with the US army who leaked classified documents pertaining to certain military operations in Iraq and Afghanistan as well as thousands of diplomatic cables shedding light on US foreign policy. One of the more important effects of the leak was the exposure of the corruption of the Ben Ali regime in Tunisia – one of the sparks that lit the Arab Spring. As a consequence of this truly historic act of truth telling, Manning was arrested, kept in solitary confinement in a small cell for a period of over nine months and tortured using Guantanamo bay techniques such as harsh lighting, stress positions and enforced nudity. After three years of pre-trial confinement, the trial was finally conducted and resulted in Chelsea Manning being sentenced to thirty-five years in prison for violations of the Espionage Act.

The consequences of this courageous act are incalculable. As Edward Snowden so eloquently put it, Chelsea's disclosures established the fact that 'people are ultimately the strongest and most reliable check on the power of government'. Chelsea's disclosures showed that 'insiders at the highest levels of government have extraordinary capability, extraordinary resources, tremendous access to influence and a monopoly of violence, but in the final calculus there is one figure that matters: the individual citizen.' As Snowden concluded, 'And there are more of us than there are of them (Snowden 2016, xi).

The serious consequences of making public US military documents must surely have been known to Chelsea Manning. What motivated her to place her personal freedom and liberty at risk? In a statement at her trial she said, 'this is possibly one of the more significant documents of our time removing the fog of war and revealing the true nature of twenty-first century asymmetric warfare...'⁶

When Chelsea Manning refers to asymmetric warfare what she is referring to is the power to kill on a mass scale at the disposal of the US military. Such enormous power should in the least, be exercised with great responsibility, and what Chelsea Manning responds to is the 'blood lust' with which this power is exercised. One of the videos that Chelsea Manning made public exposed the cold-blooded killing of twelve civilians including two Reuters journalists by a US Apache helicopter crew in Iraq. The US military had initially justified the killing as being within the rules of engagement and refused to release the video. Manning chanced upon the video documentation and she was shocked by what she saw:

The most alarming aspect of the video to me, however, was the seemingly delightful blood-lust the Aerial Weapons Team seemed to have... They dehumanized the individuals they were engaging and seemed to not value human life, and referred to them as quote-unquote "dead

bastards” and congratulated each other on their ability to kill in large numbers. At one point in the video there is an individual on the ground attempting to crawl to safety. The individual is seriously wounded. Instead of calling for medical attention to the location, one of the aerial weapons team crew members verbally asks for the wounded person to pick up a weapon so that he can have a reason to engage. For me, this seemed similar to a child torturing ants with a magnifying glass.⁷

Chelsea Manning’s shock transforms into a conviction that the American public needs to know what happened: ‘I wanted the American public to know that not everyone in Iraq and Afghanistan were targets that needed to be neutralized, but rather people who were struggling to live in the pressure cooker environment of what we call asymmetric warfare.’⁸

There might not be much in common between Chelsea and the Iraqis who were the victims of the US invasion. Yes Chelsea Manning chose to speak out and bear witness to wrongs her country has done. What describes best this sentiment of solidarity and empathy towards those who are so different is what Christopher Lee calls radical empathy. According to Lee, radical empathy can be ‘provisionally defined as a politics of recognition and solidarity with community beyond one’s immediate experience’ (Lee 2015, 191).

In Lee’s understanding the exemplar of the politics of radical empathy was the anti-colonial writer and activist, Frantz Fanon who is born in St Martinique, yet in the course of his life became a comrade in the Algerian liberation struggle. Reflecting on what drove him to empathize with the Algerian cause, Fanon’s wife Josie Fanon says ‘people have often wondered why he should have taken part in the liberation of a country that was not his originally. Her reply was that only ‘narrow minds and hearts’ for whom race or religion ‘constitutes an unbridgeable

gulf’ fail to understand, there was no contradiction or dilemma for Fanon, only necessity. (Lee 2015, 31) Like Fanon, Chelsea transcends the limits of her origin and is able to establish a human connection with those who are very distant in both geographical and cultural terms. Chelsea Manning embodies a contemporary politics of radical empathy that takes forward the heroic struggle against forms of neo-colonialism by exposing its brutal face. Chelsea Manning is a dissenter in the best sense of the word. Chelsea’s act of dissent has consequences moving beyond revealing the truth about the wars in Iraq and Afghanistan and what she did provides the necessary inspiration for other citizens to begin questioning the deep state. Snowden captures this sentiment of inspiration powerfully in his account of his first meeting with Daniel Ellsberg, the man who leaked the Pentagon papers more than forty years ago. As Snowden put it, when he met him, Ellsberg’s first comment was that he had to wait 40 years to meet someone like Snowden. However Snowden says that ‘unlike Daniel Ellsberg, I didn’t have to wait forty years to witness other citizens breaking their silence with documents. Ellsberg gave the Pentagon papers to the New York Times and other newspapers in 1971; Chelsea Manning provided the Iraq and Afghan war logs and the Cablegate materials to Wikileaks in 2010. I came forward in 2013. Now here we are in 2015 and another person of courage and conscience has made available the set of extraordinary documents that are published here.’ (Snowden 2016, xi)

What Chelsea’s brave act of dissent opens our eyes to is that one of the ‘lacks’ in the contemporary world is an unwillingness to open one’s eyes and see a world outside the private and personal. The injustices that are perpetrated on a global scale, by forces too large to comprehend let alone fight, create a sense of personal helplessness. In fact one can argue that in the contemporary world, the retreat into the private and personal may be a default position for the large majority too bewildered by such forces and the scale of injustice.

In times such as this, when the desire to retreat inwards is immensely attractive, we need the examples of lives which seek to broaden the sphere of concern. When people owe their greatest loyalty to their nation and are prepared to kill on behalf of their country, we need ethical voices such as Chelsea Manning to remind us of our common humanity.

4. Broadening the Notion of Freedom: From Bradley Manning to Chelsea Manning.

There is a deep internal dimension to Chelsea's remarkable act of dissent. Private Manning at the end of this journey from loyal soldier to dissenter also transitions from the male gender (Bradley Manning) to the female gender (Chelsea Manning). As she is sentenced to thirty-five years in prison, Manning makes public her gender identity, 'as I transition into this next phase of my life, I want everyone to know the real me. I am Chelsea Manning. I am a female. Given the way that I feel, and have felt since childhood, I want to begin hormone therapy as soon as possible.'⁹

There is not just a public and outer dimension to Chelsea's deep moral convictions but also a private and inner dimension. The importance of Chelsea Manning's life stems from one fundamental aspect. To Chelsea the self was not a given, something like an inert object. Rather in Chelsea's understanding the human self was always in the process of becoming. In Emerson's terms, Chelsea's voyage of discovery is about working on the realization that the self is 'unattained but attainable' (Emerson, 2003). Chelsea's journey is also one with Foucault's, who once famously said that 'The main interest in life and work is to become someone else that you were not in the beginning.' (Foucault, 1982)

What is truly remarkable about this journey is that it goes deep within as much as it goes outward. There is a recognition that something is not quite right with the world as it exists, just as there is recognition that there is something not quite right about who I am.

The recognition that there is something wrong with the world is an understanding that to unthinkingly conform to the demands of society is to do serious damage to the self. Conformity produces what Emerson calls living in 'secret melancholy' and Thoreau describes as 'the mass of men living lives of quiet desperation' (Cavell 2004, 25). It is precisely this conformity which is responsible, not only for individual unhappiness as Thoreau and Emerson put it, but also the infliction of needless suffering through heedless wars whose necessity is never challenged.

Chelsea Manning's decision to tell the truth about the Iraq war, regardless of the consequences, is at one with that of other heroic dissenters like Thoreau himself, as well as Socrates, Martin Luther King and Mahatma Gandhi. For Manning, working on the self is not only about broadening the range of ethical concerns but also about being true to who you are in the deepest sense. By questioning the 'truth' that a person born biologically a man should live for their whole life as a man, Chelsea Manning challenges the socially imposed borders of gender and sexuality. By challenging these norms Chelsea Manning gives the notion of freedom another dimension.

The moral compass, which is so strongly a part of Chelsea Manning, is inseparable from her gender identity. Her being transgender and her willingness to be herself, truthfully and without adornment or artifice is one with her strong moral drive to make her government accountable even at high personal cost. Chelsea Manning exemplifies a life, which is an ethical life – one devoted to a practice of freedom. Chelsea Manning through her transition, gives a deep ethical meaning to what it means to live a queer politics as for her there is no difference between desiring the freedom to live in the gender of one's choice and desiring freedom from the wars of the deep state.

5. Beyond Single Issue Activism: From Chelsea Manning to Rohit Vemula

It is important that social movements move from being focused on the suffering of a single group to understanding the connections to other forms of suffering inflicted on human beings. This utopian aspiration for the future of social movements, is exemplified by the life of Chelsea Manning who in the remarkable actions of her life, embodied a politics of radical empathy towards strangers in distant lands. This aspect of Chelsea Manning's life finds echoes in other lives as well.

In 2016, India was convulsed with the suicide of a young Dalit scholar, Rohit Vemula, at the Hyderabad Central University. Rohit was persecuted for his activism in leftist, Dalit and other progressive causes by a vindictive university administration. Eventually this persecution took its toll, Rohit took his own life. He left behind a suicide note, which movingly recalled a creative life so tragically lost. In his suicide note Vemula said: 'The value of a man was reduced to his immediate identity and nearest possibility. To a vote. To a number. To a thing. Never was a man treated as a mind. As a glorious thing made up of star dust. In every field, in studies, in streets, in politics, and in dying and living'.¹⁰

The eloquence of the suicide note hinted at the remarkable life that was lost. The life that Rohit Vemula lived was as inspirational as the note he left behind. One aspect of Rohit's remarkable life was his passion for politics not defined as single-issue politics but rather politics in a broader sense. It is precisely this broad approach to politics which allowed Rohit to see not only discrimination due to caste as an issue of importance but also discrimination against Muslims and also campaign against the death penalty.

In fact it was the stance taken by Rohit's organization, the Ambedkar Study Circle, on this broader terrain of politics that earned him the wrath of the university. The fact that the Ambedkar Study Circle conducted programmes on multiple human

rights issues (including the anti-Muslim pogroms in Muzzafarnagar as well on the death penalty) resulted in vindictive action by the university authorities.¹¹ It was the broad platform that the Ambedkar Study Circle espoused which the state found very threatening. Unlike single-issue identity politics, this form of political thinking and action could not be easily managed and controlled, and instead needed to be silenced.

The silencing of Rohit parallels the thirty-five year prison sentence for that other heroic dissenter - Chelsea Manning. There are echoes of Chelsea's bravery in the actions of the young Rohit Vemula, who refused to see the world within narrow 'identity' frames. They both call out to us to embrace a politics of radical empathy which broadens the notion of what it is to be human.

The counterpoint to the politics of anger and hatred can only be a cultivation of the politics of love. Love seen as empathy for those who are not like you and a deep commitment to go beyond the individualist norm of 'I, me and myself.'

Conclusion

Queer politics for the era of Trump will have to move beyond single-issue framing. Unless addressing the challenge of inequality becomes a central frame of queer politics, it is unlikely that the gains of neo-fascism can be stopped. However this cannot be a simple call to a return to the politics of class, even while class remains central. There is a need to broaden the notion of struggle to also include other forms of discrimination including on grounds of caste, religion, sexual orientation and gender identity. The emotional basis of this form of politics is the cultivation of a politics of love.

NOTES

- ¹ Martha Nussbaum in her book, *Political Emotions: Why Love Matters for Justice* (Harvard University Press, 2015) argues that we should take seriously the role that emotions that are mobilized in politics can play; she uses the term political emotions to describe this function of emotions in politics.
- ² Naomi Klein, it was the Democrats' embrace of neo-liberalism that won it for Trump, <https://www.theguardian.com/commentisfree/2016/nov/09/rise-of-the-davos-class-sealed-americas-fate>
- ³ Lenin. 1999. *What is to be done?*, <https://www.marxists.org/archive/lenin/works/1901/witbd/>
- ⁴ Marx, Karl 2006. The eighteenth Brumaire of Louis Bonaparte, <https://www.marxists.org/archive/marx/works/1852/18th-brumaire/>
- ⁵ *ILuxemburg, Rosa. 1916. The Junius Phamplet*, <https://www.marxists.org/archive/luxemburg/1915/junius/>
- ⁶ <http://www.bradleymanning.org/news/bradley-mannings-statement-taking-responsibility-for-releasing-documents-to-wikileaks>
- ⁷ *Ibid.*
- ⁸ *Ibid.*
- ⁹ http://www.huffingtonpost.com/2013/08/22/bradley-manning-chelsea-manning_n_3794629.html
- ¹⁰ <http://indianexpress.com/article/india/india-news-india/dalit-student-suicide-full-text-of-suicide-letter-hyderabad/>
- ¹¹ <http://indianexpress.com/article/india/india-news-india/behind-dalit-student-suicide-how-his-university-campus-showed-him-the-door/>

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The Harm in Section 377: Locating Evidence in Sexuality Research and Advocacy

DANISH SHEIKH

Sheikh examines the impact of, and the research and advocacy surrounding, Section 377 of the Indian Penal Code. This Section criminalizes “carnal intercourse against the order of nature with any man, woman or animal” and is the law most widely associated with the criminalization of homosexuality. The article examines the recent Supreme Court judgment relating to this legal provision, prosecutions under Section 377, persecution linked to Section 377, the indirect impact of certain other laws and future research and advocacy possibilities concerning this issue.

1. Introduction

Section 377 of the Indian Penal Code (IPC) criminalizes “carnal intercourse against the order of nature with any man, woman or animal”. In contemporary India, it is the law most widely associated with the criminalization of homosexuality, even as it is used to target the spectrum of queer individuals. The queer movement owes much to the use of 377 as a rallying cry through its use in strategic constitutional litigation. From 2001, when a petition was filed by the NGO Naz Foundation challenging the constitutionality of the Section in the Delhi High Court, 377 has occupied a significant space in the discourse around queer rights in the country. 2009 saw the Delhi High Court release a landmark judgment reading down Section 377 to remove consensual sex from the ambit of criminality.¹ In 2013, the case reached its apparent conclusion when the Supreme Court reversed the Delhi High Court’s judgment, rendering 377 fully operational again.²

The Supreme Court judgment was widely criticized: amongst other things it was notably called a bad day for law and love by Vikram Seth.³ The case now stands extended through a final appeal process, by way of a remedy introduced by the Court as recently as 2001. The curative petition as it is called, allows the Court to review cases that demonstrate a failure of the principles of natural justice, along with a range of other grounds.⁴ Such an error seems to have been taken cognizance of by the Court in this case, enough at least to make the three senior-most judges of the Court refer the matter to a 5 judge Constitution Bench in February 2016.⁵

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2. The Koushal Court's Assessment of Evidence

Even as the Court drags its heels on setting up this bench, I would like to go back to look at four observations that the Koushal Court makes. First:

While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.⁶

In this first quote, the judges note that a miniscule fraction of the country's population constitute LGBT individuals, and that of the reported orders (in appellate courts), less than 200 persons have been prosecuted for committing an offence under this section.

