

Queer¹ women and the law in India: The writ of Habeas Corpus

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For the “I” to launch its critique, it must first understand that the “I” itself is dependant upon its complicitous desire for the law for the possibility of its own existence”

*Judith Butler*³

This reflection on the “I” when read as queer women in many ways summarises the tension this paper attempts to analyse. To explain this further a cursory look at the position of queer women’s everyday lives as well as their ‘position’ vis-à-vis the law is important. The limitation of space and mobility that affects the lives of all women also applies to queer women. This is explained best by contrasting their story with that of many queer men in India. Many queer men in India are often married to

¹ The term Queer is used by some activists in India who work around issues of gender and sexuality as well as theorists to mean a more holistic critique of heteronormativity extending beyond what is seen strictly as sexual identity or sexuality. It is a one that engages with a larger world view that recognizes and critiques complex systems of class, caste, gender, sexuality, race, region, religion etc. See Menon, Nivedita; *How natural is normal? Feminism and compulsory heterosexuality*; in *Because I have a Voice: Queer Politics in India*; (Yoda Press; New Delhi; 2005) pg. 33- 40. In the context of this paper however, it is being used to refer to women who engage in sexual and/or romantic endeavours with other women. It also refers to, in some cases, women who identify as men or as transgendered individuals. While the complexity of these identities in the context of law will be discussed in the paper, it tells their story and not of individuals without vaginas who might identify as women. The socio-legal perceptions of the latter differ significantly and are outside the scope of this particular paper. The use of the phrase ‘Queer women’ is a conscious political and theoretical choice to step out of an engagement with a long list of ‘names of identity’ which can never be exhaustive but instead to use a limited reading of a broader theoretical coinage of ‘Queer’.

² It is important to note at the very outset that the co-authorship of this paper as of our earlier work on “*Queer women and the law in India*” is in itself a statement of the dialogues and tensions we wish to highlight. Apart from both of us being queer women and feminist activists, we also come from two different kinds of training in academic language. Priya being trained primarily in law and Ponni primarily in the social sciences, the partnership is one in which the dialogue between different kinds of criticisms of the law through articulations of feminism occurs. Our reflections on a socio-legal problematique are as much a product of this constant dialogue as it is of the other material we analyse here.

³ Judith Butler; “*Conscience Doth Make Subjects of Us All*”; *Yale French Studies*, No. 88, *Depositions: Althusser, Balibar, Macherey, and the Labor of Reading*. (1995), pp. 6-26.

women. This set up might be a pressure on them. But this multiple life, as it were, is one that is even possible because of the space and mobility that remains the privilege of men. Apart from the privilege within the private sphere, the public sphere still remains one that is not entirely comfortable with women's being in it and their expression. The option of discussing 'cruising' in public parks in the case of queer men remains an impossibility for queer women. Queer women often meet, get to know each other and evolve different kinds of relationships through networks created specifically for this purpose and/or in their everyday lives like everybody else. The gendered privilege then is a comment on the construction of the role of sex in the lives of men and women. It is often seen as drastically different. A generalization about this perception would invariably be flawed but we argue that the relative levels of looking at 'sex' as a 'good' thing remains higher for men. This, in turn is a comment on how women and men view their bodies as those that feel pain, shame and pleasure. A language for pleasure then remains one that is a relative privilege for women as opposed to its 'normalisation' for men.

This then brings us to an observation about single gender spaces, which are common in our society. These spaces often become ones where illicit pleasures are experienced. The story of the "L" in a ladies college hostel, we know of, makes an important point. The hostel saw a lot of same sex activity often not secretive within the hostel. These encounters did not always grow into longer term emotional commitments between the women involved. It often did not lead to these women identifying as 'lesbian' in college or in the hostel. "L" was how all the girls referred to those who engaged in same sex sexual activity. This "L" was a non-descript, not so dangerous entity. It almost seems as if the "L" was safer if not absolutely safe than the "lesbian" was. In the case of both queer men and women the act of naming then

becomes one that is threatening rather than the sexual act as long as it's done in secret.

Even with this primary look at the aspects of queer women's lives, it becomes apparent that it has many things in common with any heterosexual woman who chooses her own partners (irrespective of caste, class, religion, race, region), choose to engage in sexual activity before or outside wedlock, decide to be a single mother, have multiple sexual partners and so on. There are however significant differences in the challenge that queer women articulate to heteronormativity. First, they shake the very basis of heteronormativity, which is the need for a man in an intimate, interdependent relationship. Second, the structure of family is challenged significantly as these women then engage in sexual activity which does not and cannot result in procreation or in the fixed legal category of marriage. Third, and most significantly, lesbian women's sexual activity is one that is ONLY for sexual pleasure. Sexual pleasure, a 'luxury' not allowed to women as a whole and to men (the disallowing being a gendered process) is in many ways the basis of lesbian sexual activity, thus making it incomprehensible and a threat⁴.

Section 1

Queer women and the law

'section 377 explicitly linked criminal sexuality... with male agency, and hence did not *have to* criminalise lesbian sexuality...'

