

# RE-CAST(E)ING NAVTEJ SINGH V. UNION OF INDIA

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*Taking inspiration from feminist judgment projects from around the world, this article provides an alternative judgment in the case around the decriminalisation of §377 in Navtej Singh v. Union of India, adjudicated by the Supreme Court of India in 2018. It places caste as central to the analysis of the persistence of §377, and its attendant legal and social denunciations of furtive sex especially along the lines of non-normative sexualities and genders.*

## TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. JUDGMENT..... 5

    A. BRIEF HISTORY OF ANTI SODOMY LAWS IN BRITAIN..... 6

    B. BRIEF HISTORY OF SECTION 377 IN INDIA..... 7

    C. THE ISSUE OF CONSENT: A COMPARISON OF SECTION 375 AND SECTION 377 OF THE IPC ..... 8

    D. CONSTITUTIONAL ANALYSIS OF SECTION 377 IN THE CONTEXT OF SOCIAL NORMS IN INDIA..... 10

    E. CONSTRUCTION OF CRIMINALITY WITHIN THE LEGAL REGIMES OF INDIA..... 17

    F. THE RIGHT TO PRIVACY: PRECEDENTS AND INTERPRETATIONS ..... 19

    G. CONSTITUTIONAL MANDATES FOR PROTECTION OF VULNERABLE SECTIONS 23

    H. CONCLUSION ..... 23

## I. INTRODUCTION

The Women’s Court of Canada (‘WCC’) was formed after a colloquium of academics, activists, and litigators in 2003 began a creative pedagogical exercise of rewriting equality jurisprudence in cases decided by the Supreme Court of Canada. This legal scholarship intervention spread across a wide range of regions like the United Kingdom,<sup>1</sup> Africa,<sup>2</sup> India,<sup>3</sup> United States,<sup>4</sup> Aotearoa New Zealand,<sup>5</sup> Northern/Irish,<sup>6</sup> and Australia<sup>7</sup> as Feminist Judgment

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<sup>1</sup> Rosemary C. Hunter and others, *Feminist Judgments: From Theory to Practice*, available at <http://site.ebrary.com/id/10453834> (Last visited on July 15, 2020).

<sup>2</sup> Cardiff Law and Global Justice, *African Feminist Judgments Project Launched by Cardiff Law and Global Justice*, October 11, 2018, available at <https://www.lawandglobaljustice.com/news/2018/10/11/african-feminist-judgments-project-launched-by-cardiff-law-and-global-justice> (Last visited on July 15, 2020).

<sup>3</sup> Feminist Judgments Project, India, available at <https://fjpiindia.wixsite.com/fjpi> (Last visited on July 15, 2020).

<sup>4</sup> UNLV - William S. Boyd School of Law, *The U.S. Feminist Judgments Project*, available at <https://law.unlv.edu/us-feminist-judgments> (Last visited on July 15, 2020).

<sup>5</sup> FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO, A TWO-STRANDED ROPE (Elisabeth McDonald et al, Hart Publishing Ltd, 2017).

Projects ('FJP'). The feminist lens used in each of these regions and within these regions are varied, as are the methodological interventions used. Many of the scholars re-write and re-imagine existing judgments through varied feminist lenses applying the feasibility of doctrinal jurisprudence in expansive ways to enable substantive notions of equality to be foregrounded. There are also interventions, particularly through Maori *mana wahine* judgments from Aotearoa, New Zealand FJP, and indigenous scholars from the Australian FJP, which challenge or reject the legal frames of settler-colonial judicial systems. Irene Watson, for instance, rejects the white patriarchal laws of the colonial settlers, asserting that the Australian legal system, that is founded on the violence of the *terra nullius* framework, has no jurisdiction over First Nations People. For this reason, she points to the impossibility of rewriting the Kartinyeri judgment,<sup>8</sup> within the frame of Australian constitutional validity; a frame that ignores or violently erases the laws of the First Nations women.<sup>9</sup> Nicole Watson,<sup>10</sup> uses outsider jurisprudence and indigenous storytelling traditions to re-write the judgment of *Tuckiar v. R*, a criminal case from the 1930s as *In the Matter of Djappari (Re Tuckiar)*, setting it in the year 2035 which she imagines is adjudicated in the First Nations Court set up after a treaty between the Australian Republic and a confederation of Aboriginal and Torres Strait Islander people.<sup>11</sup> In a remarkable gesture of self-reflection, one of the re-written feminist judgments from the Aotearoa New Zealand FJP is written by the same judge, Judge John Adams who decided the original case in *V v. V*.<sup>12</sup>

One of the key arguments for the formation of the FJP is the lack of diversity within the judiciary and the need for a more critical and diverse group of judges who could interpret and read laws in intersectional ways to uphold notions of substantive equality.<sup>13</sup> This lack of diversity has been a long-standing issue with the Indian judicial system from the lower courts to the Supreme Court. For instance, as of July 20, 2020, out of the 31 sitting judges of the Supreme Court, only 2 are cis-women (since Indian Independence in 1947, the number of cis-women judges in the Supreme Court has been only 8). Both cis-women judges belong to dominant caste backgrounds (one of them is Brahmin). Out of the remaining 29 cis-male judges, 23 belong to dominant Hindu castes,<sup>14</sup> only 1 judge from a Dalit background, 1 Catholic Christian, 1 Muslim, 2 from backward classes, 1 Parsi and none from indigenous/*adivasi* backgrounds.<sup>15</sup> Several reports have highlighted the abysmal lack of diversity and representation across caste and gender lines in the Indian judiciary but no proactive measures have been taken

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<sup>6</sup> Máiréad Enright, *NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES' TROUBLES AND THE GENDERED POLITICS OF IDENTITY* (Máiréad Enright, Julie McCandless et al, Hart Publishing Ltd, 2017).

<sup>7</sup> HEATHER DOUGLAS et al, *AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW* 21 (Hart Publishing Ltd, 2014).

<sup>8</sup> *Kartinyeri v. The Commonwealth* [1998] 195 CLR 337.

<sup>9</sup> Irene Watson, *First Nations Stories, Grandmother's Law: Too Many Stories To Tell*, SSRN ELECTRONIC JOURNAL (2014).

<sup>10</sup> Nicole Watson, *In the Matter of Djappari (Re Tuckiar): Judgement* in *AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW* 442 (Hart Publishing Ltd, 2014).

<sup>11</sup> DOUGLAS, *supra* note 7 at 1.

<sup>12</sup> *V v. V* [2002] NZFLR 1105; *Law & Culture*, Vol. 43(2) ALTERNATIVE LAW JOURNAL 146-150 (2018).

<sup>13</sup> Rosemary Hunter, *Feminist Judgments as Teaching Resources*, Vol. 2(5) OÑATI SOCIO-LEGAL SERIES 47-62 (2012).

<sup>14</sup> Almost half of the male judges are Brahmin. This makes the representation of Brahmins disproportionately high in the Supreme Court compared to only 5% of their total population in India.

