## Transcript of “Dismantling India’s Anti-Sodomy Law – A People’s Journey in India”

SITAL KALANTRY: Thanks, everyone, for coming out on this incredibly snowy day. [INAUDIBLE] too early for [INAUDIBLE] for those of [INAUDIBLE]. And hopefully it will warm back up a little bit. We're so lucky that our speaker got in just before the snow started. So my name is Sital Kalantry, and I am [INAUDIBLE] professor here. I'm teaching human rights and immigration, and I'm so happy to welcome you to this event by the India Law Center, which was founded to increase dialogue about India and knowledge about India in the United States. We had some good [INAUDIBLE] out there in case anybody [INAUDIBLE] center. We're so excited to have Vivek Divan here, who's incredible amount of achievements I can't possibly talk about. But the biggest achievement, I think, is that he is a graduate of Cornell Law school, was an LM here in '94-95. He's a human rights lawyer and works in the intersection of law, health, and sexuality. He began his career as a career activist over two decades ago, practicing in [INAUDIBLE] high court, and then running a very prestigious unit of a very prestigious non-governmental organization, called the Lawyers Collective. He ran the unit on health and HIV. And this is where he worked with the communities and social movements. And I'm really excited about this lecture today, because in law school we often just study the case and we see the pages on the text. But we don't know what came before the case, what got-- what made the decision happen, and really what happened after the case and what it meant to the social movements it. And he has been living in those movements and creating those movements and making it happen. So we're so excited to hear about the efforts to decriminalize sodomy in India, which [INAUDIBLE] books [INAUDIBLE]. Basically, it was a British transplant that remained in the Indian penal code. So with that, please [INAUDIBLE] help me please welcome Vivek. [APPLAUSE] VIVEK DIVAN: Thank you. All right. Thank you, Dr. [INAUDIBLE], for this. It's just great to be back. I think this is the room where I studied bioethics in law in 1994, if I'm not mistaken. It looks similar. I sat somewhere there regularly. It's great to be back. This is the first time in 25 and a half years that I'm in Ithaca. I walked around with a friend little earlier today, and there's some things I certainly can't recognize. But Myron Taylor Hall looks more or less the same, so the Berger atrium was very familiar. So it's great to be here, and we've got an hour. And I do want to spend enough time for questions, answers, discussions that you may want to engage in. But before I do, I think Professor [INAUDIBLE] has already mentioned a little bit about the background of what I'm going to speak about. But before that, I should say something about the link I had with Cornell and my work around queer-- and when I use the word queer, I'm covering LGBT and the spectrum of sexuality and gender diversity. In India, it's-- we use it as short form in India, because there's a lot of other identities in India which we'd have to alphabetize and that would get a little too difficult. My first, actually, engagement with queer activism and law was at Cornell when I took the course in political obligation and civil disobedience, which was offered by the phenomenal Professor David Lyons, who then, I think, in the mid '90s left for Boston University, if I'm not mistaken. And it was the art school that-- the humanities school that this was taught in. It was just this incredible course I took where we actually looked at US LGBT activism. And this was 1994, '95, so you had Bowers versus Hardwick but you didn't have Lawrence versus Texas, but you had a whole bunch of other things going on in terms of you had an HIV epidemic. There was a community in the context of ACT UP and all kinds of other organizing which was taking place around LGBT concerns. So I just want to recognize that that was really a vital thing in my understanding around how activism can be done and should be done. So the journey to decriminalize sodomy in India. So we have a law called-- we had a law-- well, we have a law, actually, called Section 377 of the Indian penal code, which was, like you said, a British transplant. It went around the world. You have Section 375, 77, 77a, and different numbers in former British colonies, even today. And basically the law was-- the wording of the law was it criminalized what it termed as unnatural sex. So whoever voluntarily has carnal intercourse against the order of nature with man, woman, or animal shall be punished with so many years in jail and fined. And the definition of intercourse required penetration, which was the explanation to the section. So we had this law in 1860, which the British brought along. We hadn't-- we didn't have a context of criminalization of what was called "unnatural sex" before that. And it was something which was prosecuted. There's a history of that in-- there's a very good Human Rights Watch report about how India's anti-sodomy law was deployed over a century or so, largely in cases of consensual sex initially between men. And then towards the '90s, the 1990s, more in cases of child sexual abuse. Because until recently, India didn't have a law covering child sexual abuse. This was the law which actually covered those situations, too. And so, therefore, when we filed this case, we very consciously knew that we didn't want the law to be completely repealed or struck down by the courts. Because we wanted it to be saved to the extent that it covered child sexual abuse, but voluntary adult sex should be outside the purview was the prayer to the court in 2001. Let me just tell you a little bit about-- I'll have to hit on a few dates to give you an idea of how things kind of unraveled over 20 odd years. But I think what I really want to focus on ultimately in about 20, 25 minutes that I will have is actually the back story, like you said, about the case. Because that's really an interesting thing. I think there's a whole activism there which took place which informed everything that happened in the courtroom and outside. And I think that's really interesting