

Short Despatches from the 377 Courtroom

Danish Sheikh

danishsheikh726@gmail.com

Summary of Day 3, 12 July 2018

The third day of the 377 Constitution Bench hearings was a mix of pointedly sharp arguments from the lawyers arguing for decriminalization and horrific hate speech masquerading as submissions from the respondents who finally began their arguments. In both cases, the Bench continued to give us an exemplary hearing.

Shyam Diwan's arguments stressed the importance of the court providing a positive guarantee of rights both in terms of equality as well as intimacy. Focusing squarely on intimacy would risk merely paving the way for same-sex partnerships without simultaneously crafting strong anti-discrimination guarantees to protect queer persons in public institutions. Diwan's balancing act here nudged the Court towards the need for both. He also argued the principle of non-retrogression: the idea that once the Delhi High Court's judgment in 2009 had read down Section 377 and facilitated equal citizenship, the roll-back of rights in Suresh Kumar Koushal was unjustifiable. In other words, No Going Back.

Chander Uday Singh represented a group of mental health professionals whose argument has been that homosexuality is a natural variant of human sexuality while also focusing on the mental health impact of criminalization. In 2012, the Koushal judges gave this particular brief approximately 90 seconds of Court time, dismissing it as unnecessary: today, Singh's arguments were not just heard properly but given additional heft by Justice Chandrachud's nuanced reading of the Mental Health Act.

Ashok Desai next brought literature into the courtroom. He began with the Greeks, telling the Court about Plato's Symposium, the ancient Athenian conference on love, and the efforts of young Alcibiades to pursue the learned Socrates. From there, he moved to Indian literary narratives, ancient and modern as captured in Ruth Vanita and Saleem Kidwai's Same Sex Love in India. These arguments about queer literature moved almost seamlessly to the final counsel, Krishnan Venugopal whose submission focused on the

impact that criminalization had on the freedom of speech and expression as well as, in an intriguing new argument, on the freedom of conscience.

And then, we were on to the respondents. As with the 2012 hearings, there was little substance in what they actually had to say. Unlike the 2012 hearings, the judges did not allow these digressions to go on for long. “How can we promote bestiality” began one lawyer, to which he was swiftly cut off by Justice Nariman – “Nobody has argued bestiality!”. Another lawyer launched into a monologue on what parts of the body were reproductive and should be used for sex only to have the Chief Justice curtly respond – “That’s not the issue”. Yet another lawyer said the case required public consultation to which he was reminded that the court does not follow public morality, it is instead guided by constitutional morality; not the changing whims and fancies of public opinion, but instead a more principled set of values rooted in the Constitution.

The reason the Court has been giving a generous hearing to the petitioners is the same reason it came down so hard on the respondents. As the Chief Justice repeatedly reminded us today, this is a matter of constitutional law, the arguments submitted before the Court have to be rooted in constitutional law. We have lawyers on our side basing their arguments on a combination of constitutional rights discourse, comparative and international law, along with decades worth of testimonies and painstakingly collated research reports. On the other side, there are lawyers who would like the Court to please note that homosexuality is really only naturally found in the lower vertebrates. Lengthy discursions into the sexual limits of the human anatomy were a matter that the Koushal judges in 2012 were more than happy to hear about and prolong.

This Constitution Bench however? It’s here to do its job.