<sup>15</sup> See Department of Justice, *List of Supreme Court Judges*, available at <https://doj.gov.in/appointment-of-judges/list-supreme-court-judges> (Last visited on July 15, 2020).

to address the issue.<sup>16</sup> While it is crucial for a democratic system to have adequate representation of all sections of society within judicial and political systems, what the current situation enables, is the continued perpetuation of power in the hands of the privileged few. This creates the conditions for a judicial system that requires restructuring to include the vast majority of the underprivileged who do not find any representation, and consequently face huge barriers to accessing justice.

In legal scholarship, the intervention of critical race theory ('CRT') has effectively challenged the liberal notions of constitutional law as neutral and unmasks the power of white supremacist patriarchal structures that are embedded within and perpetuated by law.<sup>17</sup> The FJP enables a creative and critical pedagogical exploration of what specific judgments, and judicial systems at a broader level could look like. This article attempts to take forward the work of critical race theory and the FJPs by reading caste cis hetero patriarchy as omnipresent, albeit often invisibilised under the structure and functioning of the Indian legal system. It attempts to do this by presenting an alternative judgment to the *Navtej Singh Johar v. Union of India* ('Navtej Singh') Supreme Court decision in 2018 which decriminalized §377 of the Indian Penal Code, 1860 ('IPC').

Unlike some of the more problematic SC judgements in the recent past,<sup>18</sup> the *Navtej Singh Johar v. Union of India* judgment,<sup>19</sup> upheld the constitutional rights of (some) lesbian, gay, bisexual, transgender, intersex ('LGBT') citizens of India. This article presents a concurring judgment outlining a different judicial reasoning, and drawing from anti-caste historiography to reach the consensus of the bench to decriminalize the section. The article mostly limits itself to the precedents and cases referred to in the original judgment but relies on the same, to reach a concurring judgment based on an anti-caste lens as central to the judicial reasoning. Caste is analysed as a foundational structure that constructs and enforces gender roles/relations and sexualities in the Indian context, and not as a category that is discrete from the latter.<sup>20</sup> Methodologically, the article follows the arguments placed before the Court by the original petitioners, the imagined arguments made by an imagined petitioner Ayyankali's

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<sup>16</sup> Report of the National Commission for Scheduled Castes on Reservation in Judiciary, available at <http://ncsc.nic.in/files/Reservation%20in%20Judiciary.pdf>; See also C. Ahmad Fayiz, *Caste and Judiciary: Looking for Dalit and Adivasi Judges in Supreme Court of India*, April 3, 2019, available at [https://roundtableindia.co.in/index.php?option=com\\_content&view=article&id=9623:caste-and-judiciary-looking-for-dalit-and-adviasi-judges-in-supreme-court-of-india&catid=119:feature&Itemid=132](https://roundtableindia.co.in/index.php?option=com_content&view=article&id=9623:caste-and-judiciary-looking-for-dalit-and-adviasi-judges-in-supreme-court-of-india&catid=119:feature&Itemid=132) (Last visited on July 15, 2020).

<sup>17</sup> RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3, 21 (1<sup>st</sup> ed., 2001).

<sup>18</sup> A two-judge bench of the SC diluted the Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act, 1989, by opining that the "abuse of law was rampant" due to "malicious complaint" and "malicious prosecution". See *SK Mahajan v State of Maharashtra* AIR 2018 SC 1498, ¶22; On 22<sup>nd</sup> April 2020, a five-judge Constitution Bench declared the Office Memorandum of Andhra Pradesh Government in 2000, which provided 100% reservation to indigenous teachers in Scheduled Areas as unconstitutional. The judgment upholds the idea of merit as oppositional to affirmative action and uses the language of "primitive" culture and makes an analogy to the indigenous way of life as a 'human zoo'. See *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh*, Civ. App. 3609 and 7040 of 2002, ¶107.

<sup>19</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>20</sup> This analysis of caste and gender is derived from the life and works of Dr. Ambedkar, Jotiba Phule, Savitrimai Phule, Thanthai Periyar and Mahatma Ayyankali.

Makkal,<sup>21</sup> an anti-caste trans and intersex rights group, the judgments of the judges of the original bench within the temporal and constitutional limits of the original case. This alternative judgment will present brief histories of §377 and/or anti sodomy laws in Britain and India, drawing on the myriad ways in which caste structures construct gender and sexuality norms in the social and legal regimes in India, discuss the constitutional validity of §377 with a discussion on the legal precedents, caste morality and interpretations of the right to privacy in a caste based society. The choice of presenting the critique of the Navtej Singh judgment as an alternative judgement offers a few limits and possibilities- the tempering of the writing style and tone, the references to fictional forms like poetry, the difference in citational practices etc. However, unlike legal judgments, the limit on word count provided by the law journal also circumscribes lengthy discussions. Hence, this article differs in form from a conventional academic essay and warrants more interpretative participation from the reader than an explanatory essay. As a person with caste and class privileges whose gender identity is within the trans masculine spectrum, the choice of an alternative judgement also offers me the possibility of creatively using this form as a “writing back” exercise.<sup>22</sup> A writing back to the exclusions faced by transgender persons across caste within the legal structures of the country in general and the text of the original judgment in particular.

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<sup>21</sup> I thank Chinju Aswathi, my Ambedkarite sibling who first held up a placard during Kerala Pride 2019 that read, “Ayyankali Pillera” (children of Ayyankali) for the inspiration for the title of the imagined petitioner. I also thank Esvi Anbu Kothazham whose Instagram post titled Laws of Manu: The distance between savarna LGBQ and Bahujan TIQ+ on November 25, 2019 highlighted the way *Manusmriti* prescribes graded punishments for ‘unnatural offences’. I thank Nithin Manayath and Namita Aavriti for their comments on an earlier draft of this article.

<sup>22</sup> See BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK (1<sup>st</sup> ed., 1989).

**II. JUDGMENT**

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 76 OF 2016

NAVTEJ SINGH JOHAR &amp; ORS. Petitioner(s)

VERSUS

UNION OF INDIA

THR. SECRETARY

MINISTRY OF LAW AND JUSTICE Respondent(s)

WITH

WRIT PETITION (CIVIL) NO. 572 OF 2016

WRIT PETITION (CRIMINAL) NO. 88 OF 2018

WRIT PETITION (CRIMINAL) NO. 100 OF 2018

WRIT PETITION (CRIMINAL) NO. 101 OF 2018

WRIT PETITION (CRIMINAL) NO. 121 OF 2018

**JUDGMENT**

ANONYMOUS, J. (separate concurring judgment)

1. I have had the advantage of reading the judgements prepared by the Hon'ble Chief Justice (for himself and Justice Khanwilkar), and my colleagues Justice Indu Malhotra, Justice Rohinton Fali Nariman and Justice Dhananjaya Y. Chandrachud. The judgments have dealt in depth with the questions before this bench: -
  - i) The constitutional validity of Section 377 of the Indian Penal Code, 1860 ('IPC') on the grounds that it denies equal citizenship and constitutional rights (specifically Articles 14, 19 and 21 in Part III of the Constitution) to LGBT adults who engage in consensual sexual activities by criminalizing such conduct under the Section.