to think about in a context like India. I don't know how many of you are familiar with the Indian context, but it's a massive country in terms of population. It's a massive country in terms of diversity. We have 25 official languages. We have 25 and more cuisines. We have a pretty wide geography. Not as broad as the United States, but it's a large territory. We have all kinds of ways in which class and caste and ethnicity play out and gender play out. So there's-- it's quite complex. And it's huge-- it's a real diversity of socioeconomic status. So there's a lot to grapple with when you're trying to actually speak for a community which includes all of that diversity. But before that, like I said, let me hit on a few dates. What I do want to touch on in this talk is a few things. I think y'all are either lawyers or about to be lawyers. And I think there's something to be said about cause lawyering, and what I learned certainly from cause lawyering in this journey and how that should or can be done. And the challenges that speaking for a community of people actually poses and how do you overcome some of it. So the first actual challenge to the section 377 of the Indian penal code happened in 1994, actually, when the largest prison in India in New Delhi, the head of prisons refused to distribute condoms when an AIDS organization actually questioned the administration of the prison about condom distribution. And the head of the prison said, we cannot possibly do that. We'd be abetting and aiding a law. We'd be abetting and aiding a sexual act which is criminalized, and, therefore, we'd be actually supporting something which we cannot possibly. And that was challenged, and, therefore, the law was challenged as violative of the right to health. The right to health is not something which is actually specified in the original text of the Constitution of India under the fundamental rights chapter, but it's been over time interpreted to be included within the right to life and liberty. And so you have quite a bit of precedent which actually indicates that there's the right to health in various contexts. So this law was challenged as a right to health claim in 1994. And by the time I suddenly got onto this scene-- and I'll, of course, be focusing on when I got onto the scene and onwards-- was around '99, 2000 when HIV was anticipated to be the sort of epidemic that sub-Saharan Africa was seeing. So there was a real expectation that this was going to be a crisis of epic proportions. And that-- the World Bank gave a $200 million loan to India in the '90s to really kind of ramp up its efforts. And you saw a whole bunch of non-profit organizations which were service delivery organizations, which were community based organizations, working with sex workers, drug users, gay men, trans people, et cetera, and HIV positive people, women's groups, children's groups, et cetera across the country, really as part of the response. Some of those funds came through the World Bank to the government and then were distributed to the non-profits. Others came from spaces like USAID or the UK Department for International Development, or the Swedish, et cetera. So we had a whole bunch of funds from abroad. And that's really the basis on which a lot of the HIV work actually happened. One of they NGOs which was doing this extraordinary work was in New Delhi and was called Naz Foundation. Naz Foundation provided safe sex information and services to men who were cruising the parks of New Delhi or in the public toilets, et cetera, which was the hardest people to get to. Often these were folk who didn't identify as gay at all. The word gay is actually a Western construct for most of queer India. It's certainly something which is urban centric. It was the word I used as a Westernized, privileged, urban person in India when I first came of age and figured my sexuality out, but it's not necessarily the word that the vast majority of queer people in India use. And so I am using it as short form again, but the public health term was men who have sex with men. And the idea of that terminology was that you would encapsulate a whole bunch of people who didn't identify as such, but clearly manifest a certain behavior which requires a health intervention. So Naz was doing this work in this parks and toilets, et cetera, public places in Delhi, and was finding that its condom distribution, et cetera, was being compromised, because the cops used to come and prevent the work from happening. And so what was the reason for that? Because the cops were actually brandishing this law and threatening to brandish this law. And so the law was challenged as a right to health care in 2001, and I was part of the group of lawyers who litigated that. But we were very clear, as were people in that effort, that this was fundamentally about the right to equality, life and liberty, and all kinds of other ways, the freedom of expression, privacy, et cetera. And so that petition, the Naz Petition which really became the vehicle through which we actually got a movement and an ecosystem really going around the case, was a petition pegged on a challenge of all these rights which were fundamental rights in the Constitution of India. This was filed in the Delhi high court in 2001. The previous case I mentioned, actually, was dismissed for non-prosecution, we discovered, in 2000. It was just not followed through by the NGO-- well, the collective of people who filed it, because it had sort of disbanded. So an interesting moment happens then in 2001. Because we filed this case and we expect that there's-- we've talked a little bit about this to the queer community in India. A lot of queer community at that point is represented through these HIV groups. A lot of the work on queer organizing is happening. Queer men's organizing, particularly, is happening through the HIV opportunity, but a lot of it is also happening through queer women's collectives, which are not linked to HIV at all, necessarily. Or it's happening through organizations which are just pure LGBT rights outfits and nothing to do with the epidemic. And so one would have thought, and we certainly thought, that this would be something which brought everyone together