

THE QUALITY OF MERCY, STRAINED: COMPASSION, EMPATHY AND OTHER IRRELEVANT CONSIDERATIONS IN KOUSHAL V. NAZ

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The Supreme Court of India's decision in Suresh Kumar Koushal v. Naz Foundation, besides lacking in legal logic, also displayed a marked absence of another essential judicial quality: that of empathy. It is also a virtue that was in abundant display before the Delhi High Court both during the Naz Foundation hearings and then again in the text of the judgment. In tandem with the Supreme Court's lack of empathy was an attempt to annul a discourse of queer intimacy that the Delhi High Court had brought into the judicial imagination in India. This essay will scrutinize the Supreme Court's attempt to separate humanity from carnality, acts from identity and sex from love in light of the hearings before the Court.

I. INTRODUCTION

There is only really one true dismissal to a proffering of love according to Roland Barthes. It isn't the mere denial of the claim, for that still allows discourse to continue; the true rejection, rather, is that "there is no answer".¹ The non-answer denies not merely a demand, but really denies the power of questioning:

"I am wiped out more completely if I am rejected not only as the one who demands but also as the speaking subject; it is my language, the last resort of my existence, which is denied, not my demand; as for the demand, I can wait, make it again, present it later; but denied the power of questioning, I am 'dead' forever".²

On the 11th of December, 2013, the Supreme Court of India denied millions of lesbian, gay, bisexual and transgender ('LGBT') individuals in the country this very existence as speaking subjects.³ By striking down the

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¹ ROLAND BARTHES, A LOVER'S DISCOURSE - FRAGMENTS 147 (2002).

² *Id.*, 149.

³ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

Delhi High Court's 2009 decision⁴ decriminalizing homosexuality, the Court effectively nullified the autonomy of LBGT individuals from making personal decisions about their intimate lives, taking away their right to love.

In the days that have elapsed since the judgment, it has already gone down in public discourse as one of the Court's most reviled decisions, notching a claim next to a case where police officers accused of raping a tribal girl were acquitted on the grounds that she was "habituated to sex"⁵ and another where it said that the writ of habeas corpus could validly be suspended in conditions of declared state emergency⁶. *Suresh Kumar Koushal v. Naz Foundation* ('Koushal')⁷ has been accused of being a cowardly judgment, one that masks homophobia through its (ill argued) legal reasoning.⁸

The Supreme Court did not merely overrule the prior judgment—it attempted to effectively annul a discourse of intimacy that the Delhi High Court had brought into the judicial imagination in India, which had prior to 2009 maintained an exclusively sterile conception of the queer subject. In this essay, I will examine the judgment's attempt to separate humanity from carnality, acts from identity, and sex from love in light of the hearings before the Court, while drawing from a similar exercise undertaken by Arvind Narrain in analyzing the Delhi High Court decision.⁹ Where his foray results in him finding a remarkable empathy in the judicial discourse right from the hearings, I reach the opposite result here.

II. WHAT IS 'CARNAL'?

Over the course of six weeks in early 2012, the Supreme Court heard arguments in the matter of Koushal. It had a vast breadth of arguments to potentially consider before itself: the Delhi High Court's ruling that was being challenged had read down the law on grounds ranging from the right

⁴ *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277.

⁵ *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

⁶ *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521; AIR 1976 SC 1207.

⁷ (2014) 1 SCC 1.

⁸ See Shivam Vij, *The Dubious Arguments for India's Ban on Gay Sex*, December 13, 2013, available at <http://www.newyorker.com/online/blogs/newsdesk/2013/12/the-dubious-arguments-for-indias-gay-sex-ban.html?mobify=0> (Last visited on June 18, 2014); Siddharth Narrain, *We Dissent*, available at <http://kafila.org/2013/12/12/we-dissent-siddharth-narrain/> (Last visited on June 18, 2014).

⁹ Arvind Narrain, *A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation*, 4 INDIAN JOURNAL OF CONSTITUTIONAL LAW 84 (2010).

to equality¹⁰, non-discrimination¹¹, health¹², privacy¹³ and dignity¹⁴. Instead of constructively engaging at depth with any of these arguments, the Court fixated almost solely on the permutations and combinations of one question: “What constitutes carnal intercourse against the order of nature?”