- ii) Whether the decision in *Suresh Kumar Koushal and another v. NAZ Foundation and others*<sup>23</sup> requires re-consideration was referred to the Constitution Bench vide Order dated 8th January 2018.

2. Section 377 of IPC states-

*“Unnatural offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term 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.”

My learned colleague Justices have presented a detailed history of this British era legislation, introduced in 1861 in India, modelled on the English Buggery Act of 1533 and hence it is not necessary to belabour the point at this stage.

**A. BRIEF HISTORY OF ANTI SODOMY LAWS IN BRITAIN**

- 3. Briefly, the crime of sodomy in English law finds its roots in Judeo-Christian religious interpretation that is derived from an interpretation of Genesis 18:20 of the Old Testament, known as the story of Sodom and Gomorrah. The use of the term sodomites to describe those who engaged in anal intercourse emerged in the 13th Century, and the term sodomy was used as a euphemism for several sexual sins two centuries earlier.<sup>24</sup>
- 4. In 1954, the Wolfenden Committee, under the chairmanship of Sir John Wolfenden, was set up in England to consider the Criminal Law Amendment Act 1885, which criminalised homosexual activity between males. The Wolfenden report recommended that homosexual behaviour between consenting adults in private was part of the realm of private morality and should not be within the jurisdiction of the law and hence can no longer be criminal. It stated:

“homosexual conduct between consenting adults should no longer be a criminal offence...The law’s function is to preserve public order and decency, and to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior” .<sup>25</sup>

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<sup>23</sup> *Suresh Kumar Koushal v. NAZ Foundation*, (2014) 1 SCC 1.

<sup>24</sup> *Supra*, note 19 at 3.

<sup>25</sup> Scottish Home Department, Sir John Wolfenden, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, (1957) (United Kingdom).

5. It was only 10 years after the Wolfendon committee report was released in 1957 that the British Parliament abolished penal offences involving consenting same-sex adults over the age of 21, by enacting the Sexual Offences Act, 1967. In 2001, the age of consent was subsequently lowered to sixteen for homosexual and bisexual men in England.<sup>26</sup>

**B. BRIEF HISTORY OF SECTION 377 IN INDIA**

6. The erudite judges of this Court have pointed out the Victorian morality (in Para 17, 78, Part L) underpinning Section 377 which interprets “against the order of nature” as anything outside the realm of procreative sexual intercourse. In 1837, Thomas Macaulay, while presenting the draft report of the Indian Penal Code that Section 377 (at that time listed as Clause 361 and 362):

“ relates to an odious class of offences respecting which it is desirable that as little as possible should be said...We are unwilling to insert, either in the next, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury that would be done to the morals of the community by such discussion would far more than compensate for any benefit which may be deprived from legislative measures framed with the greatest precision”.<sup>27</sup>

The vagueness in the language of the section can be attributed to the unwillingness of colonial legislators to demarcate the categories under the law to prevent public discussions and the attendant fear of “spread” of such ideas among the natives.

7. However, as Oscar Wilde, who was tried and punished under the Criminal Law Amendment Act of 1885 for sodomy said, “The one duty we owe to history is to rewrite it”.<sup>28</sup> Since the first petition filed by AIDS Bhedbhav Virodhi Andolan, in 1994 which was ultimately dismissed in 2001 after the disbanding of the group, the legal battle against Section 377 has been a protracted one in India. The time has come for this Court to speak openly about this subject and not seek refuge under the moral frames of the past even as we acknowledge that many of the social mores of the past exist in contemporary society.
8. In the words of the poet Namdeo Dhasal in his poem ‘Speculations on A Shirt’<sup>29</sup>

“Crossing over a period of painful love-play,  
Let’s reject the traditional game of conventions.  
Let’s change the sex of Eve.

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<sup>26</sup> Sexual Offences (Amendment) Act, 2000 (United Kingdom).

<sup>27</sup> Law Commission of India, *Indian Penal Code*, 3990 (October 1837), cited in HUMAN RIGHTS WATCH, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, December 2008, available at [https://www.hrw.org/sites/default/files/reports/lgbt1208\\_webwcover.pdf](https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf). (Last visited on September 4, 2020).

<sup>28</sup> Oscar Wilde, *The Critic as Artist* in INTENTIONS (1891).

<sup>29</sup> NAMDEO DHASAL, *A CURRENT OF BLOOD* (translated by Dilip Chitre, 2009).

Let's make Adam pregnant.  
 Let's speculate beyond animal anxieties...  
 A Human Being shouldn't become so spotless.  
 One should leave a few stains on one's shirt" .

9. In 1973, the American Psychiatric Association removed homosexuality from its prior classification as a mental disease. The World Health Organization ('WHO') also removed homosexuality from its classification as a mental disease with the publication of International Classification of Diseases 10<sup>th</sup> revision ('ICD-10') in 1992.<sup>30</sup> The American Psychiatric Association, in 2013, removed the diagnostic label, "gender identity disorder" ('GID') to refer to transgender people in 2013 with the release of The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ('DSM-5').<sup>31</sup> In 2019, WHO in ICD-11, replaced the term "gender identity disorder" with "gender incongruence". However, intersex activists are still protesting the term "disorders of sex development" used in ICD-11 by the WHO to refer to people with intersex variations.<sup>32</sup> The changes in medical terminology and limited de-pathologisation does not necessarily translate into widescale change in societal attitudes. LGBT people in India are still suffering under forced conversion therapies and treatments, lack of acceptance from families and the larger society, forced marriages, police violence etc.
10. In 1971, the 42<sup>nd</sup> Law Commission of India Report deferred to social morality on the issue of homosexuality and recommended continued criminalisation under Section 377 of the IPC.<sup>33</sup> In 2000, the 172<sup>nd</sup> Law Commission of India Report raised questions on the rationale of the law in treating child sexual abuse as morally and legally equivalent to sexual acts between consenting adults in private under Section 377 IPC.<sup>34</sup> The 172<sup>nd</sup> Law Commission of India Report broadly looked at overhauling the sexual assault law in India, and in recommending amendments to existing laws to cover all forms of non-consensual, penetrative and non-penetrative sexual acts under sexual assault laws, recommended deletion of Section 377, IPC. The legislature, however, chose not to act on the recommendation.

### C. THE ISSUE OF CONSENT: A COMPARISON OF SECTION 375 AND SECTION 377 OF THE IPC

11. The Criminal Law Amendment Act, 2013, has further strengthened the provision of consent under Section 375 of the IPC (pertaining to the crime of rape),<sup>35</sup> by outlining the

<sup>30</sup> See LGBT Mental Health Syllabus, *The Declassification of Homosexuality by the American Psychiatric Association*, available at [https://www.aglp.org/gap/1\\_history/#declassification](https://www.aglp.org/gap/1_history/#declassification) (Last visited September 1, 2020).