around the case. But surprisingly, and this is where I think the challenge of how do you cause lawyer comes up, which is that we got a backlash from within the queer community for having filed this case. And there were interesting points that were raised. I think there was some which I find even today to be a little a little tough to kind of justify. But one of the-- so let me run through some of those, because I think they pose interesting questions around representation, and how do you go about a case which is trying to speak for a community of people. One of the issues was, why didn't you consult us? And one of the issues as a lawyer was, well, if a client comes to you, do you litigate with that client because they have an absolutely justifiable reason to actually go to court, or do you speak to the larger community that the case is going to speak about? So why was there not robust consultation before you filed the case? Why was HIV used as a peg through which this was done? Because HIV is really not the primary concern for queer emancipation. It is a serious issue among certain groups of queer people but not everyone. Why did you use words like in MSM, men who have sex with men? Why didn't you used the word homosexual or gay? And there were very many reasons for the way we drafted that petition. The absence of transgender people completely from actually the draft-- or the petition as you see it even today. And by the way, a lot of this documentation is available online now, which I'm going to refer to. It's at a website called O-R-I-N-A-M, orinam.net, if any of you're interested. We've put up everything from over the years, all the papers that were filed in the courts. And then, of course, there was the issue-- and this was, I thought, a really valid concern which kind of metamorphosed into something fascinating. We'd asked for private consensual sex between adults to be decriminalized in the prayers of that petition. And the challenge was, why did you use the word private? Because a lot of queer lives are led in public. Actually, queer lives are fundamentally led in public by masses of queer people who are indigent, do not have the privilege of a bedroom where they can have sex. Often demonstrate their sexuality in public, and that's where the cops come and the goons come and the harassment really is experienced. So why have you framed it as private in this special manner, which evokes an elitism where you have the privilege of a bedroom? It was a really important point. And the reason I say it was particularly important in our history is because it morphed into this really sophisticated understanding what the word private means. And I think it's a little different from American jurisprudence around privacy, but the notion of breaking down privacy and saying it's not about a special issue. It's more about the ability to be autonomous, that you can exercise your privacy even in a public space by exercising a certain kind of autonomy, is something which was developed over time. And you then see that in various judgments of-- in recent times in India in the Supreme Court in India, so that was a really interesting point. I think another interesting point, which really I wasn't convinced by but certainly had some validity to it, was that even if this law goes, how is it going to change our lives? Because the law is so remote from our lives. It is of no relevance. The police are abusive. It just doesn't really matter if you're [NON-ENGLISH SPEECH]. A [NON-ENGLISH SPEECH] being a transgender woman. It's an old historic identity in India off trans women who live very public lives often in circumstances which are not particularly financially secure at all, so it's often sex work or begging that they indulge in. It's a community which has a phenomenal network of support, and also now a phenomenal voice for reasons which I can come to in a bit. But how is the law going or not going and to make a difference in our lives was another point, which I wasn't convinced by. Because I thought there was something symbolic in the victory in itself if we won eventually. And actually not just symbolic, but it would impact the way cops started behaving with queer people. And finally, another interesting point which was that does social change mean a legal change, or does legal change mean a social change? And should we-- have we put the cart before the horse, et cetera. So these were some of the difficult challenges raised and which came our way, and it created massive fissures in the community. There was a real divide amongst us. Many of us disagreed and some of us agreed, et cetera, but there was no conversation that could be-- it was tough to move on from here when such fissures got articulated. Of course, we had our views as lawyers. A lawyer-client relationship is one which if someone approaches you and there's a legitimate cause, you go to court and you fight this out. So was that the way cause lawyering could be justified in this context? Two years after we filed in 2003, the government of India filed its response, which was, as expected, homophobic, against the decriminalization of sodomy, but very, very light on law. High on morality and what will happen to Indian family traditions, and kids and children will be in trouble for some bizarre reason, et cetera. Despite us saying that this law must remain in cases of child sexual abuse. But what that did, and this is, I think, the really interesting thing-- and, again, I can just give you a flavor of it today, but it's all documented and online now-- is this process of consultation and debate and discussion that we as lawyers and queer activists brought together right across this extremely diverse country, where it's really often hard to actually agree on almost anything. But this process of meetings that happened across the country, across languages, across class, across agenda identities and sexual orientations, where we were able to actually bring many, many people into rooms together to really brainstorm how we move ahead. And this was something which-- It's a little difficult to tell you if you were not in the room, but it created a certain solidarity of effort, which gives strength. There was a time when we-- it