(Emphasis added)

⁴ Ref: Priyadarshini Thangarajah and Ponni Arasu; *Queer women and the law in India*; (Paper presented at Critical Legal Studies Conference; Hyderabad; 2006)

*Giti Thadani*⁵

This complaint is not an unfair comment on the position of queer women within the ambit of sec. 377 of the Indian Penal Code. The articulation of sec 377 as well as the legal position of queer women is one that is a more complicated process⁶. Unlike the well known limitations of articulating social struggles and identities around a law Sec. 377 and the struggle against the same remains primarily male and thus addresses queer men. The symbolic potential of the struggle against Sec. 377 within the context of the history of the law and its role in constructing a homosexual identity remains a significant one⁷.

Before entering a more specific analysis of the role of the writ of habeas corpus in the lives of queer women, we have to set out the context of the relationship between queer women and the law in India. This history and analysis is one at its nascent stage and is not yet part of common parlance while discussing the relationship between law and queer people in India. Habeas corpus cases are part of this little known story of queer women and the law.

Below are some examples of how various laws have affected queer women. This rather simplistic narration is more to broaden the common sense knowledge of the relationship between law and queer women in India. A more analytical discussion is outside the scope of this paper⁸.

⁵ Thadani, Giti; *Silence and invisibility*; in Facing the Mirror: Lesbian writing from India; Penguin books; 1999

⁶ Thangarajah, Priyadarshini and Arasu, Ponni; *Queer Women and the Law in India*; (paper presented at Critical Legal Studies Conference; Hyderabad; 2006)

⁷ Narrain, Arvind; Queer: 'Despised Sexuality', Law and Social Change; BOOKS for CHANGE; Bangalore; 2004

⁸ For a more detailed discussion see Thangarajah, Priyadarshini and Arasu, Ponni; *Queer Women and the Law in India*; (paper presented at Critical Legal Studies Conference; Hyderabad; 2006).

Section 340⁹ and section 339¹⁰ of the Indian Penal Code (IPC) makes confinement done in a wrongful manner a crime. Wrongful confinement then means being confined by a person who does not have the authority to restrict your movement. In habeas corpus cases we see this section being used in alleging that either the state or in the cases of women husband/lovers or fathers/ families are illegally confining the woman. In the case of M and L who ran away together realising that they could not love together in their village the parents filed a case of illegal restrain and even though L stated that she would not like to go home the court ordered that this 21 year old be sent back to her parents.¹¹

Section 361¹²- Kidnapping from lawful guardianship- if a person ‘entices’ or takes a minor(under the age of 18 for girls) from legal guardianship without the consent of the legal guardian, they can be charged for kidnapping. Consent of the woman/girl kidnapped is immaterial under law. Kidnapping is a crime that most families argue in the case of queer women and it’s interesting to note the trouble that is taken to prove the minority of the woman so as to keep her in the family’s custody. What is even more interesting in this regard is the courts decision to send an adult woman back into the home that she does not wish to live in and fulfill ironically the requirements under section 340. In the case of S (21) and R (18) eloped to Punjab, where they were traced after R’s parents filed a kidnapping complaint. S was forced to have a medical exam to establish she was a woman. Under pressure, the girls publicly declared they

⁹ Section 339 of the Indian Penal Code. (IPC) -Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

¹⁰ Section 340, IPC-Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

¹¹ April 2006, Kokrajhar, ASSAM

¹² Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

were just friends. On 8 March, the Halol magistrate ruled that as consenting adults they were free to live together.¹³

Section 362¹⁴, - Abduction is another allegation that gets thrown at women who run away together. The allegation then is that one of them enticed the other away to another place with the intent of committing a crime such as an illicit sexual relationship. P, a widow with an 8-year-old son, was jailed for “abducting” S (19). The two had exchanged vows in a temple and eloped. S was sent back to her parents. The police claimed P was “characterless” and involved in “criminal activities”.¹⁵

Interestingly **section 366** has also been used against lesbian women. Section 366 criminalises kidnapping that is done with the intention of compelling someone to marry them.¹⁶ This section is used widely by parents of heterosexual couples when they run away. R and M met while working together. When the parents of R heard of the relationship confined her within their home. However R and M left home. But their parents filed a complaint under section 366. The magistrate court decided that the 21 year old R must return to their parents. The decision was appealed by the activist, and lawyers in the Delhi High Court. The high Court Judge agreed that no adult can be forced to go with their parents if she does not wish to. Through the case, the relationship between R and M was consciously concealed.

¹³ Jan 2006, Halol, Gujarat.

¹⁴ Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.

¹⁵ Dec 2004, Patna, BIHAR

¹⁶ Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Perjury has also been used against lesbian couples. Under the IPC giving false evidence to the court is seen as a crime.¹⁷ SR was a female transsexual who was married to ST. They both live in Pakistan. ST's family filed a case against SR for Kidnapping and fraud. While the magistrate court decided in their favor the High Court on the allegation by ST's father that SR was a woman ignored the contentions before him and ordered that SR be examined. When it came to be known that 'he' was indeed a 'woman' SR and ST were sentenced to 3 years imprisonment for perjury. Note here that although ST had undergone basic surgery and he himself identified as a man, the court took no heed of this and declared his 'manhood' a lie in the eyes of the court. However the Supreme Court in a path breaking judgment not only held that there was nothing wrong with the relationship that these women had but that also there was no perjury on their part as it was not illegal to change one's identity¹⁸.

