

# OUT OF THE COLONIAL CLOSET, BUT STILL THINKING 'INSIDE THE BOX': REGULATING 'PERVERSION' AND THE ROLE OF TOLERANCE IN DE- RADICALISING THE RIGHTS CLAIMS OF SEXUAL SUBALTERN\*

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*This paper primarily intends to throw light on the postcolonial reading of the legal engagements of sexual subgroups that depicts the complex layering of sexual subjectivities in a postcolonial context, which are not captured in a straightforward 'lesbian' or 'gay' reading. The use of the term 'sexual subaltern' in this paper is mainly intended to capture this complexity. Through the discussions on the engagement of the sexual subaltern with law, the author draws on subaltern scholarship to provide a more complex articulation of the position of the sexual subaltern as well as the relationship between law and the subject. The first part of the paper, briefly discusses the explosion of homoerotic imagery, literature and sex talk in the context of sexual subalterns in postcolonial India, to illustrate that the voice of the sexual subaltern is being gradually accommodated within the postcolonial discourse, and that the public space has become more amenable to sexual subaltern claims*

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*and practices. However, any declarations of victory, especially after the historic **Naz Foundation** judgment, may be somewhat premature. The second half of the paper analyses tolerance is constituted in postcolonial India, and excavates the historical and politically discursive character of tolerance. The author explores how suggestions for expansion of the majoritarian religious moorings of tolerance, or for adopting a more political conception of tolerance, are still unable to displace dominant understandings of culture or disrupt normative sexuality. Instead, sexual subalterns are still treated as a ‘perversion’ to be tolerated within the framework of liberal democracy, and where tolerance is deployed to deal with the excess that formal equality has failed to accommodate.\*\*\**

## I. INTRODUCTION

The Delhi High Court judgment in *Naz Foundation v. Government of NCT*<sup>1</sup> (*hereinafter* “*Naz Foundation*”) has declared unconstitutional the application of Section 377 of the Indian Penal Code (*hereinafter* “*IPC*”) to non-consensual sexual conduct. The Central government has decided not to contest the decision. At the same time, at least nine other petitions have been filed in the Supreme Court, the most famous being that of Baba Ramdev, the brand ambassador for Ayurveda and Pranayama yoga. The challenges are based on arguments that range from assertions that homosexuality is an illness for which there is a cure to expressions of anxiety over the crisis of cultural identity produced by the decision. Most of the challenges allege that homosexuality is associated with rampant promiscuity of the West, which centres hedonism and pleasure that are not apparently a part of our genetic cultural make-up.

Oddly enough, such a logic, which views Indian culture as puritan, devoid of pleasure and even uncivilized, continues to inform the arguments and interventions of some activists and scholars in the western academy. In the arena of sexuality, pleasure, desire and agency are invariably assumed to be associated with the West, while the third world gendered and sexual subject is constructed almost exclusively through the lens of violence, victimization, impoverishment and cultural barbarism. Slumdog Millionaire’s bouquet of Oscars in 2009, and similar accolades for Deepa Mehta’s film *Water*<sup>2</sup> and Zana Briski’s film *Born into*

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\*\*\*Abstract supplied by Editors.

<sup>1</sup> (2009) 160 DLT 277; W.P. (C) No.7455/2001 of 2009 (Delhi HC).

<sup>2</sup> This film won an Oscar nomination in 2007.

*Brothels*,<sup>3</sup> all reinforce the idea that while India has arrived on the global political and economic scene, Indians are still largely represented as slumdogs, and Indian women as victims are waiting to be rescued by their global feminist sisters.

The High Court decision directly challenges both of these overlapping views, which tend to marginalise or disregard the voice of the sexual subaltern in their assessments of Indian culture. The sexual subalterns are unequivocally claiming the decision as a victory for sexual rights, and one that builds on the proliferation of homoerotic imagery and scholarship within the context of postcolonial India. While it is important to savour the victory and feel a sense of pride in the opening up of the public arena to diverse sexualities, it is also important as both legal activists and scholars, to take a step back and to be attentive to what has been lost in the course of such journeys, including an assessment of the strengths and limitations of engaging with the legal system. I provide a postcolonial reading of the legal engagements of sexual subgroups that expose the complex layering of sexual subjectivities in a postcolonial context that are not captured in a straightforward 'lesbian' or 'gay' reading.<sup>4</sup> In this paper, I use the term 'sexual subaltern' to capture this complexity. In discussing the sexual subaltern's engagements with law, I draw on subaltern scholarship to provide a more complex articulation of the position of the sexual subaltern as well as the relationship between law and the subject.

The paper is divided into two parts. In the first part, I briefly discuss the proliferation of homoerotic imagery, literature and sex talk in the context of sexual subalterns in postcolonial India.<sup>5</sup> The voice of the sexual subaltern is being increasingly been accommodated within the postcolonial discourse, and, in the process, has disrupted cultural and sexual norms in the public arena. This disruptive capacity provides space for more productive and complex politics than cannot be captured in the notion of 'coming out', or through a focus on non-heteronormative performances. While the public space has become more amenable to sexual subaltern claims and practices, any declarations of victory, especially after the historic Delhi High Court judgement, may be somewhat premature. In the second part of the paper

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<sup>3</sup> This film won the Oscar for best documentary in 2005.

