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Invisible Judgments: Locating Dissent between Law and Literature

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This essay makes a case for removing some of the barriers that exist between the realms of law and literature. Not all legal documents come attached with a force that mandates implementation. Conversely, there is a realm of literary texts that do intend to reach beyond the written page and translate ideas into action. Here I make a case for judicial dissents and theatrical plays as texts that occupy the first and second category respectively. If the dissenting opinion is a literary text then what forms might it occupy? And if the theatrical text constitutes a form of dissent then what iteration might it take to speak to the judicial dissent?

A judgment is rooted in the closure of possibility. Shoshanna Feldman tells us that the law is a function of limits; that a trial closes and encloses a case in the past. Decisions may be challenged at future points of time, the process of appeal might be activated, a subsequent bench might overturn a decision, and yet the moment of decision carries with it a weight of finality, a threat of force, the "field of pain and death" within which legal interpretation takes place.

The dissenting judgment exists in a somewhat different place, however. As Kenji Yoshino notes, dissents are spatially and temporally distinct from the majority opinion, operating as rhetorical islands distinguishable from the majority opinion and focusing their attention on the future.[1] This rhetorical freedom exists in part because the dissent at the point of articulation lacks the force of law. In the inverse relationship between force and fancy then, the dissent acquires the potential to be fantastical because of its distance from legal force.

If the judicial dissent is a legal artifact with muffled force, the dramatic play is a literary artifact with amplified force. Percy Shelley calls poets the unacknowledged legislators of the world: the playwright nudges closer to acknowledgment. Theatrical texts often contain a more direct ability to communicate meaning. Hannah Arendt tells us that theatrical plays tend to address us as citizens in a manner distinct from other creative mediums. In particular, I argue that plays which directly address and critique court decisions or laws occupy a realm similar to that of the legal dissent.

The legal dissent pivots towards the literary; the theatrical dissent pivots towards the legal. Both serve to open up the law, to "those aspects of the past that legal closure effaces".

Yoshino finds that the space the judicial and theatrical dissent occupy points to a Foucauldian heterotopia, a place which situates a utopia within a real site, where the image of the utopia is both represented and contested.

Five years after Foucault's lecture on heterotopian spaces, Italo Calvino's Invisible Cities catalogued 55 visions of the city of Venice. Over the course of the book, the explorer Marco Polo gives an account of his travels to the emperor Genghis Khan, describing a dizzying array of cities ranging from spaces where earth replaces air or where a parallel space for the unborn exists alongside the world of the living. These architectural thought experiments ultimately emerge as pieces contained within the world of Venice, opening up the possibility of what the space of the city can be, and how we might inhabit and live within that very space.

Through the frame of the dissenting judgment I want to ask a related series of questions in my essay: What worlds does dissent try to imagine? What are the different ways in which we can think of the dissenting judgment as a literary document, as constituting its own distinct genre(s)? And how can we imagine the theatrical play as yet another kind of dissenting judgment?

I. Dissent as Hope

"The dissenter's greatest permission is to imagine a better world, to be the prophet of eternities."[2]

Taking off from Kenji Yoshino's observation above, the first frame to place the dissenting judgment within is that of hope. In striking out from the majority and choosing to express an opinion that must be necessarily overshadowed by the judgment of the court, the dissenting judge orients themself to a future possibility. As Justice Brennan of the US Supreme Court once noted, the dissent is offered as "a corrective - in the hope that the Court will mend the error of its ways in a later case."[3]

Hope as a genre comes closest to the idea of the liteary utopia, or rather the heterotopia that Foucault imagines. The hopeful dissenter constructs an adjacent world that grapples with the present while also leaving open a door for future transformation.

About the Author
Danish Sheikh *has a B.A., LL.B. from NALSAR University of Law and an LL.M. from the University of Michigan. He is an Assistant Professor at Jindal Global Law School.*

There is no guarantee for this future world to emerge, little that the judge themself can do outside the process of the court, and so it is that the dissent becomes a document that captures a rhetorical force rife with potential. In cases where that potential is realized, the future words cast a retroaspective sheen on what has come before.

Justice Subba Rao's dissent in *Kharak Singh v. State of UP*[4] stands as an important example of such a dissent. The case dealt with the question of whether state surveillance was against the right to privacy, in a situation where the petitioner challenged regular police surveillance even after he was discharged from a dacoity case due to lack of evidence. The surveillance in question was conducted under UP regulations which allowed amongst other intrusions, domiciliary visits at night to Kharak Singh's house. A six judge bench of the Indian Supreme Court examined the regulations against the touchstone of Article 21 of the Constitution. While they ultimately found the specific provision allowing domiciliary visits to be unconstitutional, they did not hold privacy to be a guaranteed constitutional right. The Court's understanding of the impact of surveillance meant they were only able to imagine a direct domestic intrusion as a constitutional rights infringement, while any kind of diffuse apprehension of the petitioner that the police were on the watch for his movements was cast aside.

