

# HOW DOES THE CENTRE APPEAR FROM THE MARGINS? QUEER POLITICS AFTER SECTION 377

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*A struggle against any form of margins is a feminist struggle, and it is incontrovertible that reading down §377 of the Indian Penal Code, 1860 ('IPC') was an important feminist struggle. However, I argue here that §377 must be located as just one among various other struggles towards queer liberation in the history of India, and must be viewed as harmful without such a location. In this article, I lay out the hierarchies and exclusions within queer communities in the country along the lines of gender, caste, class, and religion. This is to show that the often opposing politics of these identities prevent us from constituting the 'LGBT community' as a singular subject of legal analysis, which the judgment of the Supreme Court in Navtej Singh Johar v. Union of India (2018) attempted to do but failed at. I argue that the judgment materially benefitted primarily gay men, while not applying to female sexuality (except symbolically), and having limited impact on the trans communities especially in the aftermath of National Legal Services Authority v. Union of India (2014). In a paradigm of limited funding and prioritised campaigning, acknowledging that funding and public discourse are among the primary ways in which many identities and lives have been made visible, I also point to possible focus areas that activist, legal and academic energies can be extended to going forward to benefit queer and trans women under the law. In keeping with the intersectional feminist understanding that if our freedoms are not interlinked, they are not freedoms at all, this paper highlights the urgent need to strengthen queer solidarities after the Navtej Singh Johar judgement*

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## I. INTRODUCTION

On the one hand, queer activism has never been more widely proclaimed or marketable than it is now in the country. On the other hand, the last few decades of legal energies for queer rights being focused unprecedentedly on battling a singular law, §377 of the IPC has culminated in the re-election of a government that is violently opposed to queer rights. The judgment of the Supreme Court in *Navtej Singh Johar v. Union of India* ('Navtej Singh Johar') that read down §377 is hailed as a milestone for queer liberation in India. The movement for scrapping §377 saw widespread public mobilisations, academic scholarship, and series of litigations targeted towards it. Yet, queer persons from all walks of life continue to face societal stigma, discrimination, and police violence.<sup>1</sup> Queer communities still do not have equal access to adoption,<sup>2</sup> inheritance,<sup>3</sup> marriage,<sup>4</sup> right to serve in the military,<sup>5</sup> surrogacy for same-sex couples,<sup>6</sup> blood donations for queer men.<sup>7</sup> Queer and trans women are still blackmailed using provisions under the IPC for kidnapping, obscenity, pornography, and trafficking.<sup>8</sup> It is at this juncture that one must interrogate whether §377 was the most important queer struggle for all queer communities in India. However, before we can investigate this question, we must understand who the queer communities in India are and what their varied experiences under the law at the margins of power look like – when the law addresses the 'LGBT community', whom exactly does it address?

To begin responding to this, in Part II of this paper, I establish the plurality of queer articulations in India. I aim to show that queer lives, struggles,

<sup>1</sup> Annie Banerji, *One Year After Landmark Ruling for LGBT+ Rights in India, Challenges Persist*, September 6, 2019, available at <https://www.reuters.com/article/us-india-lgbt/one-year-after-landmark-ruling-for-lgbt-rights-in-india-challenges-persist-idUSKCN1VR256> (Last visited on January 10, 2020).

<sup>2</sup> Angana Chakrabarti, *Queer Freedom? A Year After Section 377 Verdict, LGBT Community Still Don't Have These Rights*, September 6, 2019, available at <https://www.news18.com/news/buzz/queer-freedom-a-year-after-section-377-verdict-lgbt-community-still-dont-have-these-rights-2299373.html> (Last visited on January 10, 2020); Wikipedia, *LGBT Rights in India*, available at [https://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_India#Summary\\_table](https://en.wikipedia.org/wiki/LGBT_rights_in_India#Summary_table) (Last visited on January 10, 2020).

<sup>3</sup> *A Win for LGBT Rights in India*, September 20, 2018, available at <https://www.nytimes.com/2018/09/20/opinion/editorials/india-gay-rights-supreme-court.html> (Last visited on January 10, 2020).

<sup>4</sup> *Supra* note 2.

<sup>5</sup> *See* the Army Act, 1950; *See also* the Navy Act, 1957; *See also* the Air Force Act, 1950; *See* Amrita Dutta, *Indian Army is Worried now that Men can Legally have Sex with other Men*, available at <https://theprint.in/defence/indian-army-is-worried-now-that-men-can-legally-have-sex-with-other-men/113644/> (Last visited on January 10, 2020).

<sup>6</sup> Vaibhav Tiwari, *Surrogacy Regulation Bill Passed in Lok Sabha: 10 Points*, December 19, 2018, available at <https://www.ndtv.com/india-news/surrogacy-regulation-bill-passed-in-lok-sabha-10-points-1965215> (Last visited on January 10, 2020).

<sup>7</sup> *No LGBTI Person can Donate Blood in India*, GAY STAR NEWS, available at <https://www.gaystarnews.com/article/no-lgbti-person-can-donate-blood-india/> (Last visited on January 10, 2020).

<sup>8</sup> International Conference on Preventing Violence, Caring for Survivors: Role of Health Professionals and Services in Violence November 28-30, 1998, *YMCA*, Sherry: The Law and Homosexuality in India, 150-154.

languages, and histories, have evolved over a long period of time that dates back to much before legal battles focusing on §377 of the IPC. By bringing the multiplicity of these articulations to the forefront, I highlight the inequalities and exclusions *within* queer communities along the lines of gender, caste, class, and religion, to show how the sometimes opposing politics of these identities prevent us from constituting the ‘LGBT community’ as a singular subject of legal analysis. Thus, I question whether §377 applied uniformly to all queer communities.

In Part III, I build upon this contextual understanding of queer grassroots politics to critically discuss the legal implications of §377 on specific subgroups of queer communities in the country. I analyse that the Navtej Singh Johar judgment primarily benefitted gay men, while not applying to female sexuality (except symbolically), and having limited impact on trans communities in the aftermath of *National Legal Services Authority v. Union of India* (‘NALSA’) (2014).

In Part IV, I point to possible focus areas that activist, legal and academic energies can be extended to going forward to make visible the experiences of queer and trans women under the law. I do this by briefly examining legal provisions that have primarily been used to target, harass, and in some cases – convict queer and trans women in India, outside of §377, such as laws for abduction, trafficking, and kidnapping. I question why they have not been given comparable focus in legal scholarship and public discourse.

I conclude by locating the battle against §377 among other struggles within larger hetero-patriarchal systems of oppression. In keeping with the intersectional feminist understanding that if our freedoms are not interlinked, they are not freedoms at all, I highlight the urgent need to build queer solidarities along the lines of gender, caste, and religion.

As a firm supporter of the notion that work on queer lives must be produced only by queer persons and discourse around queer issues should be led by queer communities and movements, I draw upon my own lived experiences of being a cis-queer woman in India, and cite the work of only publicly queer scholars and activists here, as far as possible.