I’d like to highlight where this question was coming from: the words of § 377 of the Indian Penal Code (‘IPC’), the statute in challenge, do not make explicit reference to a particular act or sexual identity. This is a reflection of its draftsman, Lord Macaulay’s reluctance to actually discuss the subject:

“[We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.”¹⁵

While not explicitly naming the offence of homosexual sodomy then, § 377 has effectively functioned to leave out from the domain of prosecution acts of consensual heterosexual sodomy.¹⁶ This was an assertion the Delhi High Court accepted without ado. It was also a point that remained largely unchallenged by the respondents in the case. Even before the Supreme Court, the respondents- now petitioners- did not focus on this point. It came, instead, from the Bench.

The first named petitioner, Suresh Kumar Koushal, was represented by Praveen Agarwal. The Bench asked Mr. Agarwal a number of questions on the statute, such as what § 377 explicitly spelled out and whether it concerned homosexuality as such at all.¹⁷ What, the Bench was interested in knowing, were the subjects it focused on. With minor changes to the phrasing and terminology, this was the core question repeatedly posed before every counsel.

¹⁰ Naz Foundation v. Govt. of NCT of Delhi, (2009) 160 DLT 277, ¶ 92.

¹¹ *Id.*, ¶ 99.

¹² *Id.*, ¶ 72.

¹³ *Id.*, ¶ 47.

¹⁴ *Id.*, ¶ 26.

¹⁵ Indian Law Commission, *Report on the Penal Code*, October 14, 1837, 3990-91, as cited in Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, XLI (46) EPW 4815 (November 18, 2006).

¹⁶ *Id.*

¹⁷ Orinam.net, *Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation: February 23 to March 27, 2012*, available at http://orinam.net/377/wp-content/uploads/2013/12/SC_Transcripts_Hearings.pdf (last visited on June 18, 2014).

As the respondents finally got to argue, they presented submissions on how this reference to acts really targeted a particular category of individuals solely on the basis of their sexual orientation, and robbed them of their dignity by reducing them to the status of unapprehended felons.¹⁸ Additionally they stressed on how, indeed, it was important to view this matter not as one about the right to commit a checklist of sexual acts, but to take a step back to see the animus in the law.¹⁹ One would have thought that in light of these arguments, the Court would move away from this line of questioning.

However, it did not. Almost completely sidelining the submissions made on selective persecution by the law, the Court continued to harp on the same questions: “What acts are carnal? What go against the order of nature? What is rightly proscribed under this section?” Their unrelenting focus on the preliminary question made it increasingly impossible to articulate arguments relating to homosexual intimacy or dignity. Instead, the discussions on carnal intercourse got increasingly colourful, with the judges imagining elaborate permutations of sexual acts and wondering out loud if they were covered. Particularly seared into my memory is “what if a father inserted his tongue while kissing his child?”²⁰

III. SIGNS OF TENDERNESS

In Jean Genet’s *Querelle*, a gay fantasia set in the port town of Brest, sex is often utterly conventional, where love is subversive. The act of gay sex tends to be inconsequential for its characters. Tenderness, on the other hand, is frowned upon. “No kissing, that’s for sure,”²¹ thinks Nono as he is about to have sex with the protagonist, *Querelle*. *Querelle* knows this too: “The boss had no tender feelings for him whatsoever, nor would it ever have entered his head that a man could kiss another.”²² Sex seems to maintain a kind of status quo in the story, operating in a register of dominance and inequality, so that there are many points in the book where characters don’t want to be caught expressing the desire to be buggered and so reveal their vulnerability. The manner in which this status quo gets destabilized is through the act of kissing, which becomes for Genet not just a question of making love, but truly an act of love. As *Querelle* notes that his kiss with Mario marks his first with a man: “As it was an act of love, and of forbidden love, he knew that he was committing evil.”²³ Where these two men are engaged in a game of not displaying tenderness, the kiss breaks the illusion. In turn, they need to compensate for that and set a new

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation: February 23 to March 27, 2012*, *supra* note 17, 18.