The total population of MSM as in 2006 was estimated to be 25,00,000 and 10% of them are at risk of HIV. The State-wise break up of estimated size of high risk men who have sex with men has been given in paragraphs 13 and 14 of the affidavit. In paragraph 19, the State-wise details of total adult population, estimated adult HIV prevalence and estimated number of HIV infections as in 2009 has been given. These details are wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society.⁷

In the second quote, they look at an affidavit submitted by the National Aids Control Organization (NACO) which details HIV prevalence amongst men who have sex with men, ultimately finding that the details do not demonstrate discriminatory

treatment of LGBT individuals by the State.

Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section.⁸

The third quote takes note of the use of Section 377 to harass LGBT persons, ultimately noting that the treatment is not actually mandated or condoned by the Section.

The final quote follows after a lengthy recounting of appellate court cases interpreting Section 377, *"...from these cases no uniform test can be culled out to classify acts as carnal intercourse against the order of nature."*⁹ The Court finally notes that there is no real test that can be determined to classify what constitutes an offence under the Section.

In each of these instances, the Court is asking a question about evidence or interpretation. While the ultimate reasoning of the Court ignores many fundamental points about the reality of Section 377, I would like to use the rest of this piece to explore a different question. If we are to take these statements at face value, what could their significance be for a research and advocacy agenda for LGBT rights in India? What are the difficulties that arise in trying to make a claim of harm under Section 377? What are the different ways in which we can attempt to gather information around the impact of criminalization? What, ultimately, is the significance of 377 when it comes to the construction of criminality of queer persons in the country?

This last question is the subject of vigorous debate within the queer community, fuelling much of the objections behind the litigation strategy that placed 377 at the heart of the queer rights agenda

in the country. This essay does not aim to argue against the Naz Foundation litigation – indeed, the litigation proved to be an invaluable lightning rod for future engagements to organize around – but rather highlight some of the issues that arise in attempting to push 377 as the lynchpin of queer rights in the country. As we will see, there is a gap between the intent of the provision which clearly was to target homosexual behavior, and the actual enforcement of the section which casts a wider net.

Evidence of harm under Section 377 was presented in a number of ways before the Koushal case: as the judges note, there were reported appellate Court orders, an affidavit by NACO, and other affidavits attesting to harassment faced by queer persons, purportedly emanating as a result of Section 377. We may understand this kind of evidence to split across two lines: one set deals with the use of 377 for prosecution of queer persons, while the other set deals with the indirect use of the section to persecute individuals.

3. Prosecutions under Section 377

In terms of prosecution, the appellate court record has few instances of consensual encounters between queer persons being prosecuted. A few cases, particularly from pre-independence India, give us a sense of how the section was interpreted. These do appear in the judgment, with the Court noting that the understanding of acts which fall within the section has changed from non-procreative (citing a 1925 case, *Khanu v. Emperor*) to that of sexual perversity (citing a 1963 case, *Fazal Rab v. State of Bihar*).¹⁰ They are however few and far between and as the Court notes, do not provide us with a uniform test for application of the law. The other fact which remains is that the majority of the cases at the appellate level do not involve sex between consenting adults. Instead, the majority of recorded cases under the Section involve non-consensual sex.¹¹ Given that the appellate courts represent only a fraction of cases filed and prosecuted, is there a way to broaden our field of enquiry, and look at other spaces to gain information on prosecution?

The National Crime Records Bureau (NCRB) is an attached office of the Ministry of Home Affairs of the Indian Government. As the Director General notes, its vision is to “empower Indian Police with Information Technology to enable them to effectively enforce the law and improve public service delivery.”¹² The Bureau produces annual reports providing a range of information around criminal cases under specific provisions and statutes. It was only in 2014 that it began compiling information on Section 377. Its most recent statistics, for 2015, indicate that 1347 complaints relating to the Section were filed at police stations across the country. Even as this number indicates a much more prevalent use of the Section than the 200 appellate court judgments taken note of in the Koushal judgment, the figures provide limited guidance when it comes to truly gauging the impact of 377 on consensual encounters.

For one, the numbers don’t tabulate instances where the case was filed against consenting adults. Given that consent is irrelevant under the Section, this can hardly be blamed as an oversight, but it does make the process of discerning its impact that much more difficult. Further, it is in fact clear that a majority of these cases do not involve consent: out of the 1347 cases, there are 814 cases where the crime has been committed against a child, which automatically means those cases do not constitute legal consent.¹⁵

How else might we attempt to gain a clearer picture of the use of the law? The Right to Information (RTI) process could potentially be one way forward. The RTI allows individuals to file an application with the relevant government department to receive specified details within a 30 day time period. Since the inception of the RTI Act in 2005, the process has become a crucial tool to enhance accountability from the State. An RTI application would theoretically allow for a larger and more detailed spread of information than the NCRB data. In practice however, the results have been less encouraging.

From 2014, a number of organizations working on queer rights in the country began filing RTI requests in their respective regions relating to the use of Section 377.¹⁴ This included information relating to the number of complaints filed and arrests made under the Section across the period of 2005-2015, the gender composition of the accused and victims involved, and significantly, have asked for copies of the First Information Reports (FIR) in the respective case, or at least the permission to physically inspect the same.

As the responses have begun to trickle in, one major limitation with the RTI process has become clear – it provides strong leeway to the information officer's discretion in terms of the level of detail in which to respond to information. The process of displaying information does not just vary from state to state, it varies drastically from station to station as well. Some officers would choose to provide all of the details that had been requested, while others would note that their obligation only lay to the extent of providing information already collated as opposed to making a new tabulation. Most stations refused to provide copies of the FIRs.

One notable exception was the state of Haryana, where a number of districts provided full copies of the FIRs. On examining the factual details across different cases, there were no cases involving an explicitly consensual encounter being prosecuted under the Section. Instead, most cases featured what clearly seemed to be violent non-consensual encounters, pointing to the use of 377 as a remedy for male survivors of sexual assault as opposed to a tool of prosecution for consensual encounters. If there was an ambiguity on the facts, it was in some of the complaints that were filed by a third party, often the father of the victim. In a number of these cases the survivor was well above the age of consent or in the periphery i.e. around 16-18. In the complaint, the father would simply state in the FIR that the accused *ne galat kaam kiya mere bete ke saath* (did a wrong deed with my son). The wrong here points more towards the moral wrong of the homosexual encounter as opposed to the wrong of a lack of consent.

3.1 Persecution Linked to 377

This kind of ambiguity aside, it does seem to be the case that there is no real epidemic of 377 prosecutions in the country. Instead, the Section appears to overwhelmingly be invoked in cases where male perpetrated sexual assault takes place. Indeed, queer rights advocates have argued that the prevailing harm under the Section occurs in terms of persecution rather than direct prosecution. The problem with an argument based on persecution is that it is even harder to establish. The persecution principle is based on the idea that through creating a class of un-apprehended felons in terms of LGBTQ individuals, Section 377 legitimizes discriminatory and violent treatment. One of the ways to understand this is to see how 377 operates as a barrier to access to justice, for instance, in the case of blackmail.

In a number of reported encounters particularly among communities of men who have sex with men, blackmail emerges as a theme. After a casual, consensual encounter, one of the men begins to threaten the other, often closeted individual with outing or exposure to the police. Besides punishing extortion in a general provision, the Indian Penal Code does provide for a remedy specifically for such kinds of blackmail. Section 389 of the Code states that when extortion is carried out with an attempt to put a person in fear of having committed an offence punishable under Section 377, the person committing the extortion may be subject to life imprisonment. Of course, the fact that Section 377 exists means that most individuals do not actually seek out the police to complain about blackmail, with Section 389 remaining one of the more underused provisions of the Penal Code.

While tangible incidents of persecution such as this are easy to link to a purported harm caused by 377, most accounts of persecution tend to be a bit broader. Many affidavits before the Supreme Court, memorably from parents of queer individuals, testified to the fear that was induced for their families because of the existence of the law. Much as there is to be said about the pervasive fear of the

existence of the law, it becomes less compelling a point when trying to tangibly locate the harm caused by the construction of queer persons as criminals.

Where else can we look towards?

4. The Impact of Indirect Laws

Beyond 377, there are a number of laws whose impact falls disproportionately on queer persons. Many of these happen to fall in particular on individuals at a lower socio-economic scale, where their queer identities intersect with class oppression. For instance, for many transgender persons who escape their homes at a young age, massive barriers from accessing the formal workforce push them into a space where sex work and begging become the only viable income generation options. The legal regime surrounding these activities leads to immense persecution, through the Immoral Trafficking Prevention Act on the one hand, and the many state level anti-beggary laws on the other.

Many individuals tend to be picked up under state specific police acts, which have broad provisions to deal with public nuisance. The IPC itself defines public nuisance as an act causing common injury, danger or annoyance to the public, with state police acts taking the cue from this definition. Analogous to this is the targeting of public obscenity also under the IPC. Taken together, this set of offences target acts of public sex, which is where queer communities tend to be more vulnerable.

In at least one notable instance, an Act has been amended to specifically give the police powers to target queer persons: with the addition of Section 36A to the Karnataka Police Act in 2012, the police could regulate “eunuchs”, where such regulation included the power to prepare and maintain a “*register of names and places or residence of all eunuchs residing in the area ... who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences*”. In the course of a constitutional challenge to this provision before the

Karnataka High Court, the government submitted before the Court its agreement to amend the section and remove the word “eunuch”¹⁵ – however, almost a year since this assurance, no such change has been effected.

Given the demonstrably prevalent usage of some of these provisions, perhaps a more reflexive queer advocacy requires us to look beyond the direct emotive appeal of Section 377 to better understand the nexus of indirect laws (direct in the case of Section 36A) that construct and regulate queer criminality. Unlike 377, we do know that at least some of these laws are being used to actively prosecute queer individuals on a regular basis. At the same time, I would like to make one point clear: it is not my case that Section 377 is a constitutionally valid piece of legislation. There is a strong principled case to make, devoid of empiricism, on how it violates the constitutional right to equality and non-discrimination, freedom of speech and expression, and the right to life and personal liberty. Even without a single recorded instance of violation, there is no legitimate purpose for the existence of Section 377 on the statute books insofar as it expresses the State’s moral disapproval of queer individuals.

The clearest such articulation has indeed already been made, in the form of the Delhi High Court’s Naz Foundation judgment. That the Supreme Court ignored the lower court’s sound reasoning in favour of a curious attempt at foraging for evidence is a different matter. In other words, the Koushal Court may be right in saying that 377 is barely used to prosecute LGBT individuals – but it is incorrect in allowing that determination to dictate its reasoning on whether the Section is constitutionally infirm.

On the other hand, while the Koushal court’s purported claims for more evidence and empiricism may be rooted in prejudice, as this piece has noted it does allow for us to look at different routes through which to gather evidence of the harmful impact of criminalization. The aim is not to say that advocacy against Section 377 is irrelevant, but rather to more

intensively interrogate how queerness becomes relevant under other laws, and how advocacy and research strategies can allow us to better engage with them.

5. A Future Research and Advocacy Agenda

What could be the possibilities and methods of taking forward this kind of work?

At present, the NCRB collates identity-specific data for crimes against certain groups: women, children, senior citizens, scheduled castes and scheduled tribes. Its Prisons report meanwhile collates incarceration data that also accounts for other backward classes and religious demographics.¹⁶ Going forward, one crucial way in which we might get a better understanding of the selective enforcement of criminal laws against queer persons is to have the NCRB begin collecting such data with respect to transgender persons where possible. There are clear complications when it comes to making such a compilation with respect to sexual orientation, with the potential of abuse too high to make any such claim in that respect. As far as transgender individuals are concerned however, given that the complaint process already records the gender of the complainant, it would be a logical extension to include transgender complainants as a separate category if they choose to identify as such. Further, when it comes to detention, it would even be quite crucial to account for the specificities of transgender experience, of which a separate maintenance of records would be the first step.

Beyond the NCRB, the RTI process is worth exploring even with its vagaries. Part of the complications on receiving and inspecting FIRs under 377 was that they involved sexual crimes, which raise a specific set of privacy concerns. The same will not be applicable when asking for FIR data on the enforcement of beggary laws or the use of public nuisance provisions. The bigger challenge there will be in terms of how to frame such requests and how to organize information collection in a more systematic manner.

Looking further, the information and better understanding on enforcement that we could get from these interventions could further inform advocacy interventions. Section 377 has had a clearly articulated civil society response: repeal the provision or read it down to exclude consensual sex. Many of the other laws mentioned here can't necessarily be dealt with in the same manner. The confusion in engaging with such laws can be seen even in documents like the Yogyakarta Principles, which enumerate the standards of contemporary international human rights law in relation to issues of sexual orientation and gender identity.¹⁷ Principle 7, which articulates the right to freedom from arbitrary deprivation of liberty features the rather broad mandate asking states to *"take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice."*

This is not the most practicable solution, given that many vaguely worded criminal laws that invite discriminatory application such as the public nuisance provisions have a much broader range of application particularly as far as the police are concerned. Any effective advocacy strategy requires a more strategic intervention with these laws. I believe that such an intervention can only come through a better understanding of the extent to, and manner in which these laws are used.

In conclusion, I reiterate that the legal campaign around Section 377 has been a significant tool to mobilize the movement and create a space for conversations which were untenable at the start of the litigation process. The harm of 377 however exists in a more nebulous sphere, in contrast to the harm of selective enforcement of more indirect laws which clearly have a tangible impact on the lived realities of LGBT individuals particularly those lower on the socio-economic scale. This understanding should not take away from our

advocacy against 377, but it should certainly make us aware of the importance of articulating a more cohesive research and advocacy agenda around these other laws. Ultimately, the dream of repealing 377 will only be an effective one if these other laws are also rendered ineffective in their potential of targeting queer persons.