In cases regarding runaway heterosexual couples the sexual relationship however illicit it maybe, either due to difference in class, caste, religion is minimally acknowledged when the parents or the lover is arguing about various other criminal charges. Proving marriage becomes the most important aspect in most of these cases. However in the case of runaway lesbians the 'aggrieved' parents and the lover both are seen arguing on the issue of majority. The problem with such an argument as we see is that the idea that a woman who is a major belongs to nobody seems to not sit well with all judges. So women above the age of majority, independent, are sent home or to shelter houses against their wishes.

¹⁷ Section 191- Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

¹⁸ http://news.bbc.co.uk/2/hi/in_depth/6679733.stm,
<http://womensspace.wordpress.com/2007/05/31/todays-male-terrorism-female-born-couple-imprisoned-for-marrying-to-prevent-one-of-them-from-being-sold-to-pay-uncles-gambling-debt/>,
<http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=734>,
<http://www.samarmagazine.org/archive/article.php?id=239>,
http://www.dailytimes.com.pk/default.asp?page=2007%5C10%5C30%5Cstory_30-10-2007_pg13_2

The other aspect that draws one's attention when reading these cases is the battle the court faces with the women who don't conform to her gender role. The judge grapples with the identity and yet leaves it unsettled in his judgment.

Feminist legal debates in India and the place of lesbians

The story of feminist legal debates is a nuanced one. The story has been told by many with different foci and in many contexts¹⁹. It would suffice here to say that legislation has been a significant form of affirming women's rights in India and thus have formed a significant analytical frame²⁰ for gender and feminism in India. At the same time however, the effects of legislations on the lives of women have been analysed critically thus questioning the strength of advocacy for legislation as a strategy for feminist struggles. 'if oppression could be tackled by passing laws, then this decade would be adjudged a golden period for Indian women. When protective laws were offered on a platter. Almost every single campaign against violence on women

¹⁹ Some significant texts on feminist movements in India have discussed in detail, the role of advocacy for legislation as well as the debates around the same. E. John, Mary and Nair, Janaki ed.; *a question of silence: the sexual economies of modern India*; Kali for Women; New Delhi; 1998. Menon, Nivedita; *Embodying the self: Feminism, sexual violence and the law*; in Subaltern Studies XI: Community, Gender and Violence; Permanent Black; New Delhi; 2000, pg. 66-106, Thapan, Meenaksi ed.; *Embodiment: Essays on Gender and Identity*; Oxford University Press; India; 1997. Khullar, Mala ed.; *Writing the Women's Movement: A Reader*; Zubaan; New Delhi; 2005. Mukhopadyay, Maitreyee; *Legally Dispossessed: Gender, Identity and the Process of Law*; Stree; Calcutta; 1998. Shah, Nandita and Gandhi, Nandita ed.; *The issues at stake: Theory and Practice in the Contemporary Women's Movement in India*; Kali for women; New Delhi; 1992. Kumar, Radha; *History of Doing: The Women's Movement in India Verso and Kali for Women*; 1993. Kapur, Ratna; *Erotic Justice: The Law and the New Politics of Postcolonialism*; Permanent Black; Delhi; 2005. Chakravarty, Uma; *From fathers to husbands: of love, death and marriage in North India*; in 'Honour': Crimes, Paradigms and violence against women; edited by Lynn Welchman and Sara Hossain; 308-331; Spinifex Press and Zed books; 2005. Baxi, Pratiksha. *Habeas Corpus in the Realm of Love: Litigating Marriages of Choice in India*. *Australian Feminist Law Journal*, 25; 2006; 59-78. Parashar, Archana and Dhanda, Amita ed. ; *Redefining Family Law in India*; Routledge; India; 2008

²⁰ It is important to remember that by frame we do not mean an unquestioned context but one that is useful but also critically analysed constantly.

resulted in new legislation' (Agnes 1992) says Flavia Agnes a significant feminist lawyer based in Bombay.

There have been more specific analyses about the role of sexuality in the Indian women's movement(s) and law has been one aspect of these studies. 'Interestingly enough, it is in the legal sphere..., that the mediations of sexuality by the structures of gender, caste and class are most clearly revealed' write John and Nair in 1998²¹.

For this particular essay, we can borrow some aspects that feminists have pointed out which might be useful to our analysis. With regard to the addressal of sexuality within legal activism by feminist struggles, certain broad observations can be made.