Those fears were taken seriously by Justice Subba Rao who crafted a dissent striking down the regulations in their entirety, in the process imagining another space where the law did take cognizance of the intangible: *"How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail".* This is a vivid metaphor that the judge goes on to further illustrate with an example: *"A visitor, whether a wife, son or friend, is allowed to be recevied by a prisoner in the presence of a guard. The prisoner can speak with the visitorl but, can it be suggested that he is fully enjoying the said freedom? It is impossible for him to express his real and intimate thoughts to the visitor as fully as he would like."*

Ignored by the majority, fifty-five years later, Justice Subba Rao's dissent was "resurrected in its entirety"[5] by a nine judge bench of the Supreme Court in KS Puttaswamay v. Union of India.[6] Beyond its unanimous finding that the right to privacy was a constitutional right, an opinion by Justice Nariman specifically referred to Justice Subba Rao's opinion as one of the "three great dissents" in the history of Indian constitutional law.

II. The Conservative Dissent

> *"Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda ... the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."*
> - Justice Antonin Scalia dissent in Lawrence v. Texas[7]

> *"This Court has mistaken a Kulturkampf for a fit of spite"*
> - Justice Antonin Scalia dissent in Romer v. Evans[8]

The conservative dissent often has a different rhetorical tone from the liberal one. The dissenting opinions of Justice Scalia of the US Supreme Court tend to exemplify this particularly well.

In *Romer v. Evans*, the Supreme Court held an intiative barring antidicrimination laws protecting gays and lesbians passed by Colorado voters to be a violation of the Constitution's Equal Protection Clause.

A few years later, the Court found laws that criminalized sodomy to violate the Constitution's Due Process Clause in *Lawrence v. Texas*. In both cases, Justice Scalia wrote a withering dissent that was focused less on the interpretation of the respective constitutional clauses, instead making adjacent digs at the underlying assumptions behind the decision.

In the Romer dissent for instance, he focuses on the Court's finding that the Colorado initiatve displays animus towards homoosexuality: "The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American." Of course, "American-ness" was never part of the argument but that doesn't stop the judge from forging his claim, which he then bolsters by finding that even if there was any animus on the part of the Coloradans, it was "the smallest conceivable", a claim that was "was belied by the virulently homophobic campaign that surrounded Amendment 2, which even included the sensationalist claims that gay people "eat feces and drink raw blood."[9] In his Lawrence dissent, Justice Scalia goes even further, accusing the Court of supporting "the so-called homosexual agenda" and departing from its constitutional role as a neutral observer.

Susanna Lee discusses how this tone is typical of the conservative dissent. As distinguished from the liberal dissent which tends to be more measured in its disagreement with the majority, choosing to engage on more carefully tailored legal grounds, the conservative dissent is often animated by a stronger rhetorical force. Would the term polemic be of any use to in describing this category, even as we acknowledge that a number of liberal dissents could still match this rhetorical force? Or is there perhaps another genre, say the dystopia, that better describes this form of dissent?

III. The Internal Dissent: Dissent as Counterfactual

> *"Two roads diverged in a wood, and I -*
> *I took the one less travelled by,*
> *And that has made all the difference."*
> - Robert Frost, The Road Not Taken

Robert Frost's poem is often taken as a celebration of taking the uncharted path, the courageous decision to veer from known territory. However, as Ravit Reichman observes,[10] the title of this poem points us to a different state of mind as far as the protagonist is concerned: it is the road not taken that seems to quietly haunt the traveller here. Reichman views this as the internal dissent of a figure who fleetingly imagines another existence, who wonders whether things could have been different. The road less travelled may have worked out just fine for the traveller, but we are left to wonder about that other possibility at the same time.

The counterfactual emerges as a moment or an entire genre across different works of literature. The bulk of Ian McEwan's Atonement is a counter-reality composed by one of its characters in an effort to provide two lovers a happy ending which was denied to them by her own actions in reality. Kazuo Ishiguro's Remains of the Day ends with a gently devastating moment as a butler lets his tightly constructed guard down to imagine a possible life of happiness with a woman he has loved for years, even as it becomes clear that this will never come to pass.

And in Reichman's own essay, she looks to a moment in EM Forster's A Passage to India where a character momentarily lapses into a vision of a life that might have been, before snapping back to the present.