NOTES

- ¹ 60 Delhi Law Times 277.
- ² *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.
- ³ NDTV, “Bad day for law and love: Vikram Seth to NDTV on Supreme Court ruling on gay sex”, 11 December 2013, <http://www.ndtv.com/video/news/the-buck-stops-here/bad-day-for-law-and-love-vikram-seth-to-ndtv-on-supreme-court-ruling-on-gay-sex-300992>
- ⁴ The curative petition was articulated as a remedy by the court in *Rupa Ashok Hurra v. Ashok Kumar Hurra*, AIR 2002 SC 1771 where it noted: “We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error.”
- ⁵ <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>
- ⁶ Para 43.
- ⁷ Para 40.
- ⁸ Para 51.
- ⁹ Para 38.
- ¹⁰ Para 38.
- ¹¹ See for instance Jyoti Puri, 2016. *Sexual States: Governance and the Struggle over the Antisodomy Law in India*. Duke University Press.
- ¹² <http://ncrb.nic.in/index.htm>
- ¹³ As an aside, it is worth noting that 154 cases were registered against juveniles, where 11 cases were registered against juveniles below the age of 12, and 100 cases against those between the ages of 12 and 16
- ¹⁴ Coordination was done through one of the most active queer mailing lists in the country, “377no-goingback”. RTIs were filed by a mix of organizations and individuals, covering Karnataka, West Bengal, Maharashtra, Delhi, Haryana, Punjab and Uttar Pradesh.
- ¹⁵ <http://www.thehindu.com/news/cities/bangalore/will-delete-word-eunuchs-from-police-act-state/article8099752.ece>.
- ¹⁶ NCRB, Prison Statistics India 2015, available at <http://ncrb.gov.in/StatPublications/PSI/Prison2015/PrisonStat2015.htm>.
- ¹⁷ The Yogyakarta Principles, available at http://www.glen.ie/attachments/The_Yogyakarta_Principles.pdf.

“I was told to stop questioning”

A Biography of the Political Economy of Gender Relations in Post-War Eastern Sri Lanka

SARALA EMMANUEL

This essay examines the gendered nature of the political economy of household, state and the market relations in post-war Sri Lanka through the life story of Anuratha, a woman living in the East. The essay highlights the issue of non-recognition of unpaid care work and informal work of women, the exploitation of women’s labour, including by the state, and multiple burdens and risks faced by women in the North and East, in need of social security.

Through a first person narrative of one woman’s struggle for survival and justice, this contribution explores the gendered nature of the political economy of household, state and the market relations in post-war Sri Lanka. Such accounts are especially important because their voices are often silenced or marginalised by dominant modes of articulating gendered social relations. An epilogue places this narrative and the struggle itself in its broader political context.

My name is Anuratha¹

I grew up in a small village in the Batticaloa district. My father had abandoned us and we grew up with my mother. My brother started working from age 10 to help the family. He cut firewood and removed weeds in the *chena* cultivations. He didn’t go to school. My mother worked as a day labourer on *chena* farms picking groundnut. In the 1980s, my brother and mother would have got around 5 rupees or 10 rupees a day. My brother was 11 when he was disappeared on 10th November 1986. There was a bomb blast and following that the military had come to the village. My brother left to go to the shop but never returned home. My grandfather and uncles were also disappeared. We ran away and were hiding in Kopaveli; many people were displaced.

When we were displaced in the jungles in 1988, my mother was pregnant with my sister who was born during the fighting so her birth was never registered—she only got her birth certificate 5 years ago. A traditional midwife was with them and helped my mother during the birth but soon my mother’s womb came down. She never went to hospital. She suffered a lot of pain but she never treated it. I only got to know that she was suffering all these years when she told me five years ago. I

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managed to get her medical care and her womb was removed recently. My mother is now 66 and my father 70 years old.

In 1990 we were displaced again. We walked for one week, hiding in the jungles until we came to a church. We stayed in a displaced camp in the church premises for one and half years, and in another school for two years. It was only in 1995 that we finally came to this village, where I continue to live. Under a temporary resettlement programme, 186 households were resettled and we each got 20 perches of land and Rs. 25,000/- in cash. The land and the money were given to my father. I was 13 years old. We struggled for a living and I was working while attending school. I worked as a domestic worker but I used to weave coconut leaves for roofs, and I broke stones to make posts for fencing. People gave me food. I never got any money. I brought the food home and shared it with my siblings.

My father was a daily labourer, doing household work. He used to get paid around Rs. 500/- a day. My mother used to go to the paddy fields during the harvesting season to collect the leftover paddy after the harvest. This is how we managed to get rice for us to eat.

I tried to complete my studies. I wrote my O/Ls. I only passed 6 subjects. I didn't have any support to continue my studies. I got married when I was 16 and we ran away to the LTTE controlled areas. My husband was 17 at the time. The LTTE remanded him for 21 days for running away and getting married. His parents were against our marriage. They called me a *veettu velaikari* or 'domestic servant'.

My father and mother built a small *kudil* [hut] with the Rs. 25,000/- they got when they were resettled. This house had walls made of tent material and a roof of coconut thatch. Many years later, with some money they managed to build the foundation and a permanent house. This little house has been given to my younger sister as dowry.

I don't have a permanent house of my own. In the 20 perches, we are 3 families. There are 11 of us.

My house is made of tin sheets. I have put tiles on the tin roof. The partitions inside are of plastic tent material. My parents now live with me.

Some years ago, we were asked to go back to our original village in Periyapullumalai. People refused to go, as there was no infrastructure or services there. So now we are nowhere, we don't get housing or any other support.

"I work so hard, I work in the night. But my work is not valued"

Today, to earn, an income, I do many jobs. I run my small shop. I also sell vegetables. In the night, my husband, myself and my oldest son (he is 14 years) weave Palmyra baskets—based on orders. I also give Math and Tamil tuition to seven children between school years 1 and 5. I also make short eats like *vadai* and boil yam to sell in the evenings. I also drive a neighbour's auto sometimes and I get paid for those hires, taking children to tuition classes. I am also a member of a women's cultural group and I get paid a monthly allowance.



I wake up at 4.30 a.m. My mother sweeps the compound and we all have our baths before there is too much light. I get the children ready for school. I open the shop at 6.30 a.m. My husband goes to the market to buy vegetables to resell in my shop. I also start cooking lunch for 8 people. After that I start preparing to make the *vadai* and other short eats to sell in the evening. Then in the afternoon, between 2.30 and 4.30 p.m., I come for the cultural group practice and from 5.00 to 6.00 p.m., I run a

daily meeting with a small women's group. We have savings and rotating loans we put in 20 rupees each and the next week the person must return the money with 1% interest. But we also talk about other issues like domestic violence and social problems. There are 10 women in my group. This is our volunteer work. Between 6.00 and 7.30 p.m., I run my tuition class. At night, I do the Palmyra work and I sleep around 10.00 p.m.

I have three sons. When I had my second son I started to work. I started a small shop in the resettlement village. I get around 1000/- per day. My husband goes for cooli [casual daily wage work] work. When he has work, he gets paid. Sometimes he goes to work in the rice mills. At other times he goes to other districts like Sinhala villages in Polonnaruwa as a daily labourer to prepare the land before planting paddy.

“All we have are loan schemes. We are constantly pushed into becoming indebted”

After the war ended, I borrowed Rs. 150,000/- from a local money-lender to send my husband abroad. He left in 2014. In the post-war economic context we were struggling to manage with our earnings from daily work. For this loan I had to pay Rs. 15,000/- per month as interest. My husband's salary was 17,000/- and I paid 15,000/- for 10 months as loan repayment. Suddenly my husband fell ill in Qatar, and didn't get paid for three months and he came home.

I took another loan from a private finance company to settle the loan with the local money-lender. As was common after the war, the finance company came to our village and said they will give loans to women's groups. So I took a loan of Rs. 140,000/-. Since 2015, every week I have paid back Rs. 3000/- for 18 months. The total I have paid back is Rs. 208,500/- I have taken another loan from BRAC (a finance company) to the value of Rs. 95,000/-. I must pay back Rs. 675/- every month for 18 months for that loan.

“The right to Samurdhi is fundamental to me.” The government gave us a piece of land but never thought of how we were going to live. If they had thought about that, they would have given us a little more land so we could grow our own food to eat and to sell.

I am 33 years old. I still don't have Samurdhi. In my village there are 423 households but none of us have been included in Samurdhi.

Samurdhi is an important identity for me. It is what says that we are *coolie* workers, that we were displaced, that we are from difficult communities, that we are not employed in the state or private sector, that our households are struggling, and that we don't have housing security.

The right to Samurdhi is fundamental to me. Samurdhi is what identifies us as poor. If not for this identification, we are invisible. Otherwise we are treated the same as those who have wealth and resources. Samurdhi support is essential when there is a child born, during marriage, and during funerals. Often government assistance depends on my identity as a Samurdhi recipient. Samurdhi is the identity that gives us entitlement to training and support for our children's education.

In 1990, we were given dry ration cards for 2 years. This was to the value of Rs. 1200/- per month. We got rice, flour, pulses, sugar and oil. After 2 years, they said they will give us a new stamp but since 1992 we have not been entitled to any assistance.

My village of origin has been granted Samurdhi and other government assistance. The old village has paddy lands, and they are also from the Mukkuvar and Karayar castes, there are also families who work in the Kovil. Our village, which is a resettlement village, does not get these entitlements. My father is from Badulla. He was born in Gonagala Plantations in Passara. Generations of my father's family worked and lived in the plantations. Some 50 to 60 families in my village have their ancestors in the Badulla plantations.

In 2000, when I got married, I begged the Samurdhi officer to register me as an independent household. But they never did. After I started taking on a leadership role in the village through the support of a women's organisation, I started raising these questions at the local government level. I have sent many letters and I have spoken in many meetings about my village. Since 2000, the Divisional Secretaries in my area have changed 4 times, and I have met each of them asking them to give Samurdhi assistance to my village. Similarly, 5 Grama Niladharis have come and gone, but we still have not got Samurdhi.

Three years ago, the Samurdhi officer organised us into small groups. And we opened bank accounts in the Samurdhi bank. Three of us got a group loan of Rs. 300,000/- or Rs. 100,000/- per person. I used it to repair the roof of my house and to improve my shop. To get the loan, I gave my father's housing deed [as security] and I have to pay back Rs. 2000/- per month for a 5 year period. But I also had to deposit Rs. 10,000/- in a compulsory savings account and have to contribute Rs. 1000/- or Rs. 500/- once a year towards the Samurdhi alcohol and anti-smoking campaigns.

Recognition of socio-economic rights in the constitution

I never knew what was in the constitution. I didn't even know what 'constitution' meant. I wanted to know if the problems of women like me were in there, and if not, I felt strongly that my problems should be addressed in the constitution. I too have rights.

When I went in front of the constitutional committee I wanted to ask 'give me my rights!' Instead, I was questioned—*did I inform my DS before coming?* I replied that to talk about my rights I don't need to get even my husband's permission and I have got an opportunity to speak so I am speaking. This is my own problem. I said that I came to talk about my own problem. I spoke about the value of my work, about why Samurdhi should be my right, and why we need elders' support.

I wake up in the morning and work so hard. Even I don't value my own work. I work for 3 nights to make a basket, for which I get Rs. 250/-. My labour for three days is bought by the Palmyra board for Rs. 250/- and they sell it for a high amount. I don't even know how much. They don't tell me. The Rs. 250/- I get does not value my hard work or even that poor basket.

I have asked the officials at the Palmyra board, "We work so hard. Some of the women who work like me are old and sick. If you increase our payment to Rs. 260/- that ten rupees can go into a scheme that can be a pension scheme for women like me. We can get a pension of 1000/- per month when we are old." I was told to stop questioning. And other women also told me to shut up because they were worried about losing even that 250 rupees.

State officials work from 9 to 5 and go home. I work so hard, I work in the night. But my work is not valued. I don't get any services or assistance even though there are so many government officials working in our area. There are workers who work as road workers or garbage collectors in the municipality. They have salaries, benefits and protection. Workers like me also do the same work for day wages as day labourers for private business. But we get paid only if that contractor decides to pay. If tar falls on my leg I go home with my injured foot.

We don't even have elders' allowance. My mother is old and I am growing old.

All we have are loan schemes. We are constantly pushed into debt. Even Samurdhi has turned us into debtors. If I don't pay, the other 3 women will be pressured and threatened.

Based on my work, my government gets an income. We are the ones who give work and money to the government. We pay their salaries. We pay tax. What happens to our tax? I attend the local government meetings, so I know what happens to the tax money—government staff are paid from the income from my hard work.

I don't have a house, I don't have land, I am not registered anywhere, I have no social contacts, nor upper caste status or family links. In my village people are of mixed castes. I am of low caste. How can I stand for local elections? Political parties won't nominate me. But if a representative from my community is not in local government who will talk about our issues? Who will represent us and our problems? Who will give resources to our village? Our voters' list has been amended to our resettled location. We are recognised for our votes, but not for our entitlements. Why?

Epilogue: Some Reflections on Anuratha's Story

Anuratha, now 33 years old, carries the burdens of multiple harms associated with over two decades of war—from displacement, enforced disappearances and death of loved ones to loss of schooling, child labour, and early marriage, among many others. But she is also of Up-Country Tamil origin, a community marginalised due to caste and impoverishment as well a history of indentured labour, violent exploitation, and statelessness and disenfranchisement in Sri Lanka. Anuratha is also of course a daughter, mother, and wife. Her experiences and voice embodies a struggle against multiple and intersecting lines of exclusion, discrimination, and violence.

Women in the North and East in post-war Sri Lanka are shouldering a constant expansion of their burdens rather than choices, entitlements, and rights. Firstly, just as during the war, women are often the primary source of sustaining their households by resorting to multiple livelihood strategies that bring in either cash or secure access to essential goods or services. Secondly, and related to the first, is that women have become the main conduits of 'development'.

They have become prime targets of a range of state sponsored and non-government livelihood programmes. For women like Anuratha however, this has not translated into economic empowerment but

rather multiplied their burdens. Women continue to be 'organised' by state or NGOs into all manner of groups and collectives—not all of which actually further their empowerment. In fact, micro-finance groups, driven by a highly competitive public as well as private finance sector, have pushed women into debt, and have led to other forms of exploitation and even suicides. The 'reliability' of women in repaying loans reinforces the stereotype of an obedient female subject of a hetero-patriarchal order.