wasn't-- I think it's a little easier to be queer in India now and open about it. It wasn't that easy just 15 years ago, 16 years, ago 17 years ago. It was much tougher to be open. It was-- but there was a sense of strength you got from one another when you realized you were part of a cause which was everyone's cause. And we created a sense of ownership in this case. And I'm going to tell you a little bit about what that might look like. So-- what that did look like, rather. So at one point in 2004, we were thrown out on locus standi by that Delhi high court. The court said that you're an NGO. You don't have sex. What's your ground to actually challenge this law? And completely ignoring the rich tradition of public interest litigation that has now been well-established in India. So kind of like class action litigation in the US where you can actually appeal on the behalf of a larger community and speak to their concerns. So the courts chickened, and that comes to another interesting angle to the whole case, which is about luck and how luck plays a role in a lot of this. But this was bad luck at that point in 2004. And basically, we had two choices. We just let this go, or we go to the Supreme Court and ask them to send it back, which was possible under Indian-- or the Indian procedural system. And the risk was the Supreme Court might say, well, we reject your plea, which means we're dead and that's over for a generation. Or it might say, we want to hear it ourselves, which is then we-- you lose a point of remedy. Or it might actually say, yes, we're sending it back. So there was all this tricky stuff which was possible. But the decision was extraordinarily a decision of 80 people in a room, in a hotel room in India, speaking on behalf of hundreds and thousands more, who actually were educated now in this process of consultation. You had non-lawyers, queer activists, HIV service providers, folks who just had no idea about what a court is, what an appeal is, what an affidavit is, what all of this arcane stuff is in the courtroom, what procedures are in the courtroom, actually, understanding a lot of this stuff. And actually saying, no we're going to actually have to come to a consensus on the risks and benefits. And it was a consensus decision that sent us to the Supreme Court and had it sent back. So the Supreme Court actually heard our plea and sent it back to the Delhi high court to be heard, which it finally got-- finally happened in 2008. So something quite extraordinary in that sense where you actually were able to create a sense of legal literacy through a process which-- where people actually bought into it, bought into the case, realized how it impacted their lives. And also realized how this was part of a larger sense of citizenship, really. That this was part not simply of a law of a sexual act being decriminalized, but of a way in which you participated in democracy and claimed your space within it. So it was a really interesting thing, and a certain sense of confidence which emerged in that process, which was quite something to behold. Again, I feel I-- right through a lot of this, I realized a lot about my own privilege in all of this. One came from a certain class. One came from certain educational contexts and a certain access in terms of social mobility, et cetera. And what was really heartening was to see that hopefully we were able to kind of empower through this process people who didn't necessarily feel empowered around their sexuality or even the legal system. But a few other things which emerged were vital in all of this. We brainstormed through these meetings about historians we can identify, mental health experts we can identify, parents and friends of queers that we can identify. And all of these eventually became separate petitions which supported the main petition. So that was part of this process of discursive deliberation and debate and disagreement and stuff. The other thing which happened was this incredible petition, which was also filed in support of the main petition, which was a petition of a coalition of queer voices and unqueer voices. And this was an important moment, too, where we realized that this is not simply about a sexual act, but this is about that larger sense of citizenship, which we must engage with, along with the women's movement, the child rights movement, the labor unions, et cetera. And so you saw allies coming into play. And you saw, therefore, outside the courtroom when there was protests to be organized, or when there was a celebration of international human rights day, for instance, or pride parades, that you actually saw women's movements and child rights groups, et cetera, actually participating in this. You already had the HIV movement. You had the sex workers marching on the streets with queer people, et cetera. But you actually saw a sense of ownership around the law going, which would have repercussions for sexual rights across many, many other spaces. And so that voices petition actually represented not just the voices of queer people, but also some of these movement folk. That was something extraordinary. And it was actually that movement-- and I'm going to read out something there, which I think will hopefully give you an idea of the ways in which we were able to really affect the court's thinking. It was that petition which actually brought forth the affidavits of several queer people who spoke not as NGOs working on HIV, but as queer people being impacted by the law. Saying, this is the law. This is how it hurts us, and this is how-- where our lives are compromised because of its existence. And one of the most powerful ones is from [INAUDIBLE]. [INAUDIBLE] is actually a trans woman, a [NON-ENGLISH SPEECH], from the south of India. She's not-- I don't think she'd claim to be an activist anymore, but she was very much at the heart of trans activism in those days. And her affidavit says this. I, [INAUDIBLE], daughter of [INAUDIBLE], age around 20 years, a resident of Bangalore, status [INAUDIBLE]. That I identify myself as [NON-ENGLISH SPEECH]. That on 18th June, 2004, around 8:00 PM, while I was dressing in women's clothing and waiting on the road, I was raped by 10 [NON-ENGLISH