<sup>31</sup> HUFFPOST, *DSM-5 Reflects Shift in Perspective on Gender Identity*, June 4, 2013, available at [https://www.huffpost.com/entry/gender-dysphoria-dsm-5\\_n\\_3385287](https://www.huffpost.com/entry/gender-dysphoria-dsm-5_n_3385287) (Last visited September 1, 2020).

<sup>32</sup> BBC NEWS, *Transgender No Longer Ranked as "Disorder"*, May 29, 2019, available at <https://www.bbc.com/news/health-48448804> (Last visited September 1, 2020).

<sup>33</sup> Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971).

<sup>34</sup> Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000).

<sup>35</sup> The Indian Penal Code, 1860, §375, Exception 2 states, "*Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape*". See *Independent Thought v. Union of India and Another* (2017) 10



definition of consent as unequivocal- “*an unequivocal voluntary agreement by the woman through words, gestures or any form of verbal or non-verbal communication whereby she communicates her willingness to participate in any of the sexual acts described*” .<sup>36</sup>

12. Additionally, Section 375 outlines certain conditions like intoxication, fear of death or hurt to victim/survivor or anyone close to her, if obtained under pretensions of marriage and if she is a minor under which what seems like consent to the act, is declared void. Lack of physical resistance, importantly, cannot be construed as consent under Section 375. Section 377 in contrast, does not outline any definition of consent and moreover, seeks to criminalise those who “voluntarily” engage in such acts. Although one may judicially interpret consent and voluntary acts differently, the implications remain the same i.e. whether you enter such acts willingly or not, Section 377 prohibits certain kinds of sexual intercourse. The lack of any provisions on consent under Section 377 essentially precludes the possibility of discussions in law around informed consent or withdrawal of the same among those criminalised under it.
  
13. It is true that Section 377 in its wording does not single out any demographic based on sexuality or gender. However, it has been demonstrated in this Court that in its enforcement, apart from cases related to child sexual abuse and bestiality, it is used primarily against homosexuals, bisexuals, and transgender people. The National Crime Records Bureau started recording data of cases registered under Section 377 in 2014. In 2015, among the 1,347 cases registered in the country under Section 377, in 814 cases, the victims were children.<sup>37</sup> However, this raises the question of the remaining 533 cases registered under the section. The contradiction that anything outside of the heterosexual intercourse among adults, albeit consensual, has been effectively criminalised under this provision has been highlighted in this case as unconstitutional on the grounds of equality. Along with the Protection of Children from Sexual Offences (‘POCSO’) Act 2012,<sup>38</sup> Section 375 of the IPC is sufficient to cover non-consensual offenses between cis-men, cis-women and minors that purportedly fall within the ambit of Section 377. I agree with my colleagues of this bench that the provision of unnatural offenses or ‘carnal intercourse against the order of nature’ should not criminalise a certain section of the population, in this case, LGBT adults, for engaging in consensual or more appropriately, ‘voluntary’ sexual activities, when it does not criminalise the other, in this case, cisgender heterosexuals. Relatedly, it must be highlighted that there is a lacuna in law when it comes to granting equal protection under law- since the language of Section 375 specifies the victim or survivor as women, transgender people who face sexual assault are left with no protections. It is left to the legislature of India to make sufficient laws to provide equal protection of law to this group of people.

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SCC 800, where the Supreme Court read down this exception to recognize marital rape of any girl below the age of 18 but refrained from commenting on marital rape of women over the age of 18.

<sup>36</sup> Indian Penal Code, 1860, §375.

<sup>37</sup> THE NEW INDIAN EXPRESS, *Kerala, Uttar Pradesh top list of states with Section 377 cases: NCRB data*, September 10, 2018, available at <https://www.newindianexpress.com/nation/2018/sep/10/kerala-uttar-pradesh-top-list-of-states-with-section-377-cases-ncrb-data-1869859.html> (Last visited on September 4, 2020).

<sup>38</sup> Protection of Children from Sexual Offences Act, 2012.

#### D. CONSTITUTIONAL ANALYSIS OF SECTION 377 IN THE CONTEXT OF SOCIAL NORMS IN INDIA

15. For the test of the applicability of a reasonable classification under Article 14 of the Constitution, two criteria must be met:
- (i) The classification must be founded on an intelligible differentia; and
  - (ii) The differentia must have a rational nexus to the objective sought to be achieved by the legislation.<sup>39</sup>

It is imperative that this Court examine section 377 in relation to the test of rational classification for the purposes of the legislation outlined above. What are the classificatory criteria used by or rather constructed by social systems in general and administrative practices in particular? What objectives do they seek to achieve? These are the questions that must be answered by the Court to present a historical understanding of the issue before the bench and its current implications and consequences. It is important to dig deeper into the history of our land, to understand why this provision has survived even after seventy-one years of Indian Independence. The British colonial government did not encounter a *tabula rasa*, or ‘clean slate’, in their colonies to administer. Indeed, history must be read as a palimpsest on which earlier writings are written over or altered but carrying visible traces of the past in numerous ways. Many of the colonial era laws were founded based on the conditions that pre-dated British colonialism. It is time for us as a country to take stock of our complicated histories to truly build a future based on Dr. B.R Ambedkar’s constitutional vision of equality, liberty, and fraternity. The concept of ‘against the order of nature’ when read against studies within evolutionary biology of the animal kingdom or the human world does not stand the test of scientific accuracy. Contemporary scientific theories have disproved the Darwinian notion of sex selection pointing towards sexual reproduction as an incredibly diverse process involving a huge variation of bodies, familial organisations, and patterns of bonding between and within sexes based on social selection.<sup>40</sup> Dr. Joan Roughgarden, emeritus professor at the Department of Biology, Stanford University has done in depth studies of diversity in gender and sexuality in the natural world. For instance, she observes that the bluehead wrasse fish develop as three possible genders when they enter sexual maturity. One gender consists of individuals who begin life as a male and remain so for life. Another gender consists of individuals who begin as females and later change into males. The third gender consists of females who remain female. Among mammals too, there is evidence of intersex kangaroos, female spotted hyenas, white tailed deer, roe deer etc. There is extensive literature dating to the 1970s regarding homosexuality among primates including bonobos that are accepted as the closest relatives to the human species.<sup>41</sup>

<sup>39</sup> *Supra*, note 19, ¶128 at 3.

<sup>40</sup> JOAN ROUGHGARDEN, *THE GENIAL GENE: DECONSTRUCTING DARWINIAN SELFISHNESS; COOPERATION AND THE EVOLUTION OF SEX* (2009).

<sup>41</sup> Joan Roughgarden, *Evolution’s Rainbow: Diversity, gender, and sexuality in nature and people*, RESEARCH GATE, April 2009, available at [https://www.researchgate.net/publication/285941707\\_Evolution's\\_rainbow\\_Diversity\\_gender\\_and\\_sexuality\\_in\\_nat](https://www.researchgate.net/publication/285941707_Evolution's_rainbow_Diversity_gender_and_sexuality_in_nat)

Surely, a rational argument cannot be made that non-normative sexual or gender behaviours or patterns among humans can be classified as “unnatural” if scientific evidence shows the existence of the same in the animal kingdom. It must then be inferred that “against the order of nature” does not in fact refer to the natural world but refers more importantly, to the social order of human societies.