First, the history so far of feminist struggles engaging with the law in matters concerning primarily violence of different shades. This is not, for a moment, to say that these movements and discussions are not significant. It is to contextualize them in a similar manner. The law and its language often recognizes violence in a way that it does not many other acts. Social movements, including feminists, have also read into and used this aspect as an asset. Legal advocacy around the issue of sexual violence has in turn been significantly criticized and its limitations articulated²². In the context of this paper, this broad observation serves another purpose. Let's consider for a moment the struggles of bar girls in Bombay and the debate over sex work in India. Both struggles have been also legal among other things. Both of these struggles have not received the unanimous support of the feminists in India the way

²¹ E.John, mary and Nair, Janaki; a question of silence: the sexual economies of modern India; Kali for women; New Delhi; 1998; reprinted in 2000

²² Menon argues that the 'binary logic' of the law cannot comprehend women's experiences in all its complexity. She further questions the construction of the 'body' as a preexisting entity which can be universalized through the law. She speaks of the primary place given to legal changes in feminist practice. She also speaks of how we might be reasserting notions that we seek to break through processes of law, where we will be forced to speak its binary language. See Menon, Nivedita; *Embodying the self: Feminism, sexual violence and the law*; Sub altern Studies XI: Community, Gender and Violence; Permanent Black; New Delhi; 2000, pg. 66-106

the Domestic Violence Bill which then became an Act (which is a contemporary of both the bar girls' case and the debate over sex work) received²³. This, of course, is not an allegation but is an instance that can be used for a specific kind of analysis. Lets for a moment speculate on what the difference is between the women who is the subject of the domestic violence act and the bargirls' and sex workers. The difference seems to be a clear articulation of desire in the case of the latter. All these women might invoke the language of rights, citizenship etc but the differences between them are important. We are yet to learn a feminist language that can incorporate discourses of pain, pleasure and shame; sometimes with blurred lines between them. This language is not in the least apparent, but the process of finding it might be a worthwhile feminist exercise in India today. This process is one that we believe, feminists have always been in, and are now slowly trying to create means to communicate it as a political language. Lesbian women in many ways symbolize this need for a complex language. Lesbians tell us the story of violence unleashed on them ONLY by virtue of their 'deviant' desire and their choices to live by them²⁴. Lesbians²⁵ seem to symbolize this within women's movements, queer struggles and in moments when these movements interact with the law.

Second, while it has critiqued the heteronormative family from various angles;; violence against women, dowry, female infanticide, to name a few, the articulation of

²³ Here again, one is not suggesting unanimity in every aspect of the act or the process by which it was formulated. A general consensus however did prevail, over the need for the law. Sex workers' and Bar girls' on the other hand had the support of some feminists and not of others.

²⁴ This is not to deny the role of desire in women's experiences in general as well as in experiences of violence in particular. It is only to emphasis the singular nature of desire's role in the lives of queer women and the violence they face.

²⁵ Here, we changed the word 'they' to 'lesbians leading to repetition of the term. This comes from the inhibition in using the word 'they' which could suggest an 'othering'. 'we' on the other hand also becomes limited as it is not exhaustive or entirely true when we as queer feminist activists writing this paper, privileged by virtue of our class status as well as our politics that have spared us much of the violence faced by many other lesbians.

the fact that law is entirely based on the ‘legitimate’ heteronormative²⁶ ‘family’ and heteronormative marriage has not been done enough. Here again, one has to consider bargirls and sex workers. There have been debates along the lines of ‘objectification of women’ and in that context bar girls and sex workers²⁷. There have been other nuanced differences such as over ‘decriminalising’ vs. ‘legalising’ in the context of sex workers. There have been some criticisms that the emphasis on ‘pleasure’ as it were, cannot be extended to the level of denying the experiences of violence all together. Sex workers’ organisations and activists have critiqued feminists in this country as addressing only the so called ‘chaste’ women (chaste being a euphemism for married) while leaving out the issues of the ‘veshya’. From these debates, however, we hope to ask a different question. Is this reluctance just about giving secondary status to women outside the folds of normative ‘marriage’ and ‘family’; or is it also emerging from the discomfort with and/or the lack of a feminist language that addresses issues outside the frame of marriage and family?

These issues discussed above will run through the paper and return in our analysis of the writ of habeas corpus and its relation to queer women in India.

²⁶ Heteronormativity here is being used to refer to a system that asserts as the norm not only heterosexuality but also caste, religious, regional oppressive factors. Arranged marriages for instance have been critiqued by feminists as a system that keeps in place all these practices at the cost of loss of agency to the woman in the matter of choosing the course of her life.

²⁷ Approaches to prostitution; Faultiness: A reader for “trafficking in South Asia; A conceptual clarity workshop”; JAGORI; 1998

Section 2

Habeas corpus and queer women

Feminist have argued and convincingly so that the writ of habeas corpus is often used by members of the natal family of a woman to claim ownership over her in cases of marriage against the will of and/or without the consent of the natal family. This corresponds to the feminist critique of family/ community's ownership of women's bodies, spaces, lives. Nasser Hussain discusses one of the earliest habeas corpus cases involving a woman where the unfathomable nature of looking at her as someone with 'individual agency' makes the case into one between two religious organisations. One that the girl seems to have chosen to join and the other that supports and helps the parents to 'get her back'²⁸. His discussion of the 'writ of liberty' (read the writ of habeas corpus) where he argues primarily that the evolution of habeas corpus in the pre- world war II period is one that is a conflict of assuring rights of people while not allowing any challenge to the colonial state or its policies²⁹. This analysis can be a useful one in the feminist context, of maintenance of normativity while claiming sensitivity to rights. More specific theorization in the context of habeas corpus, to carry forward the 'ownership of women' argument has been done through an analysis of case law involving women³⁰.