²¹ JEAN GENET, *QUERELLE*, 70 (1974).

²² *Id.*, 73.

²³ *Id.*, 206.

bar. To ensure that they don't get too far, "neither one of them dared to move on to the rough cheeks, where a kiss would have been a sign of tenderness."²⁴

More than a century of judicial discourse has displayed just this fear of tenderness, with appellate courts refusing to look at homosexuality as anything more than the carnal acts that constituted it. When the Delhi High Court passed its judgment in 2009, it broke through precisely that refusal to look past a singular act, instead it used the language of dignity, privacy, equality and inclusiveness. Note for instance the paragraph where the Court elaborates on privacy as a decisional right: "the expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves."²⁵

With Koushal however, the Supreme Court refused to acknowledge homosexuality as a question of love or intimacy. If there is a classification that § 377 makes, they found that it was simply between certain kinds of sexual acts without any reference to identity. Sure, the Section might be misused against LGBT individuals, but as long as the words in the provision weren't stating that, it was in accordance with the 'letter of the law'. Whether in the hearings or the text of the judgment, the judges constantly pushed discourse to the base question of sexual acts, that being the status quo through which they were able to avoid dealing with the core question of dignity. The possibility of love and intimacy on the other hand is what would have made this entire edifice crumble. Intimacy was the big enemy here, the subject that could have ruptured their constant digression to the strict letter of the law, and so it was that very discussion that they stymied.

IV. 'WHAT ABOUT ANIMALS?'

In her book 'Political Emotions', Martha Nussbaum describes compassion as "a painful emotion directed at the serious suffering of another creature or creatures"²⁶. A number of thoughts constitute compassion: first, the thought of seriousness, so that in experiencing compassion, the person who feels the emotion thinks that someone else is suffering in some way that is important and nontrivial. The second is non-fault, so that we don't typically feel compassion if we think the person's predicament is chosen or self-inflicted. There is also the notion of eudaimonistic thought, where the suffering person or persons are placed among the important parts of the life of the person who feels the emotion: "they count for me, they are among my most important goals and projects". The major human emotions are always eudaimonistic, meaning focused on the agent's most important goals and projects, and seeing the world from the point of view of those goals, rather than from some impersonal

²⁴ *Id.*, 200.

²⁵ Naz Foundation v. Govt. of NCT of Delhi, (2009) 160 DLT 277, ¶ 94.

²⁶ MARTHA NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 142 (2013).

vantage point. Moreover, Nussbaum notes that the thought of importance need not always antecede the compassionate response: the vivid presentation of another person's plight may jumpstart it, moving that person, temporarily, into the center of the things that matter.²⁷

Nussbaum also distinguishes compassion from empathy to the extent that it is an outgrowth of the latter: empathy is the ability to imagine the situation of the other, taking the other's perspective. Empathy requires entering into the predicament of another, and this in turn, requires some type of distinction between self and other, and a type of imaginative displacement.²⁸ Empathy isn't sufficient for compassion: actors may have consummate empathy with their characters without any true compassion; a sadist may have considerable empathy with the situation of another person and use it to harm that person. The link between compassion and empathy is the idea of imagination: the key variable distinguishing those in whom a story of woe elicits compassion, from those in whom it does not, is the experience of vivid imagination.²⁹

The judges at the Delhi High Court were sensitive to these qualities of compassion and empathy. These virtues came through in the hearings before it in a manner as strongly as they were denied before the Supreme Court. Arvind Narrain takes note of a moment in the Delhi High Court hearings where the lawyers read from Justice Albie Sachs' concurring opinion in a South African Constitutional Court decision³⁰:

“In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.”³¹

Narrain mentions how the judges were visibly moved by Justice Sachs' opinion and conferred among themselves.³² One of the judges stated that he wished the Additional Solicitor General was in Court to listen to Justice Sach's opinion.

²⁷ *Id.*, 145.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Arvind Narrain, *A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation*, 4 INDIAN JOURNAL OF CONSTITUTIONAL LAW 84 (2010).

³¹ National Coalition For Gay and Lesbian Equality v. Minister of Justice, (1998) 12 BCLR 1517, 217.