<sup>4</sup> I acknowledge that there are distinctions drawn between Lesbian, Gays, Bisexuals and Transgender (*LGBT*) scholarship and the field that constitutes queer theory. JUDITH BUTLER, *BODIES THAT MATTER* (1993); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality* in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267-319 (C. Vance ed., 1989, reprint); EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990). There are also some moves in postcolonial scholarship in India to distinguish queer theory from LGBT scholarship. See Arvind Narain, *Queer Journey*, (2007) 14 *INDIAN JOURNAL OF GENDER STUDIES* 61. However, these distinctions are often blurred in legal advocacy as well as by those citing the scholarship. The argument remains that both are seen to emanate primarily from 'the West', and neither captures the nuances and complexities of postcolonial contexts and histories within which the sexual subaltern has emerged.

<sup>5</sup> *THE PHOBIC AND THE EROTIC: THE POLITICS OF SEXUALITIES IN CONTEMPORARY INDIA* (Brinda Bose & Sanjay Bhattacharyya eds., 2007); MARY JOHN, *WOMEN'S STUDIES IN INDIA: A READER* 560 (2008); *SAME SEX LOVE IN INDIA* (Ruth Vanita & Salim Kidwai eds., 2000).

I draw attention to some of the contradictory results produced in the sexual subaltern's engagements with law, which has at times diminished the radical potential of sexual subaltern politics. While part of this loss can be attributed to the monochromatic lens through which law regulates the sexual subject, I focus on how there is a flattening out of the sexual subject, produced and regulated in and through the discourse of tolerance. In postcolonial India, tolerance is informed not only by dominant religious norms, most explicitly articulated by the Hindu Right, but also normative sexuality, which prescribes norms of behaviour and sexual conduct that are deeply implicated in the identity of the nation. I unpack the competing understandings that structure the concept of tolerance, which has become central to shaping the way in which sexual subalterns are accepted in the public space. I argue that legal engagements have not resulted in the equal treatment of homosexuals and heterosexuals in law, nor have they necessarily been transformative or emancipating.<sup>6</sup> Instead, sexual subalterns are treated as a 'perversion' to be tolerated within the framework of liberal democracy, and where tolerance is deployed to deal with the excess that formal equality has failed to accommodate.

## II. WHO ARE SEXUAL SUBALTERNs?

In order to capture the situatedness of the sexual subject in law in India, it is important to scan beyond the disciplinary boundaries of law. The subaltern studies project emerged as a political project from within history, sociology and political science. It is a project that has exposed how certain voices have been excluded from the dominant narratives and the telling of history. The project, as it emerged in India, was initially based on the position and location of the subaltern subject and of writing history from below.<sup>7</sup> The project was grounded in historical materialism and a search for an essential peasant consciousness. In the 1980s, the project splintered into those who continued to write histories from 'below' and those who adopted a more Foucauldian analysis, focused on contesting the Eurocentric, metropolitan and bureaucratic systems of knowledge.<sup>8</sup> The new focus sought to challenge all traditions and disciplines defined within the logic and rationale of the Enlightenment project, including unmasking the universal subject of liberal rights discourse.<sup>9</sup>

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<sup>6</sup> WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* (2006).

<sup>7</sup> *SUBALTERN STUDIES I: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY* vii-viii (Ranjit Guha ed., 1982); SUMIT SARKAR, *A CRITIQUE OF COLONIAL INDIA* (1985).

<sup>8</sup> DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE* (2000); Dipesh Chakrabarty *Radical Histories and Question of Enlightenment Rationalism: Some Recent Critiques of Subaltern Studies* 30(14) *ECONOMIC AND POLITICAL WEEKLY* 751 (1995) (reprinted in Vivek. Chaturvedi ed.) *MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL* (2000). For an understanding of the use of the term subaltern in the context of sexuality, see RATNA KAPUR, *EROTIC JUSTICE AND THE NEW POLITICS OF POSTCOLONIALISM* (2005).

<sup>9</sup> DIPESH CHAKRABARTY & HOMI BHABHA, *HABITATIONS IN MODERNITY: ESSAYS IN THE WAKE OF SUBALTERN STUDIES* (2002); VINAY LAL, *EMPIRE AND KNOWLEDGE: CULTURE AND PLURALITY IN THE GLOBAL ECONOMY* (2002); WALTER MIGNOLO, *LOCAL HISTORIES/GLOBAL DESIGNS* (2000); HOMI BHABHA, *THE LOCATION OF CULTURE* (1994).

The term sexual subaltern is at one level intended to capture the extraordinary range and diversity of the counter-heteronormative movement. In India, these counter-heteronormative movements have included a vast array of sexual identities: gay, lesbian, bi-sexual, transgendered, *kush*, queer, *hijra*, *kothis*, *panthis* and many more.<sup>10</sup> They have also included sexual practices and behaviours such as adult and consensual pre-marital, extra-marital, non-marital, auto-erotic/masturbatory, promiscuous, and paid-for sex, as well as MSM (men who have sex with men). It is this diversity of identities and range of practices that cannot be captured within the acronym 'LGBT', and why there is a need to articulate the politics of sexual subgroups from within a postcolonial context rather than to borrow theories or politics from elsewhere, a move that is both decontextualised and dehistoricised.

