

<https://www.internationalviewpoint.org/spip.php?article3210>



India:

Scrap Article 377, Defend LGBT /Queer Rights Through Mass Movements

- IV Online magazine - 2013 - IV467 - December 2013 -

Publication date: Wednesday 18 December 2013

Copyright © International Viewpoint - online socialist magazine - All rights reserved

In 1895, during the trial of Oscar Wilde, the German socialist Eduard Bernstein wrote a few articles in the German Social Democratic press on the issue. While confused by today's standards, Bernstein made a few cogent points.

On the view that same sex relations were unnatural, Bernstein commented:

“Our entire cultural existence, our mode of life from morning to night is a constant offence against nature, against the original preconditions of our existence. If it was only a question of what was natural, then the worst sexual excess would be no more objectionable than, say, writing a letter – for conducting social intercourse through the medium of the written word is far further removed from nature than any way as yet known of satisfying the sexual urge. Have there not been observed among animals (usually amongst domestic and captive animals, of course, but these are still significantly closer to nature than man himself) and amongst so-called natural peoples practices relieving the sexual urge which would colloquially be termed, “unnatural”?”

He went on to argue that in reality, in most civilised countries, sexual intercourse, while formally being described as being related to the propagation of new generations, was actually conducted for pleasure, and was “unnatural” in the sense that all attempts were usually taken to ensure that childbirths did not result from the act.

Bernstein used the word “abnormal” in preference to “unnatural”, suggesting that this was a deviation from the norm. He suggested that there was a need to understand the history of same sex relations rather than to condemn it. In particular, he made out an extremely strong argument. It is the male same sex relation that has been the prime target. Both English and German law condemned this. Anal sex perpetrated between two men was a criminal offence, as it indeed still is, in terms of Article 377 of the Indian Penal Code. But quoting Kraft-Ebbing, Bernstein showed that Prussian law did not punish sodomy when one partner was a woman.

As he argued, this latter was most often carried out on women who had no say in the matter, so that it was in fact “inferior” (in his words) to such a relationship between two males. The rise of the “paternal-right family” meant the woman’s body was of little consequence. If she was a prostitute, the state in Prussia oversaw the health of her sex organs to the extent that if a man infected her with a sexually transmitted disease, she was kept locked up. But how a man, whether the husband or the customer, used a woman’s body was of supreme unconcern to the state.

Bernstein’s authority being Kraft-Ebbing, he had the problem of viewing same-sex relations as a medical or psychological issue. Despite that, a century and eighteen years back, he, and a large part of the SPD, were involved in the campaign for the abolition of punishment for homosexual relations.

118 years later, the Supreme Court of India as well as the entire range of Indian political parties have shown their inability to grasp this. Bernstein had grasped, however imperfectly, that hetero-sexism is rooted in the heterosexual, patriarchal family relations. Under capitalist conditions, the family of this kind is important for the perpetuation of class divisions from one generation to the next. It provides a cheap and ideologically acceptable mechanism for reproducing human labour.

This involves using unpaid, and overwhelmingly female labour in the family to care for the young, the old, as well as for the male working adult. Monogamous, heterosexual love as a compulsion is a central aspect of the family system as it exists. The state and its laws, the medical and psychiatric establishments, much of the educational system, are all tailored to promote procreative heterosexuality and to stigmatize and suppress other forms of sexuality, often described as abnormal, irresponsible, or medical cases.

Scrap Article 377, Defend LGBT /Queer Rights Through Mass Movements

Marxist responses subsequently to start with Engels varied from hostility, indifference, and deprioritization. Since the 1970s different currents of Marxists have been compelled to take up the LGBT issue seriously as a political issue. The Fourth International argued in 2003:

“As long as society is organized in a way which assumes that many basic needs will be met within the family, all those who are marginalized from it or choose not to live in it will have difficulty in meeting their needs. This family form under capitalism presupposes and reproduces a heterosexual norm, which pervades the state and society and is oppressive to anyone who deviates from it. As long as heterosexual love is the basis for forming a family, people whose emotional and sexual lives revolve largely around same-sex love are marginalized from family life.