What might often get left out is the upholding of the institution of marriage itself as the only recognizable institution of partnership/intimacy in the context of

²⁸ Hussain, Nasser; The "writ of liberty" in a regime of conquest; in *The Jurisprudence of Emergency: Colonialism and the Rule of Law*; The University of Michigan Press; 2006.

²⁹ *ibid*

³⁰ Chakravarty, Uma; From fathers to husbands: of love, death and marriage in North India; in 'Honour': Crimes, Paradigms and violence against women; edited by Lynn Welchman and Sara Hossain; 308-331; Spinifex Press and Zed books; 2005. Baxi, Pratiksha. Habeas Corpus in the Realm of Love: Litigating Marriages of Choice in India. *Australian Feminist Law Journal*, 25; 2006; 59-78

heterosexual couples. Put simply, if a heterosexual couple were to counter any case of habeas corpus (or any other case) filed in court by the girl's family, they will have to be legally married. Proving legal marriage has been the crux of their defense in most of these cases. This of course does not mean that it assures the woman's interests in many ways. First, the natal family might still be privileged in the courtroom³¹. Second, the woman's individual interest within the marriage is left unquestioned as it is the couple's sole defense and questioning it, would mean jeopardizing their chances of being with each other. Thus the woman often does not question the choice to get married or to stay in it as her other option (according to the court) remains her natal home, which she has left for a myriad of reasons, including her desire to be with her male lover.

This power tussle between the father and the husband as it were is not such a simplistic process. It is not a simple case of the state maintaining normativity while claiming sensitivity to rights. It is one that complicates the very intention of the state. "...the lower judiciary acts in complicity with the family to "rescue" adult women from "improper" alliances, which contradicts the juridical emphasis on enforcing marital relations through the technique of reconciliation. The emphasis on upholding the institution of marriage means that the distinctions between arranged marriages and marriages of choice must find challenge within the judiciary..." argues P. Baxi³²

This particular paper is in many ways an extension of P. Baxi's argument to look specifically at certain specific aspects, using the experiences of queer women. First, to look more critically at the implication of the supreme legitimacy of marriage as an institution in the lives of women.

³¹ *ibid*

³² Baxi, Pratiksha. *Habeas Corpus in the Realm of Love: Litigating Marriages of Choice in India*. *Australian Feminist Law Journal*, 25; 2006; 59-78

Second, to look at the bodies that the court identifies and those that it does not. In this case it would be that of the queer woman with her desires. In the specific context of habeas corpus U.Baxi's discussion of 'readerly rights' is useful. He complicates the notion of rights ensured within the constitution by arguing that rights are not those that are given to citizens but are those that can be read into the constitution. Thus, if that reading is not possible then acquiring those rights through constitutional means also becomes difficult. It is this 'readerly right' that is the one we possess³³. Reading queer desire then is the challenge. The standard comment on queer women in court and in society at large as well as within queer movements themselves have been that of 'silencing'³⁴. This argument however, counters as well as takes forward this view to see it as a non-recognition.

Third, to look at the implications of this non-recognition and how it can be used for an assertion of oneself and one's desire. Yet again, the arguments so far have been a complaint of silencing and thus a lack of agency to assert one's rights and desires³⁵. In this paper, we hope to ask questions which might complicate this alleged 'lack of agency'.

The next section will look at the two cases that we know of that has involved queer women and the writ of habeas corpus. These are the only two cases we have found so far. For the purposes of this paper we have looked at records of habeas corpus cases involving women from the 1940s till October 2007. This exercise was to look for,

³³ Baxi, Upendra; Politics of reading human rights: inclusion and exclusion within the reading of human rights; in The legalization of human rights: multidisciplinary perspectives on human rights and human rights law; edited by Saladin Meckled-García, Basak Cali; Routledge; 2006

³⁴ Ref: Priyadarshini Thangarajah and Ponni Arasu; *Queer women and the law in India*; (Paper presented at Critical Legal Studies Conference; Hyderabad; 2006)

³⁵ Thadani, Giti; *Silence and invisibility*; in Facing the Mirror: Lesbian writing from India; Penguin books; 1999

what we almost in jest now refer to as, 'lesbian undertones'. In all these cases there was a husband/male lover and a father/natal family. We have no basis to assert that there might have been same sex desire in these cases. We can however state that many cases involving women wanting be with/love other women have not entered the court records. Below is the script of a hearing that I, Ponni was witness to. The case was one were a lesbian couple had left home and the parents of R, one of the women charged the other M, with a kidnapping charge. R had to present herself at the Delhi High Court and declare that she left home out of her own will and volition. We 'won' the case as the judge declared that R was an adult and can live wherever she pleases. The charges against M were nullified. Here goes the scene:

(a packed court room with an old, largely pleasant looking man as the judge. A queer friendly senior lawyer is fighting our case. I stood next to R dressed respectfully in a salwar kameez, duppatta and bindi {read good north Indian girl}.)

Parents' lawyer (*after restraining R's parents from physically pushing us. angry tone*): Your honour, M has kidnapped R to use her for immoral and illegal purposes.