The subaltern subject is not simply a member of a minority group. While they are minorities in so far as they seek to claim formal equal rights, at a more radical level, this subject also brings about a conscious challenge to the dominant normative assumptions about the subject on which law is based. By virtue of her subaltern location and performance in a postcolonial space, the subaltern subject resists the assimilative gestures of the imperial and liberal project. She is a subject who is quite distinct from, and unlike the sovereign autonomous subject of liberal rights discourse. The subaltern is a peripheral subject, deployed by postcolonial theory to unmask and challenge the dominant sexual, cultural, gendered and religious perception about the 'Other' that continue to inform the law. In the context of the sexual subaltern subject, the dominant sexual, cultural and familial arrangements that are imbricated in law are exposed and disrupted. In the process, new possibilities are produced for excluded subjects, and law is reconceived as a site of power rather than freedom and emancipation. It is this perspective that I bring to my analysis of the sexual subaltern's engagements with law in postcolonial India.

### III. SEXUAL EXPLOSIONS IN LAW AND CULTURE

In the 1990s, there was a significant amount of anxiety over the proliferating discourse on sexual desire and agency in India. There were routine attacks on heterosexual couples celebrating Valentine's Day or stores selling Valentine's Day cards. Police raided cyber cafes for clients surfing for pornography, or to 'clean up' parks routinely visited by heterosexual couples in large urban centres. These panics continue to feed the sexual shakedowns in the contemporary period. Movements have emerged against public displays of affection, as well as increased surveillance of female sexual conduct in public.<sup>11</sup> The harassment on

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<sup>10</sup> SHERRY JOSEPH, *SOCIAL WORK PRACTICE AND MEN WHO HAVE SEX WITH MEN* (2005); Shivananda Khan, *Culture, Sexualities, and Identities: Men Who Have Sex With Men in India*, 40 *JOURNAL OF HOMOSEXUALITY* 99 (2001).

<sup>11</sup> *Pub culture against Indian ethos, must stop: Ramdoss*, INDIA TODAY, January 30, 2009, available at [http://indiatoday.intoday.in/index.php?option=com\\_content&task=view&id=26843&sectionid=4&secid=0](http://indiatoday.intoday.in/index.php?option=com_content&task=view&id=26843&sectionid=4&secid=0) (Last visited on September 2, 2009); *Muthalik's Sene turns*

Valentine's Day continues, and homosexual men also continue to be persecuted under legal provisions that criminalise sodomy and other 'unnatural' sexual offences, until the recent Delhi High Court verdict. The Hindu nationalists, who seek to establish a Hindu State in India, are key players in the movement to purge India and Indians of sexual agency and sex talk. Its foot soldiers continue to degrade sexuality and banish any overt expression of it outside the model of the good Hindu wife and heteronormative arrangements. In the process, it has projected outward expressions of this degraded sexuality onto its 'Others'<sup>12</sup>.

Despite these efforts to contain, confine and cage sexuality, there has been a proliferation of images of alternative sexuality, gay pride marches in most metropolitan cities, and an increased self-confidence on the part of sexual subalterns to speak out, conveying a sense that India has finally arrived. Some declare that the 21<sup>st</sup> century will be the Asian gay century! In the 2008 film *Dostana* even Bollywood took the issue of gay sexuality to another level, pulling it from the erratic margins of formula Hindi films, and served up a full frontal gay performance complete with a thirty second lip-locking kiss involving the hottest superstars of the day – Abhishek Bhacchan and John Abraham. More serious incarnations of the subject, with less beef and brawn, came in *My Brother Nikhil* (2005), a small budget film sympathetically depicting the discrimination and homophobia experienced by an HIV patient in contemporary Indian society. In 1998, the diasporic film *Fire*, rendered same sex desire intelligible through the performance of queer femininity between two married women in the postcolonial domestic space.<sup>13</sup> There have also been the unlimited subversive readings of the erotic spaces that occur even in the most nationalistic, heteronormative, gender conforming Bollywood movies – and that too in the domestic arena.<sup>14</sup> These readings attest to the disruptive capacity of queer female desire to complicate the narrative by demolishing the masculinist fortifications and dominant sexual norms that structure the film. The narratives are exposed as being both amenable to queer readings that are momentarily at least subversive, as well as providing space for the recognition of female homoerotic desire.

Alongside the explosion in sexual imagery, there has been a simultaneous proliferation of rights talk in favour of greater sexual expression in public, as well as more heterogeneous sexual identities. In February 2009, the Delhi High Court stayed criminal proceedings against a young married heterosexual

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*wrath on Valentine's Day*, TIMES OF INDIA, February 3, 2009, available at <http://timesofindia.indiatimes.com/articleshow/msid-4068955,prtpage-1.cms> (Last visited on September 2, 2009).

<sup>12</sup> Paula Bacchetta, *When the (Hindu) Nation Exiles its Queers*, 17(4) SOCIAL TEXT 141 (1999).

<sup>13</sup> GAYATRI GOPINATH, IMPOSSIBLE DESIRES: QUEER DIASPORAS AND SOUTH ASIAN PUBLIC CULTURES 155 (2006).