## II. PLURALITY WITHIN QUEER COMMUNITIES

This part explores the complexities that the intersecting and more importantly, often *opposing*, politics of gender, caste, class, and religion stage in constituting the ‘LGBT community’ as a singular subject of legal analysis. The judgment of the Supreme Court in Navtej Singh Johar recognises diversity and plurality –

“Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society.”<sup>9</sup>

“Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.”<sup>10</sup>

These precepts within the paradigms of constitutional morality and transformative constitutionalism espouse the ideas that the Constitution must transform and democratise relations in society, and that in order to achieve this, the ‘majority’ opinion should not prevail over the right to dignity and liberty of the ‘minority’. Some of these insights flow from Ambedkar whom Chandrachud J. quotes in saying that “Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to enforce them...Without fraternity equality and liberty will be no deeper than coats of paint”.<sup>11</sup>

It is important to unpack how we should understand such a vision of fraternity today; who the ‘LGBT community’ is that the judgment refers to; the diversity and plurality within ‘the LGBT community’; and whether §377 applied uniformly to this entire ‘community’. Irrespective of the portrayals of queer communities in mainstream media, there is no monolithic queer ‘community’, and queer spaces are deeply embedded with their own violent hierarchies.<sup>12</sup> While in an ideal world, queer politics would not be as exclusionary as mainstream politics, the reality we live in is that queer communities struggle as much (if not more) against their own hierarchies along the lines of gender, class, caste, and religion.<sup>13</sup> I want to argue here that queer lives, histories, languages, and experiences are multiple, mediated by politics of gender, caste, class, and religion. Thus, the essence of understanding plurality must extend to understanding how it plays out even *within* queer communities and movements. This is important because it is only by foregrounding this that we will be able to understand the impact of the judgment on lives of diverse queer persons, and critically question who it benefits the most within plural queer communities, and whose struggles it leaves out.

There has been a long-standing vocal critique within LBT (lesbian-bisexual- trans\*) collectives that much of the limelight as well as funding for what

<sup>9</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶268 (per Dipak Misra C.J.). (‘Navtej Singh Johar’).

<sup>10</sup> *Id.*, ¶610, (per Chandrachud J.).

<sup>11</sup> *Id.*, ¶600, (per Chandrachud J.) (quoting Dr. Ambedkar, Constituent Assembly Debates, Vol. XI, 980 (1949)).

<sup>12</sup> Shreya Ila Anasuya, *Beyond Section 377: What about Inequalities within LGBTQ+ Groups?*, September 7, 2018, available at <https://www.thequint.com/voices/opinion/section-377-supreme-court-verdict-queer-trans-community-rights> (Last visited on December 26, 2019) (‘Anasuya’).

<sup>13</sup> GAUTAM BHAN & ARVIND NARAIN, BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 16 (2005) (‘Bhan’).

are collectively called ‘queer issues’ in India has been centred around the figure of the gay man, mediated by his caste and class (“battle against Section 377 has been a ‘rich gay man’s party’”).<sup>14</sup> Gay men became more prominently visible to the State through international AIDS funding to India, while lesbian women remained in the shadows; lesbian women are considered among the lowest-risk groups for HIV infections.<sup>15</sup> In a paradigm of limited funding and prioritised campaigning, acknowledging that funding and public discourse are among the primary ways in which many identities and lives have been made visible leads us to wonder about the many queer realities that have been left in the shadows. I want to therefore begin this discussion with the various ways women who love women have historically been *invisibilised* within queer communities, which translates to their *invisibilisation* in the eyes of the law (“More often than not, the law’s effect on queer women’s private spaces is not visible”).<sup>16</sup>

There is a historic basis to the exclusions queer women face through invisibilisation, and examples of this exist throughout time. In 1885, when it was suggested to Queen Victoria that laws criminalising homosexual acts be extended to address female homosexuality, she is said to have refused to believe that such acts between women were possible.<sup>17</sup> The charge against Ismat Chughtai by the British government for ‘obscenity’ in *Lihaf* (a short story she had published in 1941 about a girl who witnesses a lesbian love affair) was similarly dismissed because it was argued that the story could be understood only by lesbians, so there was no doubt over Chughtai having intended to “corrupt the innocent” reader.<sup>18</sup>

Terms such as *sakhi* or *saheli* which have historically been used to describe women who love women have over the years been purged of their erotic nature and re-moulded into innocuous depictions of female friendship in a manner that queer women find themselves “banished from language itself, literally at a loss for words”.<sup>19</sup> Similarly, in the film *Fire* (1996) by Deepa Mehta, depicting the love between two female characters, does not even once use the word ‘lesbian’, instead portraying their relationship using emotional intimacy and loneliness.<sup>20</sup> This is also observed in court proceedings wherein the most common and safe manner

<sup>14</sup> Poorva Rajaram, *Grey Shades in the Rainbow*, July 27, 2018, available at <https://www.thehindubusinessline.com/blink/cover/grey-shades-in-the-rainbow/article24529669.ece> (Last visited on December 26, 2019) (‘Rajaram’).

<sup>15</sup> Ruth Vanita, *Section 377: A Battle Half Won*, September 8, 2018, available at <https://economictimes.indiatimes.com/news/politics-and-nation/section-377-a-battle-half-won/articleshow/65736151.cms> (Last visited on December 26, 2019) (‘Vanita’).

<sup>16</sup> Arasu Ponni & Priya Thangarajah, *Queer Women and Habeas Corpus in India: The Love that Blinds the Law*, INDIAN JOURNAL OF GENDER STUDIES, 19(3), 413-435, 414, (2012) (‘Arasu’).

<sup>17</sup> Terry Castle, *The Apparitional Lesbian: Female Homosexuality and Modern Culture*, Columbia University Press, New York, 67 (1993).

<sup>18</sup> ASHWINI SUKHTHANKAR, *FACING THE MIRROR: LESBIAN WRITING FROM INDIA* 26 (1999) (‘Sukhtankar’).

<sup>19</sup> GITI THADANI, *SAKHIYANI: LESBIAN DESIRE IN ANCIENT AND MODERN INDIA* (2016).

<sup>20</sup> SUKHTHANKAR, *supra* note 18, 31.

of referring to women who love women in court reportage has been ‘friends’, thus sanitising and changing the nature of the relationship than is in place between the women.<sup>21</sup> This euphemism, appropriation, and subversion of language for connecting to the masses and to be culturally relevant in times rife with stigma against homosexuality, is also observed in the names of L/B/T collectives which use the word for ‘friend’, such as *Sangini* (Delhi), *Sakhi* (Delhi), *Stree Sangam* (Mumbai - now renamed to LABIA), *Humrahi* (Delhi), *Humsafar* (Mumbai), Sisters (Madras). Moreover, among the world’s earliest south Asian newsletter on homosexuality was called *Anamika*, translating to ‘name-less’ in Sanskrit.<sup>22</sup>

Even today, there is not much research, advocacy, and discourse around lesbian and bisexual women under the law which has largely been focussed upon gay and bisexual men because of which the unique situation of women who love women has not been properly addressed in legal responses to criminalisation.<sup>23</sup> Lesbians and bisexual women are disadvantaged economically and therefore able to live less independently without male family members. Facing common societal pressures on women to marry, lesbians and bisexual women are often forced into heterosexual marriages in which they have significantly reduced control over their bodies and sexuality compared to gay men who are in similar sham heterosexual marriages.<sup>24</sup> They are also particularly vulnerable to certain unique forms of control, abuse, and violence. These human rights violations are compounded with stigma and violence for lesbians and bisexual women who are more visible in the public eye by presenting in ways that do not conform to traditional notions of femininity.