³² Narrain, *supra* note 30.

Albie Sachs' opinion in the South African Constitutional Court judgment was also invoked in the Koushal hearings before the Supreme Court. Once again, counsel for the respondents read out passages from the decision and argued that anti-sodomy laws offended the dignity of LGBT persons. Demonstrating no empathy or compassion towards the cause of LGBT persons, the judges here reacted with the following question: "In this Court, didn't the concurring judge say he was homosexual?"³³

The lawyer was quick to catch on to this (inaccurate) allegation of bias, point out that the judge the Court was thinking of was Cameron who was not on the case, but also expressing how a heterosexual judge could just as easily have bias. The real travesty of course was that the Court's discussion even veered in this direction.

Narrain also takes note of the series of exchanges between the judges and the Additional Solicitor General and two of the counsels arguing for criminalization of homosexuality.³⁴ By contrast to the evident empathy with which the judges heard the petitioners, the opposing lawyers were subject to questions which showed the judicial impatience with the immensely prejudiced nature of arguments.

The following exchange between the Bench in Delhi High Court and the counsels is illustrative of the judges' empathy towards the petitioner's case.³⁵ A lawyer referred to *R. v. Brown* ('Brown')³⁶ in which it was the House of Lords ruled that consensual sado-masochistic practices between adults were not entitled to protection on grounds of privacy. The Bench noted that:

"[...] when the Brown judgment was delivered, sodomy was not a crime in the United Kingdom. So even if § 377 is read down and homosexual acts between consenting adults does not amount to an offence under § 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if partner has consented to it."³⁷

The judges enquired about the relevance of the judgment. Mr. Sharma responded that "anus is not designed by nature for any intercourse and if the penis enters the rectum, victim is found to get injury".³⁸ The activity itself, he argued, causes bodily harm.

³³ *Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation: February 23 to March 27, 2012, supra* note 17.

³⁴ Narrain, *supra* note 30.

³⁵ *Id.*

³⁶ (1994) 1 AC 212 (HL).

³⁷ Narrain, *supra* note 30.

³⁸ *Id.*

Chief Justice Shah asked whether the submission that the act of anal sex itself causes injury or is likely to cause injury had been made before. He further questioned whether in any culture, western or oriental, in countries where the ban was lifted, or in World Health Organization Reports, anyone had argued that the act itself causes injury. Could you force Brown to the conclusion that sex between two males itself is a cause of injury? More importantly why had this submission never been raised before any court till now?³⁹

The counsel for petitioners read from Brown to make the point. He argued that “homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and [...] criminal acts warranting prosecution were committed in the course of such perversity”.⁴⁰ He said that “it was disconcerting to see tendency of homosexuals to indulge in group sex”.⁴¹ At this point. Chief Justice Shah lost his patience and interjected to ask if it was based on personal knowledge that Mr Sharma knew about homosexuals’ alleged universal enjoyment of group sex?⁴²

The Supreme Court had startlingly different responses to similar claims. The Additional Solicitor General P.P. Malhotra, representing the Union Ministry (which had not even authorized him to appear in the first place, since the Government had decided not to challenge the Delhi High Court) made the following argument:

“Nature has made man and woman. His penis can be inserted into female organ because it is constructed for that. It is natural. Now, if it is put in the back of a man where human waste goes out, the chances of spreading disease is high. There are United Nations studies to show this.”⁴³

I take a moment to look back to Nussbaum’s words. For her, a response that displayed a modicum of compassion would be one that was at the very least non-trivial; and where empathy would require the ability to imagine the situation of the other. The absurdity of this argument would warrant its outright dismissal. In the alternative, it is expected that the apex court of this country would at least subject it to thoughtful or logical scrutiny. Whatever the court’s thoughts on constitutionality of § 377 were at this point, it did not require too massive a leap of imagination to see the power that such hateful speech had when uttered in a court of law and left unchallenged. Empathy

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation: February 23 to March 27, 2012, supra note 17.*

would require the Court to understand that, compassion would require that they act on it seriously.