"The interruptions of possible worlds do not change the outcome of the story, but they help us to judge it differently, to feel at its close that the parting of ways might not be inevitable, that a more fitting end - indeed entirely a different novel - might have been written"[11]. Dissent may not always be articulated in the terms of a dissent - and even when articulated it may not alter the resolution of the decision. In telling law's stories we tend to understand a decision as "dissenting" only when composed by a member of the same bench that decides another way. For this particular frame, I will imagine a different situation: where a moment of dissent is articulated by a separate judicial opinion in relation to one that comes prior. In many instances, a subsequent court's disagreement with a prior court's reasoning would result in the former judgment being overruled. In the case of the internal dissent, this is not quite what happens.

In 2013, a two judge bench of the Indian Supreme Court passed the Suresh Kumar Koushal decision which upheld the constitutional validity of Section 377 of the Indian Penal Code. The judgment was widely understood as effectively decriminalizing sexual acts done by LGBTQ individuals in the country. To reach this conclusion, the judges make the claim that Section 377 of the Indian Penal Code criminalizes "carnal intercourse against the order of nature" without specifically targeting LGBTQ individuals. Framing the issue in this manner paves the way for the Court to reject arguments about inequality and discrimination faced by what it terms as ultimately a "miniscule minority".

Four months after the decision, another two judge bench of the Court in the decision of NALSA v. Union of India held that non-recognition of transgender identity amounted to a constitutional rights violation. In making this assertion, the Court takes a detour to mention Section 377, in particular noting the 1884 Allahabad High Court judgment of Queen Empress v. Khairati where a transgender person was arrested under Section 377 on suspicion of being a habitual sodomite. The NALSA judgment takes note of this case as a demonstration of the fact that Section 377, though associated with specific sexual acts, highlighted certain identities, including hijras and was used as an instrument of harassment and physical abuse against hijras and transgender persons. This seemingly throwaway statement in fact undermines the core of the reasoning in the Koushal decision, which is ultimately based on an argument that Section 377 does not target any specific group identity.

The moment of rupture is fleeting, however. Barely has the judge made this statement before he circles back to note that he will actually make no opinion on Section 377 since the Suresh Kumar Koushal decision has already ruled on its constitutionality. There are other issues that concern the Court here, we are told. In the process, what we are left is a fleeting moment of internal dissent, a tentative possibility that remains unrealized.

IV. Theatres of Dissent

Noting that most forms of pre-modern theatre maximized the audience's awareness that it embodied a community that transcended familial and neighbourly relations, David Wiles argues that the very nature and purpose of theatre is to create communities.[12] For Bertolt Brecht, this community is to be created for a specific purpose. Brecht's plays were not designed to evoke feelings of compassion and pity in the audience: their aim was to teach the audience so that each member left the theatre a changed person, "ready for political action".[13]

Most of this essay has looked at the dissenting judgment as one that emerges from the court of law. With this final section I imagine how we might look at dissent that emanates from plays dealing with legal/political themes as yet another component of the dissenting judgment. I use two plays from India in particular to touch upon how they imagine different frames of dissent in relation to the Suresh Kumar Koushal decision: Dohri Zindagi performed by Neha Singh and Bhumika Dube and Contempt, a rendition of the Section 377 hearings that I have written.

Contempt is a more straightforward dissent: the core of the play is four scenes based on the unofficial transcripts of the Suresh Kumar Koushal hearings. Each scene features a different line of argument employed by a lawyer before the two judges: the historical basis of the law, the law's impact on HIV/AIDS efforts, the law's legitimization of police violence, the law's effect on the dignity of LGBT persons. As each of these scenes progresses, the play shows how the judges constantly invoked the same question - what constitutes carnal intercourse against the order of nature - to avoid substantively engaging with the content of the lawyers' arguments. My vision of dissent within this play is in the form of the scenes that are juxtaposed with each narrative in the courtroom - monologues that feature the lived narratives of different queer persons. Where the courtroom space denies the experience of queer subjectivity, I attempt to place the voices of the very same persons in the courtroom space as an implicity denial of the Court's rhetoric.

As regards the other "dissenting play" I refer to, the Koushal decision is never actually referenced in the world of the play. I still find however that the play constitutes a strikingly powerful response to the decision. Dohri Zindagi was first presented in India in 2016, three years after Koushal. The play is based on a short story by Rajasthani author Vijay Dan Detha, following two small town women in love who elope and find a space where they can escape persecution.

During the final arguments before the Supreme Court in 2012, there was a moment when the judges took pause in their constant excavation of what constituted carnal intercourse against the order of nature. It was a moment prompted by a story in a book titled Same Sex Love in India: Readings from Literature and History, edited by Ruth Vanita and Saleem Kidwai. The story was Vijay Dan Detha's Dohri Zindagi. The Court had just resumed after lunch, when Justice Singhvi remarked that he'd had a chance to read the story over his break. What followed was one of the few truly reflective moments during the course of a six week hearing where the judge spoke about the struggles he'd had with the case, while acknowledging the reality of the story he had read: that same-sex relationships had indeed formed a part of the country's past. This was a remarkable moment, all the more notable for its complete erasure from the text of the final decision.