“... important fact about the politics of the identity of gay and lesbian movement: it is male-dominated. Lesbians have participated in the movement since the beginning... but they often had the secondary role that characterises their position in the mainstream society. This imbalance has deep cultural and historical roots and it points to the dilemma lesbians face when they identify with the movement.”<sup>25</sup>

In the same manner as cis-heterosexual spaces are male-dominated, so are queer spaces. In the late 1990s, the existence of merely three ‘exclusive lesbian groups’ was known widely in India – Sakhi Lesbian Resource Centre and Research and Networking Institute in Delhi, *Stree Sangama* in Bombay (now

<sup>21</sup> Arasu, *supra* note 16, 414.

<sup>22</sup> Sherry Joseph, *Gay and Lesbian Movement in India*, 31 ECONOMIC AND POLITICAL WEEKLY 33, 2228-2233, (1996) (‘Joseph’).

<sup>23</sup> HUMAN DIGNITY TRUST, *Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and its Impacts*.

<sup>24</sup> *Id.*, 4.

<sup>25</sup> Joseph, *supra* note 22.

renamed to LABIA - Lesbians and Bisexuals in Action) and Sisters in Madras.<sup>26</sup> Even though some other groups also claimed to be gay and lesbian groups, visibility of women in their activities was minimal.<sup>27</sup> The publications by these groups were male-dominated and none of them had a lesbian on their editorial board.<sup>28</sup> The ‘multiple life’ that queer men are able to lead in heterosexual marriages (while also creating pressures for them) are only possible because of the spaces and mobility that remain the privilege of men.<sup>29</sup> Even in the public sphere which remains hostile to women, queerness complicates women’s relationships with space as public spaces are often already unsafe for all women. An example of this is that “the option of discussing ‘cruising’ in public parks as in the case of queer men is an impossibility for queer women”.<sup>30</sup>

While some LBT collectives have tried to ally with “extended ‘sexual minorities’ community - the gays, the *kothis*, the *hijras*...”<sup>31</sup>, many of their realities have been vastly different from those of lesbian, bisexual, and trans women.<sup>31</sup> Queer women have also expressed concern over a certain lack of an understanding of patriarchy within the queer movement(s) – “The patriarchal behaviour of the gay community sometimes really baffled us. Women were almost completely absent from many of their worlds.” This difficulty in allying with other progressive movements and politics has been ‘frustrating’ and the misogyny in the behaviour of some gay men has been written about as difficult to deal with.<sup>32</sup> Even today, the queer movement continues to be criticised for reflecting patriarchal biases of society, and being more easily accessed and safer for queer men; there are far fewer women who love women who even today are able to live their lives as freely as most men who love men.<sup>33</sup> This has also translated into the leadership of the movement in many ways.

“From time to time, Dalit women, tribal women, women from religious minorities, single women and now lesbian and bisexual women have pointed out that their issues do not have space or are not prioritised within the women’s movements.”<sup>34</sup>

Apart from the exclusions faced by queer women within the queer movement(s), queer women have also faced some kinds of exclusions within the women’s movement(s) which has been dominated by cis-women, especially in the leadership. Queer women who were part of the women’s movements in the 1990s

<sup>26</sup> BIMA FERNANDEZ & GOMATHY N.B., NATURE OF VIOLENCE FACED BY LESBIAN WOMEN IN INDIA, 71 (2003).

<sup>27</sup> *Id.*

<sup>28</sup> Joseph, *supra* note 22.

<sup>29</sup> Arasu, *supra* note 16, 414.

<sup>30</sup> *Id.*

<sup>31</sup> Chayanika Shah, *The Roads that E/Merged Feminist Activism and Queer Understanding in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA*, 143–154, 149 (2005) (‘Chayanika’).

<sup>32</sup> *Id.*, 150.

<sup>33</sup> BHAN, *supra* note 13, 16.

<sup>34</sup> Chayanika, *supra* note 31, 147.

would often hear statements such as “Our women will not be able to identify with groups whose names contain words like Lesbian and so we cannot march with them” and “There are no lesbian women amongst the women we work with” etc.<sup>35</sup> The women’s movements are usually referred to in the plural form so as to acknowledge these disparities and to articulate the understanding that ‘women’ are no generic community. This understanding needs to also be extended to queer communities and movements.

Through this analysis, I am trying to underscore that the exclusions queer women face within both queer movement(s) and women’s movement(s) in India is the plurality of queer articulations, histories, languages (or lack thereof), and experiences that are sometimes at odds with each other. These conflicting struggles within queer communities do not merely lie along the lines of gender, but also exist along the lines of caste, class, and religion, among others. There is no homogenous queer person; each of us simultaneously occupy multiple different identities, be it man or woman or transgender, Dalit or ‘upper’-caste, bisexual or gay or lesbian, able-bodied or disabled, Hindu or Muslim or Christian... the list goes on. Many of these social locations are often contradictory, at odds with each other; while one location may grant us some kinds of privileges, another may be the cause of other kinds of disempowerment. The manner in which we respond to various political challenges and which of these identities we bring to the forefront depends on a host of time and space factors.<sup>36</sup> To acknowledge the fundamental instability of identities is to also understand that intersectionality does not simply imply an intersection of multiple identities, but is in fact more than the sum of its parts. Systems of power are not necessarily mutually reinforcing but often work against one another in weakening one another.<sup>37</sup>

Take for instance, the caste composition of queer rights that is observed in a matrimonial advertisement that had appeared in a local Mumbai newspaper.<sup>38</sup> The ad was placed by the mother of a gay activist while looking for a groom for her son. It mentioned that while caste was no bar, the preference sought was for an *Iyer* (a Hindu Brahmin). This speaks to the systematic exclusion of Dalits, *Bahujans* and *Adivasis* in queer movements, and the exclusion of queer individuals in anti-caste mobilisations. Dalit activists have been insisting for a long time that upper-caste queer activists have historically silenced discussions of caste in the struggle for queer rights.<sup>39</sup> This is discussed alongside instances of right-wing queer activists side-lining queer Muslims, caste-class networking between

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

<sup>36</sup> Joseph, *supra* note 22; Nivedita Menon, *Is Feminism about ‘Women’?*, 50 ECONOMIC AND POLITICAL WEEKLY 17, 37-44 (April 25, 2015).

<sup>37</sup> *Id.*

<sup>38</sup> Sumit Baudh, *Groom for Groom*, *THE INDIAN EXPRESS* (May 25, 2015).