While ‘against the order of nature’ can be traced to the Christian morality of the Victorian system that privileged procreative sex regardless of sexual orientations, we need to also examine what is considered as the corollary in Indian society. In other words, what is normalised or enforced as societally acceptable and hence “natural” sexual relationships in our context?

The *Manusmriti*, which is said to be the most authoritative legal text of the Hindu society, dated roughly to 100 CE provides a historical lens to examine the persistence of this issue. According to the laws of Manu, apart from stringent and graded punishments for marrying or having sexual relationships outside one’s own caste, the text says: -

“68. Giving pain to a Brahmana (by a blow), smelling at things which ought not to be smelt at, or at spirituous liquor, cheating, and an unnatural offence with a man, are declared to cause the loss of caste (Gatibhramsa).<sup>42</sup>

175. A twice-born man who commits an unnatural offence with a male, or has intercourse with a female in a cart drawn by oxen, in water, or in the daytime, shall bathe, dressed in his clothes.”<sup>43</sup>

Although the term ‘unnatural offence’ could be extrapolated as an English colonial translation done in 1886, it is clear from this source that these sexual activities were in fact considered to be an offense and censured much before the advent of British colonialism. Perhaps this explains the persistence of the attitudes in our society towards so called ‘unnatural offences’ several decades after Indian independence. It is important to highlight that under the laws of Manu, graded punishments are granted for the commission of the same crime, according to one’s positions in the caste hierarchy. The stringent measures taken under Section 377, specifically against those who face heightened vulnerabilities due to their caste, gender and sexuality is testimony to the fact that socially differentiated moralities rather than the equal application of a universal morality is being enforced under this law today. From the evidence presented in this case, we have seen how lower caste trans women or *hijras* who do street based labour are disproportionately targeted by law enforcing authorities under this provision, while those privileged sections within the LGBT spectrum enjoy more material and social privileges

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ure\_and\_people (Last visited on September 4, 2020); L. Fairbanks, M. McGuire, and W. Kerber, *Sex and aggression during rhesus monkey group formation*, Vol. 3(3) AGGR. BEHAV. 241–49 (1977).

<sup>42</sup> GEORGE BÜHLER, *THE LAWS OF MANU (MANUSMRITI)* Vol. 25 Chp. 11, 179 (Clarendon Press, 1886).

<sup>43</sup> *Id.*, 188.

even as they face psychological/emotional distress due to lack of familial and societal acceptance. This is a great travesty of justice and hinders the equal treatment of all under the Indian constitution. This brings us to the question of who enjoys the right to have intimate relationships and are granted legitimacy for the same in the Indian context. Do all cisgender heterosexuals enjoy this right across caste and religious markers in our country?

16. It is not just same-sex relationships that are denounced in Indian society as against the social order or, by extension, ‘unnatural’. There continue to be reported cases of violence against inter-caste couples who are excommunicated from their families/places of residence, violently murdered and/or punished by extra-legal institutions like *khap panchayats*. This Court will refrain itself from commenting on the cases that are sub judice in lower courts. However, it is the duty of this Court to highlight a few judgments in this regard.
17. In *Lata Singh v. State of U.P.*,<sup>44</sup> a two-judge Bench of this Court, while dealing with a Writ Petition under Article 32 of the Constitution filed for issuing a writ of certiorari and/or mandamus for quashing of a trial, allowed the Writ Petition by the petitioner whose life along with her husband was in danger from her family. The Court observed that there is no bar for inter-caste marriage under the Hindu Marriage Act or any other law and, hence, no offence was committed by the petitioner, her husband or husband’s relatives. The Court stated: -

“18. We sometimes hear of honour killings of such persons who undergo inter-caste or inter- religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism”.<sup>45</sup>

18. In *Shakti Vahini v. Union of India*,<sup>46</sup> a three-judge bench of the Supreme Court stated: -

“52. It is worthy to note that certain legislations have come into existence to do away with social menaces like Sati and Dowry. It is because such legislations are in accord with our Constitution. Similarly, protection of human rights is the élan vital of our Constitution that epitomises humanness and the said conceptual epitome of humanity completely ostracises any idea or prohibition or edict that creates a hollowness in the inalienable rights of the citizens who enjoy their rights on the foundation of freedom and on the fulcrum of justice that is fair, equitable and proportionate. There cannot be any assault on human dignity as it has the potentiality to choke the majesty of law. Therefore, we would

<sup>44</sup> *Lata Singh v. State of U.P.*, (2006) 5 SCC 475.

<sup>45</sup> *Id.*

<sup>46</sup> *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

recommend to the legislature to bring law appositely covering the field of honour killing”.

19. In *Shafin Jahan v. K.M Asokan*,<sup>47</sup> this Hon’ble Court held, that the right to choose a partner and or religion is within an area where individual autonomy is supreme. The judgment stated: -

“[T]he Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects, which define one’s personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy which is inviolable”.<sup>48</sup>

“Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the constitution protects personal liberty from disapproving audiences”.<sup>49</sup>

20. In contemporary Indian society, due to the ubiquitous nature of violence against persons who choose their partner outside of their own caste, religion or imposed heterosexuality, there is a grave danger of Fundamental Rights, including their right to life being violently snatched away by the morality of the public. In a caste-based society like ours, this public morality is rooted in caste and can be more accurately referred to as caste morality. Caste morality is an anathema to the values of equality, dignity and liberty that are the pillars of the Indian Constitution. It is this caste morality that grants legitimacy to endogamous cis-heterosexual relationships within monogamous marriages and brands inter-caste, inter-religious, homosexual and bisexual relationships and relationships of transgender persons as illegitimate or against the caste Hindu social order. It is important to highlight that unlike a legal provision such as Section 377 which is currently being deliberated upon by this Court, the social harms of dowry, *khap panchayats*, honour killings, excommunication are all illegal under criminal and constitutional laws of this country. Despite legal deterrents, we see the continued perpetuation of these crimes in our society. It is thereby important to provide legal protections to those already vulnerable under Section 377 in order to strengthen their assertions against public or caste morality which unfortunately, we may realistically expect, will continue even after this provision is read down. However, we can at least be rest assured that their persecution will not enjoy the sanction of the law and instead, the judiciary will provide legal recourse to those aggrieved parties who will come to us for protection in the future.

21. The odious practice of social boycott or excommunication by societal pressures or parallel institutions like *khap panchayats* are a barrier to the enjoyment of life and liberties by those citizens of India who are most vulnerable. Transgender people who are disowned by natal families for bringing ‘dishonour’ to the families are very much part of

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<sup>47</sup> *Shafin Jahan v. K.M Asokan*, 2018 (4) SCALE 404.

<sup>48</sup> *Id.*, ¶19.