SPEECH], or goons, all-male, who forcefully took me to the grounds next to [INAUDIBLE] Road. They threatened to kill me if I wouldn't have sex with them. I was forced to have oral and anal sex with all of them. I can't get into too much, because there's-- it's quite lengthy. But she then goes on to describe the police arriving, arresting her, and subjecting her to horrific torture instead of the goons. And then she says that section 377 has made it difficult for me to express my sexual and gender identity. The police and goons feel free to rape and torture me as they feel that anyway my very existence is illegal in this country. So even though the law was not deployed itself, it created it in a context within which you are second class, third class, fourth class citizen with absolutely no rights. And so you couldn't even activate the criminal justice system, despite you being at the receiving end of violence, et cetera. So [INAUDIBLE] was one of those affidavits. There were several others [INAUDIBLE] women and men. And I think when that was presented to the courtroom, that also really informed the way in which judges finally saw what these queer lives looked like. Again, I mean, many of us were queer lawyers in this entire journey. But I think what we did want to present also was the quotidian queer experience, not the privileged, educated queer experience in cities and in context of privilege. So that's that was super vital in terms of how we were able to convey the impact of the law, even if it was not specifically deployed in people's lives. Like I said, I think we'd begun to think about intersectionalities of movements and efforts. And I mentioned women's rights movements, et cetera. There was a lot of effort by queer women's groups to actually engage with the mainstream women's movement. And I think for the first time on International Women's Day in 2003-2004, you saw queer contingent of women marching with a woman on International Women's Day because of these efforts. So you then saw allies coming into the picture. I think the last thing I'd probably say is that all of this really-- well, the second to last thing I'd really say is that all of this really fostered courage. I think in contexts like these where you really-- it's really tough to actually-- you often feel you're working in isolation. That you're up against it, that there's hostility on the bench. It's a very hetero-normative context, the legal profession. It plays a hetero-normative-- I mean, it's a constant reaffirmation of the male and the female in the courtroom through costume and through performance, et cetera. But that the sense of ownership and allies really became strong. And so when the case was argued in 2008, and we got this great victory. And so 2009 was this victory, right, where we got decriminalized, as you might have heard about a decade now ago. And actually, we got re-criminalized. So this is the only place in the world where we got re-criminalized in 2013 by a perverse judgment of the Supreme Court. Because all the religions, the Muslims, the Hindus, the Christians, like never before came together in India and actually opposed our decriminalization. And so the Supreme Court overturned the lower court's decision. And then what happened last year was the Supreme Court actually reviewing their own decision and realizing they were wrong. And in the 2009 decision and last year's decision, you will-- I'm unfortunately not able to pull it out for you, but you will read the articulations of notions of privacy, which are far more nuanced than the notion of a special zone. And I think that's a really rich kind of jurisprudence that can potentially develop from there. It also has had impacts in terms of India has this universal identification system that it's setting in place or has been set in place called [NON-ENGLISH SPEECH]. And that was challenged on privacy grounds. And in that judgment of the right to privacy by nine judges, which is the largest bench of judges in the Indian Supreme Court, there is that articulation of a nuanced privacy. And it's in that judgment, actually, that essentially the court says come back. We will get you your victory vis-a-vis 377, which is how we reactivated things last year and won finally. I just-- since we're on the judiciary, let me just say a couple of more things which is about luck, how that plays a role. So one of the things we did as a nonprofit group of lawyers working on HIV was to sensitize the judiciary on the issues that are going to come before them possibly. Discrimination in the workplace, in the health care setting, women being thrown out of their homes, sex workers being rounded up and harassed which compromised health efforts within their brothel communities, et cetera, and stuff like section 377 which criminalized queer, gay man, et cetera. And we in India-- I don't know how it is in the states, but in India one is very conscious of actually socializing between the bard and the bench. It just doesn't happen. It's a very formal divide, and so the interaction just doesn't happen. It's not meant to. It's perceived as problematic, unethical. What we used to do, though, was we used to get Edwin Cameron, who just retired as the Constitutional Court of South Africa, a judge on the Constitutional Court of South Africa, and Michael Kirby, a former judge of the High Court of Australia, which was their Supreme Court. Both openly gay judges, Edwin living with HIV now for over 20 years, to come and do judicial trainings and workshops in India. And they talked about HIV law. They talked about discrimination, confidentiality standards, informed consent, and criminalization. These are the three or four broad themes. And what we saw, what we witnessed-- and we as lawyers organized this and stepped back, and then they conducted these workshops and trainings and stuff. And what we saw was palpable change. We saw lawyers-- judges crying. We saw judges seeing peers and realizing that, oh. OK. So when a judge talks to a judge, it's a whole different way in which they engage with information. And a really emotional response to a lot of this stuff. And if and when cases did come up before some of these judges who got trained, we often saw