As long as the family is a central place where children are raised, lesbian/gay/ bisexual/transgendered children will grow up alienated - even more than children and young people in general are alienated in the family; and children's access to adults, especially unmarried adults, and other children to whom they are not biologically related will often be limited. As long as only heterosexual desire and romance permeate capitalist consumer culture, LGBT people will feel invisible. As long as heterosexuality is defined as the norm by the state and medical and psychiatric establishments, LGBT people will be explicitly or implicitly discriminated against and marginalized. Repressive laws and widespread social discrimination intensify this oppression in most parts of the world, but repealing repressive laws and combating social discrimination will not by themselves eliminate it”.

In India, the LGBTQ community is mostly hidden. The Telegraph, reporting the SC judgement, suggested the figure of 12 million for a possible size of this community. In course of the case, Suresh Kumar Kaushal & Another v. Naz Foundation & Others, attempts were made to present before the Supreme Court a mass of evidence concerning discrimination, harassment, and torture faced by LGBT persons.

The Supreme Court, in striking down the Delhi High Court judgement, has argued that the High Court had relied too much on foreign judgements, which cannot be applied to the Indian context. This is not the first time that judgements in foreign courts have been discussed by Indian courts. So this insularity has to do with a political orientation, regardless of the formal words uttered. In that case, what the Supreme Court is deferring to, is the socially constructed and maintained conservatism. This finds striking confirmation in the utterances of Baba Ramdev, the BJP, and the Darul Uloom Deoband. For Ramdev and the BJP this is a western aberration that has no space in “Indian tradition”. For the Darul Uloom Deoband deputy Vice Chancellor Maulana Abul Khlik Madrasi, “Homosexuality is an offence under Islamic law and â€˜haram’ [prohibited] in Islam”.

The apex court has upheld the constitutionality of IPC 377 by rejecting the constitutional validity of Articles 14, 15 and 21 of our constitution. By this it had written off the very cornerstone of democracy,----pluralism.

The court distinguishes between “those who indulge in carnal intercourse in the ordinary course” and “those who indulge in carnal intercourse against the order of nature”. The Court says that therefore section 377 is not classified irrationally or arbitrarily. In other words, the Supreme Court is opposed to sex against the “order of nature”. But in that case, should the Supreme Court not oppose, in a spasm of judicial activism, the Government of India's decades long birth control or the so-called â€˜population control’ campaigns? Sex using condoms, sex after various measures to ensure that women do not get pregnant? Is not it going to the extent of authorising the policing of sex lives to check whether fellatio is committed?

The Supreme Court has also argued that the LGBT community is a very small community. So it seems that if a community is sufficiently small, then being a minority confers no assistance. Rather, if you are a small enough minority, then your rights can be violated with impunity since that does not disturb the public peace. The Court cites the fact that there have been only a handful of convictions as proof the community is small. It prefers to ignore how the police routinely harass, take bribes, etc, when it sees same sex activities. The fact that the existence of the law

acts as a perpetual threat to the LGBT community is totally ignored.

The court also rejects the claims that Article 377 leads to violation of the right to privacy, the right to bodily integrity and sexual choice and the right to live with dignity. The cases cited by the court have been extremely confused. Of course, the women's movement has long opposed certain uses of the argument of privacy, for e.g., when it is used to hide rape of a wife by a husband. But that is not the concern of the SC. Ignoring the fact that what was under the scanner was consensual sex between two adults, the SC cited a case where a doctor had disclosed the HIV positive nature of his patient to her fiancée. In that case, it had been correctly held that privacy was subordinate to the right of health and freedom of others. But changing the scope of Article 377 to remove consenting adults from its purview does not come under this head. Once again, if two consenting adults have any kind of sexual relations, whose health and freedom is negatively affected?

