

BEYOND DECRIMINALISATION: UNDERSTANDING QUEER CITIZENSHIP THROUGH ACCESS TO PUBLIC SPACES IN INDIA

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Public spaces are often constructed around particular notions of “appropriate” codes of conduct which exclude those who do not conform to heteronormative ideals. In India, queer persons, especially those belonging to socio-economically disadvantaged backgrounds, experience hostility in public spaces and often start avoiding those spaces altogether. Further, there are certain laws that interact with other forms of societal censure to produce a climate of oppression where safe areas, in contrast, are marked off by lack of detection and relative freedom from the law. By making queer identities invisible, it is understood that the sexual ‘others’ have no claims or lesser claims to citizenship alongside the ‘good’, law abiding, heterosexual subjects. In this sense, questions of gender and sexual identity can be seen to intertwine with those of citizenship in a number of profound ways for queer persons are often reduced to being ‘partial citizens’. This paper will look at how certain laws in India intersect with informal methods of social censure to produce a regime that has a disenfranchising impact on queer persons’ access to public spaces, and largely, their citizenship.

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I. INTRODUCTION

Studies of gender, sexuality, and public space have demonstrated that public spaces are constructed around particular notions of ‘appropriate’ sexual conduct that excludes those whose gender expression and sexual choices do not

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conform to heteronormative norms.¹ This spatial exclusion of people who are constructed as sexual “dissidents” reflects and reproduces notions of belongingness based on heteronormality and more essentially, heterosexuality.

Since public spaces are not equally accessible to everyone, it results in the selective removal of certain groups, making some people ‘more equal’ than others. Queer persons,² especially those belonging to socio-economically disadvantaged backgrounds, experience hostility, prejudice, discrimination, and violence in public spaces, and often start avoiding these spaces altogether. There exists a patriarchal dichotomisation of space that has profound and painful consequences for gender non-conforming persons in different spaces - public spaces such as streets, quasi-public domain of the schools and offices, to semi-private spaces of malls, theatres, and parks and ending with the privacy of home. Studies have shown that queer persons may avoid using public transport and public toilets, only walk on the streets when accompanied by others so as to avoid homophobic and transphobic violence, and live in a state of constant anxiety and fear of being attacked.³ Queer persons experience a certain tyranny in the gendered division of space that arises as they challenge the hegemonic expectations for ‘appropriately’ gendered behaviour in society.

This paper will highlight how the legal system creates, what Foucault called, ‘disciplined bodies’⁴ under the gaze of the State. Drawing from Foucault’s theory of Panopticism, I will discuss how certain present day laws in India, such as those regulating sex work and begging, whether enforced or not, act as forms of disciplinary control and reinforce colonial mindsets by treating queer persons as criminal subjects who need to be regulated.⁵ This distinction between conduct and identity, with respect to non-normative sexuality, is often conflated by the laws that view queer persons through the prism of illegality even if they are not engaging in the act that is deemed illegal by the law. This is particularly true for transgender individuals who bear visible marks of their gender identity and are in turn subject to various forms of harassment as they navigate public places.⁶

¹ *Unnatural Offences: Obstacles to Justice in India based on Sexual Orientation and Gender Identity* 23, INTERNATIONAL COMMISSION OF JURISTS (‘ICJ’), (February 2017).

² The term ‘queer persons’ here is used as an inclusive term to include the entire spectrum of gender/sexuality identities.

³ *Living with Dignity: Sexual Orientation and Gender Identity -based Human Rights Violations in Housing, Work and Public Spaces in India*, INTERNATIONAL COMMISSION OF JURISTS (‘ICJ’) (June, 2019).

⁴ MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH* (1975).

⁵ Ajita Banerjee, *Discipline and Punish: How Anti-Beggary Laws in India are used to Criminalize Transgender Persons*, OXFORD HUMAN RIGHTS HUB, available at <http://ohrh.law.ox.ac.uk/discipline-and-punish-how-anti-beggary-laws-in-india-are-used-to-criminalize-transgender-persons/> (Last visited on February 22, 2020).

⁶ Danish Sheikh, *Queer Rights and the Puttaswamy Judgement*, ECONOMIC & POLITICAL WEEKLY (December 23, 2017), available at <https://www.epw.in/journal/2017/51/privacy-after-puttaswamy-judgment/queer-rights-and-puttaswamy-judgment.html> (Last visited on February 22, 2020).