positive judgments and a real deep dive into anti-discrimination jurisprudence in the context of HIV barring from other courts, et cetera. And it was Justice Shaw who was-- who happened to be at one of these meetings in 1998, the Bombay High Court, who turned out to be the Chief Justice in 2008 in the Delhi high court who passed the judgment of 2009. So luck plays a role in all of this. How does that judge turn up to be there and happen to be actually sensitized over time? 2013, we got two judges who were clearly biased. I mean, there was just-- it's hard for me to prove bias, but it was obvious. They passed that judgment. Basically said, this is not our job to strike down laws. That's the job of parliament. So that was a learning experience. They used the phrase minuscule fraction. How does it matter? This is a minuscule fraction of India. So whether the rights are violated or not, implying that whether the rights are valid or not, is irrelevant. That phrase is from-- very much from the judgment. So that was bad luck. And then you had four months later, in 2014 early, a judgment of the same Supreme Court, another bench of it, saying transgender people have equal rights. And so how do you square the re-criminalization of the sexual acts of some of trans people and their equal rights? And so that became something where we took advantage of the moment. And then you have this, like I said, this moment where we actually got a privacy ruling which echoed the fact that the court was wrong, or-- in 2013. Come back and we'll rectify that wrong. And eventually you have this very, very powerful judgment, which was unanimous last year. And it was 17 years after we filed. So it's been a generation which has really fought this case. And it's been funny to live through. I mean, I feel like it was yesterday at some level. I also feel that it was not joy really for me. It was just relief that that was done with, because it should have been done with some time ago. But I think what it taught me, certainly, as a lawyer is that if I'm ever involved in stuff like this, especially in a context which is so, so diverse, the only way to do this is to actually engage with the community that's affected in a really robust way. I don't think you can convey how laws impact communities and people unless you really get a sense from them about how that happens, even if you're part of that community often and even if you have a window into it. And I don't think-- and I think it's painstaking and it's difficult and it's challenging, but I think it's ultimately deeply rewarding. Because what you see today because of that effort-- and I can't actually attribute everything to that effort. But I would say that these efforts led to some definite conversations in Indian society. You see today numbers of queer women, couples approaching courts, seeking injunctions from the courts against their parents who are accusing one of the women of kidnapping the other. You're not seeing this in big cities only. You're seeing this in small towns, too. You're seeing a drop in blackmail against queer men online who are cruising on Grindr, et cetera online. So you're seeing a real drop because the cops are stepping back, realizing that, no. This is a conversation now which is done with, and we're not-- our efforts are not towards that. And you're seeing trans [INAUDIBLE] communities which were fundamentally disempowered because they are of a low caste, often lower class. Like I said, they live public lives, fighting back against goons. So what happened-- what [INAUDIBLE] describes in her affidavit is something now recently you're seeing actually goons in cities, organized crime goons, who actually exploit rape and even extort from [NON-ENGLISH SPEECH], being taken into-- taken to the police station. It's something incredible. You can't imagine that being done against hetero-normative men of a certain power, in a position of certain power and in communities. So I think that's-- if this case was fought in the normal course-- and is the last thing I'll say-- where a client had a-- went to a lawyer, a lawyer argued in court, I don't think you'd feel the impact that you do today. Because I think there was this real groundswell of involvement, which was pretty extraordinary. So thank you. [APPLAUSE] SITAL KALANTRY: [INAUDIBLE]. Thank you for that great presentation. So I can start while people are thinking about their question and thinking if it's smart enough. And it is. Trust me. So what I'm curious is the comparative law that might have been involved. And I know [INAUDIBLE] in the beginning, it used to refer to British law. Then it stopped, and now it seems to be opening up a little bit more [INAUDIBLE] reference to US laws. And I'm just wondering how-- [INAUDIBLE] VIVEK DIVAN: Yes. SITAL KALANTRY: What are the connections between-- VIVEK DIVAN: Well, I think that a lot of common law jurisprudence was placed from the very beginning. And I think it was laptop-- in 2009, [INAUDIBLE]. You see that in Delhi High Court judgment. You see that in the Supreme Court judgment. You see suddenly-- and I think a lot of this is about the judges [INAUDIBLE]. So I think you see a certain dismissiveness in 2012, '13 of that bench. They really just don't engage with most things. You also see international law precedent, so you see [INAUDIBLE] and you see some of that stuff. You also see surprisingly the [INAUDIBLE] principles on sex, sexual orientation, gender identity, and sex characteristics, being actually almost put on a pedestal like you would international law norms. It's quite surprising now how that kind of slipped in. We were very thrilled that it did, but it's certainly not even soft law by the stretch of anyone's imagination. But yeah. So I would say that a lot of this depends on the judges. Traditionally, Indian courts have looked to the British precedent, but I think increasingly with Australian, US certainly over the years. And I think it's all pretty-- [INAUDIBLE] South African strongly featured in a lot of this. So the way I see it, I don't think there is an aversion to that at all. It depends on the issue sometimes. So sexual harassment law in India, I think, evolved because of-- fundamentally because of