Thus women have been 'mobilised' and 'organised' but without any change in the balance of power in the public or private sphere. Women are nevertheless in the forefront of many struggles for justice in the north and east, especially in terms of issues like disappearances or sexual and domestic violence. Even in processes like the recently concluded consultation process on transitional justice, women in the North and East played a key role as members or leaders of zonal consultation task forces. Women's role in 'bearing witness' and demanding justice is driven by a sense of injustice and assertion of agency. It exposes women to many risks and also imposes significant costs and burdens, especially because other gender roles have tended to remain intact.

While there has been an expansion of responsibilities, like with political representation, women's socio-economic entitlements have also not expanded. Despite multiple disadvantages, thousands of women like Anuratha are either denied access to social security or given access loaded with conditionalities—such as forced saving or compulsory contributions to anti-smoking and anti-liquor campaigns. All this while they are burdened by a highly regressive tax system heavy on (steadily rising) indirect taxes.

For women like Anuratha the non-recognition of unpaid care work (or social reproduction) coupled with the cheap exploitation of their labour, including by the state, remains a crucial part of their marginalisation. It is also the reason she values Constitutional reform because Anuratha

intuitively sees in it an opportunity to renegotiate and change the terms of her social contract with the state, the market, and within the household. In February 2016, Anuratha went before the Public Representations Committee for Constitutional Reforms and demanded recognition of social and economic rights, especially the right to social security, and recognition of women's work.

Despite the demands of women like Anuratha it appears unlikely that the new constitution will help fundamentally redraw the terms of the social contract through recognition, like in Venezuela or Ecuador,² of gendered political economic relations such as housework and the care economy. In the meantime, the possible recognition of the right to social security is threatened by further neo-liberal economic 'reforms'. At the same time, discussions on transitional justice have failed not only to account for questions of distributive and economic justice but have also not recognised the multiple burdens and costs of the war and post-war reconstruction on women.

Processes of 'reform' and even justice are highly vulnerable to being either gender blind or driven by a narrow recognition of gendered harms and entitlements. Indeed, often such recognition amounts to what men view as the worst harms that can befall a woman. As experiences in Sri Lanka and so many parts of the world have shown, even if women are visible in such processes their experiences are not necessarily so.

Eventually, what women like Anuratha are demanding is not just equality within the existing frame but a radically new social contract. One that is also queered in that it challenges hetero-patriarchal relations of power, breaks gendered binaries in terms of men and women's work and calls for a constitutional or transitional justice order that accounts for both the complex nature of gendered harms faced by women and their entitlements. It is no coincidence that the current constitutional order that fails to acknowledge social and economic rights, also denies substantive equality to women

and by way of Article 16 protects all manner of legislation that perpetuates hetero-patriarchy—whether in the form of personal or land laws that discriminate against women or legal provisions that criminalise adult consensual same-sex relations. The voices of Anuratha and other women like her may well be drowned out for now, but they will not be silenced.

NOTES

- ¹ Her name has been changed and the names of her village of origin and current residence masked in the interests of privacy.
- ² Venezuela's 1999 Constitution (in article 88) recognizes "work at home as an economic activity that creates added value and produces social welfare and wealth" while the Ecuadorian Constitution of 2008 (Section 8, Article 34) guarantees and ensures "the full and effective exercise of the right to social security, which includes persons who carry out unpaid work in households, livelihood activities in the rural sector, all forms of self-employed and who are unemployed".

From the Estate to Domestic Work: Women's Labour and the Political Economy of Heteropatriarchy

PRASHANTHI JAYASEKARA

This essay examines the issue of women's labour within Sri Lanka's plantation economy. Within the Up Country Tamil struggle for citizenship, equality, labour, and other rights, the subordinate position of women has been neglected, in both the public and private sphere. The essay examines the more disadvantaged status of women in the estate sector not only compared to their male counterparts but also compared to women in urban and rural sectors. The essay particularly focuses on the reproduction of heteropatriarchal relations in the shift from estate to domestic work, and also the heteropatriarchal legal and policy mechanisms at play.

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1. Introduction

Sri Lanka's plantation economy has its origins in the colonial mode of accumulation, central to which was transfer of poor, low caste Tamils from Southern India to plantations on Sri Lanka's central highlands. Over the 19th century and beyond, thousands of men and women crossed the Palk Straits and were transformed into a cadre of cheap and eventually stateless workforce in the estates.

Sri Lanka's plantation community, generally known as Up Country Tamils (*Malaiyaha Makkal* in Tamil), bears a legacy of nearly two-hundred years of physical and structural violence, including starvation, forced labour, sexual violence, statelessness, disenfranchisement, and discrimination based on ethno-national and caste identity. To this date the community lags significantly behind all others in the country in terms of social citizenship¹ including with respect to access to land, health, education, adequate housing, or drinking water and sanitation (Centre for Poverty Analysis, 2005; Jayawardena & Kurian, 2015; HIES, 2012/2013). A submission on behalf of the community to the Consultation Task Force on Reconciliation Mechanisms highlights that they have been subjected to, "Extremely exploitative economic and social relations that contributed significantly to national wealth, but received relatively little but poverty in return."

Women in the estate sector continue to be more disadvantaged, not only compared to their male counterparts but also compared to women in urban and rural sectors. Despite a large number of women from the estate sector participating in the labour force, their labour has not reaped an escape from poverty. Women were first brought to the estates primarily to maintain the households, to cook, care,

and meet the sexual and reproductive needs of the male workers, and ensure labour was retained and reproduced within the estates (Jayawardena & Kurian, 2015). The “productivity of the housewife is the precondition for the productivity of the (male) wage labourer” (Maria-Rosa Dalla Costa 1977 cited in Mies 1998, 31), and hence integral to the functioning of accumulation processes. This also challenges the classical Marxist and non-Marxist identification of women’s labour in a household as non-productive.

The “housewifization process across colonies was never a peaceful process” (Mies, 1998), as it involved exploitation and physical, sexual and emotional violence perpetrated on the women by the working class men and on the estates by the White planter and his acolytes. But women’s role in the process of accumulation did not stop at the household, instead their cheap and ‘nimble fingers’, disciplined by poverty, debt and denial of rights came to be central to the political economy of tea. Other male workers, from within the family or from the same class and community, commandeer the women’s labour often through physical, sexual and psychological abuse. The plantation system helps them entrench their patriarchal position and power to control and discipline the women, for example, the gender differentiated structure of the working day and the mode of payments ensures that even today it is often the men who end up collecting women’s wages.

By and large, the Up Country Tamil struggles for citizenship, equality, labour, and other rights have neglected the subordinate position of the women in the public and private sphere. In other words, the idea of ‘citizenship’, by default, has been androcentric in nature, and the private sphere or the household, which is a key unit of the socioeconomic and political makeup of the plantation, completely unaccounted for (Jayawardena and Kurian, 2015). The patriarchal power and privilege of the Up Country male worker is further entrenched by male dominated trade unions leading to the complete alienation of women from organising and collective

bargaining (Jayawardena and Kurian, 2015) leading to an abundance of cheap and disciplined female labour within the plantations (Mies, 1998). Therefore, while it is true that all workers, male and female, in the plantations were essentially captive and bonded due to debt, and subject to various forms of deprivation, coercion and violence, Up Country Tamil women also bore the burdens of the heteropatriarchal character of the system. The experiences of women workers living and working within such a heteropatriarchal order indicate that class, caste and ethnicity cannot be essentialised in the face of gender relations. Therefore, “in many ways women workers in the plantations could be viewed as the ‘slaves of slaves’” (Jayawardena and Kurian, 2015 cited in Skanthakumar, 2016).

2. From Tea-pluckers to Domestic Workers: ‘Moving out’ and the Reproduction of Heteropatriarchal Relations

A 2005 study by the Centre for Poverty Analysis (CEPA) found that in tea and rubber plantations, households with women as heads were the worst affected by chronic poverty. The study further shows that the households that have moved out of chronic poverty have at least one household member working outside the estate to earn an income. Since men in the plantations have less binding and infrequent manual employment, and their role is minimal or altogether absent in the domestic care work, the study points out that the men have greater opportunities to move out of the estates for employment. Even if most of the income earned by these men does accrue to the households (not always the case), it is not sufficient to alleviate conditions of poverty, deprivation, and bondage that hold women’s labour captive.

But declining employment on the estates has also led to Up Country Tamil women migrating to other urban areas or overseas as domestic workers. The Sri Lanka Bureau of Foreign Employment’s statistical reports, over the years, show that in the plantation districts of Nuwara Eliya, Badulla, Kegalle and

Ratnapura, a large number of women are migrating to the Middle East as domestic workers.

Women migrating from the estates into domestic and care work can, on the one hand, be viewed as an act of ‘moving out’ of the heteropatriarchal relations that govern their lives on the estates. However, on the other hand, their ‘moving out’ of the estates and into domestic work simply marks crossing over into another circuit of capital and accumulation that is also very much heteropatriarchal in order. In most cases, in the household where the Up Country Tamil domestic worker is employed, she is supervised by an upper class² woman or the ‘mistress’³ who elevates her own status by supervising the low class, low caste, domestic worker, and whose minority Up Country Tamil identity may also render an ethnic angle to this relationship of power and dominance. Within such a household, domestic workers end up ‘selling’ not only their labour—for low and infrequent wages, with little or no other benefits and with much risk—but often also their freedom and dignity (Kandasamy, 2014).

The supervisory role of the mistress of the household is a way in which traditional heteropatriarchal notions and sex-gender roles within a household are left unperturbed. The labour of the domestic worker in turn allows the upper class woman to provide her labour within formal circuits of capital without the burden of domestic responsibilities. The domestic worker thus is also responsible for the stabilisation and reproduction of heteropatriarchal circuits of capital which the ‘master’ and the ‘mistress’ are a part of. At the same time, the income earned by the Up Country Tamil domestic worker contributes to the stabilisation of the plantation household otherwise struggling to sustain itself.

A similar relationship of commodification of women’s domestic labour is in fact reflected when poor women from Sri Lanka cross borders to service households in the Middle East and elsewhere. The remittances sent home by these domestic workers invariably stabilise struggling third-world economies (Nilliasca, 2011). In other words, “the

manipulation of women’s labour and the sexual division of labour plays a crucial role” (Mies 1998, 34) in stabilising capitalist relations at several levels. While it is important to recognise women’s labour within households (both paid and unpaid) as a productive source, it is also important to identify their labour as a stabilising source.

3. Heteropatriarchal Legal and Policy Mechanisms

The idea of ‘wage labour’ outside the home in the ‘public sphere’ as the only recognised and remunerable form of labour rendered the work done by women in the ‘private sphere’ an unpaid ‘woman’s job’ that women must do ‘naturally’ (Mies, 1998; Smith, 1999; Smith, 2006; Silbaugh, 2006; Nilliasca, 2011). Thus women’s labour within the household, whether as mother, wife, daughter or indeed a domestic worker, is separated from the market and the purview of the law. This separation of the ‘private sphere’ and ‘public sphere’, so central to the heteropatriarchal sex-gender system roles, is codified in law. As Menaha Kandasamy points out:

“...Domestic workers do not fall within the purview of the legislative framework in Sri Lanka. The laws, which provide the legal framework for the recognition and protection of workers in the private employment sector, do not recognize domestic workers as part of the formal workforce, thereby not providing any framework of protection and rights for them. Stemming from this lack of the legislative framework for domestic workers, there are no reported court cases or judgments that deal with any form of issue or incident involving domestic workers. As such, the legal literature does not recognize domestic workers as legal entities... As a result, domestic workers are not protected by labour laws, in relation to legal binding contracts, equal wage regulations and decent working conditions, and are not afforded safety and protection from exploitation and abuse...” [2014]

The Domestic Servants Ordinance No. 28 of 1871, a racialised colonial instrument meant to police and control the movement of workers selling their labour to households, remains the sole recognition in law of domestic workers in Sri Lanka—as a class of ‘servants’. Given the notion of servitude in social and legal relations, domestic work “has always been one of the most exploitative and oppressive forms of labour, characterized by low wages, gratuities or economic benefits, no fixed hours of work or leave and few political rights... (Kandasamy, 2014). When women from the estates move into domestic work they in fact move not only from one enclave system to another but also into one that is individualised, private actually becoming less visible and therefore more vulnerable.

It is in this context that Sri Lanka’s Domestic Workers Union, the only organised domestic workers union, has been demanding law and policy to recognise domestic work as a form of labour and secure some measure of recognition and protection of the dignity and rights of domestic workers. In a country where the law enforces servitude in the very recognition of their labour, the call for appropriate recognition of domestic workers is an arduous struggle. Even securing legal registration proved difficult for the Domestic Workers’ Union, as domestic work is considered part of the so-called informal sector and their request to be registered as a union was turned down. In 2012, together with the Red Flag Women’s Movement, an organisation dedicated to mobilising women workers in the plantations, garment factories and domestic work, they managed to proceed with their registration as a union.

Organising workers in the beginning was very difficult, says Menaha Kandasamy from the Domestic Workers’ Union (in a personal interview carried out on the 17th of October 2016). For one, the social stigma surrounding a domestic worker is still significant; workers who leave their homes in the Estates are hesitant to recognise themselves as domestic workers. The Domestic Workers Union therefore forayed into awareness programmes, to

build within the workers a realisation of their own rights and recognition as a worker equal to any other.

In 2007 the Domestic Workers’ Union conducted a study on the status of domestic workers in Sri Lanka. This was important both to document the lived experiences of workers as well as to provide a basis for advocacy for recognition by the state. However, these attempts were, as Menaha recalled, “laughed at” or ridiculed, even within the Department of Labour. Gradually, the Union decided to be more expansive in its efforts and also started trying to build alliances with other trade unions. By April 2008 the Union had developed draft legislative provisions to provide legal recognition of domestic workers. The Union has been engaged in enrolment and conscientisation of workers apart from organising demonstrations, signature and media campaigns, and advocacy efforts with policy and law-makers.

In 2015, before the First Reading of a bill to amend the Minimum Wages Act, the Union pushed for domestic workers to be recognised by the Act. However, they were unsuccessful. Lobbying continued, especially with the Commissioner of Labour, but this was a futile and a frustrating attempt, as the Commissioner told them that due to “practical reasons” it was not possible to recognise domestic workers in the minimum wages act (Ananthi Shivasubramaniam, Joint Secretary, Domestic Workers Union, in a personal interview conducted on the 10th of November, 2016).