<sup>14</sup> *Id.*; See Shohini Ghosh, *Invoking the Imagined Spectator: Bombay Cinema and Queer Sexualities* in QUEER THEORY: LAW, CULTURE AND EMPIRE (K.Brooks & R.Leckey, eds., 2010).

couple who were charged with obscenity for kissing in public.<sup>15</sup> The Court held that such conduct amounted to nothing more than an 'expression of love' and did not fall within the scope of the obscenity provision of the IPC, 1860.<sup>16</sup> Gay and lesbian groups have successfully challenged the scope of Section 377 of the IPC, which makes unnatural sex of any kind illegal, including sodomy between consenting adults, encouraging the trend in the direction of more sexual speech.<sup>17</sup> The provision was inserted into the IPC by Lord Macaulay as part of the colonial project of regulating and 'cleaning up' native culture in the course of the civilizing mission. The provision marked the convergence of colonial, cultural and scientific discourse, to produce a subject where the sexual act was regarded as constitutive of the subject.<sup>18</sup> Sodomy was the core identity of this subject who was driven by nothing other than sexual desire.<sup>19</sup> The contemporary use of Section 377 of the India Penal Code has been limited to rare prosecutions for child sexual abuse, rather than to prosecute gay men. It has nevertheless been continuously used as a tool to harass gay men especially in the context of cruising.<sup>20</sup> The petitioners successfully argued that the Section should be narrowly construed to apply only to non-consenting sexual activity. The case constitutes what Bose has described as the 'eye of the sexuality storm in India'.<sup>21</sup>

All the forms of resistance discussed have been framed within the overarching claim of human rights. Sex talk and sexual expression are predicated on a universal human rights foundation, and its claim to protect the rights of marginalized groups as well as non-conforming sexual expression. The challenge to Section 377 marks the moment when sexual rights claims can no longer be treated as distinct from the larger human rights struggle.<sup>22</sup> The persistence of gay rights activists, the enormous publicity afforded to the subject of homosexuality through Bollywood, increased visibility on the streets and in the media, as well as the successful legal challenges to the sodomy law has shifted the goal posts on

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<sup>15</sup> Abhinav Garg, *Kissing in Public by Married Couples not Obscene*, TIMES OF INDIA, February 2, 2009, available at <http://www.Indiatimes.com/articleshow/msid-4066941,prtpage-1.cms> (Last visited September 2, 2009).

<sup>16</sup> *Id.*

<sup>17</sup> § 377 states as follows: *Unnatural sexual offences*: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment... Which may extend to ten years, and shall also be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. (The provision was held not to apply to consenting adult sexual relations in *Naz Foundation v. Government of NCT and Ors. W.P. (C) No. 7455/2001*, July 2 2009).

<sup>18</sup> MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (trans. A. Sheriden, 1979).

<sup>19</sup> MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (1978).

<sup>20</sup> Peoples' Union for Civil Liberties, *Report on Human Rights Violations Against Sexual Minorities* (2003) available at <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.htm> (Last visited on September 2, 2009).

<sup>21</sup> BOSE AND BHATTACHARYYA, *supra* note 5, xix.

<sup>22</sup> *Id.*, xxix.

what constitutes good sex and bad sex.<sup>23</sup> It is no longer possible to contain or muzzle the gay subject. Eroticism is claiming a space in law and on the streets, and efforts to eliminate or incarcerate it are being seriously challenged as violations of human rights. There seems little more to say on the matter. If it is now possible to be gay and *kush* in India, then surely homosexuals can give themselves a pat on the back to have realised that which seemed so unrealisable only a decade ago. It's a gay party over here!

While there has been an amplification of voices for more sex and many types of sex, I still wonder if gays and lesbians are feeling more empowered, transformed or emancipated? Is the party premature? The question that arises is whether the court challenges, rights advocacy, civil dissidence and increased sex talk and imagery have actually furthered the cause of sexual subalterns in the direction of more rights or more freedom? Or have these legal engagement entrenched such claims in a heteronormative, liberal box?

On closer analysis, such engagements have not necessarily conferred additional rights on sexual subalterns. In the context of the Delhi High Court's decision upholding the challenge to Section 377, the whittling down of the scope of the provision is to ensure that it is not used to prosecute sexually consenting adults. It is a call to tolerate consensual sexual conduct between homosexuals, rather than to confer the right to full, substantive equality. Support for the decision from mainstream lawyers, politicians, and laypersons, reflect a similar call for tolerance or neutrality. Yet this call for tolerance is a cause for concern, as it becomes a device for social and political control, rather than empowering the groups being tolerated.

#### IV. UNPACKING TOLERANCE

Tolerance means different things to different people. In the colonial context, tolerance was the glue that enabled civilizing missions and colonial adventures to tame the barbarous 'other' who was intolerant and uncivil. The colonial project legitimised its rule through the mechanism of tolerance. Tolerance has followed separate types of logic in postcolonial period. In encounters with indigenous peoples in white settler colonies, tolerance has taken the form of apologies and reparation claims by indigenous aborigines such as in Australia. It has emerged in the form of decolonization, in the context of European encounters, with the flow of immigrations from former colonies, and talk of immigration into racially insulated Europe.<sup>24</sup> In the post-independence period in India, tolerance initially functioned to protect the rights of religious minorities and ensure their security in the immediate aftermath of partition and the process of consolidation of the identity of the modern Indian nation-state. Tolerance has also been central in efforts at conflict resolution in ethnically inflamed societies, as well as in the context of the 'War on Terror'.