The existence of the play Dohri Zindagi then serves as a reminder of this moment that is left out of the decision. And even as Suresh Kumar Koushal v. Naz Foundation closed off the reality of queer intimacy (albeit temporarily14) Dohri Zindagi re-opens it. Over the course of the play, two women fall in love, resist a patriarchical society that will not allow them to be together, escape to another space where they encounter transformations both metaphysical and emotional, and in a final twist, are allowed to celebrate their sexuality in an autonomous manner. They dissent.

Conclusion

I have argued in this essay that a dissent that emerges from a Court of law can be viewed on a plane that is different from the law pronounced by the majority. Where the former has an immediate sovereign force, the dissent operates in a sphere that is more literary by default, where it could be viewed as rhetorical device, or an appeal to the intelligence of a future day, or an act of internal struggle. Viewed like this, it opens up the literary quality of the dissent; and having done so, it invites other literary forms into the realm of the law. The particular literary form that I have chosen as its closest correlative is a certain kind of theatrical play. The plays that I understand as occupying the space of the judicial dissent are ones that tend to directly speak to a court or policy decision. In doing so, the plays perform a dissent that pushes the text into a realm that occupies a more immediate force than other literary forms.

The first direction this points us towards examining further is the interdiscipline of law and literature – in particular, the branch that looks at the law *as* literature. To make a case for dissents as a form of literature makes the argument for examining this particular area of the law using literary theory that much stronger. The second direction we might look towards is how this understanding of the force of legal theatre, if I might use the term, aids us in using theatre as a means of activating critique against the judiciary or, even more broadly, the state. What would it mean for more legal actors – lawyers, litigants, activists – to engage with the form of theatre as a device for thinking about social change?

End Notes

1. Kenji Yoshino, Of Stranger Spaces in Austin Sarat (ed)., Dissent.
2. Kenji Yoshino, Of Stranger Spaces in Austin Sarat (ed)., Dissent.
3. W.J. Brennan Jr., "In Defense of Dissents," Mather 0. Tobriner Memorial Lecture, reproduced in H. Clark, Justice Brennan: The Great Conciliator (Secaucus, N.J.: Birch Lane Press, 1995) at 256.
4. 1963 AIR 12951
5. See Gautam Bhatia, The Supreme Court's Right to Privacy Judgment - III: Privacy, Surveillance, and the Body
6. (2017) 10 SCC 1.
7. Lawrence v. Texas, 539 U.S. 558, 602 (2003)
8. Romer v. Evans, 517 U.S. 620 (1996).
9. M.K.B. Darmer, The Enduring Force of Scalia's Lawrence and Romer Dissents: The Case for Proposition 8, 22 La Raza L.J. (2015). Available at: http://scholarship.law.berkeley.edu/blrlj/vol22/iss1/
10. Ravit Reichman, The Ethics of an Alternative in Austin Sarat (ed), Dissent.
11. Ravit Reichman, The Ethics of an Alternative in Austin Sarat (ed), Dissent.
12. David Wiles, Theatre and Citizenship: The History of a Practice, Cambridge University Press, 2011.
13. See Yasco Horsman, Theaters of Justice: Judging, Staging and Working Through in Arendt, Brecht and Delbo, Stanford University press, 2011.
14. A five judge constitution bench of the Court is expected to hear the matter later this year.

Editors and Conveners of the Law and Policy Research Group

Dr. Ashish Bharadwaj is an Associate Professor in Jindal Global Law School, and a founding editor of the Law & Policy Brief. He serves as Director of Jindal Initiative on Research in IP & Competition (JIRICO) at O.P. Jindal Global University, a visiting professor at Institute of Innovation Research in Tokyo, and an affiliated faculty of CIPR, Maurer School of Law in Indiana University Bloomington. He holds a B.A. (Hons.) and M.Sc. in economics from Delhi University and Madras School of Economics, LL.M. in law and economics from Rotterdam, Hamburg and Manchester, and Ph.D. from the Max Planck Institute for Innovation & Competition in Munich.

Sannoy Das is an Assistant Professor at Jindal Global Law School. He holds a B.Sc. LL.B. (Hons.) from National Law University, Jodhpur and read his masters[1] in law from Harvard Law School. He researches on questions of law and history, international trade, political economy and political theory. Prior to joining the academy, he practiced law at the High Court at Calcutta. At the law school, apart from teaching courses on civil litigation, international trade and interdisciplinary electives, he also co-ordinates moot court activities.