The strategy of over-reliance on judiciary can sometime be counter-productive. To cite two landmark cases, the Supreme Court did not come out with a rights perspective for the marginals. It had rejected the Narmada Bachao Andolan plea, and had acquitted the accused in the Mathura Rape Case. If we focus on the elite, if we focus on well-paid lawyers arguing in courts, we cannot expect a wider discourse of rights to be articulated or honoured. To rely on NGOs, to lobby, cannot go far when fundamental social issues are involved. And at the beginning of this essay that is what we argue. To decriminalise and recognise the equality of same sex relations is detrimental to fundamental interests of the ruling elite.

Lesbian/gay liberation is part of a broader, human liberation we are fighting for. We cannot fight for full rights for LGBTs and think that we do not need to fight for the immediate scrapping of the AFSPA. Even closer to the community itself, the 'queer movement' of the subcontinent has to look at the queer who are poor, who are not from the upper castes, who are non-urban. To get rights one has to fight for rights, not just lobby for rights. Lobbying can get little advantages for small segments. Full equality cannot be gained other than by mass struggles.

It is when there are mass struggles that courts, legislatures, have shown themselves to be willing to be positive. This is not a call for rejecting court battles, but a call to recognise that if we want, not slight gains for small sections of LGBTs, but full equality, then we need to fight for it.

One needs to be grateful for the SC nonetheless, for it has forced into the open the issue of LGBTs. One is grateful also to the BJP, for having come out openly, showing that it is reactionary across the board. But what about the hypocrites in the mainstream parties who are today suddenly concerned about LGBT rights? Much calculation goes into their stances.

The Congress has today declared it will bring legislation or push for ordinance. Where was it all these years, especially in periods when it enjoyed comfortable parliamentary majorities? Clearly, at best, the Liberals on the Right wanted to let the courts decide. To take up the cause of alternative sexualities risked losing votes, which they were not keen to do.

The reason for Rahul Gandhi's sudden concern is not far to see. The Deobandis have already declared that they are not particularly keen to take the side of Congress against the BJP. Meanwhile the Delhi elections have shown that the younger generation and the middle class generally has rubbed the Congress out. So this is a desperate gesture to try and regain some support.

At the same time, it is quite a safe gesture. The government will either try for a "curative petition" (i.e., again ask the Supreme Court) or ask Parliament, a very safe option since in the current parliament the bill cannot be driven through with a party whip, as not enough parties are openly for the decriminalization of alternative sexualities, so that the

Congress gets left-liberal approval without antagonising its other potential voters too much.

Nor, sadly, are those whose stated agenda are for social change fully behind the struggles of the LGBTs. The AIDWA demonstrated criticising the Supreme Court. Yet it was also the same AIDWA that had criticised the World March for Women, because in the AIDWA's opinion, the WMW was wrong in putting LGBT rights upfront along with issues like economic security. Biman Bose, the CPI(M) leader and Chairperson of the Left Front in West Bengal, was blunt. He is on record as having said that there is no hurry as there are more important issues. In other words, the Left is unable to understand that pushing LGBTs back to the closet will be worse for LGBTs from socially deprived sectors.

The women's rights movement has also not always taken up LGBT rights sufficiently seriously, or in a sufficiently central way. One can think of moments when one has seen LGBT organisations visibly distressed by the reluctance of the sectors of the women's movements one has participated in, to foreground LGBT rights.

And the LGBT movement, likewise, has to recognise that political rights and civil liberties are indeed indivisible. If we fight for civil and political rights, we cannot afford to be sectoral. One cannot say that one is supporting the rights of people of Manipur but not someone accused of being a Maoist. Likewise, one cannot desire rights for LGBTs but say that one is unconcerned about the rights of others. It is by building popular alliances, by launching peoples' struggles, that we can win. And we cannot fight purely on the terrain of courts.

[Radical Socialist](#)