Our lawyer (*in a calm and composed tone*): Your honour, there remains no proof to assert that R has not left with her own will and volition. R does not have any relationship with M apart from being a colleague and we have no knowledge or concern with her whereabouts. (*in a mocking tone*) Besides my dear friend here in his submission has alleged a sodomy charge. This is unheard of as you can clearly see that R is a woman and so is M from what I

gather. This day we had to see **where women are being charged with sodomy.**

(giggles in court and the judge laughs openly)

Thus the exact nature of M and R's relationship is known only to the activists involved in the case and our lawyers and has been actively kept out of court records. This remains the primary methodological problem with writing a legal history of lesbian relationships and law in India.

Further, one of the two cases we discuss below, N and R was thrown out of court for reasons mentioned below. One can comfortably assume that this is not specific to N and R but is the story of many such cases invoking the writ of habeas corpus or any other law. We can write this story only through our access to queer archives that are being built in India which tells stories that could never enter the haloed sphere of the court.

Two stories...

Two adult women. M aged 29 and S 19 were working together in an industrial unit that employed unmarried women at Varapuzha. In May 2000 girls left their village for Coimbatore, M had changed her name to Babu, cut her hair and dressed like a man. S's family filed a complaint regarding her disappearance. When the women heard of this they returned home. They were produced before the first class magistrate in Paravur. At the hearing M was dressed as a 'man'.³⁶ The court then granted them permission to live where they want to but the families want them separated.³⁷ Even though the court ruled that two adults could live together as they wished the parents separated them and took S

³⁶ Malayalam Manorama, October 11, 2000 Mini in Legal Battle to Get her Friend Back

³⁷ "Fire on an Island: Two Women Decide to Live Together Amid Society's Cat Calls" from The Week, October 1, 2000 by Charmy Harikrishnan

with them. Subsequently M filed a writ of Habeas Corpus demanding that S be brought to court and that she was being illegally confined by the parents. The relationship however broke down when S was brought before the High Court and she said that she was not being held against her wishes and that she would like to return to her parents.³⁸

In the year 2005 N filed a writ of Habeas Corpus, at the Kerala High Court for the release of R, who was being confined against her wishes by her parents. N and R were friends for a long time and R confided in N about the abuse she faced from her brother. This was one of the reasons why R wanted to leave her home. The situation increasingly deteriorated and the girls decided to run away as R threatened to commit suicide, if she continued to stay in that house. The two women ran and sought shelter at Sahayatrika³⁹ and called their parents to assure them of their safety. The parents complained to the police due to which they had to be presented to the magistrate who allowed the women to do as they wish. Despite the assurances given by their parents they were separated and N was put under medication. N escaped from her parents but was unable to find R and thus sought remedy under the constitution. The court however dismissed the writ of habeas corpus on the grounds that N had no right to seek this remedy as she had no *locus standi*, she was not related to R neither was she an affected party .

The stories within the story

Let us take a cursory look at available court records and newspaper reports about the two cases in question. These quotes involve descriptions of the women involved by the press which often uses the language of the court as well those by the women themselves in court documents and in the press.

³⁸ Malayalam Manorama, November 23, 2000 S Not in Confinement: Divorces M

³⁹ Sahayatrika is an organisation based in Kerala that works on issues concerning queer women and facilitates creation of safe spaces for queer women and a network of queer women within kerala. Sahayatrika's work has involved a large number of emergency interventions

Naming the relationship

“close friends for the past 2 and half years⁴⁰”

“The petitioner submits that she has been searching for her friend⁴¹”

“M returned to her home with S. Her father Bhaskaran received the friends with pleasure.⁴²”

“...extremely nervous nature and would easily get frightened and it was a major support for the detainee that she had a friend.⁴³”

The most common and safest form of referring to lesbian women in the court and in reportage has been ‘friend’. A process of sanitizing, deintensification of the relationship then is in place.

“S is trying to give up her partner and friend M after living together for months in Coimbatore,⁴⁴”

“...who kidnapped her partner and lover.⁴⁵”

The closest one can see that reportage often comes to the use of the term ‘partner’. A term common to usage also in the case of unmarried heterosexual couple. Rarely does one see the word ‘lover’. This however is used without leaving any loose ends in declaring the illicit nature of this ‘love’ affair.

“They lived there for three months as husband and wife.⁴⁶”

“They came back from Coimbatore after three months of married life. After they got this permission they were living together as husband and wife in M’s house.⁴⁷”

⁴⁰ *N v. State and Others*; 2005

⁴¹ *N v. State and Others*; 2005

⁴² Malayalam Manorama, October 11, 2000; M in Legal Battle to Get her Friend Back

⁴³ *N v. State and Others*; 2005

⁴⁴ Malayalam Manorama, October 13, 2000; S Changes Her Mind; Refuses M

⁴⁵ Malayalam Manorama, October 11, 2000; M in Legal Battle to Get her Friend Back

⁴⁶ Vanitha October 15-31, 2000; ‘Living together is marriage?’