<sup>49</sup> *Id.*, ¶88.

this vulnerable group of people who lose their right to residence, nutrition, education and employment at a young age. The practice of excommunicating a person due to choice of partner or gender identity is an abominable act that is rooted within caste practices and has no place in a democratic society that seeks to uphold the dignity and autonomy of individuals and their choices. Notions of community or family honour and dishonour should not be used to condemn those who express non-normative sexualities or genders to a life without access to basic necessities of life on the fringes of society. Expressing a gender that is in congruence with who you are is not a crime, it is a right that should be available to anyone who is part of the naturally existing diversity of the human world in general, and protected by constitutional rights of every citizen of India in particular.

22. In *NALSA v. Union of India* ('NALSA'),<sup>50</sup> the judgment opens with: -

“1. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”

The deplorable treatment of transgender people in this country is a matter of great shame and we must make social and legal measures collectively to change this state of affairs. We must also ask of ourselves as a society why those who are violently ascribed a lower place in the caste hierarchy are treated as untouchables even in the 21<sup>st</sup> century in this country.

23. In *NALSA*, transgender people were granted the right to self-identify gender and it was reiterated that they must be accorded equal and full protection of the law under Articles 14, 15, 16, 19 and 21 of the Indian Constitution. The existence of Section 377 is also in contradiction with these constitutional provisions.

24. Article 14 of the Constitution of India reads as under: “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*”. This places a positive obligation on the part of the State and all its organs- the executive, judiciary and legislature- to proactively protect the equal rights of all citizens of the country. My colleague judges have dealt with and analysed in depth, the myriad ways in which Section 377 is manifestly arbitrary and discriminatory so without belabouring the point, it suffices for me to say that I am in agreement with them. In so far as Section 377 is a barrier to the provisions of Article 14 because it is manifestly arbitrary in its selective application and penalisation of non-normative sexualities, it is against the principles of equality before the law and hence unconstitutional.

25. Article 15 of the constitution states that: -

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<sup>48</sup> *NALSA v. Union of India*, (2014) 5 SCC 438.

“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them” and that “no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public”.

26. Article 16 assures equality of opportunity in matters of public employment and prevents the State from any sort of discrimination on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. The interpretation of sex in these provisions includes sexual orientation and chosen gender identity. The *Naz Foundation v. Govt. of NCT of Delhi* judgment delivered by the Delhi High Court in 2009 also relied on an interpretation of ‘sex’ as including sexual orientation. The petitioners have argued for the social disabilities of transgender persons, especially *hijras* or trans-women in accessing education, housing and employment, which effectively condemns them to a life of street-based labour, such as begging at traffic lights, for survival. Thus Section 377 is violative of Articles 15 and 16. Further, Article 16 places a duty on the part of the State to proactively ensure equality of opportunity in employment. Article 15 also affirms that nothing within this Article or sub-clauses shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. In this regard, we reiterate that the decision in NALSA to provide affirmative action in education and employment to transgender people who are declared as socially and economically backward in the judgment, be implemented.
27. Article 19 protects the right to freedom of speech and expression. Expressing through any communicative practice whether it be verbal, physical or emotive of one’s sexuality, or gender non-conformity is protected under this provision. Section 377 acts as a barrier to the full enjoyment of these rights for those who are targeted under it. In NALSA, this Hon’ble Court was unequivocal in its application of Article 19(1)(a) of the Constitution to transgender people. The Court held that: -

“66. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality.....We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the

Constitution of India and the State is bound to protect and recognise those rights”.

28. Additionally, international mechanisms have highlighted that the right to freedom of expression and information applies irrespective of sexual orientation. The United Nations High Commissioner on Human Rights has recommended that States: “*Ensure that individuals can exercise their rights to freedom of expression, association and peaceful assembly in safety without discrimination on grounds of sexual orientation and gender identity*”.<sup>51</sup>
29. Article 21 guarantees the protection of life and personal liberty. These rights can be meaningfully enjoyed by an individual or communities only if they are complementarily able to access right to health, nutrition, legal aid, living wage, housing, education and all other necessities required to live a human life with dignity. Although these come under the Directive Principles of State Policy contained in Part IV of the Constitution of India, and are not justiciable *per se*, substantive readings of equality and the right to life make it imperative for the State to ensure that these are fulfilled as part of good governance for Fundamental Rights to be enjoyed by the citizens in any meaningful way.
30. In *Justice K.S Puttaswamy v. Union of India* (‘Puttaswamy’) a nine-judge bench of this Court, in reference to *Suresh Kumar Koushal v. Naz Foundation* judgement that upheld Section 377 stated: -

“126. That a miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders” (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection”.<sup>52</sup>

31. It is the duty of this Court to uphold the individual liberty and autonomy of not just the citizens whose social and sexual behaviours or identities form a majority nor just those who claim citizenship rights on the basis of their ostensible merits and productivity to the nation but more importantly, extend to those who are left with no protections and are socially, economically and culturally leading a life of precarity.

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<sup>51</sup> UN High Commissioner for Human Rights [UNHCHR], *Report on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, U.N Doc. A/HRC/19/41 (17 November 2011), ¶ 84(f).

<sup>52</sup> Justice K.S. Puttaswamy VS. Union of India (2017) 10 SCC 1, ¶126.



32. We must be eternally vigilant to ensure that the rule of law prevails in this country against caste morality which seems to have permeated every sphere of life including but not limited to the choice of companion or life partner. The transformational power of the Constitution lies in the extension of constitutional morality within the Indian polity and depends on the effective replacement of caste morality with constitutional morality in the consciousness and practice of our citizens.

#### **E. CONSTRUCTION OF CRIMINALITY WITHIN THE LEGAL REGIMES OF INDIA**

33. The petitioners have presented evidence of numerous instances of wrongful confinement, being disowned by natal families, and suffering grave psychological trauma and dispossession due to their non-normative gender and sexualities. The petitioners have also presented their arguments for the disproportionate targeting of LGBT people by police officials under Section 377 and many instances have been quoted to strengthen this claim before this bench. It is appalling that the executive organs of the State are using Section 377 as an instrument to extort and criminalise a vulnerable group of citizens who must be extended protection in a society that is already hostile to their sexuality and gender identities and expressions.

The creation of certain classes of people to enact criminal provisions against them is not merely a colonial import. It is to be read as a key feature of the social system of caste that is prevalent in India even today. The Criminal Tribes Act, 1871 ('CTA') was enacted in British India whereby it was declared under Part 1 that: -

“If the local government has reason to believe that any tribe, gang or class of persons is addicted to the systematic commission of non bailable offenses it may report the case to the Governor General of the council, and may request his permission to declare such gang, tribe or class to be a criminal tribe”.<sup>53</sup>

34. According to this Act, tribes, especially the nomadic ones, were hereditarily classified as criminal and control was established over their residence and livelihoods. However, we must not bury our heads in the sand when it comes to confronting our own home-grown prejudices if we want to build the future of this country. It must be borne in mind that at the time of introducing this Bill, the Hon'ble Mr. T. Y. Stephens, the then Member for Law and Order, observed:

“The special feature of India is the caste system. As it is, traders go by caste: a family of carpenters will be carpenters, a century or five centuries hence, if they last so long. Keeping this in mind the meaning of professional criminal is clear. It means a tribe whose ancestors were criminals from times immemorial, who are themselves destined by the usages of caste to commit crime and whose descendants will be offenders against law, until the whole tribe is exterminated or accounted for in the manner of the Thugs.