<sup>39</sup> *SC Verdict on Section 377 Won’t End Fight against Inequality; Love is as Much about Caste, Class and Religious Struggle*, *FIRSTPOST*, September 7, 2018, available at <https://www.firstpost.com/india/sc-verdict-on-section-377-wont-end-fight-against-inequality-love-is-as-much-about-caste-class-and-religious-struggle-5126261.html> (Last visited on December 26, 2019).



lawyers who are in opposition to Muslim issues but support queer struggles, and issues arising out of queers being represented by upper-caste lawyers. The lime-light of the §377 struggle has been focused on upper-class and upper-caste collectives, lawyers, activists, and celebrities. This is as opposed to the many lesser privileged queer persons who “can’t afford to hide the visibility of their sexuality behind their respectable professions, or who didn’t have the appropriate surname to be included in the ever inclusive queer collectives.”<sup>40</sup>

For instance, the most prominent petitioners and lawyers involved in the §377 case are upper-caste individuals, such as Menaka Guruswamy and Arundhati Katju. The ‘celebrity petitioners’ in the case included; journalist Sunil Mehra, fine-dining restaurant owner Ritu Dalmia, hotelier and writer Aman Nath, executive director of The Lalit Suri Hospitality Group Keshav Suri, and business-woman Ayesha Kapur. Among the petitioners was also the elite pan-IIT group, largely comprising gay men, called *Pravritti*. Other petitioners who are more renowned for their work within queer communities such as Gautam Yadav from Humsafar Trust, Arif Jafar from Bharosa Trust, and Akkai Padmashali, respected transgender rights activist received much less media attention.

Grace Banu, a transgender activist, analyses that many trans persons suffer from the ‘double binds’ of caste as well as gender.<sup>41</sup> Banu states that upper-caste trans persons have the most degree of access to power as well as resources within the queer community, while Dalit, Adivasi and poor trans persons spend their lives doing sex work and begging on the streets. Poorva Rajaram notes that there is distaste within the queer community for what the *hijra* represents; urban, elite gay men and women prefer to model themselves along global notions of acceptability and associating themselves with *hijras* is deemed as a drop in their social status due to notions of untouchability historically associated with caste.<sup>42</sup>

This is the larger context in which we need to view §377 and all judgments relating to it. This is the heterogeneity of queer politics in India. These are the realities that must be acknowledged within a framework of diversity and plurality. This leads us to wonder whether one coherent demand can come out of such diverse communities of people and whether a singular law can apply uniformly to all of them. Keeping these grass root complexities in mind, in the following parts, I analyse whom the law addresses when the Navtej Singh Johar judgment addresses “the lesbian, gay, bisexual and transgender (LGBT) community”<sup>43</sup> and what this means for the queer lives that get left out and fall through the cracks. In the context of the problems I have highlighted above of how a singular law may be problematic

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

<sup>41</sup> Khushboo Sharma, #377StrikeDown: Grace Banu Tells us Why the Celebration Remains Incomplete, September 8, 2018, available at <http://www.indianwomenblog.org/377strikedown-grace-banu-tells-us-why-the-celebration-remains-incomplete/> (Last visited on December 26, 2019).

<sup>42</sup> Rajaram, *supra* note 6.

<sup>43</sup> See Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶16.

in capturing varied queer experiences, I also address the various other laws that need to be focused upon for queer liberation in India.

### III. SECTION 377 - WHOM DID IT IMPACT?

“But even as we celebrate this victory, we have to remember that the reading down of Section 377 has certainly not been the only or the most pressing issue to do with queer and trans rights in India. Several commentators who have been deeply immersed in working on issues of gender and sexuality have repeatedly pointed out, that we need to look beyond Section 377.”<sup>44</sup>

A significant part of visible queer activism in the past decade has been focused on the movement for legal reform, especially regarding §377. For many Indians identifying outside of the queer spectrum, the understanding of the struggles of our communities appear to begin with the *Naz Foundation v. Govt. of NCT of Delhi* (“Naz Foundation”) and end with Navtej Singh Johar. Consequently, much of our collective history and memory has been invisibilised through such a selective legal, advocacy, and scholarship focus. More importantly, such a homogenising of queer identities and experiences has prevented us from questioning whom the judgment on §377 impacted the most, and whose experiences have been left out and need to be reflected going forward. To fill the vacuum, I will attempt to unpack that here.

Even though the law criminalised specific sexual actions and not identities, it certainly did have the effect of criminalising specific communities through the outing of those actions. The law does not simply enforce legality but it also actively arbitrates social norms and morality.<sup>45</sup> This role of the law in not just externally enforcing upon its subjects, but also internally manifesting within them was described by Foucault<sup>46</sup> through the analogy of Jeremy Bentham’s Panopticon<sup>47</sup> (a building structure having a central tower from which one could keep an eye on surrounding prisoner cells). Since prisoners would at all times be able to see the central tower, yet never be sure from where they were being observed, the panopticon induced in the prisoners a sense of permanent visibility ensuring the continued functioning of power. To the same effect, the mere existence of §377 has had the power to influence the public opinion about queer sexuality and legitimise disgust towards our communities through the channel of the law.<sup>48</sup>

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<sup>44</sup> Anasuya, *supra* note 12.

<sup>45</sup> BHAN, *supra* note 13, 8.

<sup>46</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975).

<sup>47</sup> JEREMY BENTHAM, PANOPTICON: OR, THE INSPECTION-HOUSE (1791).

<sup>48</sup> BHAN, *supra* note 13, 8.

Thus, there is no doubt that irrespective of the enforcement of §377, it was discriminatory towards some queer persons by its mere existence. More importantly, the impact of §377 was felt far and beyond the courtroom – in families, societies, police stations, media, and the medical establishment. A PUCL-Karnataka report documents the use of §377 to justify the harassment, abuse, extortion, and illegal detention of queer persons.<sup>49</sup> Thus, even if not used to directly prosecute queer persons, the law did manage to give legitimacy to violence against queer people. It gave thrust to everyday conversations and became intricately woven into the social fabric of institutions like families, workplaces, medical establishments, and the mainstream media.<sup>50</sup> When sexual acts are termed ‘unnatural’ under the law, it is argued to have created ‘negative social identities’<sup>51</sup> for queer persons, thereby devaluing all queer persons in the eyes of the law and creating pathologised identities.

At the same time, we must acknowledge that while such symbolic harms of §377 extended to all queer communities in the country, its material impact was felt only by a few. The primary argument used in the *Navtej Singh Johar v. Union of India* (2018) judgment to read down §377 was that it criminalised a person’s sexual orientation and identity. But insofar as tangible, legal consequences are concerned, framing §377 as a tool for criminalising one’s identity is not as useful as framing it as a tool for violence against queer persons. The judgment should have ideally been premised upon that argument. Framing it as a tool for violence against queer persons brings to forefront the sub-classes of queer persons being affected by it.

§377 did not mean the same thing for different queer communities; some queer communities were impacted symbolically by their sexualities being termed as ‘unnatural’, but for others it had a material significance in their everyday lives through violence in public spaces.<sup>52</sup> Working class transgender persons and effeminate gay men whose class position and gender performances make them hyper-visible in public spaces were most vulnerable to §377 (as well as other laws relating to sex work, public nuisance, etc.). §377 may have created a ‘negative social identity’ for all queer individuals, but it criminalised only some, and therefore some queer communities were more vulnerable to its (mis)use by the State and law enforcement. Such a narrative allows us to view queer communities as plural and diverse, truly upholding constitutional visions of fraternity that the judgment intends to. This part will analyse the material impact that §377 had on different groups of queer people.

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<sup>49</sup> *Human Rights Violations against Sexuality Minorities in India*, PUCL-KARNATAKA, (2001).

<sup>50</sup> BHAN, *supra* note 13, 8.