international precedent and [INAUDIBLE] principles and stuff like that. But that was some time ago, that, too. That was about 20 years ago that you had that. So that would be my general sense of how the court is receptive to stuff like that. Yeah. Yes? AUDIENCE: I just had a general question about the future of gay rights in India [INAUDIBLE], queer rights in India. VIVEK DIVAN: Right. AUDIENCE: [INAUDIBLE] clearly the fight for equality is not over, so what's the [INAUDIBLE]? VIVEK DIVAN: Right. So this was interesting because I think 370-- decriminalization was the lowest common-- it brought everyone together. It was the minimum common program that all of us had. We need at least this out of the way. Then how we prioritize and what we prioritize is up to us now as a community. And there's quite a community. There's a lot of activism. There's incredible support structures and activism happening at very local levels in India of queer communities, et cetera. I think what has not happened since last year is a national sense of what next. We haven't had that conversation. Is it going to be easy to have that conversation? I'm not sure. I think there's much more of a diversity of voice around what-- so, for instance, is marriage a priority, or is an anti-discrimination law a priority, or is countering violence within families and in public spaces a priority? This is not necessarily a cohesive conversation, and different people are addressing different aspects of things. We also have a transgender bill which has been proposed by the government, which is deeply problematic and has been-- often been pushed back from queer people and trans people in particular against it. And I think it has been pulled back from Parliament a couple of times now. I think one of the founding principles of the trans judgment was to recognize a self-recognition of gender identity, and this law fundamentally takes that away and puts it to committee. That a committee of people in your district will decide whether you are-- your gender should be-- your gender identity should be changed or not. The last thing that you would possibly want. Certainly the last thing that the Supreme Court said. So that's right now the focus of some of the work. I would say that there's other ways in which I think there are concerns which are not just queer related. So, for instance, censorship law and obscenity law, and how that may or may not be redefined in an increasingly conformist society, which is being told to conform more and more. Will that be a challenge or not? I think these are conversations which will happen. There was a case filed by an individual as a petitioner in person who argued his own case in the Supreme Court two months after we were decriminalized, asking for the right to be married. And it was dismissed. He'd called me at one point, and I said, listen. This has got to be a conversation which is a larger conversation. It's not going to happen two months after you got decriminalized. The Supreme Court's going to have no appetite for this at all. They didn't. Part of it was possibly because he just didn't have a lawyer and he appeared himself. But there is-- there's a lot of that conversation about marriage. We want marriage now, and we want bank accounts and we want insurance which recognizes our status, et cetera, and stuff like that. There's also conversation around this, which is about, let's look at domestic partnership models. Let's not look at marriage as an institution, but what are the alternatives of family structures and how can we claim some of that? So that's happening also. I can't give you a more clear picture than that right now, I don't think. Yeah? AUDIENCE: So you kind of mentioned some of the biases of individual judges. Do you think some of the unpredictability was just due to maybe the judicial system not having checks on it? Or what do you think is the reason that some judges were able to stop things and other judges [INAUDIBLE]? Is it just the structure of the court system there? VIVEK DIVAN: That's an interesting point. I think a lot of the 17 years was because of some of what you just mentioned, either proactive judges or absolutely non-proactive judges. I think a lot of that the delay was because of the refusal to touch this. I think it's a lot to do with promotions in the judiciary. Where will my career track lead to? Will I get to the Supreme Court? Will I not? It's impossible for me to in any way prove this to you, but I have a sense of that. I think it's about chickening, about-- so the 2013 judgment was interesting because the case was heard in 2012 March. The judgment was given on the last day before that judge retired in 2013 December, 19 months later. In 19 months he didn't write the judgment. That day he retired in December, there was a sense of who will win the next general election in India. Now did that play a role in his-- I don't know. It's impossible for me to say. He's given one interview, or one journalist has been able to reach him, and he was quoted as saying that his decision was based on the papers that were put before him by one of the parties to the case, and the graphic, sexual violence against children that was demonstrable through that-- those submissions. Which made no sense to us, because we had actually said child sexual abuse needs to be covered, continue to be covered by the law. So what is this concern around? So hard to understand how some of this happens, but inevitably it's about, I think, that often the antecedents, the historic context of that particular judge or person and where he comes or she comes from. I think a couple of judges who gave the 2018 judgment have given interviews where they've said that they know too many queer people in their own lives. They know some of us. We've grown up with them. I'm almost 50. I was not a contemporary of those judges. I was a little younger. So people know people now, and people are more out. And so you can't deny some of this stuff anymore. So that's changing and that's good. Yeah. I think-- yeah. Yes? There's a couple. Yeah? Yes? AUDIENCE: Thanks for that. It was just tremendously interesting, and I come to it from a point of view of being interested in social movements, so-- VIVEK