<sup>23</sup> Rubin, *supra* note 4; Carol Vance, *Pleasure and Danger: Towards a Politics of Sexuality* in Vance, *supra* note 4, 1-27.

<sup>24</sup> BROWN, *supra* note 6, 2.



In the following section, I analyse how tolerance is constituted in contemporary postcolonial India. I excavate the historical and politically discursive character of tolerance. Beginning with it as a religious norm that has been aggressively and most actively pursued by the Hindu Right to advance its own anti-Muslim agenda, I then examine how proposals to expand the majoritarian religious moorings of tolerance, or adopt a more political conception of tolerance, are still unable to dislodge dominant understandings of culture or disrupt normative sexuality. I examine how the use of tolerance continues to inform the postcolonial present and the claims of sexual subalterns. In the context of the colonial encounter, tolerance is a device to deny full legal equality to the native while also managing their claims for greater recognition and empowerment. Tolerance becomes a way of reinforcing dominant norms, while at the same time sustaining an antagonistic posture towards difference and the continuing perception of that difference as threatening or toxic. This discursive aspect of tolerance challenges the normally benign understanding of tolerance as a universal transnational norm or tool to protect the weak against the strong.

### A. TOLERANCE AND THE HINDU RIGHT

I turn first to the way in which tolerance has in fact been deployed in the context of managing religious minorities in India. The overwhelming view is that tolerance speaks of a protection of minorities against the majority. However, in the context of the emergence of the Hindu Right, 'difference' has become a foreign and dangerous identity. Sex workers, migrants, homosexuals and, most overtly, Muslims have become the target of the majoritarian politics of the Right wing. And tolerance has become a mechanism for advancing their agenda.

Tolerance in the Indian context has had deeply religious moorings.<sup>25</sup> Dominant discourses of secularism have emphasized that the principle of tolerance is derived from the cultural traditions of Indian society – cultural traditions that more often than not are equated with Hindu traditions and Hinduism. Although this majoritarian and religious basis of tolerance has been made most explicit in the discourse of the Hindu Right, it is also apparent in the constitutional discourse of secularism.<sup>26</sup> Tolerance is held out by the courts as representing the pluralism of Indian society.<sup>27</sup> Unfortunately, time and again the unstated norm of the majority slips into judicial discourse. The very reason that Indian secularism is said to be

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<sup>25</sup> BRENDA COSSMAN AND RATNA KAPUR, *SECULARISM'S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW* (2001 reprint).

<sup>26</sup> *SECULARISM AND ITS CRITICS* (Rajiv Bhargava ed.); *THE CRISIS OF SECULARISM IN INDIA* (Anuradha Needham *et al.*, eds., 2007); *THE FUTURE OF SECULARISM* (T. N. Srinivasan ed., 2009); Upendra Baxi, *The Constitutional Discourse on Secularism* in *RECONSTRUCTING THE REPUBLIC* 211, 213 (U. Baxi, A. Jacob, A., & J. Singh, eds., 1999).

<sup>27</sup> *M. Ismail Faruqui v. UOI* (1994) 6 SCC 360 (discussing the meaning of secularism and tolerance in the context of a case challenging the attempt to acquisition land for the purpose of constructing a temple to god Ram in the same place where a 16th century mosque, the Babri Masjid, stood).

different from the western model lies in the concept of tolerance and the claim that historically, Indian society in general, and Hinduism in particular, has been tolerant of other religions. It has a historical and cultural grounding. It is this grounding that has been taken up by the forces of the Hindu Right to develop tolerance in its own distinctive and aggressively nationalistic direction.

Tolerance has a vital place in a liberal democracy for it is the primary defence to assimilation. But to truly be of use to the minority community, tolerance needs to be delinked from its majoritarian and religious foundations - foundations that assert that only Hinduism can be truly tolerant because it does not proselytize. One way out of this dilemma would be to simply pluralise the cultural and religious traditions on which tolerance is based. Rather than emphasising the exclusivity of Hinduism as a tolerant religion, this pluralising strategy would search for the historical roots of tolerance in the multiplicity of India's religious traditions.

Such a strategy has been advocated by Ashish Nandy, who argues that secularism as a nineteenth century import from Europe should be abandoned in favour of a 'tolerance that is religious', and a tolerance that is located 'outside the ideological grid of modernity'.<sup>28</sup> In essence, he is arguing in favour of a return to pre-modern forms, uncontaminated by India's encounter with colonialism and modernity. Such an approach has two limitations. The first is that it runs the risks of nostalgic idealism and cultural essentialism - of searching for the elusive authenticity of religious and cultural traditions, of assuming that those traditions can be discovered rather than constructed and negotiated, and of reconstructing those traditions as static, immutable, and monolithic. Second, a religious conception of tolerance does not extend beyond tolerance of religious difference. It is unlikely that religious tolerance could speak to the importance of tolerating those who think, act and live differently, if those differences were based on something other than religion. A religious conception of tolerance may not support an argument for tolerance towards sexual sub-groups. It is unclear that such a shift would help sexual subalterns, who may be accorded more space in the polity as members of different religious and cultural communities, but would still be governed by the dominant sexual, cultural, familial and sexual norms that inform tolerance. Such a shift is unlikely to tolerate sex workers or homosexuals, and may continue to encourage incarceration for homosexuality or denial of certain rights and benefits to sexual sub-groups to which heterosexuals are entitled. A principle of tolerance must be one that is up to the challenge, not only of promoting respect for difference along religious lines, but also along a range of other fault lines.