<sup>51</sup> Saptarishi Mandal, *Section 377: Whose Concerns Does the Judgment Address?*, 53 ECONOMIC AND POLITICAL WEEKLY 37, 2, available at <https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment> (Last visited on December 26, 2019).

<sup>52</sup> *Id.*

## A. MINORS AND GAY MEN

An analysis of the use of §377 in higher courts (not accounting for lower and trial court decisions) shows that it was mostly used to prosecute cases of child sexual abuse.<sup>53</sup> A PUCL 2003 report<sup>54</sup> mentions a study of judgements under §377 that shows that more than sixty percent of cases filed under §377 dealt with child abuse, mostly involving male children.<sup>55</sup> However, since the Protection of Children from Sexual Offences ('POSCO') Act was put into place in 2012, some of these charges have now become irrelevant under §377.

§377 primarily impacted gay men because it criminalised all "carnal intercourse against the order of nature" (including consensual sex between adult men) wherein "penetration is sufficient to constitute the carnal intercourse". Thus, it made gay men particularly vulnerable to prosecution under the law, and to exploitation and extortion by law enforcement and blackmailers.<sup>56</sup> Humjinsi,<sup>57</sup> a prominent resource book on Lesbian, Gay and Bisexual rights in India states that §377 exists to be used mainly by the police to victimise gay and bisexual men whom they catch in public areas to extort money and blackmail, despite the fact that blackmail and extortion are criminal offences. NCRB data also confirms that in 2017, 927 adult male and 211 boys were arrested for 'unnatural offences', while only 5 adult females and no girls were arrested for the same offense.<sup>58</sup>

It thus emerges that the material impact of §377 was felt largely by gay men, and almost all convictions under this offence were relating to them. This is no doubt reason enough for the battle against §377 to be considered an important milestone, but as the next sub-section analyses, it was not a milestone that had comparable impact on the lives of other queer communities, specifically queer and trans women in the country.

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<sup>53</sup> Alok Gupta, *The History and Trends in the Application of the Anti-Sodomy Law in the Indian Courts*, 16 LAWYER'S COLLECTIVE, 7, 9 (2002).

<sup>54</sup> Human Rights Violations against the Transgender Community, 48 (2003), PUCL-KARNATAKA, available at [http://pucl.org/sites/default/files/reports/Human\\_Rights\\_Violations\\_against\\_the\\_Transgender\\_Community.pdf](http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf) (Last visited on January 10, 2020).

<sup>55</sup> Fernandez, *supra* note 26.

<sup>56</sup> Bhavya Dore, *How Section 377 is Being Exploited by the Police and Blackmailers to Extort Men*, November 3, 2015, available at <https://caravanmagazine.in/vantage/how-section-377-became-payday-extortionists-and-police-alike> (Last visited on December 26, 2019).

<sup>57</sup> BINA FERNANDEZ, HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY, AND BISEXUAL RIGHTS IN INDIA (1999) ('Humjinsi').

<sup>58</sup> National Crime Records Bureau, *Crime in India 2017*, 1166.

## B. CIS WOMEN WHO LOVE WOMEN

*“Section 377 explicitly linked criminal sexuality... with male agency, and hence did not have to criminalise lesbian sexuality...”*<sup>59</sup>

A very small number of cases that have been booked under §377 involve cis- queer women. Many scholars and reports, dating back at least to the 90s, have in fact questioned whether §377 applied to female sexuality at all. Since the legal definition of intercourse requires penetration, §377 does not technically have lesbianism in its purview though it makes homosexual acts between men illegal.<sup>60</sup> The landmark report -- *Less than Gay* -- by the AIDS Bhedbhav Virodhi Andolan (ABVA) in 1991 states that lesbianism has rarely been prosecuted in a court of law in India and that same-sex female relationships are not covered under §377.<sup>61</sup> A 2003 report on the nature of violence faced by lesbian women in India mentions repeatedly that §377 only criminalises male homosexual behaviour and read literally, does not apply to women who love women.<sup>62</sup> This ties back to the understanding grounded in Part I of how same- sex female sexuality is experienced differently from and invisibilised in relation to male sexuality; while women who love women primarily deal with issues of invisibility and combating social pressures to marry, men who love men have been more preoccupied with the AIDS epidemic and criminal status of male homosexuality under §377.<sup>63</sup>

In light of Navtej Singh Johar, it has also been argued that among all the laws that affect queer lives, §377 has not been the one that did the most damage for LBT women, as §377 was primarily a tool of harassment towards gay men.<sup>64</sup> Some activists have thus assembled as LBT collectives to map out separate activist agendas in the past couple of decades. This includes a focus on family pressure that LBT women face to enter into heterosexual marriages (‘compulsory heterosexuality’),<sup>65</sup> and their economic struggles for livelihood if they run away from these forced marriages. However, despite the pressing nature of these concerns, and perhaps owing to the relatively small numbers of such LBT collectives, they have neither secured the same funding that gay men have secured through AID funds nor have gained as much traction in activist spaces. Thus, activists

<sup>59</sup> Giti Thadani, *Silence and Invisibility* in *FACING THE MIRROR: LESBIAN WRITING FROM INDIA* (1999), 135.

<sup>60</sup> SUKHTHANKAR, *supra* note 18, xxv-xxvi.

<sup>61</sup> AIDS BHEDBHAV VIRODHI ANDOLAN, *Less Than Gay: A Citizens’ Report on the Status of Homosexuality in India*, (1991).

<sup>62</sup> FERNANDEZ, *supra* note 26.

<sup>63</sup> SUKHTHANKAR, *supra* note 18, xlvii.

<sup>64</sup> Rajaram, *supra* note 4.

<sup>65</sup> Adreinne Rich, *Compulsory Heterosexuality and Lesbian Existence* in *CULTURE, SOCIETY AND SEXUALITY* (2007).

argue that there is a feeling that the battle against §377 has been a “rich gay man’s party” focused on protecting the rights of upper-caste men.<sup>66</sup>

It should however be noted that even though §377 expressly excludes lesbianism, it has still been read expansively by the State to harass and intimidate women who love women,<sup>67</sup> thereby making them vulnerable to police interventions as long as the legal proscription existed.<sup>68</sup> A 2016 report by the Human Dignity Trust states reports of the law being used against women despite not applying to female same-sex sexual conduct.<sup>69</sup> Many female couples who had eloped from their families were threatened and intimidated by the police that their relationships were illegal under §377.<sup>70</sup> For instance, an article that appeared in *Samna* in October 1999 mentioned the arrest of a lesbian woman under §377 for having an ‘illegal’, ‘unnatural’ lesbian relationship with her partner for seventeen years.<sup>71</sup>

Thus, there is no doubt that §377 being read down will benefit queer women. But given the existence of laws that more commonly impact queer women, it is yet to be seen how much of a difference it will make. Part III charts out some lesser known but widely used legal provisions that have been used to target and harass queer women.

### C. TRANS COMMUNITIES<sup>72</sup>

“To be a homosexual or a hijra is to draw the presumption that the hijra or the homosexual is engaging in ‘carnal intercourse against the order of nature’. This particular interpretation of Sec 377 means that all queer people, particularly the kothi and hijra sex worker population are particularly vulnerable to harassment under this provision.”<sup>73</sup>

“I always knew that it will not benefit people like me who are begging on the streets and sex workers. We all know who is going to benefit out of it.”<sup>74</sup>

<sup>66</sup> Rajaram, *supra* note 14.