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<sup>51</sup> The Criminal Tribes Act, 1871, §2.

When a man tells you that he is an offender against law, he has been so from the beginning, and will be so to the end, reform is impossible, for it is his trade, his caste, I may almost say his religion to commit crime”.<sup>54</sup>

The Act was repealed in August 1949 and tribes that were classified as criminal were de-notified on August 31, 1952, when the Act was replaced with the Habitual Offenders Act, 1952 of Government of India.<sup>55</sup>

35. The Preamble of the Criminal Tribes Act states that it is “*An Act for the Registration of Criminal Tribes and Eunuchs* (‘CTA’).<sup>56</sup> Of pertinence to this case is Part II of the CTA which included the registration of the residence and details of ‘eunuchs’ who are “*reasonably suspected of kidnapping or castrating*” children or committing any of the offenses under the Indian Penal Code.<sup>57</sup> Thus, just by virtue of expressing non-conforming genders and/or by being born into a certain tribe, groups of people were constructed as criminal classes with the presumption of guilt as a hereditary characteristic for the purpose of penalising them. It would be superfluous to point out that this Act would not have stood the test of constitutional validity today. However, although the Act was repealed in 1949, it has been brought to the attention of this Court by the learned counsel Ms. Jayna Kothari that two State laws continue in contemporary India that are modelled on the CTA. These are The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F, 1919<sup>58</sup> and Section 36A of The Karnataka Police Act, 1963.<sup>59</sup> The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F is currently under challenge in W.P. No 44 / 2018 pending before the High Court of Andhra Pradesh and Telangana in Hyderabad.<sup>60</sup> Under both these State Acts, the administration can keep a register of all transgender women and/or *hijras* in the State. Along with these acts, the continued existence of Section 377 compounds the discrimination they face within law.

36. Dr. B. R Ambedkar, the first law Minister of independent India and the chief architect of our Constitution observed, in his treatise *Annihilation of Caste*, 1936 that “*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic*”.<sup>61</sup>

It seems that the cultivation of the sentiment of constitutional morality is the urgent need of the hour to protect the rights of the most vulnerable citizens of our country from perilous and premature doom.

<sup>54</sup> V. RAGHAVIAH, THE PROBLEM OF CRIMINAL TRIBES, p. 6; Saunders, *Soe. & Soc. Research*, XII, cited in KM Kapadia, *The Criminal Tribes of India*, Vol. 1 SOCIOLOGICAL BULLETIN 99-125 (1952).

<sup>55</sup>The Habitual Offenders Act, 1952.

<sup>56</sup> The Criminal Tribes Act, 1871, Preamble.

<sup>57</sup> The Criminal Tribes Act, 1871, §24.

<sup>58</sup> The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F, 1919.

<sup>57</sup> The Karnataka Police Act, 1963, §36A.

<sup>58</sup> Vasanta Mogli v. State of Telangana, W.P(PIL) No. 44 of 2018.

<sup>59</sup> DR. B.R. AMBEDKAR, ANNIHILATION OF CASTE (1936).

## F. THE RIGHT TO PRIVACY: PRECEDENTS AND INTERPRETATIONS

37. In the challenge placed against Section 377 before the Delhi High Court in 2009, and in the present case, one of the arguments to challenge the provision was that it amounted to an infringement of the right to dignity and privacy. The Delhi High Court observed in *Naz Foundation v. Govt. (NCT of Delhi)* that the right to live with dignity and the right to privacy both are recognised as dimensions of Article 21 of the Constitution of India. The view of the Delhi High Court, however was overturned by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*,<sup>62</sup> in which judgment it was argued that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender people and hence, there cannot be any basis for declaring the section *ultra vires* of provisions of Articles 14, 15 and 21 of the Constitution. My learned colleague justices of this bench have eloquently stated already that minority groups regardless of their numerical strength, have equal claims to rights, including the right to privacy guaranteed under the Indian Constitution. They have also analysed the *Suresh Kumar Koushal v. Naz Foundation* in great detail in their opinions, and it suffices to say at this point that I am in agreement with my learned colleagues on the erroneous judicial reasoning in the judgment and its conclusion. There are many precedents that uphold and extend the right to privacy as an intrinsic and inalienable right of a human being internationally as well as within the jurisprudence of this Court.

38. Article 12 of the Universal Declaration of Human Rights, (1948) refers to privacy and states, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.<sup>63</sup> Additionally, Article 17 of the International Covenant on Civil and Political Rights,<sup>64</sup> is almost identical in wording to Article 12 of the UDHR.

Yet within the context of India, it is precisely within the privacy of the home or the ostensibly intimate familial spaces that queer and/or inter-caste relationships are punished with wrongful confinement, murders, emotional and physical violence etc. The idea of honour and privacy has different connotations within our religious-cultural context precluding the easy application of these notions in India.

39. Following an experts meeting held in Yogyakarta, Indonesia from November 6, 2006 to November 9, 2006, twenty-nine distinguished experts from twenty-five countries with diverse backgrounds and expertise adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. The NALSA judgment relies heavily on these principles which the esteemed justices found in consonance with the Indian Constitution. Principle 6 of the Yogyakarta Principles addresses the right to privacy: -

<sup>60</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 3 SCC 220.

<sup>61</sup> Universal Declarations of Human Rights, G.A. Res. 217A (December 12, 1948).

<sup>62</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (December 16, 1966).

“Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others”.<sup>65</sup>

40. In *Puttaswamy*,<sup>66</sup> a nine-judge bench expanded on the many facets of the right to privacy, elevating it to the status of a Fundamental Right under Article 21. The Court described discrimination based on sexual orientation as “*deeply offensive to dignity and self-worth*”,<sup>67</sup> while observing that the right to privacy is an expression of individual autonomy, dignity, and identity.

“(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, **it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being** (emphasis supplied)”.

The judgment provides an expansive reading of privacy to include (i) spatial control; (ii) decisional autonomy; and (iii) informational control: -

“Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person”.<sup>68</sup>

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<sup>63</sup> THE YOGYAKARTA PRINCIPLES, PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 14 (2007).

<sup>64</sup> Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

<sup>67</sup> *Id.*, ¶126.

<sup>68</sup> *Id.*, p.201 at 20. This portion in the judgment cites Bhairav Acharya, *The Four Parts of Privacy in India*, Vol. 50(22) ECONOMIC & POLITICAL WEEKLY 32 (2015).

