THE ROAR OF THE SPIRIT

By Ashok Row Kavi

I met them nearly two years ago at a colloquium of high court judges called by the India Centre of Human Rights, an NGO run by Colin Gonsalves. And they were hardly the lions that they sound in the judgement they gave. The important fact is that both are extremely traditional gentlemen. The reading down of the sodomy statutes, Section 377 of the Indian Penal Code, was done by two Indians who come from deep within the civilisation of what can be called “traditional India”.

They are not Maoists, they are not burning reformers out to turn our lives upside down and neither are they there waving flags in Lalgarh or screaming for Narendra Modi’s blood. They happen to be very religious, dharmic folk who ponderously did their homework and came out with a document that reaches out to every marginalised group in this ravaged and pillaged land.

Let me quote from their judgement to remind you how deep this commitment is: “The impugned provision in Section 377 IPC criminalises the acts of sexual minorities, particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision runs counter to the Constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution. Section 377 IPC in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation, which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the State’s moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review”. [Pages 91 and 92 of the judgement of the Delhi High Court on 2 July 2009.]

What is interesting is how this will now apply to the sphere of the domestic life of
heterosexuals. Marital rape can now be handled under the law, whereas formerly it was allowed within the confines of the household on the touchstone of Marriage Acts like the Hindu and Muslim Marriage Acts. Personal codes of many religions will now be under scrutiny thanks to the wider implications of this judgement, which seems to be slowly dawning on the more stubborn of our conservatives, hence the shouting and unity among all the religious Right.

This has been noticed by feminists like Ratna Kapur, who writes, “Women’s groups and feminists should be particularly encouraged by the decision and indeed learn from it when it comes to future interventions in favour of women’s equality” [Times of India, 8 July 2009]. In other words, the judgement “provides firm ground for all players in the equality rights arena”. Surprisingly, some day it might even come as a saviour for the marginalised Brahmins if they suffer under Dalit majoritarianism [if such a thing were to happen].

To many of us, it was obvious that the judgement we awaited with bated breath would open the door onto a much larger landscape than we had envisaged, but we did not bargain for such an incredible vision of India. The fact that India, after South Africa, would be able to replenish its free spirit from the well of Constitutional plenty is a pleasant surprise.

It is, therefore, important to note that it is two solidly traditional gentlemen who are the best representatives of what could be called a homebred Indian intelligentsia that cast its net far and wide to get the best that human endeavour has mustered in the freedoms that our Constitution hoped to realise.

**THAT FATEFUL** day two years ago, I had talked about how what are known as sexual minorities had — and have — existed in India since the dawn of humankind. I had talked of how the Atharva Veda mentioned napumsaka first in the context of defective sacrificial offerings [goats and bulls] which then got anthromorphed to humans who were “not fitting into the usual category”. I talked about the words, pandaka, kliiba and shandas mentioned in the Bhagawata, the Charaka Samhita and the Sushruta Samhita. I had said the differences between “biological sex” [male or female] were clearly mentioned compared to all these gendered humans occupying
both pre-history and history. The fact that Arjuna spent a year as kliba (cross-dresser) did not imply that he was homosexual, for example, in the Brunella phase. He explicitly rejected the sexual advances of Uttara’s brother to prove the point.

Even as we move into recorded Islamic history, Mahmud of Ghazni’s obsession with his servant Ayaz and Alauddin Khilji’s relationship with the Gujarati eunuch Malik Kafur are not at all treated as perverse or deviant behaviour. The construction of “homosexual” is not applied to Babar by his daughter Gulbadan who complaints that her father neglects her mother for the boys in the bazaar. Yet, today we get Marxists distributing pamphlets on how the Ayyappa shrine is a shrine of a “perverse god born of Shiva and Vishnu” [Hariharaputra], making a mockery of their alleged tolerance for all minorities.

Going back to that day, except for one judge who made an extremely homophobic remark, there was a stunned silence with the audience busy writing up what they wanted cleared up. However, what was most impressive to me was a judge from the Supreme Court coming and thanking me for “explaining what nearly all of us had no clue about”. It is that honesty that was disarming from our judiciary and needs to be put on record. Unlike know-alls in the medical fraternity who are always asking the most terrible questions [do we have any kind of injection that can be given to convert a homosexual into a heterosexual, being the classic one I am asked], the judges I met that day were citizenry who knew both their duties and their responsibilities.

**THE MORE** one thinks and engages post colonial history, the more it is obvious that it has had a dangerous and dark fall-out on our lifestyles and acceptance of sexual and gender diversity. The fact that nobody questions or molests the Jain nuns walking alone down lonely roads and through forests and deserts is a reminder that India is still the home of the oldest living continuous civilisation on earth and its heart is in the right place. Despite the sudden bouts of rioting and senseless bloodshed that have marked our recent past, there is hope yet that this gracious and great civilisation will embrace us all in its true spirit.

On 2 July 2009, that spirit revealed itself as a roar in the Delhi High Court. It did not require the quote from Jawaharlal Nehru to show our Constitution as a living
breathing social document that will lead the way; all it required was the brave spirit of
two judges who knew that the spirit had to become flesh to speak its soul. In that
spirit, the lesbian, gay, bisexual and transgender communities in India will not only
learn to walk free but also access resources that will make them healthy and free [¼]

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