<sup>67</sup> PUCL-Karnataka, *supra* note 44, 48.

<sup>68</sup> FERNANDEZ, *supra* note 26.

<sup>69</sup> Human Dignity Trust, *supra* note 15, 12.

<sup>70</sup> VANITA, *supra* note 15; FERNANDEZ, *supra* note 26; Rajaram, *supra* note 14.

<sup>71</sup> FERNANDEZ, *supra* note 26, 12.

<sup>72</sup> *Author’s note*: As a cis queer woman, any errors in the following analysis of trans issues should entirely be attributed to my own privileged location.

<sup>73</sup> PUCL-Karnataka, *supra* note 44, 47.

<sup>74</sup> *Even without 377, There are Struggles Ahead; Says Revathi*, MAKTOOB MEDIA, September 6, 2018, available at <https://en.maktoobmedia.com/2018/09/06/even-without-377-there-are-struggles-ahead-says-revathi/> (Last visited on December 26, 2019).

There seem to be conflicting schools of thoughts within trans communities over whether §377 materially impacted trans persons, and if so, to what extent. A petition was filed this year in the Delhi High Court challenging the constitutional validity of §377 by stating that it violated Articles 14, 15 and 21 of the Constitution as it extends only to men, women and animals and excludes trans genders as victims of unnatural offences.<sup>75</sup> One of the motivations for this petition seemed to be a recent case in 2018 where the Delhi police had refused to register an FIR for sexual harassment under §354-A on the ground that it applied only to women, and not trans-women.<sup>76</sup>

Despite this interpretation of §377, a 2003 PUCL report on human rights violations against the transgender community cites instances of marginalised populations (such as *hijras* or *kothis*) being particularly vulnerable to arrest under §377.<sup>77</sup> This is because marginalised populations mostly use public spaces like parks and public toilets for engaging in sexual activity proscribed under §377.<sup>78</sup> The report also cites the *Queen Empress v. Khairati* ('Queen Empress')<sup>79</sup> in which the police had arrested a victim under §377 (later acquitted by the courts) after suspecting him of being a "eunuch" who dressed in women's clothes and on occasion was found dancing and singing with women.<sup>80</sup> He was put through a medical examination and his "feminine behaviour" was attributed to him being accused of being a "regular sodomite."<sup>81</sup>

On the other hand, A. Revathi, a noted trans activist has seemed sceptical of the extent to which §377 impacted trans communities. She has drawn attention to the state machinery policing *hijras* for their food, clothing, and expressing choices and the innumerable murders, rapes, thefts, false charges, and shootouts that are inflicted regularly upon trans communities in the country using provisions other than §377. Rajaram further writes that when *hijras* are arrested by the police, often no law is cited for the same. If they do need to cite one, they rarely use §377, preferring to cite laws on trafficking or public nuisance instead. Hence, despite §377 being read down, these police atrocities are unlikely to be affected.<sup>82</sup> Moreover, the NALSA judgment also established that trans persons could not be discriminated against, making some of the charges against trans persons under §377 now irrelevant.<sup>83</sup>

<sup>75</sup> *Pleasays Section 377 Excludes Transgenders as Victims of Unnatural Sex, Court Seeks Centre's Reply, SCROLL.IN.*, 2019, available at <https://scroll.in/latest/940548/plea-says-section-377-excludes-transgenders-as-victims-of-unnatural-sex-court-seeks-centres-reply> (Last visited on December 26, 2019) ('Scroll.in').

<sup>76</sup> *Id.*

<sup>77</sup> PUCL-Karnataka, *supra* note 44, 50.

<sup>78</sup> *Id.*, 47.

<sup>79</sup> *Queen-Empress v. Khairati*, 1884 SCC OnLine ALL 70.

<sup>80</sup> PUCL-Karnataka, *supra* note 44, 47.

<sup>81</sup> *Id.*

<sup>82</sup> Rajaram, *supra* note 14.

<sup>83</sup> *Author's note*: I thank Gautam Bhatia for bringing this to my attention in a conversation.

Different sub-classes of queer communities were thus impacted differently by §377. Gay men and gender non-conforming individuals, especially those belonging to lesser privileged caste and class locations, who are more likely to use public spaces for sexual activity, were most vulnerable to being convicted under §377. Moreover, §377 was never applicable to female sexuality in the first place, and when in rare cases it was used to target women, it was mostly through the incorrect application of the law to harass queer women. In the aftermath of the NALSA judgment, trans communities were also granted protection from discrimination under the law, thereby making the impact of §377 on their lives less significant than other forms of oppressions and violence regularly faced by trans communities in the country, which will be discussed in greater detail in the following Part.

#### IV. LAWS BEYOND SECTION 377

Moreover, even specifically within the legal paradigm, there are various other laws that impact and are used to target queer women, such as laws against kidnapping, obscenity, pornography, and trafficking. There are also many civil laws that deprive queer persons of the basic rights such as the right to marry, and a whole set of rights that flow from the assumption of a heterosexual family.<sup>84</sup> However, these have not received comparable focus by legal scholars and activists in the narration of the story of queer liberation in India.

##### A. CIS WOMEN WHO LOVE WOMEN

In Part I, I have discussed the invisibility that lesbian and bisexual women face under the law – of the law’s reluctance to acknowledge female sexuality in general, and female sexuality “against the order of nature” specifically. This has however not meant that women who love women have escaped unjust scrutiny under the law. I will argue here that the persecution of women who love women has taken different routes far away from §377.

“Some of us within the community have felt that among the different laws affecting queer lives in India, Section 377 is not the one doing the most damage. The belief meant that the LGBT did not sit well together between themselves. Section 377 was chosen on the rationale that it was a tool of extortion and blackmail against gay men picked up by the police... As LBT women, we know how the laws on kidnapping are used against runaway couples.”<sup>85</sup>

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<sup>84</sup> Mihir Desai, *Law and Discrimination against Homosexuals*, 2(4) *COMBAT LAW: THE HUMAN RIGHTS MAGAZINE*, (2003).

<sup>85</sup> Rajaram, *supra* note 14.



Given the nascent stage of analysing relationships between queer women and the law in India, many of the laws affecting queer women's lives have not yet received much scholarly or public attention.<sup>86</sup> Since same sex unions are not legally recognised in India, none of the economic and legal rights and benefits that flow from a marriage contract are available to same-sex couples, such as the right to common property and inheritance, custody and adoption rights, or next of kin privileges in the event of illness or death of their partner; many of the cases of same-sex union in India that have appeared in the media are also those of women from smaller towns.<sup>87</sup>

Rather than §377, there are many civil and criminal laws that are used to target lesbian and bisexual women. Some of these as highlighted by Arasu and Thangarajah through an analysis of Habeas Corpus cases in India are briefly discussed here.<sup>88</sup> Wrongful confinement

– when a person is confined by someone who does not have the authority to do so – is a crime under §339 and §340 of the Indian Penal Code (IPC), and kidnapping that is done with the intention of compelling someone to marry them is covered under §366 of the IPC. These provisions are used frequently by families to allege that a woman is being confined or kidnapped when she is living with her same-sex partner or has run away. Kidnapping from lawful guardianship – when a minor is taken away from their legal guardian without the guardian's consent (minor's consent is legally immaterial) – is outlawed under §361 of the IPC. This provision is also taken advantage of by families of queer women to keep them away from their same-sex partners. Extensive evidence is produced to prove that the woman is a minor so she may be kept in her family's custody. In many cases, the court also rules that she returns to her family's home even when she is not a minor and does not want to live with her family. Abduction is illegal under §362 of the IPC. However, families of queer women often allege that their daughters have been enticed by the partner to another place with the intent of committing a crime such as an illicit sexual relationship.