⁴⁷ Malayalam Manorama, November 23, 2000

A common and interesting practice is one of referring to these couples as 'married'. This is done, one can argue for two reasons. One, often the couples themselves imitate a marital relationship through performances of their gender and the roles within marriage. Second, the press often has no other way of recognizing this relationship except through the trope of marriage. Taking the invocation of marriage as a description to new limits is a heading of an article which says, "S not in confinement, divorces M"⁴⁸

"The Petitioner fears for the safety of the detainee and it is under these extreme circumstances she is approaching this Hon'ble court."⁴⁹

"...into a depressive state and would threaten to commit suicide if she went continued staying there. It was only on the persuasion of the Petitioner that the detainee would avoid taking that extreme step."⁵⁰

"...earlier she tried to commit suicide. She threatened S's family saying that she would hang herself in front of their house if they don't allow S to live with her."⁵¹

In a desperate bid to at least begin to articulate the intensity of the relationship to the court, the petitioner above uses convoluted language. As there remains no language to articulate intimacy outside of heterosexuality and heterosexual marriage, she is left with no choice but to argue her case in a language that is almost incomprehensible to the court. The last quote is anecdotal to prove the intensity and thus the significance of the relationship.

⁴⁸ Malayalam Manorama, November 23, 2000; S Not in Confinement: Divorces M

⁴⁹ *N v. State and Others*; 2005

⁵⁰ *N v. State and Others*; 2005

⁵¹ Malayalam Manorama, October 11, 2000; M in Legal Battle to Get her Friend Back

The natal family's recognition of the relationship

“ he started tormenting the detainee mentally by spreading rumors that she did not have a healthy relation with the Petitioner.⁵²”

“S’s relatives stated that M began a close relationship with S by loving and threatening her⁵³”

Some observations can be made from the above account. First, the court hears the cases without being ever exposed to the full nature of the case in question. This of course remains inadequate and unjustified legal practice. Second, this exposure of the court is impossible as there is no legal language that permits the nature of this relationship. If one were to risk serious consequences and use terms such as ‘lesbian’ or ‘homosexual’ or ‘women loving women’, the court might still not comprehend the concept and if it does the situation is worse as it gives space for criminal prosecution. The media follows the court in its language adding to it an element of sensationalism. It has never pointed out to the simple fact of the exact nature of the relationship not having entered the court at all. This kind of observations seems to lie outside of the scope of the media coverage. Positive media coverage even may express support to the couple and point out to ‘injustice’ done to them if any, but will still not address the silences.

Describing the body

“I am no longer M, I am Babu,⁵⁴”

“M cut her hair and wore men’s clothes so as to live like a man.⁵⁵”

⁵² *N v. State and Others*; 2005

⁵³ Malayalam Manorama, October 13, 2000; S Changes Her Mind; Refuses M

⁵⁴ Malayalam Manorama, September 10, 2000; No Longer M; Now she is Babu, the Companion of S.

⁵⁵ Malayalam Manorama, October 11, 2000; M in Legal Battle to Get her Friend Back

“M’s voice and structure are almost like a man’s. She is able to do electronic work and climb trees. She has changed her name to Babu. She has had some similar relations with other girls in the unit in which she worked;⁵⁶”

The above discussions of M’s body as you will notice are entirely descriptive in nature. Being restricted by the man- woman dichotomy, it is the description of attire; physical attributes etc become the only way of communication.

“M is the youngest daughter of Bhaskaran. She was brought up as a boy since the family has no male child.⁵⁷”

“I dress like a man for safety in traveling. For this reason I have decided to live as Babu,⁵⁸”

“M dressed like a man for filing a petition before the court. M is filing this petition for the protection and safety of S as well.⁵⁹”

These quotes point to the reasons for mini being a ‘man’. This of course flows from the assumption that this deviance has to be compulsorily explained. It is also important to note that it is also a bid to legitimize the deviant body through explanations that can be argued to be justified. The last quote is the most interesting. It points to many things. One, the ease of the male self in court as opposed to the female. This of course extends to the public sphere as a whole as mini states safety as a reason for her ‘male behaviour’ repeatedly. Second, in this particular instance of a case involving a woman, mini seems to have doing nothing but performing the recognizable act of a husband seeking to find the body of his wife. Then of course remains the more obvious observations of a mini-Babu combine or Babu (only a figment of mini’s imagination according to everyone else except shisha) is not

⁵⁶ Malayalam Manorama, October 11, 2000; M in Legal Battle to Get her Friend Back

⁵⁷ Malayalam Manorama, October 11, 2000; M in Legal Battle to Get her Friend Back

⁵⁸ Malayalam Manorama, September 10, 2000; No Longer M; Now She is Babu, the Companion of S

⁵⁹ Malayalam Manorama, October 13, 2000; S Changes Her Mind; Refuses M.

permissible in court. Further, mini's case being thrown out for lack of *locus standi*, points yet again to the unimaginability of the existence of this intimate relationship, leave alone legitimizing of it.