DIVAN: Yeah. AUDIENCE: [INAUDIBLE]. And so the question I wanted to ask is probably not a fair question, but I wondered what implications you might say we could extract from this experience to the issue around this [INAUDIBLE] recent decision [INAUDIBLE]. Do you think if you had been advising the people, the different parties in this recent decision, that you would have something you could have brought to this whole litigation [INAUDIBLE]? VIVEK DIVAN: Well, so I should first of all say that I'm actually not entirely well versed with the history of the [INAUDIBLE] case. I mean, I have a broad idea of what the fight is over, but I just don't know how it was actually thought through, litigated, who the parties were, et cetera. So I'm unaware. But I think a lot of that was political. I think that case was particularly political. So I don't know how legal strategy in a courtroom would have or would not have affected things. There was so much going on all around. This is like the flash point issue in India. It's probably like races in the US in some ways. It's absolutely at the-- so it's hard for me to say. I haven't actually-- besides some headlines the last few days, I don't even know exactly what the reasoning of the court is. Yeah. I think, though, I should say that I've been asked, and-- well, there's-- I'm not-- I don't know if I'm answering you directly, but there's a way in which [INAUDIBLE] answering you. Which is that if we had to file a challenge to sodomy law today in India, how would we have done it? And I think not just before this court, because I think this Supreme Court right now is a little wary of challenging the executive branch of government or ruling in favor-- against it. But I also think that in terms of social movements, et cetera, we're living in this entirely different social media world. So how do you actually message around queer emancipation now? Much more complicated for middle aged me. Maybe younger queer people get it, and they're very able-- they know the syntax and they know how this needs to be conveyed as a social movement. I think organizing people, it seems to me, is much tougher these days in India. Just getting people onto the streets or just into meeting rooms. Forget about the streets. Just meeting rooms to actually discuss and brainstorm. Much tougher now, it seems to me. And the fact is that there's no doubt about it. Civil society space in India is shrinking. It is. I think the HIV movement gave an opportunity for us to organize a lot. The money for that's disappeared while actually HIV continues to impact the communities which are the most vulnerable, the sex workers, the drug users, queer communities, too. There's medication now which is helpful, of course, but it was a time of death in the 2000s. So that's another basis on which we can't function. Yeah. It's just tough. It's tough to organize. It's-- and there's a certain denigration of NGOs happening in India. The whole non-profit sector is a bunch of corrupt, lefty-- so there's those stereotypes being-- which are succeeding in the Twitter age in sending this impression around. So I really don't know how one would do this now. I really don't know. It's hard to say. SITAL KALANTRY: [INAUDIBLE] VIVEK DIVAN: Yes? Sorry. AUDIENCE: [INAUDIBLE] before [INAUDIBLE] so long before, the whole spectrum of HIV was also active around [INAUDIBLE]. And that was [INAUDIBLE] to us, even though we had rights [INAUDIBLE] non HIV [INAUDIBLE]. So do you think after [INAUDIBLE] gone some [INAUDIBLE] or [INAUDIBLE] was there? The challenges were there, but the acceptance of the gay population [INAUDIBLE]. VIVEK DIVAN: Right. Right. So it's interesting. I think it depends on where we-- it's been interesting to see, for instance, that I think I'm understanding you correct about how the health sphere is now responding to queer communities post decriminalization. So there's a real gap in mental health services. That's coming quite clearly to the fore. I think one of the things that queer people want to organize around is access to good mental health services right now. And especially young queer people who are seeking-- the people who are understanding their gender identity and sexual orientation, but they want someone to talk to about it, to talk them through about it in isolated context. And that's been a challenge, I think, even in bigger cities. I think in the context of HIV, it's a real collapse in the programming you mentioned. So the money has dwindled and a lot of those outfits have shut down, essentially. So the kind of social services you saw people go-- I mean, it's really-- where you could go to a community center and actually get advice on safe sex and get counseled on antiretroviral medication and stuff like that is less and less so. But what is also interesting is-- so I work also on tuberculosis. And what I'm finding is that the whole structure of seeking tuberculosis treatment comes without any counseling support. But if you are HIV positive and have TB and you go to an HIV center, there's still good counseling services available there. There's still-- so that's interesting how we haven't seen the impact of HIV-- the positives of HIV trickling into other health issues in the way we should have by now. I think on health rights generally, there is a better-- so there's now an HIV Act, which is India's first anti-discrimination law. So actually if you're thrown out on your HIV status, or you're removed from a hospital, et cetera, you can now claim anti-discrimination, make an anti-discrimination claim, even in the private sector. But that's not been implemented. So my understanding is the act has been passed, but there's no infrastructure being put in place to see that people can actually go to a complaints redress mechanism and actually file a complaint and get relief. So there's a big gap in passing legislation and then actually supporting it financially through implementation and enforcement. Yeah. I don't know if I've answered it-- Yeah. OK. Yeah. It's a real worry. I think HIV is affecting communities [INAUDIBLE]. It's a real concern. SITAL KALANTRY: Well, great. Thank you so much. We really appreciate it. VIVEK DIVAN: OK, thanks. Thanks for having me. [APPLAUSE]