The infusion of religion into the discourse of tolerance needs to be a cause for concern for sexual minorities, and other excluded or marginalized groups. While the dominant understanding of tolerance in India is linked to religious majoritarianism, it is also simultaneously informed by dominant sexual, familial, and cultural norms. There is evidence that for the Hindu Right, tolerance is shaped

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<sup>28</sup> Ashish Nandy, *The Politics of Secularism and the Recovery of Religious Tolerance*, in BHARGAVA, *supra* note 26, 321.

by sexual and gender stereotypes that determine the line between those who are a part of Indian culture and society and those who are not. The Hindu Right is increasingly defining tolerance according to its own terms. And these terms are partly based on an understanding of female sexuality as heterosexual, chaste, marital, obedient, and pure.<sup>29</sup> All other types of sex and sexual conduct that do not fall within this normative arrangement are penalised. Sexual minorities, who think, act and live differently challenge dominant sexual and gender norms and remain ostracized in this conception of tolerance. They produce apprehensions over the threat they pose to the identity of the nation state, which resides partly in normative definitions of Indian womanhood and female sexuality.<sup>30</sup>

These apprehensions were expressed in the government's original stand in the High Court challenge to Section 377, where it stated that Indian society was not as yet ready to extend toleration in the direction of sexual minorities.<sup>31</sup> Similarly, in a petition filed in the Indian Supreme Court by Baba Ramdev seeking a stay of the High Court decision, states that homosexuality is against Indian cultural values, the institution of the family and threatens to bring about the collapse of the institution of marriage.<sup>32</sup> The appeal does not provide any space for tolerating this conduct but in fact argues in favour of a 'cure' through yoga and ayurvedic medicines.<sup>33</sup> It argues that too much of that which constitutes India's identity as separate and distinct (implicitly from the West) is at stake to allow the High Court judgement to stand.

## *B. POLITICAL CONCEPTION OF TOLERANCE*

The claim for greater space and freedom of sexual expression by sexual subalterns has been part of an effort to unhinge tolerance from its religious and majoritarian moorings. It is a strategy based on a concept of political tolerance, which acknowledges the irreversible mark that modernity has made on our times, and recognises that a commitment to living together across differences has to be carved out of this modernity - not in opposition to it. In terms of legal and political discourse, tolerance is no longer derived from ancient, religious sources, but approached as a constitutional value in its own right. This political norm begins

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<sup>29</sup> TANIKA SARKAR, *HINDU WIFE AND HINDU NATION* (2001); Tanika Sarkar, *Colonial Lawmaking and Lives/Deaths of Indian Women: Different Readings of Law and Community*, in *FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMAN AND LAW* 210 (R. Kapur ed., 1996).

<sup>30</sup> JYOTI PURI, *WOMEN, BODY, DESIRE IN POST-COLONIAL INDIA: NARRATIVES OF GENDER AND SEXUALITY* (1999).

<sup>31</sup> *Naz Foundation*, *supra* note 17, ¶ 13. This position was argued during the period when the Bhartiya Janata Party, aligned with Hindutva ideology, was leading the government at the Centre from 1999-2004.

<sup>32</sup> *Swami Ramdev v. Naz Foundation and Others*, S.L.P. (S.C.), July 8, 2009, ¶5 (a), (h), (i), (t), (u), (cc), (dd.2).

<sup>33</sup> *Id.*, ¶ 5 (dd. 2).

from the most basic premise of tolerance - accepting people and their practices despite our disagreements and disapproval. It means not only accepting differences, but accepting those differences that at some level we find unacceptable. It is a conception of tolerance that goes beyond the mere acceptance of different forms of worship or religious differences. It is a normative commitment to accepting a broad range of differences in beliefs, practices and ways of being made necessary by the pluralistic and fragmented world in which we live.

Partha Chatterjee has examined a political conception of tolerance, derived from his Foucauldian analysis of governance and some of the requirements it entails.<sup>34</sup> He argues for a reconceptualization of the concept of tolerance as the basis for the recognition and accommodation of group rights in general, and minority religious rights in particular. Chatterjee reframes the kind of treatment that the dominant community will have to extend to subgroups, where tolerance means something more than the right to be different. It requires accepting 'that there will be political contexts where a group could insist on its right not to give reasons for doing things differently provided it explains itself adequately in its own chosen forum'.<sup>35</sup> He further proposes that cultural minorities will need to ensure that procedures exist through which they can 'publicly seek and obtain from its members consent for its practices...'.<sup>36</sup> In his vision, internal accountability becomes a prerequisite for extending the principle of tolerance, and in turn, for accommodating a cultural minority's right to do things differently.