The Union’s continuing struggle for appropriate legal recognition as workers is central not only to the entitlement and dignity of domestic workers but also recognition of their agency rather than merely viewing them as commodified labour for the benefit of another class. It is also critical to pushing back against a feminized discourse of ‘protection’, which in the case of migrant women domestic workers has translated into active measures to curtail women’s mobility rather than ensure their right to decent and safe work.

The level of resistance to the Union's demands for due recognition of domestic workers as 'workers' in law and policy betrays the extent to which the notion of servility of domestic workers continues to remain entrenched. But underlying this is the framing of domestic labour, paid or unpaid, within gendered sex roles—the heteronormative underpinning of virtually all modes of accumulation including neoliberal capitalism facilitating the accumulation of wealth and power upwards.

In sum, the demand for recognition of domestic workers as 'workers' queers the dominant gendered normativity regarding work as well as the productive/reproductive and private/public divides that are so central to sex/gender hierarchies and binaries. But it is also inseparable from the imperative of challenging the normalisation of women's labour within the household. At the same time, it is critical to note that for the Domestic Workers' Union securing legal recognition for domestic workers as 'workers' is not the end in itself but an important goal in the political process of mobilisation and building a working class consciousness and collective strength. The ultimate political goal, even of legal strategies they employ, are to break the heteropatriarchal balance of gender and class power that generates a feminised underclass of domestic workers and the 'care economy' itself.

NOTES

- ¹ T.M. Marshall refers to social citizenship as a range of rights from the right to economic welfare and security to "the right to share to the full in the social heritage and to live the life of a civilized being according to the standard prevailing in the society" (cited in Jayawardena and Kurian, 2015). He argues that an ideal citizenship experience entails access to political, civil and social rights in a state.
- ² The term 'upper class' is used to identify class in relation to the poor domestic worker. Therefore, 'upper class' includes 'middle' and 'upper middle' class categories as well.
- ³ The terms 'master' and 'mistress' is used to highlight the class and power differences in a household where a domestic worker is employed. Under the Sri Lankan law, a domestic worker is identified as a 'servant' (Domestic Servants Ordinance No. 28 1871), which bears a clear class connotation.

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Images, Myths and Stereotypes: A Critical Discourse Analysis of the Construction of the ‘Female’ in Judicial Pronouncements on Rape in Sri Lanka

SANDANI N.Y. ABEYWARDENA

This article examines the manner in which the female Complainant (Prosecutrix) is represented in judicial pronouncements by Sri Lanka’s superior Courts in cases involving rape, highlighting certain concerning trends.

1. Introduction

Violence against women (VAW) takes many interrelated forms – physical, sexual and psychological,¹ and rape is one such manifestation. In the international legal framework, rape has been classified as a crime of honour,² a war crime,³ a crime against humanity,⁴ a violation of human rights,⁵ and a form of gender-based discrimination.⁶ In Sri Lanka, the Penal Code (1883) recognizes rape as a criminal offence while the right to gender equality and prevention of gender-based discrimination is upheld by Article 12 of the Constitution of Sri Lanka (1978). While the legal system guarantees these rights and protections to women (for by its very definition in Section 363 of the Penal Code, only a woman can be a victim of rape in Sri Lanka), there has been much concern and debate as to the efficacy of these protections in holding perpetrators accountable⁷ and the culture of impunity that is perpetuated.⁸ These concerns are compounded by the effect of social norms, prejudices and stereotypes regarding rape, females, and female behaviour that often apportion blame and responsibility in a social context. Further, in a legal context, it has been argued that the legal process is biased against females seeking legal redress for rape,⁹ a notion that is inconsistent with the core principles of law.

Law has defined itself by its core principles of impartiality, fairness and rationality, and thus, it is often associated with an aura of ‘truth’, devoid of untoward influences of social norms and prejudices with no basis or rationale. In other words, law has defined itself by means of a ‘near total social amnesia’¹⁰, its ability to reason effectively and ground decisions in rational argument. However, an interdisciplinary analysis of judicial pronouncements on the offence of rape appears

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to challenge this characterization of law and legal discourse.

As a profession of words, language plays an undeniably significant role in legal discourse, thus making it a fertile site for linguistic analysis. Further, while prior research and commentary on judicial decisions on rape¹¹ have been conducted in Sri Lanka, there appears to be no evidence of a focused study on the reflections of socio-cultural narratives of gender in such judgments from the perspective of language use. Thus, this article examines how the female Complainant (Prosecutrix) is represented in judicial pronouncements on rape¹² delivered by the Superior Courts of Sri Lanka and published in law reports during the period 1995-2013 by adopting a Critical Discourse Analysis (CDA) framework. In order to contextualize this study, the article will briefly outline the suitability of a Critical Discourse Analysis framework for the study prior to discussing the representation and construction of the female Prosecutrix.

2. Critical Discourse Analysis Framework

CDA has been described as a 'special approach in discourse analysis which focuses on the discursive conditions, components and consequences of power abuse by dominant (elite) groups and institutions'¹³ while also being one which analyses 'the way that individuals and institutions use language'¹⁴. This framework provides that a systematic analysis of language used in a text can reveal ideological assumptions and power dynamics that shape the creation of a text¹⁵ because of the close link between language and ideology. Therefore, given that the Courtroom is a site of power, and judgments are its written outcome, CDA is a suitable framework to reveal dynamics of power in the judicial decision-making process. This approach requires a textual analysis i.e. an examination of grammar, vocabulary, descriptions of social actors and cohesion¹⁶, followed by an interpretation of such linguistic patterns and finally, an explanation of these features in the relevant social context, particularly with reference

to gender-based stereotypes and rape myths i.e. prejudicial or false beliefs about rape, rape victims and rapists which is a pervasive ideology that creates a hostile climate to victims by supporting or excusing sexual assault.¹⁷

2. Construction of the Prosecutrix

2.1 Deceitful, Indecisive, Seductive and Angry: Invocation of One-Dimensional Images

The credibility of the Prosecutrix is a primary consideration in many judgments and as such, the truthfulness and reliability of her narrative is frequently questioned. According to the Court, such a judicious approach to credibility must be taken because rape is '*the easiest charge that a woman can make against a man in this world*'.¹⁸ In this extract, by using the superlative 'easiest', the framing of the statement captures the notion that many rape allegations can be falsehoods simply because such allegations are the most convenient to make. Thus, there appears to be judicial reliance on the assumption that false rape accusations are a dominant occurrence,¹⁹ presumably drawn from the stereotype that women are untruthful.²⁰ Further, the statement also embodies a declarative tone which aids in justifying the examination of an allegation of rape from the position that the female Prosecutrix is providing false evidence and therefore, should be looked at with suspicion. This position is seen in a number of cases²¹, and at times, repeatedly examined in the same case.²²

An intriguing depiction of females arises in the examination of *why*, according to the Court, females make *false* allegations of rape as cited below:

*'a woman with whose consent the act of sexual intercourse was performed can later claim that it was done against her will or without her consent. This can be due to failure on the part of the man to fulfil what had been promised at the time ...of intercourse and/or she consented to an act which she is now ashamed of'*²³

The first sentence with its declarative tone makes the assertion that a female consenting to intercourse can later change her mind; it insinuates that females vacillate and will utter falsities when convenient, and thus, the Court cannot rely on the strength of their word. In the second sentence, the semantic relations between clauses i.e. the use of the lexicon 'due to', in conjunction with the modal verb 'can', draw a causal link between the retraction of consent and a failure to fulfil a promise, or feelings of shame. This depiction reinforces the stereotypical image of the manipulative female who calculates in order to achieve her own ends and the rape myth that women 'cry rape' only when they have something to 'cover up'.²⁴ The cumulative effect of invoking and subsequently placing reliance on these stereotypes of "the untruthful woman" is that the Court does not rely on her narrative and characterises her as '*an unreliable witness not worthy of credit*'.²⁵

Amongst the depictions of females in rape judgments, another image is that of the 'temptress' that seduces the male Accused into sexual intercourse with the express intention of securing some ultimate goal. This image of the seductress is illustrated in the following extract:

*'...after the sexual act she kept on asking whether he is married. She later addressed him in the following language: "Did you love me to do this? People in the bus trade are like this". She got off the bus saying that she would find whether he is married. The appellant further says that he did not give his telephone number to her although she asked for it. From this evidence it appears that her hopes of having a hold on him perhaps hopes of getting married to him have shattered. According to the Appellant both of them were having a friendly chat from Udawalawa to Colombo. It appears from the above evidence that friendly association has turn(ed) to...anger when she got off the bus. ...'*²⁶

Here, the Court constructs a particular image of the female while also relying on gender-based

propositional assumptions regarding marriage. By using the idiom '*having a hold on him*', the Court invokes the image of a *femme fatale* who seeks to exert a controlling influence over the male through sexual intercourse. This is supported by the Court by citing her presumed 'hopes of marriage' which on one hand, reinforces the image of a seductress who uses intercourse as a means to an end, and on the other, reinforces the presupposition that all women desire marriage.

Furthermore, in this extract, the events that led up to, and after, the alleged act of rape are framed in a manner which invokes the stereotype of an angry female who makes a false charge of rape in revenge. Research has indicated that the idea that women 'cry rape' to 'get back at men they were angry with' is a persistent rape myth²⁷ and indeed the trope of a scorned woman is one that is pervasive in social thought, and features in this extract as well.

2.2 'Prostitutes' v. 'Other Women': Construction of Females in Binaries

It appears that the Courts, in the consideration of the question of consent, also incorporate social norms and views regarding maidens and prostitutes, and invoke these images when arriving at a determination. Such invocations are vividly demonstrated in the extract below:

'Excepting, of course, the case of prostitutes and other mercenaries, women are seldom prone to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding. In such cases consent becomes a matter of inference...'

In examining its effect, it is clear that by using the adverb '*of course*', the Court seems to indicate that the observation that follows is a universally accepted and acknowledged truth. In doing so, any uncertainty on the part of the reader that except '*prostitutes and mercenaries*', all other women are '*seldom prone*' to explicitly consent to

sexual intercourse is pre-empted. Thus, this use of the adverb naturalises a statement which, in all respects, can be argued to be a generalisation of a social norm of how a woman should behave. Further, when relied upon in this manner, this generalised stereotype gains legal legitimacy and is vested with the force and authority of the law.

This extract also creates a binary opposition between 'prostitutes and other mercenaries' and (other) women and ascribes oppositional values drawn from social norms and attitudes to each category. This delineation of the behaviour of prostitutes in sharp contrast to other women is one which has featured both in literature as well as social thought and, as seen above, features in judgments of rape as well. This is a problematic construction in itself for it depicts females as one-dimensional and fails to account for human complexity. Moreover, by using the adverbs 'of course' and 'seldom', the judgment distinguishes between the two groups in how they would give their consent to intercourse: the former would consent freely while the latter would not give their consent explicitly, and if they do, it is extraordinary. This statement fails to account for (and thus, suppresses) the possibilities that prostitutes may be raped and that women may explicitly consent. It is perhaps this stereotypical understanding that is relied upon by the Court, in a subsequent application regarding the same case, when they observe that '*When he had taken her close to her friend's house, she had refused to get down giving him the impression that she wanted to stay with him for the night*'.²⁹ The key lexical item here is 'impression' for the Court uses her behaviour in refusing to get down from the vehicle as an implicit indication of her consent to sexual intercourse, an assertion that is supported by the presupposition that females do not provide explicit consent.

This dichotomy embodies popularly cited social stereotypes regarding rape and has the dangerous effect of validating, among others, the rape myth that 'no' means 'yes', because women are 'naturally' coy and abstain from providing explicit consent.

2.3 Objectification of the Female Prosecutrix

Each judgment commences with a brief summary of the procedural history of the case which includes the offence(s) the Accused has been convicted or acquitted of by a lower Court as illustrated by the excerpt below:

*'The Accused was indicted with having committed rape on the Petitioner'*³⁰

In this excerpt, the Court does not describe the offence as 'raping' the Prosecutrix, but as committing rape 'on' her. This linguistic feature is not rare and occurs in varied constructions such as '*performed sexual intercourse on the woman*'³¹ and 'committed sexual intercourse on the woman'.³² Here, the linguistic construction of the sentences and the representation of the Accused and the Prosecutrix are noteworthy. Firstly, the nominalisation of the verb 'to rape' in conjunction with the use of the preposition 'on' can be seen where the Court refers to the 'committing' or 'performing' of rape 'on' a woman. Secondly, the Accused is framed as the agent of the action i.e. the subject, while the Prosecutrix is framed as the recipient of the action i.e. the object which is acted upon by the agent.

The constructions of these phrases are noteworthy. Firstly, it may be argued that it is a reflection of the lexicon used in Section 364(2) of the Penal Code³³ (which deals with Custodial Rape), which in turn is replicated in an Indictment and consequently, in a judgment. However, it should be noted that such lexicon is not used in Section 363 nor is it consistent across or within judgments, as judgments do refer to the Accused '*raping a woman*'.³⁴ Whether these constructions feature in judgments because it replicates the lexicon in the Penal Code, or because it is habitually used by the Court to describe the offence, these linguistic constructions have the effect of 'activating' the Accused by assigning to him a 'capacity for agentive action' and assigning a passive position to the Prosecutrix. This 'activation' of the Accused and the 'passivation' of the

Prosecutrix frames the actors as binary opposites whereby the Accused is vested with agency while the Prosecutrix has little or no agentive power.

This passivation of the Prosecutrix through vocabulary and nominalisation whereby the Prosecutrix is constructed as a linguistic object, gains social significance in light of modern discourse on the objectification of women in various spheres of everyday life. Scholars have argued that whenever a woman is objectified, it stems from the notion that since women are ‘instruments’ or ‘things’, they are meant to be used and abused.³⁵ Further, scholars have identified seven features³⁶ that address the question of what it means to ‘treat a person as a thing’. The most relevant of these features for the present analysis is instrumentality i.e. treatment of a person as a tool for the objectifier’s purpose, and violability i.e. ‘when the physical boundaries of a person are not respected and it is considered acceptable to smash, harm or break up their physical self’.³⁷ In a number of judgments, it may be deduced that the Accused resorted to rape for sexual gratification, but also, possibly for revenge,³⁸ thus highlighting the use of the Prosecutrix as a tool to achieve the objectifier’s purpose (i.e. instrumentality) and in all cases highlighting the violability of the female by violating her physical self. This objectification of the female by the alleged rapist is reflected in written judgments as demonstrated in the linguistic construction identified above. This discursive practice reflects the perception of the female in society, and reveals the ideological position of the Court as well as the legal system given the presence of this construction in the Penal Code as well.