In the light of the discussions above, one is led to the question of what we are asking for. Do we want terms such as 'lesbian' normalized in the court and media spaces? Do we want 'lesbian marriage' to be deemed legitimate? Is one asking for the recognition and acknowledgement of the 'deviant' body? One is not sure. The simple answer would be to ask for these rights, which will then 'normalise' and thus maybe ease the strains of these women. This normalizing then becomes yet another matter of debate. Are we asking for a place within the norm or are we asking to create our own spaces outside of and sometimes opposing these norms? The reality today remains that many lesbian, gay, transgendered individuals veer towards the comfortable space of normalcy. The relief of this comfort in the otherwise difficult life of lesbian, gay and transgendered people cannot be stressed enough. Not for a moment can we disrespectfully use this comfort for purposes of any critical argument. However, it is also not to be left unquestioned or held sanctimonious. It is as important to the everyday lives of LGBT people as it is to purposes of critiquing the traps of normativity. The non-inclusivity of normalcy becomes apparent in LGBT lives becomes apparent sooner at some point and this facilitates the questioning of it. This is most explicit with the non-inclusivity even of L, G, B, T. Many slip through the cracks of this list of alphabets and have to create new ones. It remains to be seen how long this 'alphabet creation' can sustain itself as a. activist strategy to begin with apart from its limitation as an analytical frame. Either way, this quest, we argue, is primarily because of the lack of even the remote beginnings of a fresh imagination.

For now however, by virtue of this denial of a name and recognition, lesbian women among others have the abstract privilege of challenging the court among other spaces unwittingly. This challenge becomes important within the trope of creating new feminist legal languages and spaces. It gives us the pleasure of imagining new desires, intimacies and even rights.

Conclusions

Let's begin our conclusions with a provocative statement using heteronormative marriage as a symbol. This discussion is not limited to marriage but uses marriage to discuss normativity as a whole.

Even for arguments sake, at the risk of sounding naïve and unproductive, can we imagine a critique that asks for the 'abolishen of marriage' the way 'abolishen of sex work' was argued for, for instance? We are not suggesting this provocation as a serious demand in the least. The point is not to 'abolish' marriage as the dictum of abolishen itself can be deemed as problematic⁶⁰. The intention is only to explore the possibilities of ripping off of marriages' position as the soul system of intimate relationships and social organisation. This reactionary statement can, however, tell us many things.

One, we do have to train ourselves to think outside of this structure for which we need a more comprehensive critique of family that goes beyond it being an unequal relationship (which, it goes without saying is a critique that has been world altering, beyond measure. It is the history from which so many arguments have been made

⁶⁰ The abolishen of any specific set of practices almost always does not necessarily translate into the abolishen of the spirit it embodies or the politics it espouses. Abolishen of sex work, for instance, does not mean that women will not be seen as 'sexual objects'. We are not speaking of 'being viewed as a sexual object' in a pejorative tone but only as an example for purposes of this explanation.

including our own) but also address the ways in which the power it holds structures our bodies, desires and our perception of intimacy and violence. This critique will be of normative notions of gender, sexuality, identity, community, marriage, family, desire and intimacy to name a few. This critique might have to be coupled with questioning all the realms we work with, in processes of social change, including the law. The law being based entirely on privilege and criminalizing rooted in marriage and family norms can then be questioned. Let us be warned however, that this will necessarily shake up the very notion of 'the law' which necessarily requires 'names'. If we go with a politics of deconstruction that refuses to 'name' then the consequences also have to be dealt with. The challenge seems to lie in a simultaneous process of broadening the scope of the law while maintaining a basic critique of it at all times. Our critique then will extend as much to the law as it will to the nature of our interactions with it⁶¹. Recalling Butler's 'I' we know that "For the "I" to launch its critique, it must first understand that the "I" itself is dependant upon its complicitous desire for the law for the possibility of its own existence". Can we imagine a critique of the law which goes beyond one that is from an imagination different from the legal and thus finite 'I'? What will that critique look like? And how will we say it, shout it, assert it?

Two, if these critiques were to evolve significantly, then maybe we can recognize and acknowledge different kinds of support structures and social organizing. Queer women in many ways; demand this acknowledgement and this language, by virtue of being denied marriage as well as the privilege to make choices freely by virtue of

⁶¹ Ref: Priyadarshini Thangarajah and Ponni Arasu; *Queer women and the law in India*; (Paper presented at Critical Legal Studies Conference; Hydrebad; 2006)

being women⁶². This imagination might contribute positively to the earlier process of interacting with the law.

The fine balance between critical and strategic engagement is the challenge ahead of us. The imaginations, theoretical as they maybe, if used in engagements, then may show us this colourful spectrum we wish to create. Yet another challenge lies in communicating this imagination through creating a language equipped to do so. Let us remember that the theoretical remains different from everyday engagement precisely because of this lack of language. Last, and not by any stretch of imagination, the least, to be aware at all times that this imagination will be and should remain vibrant and challenge one another constantly.

⁶² This is not to say that queer women in India have necessarily denied the privileged place of marriage. On the contrary some of the earliest records of lesbians in modern India are through them getting married. Leela and Urmila, two police constables who got married in 1988, is often used as a starting point or a significant event of any history of lesbian women in India. But the fact that they often accept these norms have to do with the comfort of normativity that it gives them, as well as not knowing any other way to 'solemnise' their relationship as it were.