But this political conception of tolerance is also fraught with limitations. It may again end up foregrounding religious identity, and relinquishing too much autonomy to highly conservative, even orthodox communities to manage their own affairs without sufficient concern for tolerance within their own ranks. The safeguard in Chatterjee's vision rests in ensuring that there are mechanisms for democratic accountability within the community and respect for persons who differ from the norms within that community. He attempts to formulate a middle ground, 'a somewhere in between' universal principles and the recognition of difference. But it is difficult to imagine how Chatterjee's propositions could be translated into the legal domain. For example, would courts accept the principle of a right not to give reasons, given that the legal arena is all about giving reasonable arguments? Could, or should, courts be called upon to adjudicate issues such as whether cultural minorities have met the minimal requirement of internal accountability? Would we not expect to encounter precisely the same problem of majoritarianism?

A more robust political conception of tolerance moves away from the thin version of tolerance based on mere visibility and the premise of accepting people and their practices despite disagreements and disapprovals that is being pursued by sexual subalterns. Yet neither approach necessarily gets the sexual

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<sup>34</sup> Partha Chatterjee, *Secularism and Toleration* in BHARGAVA, *supra* note 24, 345.

<sup>35</sup> *Id.*, 375.

<sup>36</sup> *Id.*, 376.

subject out of the trap of Indian culture and normative sexuality that informs dominant understandings of tolerance. There is no disruption of dominant sexual, familial or cultural norms as a result of accommodation through political conceptions of tolerance, which continue to exist untroubled. Indeed the gravitational pull of normative sexuality that informs tolerance can ultimately de-radicalise the subversive potential of rights claims by sexual subalterns.

Chatterjee's position seems to have simply shifted the nature of the problem - from one of tolerance to one of accountability and democracy. The prerequisites of some form of representation, which Chatterjee proposes, may take very different social and political contexts into account. However, his proposal does not completely break out of the imposition of some normative framework on cultural minorities; nor does it address the specific ways in which tolerance is imbricated in power and reinforces dominant sexual, gender, and familial norms, together with religious majoritarianism.

Neither Chatterjee nor Nandy addresses the way in which the colonial encounter impacted the discourse of tolerance. Tolerance was one element in the civilising mission of Empire. If the native could conform to the standards of civilization determined by the colonial power, and demonstrate his fealty to the Empire (the subject was invariably a 'he'), he would be entitled to specific rights and benefits. Yet the move to assimilate was never a complete one. Full legal equality could never be conferred, such as political autonomy, self-rule and governance. The native remained inferior, and cultural arguments, such as evidence of the barbaric treatment of the native women by native men, were deployed to justify the continuation of colonial rule.<sup>37</sup> It is in the space between full legal equality and a complete denial of subjectivity that tolerance had a role to play. A subaltern reading of tolerance analyses the complex relationship established between the native and his colonial master. It was partly shaped by the desire on the part of the colonized to return a voyeuristic gaze upon colonial ruler, as well as the desire on the part of the colonial power to civilize and normalize the native subject. By returning the gaze, the native was able not only to expose the distinctions between super-humans, lesser humans and non-humans that informed the discourse of tolerance, but also to illuminate how tolerance was deployed to contain the native and to consolidate colonial rule.

Returning to my earlier discussion, as long as the discussion of tolerance is associated with religion and freedom of conscience, tolerance appears to be coterminous with equality. It is at least a part of equality. However, a postcolonial analysis of tolerance reveals that tolerance can take shape as a supplement to equality. While claims to equality are intended to be based on a universal logic, tolerance becomes the tool for handling that difference that formal equality is unable to accommodate or address. Tolerance addresses the excess, that which is left out when formal equality is limited or shaped according to dominant norms,

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<sup>37</sup> KATHERNIE MAYO: *MOTHER INDIA: SELECTION FROM THE CONTROVERSIAL TEXT 1927* (Mrinalini Sinha ed., 2000).

such as in the case of homosexuals. In the process, the axis of inclusion and exclusion along which the liberal ideal of equality operates is both exposed, as well as reproduced. The difference and otherness of that which is tolerated is reinscribed, while the regulatory function of tolerance remains hidden. Tolerance in this guise constitutes a compromise, as it permits membership into society, even though this acceptance is just barely able to contain its revulsion of the difference. Tolerance does not operate to dissolve or resolve the hatred.<sup>38</sup> It simply depoliticises the issue, while enabling the hatred to continue and to circulate in a more muted fashion.

### C. TOLERANCE AS POWER

As the question of tolerance in India has been so closely tied to religion, religious majoritarianism and the rights of religious minorities, there has been little scholarly attention over the regulatory and authoritative function of tolerance. As Brown has argued, tolerance no longer has a blessed status, but is revealed as operating as a tool of governance, power and subject production.<sup>39</sup> While the call for tolerance that underscores the legal engagements of sexual subalterns plays an important role in reducing, if not altogether preventing harassment, incarceration, violence and abuse, it has also become an alternative to arguing in favour of full legal equality. The discussion reveals the different roles that tolerance plays, and its imbrication in power. It polices normative borders, while also obscuring the dominant sexual, familial, and cultural norms that it sustains. The analysis helps to recast tolerance as a regulatory device that reorganises subjects and further legitimates the liberal project. Tolerance does not offer any vision of transformation, but becomes a substitute for justice, where the difference of the 'Other' is accommodated rather than her injury redressed.