The history of the offence also contextualises the social significance of this construction of the Prosecutrix as a linguistic object. Rape was considered to be the ‘theft of sexual property under the ownership of someone other than the rapist’³⁹ and therefore, rape was considered an attack ‘on the property of the dominant male in her life’, and not as an assault against the person.⁴⁰ As a result, throughout history the value of the female has been

evaluated through her virginity and modesty, loss of which is considered detrimental and requiring financial compensation, thus reducing the female to an object of financial value. Therefore, the recurrence of the discursive practice of nominalising the verb ‘to rape’ and the use of the grammatical passive in judicial decisions appears to indicate, therefore, that the legal system has not shed the shrouds of these historical origins.

3. Concluding Remarks

This study examined how the female Complainant is described and discussed in rape judgments through the identification and discussion of nominalisation, the passive voice, semantic relations, modality, and other grammatical features. This examination revealed the lack of neutrality in the manner in which the Complainant has been represented through the invocation of one-dimensional images of the female as being revengeful, angry, deceitful or indecisive, and the construction of females in binaries and ascribing oppositional values to them. Therefore, it can be concluded that gender-based stereotypes and constructed social norms are invoked in judicial decisions as a discursive practice. The existence of these images and constructions, which reflect socially constructed norms and rape myths regarding females and female behaviour, in judicial decisions, has numerous implications.

The findings of this study support the argument that linguistic habits often reflect and perpetuate ideas about things which are no longer embodied in law, but continue to have covert cultural significance.⁴¹ The invoking of social norms as a judicial discursive practice highlights how the law, through judicial pronouncements, not only reflect social norms but also produce and reinforce such norms and social structures through the use of language. Language is also crucial to the manner in which society is organised,⁴² and the presence of these discursive practices could serve to legitimise social assumptions and myths by vesting them with the authority of the law and by making subsequent and lower Courts bound by them through judicial precedent.

This, therefore, dispels the notion that the law is devoid of social influence or that it operates with 'near total social amnesia'.⁴⁵ In this regard, while it may be conceded that the law does not exist in a vacuum and its application is, and must be, situated in a proper social context, it does not mean that socially constructed stereotypes and views which have no basis or rationale, nor are backed with tangible evidence, should be invoked or relied upon in adjudication.

The findings also support the contention that reliance on social norms and myths relating to gender could play a role in apportioning blame and responsibility for rape without taking into account human complexity, fear and trauma and the socio-cultural perceptions on rape in Sri Lanka. During the process of adjudication, gendered norms that are dominant in social thought are seen to be reiterated and, as a result, whether the trial concludes with a conviction or an acquittal, the Prosecutrix is assigned a gendered subject position.

Furthermore, it is arguable that until such time that a Complainant is no longer viewed with suspicion, due to reliance on the stereotype that females are untruthful, the likelihood of the law acting as an effective deterrent in preventing crimes of rape is less. Therefore, these implications also raise a pertinent question with regard to the nature of justice that is dispensed, for the findings indicate that adjudication itself is also influenced by, and constitutes, gendered reasoning.

On a concluding note, it is noteworthy to observe the importance and utility of linguistic analysis within an institutional framework such as the legal system. The manner in which one speaks and the lexicon that is used has the potential to reveal attitudes and assumptions that are deeply ingrained, but which they may consciously disown.⁴⁴ Linguistic analyses of textual artefacts such as judgments, therefore, are particularly effective in identifying such modes of thought within the legal system, with a view to resisting, challenging and transforming such discursive practices.

NOTES

- ¹ Article 1 and Article 2 of the Declaration on the Elimination of Violence against Women, 1993.
- ² Article 27 of the Fourth Geneva Convention, 1949.
- ³ Article 8(2)(b)(xxii) of the Statute of the International Criminal Court.
- ⁴ Article 7(I)(g) of the Statute of the International Criminal Court.
- ⁵ The International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 define gender-based discrimination as a violation of human rights.
- ⁶ In identifying VAW as gender-based discrimination, the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the General Recommendation No. 19 of CEDAW (1992) play an important role (Sri Lanka acceded to CEDAW on 5 October 1981).
- ⁷ Such concerns and critique emerged prominently in relation to the investigation into the abduction, rape and murder of Seya Sadewmi and the gang rape and murder of Sivaloganathan Vitiya in 2015.
- ⁸ See E. Fulu, X Warner, S. Miedema, R. Jewkes, T. Roselli and J. Lang (2013): 'Why do Some Men Use Violence against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific. Bangkok: UNDP, UNFPA, UN Women and UNV: p.45.
- ⁹ L. Wanasundera (2000) Country Report on Violence against Women in Sri Lanka (Colombo: CENWOR).
- ¹⁰ P. Goodrich (1987) *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Hamilton: Macmillian Publishers Limited): p. 7-8.
- ¹¹ See for instance, M. Gomez (2001) *The Law on Rape: A Giant Step Back*, Law and Society Trust Review 1 (159).
- ¹² This examination excludes statutory rape as the focus of the paper is on the construction of the female, and the judicial treatment of consent is an important element in this construction.
- ¹³ T. N. Van Dijk (1995) *Aims of Critical Discourse Analysis Japanese Discourse 1*: p.24.
- ¹⁴ J. Richardson (2007) *Analysing Newspapers: An Approach from Critical Discourse Analysis* (Basingstoke: Palgrave Macmillan): p. 1.
- ¹⁵ S. Mills (2004) *Discourse: The New Critical Idiom* (London: Routledge): p.118.
- ¹⁶ N. Fairclough (1992) *Discourse and Social Change* (Cambridge: Polity Press): p. 75.
- ¹⁷ R. M. Burt (1980) *Cultural Myths and Support for Rape* 38.2: 217. For a succinct overview of rape myths and studies that determine the public's level of endorsement of such myths, see also A. D. Page (2008) *Judging Women and Defining Crime: Police Officers' Attitudes toward Women and Rape Sociological Spectrum: Mid-South Sociological Association* 28.4: p. 389-411.
- ¹⁸ *Ajith v. Attorney General* [2009] 1 SLR 23 at 28.
- ¹⁹ R. D. Cornia (1997) *Current Use of Battered Woman Syndrome: Institutionalisation of Negative Stereotypes about Women* UCLA Women's Law Journal 8.1: p. 113.
- ²⁰ In Sri Lanka, the Grave Crimes Abstract (2014) indicates that out of 2008 cases of rape/incest recorded, zero complaints were categorised by the SL Police as being 'designedly false', while the Grave Crimes Abstract (2015) indicates that out of 379 such reported cases, only 2 were 'designedly false'. See also the research of A. D. Page (2008) *Judging Women and Defining Crime: Police Officers' Attitudes toward Women and Rape Sociological Spectrum: Mid-South Sociological Association* 28.4: p. 392 which suggests that just one to four percent of rapes constitute false reports or fabrications.
- ²¹ For instance, see *Ajith v. Attorney General* [2009] 1 SLR 23 at 25.
- ²² For instance, see *Savinda v. Republic of Sri Lanka* [2010] 1 SLR 32 at 36-40.
- ²³ *Ajith v. Attorney General* [2009] 1 SLR 23 at 29.
- ²⁴ Page (2008) *Judging Women and Defining Crime: Police Officers' Attitudes toward Women and Rape Sociological Spectrum: Mid-South Sociological Association* 28.4: p. 391
- ²⁵ *Inoka Gallage v. Kamal Addarachchi and Another* [2002] 1 SLR 307 at 315.
- ²⁶ *Savinda v. Republic of Sri Lanka* [2010] 1 SLR 32 at 35-6.
- ²⁷ A. D. Page (2008) *Judging Women and Defining Crime: Police Officers' Attitudes toward Women and Rape Sociological Spectrum: Mid-South Sociological Association* 28.4.
- ²⁸ *Inoka Gallage v. Kamal Addarachchi and Another* [2002] 1 SLR 307 at 312.
- ²⁹ *Kamal Addarachchi v. The State* [2000] 3 SLR 393.
- ³⁰ *Inoka Gallage v. Kamal Addarachchi and Another* [2002] 1 SLR 307 at 309.
- ³¹ *Chaminda v. Republic of Sri Lanka* [2009] 1 SLR 144 at 145.
- ³² *Savinda v. Republic of Sri Lanka* [2010] 1 SLR 32 at 37.
- ³³ Section 364(2) of the Penal Code which deals with Custodial Rape uses the phrase 'commits rape on a woman' in its definition. However, this phrase is not utilised in Section 363 which instead provides that 'A man is said to commit "rape" who has sexual intercourse with a woman...'

³⁴ For instance, see *Savinda v. Republic of Sri Lanka* [2010] 1 SLR 32, *Chaminda v. Republic of Sri Lanka* [2009] 1 SLR 144, *Saman Kumara v. Republic of Sri Lanka* [2009] 1 SLR 18 and *Rajapakshe v. The State* [2001] 2 SLR 161.

³⁵ C. MacKinnon (1987) *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press): p.128.

³⁶ See M. Nussbaum (1995) *Objectification Philosophy and Public Affairs* 24.4: p. 256.

³⁷ E. L. Zubriggen (2013) *Objectification, Self-Objectification, and Societal Change* *Journal of Social and Political Psychology* 1.1: p. 191.

³⁸ See, for instance, *Rajapakshe v. The State* [2001] 2 SLR 161 at

164-5, where the Accused is reported to have made 'threats to harm her' including threatening 'to shoot her or rape her'.

³⁹ L. Clark and D. Lewis *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press): p. 115.

⁴⁰ B. A. MacFarlane *Historical Development of the Offence of Rape 100 Years of the Criminal Code in Canada: Essays Commemorating the Centenary of the Canadian Criminal Code*: p.3.

⁴¹ D. Cameron (1990) *The Feminist Critique of Language: A Reader* cited in P. Simpson *Language, Ideology and Point of View* (London: Routledge): p.147

⁴² P. Simpson *Language, Ideology and Point of View* (London: Routledge): p.148.

⁴³ P. Goodrich (1987) *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Hamilton: Macmillian Publishers Limited): p. 7-8. ¹⁴

J. Richardson (2007) *Analysing Newspapers: An Approach from Critical Discourse Analysis* (Basingstoke: Palgrave Macmillan): p. 1.

⁴⁴ D. Cameron (1990) *The Feminist Critique of Language: A Reader* cited in P. Simpson *Language, Ideology and Point of View* (London: Routledge): p.147

A Queer Wish List for 2017

MARINI FERNANDO

This essay examines a State's duties and obligations to protect its citizens, recalling the long time demands of the community of sexual minorities. The essay particularly focuses on demands relating to transitional justice, constitutional reform and more general law reform.

1. Introduction

Many clichés have been used to describe the transitional moment that Sri Lanka is in at the moment, moving from a government that was described as being repressive, into one which would like to present itself with an international image that is keen to engage and deliver on key human rights issues. This entails addressing issues of the past, especially in a post war context. Towards this end, it is heartening to note that there are conversations taking place on the issue of constitutional reform, in addition to transitional justice. The focus, unlike ever before, has been strong in appearing to be consultative with all parts of society. Respected civil society members and academics have engaged with a view to putting in place a credible consultative process. The outcome of consultations, though confined to the format of a report with recommendations, would hopefully be considered and implemented.

Non recognition of the rights of sexual minorities has been an issue of concern that has existed, before, during and after the war. Taking into consideration that militarization and the war made it almost impossible to voice these concerns, the current government and some key political parties too appear to be more accepting with regard to the recognition of the rights of sexual minorities. It is hoped that this piece would educate, articulate and be informative of the key concerns and demands of the community, with a view to achieving non-discrimination and equality for all.

A State is duty bound and obligated to protect all its citizens. However the demands of the community of sexual minorities have been voiced and ignored for more than two decades, in periods of war and conflict.

Marini Fernando is a Sri Lankan lawyer, and a strong advocate of LGBTIQ rights. She was inspired by the work of the late Sunila Abeysekera and continues to support the community in their struggle for equality.

2. Transitional Justice Concerns

The International Truth and Justice Project in its submission to the Commission against Torture¹ refers to the occurrence of male rape in Sri Lanka. It highlights that the general taboo surrounding male rape and the shame that is associated with rape and sexual violence, results in the incidents not being reported. Unfortunately the victims are compelled to suffer long term consequences, medically, psychologically and socially without any support and rehabilitation.

This is a clear example of the laws in Sri Lanka having a direct impact on enabling a conducive environment for abuses to be directed against its citizens. The fear of being associated of being gay, in addition to the stigma that wraps itself around a victim of sexual violence, deters any attempt to access redress, push for accountability or even report a crime.

A call to repeal section 365 and 365A of the Penal Code, the provisions that are read to be the criminalization of same sex activity, (more expressly set out below) was strongly advocated for in submissions² to the Consultation Task Force on Reconciliation Mechanisms. According to a press Statement of 16 February 2016,³ the Task Force was mandated to “Carry out a wide process of consultations on behalf of the Government of Sri Lanka”. The process was focused on ascertaining views of the public with regard to the steps they would like the government to take, including mechanisms to be established to ensure durable peace, promote and protect human rights of all, strengthen the rule of law, administration of justice, good governance, reconciliation and non-recurrence including measures for reparations in line with ideas for a mechanism that the government proposed to establish which were articulated at the Human Rights Council .

The submission to the Task Force highlights some key demands to ensure non-recurrence, and create an enabling environment for members of the

lesbian, gay, bisexual, transgender, intersex, and questioning / queer (LGBTIQ) community to live a life free of violence and discrimination.

1. It calls for the recognition of the crime of male rape, in addition to the continued recognition of the crime of rape of women.
2. For officials and persons working within any Transitional Justice framework to be sensitized in order to inspire confidence in any truth seeking or accountability mechanism.
3. Especially, for the recognition of next-of-kin to not be limited to biological relationships or official marriages, and for the provision of reparations and services to not be limited to a rigid structure of a traditional definition of family.
4. For the space to support members of the community to engage with Transitional Justice mechanisms openly and visibly, without fear of reprisals.
5. For vetting and screening of personnel to be carried out meticulously to ensure that those offenders of sexual and gender based violence would not be part of processes, and for whistle-blower mechanisms to be established.
6. Most importantly the submission called for the repeal of :
 - Section 365 and 365A of the Penal Code
 - Section 399 of the Penal Code
 - The Vagrants’ Ordinance

The final report of the Consultation Task Force on Reconciliation Mechanisms made particular reference to the submission and its concerns and

echoed the need for a process that allows LGBTIQ persons to make applications for reparations without ridicule and discrimination. The Report also picked up on the setback to possible efforts at legal reform including with regards to repealing 365A of the Penal Code and the Vagrancy Ordinance.