These provisions of the IPC impose not just symbolic, but also material consequences for lesbian and bisexual women, especially ones from lesser privileged classes and castes. Though these provisions are significantly more relevant to many queer women's lives, they have not garnered the same scale of legal attention, scholarly focus, and public limelight as S. 377. We continue to invisibilise lesbian and bisexual women's experiences in the eyes of the law.

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<sup>86</sup> Arasu, *supra* note 16, 416.

<sup>87</sup> HUMJINSI, *supra* note 57.

<sup>88</sup> Arasu, *supra* note 16, 416-417.

## B. TRANS COMMUNITIES

As discussed in Part II, the extent to which §377 impacted trans communities may be ambiguous, there are other legal provisions that quite unambiguously impact trans communities in India, but escape the same kind of legal and public scrutiny. For instance, as mentioned earlier, a trans woman's FIR was recently not registered under §354-A of the IPC which deals with sexual harassment on the ground that it applied only to cis-women, and not trans-women.<sup>89</sup> Therefore, struggles for some kinds of invisibilised bodies remain far beyond §377.

For instance, the Immoral Traffic Prevention Act, 1956 ('ITPA') (amended in 1986), has heavily been used to harass trans persons. The mandate of the Act is to prevent the trafficking of women and children into 'prostitution', not by criminalising 'prostitution', but by criminalising "brothel keeping, trafficking, pimping and soliciting." A 1986 amendment to the Act made it gender neutral (by substituting the words "female" and "girls" by the word "person" throughout the Act). This had the effect of potentially bringing transgender sex workers under the ambit of the Act. It has provided a legal basis for arresting and intimidating transgender sex workers, and male as well as hijra sex workers became criminal subjects of the ITPA.<sup>90</sup>

Though civil rights are applicable to all persons, gender non-conformity and sexual orientation play a role in one's ability to access basic civil rights; civil laws either exclude and/or discriminate against trans persons. For instance, many transgender persons may not be able to provide legal documents to access benefits associated with the verification of an official identity, such as of citizenship under the National Register of Citizens ('NRC') and/ or associated welfare schemes connected to Aadhar. This could be due to two primary reasons. One, trans persons often have severed ties with their birth families as many trans children face violence in their family homes and are either evicted or run away from home.<sup>91</sup> Second, trans persons may no longer identify with the gender mentioned on the official documents as many have undergone a change in their legal gender identity after the 2014 Supreme Court NALSA verdict that affirms the right of all Indian citizens to self-identify their gender.<sup>92</sup>

These hurdles have resulted in trans persons being excluded from both the NRC as well as Aadhar entitlements such as welfare services and the public distribution system. According to the All Assam Transgender Association (AATA), the first draft of the updated NRC (released on December 31, 2017)

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<sup>89</sup> *Supra* note 65.

<sup>90</sup> PUCL-Karnataka, *supra* note 44, 49.

<sup>91</sup> Shivalal Gautam, *Multi-Layered Exclusions for Trans Persons in Assam NRC Process*, VARTA - GENDER, SEXUALITY, INTIMACY PUBLISHING (2019), available at <http://www.vartagensex.org/details.php?p=5d2b712345de7> (Last visited on December 26, 2019).

<sup>92</sup> *Id.*

included not a single trans person with their desired gender identity, and included a few with the gender assigned to them at birth. Another study shows that more than a quarter of the transgender population of India does not have Aadhaar.<sup>93</sup>

The Transgender Persons (Protection of Rights) Act, 2019, saw the trans community take up wide protest against many provisions under the Act, as they have been doing since the Bill was initially tabled in the Lok Sabha in 2016.<sup>94</sup> The near silence of non-trans communities was clear during the campaign and agitation against the Act, even within queer circles. When the Trans Bill got passed in Rajya Sabha through brute force, major media houses barely covered it amidst the Maharashtra state elections. Few cis and cis-queer women's collectives put out statements of solidarity with trans groups. Trans activists actively called out fellow queer individuals and groups on social media to voice their opposition to the Act. The primary traction against the Act came from within trans *hijra kothi* communities. This is very different from the traction and mobilisation that §377 received from across the queer spectrum and allies outside. This is despite, as I have argued here, the section not applying to and comparably impacting all queer communities.

## V. CONCLUSION

“Why would someone like me — a lesbian — be indifferent to the outcome of the case? The answer lies in the two-decade-old history of debate within the queer community, about which little is known outside the narrow activist and academic circles. Don’t get me wrong, §377 has to be struck down. The question is how significant a change will it bring about?”<sup>95</sup>

There is no doubt about the fact that §377 was a draconian, colonial law that had no place in an inclusive, plural society, and therefore needed to be

<sup>93</sup> *Aadhaar Still Excludes Homeless and Transgender People from Being Enrolled: Study*, FIRSTPOST, 2019, available at <https://www.firstpost.com/india/aadhaar-still-excludes-homeless-and-transgender-people-from-being-enrolled-study-7706061.html> (Last visited on December 26, 2019).

<sup>94</sup> By requiring certificates of gender change to be produced to the District Magistrate, the Act violates the right to self-determination of gender, thus also going against provisions secured under NALSA (2014). It fails to recognise alternative families by stating that no children can be separated from their parental homes, despite the family and home most often being the most violent and unsafe spaces for many trans children, who’d rather live with other queer-trans communities. The Act punishes sexual violence against trans persons with lower sentences (from 6 months to 2 years, plus a fine) than equivalent sexual crimes against cisgender women. The Bill is silent in terms of marriage/partnership rights, education, and livelihood opportunities for trans persons, and makes no attempt to provide reservations which were proposed in the NALSA (2014) judgment. Various other critiques have been put forward by trans activists.

<sup>95</sup> Rajaram, *supra* note 14.

read down. However, we would do great injustice to the diverse lived experiences of queer persons if we labelled.

§377 as the most prominent struggle for ‘queer liberation’ in India. Queer communities in the country are deeply heterogeneous with their own biases and hierarchies. As a result of this, I have argued here that §377 was not the most significant legal battle within the realm of queer rights in the country. It applied primarily only to gay men, and almost all convictions under this offence were relating to the same. When the provision was used against trans-queer women, it was mostly through the State authorities misusing it as a threat to harass, coerce, and separate queer women. This is in the context of there being no protection for queer women under the law, in contrast to legal protections from violence available to Dalit and *adivasi* women under the Prevention of Atrocities Act. The laws that more directly and tangibly impact queer women in the country, such as provisions for trafficking, kidnapping, and abduction, have received negligible focus in scholarship, legal analysis, and public discourse.