The ruse of tolerance is that it obscures how it itself emerges from a normative order. Tolerance casts itself as universal, depicting the object or group that is being tolerated as deviant and places it outside of the universal - a lower or inferior form of being. This discursive ruse masks the way in which power operates to produce the dichotomies between the universal and the particular, us and them, the same and the 'Other.' The role of tolerance in the production of heteronormativity and the sustaining of dominant cultural and sexual norms in its encounters with sexual difference remain eclipsed.

Tolerance nestles in with other depoliticizing discourses such as the market and neo-liberalism.<sup>40</sup> For example, while the explosion of 'gay imagery' and 'gay talk' in popular culture and the media is much in evidence in India, this should not necessarily be equated with greater freedom or politicization. Indeed, even the homosexual is vulnerable to further depoliticisation through market rationality and

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<sup>38</sup> BROWN, *supra* note 5, 28.

<sup>39</sup> *Id.*, 10.

<sup>40</sup> *Id.*, 18.

the increasing saturation of all features of our lives with entrepreneurial and consumer discourse. In the Bollywood film *Dostana* the 'gay' performance is completely embedded in the market. The sexual subject is defined through his fancy convertibles, bikini babes, and penthouse luxury in the heart of Miami. One could read the arrival of the 'gay Indian' as thoroughly constituted by neo-liberal endeavour.

The proliferation of affirmative images and rights talk in India has not necessarily produced an emancipated homosexual subject. Rather this subject is tethered to a specific understanding of tolerance within the postcolonial liberal, democratic context of India. It is a notion of tolerance that does not resolve existing animosities or hatreds. The move towards tolerance is an extension of recognition of the sexual subaltern on terms and in a manner that the state decides. The power, authority, and normativity that inform tolerance are concealed or disguised. While there is an appearance of magnanimity on the part of the majority or the state, in fact the extension of tolerance constitutes a way in which to sustain dominant sexual, familial and cultural norms.

The attempt to move away from a religious based conception of tolerance, and the appeal to a political conception of tolerance, has not necessarily resulted in the equal treatment of homosexuals and heterosexuals in law. Instead, it has reinforced the differences rather than emancipating them. It is an understanding of tolerance that is informed by the history of the colonial encounter. The native was to be tolerated as incapable of changing. Those who could change did not require tolerance. The homosexual, historically reviled and rejected, can no longer be contained in the contemporary period. Tolerance is therefore deployed to accommodate this subject, but on terms where the dominant cultural, sexual and familial norms remain undisturbed.

## V. CONCLUSION

The recognition of homosexuality necessarily involves the creation of at least some space that has already challenged the existing heteronormative order. These entry points have been created by an array of controversies, such as around the screening of the film *Fire*, the legal challenge to kissing couples in the public space, or the constitutional challenge to the ban against bar dancing in the western state of Maharashtra.<sup>41</sup> The Delhi High Court decision to reduce the scope of application of Section 377 of the IPC was able to build on the wedge already driven into the heteronormative order to continue pushing the boundary between good sex and bad sex.

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<sup>41</sup> Indian Hotel & Restaurants Association (AHAR) v. State of Maharashtra, (2006) 3 Bom CR 705.

In India, there is a sense that homosexuals are becoming more empowered through a social justice project being pursued successfully in the name of rights and freedom. Gay and lesbian groups have been able to centre the rights of sexually marginalised groups and identities. Despite these successes, they have not been able to make much headway in the area of empowerment or liberation. As argued, this is partly because legal claims have been largely framed within the discourse of tolerance. While the Hindu Right pursues a religious conception of tolerance that is framed by an approach to Indian culture which expunges sexual contaminants, the pursuit of a more expanded religious based conception of tolerance or political tolerance does not necessarily ensure a more liberating space for sexual subalterns.

While there is indeed a proliferation of space for sexual identities to express themselves, this space is being produced in and through the liberal norm of tolerance, which performs a regulatory function at a time when it is no longer possible to totally exclude or efface the sexual 'Other' with ease. The accommodation of many and more sexualities is a somewhat hollow victory in terms of the freedom that law ostensibly offers. While sexual subalterns are pursuing tolerance as one way to counter the harassment, violence and abuse that they experience, there is a competing and dominant version of tolerance based on religious majoritarianism, coupled with dominant sexual and cultural norms that ultimately holds sway. While it may no longer be possible to incarcerate homosexuals with impunity or to penalise non-heteronormative sexual conduct, tolerance functions as a technique of perpetrating marginalization and regulation that leaves intact the broader ideological and normative framework within which it operates.

The result is neither complete appropriation nor subversion of tolerance. Both are operating at one and the same time to produce a productive tension.<sup>42</sup> At one level, the normalising potential of law is brought about through the dominant sexual and cultural norms that inform tolerance, sacrificing the erotic in the process. At the same time, the sexual subaltern is appropriating the terms of domination and remaking these terms.<sup>43</sup> She is unmasking what is sustained by law, and producing a deeper contest over the meaning of tolerance. In the end, it is perhaps this tension that becomes the space for politics and more power, as opposed to more freedom.

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<sup>42</sup> BUTLER, *supra* note 4, 128.

<sup>43</sup> *Id.*, 137.