3. Concerns on Constitutional Reform

A Public Representations Committee on Constitutional Reform was appointed by the Cabinet for receiving public representations on constitutional reform to support the Constitutional Reform Process. The Committee received written and oral submissions from the public, from all over the country and submitted its final report in May 2016, which was made public.

The report makes reference to sexual orientation and sexual and gender identities in several instances including in recommendations relating to:

- 1) The right to non-discrimination and freedom from violence and harassment
- 2) Right to marry and found a family
- 3) Freedom from discrimination in relation to citizen status

The report reflected the concerns raised by LGBTIQ persons in their written and oral submission, specifically calling for rights of the individual to equality, dignity and non-discrimination to be recognized and strengthened in a new Constitution through the specific reference to sexual orientation and gender identities, in the Fundamental Rights Chapter along with race, religion, language, caste and sex. The need that was highlighted was that in the absence of detailed mention of specific communities that are persecuted, a holistic equality would not be achievable. It categorically takes note that the Sri Lankan constitution should acknowledge these equal rights, envisioning a cascading effect, allowing for a reading down of the provisions of the Penal Code, which in turn will have a real impact on the lives of LGBTIQ members, their families, their friends and society at large.

The culture of violence and rights violations, on the grounds of actual or perceived sexual orientation or gender identity, is indeed worrisome. In order to begin to address these grievances a State must recognize its obligation to address LGBTIQ vulnerability and violence against LGBTIQ persons. The report highlights the lack of state information with respect to violence faced by LGBTIQ person, ranging from physical harm - self-harm or suicide - to more symbolic forms of violence such as non-recognition, negative hyper-visibility (especially in mass media) and a culture of silence and invisibility around ways of living and being that challenge the primacy of the heterosexual patriarchal family, as the foundation of our society.

LGBTIQ persons, in their submissions have clearly called for the legal obligations of the State to safeguard the human rights of LGBTIQ people – and explained that this does not require the establishment of new international human rights standards or the creation of a new set of LGBTIQ-specific rights, but the safeguarding of human rights of LGBTIQ people which are already clearly established in international human rights law on the basis of the Universal Declaration of Human Rights, and subsequent international human rights treaties.

On 19 November 2016, the sub-committee appointed by the Constitutional Assembly to make recommendations in the area of Fundamental Rights submitted their report to the Constitutional Assembly. The Report on Fundamental Rights has reference to the consideration of the sub-committee to the inclusion of justiciable socio economic rights in modern constitutions. It makes the important link between political rights and freedoms and access to economic resources and a better quality of life. It provides for the application of the chapter on the Right to Equality and Freedom from Discrimination to be extended in order that no one shall be arbitrarily discriminated against on the ground of gender, sex, sexual orientation or gender identity. The recommendation in the report that refers to written and unwritten laws being subject

to the provisions of the new constitution, and in the event of a court declaring that any such law being inconsistent with any such provision, such law being deemed to be void to the extent of such inconsistency, would meet the requirement of the LGBTIQ community with regard to provisions of decriminalization.

4. Law Reform

The two abovementioned processes are recent mechanisms that the community of LGBT persons have engaged with in order to renew calls for law reform. These have been consistently voiced previously in many fora, but are again set out here for ease of reference:

4.1 The Repeal of Section 365A of the Penal Code

“Any person who, in public or private commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.”.

The act of gross indecency has not been defined but like in many South Asian countries sexual minorities in Sri Lanka grapple with this harsh and discriminatory law. Up until 1995, this law applied to men alone, but a movement to raise awareness on the need to reform this law led to the law being made gender neutral and so since 1995, consensual sex between two adult women in private

is criminalised. This provision from the Victorian era has been translated into law in all the British colonies and has been prevailing in Sri Lanka since 1883, for more than a hundred and thirty years.

Section 365A serves as a warning and a deterrent to members of sexual minorities. Though there seems to be a reluctance to prosecute members of the community for this crime, its existence paves the way for violence, discrimination, extortion and blackmail, targeted at LGBT persons.

4.2 The Repeal of the Vagrant’s Ordinance

The Vagrant’s Ordinance is the more commonly used piece of legislation used to police commercial sex work. Though usually understood to be used against women, transgendered women (male-to-female transsexual or transgender persons) too are often the victims of this law.

- By virtue of Section 2, a police officer has the discretion to arrest without a warrant any person who behaves in a riotous or disorderly manner on a public street or highway.
- Section 3 (1)(b) specifies that:
- Section 3(2) specifies that such a person can be arrested without a warrant.

Since police discretion is the only means that is required to determine the intention of the said person’s behaviour, transgendered women (transwomen) often fall victim to this legislation, merely on the fact that their gender performance is non-heteronormative. The arrests result in detention until the suspect is produced before a court. Members of the transgendered community have related experiences of being sexually violated while in detention.

5. The necessity to prevent Section 399 of the Penal Code (Cheating by Personation) being used against transgendered persons

The provision which is a general provision on cheating reads as follows:

“A person is said to ‘cheat by personation’ if he cheats by pretending to be some other person or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is. Explanation - the offence is committed whether the individual personated is a real or imaginary person. Whoever is convicted of this offence will have to face a punishment of imprisonment of either description for a term which may extend to three years, or with fine or with both.”

Transgendered persons whose gender performance was in contravention of their biological sex have reported having to undergo severe hardships at the hands of public officials. Section 399 of the Penal Code was invoked against some of them even by their own family and peers, despite the fact that some of them had managed to get their documentation altered in line with the sex transitioned into, through methods that largely depended on the goodwill of officials working within the Department of Registration of Persons.

In 2013, the rules were enforced more strictly and change of sex in documentation was no longer allowed. However in 2015, the newly elected government made new appointments to the Human Rights Commission. The Human Rights Commission subsequent to a series of discussions with members of the community issued a recommendation to the Ministry of Health, requiring the issue of a circular to enable transgender persons to change their sex in their personal documentation such as

the National Identity Card. Since then the Human Rights Commission has had continuous discussions with the Ministry of Health and the Department of Registrar General and civil society regarding the issuance of gender certificates which enables change of sex in personal documents. This was followed up by the Ministry of Health circular No. 01-34/2016 under the hand of the Director General of Health Services, which instructed all registrars in the country to enable change of sex and name in birth certificates based on gender recognition certificates. Though this is not the end of the struggle for transgendered people, it is a positive step to enabling them to claim their rights and protection from violence. A mechanism to support this circular has not been in operation for very long, but it is hoped that if documentation is now obtained with regard to change of sex, that section 399 would cease to be used against transgendered person.

6. Constitutional Amendments

At present the fundamental rights of a Sri Lankan Citizen are enshrined in chapter III of the Constitution of Sri Lanka. Article 12 states that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.' Though arguably 'any such grounds' could be extended to protect people from discrimination based on sexual orientation and gender identity, the lack of explicit mention effectively excludes sexual minorities from the protection of this article, particularly in light of Section 365A of the Penal Code. The Constitution does not explicitly guarantee protection on the grounds of sexual orientation or gender identity. It also does not give any indication of the fact that the term 'sex' refers to anything other than the system of biological classification used to distinguish sex at birth as male or female. From a Human Rights perspective the legal provisions question the "equality before the law" provision guaranteed by the constitution by imposing an artificial heterosexuality "norm" among all persons irrespective of their biological

differences, as well as sexual preferences. This makes it effectively impossible for a person to access redress mechanisms in courts or independent institutions for fear of being 'outed' (exposed as being homosexual) which in turn could have a series of repercussions that could target them. Members of sexual minorities have articulated stories of marginalization when securing employment, health care facilities, housing, schooling, and promotions, in addition to other forms of discrimination.

7. Hate Speech

Lastly, there has been a disturbing trend that has been recorded (especially in social media), with regard to hate speech being directed against LGBT persons. Conversations with the police have revealed that there is no policy in place to monitor such occurrences and therefore little recourse by way of protection for victims who are targeted as a result of these attacks. Civil Society Organizations have been firm in suggesting that any legislation put in place to prevent and address hate speech should conform to international best practices, and should find balance to ensure the protection of the freedom of expression.

8. Challenges

These laws and constitutional provisions that remain in place at present make it very difficult for organizations to serve members of the community as the organizations themselves have been accused of promoting perversion. Organizations that have attempted to facilitate public activities, for instance in the areas of sports, or Gay Pride events, have had to grapple with virulent acts of homophobia. Photographs of members of the community have appeared in the media and social media, thus exposing their sexuality in a disrespectful manner, and in violation of their privacy. Particularly with the previous repressive regime, ensuring security of information was a challenge, and in some instances organizations have had to encrypt information and relocate data to off-shore locations in order to protect community members. While this manner

of surveillance and vulnerability is expected in war and post war contexts, where sensitive information is possibly being collected by human rights organizations, much of the data collected by organizations working with sexual minorities have been in connection with personal histories. Often, the perpetrators identified in such histories have been identified as individuals known to the victim, often extended family and peers. The chances of such data including politically sensitive information that could be used to discredit the country's commitment to meeting its human rights obligations in the context of national security are therefore slim, and thus the degree of surveillance clearly unwarranted.

While much has been written, and many discussions have taken place with regard to the types of violence and discrimination faced by members of the community, steps to meet these challenges are in the hands of the State and Government officials. Members of the community have engaged with consultations through the constitutional reform processes and with transitional justice process. Members of the community have also articulated basic needs with regard to laws that remain before, during and after war, regardless of which government is in power. If a State wants to engage and protect the rights of citizens, and ensure their security and well-being, all concerns that prevent citizens from contributing towards society, and living a life free of violence and discrimination should be considered.

Rates of poverty, homelessness, depression and suicide have been found to be far higher among lesbian, gay, bisexual and transgender people than in the general population. But it's not just LGBT people who pay the price. We all do. Every LGBT child thrown out of home and forced to miss out on education is a loss for society. Every LGBT worker denied their rights is a lost opportunity to build a fairer and more productive economy. These losses are entirely self-inflicted. With different laws and policies in place and a different mind-set, we could and would achieve a more free, equal and prosperous world.

* Addendum: On 18 January 2017, the media reported that the Cabinet had approved the National Human Rights Action Plan having amended it to remove provisions pertaining to the decriminalization of homosexuality. Cabinet Spokesperson Dr. Rajitha Senaratne indicated to the media that the Cabinet of Ministers had amended the National Human Rights Action Plan draft rejecting proposed measures to protect people from discrimination based on gender identity and sexual orientation. Some media sources reflected that this was done with a view to protect national culture. Provisions relating to vagrancy too were removed. LGBT activists, civil society actors and some media outlets have been critical of this move as although there was civil society participation in the initial drafting of the National Human Rights Action Plan, the process was undertaken in a rushed manner, leaving little room for public participation. The fact that a draft was never open for public comment is a significant concern.

NOTES

- 1 http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_CSS_LKA_25771_E.pdf
- 2 <http://groundviews.org/2016/08/25/submission-on-lgbtq-persons-and-transitional-justice-mechanisms/>
- 3 16 Feb 2016, Press Statement on the appointment of the Consultation Task Force <http://www.scrm.gov.lk/media-releases-latest-news>
- 4 https://drive.google.com/file/d/0Bzl_GkvmvUNzeE-hEc0IOQkJCb2c/view
- 5 http://www.yourconstitution.lk/PRCRpt/PRC_english_report-A4.pdf
- 6 <http://groundviews.org/2016/03/28/a-meaningful-right-to-equality-and-non-discrimination-recognising-sexual-and-gender-identities/>
- 7 United Nations Free & Equal – The Price of exclusion - <https://www.unfe.org/en/actions/the-price>

Not just a Man in a Sari: Queer Politics in Ranjan Ramanayake's 'Maya'

ZAINAB IBRAHIM AND JAYANTHI KURU-UTUMPALA

A film review, this article examines how the film 'Maya' attempts to challenge and disrupt hetero-patriarchal gender stereotypes together with the problematic intersections it presents between race, religion and sexuality. The review draws on queer theory, and examines the ways in which Maya has the potential to be disruptive and subversive. It also examines ethno-religious and heteronormative ideologies that are played out in the mainstream cinema, arguing that a more transformative approach to film-making could lead to an acceptance of transpeople as human beings.

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1. Introduction

In September this year, the streets of Colombo were plastered with a new movie poster: a muscular man in a red sari and large *pottu*, his look menacing and blood-thirsty.

Wildly popular and running for many weeks, *Maya* as a mainstream Sinhala language film with a central transgender character has evoked positive reviews for its attempt at giving visibility to a community that often does not have the advantage of a mass-media platform. Starring popular cinema actor cum politician Ranjan Ramanayake in the title role, *Maya* is a slapstick comedy and horror film that seeks to create a space for a transgender woman to speak out against the injustices she and others in her community have faced in their lives.

While on the one hand this film attempts to challenge and disrupt hetero-patriarchal gender stereotypes, the extremely problematic intersections between race, religion and sexuality cannot be ignored. By drawing on queer theory, this review will first examine the ways in which *Maya* has the potential to be disruptive and subversive. It will then proceed to unpack the ways in which deeply problematic ethno-religious and heteronormative ideologies are played out within mainstream cinema. The review will conclude by arguing that a more transformative approach to film-making could lead to an acceptance of transpeople as human beings, instead of mere tolerance of them, spurred on by fear and sympathy.

2. Queering Maya: The Potential to Disrupt

The film *Maya* attempts to raise consciousness about the need to accept transgender people living

in Sri Lanka. Before proceeding any further, a brief note on terminology. Whilst western queer theories would immediately identify Maya - a biological male living as a woman - as a 'transgendered person' or a 'transwoman', it is important to keep in mind that the trans community in Sri Lanka have already adopted certain terms to identify themselves. In this case *Nachchi* is "the insider term used for a long time" by Male-to-Female (MTF) transgender persons, who wished to use a term against the widespread derogatory term *ponnaya*" (2014: Equal Ground). Some MTF transgender persons however, prefer to identify as 'trans' rather than the term *Nachchi*, as the latter was "closely associated with sex work" (2014: Equal Ground).

According to Miller and Nichols (2012) "*Nachchi* saw their gender identities as preceding but linked to their sexual subjectivities. Specifically, they believed they were born with male bodies but had the hearts and souls of women, and most pointed to karmic cycles of life to account for this. *Nachchi* generally described themselves from childhood as being different from boys, with feminine mannerisms and desires."