First, I will analyse how certain colonial-era laws provide a backdrop to the legal exclusion and social panopticism faced by queer persons today. In particular, I will look at the Criminal Tribes Act 1871 which was used as a surveillance mechanism by the British to regulate ‘eunuchs’ and penalized such persons for crossdressing in public. I will also critically analyse §377 of the Indian Penal Code that encoded within it a stereotypical morality, singling out queer people and marking them as ‘less than citizens – or less than human.’ Second, I will discuss how certain criminal laws in India, such as those regulating sex work and begging act as forms of disciplinary control and form the basis of police bias against queer persons. Third, I will discuss the right to sexual privacy as envisioned in the recent Supreme Court judgments of *Navtej Singh Johar v. Union of India* (2018) and *K.S. Puttaswamy v. Union of India* (2017).

II. LAW AS A PANOPTICON: UNDER A STATE OF CONSTANT SURVEILLANCE AND CENSURE

In India, the effect of criminal sanctions against queer individuals ranges from discrimination in access to education, employment, and healthcare, to sexual violence, custodial torture, and threat to life. Archaic ‘sodomy’ laws such §377 of the Indian Penal Code (§ 377),⁷ interact with other forms of societal censure to produce a climate of oppression and perpetuate stigma around non-normative gender and sexual identities. This ‘chilling effect’ of §377 on the lives of queer individuals has had the same impact as the Panopticon, which, as Foucault explains, induces in the subject “a state of conscious and permanent visibility that assures the automatic functioning of power.”⁸

Spatial locations present various threats and manifestations of power, and certain criminal laws intersect this field in multiple ways. Certain laws frame and enable conditions of hostility, thereby creating the need for self-surveillance and discipline in public spaces. These laws interact with other forms of societal censure to produce a climate of oppression and perpetuate stigma around non-normative gender and sexual identities in public spaces. Safe areas, in contrast, are marked off by lack of detection and relative freedom from the law. These laws interact with other forms of societal censure to produce a climate of oppression and perpetuate stigma around non-normative gender and sexual identities in public spaces. These laws frame and enable conditions of hostility and interact with other forms of societal censure to produce a climate of oppression and perpetuate

⁷ 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.

Modelled on the Buggery Act of 1533, Section 377 makes sexual activities “against the order of nature” illegal. On September 6, 2018, the Supreme Court of India ruled that the application of Section 377 to consensual same sex relationships between adults was unconstitutional, “irrational, indefensible and manifestly arbitrary”, but that Section 377 remains in force relating to sex with minors, non-consensual sexual acts, and bestiality.

⁸ MICHAEL FOUCAULT, DISCIPLINE AND PUNISH (1975).

stigma. This “chilling effect” on the lives of queer citizens leads to legal exclusion and social panopticism, making them partial citizens unworthy of legal protection and social acceptance. In reality, even non-state actors start performing roles of policing and controlling queer lives in a mimetic relation to the modes of justice itself.

Laws like §377 act like the Panopticon and reinforce colonial mind-sets by treating queer persons as criminal ‘subjects’ who need to be regulated.⁹ This distinction between conduct and identity with respect to non-normative sexuality is often conflated by laws like §377 that view queer persons through the prism of illegality, even if they are not engaging in the act that is deemed illegal by the law. This is particularly true for transgender individuals who bear visible markers of non-normative identity and are in turn subject to various forms of harassment as they navigate public places.¹⁰ In this manner, queer persons often self-regulate their behaviour, expression, voice, and gait while navigating public spaces in order to become invisible to the law and society that disapproves of their identity, orientation, and expression. This vulnerability faced by queer persons in public spaces was noted by the Supreme Court in *NALSA v. Union of India*¹¹ (‘NALSA’):

“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.”¹²

The idea of a queer criminal subject identifiable by visual traits exhibited dates back to the 19th-century case of *Queen Empress v. Khairati* (1884),¹³ where the accused was a ‘male dressed as a female’ arrested for crossdressing, and dancing and singing in public with women.¹⁴ The accused in this case, found to be a “habitual sodomite” upon medical examination, was eventually acquitted but the police, who had initiated the case *suo motu*, was commended for keeping such ‘disgusting practices’ in check. Laws like these interact with other forms of societal censure to produce a climate of oppression and perpetuate stigma around non-normative gender and sexual identities. Ostensibly a neutral law that criminalised ‘unnatural’ sexual acts and not identities, §377 in its operation targeted

⁹ Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV (2011).