The immediate (and for that matter, ultimate) response of the Court did neither. Instead, Justice Mukhopadhyay chose to ask the following question: “What about animals?”⁴⁴

V. WHAT DOES JUSTICE SINGHVI READ?

The most powerful statement of the law’s violence was an affidavit read out in the open court about the brutal rape and torture of a member of the hijra community, a moment at which even the judges’ incessant questioning ceased. Also read out to the judges were affidavits of gay individuals’ struggles to come out and live a full life in the shadow of criminality, also put before them were personal narrative from a lawyer arguing the matter. This lawyer was responding to a question a judge had placed before another advocate, where they asked if the counsel had ever met a homosexual. At that moment, the advocate simply brushed off the question, but here, the lawyer repeated it to say that he did in fact know gay people - they were part of his family, of his circle of friends, and their lives were affected by this law, regardless of what its words stated.

And then there was literature.

“As long as someone has no power over me, I don’t care what they read, or if they read at all. It’s not for me to judge how people should live their lives. But once someone has power over me, then, yes, their reading does matter to me, because in what they choose to read will be found what they think and what they will do. As I wrote in one of my letters to the man, if Stephen Harper hasn’t read *The Death of Ivan Ilych* or any other Russian novel, if he hasn’t read *Miss Julia* or any other Scandinavian play, if he hasn’t read *Metamorphosis* or any other German-language novel, if he hasn’t read *Waiting for Godot* -if Stephen Harper hasn’t read any of these, then what is his mind made of? How did he get his insights into the human condition? What materials went into the building of his sensibility? What is the colour, the pattern, the rhyme and reason of his imagination? These are not questions one is usually entitled to ask. The imaginative life of our fellow citizens, like their finances, is by and large none of our business. But once a citizen is elected to public office, then their finances do become our business, and politicians routinely

⁴⁴ *Id.*

have to account for their financial dealings. It's the same with their imaginative dealings. Once someone has power over me, I have the right to probe the nature and quality of their imagination, because their dreams may become my nightmares".⁴⁵

In 2007, Yann Martel made a visit as part of a delegation to the Canadian House of Commons in March 2007 marking the 50th anniversary of the founding of the Canada Council for the Arts. Harper, the present Prime Minister of Canada, was in the House that day but he decided neither to look up at the celebratory delegation nor offer words of congratulation on the council's milestone, eventually prompting this reaction from Martel. What does Stephen Harper read, and why is it important to us?⁴⁶

We do not know what the judges in the matter read otherwise, but we do know that an important submission made to them was the text of *Same Sex Love in India*⁴⁷, a much disseminated anthology that locates queer narratives in different periods in India's history. We know for a fact that Justice Singhvi had read at least one of the stories in the book, and had commented on it with surprise.⁴⁸ A number of us observing the proceedings perceived his comment as a silver lining, reflecting the establishment of a connection, where empathy and compassion intersect.

We know now that those hopes were misplaced.

In the final assessment, the Court went against its own recent history of judicial activism. In dereliction of its responsibilities as a counter-majoritarian institution, it hid behind 'deference' to the legislature, stating that it must respect the doctrine of separation of powers and the democratic mandate of the legislature.⁴⁹ In the process, it attempted to hide its prejudice, though the cloak slips when it makes references to the "so-called rights of LGBT persons"⁵⁰ or states that since the LGBT community constitutes a "miniscule fraction",⁵¹ the High Court had erred in ruling that the law was unconstitutional.

⁴⁵ See Clair (The Captive Reader), *What Is Stephen Harper Reading?—Yann Martel*, February 17, 2010, available at <http://thecaptivereader.com/2010/02/17/what-is-stephen-harper-reading-yann-martel/> (Last visited on June 18, 2014).

⁴⁶ *Id.*

⁴⁷ RUTH VANITA AND SALEEM KIDWAI (EDS.), *SAME SEX LOVE IN INDIA: A LITERARY HISTORY*, 2010.

⁴⁸ *Notes of Proceedings in Suresh Kumar Kaushal v. Naz Foundation: February 23 to March 27, 2012*, *supra* note 17.

⁴⁹ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶ 32.

⁵⁰ *Id.*, ¶ 77.

⁵¹ *Id.*, ¶ 66.