Such a selective focus erases the identities and experiences of many queer realities. We must strive to view the battle against §377 as deeply embedded with these realities. We must also strive to view the battle against §377 as located among other struggles within larger hetero patriarchal systems of oppression, and to view it as impossible and harmful without such a location.<sup>96</sup> This is primarily because these are not single-issue struggles, and we do not lead single-issue lives;<sup>97</sup> queer persons also have religious, caste, and other identities that put them on the receiving end of various other forms of persecution.

The constitutional validation following Navtej Singh Johar needs to be viewed as part of the larger picture where lynching and attacks on minorities have been normalised, dissent silenced in ‘national interests’, and the onset of a neoliberal economy with people’s access to their means of livelihoods being taken away from them by a ‘welfare state’ which functions more like a ‘police state’.<sup>98</sup> In the current context, it needs to be viewed alongside the clampdowns in Kashmir,<sup>99</sup> the police and State atrocities against student protesters<sup>100</sup>, the imprisonment of

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<sup>96</sup> BHAN, *supra* note 13.

<sup>97</sup> (1982) Audre Lorde, “*Learning from the 60s*”, BLACKPAST, August 12, 2012, available at <https://www.blackpast.org/african-american-history/1982-audre-lorde-learning-60s/> (Last visited on December 26, 2019).

<sup>98</sup> Chayanika Shah, *None of us are Free till all of us are Free: Why the 377 Verdict is Important for all Indians*, available at <https://scroll.in/article/893578/none-of-us-are-free-till-all-of-us-are-free-why-the-377-verdict-is-important-for-all-indians> (Last visited on December 26, 2019).

<sup>99</sup> *Kashmir Under Lockdown: All the Latest Updates*, ALJAZEERA, available at <https://www.aljazeera.com/news/2019/08/india-revokes-kashmir-special-status-latest-updates-190806134011673.html> (Last visited on January 12, 2020).

<sup>100</sup> Aman Sethi, *JNU Attack Investigation: The Delhi Police Pleases its Political Masters*, available at [https://www.huffingtonpost.in/entry/jnu-violence-delhi-police-joy-tirkey-blame-aishe-ghosh-left\\_in\\_5e18853ac5b650c621dd2da9](https://www.huffingtonpost.in/entry/jnu-violence-delhi-police-joy-tirkey-blame-aishe-ghosh-left_in_5e18853ac5b650c621dd2da9) (Last visited on January 12, 2020).

political activists,<sup>101</sup> judicial accountability in light of sexual harassment allegations against the former Chief Justice of India,<sup>102</sup> the struggles of movements like the *Narmada Bachao Andolan*,<sup>103</sup> other laws such as the Transgender Persons (Protection of Rights) Act, 2019, the Citizenship (Amendment) Act, 2019, the National Register of Citizens, and the fight for equality must go beyond fighting heteronormativity.

Misra C.J. and Chandrachud J. refer to ‘a transformative constitution’ in their individual judgments in *Navtej Singh Johar*.<sup>104</sup> This derives from the understanding that the purpose of having a constitution is to transform society and democratise (caste, gender, sexuality, etc.) relations in society between dominant and minority communities. Challenging hierarchical societal relationships is deeply intrinsic for the Constitution to move beyond being merely words on paper, and towards realising the guarantee of equal citizenship that it enshrines. When this idea is applied to §377, we realise that much work remains to be done beyond the *Navtej Singh Johar* judgment. As has been analysed earlier in this paper, §377 also occupied a symbolic place in our social, cultural, and legal consciousness, fostering disgust towards queer communities in public perception. The struggle to fight these prejudices against the law has encoded towards us a struggle to realise full equality for all queer communities, as diverse and hierarchal as they are today, so that we may take forward this mandate of a transformative Constitution. As stated by Malhotra J. in the judgment, history owes our communities an apology for the ostracism that we have suffered at the hands of the law.<sup>105</sup> However, history owes us more than that. It owes us reparations for the wrongdoings and the unconscionable suffering that have for centuries been imposed upon queer persons in this country. While some specific provisions for what this atonement would look like in practice have been outlined in the judgment,<sup>106</sup> in the larger picture, they do not mean much if one community’s rights do not interlink with the rights of others.

<sup>101</sup> Betwa Sharma, *CAA: It’s Not What She Did, It’s Who She is, Says Sadaf Jafar’s Sister on Her Arrest*, January 3, 2020, available at [https://www.huffingtonpost.in/entry/sadaf-jafar-up-police\\_in\\_5e0ee1e8e4b0b2520d1f8c52](https://www.huffingtonpost.in/entry/sadaf-jafar-up-police_in_5e0ee1e8e4b0b2520d1f8c52) (Last visited on January 12, 2020); Ajaz Ashraf, ‘*At Times, without Mamma, I Feel Desperate, Says Daughter of Jailed Lawyer Sudha Bharadwaj*’, available at <https://scroll.in/article/910718/at-times-without-mamma-i-feel-desperate-says-jailed-activist-sudha-bharadwajs-daughter> (Last visited on January 12, 2020).

<sup>102</sup> Vijaya Lalwani, ‘*Anti-judicial: Activists, Lawyers Protesting against SC and CJI Ranjan Gogoi Detained by Police*’ available at [https://amp.scroll.in/article/922602/anti-judicial-activists-lawyers-protesting-against-sc-and-cji-ranjan-gogoi-detained-by-police?\\_twitter\\_impression=true](https://amp.scroll.in/article/922602/anti-judicial-activists-lawyers-protesting-against-sc-and-cji-ranjan-gogoi-detained-by-police?_twitter_impression=true) (Last visited on January 12, 2020).

<sup>103</sup> *Narmada Bachao Andolan Back on Indefinite Protest, INDIA TODAY*, available at <https://www.indiatoday.in/india/story/narmada-bachao-andolan-medha-patkar-back-indefinite-protest-1620007-2019-11-18> (Last visited on January 12, 2020).

<sup>104</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>105</sup> *Id.*

<sup>106</sup> *Navtej Singh Johar* judgment places some responsibilities upon specific stakeholders (such as the Union government, mental health and medical professionals, and citizens) to implement provisions such as giving the judgment wide publicity through public media, and conducting periodic sensitization and awareness training for all government officials, among other things.

Consider the petition by Romila Thapar that challenged the house arrest of activists in the case of the Bhima Koregaon raids which was to be heard on the same day as Navtej Singh Johar but was adjourned till later. When Dalit activists called for a *bandh* the following day to protest the adjourning of Thapar's petition, the conflict faced by Dalit queers and allies between celebrating the striking down of §377 and protesting the decision regarding Thapar's petition embodies the complexities of queer experiences and politics in the country today.

The struggles going forward are going to involve bringing to light and campaigning for changes to legal provisions impacting queer and trans\* women, bridging the different fractures and hierarchies within queer communities, and strengthening solidarities across various people's movements. If we are to realise true constitutional visions of fraternity and resist forced conformity, we must represent human lives as multiple and communities as voluntary and various.<sup>107</sup> If we are all not free together, we are not free at all.

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<sup>107</sup> Joseph, *supra* note 22.