The film *Maya* revolves around its Sinhala-Buddhist, albeit unconventional male protagonist Marlon - whose macho masculinity, depicted through an initial fight scene where he emerges victorious against a dozen or more thugs, is juxtaposed with his extreme fear of *yakku* (demons/ghosts), including an inability to be alone at night or even urinate alone. His mother, a caricatured middle class figure who mollycoddles her son, indulges him regardless of the fact that he is an adult male: not only is she expected to accompany him to the toilet and sing *baila* to him while he urinates, she is also expected to sleep next to him, on his bed, while he is covered from head to toe in a saffron-coloured sheet that says *Budhu Saranai* and *Devi Pihitai* (Gods' Blessings). Marlon's masculinity is atypical to some degree as it demonstrates a willingness to show fear, even to a potential girlfriend. Marlon's non-normative masculinity sets him apart from the rest of the male characters in the film, particularly

his own brother, who often displayed a macho aggressive form of masculinity, demonstrated through his gruff interactions with his wife.

As the story unfolds, Marlon and his friends go to an abandoned field to play cricket. As the boys enthusiastically clear the field and then hammer the wickets into the ground, the viewer is suddenly privy to a scene beneath the cricket pitch, where the wickets are being pierced into the hands and feet of a human being buried underneath and recoiling in anguish. As the boys attempt to get ready for their game, ominous clouds roll in and gale force winds rip through the field, leaving the boys terrified, huddled in the centre of the pitch. They decide to abandon their plans, running out of the field, not without, however, taking the wickets. We later learn that the wickets were blood stained, and had awakened the vengeful soul of Maya, a victim of transphobic violence, who had been brutally murdered and buried in the abandoned field a few years ago, along with her adopted father, a Tamil man and brother who were also murdered.

The film then follows the soul of Maya as she seeks to avenge her own death as well as the death of her adopted father, and mentally challenged younger brother. As Marlon's blood stained wickets are taken home, Maya's soul follows him into his house and waits patiently for a moment to possess her chosen victim.

The very fact that Maya chooses to possess Marlon has several implications, which are examined later in this review. Maya's opportunity arises on a full moon night, when Marlon's 'protective' *budhu saranai*, *devi pihitai* covering sheet had been sent to the laundry. One of Marlon's more visible transformations to Maya takes place when he is accompanying his mother and sister-in-law on a shopping spree for saris. Possessed by Maya, Marlon, in an effeminate voice, asks the shop assistant for all the red saris available and much to the horror of everyone gathered in the store begins to drape the sari on himself, to perfection. A few scenes later Marlon, once again possessed by

Maya, adorns red bangles and a large pottu on his forehead and then shows them off to his sister-in-law, who is by now deeply troubled and somewhat hysterical at Marlon's intermittent transition into a brutish and demonic Tamil woman. Through Maya, Marlon is also sometimes possessed by the spirits of Maya's adopted father and mentally challenged brother. Marlon as Maya goes on to murder a few people, which we later realise are revenge killings. Meanwhile, Marlon's family, deeply disturbed by what they see as queer behaviour, visit exorcists as well as multiple priests in an attempt to rid him of this spirit.

By the last quarter of the film, the audience has been taken through a flashback scene which traces the story of Maya, from her painful childhood to the point of her brutal murder, as well as the murder of her non-heteronormative adopted family.

For a queer audience, the crux of the film is captured in Maya's monologue towards the latter part of the film. As one queer viewer pointed out, "it's worth watching if you can sit through all the violence and aggression that takes place in the first three quarters of the film." In her monologue Maya pleads with the audience (and the viewers), seeking acceptance: "There are many of us. Society does not want us. But what is wrong with us? Is everyone else a perfect human being? This is our natural way of being. If you have a child like me, don't reject them. Everyone wants respect and to live in dignity." Maya's speech was delivered when her adopted daughter Madhuri, also a transgendered woman, gets the best grades for medicine in her school. Maya's speech is preceded by the school principal acknowledging and apologizing for his own transphobia when he initially rejected Madhuri's application into his school, based on her sexual orientation and gender identity that was non-normative.

The messaging is clear: show respect and compassion to others, who may exhibit their gender and sexuality outside the frame of normative heterosexuality. Interestingly, the film draws from the Hindu pantheon to validate and 'normalize'

Maya's queerness. Her adopted father names her 'Maya' after explaining to her that in Hinduism, "to be born as a boy, you are Shiva. To be born as a woman, you are Shakti. To be born as both is Ardhanarishvara." Through this cultural and religious reference the film locates the queer character within an accepted religious ideology which has the power to prevent any potential arguments that non-heteronormative queerness was a "western import" - a common argument used to justify violence and discrimination against the lesbian, gay, bisexual and transgender communities in Sri Lanka.

Another positive element of the film was Maya's non-normative adopted family, which consisted of a Tamil man, his mentally challenged son, and Maya, who goes on to adopt another young transwoman into their queer family. Maya was adopted by this Tamil man as a child, after being thrown out of her home for displaying what is seen as feminine behaviour. The audience is given a first glimpse of Maya's childhood during the flashback scene where Maya - as a young child - is driven away from her home by her Sinhala speaking parents. It is thereby implied that Maya's adult identity as a Tamil woman is linked to her being raised by this man as a child. By acknowledging and accepting Maya as being "born as both" male and female, Maya's father subverts and challenges the hegemonic gender binary which Maya's biological parents were unable to grapple with. The ethnicity of characters in this film is significant and is dealt with later in this review.

The film also refuses to adopt the stereotypical trope of transwomen as hyper-sexual and often engaging in sex work. Recent studies on the MTF transgender community in Sri Lanka have pointed to the fact that sex work was one of the few employment opportunities available to transwomen or the nachchi community in Sri Lanka. The very fact that Maya's adopted daughter Madhuri is able to access a school, pursue her higher education, become a doctor, and eventually open a hospital, provides the audience with a refreshing alternative to employment opportunities that trans people

could also engage in - if only they had equal access to opportunities, including education, employment and a life free from violence and discrimination.

The film ends on a positive note with Madhuri achieving her dream of building a hospital. Whether the film intended it or not, the fact that a hospital is built by a transwoman, feeds into a larger discussion on access to health services which are often denied to trans people.

3. What is Problematic about this Disruption?

The genre of the horror film allows a certain mainstream space for discussions of the non-normative and for subversion and Maya is no exception in using this space for portrayals of transpersons and queerness. This is, however, a double-edged sword. While on the one hand it is perhaps a 'palatable' entry point for mainstream audiences to confront queerness, it doesn't move a conversation out of the context of a 'freak-show.' For most of the movie, Maya is vengeful and demonised, thirsting for revenge and someone to be feared because she can curse and even bend deities to her will, and as in this movie - to violent ends. She is also simultaneously someone to be pitied, with the violence justified as a reaction to the difficult and unfair circumstances of her life. Between these extremes of feeling, Maya's queerness is still abnormal and so is something to be tolerated and not accepted. While subversive in the very fact that a mainstream film deals with queerness, this subversiveness is still contained within homophobic and transphobic stereotypes. For instance, if you are gay or trans you are either 'abnormal' or possessed by an evil spirit and therefore need to be 'cured' either medically or through an exorcism.

One of the last scenes of the movie is a ritualistic dance in which Marlon as Maya performs with other trans people on a beach one night, close upon a Kali Amman Temple. What follows is a wild-haired, demonic performance which portrays transwomen as being vindictive and violent, with the ability to

curse, and therefore to be feared. The theme of the song is about how 'Maya is coming to take revenge.' This dance foreshadows a murder that follows of the politician who had been responsible for swindling Maya of land she had bought for her daughter Madhuri's hospital, and who had murdered her, her adopted father and brother.

A recent study conducted on transgender people in Sri Lanka revealed that many *Nachchis* believe that they are blessed and protected by the Goddess Kali. "The fierce, powerful and revengeful nature of Goddess Kali might have attracted them as they experienced continuous powerlessness, marginalization and discrimination... in a culture where people were afraid of the Goddess Kali" (2014: Equal Ground).

While the film makes an effort to provide a platform for trans people, the representation of transwomen in this film repeatedly pushes them to the fringes of what's considered 'normal'. There is a continuous 'othering' that occurs throughout the film, constructed through the eyes of those who hold the greater social power and subscribe to dominant ideologies around race, religion and sexuality. This perhaps reaches its peak in the way in which the ritual to the goddess Kali is performed - transwomen as grotesque, animalistic and blood thirsty. Even in a mainstream film, the transwomen remain on the margins. As Michael Cobbs (2005) notes, "Queers are at once present and still despised ... we are visible perhaps, but definitely not victorious."

There are also problematic racial overtones in this film. Perhaps the most evident is the very fact that Maya is represented as a Tamil woman, and complicated by the fact that she is queer, demonized, and vengeful, and is ultimately controlled by a Sinhala Buddhist monk. This priest subdues Maya's spirit with the words that she "cannot battle against the Buddha Sasanaya" (teachings of the Buddha). In complete contrast to the aggressive Sinhala Buddhist monks, Tamil Hindu priests hired to rid the house of Maya's spirit were portrayed as incompetent swindlers.

Some of the characters are perhaps a legacy from the original Tamil film *Kanchana* on which this movie is based. However, considering the local context of ethno-religious tensions and extremism (including the actions of extremist Buddhist priests) the film's portrayal of certain power dynamics among the characters, seemingly driven by ethnic and religious overtones, is unfortunate. It is also unclear what purpose they serve in the telling of this story, other than that of reinforcing discriminatory, divisive and dangerous racist thinking.

Also problematic was the association of transpersons with spirits and exorcism. As a non-normative male, Marlon was more receptive to being 'possessed' by a queer spirit. However, being possessed by Maya also reinstates the homophobic stereotype that one's queerness usually occurs as a result of a 'curse' which in a heteronormative world, needed to be "cured" through religious exorcisms (2014: Women's Support Group). The film itself proceeds to exorcise Marlon of his queerness represented through the spirit of Maya.

An argument being made is that, at the very least, this movie opens up the space for a conversation about transpeople and the transphobia they face amongst a mainstream audience. As discussed in this review, this film does attempt to provide a sympathetic portrayal of transpeople, but unfortunately keeps reverting to discriminatory stereotypes in its efforts to be entertaining. Therefore, how far along does Maya actually move this conversation on queerness? We as the viewers are still presented with a portrayal of transpeople as individuals to be feared and pitied, with their queerness still being an abnormal condition that can and should be cured by religion and ritual. In effect, by the end of the film, transpeople are firmly placed in a subordinate position in the fringes that society forces them to occupy.

This review would like to make the point that we can do better than the bare minimum of politics when dealing with queer themes and in challenging a mainstream audience. Efforts must be made to go

further, and not merely limit oneself to 'creating a space.' This space must be more disruptive and transformative. Cathy J. Cohen's article 'Punks, Bulldaggers and Welfare Queens (1997),' citing Michael Warner asks the question, "What do queers want?" and goes on to suggest that "the goal of queers is an acknowledgement of their lives, struggles and complete existence." This is not a radical idea. Perhaps the more radical challenge for filmmakers attempting to address or offer a commentary on social concerns, is to create a mainstream film that entertains yet provokes mainstream thought in more meaningful ways.

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On Queering our Approach to the Law

Arvind Narrain

Queer Politics for the Trump Era

Danish Sheikh

The Harm in Section 377

Sarala Emmanuel

Gender Relations in Post-War Eastern Sri Lanka

Prashanthi Jayasekara

From the Estate to Domestic Work

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Construction of the 'Female' in Judicial Pronouncements on Rape

Marini Fernando

A Queer Wish List for 2017

Zainab Ibrahim

and **Jayanthi Kuru-Utumpala**

Not just a Man in a Sari :
Review of Maya

Queering the Law

This issue of the LST Review is dedicated to the memory of Priyadarshini Thangarajah (1982-2015) – a researcher activist and lawyer. The issue focuses on the idea of approaching law and policy from a non normative – or 'queer' – perspective, and includes topics on a wide array of subjects. Vijay Nagaraj and Shermal Wijewardene's essay is inspired by a conversation with Priya herself, and attempts to examine the use of queering for not merely engaging with the law but also for activist political engagement. In keeping with the spirit of the LST Review, the essay reflects on the way we engage with and think about the law through Priya's perspectives and critiques.

Prashanthi Jayasekara discusses the issue of 'Women's Labour and the Political Economy of Heteronormativity in the transition from Estate to Domestic Work'. This essay examines the more disadvantaged status of women in the estate sector not only compared to their male counterparts but also compared to women in urban and rural sectors, with particular focus on the reproduction of heteropatriarchal relations in the shift from estate to domestic work, and heteropatriarchal legal and policy mechanisms. "Marini Fernando"'s 'A Queer Wish List for 2017' recalls the long time demands of the community of sexual minorities, with particular focus on those relating to transitional justice, constitutional reform and more general law reform. Sarala Emmanuel's essay focuses on the issue of non-recognition of unpaid care work and informal work coupled with exploitation of women's labour, including by the state. Through a first person narrative, this essay examines the gendered nature of the political economy of household, state and the market relations in the broader political context of post-war Sri Lanka. Danish Sheikh examines the impact of, and the research and advocacy surrounding, Section 377 of the Indian Penal Code - the law most widely associated with the criminalization of homosexuality. The article examines the recent judgment of the Indian Supreme Court relating to this legal provision, prosecutions under Section 377, persecution linked to Section 377, the indirect impact of certain other laws and future research and advocacy possibilities concerning this issue. In 'Queer Politics for the Trump Era' Arvind Narrain examines the need to address economic inequalities that fuel hatred and anger in the post Trump era while discussing 'the equally important task' of cultivating the counterpoint to the politics of hate, namely, the 'politics of love'. In her article Sandani Abeywardena examines the manner in which the female Complainant is represented in judicial pronouncements by Sri Lanka's superior Courts in cases involving rape, highlighting certain concerning trends.

This edition of the Review also contains a critical review of the film 'Maya' by Zainab Ibrahim and Jayanthi Kuru-Utumpala in which they examine how the film attempts to challenge and disrupt hetero-patriarchal gender stereotypes together with the problematic intersections it presents between race, religion and sexuality. The review draws on queer theory, and examines the ways in which Maya has the potential to be disruptive and subversive. It also examines ethno-religious and heteronormative ideologies that are played out in the mainstream cinema.