41. Autonomy is not just individualistic but also social. It cannot be understood to be a separate realm from the social. Social codes of acceptability and normalcy are ingrained deeply in our consciousness and translate into actions that are seemingly autonomous. The Right to privacy hence cannot be read as a separate space that needs to be constructed by an individual away from the spatial and decisional control of the State, family, society etc. If our society were founded on individualism and not highly stratified on the basis of social groups, perhaps the applicability of autonomy would have warranted a different trajectory and interpretation.
42. Decisional autonomy and the question of choice similarly gets more complicated when read in tandem with issues of people with disabilities (disability can be social, physical or economic). Informational privacy is also a contested idea especially in the digital age when the State collects data about citizens for a variety of reasons including but not limited to welfare schemes. For instance, how could autonomy or privacy be extended to a transgender woman who needs to do street based labour for survival? Or that of a cis-woman who is being tortured for dowry within a marriage? Sexual orientation has been argued as a personal and intimate choice in this case. However, a substantive reading of equality necessitates the protection and equal treatment of the gender non-conformity of transgender persons, and those whose gender expressions are non-binary who face violence precisely because gender does not have the privilege of spatial or decisional privacy. It is always to be encountered and navigated in public by those who bear the burden of it, including socially marginalised cis-women. What are the practical ways in which privacy can be enjoyed in a highly stratified society “*from the intimate zone to the private zone and from the private to the public arenas?*”<sup>69</sup>
43. This Court has heard testimonies of gay, lesbian and transgender people who have been wrongfully confined, administered forced conversion therapies, forcibly married and even murdered within the confines of their homes. The case of Maria, a trans-woman brutally murdered within her own home in Kollam, Kerala in 2012 has been a particularly chilling example presented before this Court by the petitioner Ayyankali’s Makkal, to highlight the dangers of ostensibly private spaces for those who lead precarious lives. Additionally, this Court draws attention to the fact that domestic violence against women figures as the top category of violence against women in 2018, according to data from the ‘Crimes in India - 2018’ Report compiled by the National Crime Records Bureau (‘NCRB’). The crime rate per lakh women population is 58.8 in 2018 in comparison to 57.9 in 2017.<sup>70</sup> Home is not a safe space that allows individual freedoms for many of these vulnerable groups. The right to autonomy also must hence necessarily include the right to leave unsafe private or familial spaces and the right to alternate housing, food and employment.
44. Justice K.S Radhakrishnan in NALSA, 2014 observed: -

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<sup>69</sup> *Id.*, p.263 at 20.

<sup>70</sup> DAILY HERALD, *Domestic violence tops crime against women in 2018: NCRB*, NATIONAL HERALD, January 9, 2020 available at <https://www.nationalheraldindia.com/national/domestic-violence-tops-crime-against-women-in-2018-ncrb> (Last visited on September 3, 2020).

72. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognise those rights”.

45. In *Minister of Home Affairs and Another v. Fourie and Another*,<sup>71</sup> the Constitutional Court of South Africa ruled unanimously that same-sex couples have a constitutional right to marry. The judgment delivered by Justice Sachs, held that:

“Section 9(1) of the Constitution provides: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’ [...] Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the State. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law”.

This Court will limit itself to the issue of the constitutionality of Section 377 in this judgment and will not concern itself with the marriage rights of the LGBT people. However, the cited judgment provides a good interpretation of privacy as not simply the right to be left alone but most importantly, the right to be recognised as equals and granted dignity.

46. The right to spatial, decisional and informational privacy that has been upheld by the Puttaswamy judgment must be hence interpreted in the present case as the right of LGBT citizens of this country to be recognised as equals and be extended equal protection of law simultaneously respecting their right to assert or alternately, choose not to reveal their gender identities or sexual orientations depending on the context.

The bearer of rights is both the individual citizen and the collectivity. The Constitution of India has been written using the concepts borrowed from British laws, the constitutions of France, USSR, US and the Government of India Act, 1935. The Preamble to the Constitution upholds and guarantees its citizens social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity, and to promote among them all fraternity assuring the dignity of the individuals. It also makes provisions for collective rights that are specific to the Indian context. Articles 15 and 16 allows for making any special provisions for the advancement

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<sup>71</sup> *Minister of Home Affairs v. Fourie*, (2006) (1) SA 524 (CC) (South Africa).

of any socially and educationally backward classes of citizens and/or for the Scheduled Castes and the Scheduled Tribes including in education and employment. Article 17 prohibits the practice of untouchability. This Court acknowledges the arguments placed by the counsel for the petitioner Ayyankali's Makkal, who has very effectively argued for the collective and individual rights of trans and intersex people who face caste and gender oppression and places on record our appreciation for the same.

#### G. CONSTITUTIONAL MANDATES FOR PROTECTION OF VULNERABLE SECTIONS

47. The chief architect of the Constitution, Dr. B. R Ambedkar said, "*The Constitution is not a mere lawyers document, it is a vehicle of life, and its spirit is always the spirit of Age*".<sup>72</sup> It is the duty of this Court to hence declare that a provision such as Section 377 in the Indian Penal Code must comply with the spirit of Constitution or abandoned for not being in congruence with the spirit of this age.
48. Thus, if a certain group of people as in this case, those who have non-normative sexual orientations or genders, have been categorised as a separate class of people for the purpose of arbitrarily criminalising them, then such a provision, in this instance, Section 377 is declared *ultra vires* to the constitutional rights granted under Articles 14, 15, 16, 19 and 21. The *ratio decidendi* is based on the constitutional right of equality, dignity and liberty that belongs to every individual irrespective of their caste, gender, sexual orientation, class etc.
49. Additionally, all those who are forced into furtive sexual and intimate relationships due to caste, gender, sexuality, race, religion must be extended full protection and equal opportunity as stipulated in the Constitution. Upholding the right to have a partner of one's choice regardless of gender, caste, religion and sexuality without providing the right to food, housing, employment, education would be akin to feeding grass to tigers. The right to life encompasses equal access to the basic necessities of life - health, nutrition and housing and this must be extended to all those who live precarious lives in this case, vulnerable individuals and communities who express non-normative genders and sexualities.
50. This Court recommends that the legislature make appropriate laws for the protection of transgender people, in order to penalise non-consensual acts of sexual assault or alternately expand the current definitions under Section 375 (which currently is applicable to only women) to include them.

#### H. CONCLUSION

51. i) It is declared that insofar as Section 377 criminalises consensual or 'voluntary' sexual acts of those persons over the age of eighteen, is violative of Articles 14, 15, 16, 19, and 21 of the Constitution and is rooted in caste morality. It is hence, for all aforementioned

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<sup>72</sup> Dr. Ambedkar, *Dr. Babasaheb Ambedkar: Writings and Speeches Vol 17, Part 1, XXIII* (Ashok Godghate et al., 2014).

reasons, read down to only include within its ambit, all acts of carnal intercourse against minors, and acts of bestiality.

ii) The judgment in *Suresh Kumar Koushal v. Naz Foundation* is hereby overruled.

In view of the above findings, the Writ Petitions are allowed.

.... J.  
(Anonymous) New Delhi.  
September 6, 2018.