¹⁰ Danish Sheikh, *The Road to Decriminalization: Litigating India’s Anti-Sodomy Law*, YALE HUMAN RIGHTS AND DEVELOPMENT JOURNAL 16(1) (2013).

¹¹ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

¹² National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶1.

¹³ Queen-Empress v. Khairati, 1884 SCC OnLine All 70.

¹⁴ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; K.S. Puttaswamy v. Union of India, (2018) 1 SCC 809; Danish Sheikh, *Rights and the Puttaswamy Judgement*, 52(51) EPW (2017).

queer persons, persecuting them based on who they were or what they were perceived to be, and not because of what they did.

This link between criminality and sexual non-conformity was made explicit in 1897 with the amendment to the Criminal Tribes Act of 1871, which was subtitled ‘An Act for the Registration of Criminal Tribes and Eunuchs’.¹⁵ Under the provisions of this statute, a ‘eunuch’ was “deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent”.¹⁶ The local government was required to keep note of ‘eunuchs’ who are ‘reasonably suspected of kidnapping or castrating children or of committing offences under §377’ and any ‘eunuch’ who appeared ‘dressed or ornamented like a woman in a public street, or who dances or plays music’ could be arrested without warrant. The Act enabled the police to arrest without warrant nomadic tribes and ‘eunuchs’ who were found dancing, playing music or taking part in any public exhibition in a public street. Further, the ways in which ‘eunuchs’ earned their livelihood i.e. by singing and dancing in public spaces to seek alms, were criminalised. Thus, every aspect of their existence, including livelihood, was subject to surveillance, premised on the threat of criminal action, making the police an overt and overwhelming presence in their lives.

The colonial moral panics around ‘vagrants’ were brought into post-colonial India through laws that govern beggary, public nuisance and public obscenity. To this day, draconian provisions of the Criminal Tribes Act find their way into the statute books through laws such as the Telangana Eunuchs Act, 1919,¹⁷ that allow for the ‘registration and regulation’ of transgender persons, adding to the existing stigma, and abetting arrests of transgender persons engaged in begging or sex work.¹⁸ Even today, law enforcement officials routinely use laws like the Immoral Traffic Prevention Act, 1956,¹⁹ to harass, arrest, and extort transgender sex workers without any evidence of solicitation. Under this law, transgender women occupying public spaces, especially at night, appearing to invite the gaze or ‘gazing back’, or being in the wrong place at the wrong time in the wrong dress, could lead to them being booked for soliciting.²⁰ This produces a class of permanently targeted people who at any time are vulnerable to assault and arrest in public merely because they happen to be there. They are taken away to police stations, wrongfully confined and restrained, subjected to humiliating treatment, and have their earnings taken away. Sex workers perceived to be engaging in

¹⁵ The Criminal Tribes Act, 1871.

¹⁶ The Criminal Tribes Act, 1871, §24.

¹⁷ The Telangana Eunuchs Act, 1329F.

¹⁸ §4 of the Act titled “Registered eunuch found in female clothes”, reads: “Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with imprisonment for a term which may extend to two years or with fine or both.”

¹⁹ The Immoral Traffic (Prevention) Act, 1956.

²⁰ SHILPA PHADKE, WHY LOITER? 27 (2011).

work considered inherently illegal and criminal are seen to be outside the purview of legal protection available to other ‘respectable’ women. The vulnerability to the state’s gaze can also be traced back to incidents such as the massive police crackdown and mass detention of transgender persons in a Beggar’s Colony in Bangalore in November 2014. This premeditated, state sponsored, transphobic attack was conducted on official orders with the intention to “clean” the city of Bangalore. The incident has been captured in detail in a report by the International Commission of Jurists (‘ICJ’) and reads as follows:

“In 2014, transgender persons were arrested across Bangalore city. The policemen came and told all the community people that “sahab bula rahe hain” (senior police have called for you) and we thought maybe it’s only for record keeping or some information that we are being called to the police station for... Some people who were arrested were in their nightwear and had been picked up while buying vegetables. They still had the vegetables in their hands when they were taken into the colony. We asked them what was the reason behind arresting people who weren’t even doing sex work or begging at that point of time. We asked them to please tell us the reason and show us the order so that we can then inquire further with the respective authority who has sent that order. But they didn’t show it to us...Later, they said that “upar wale sahab se order aaya hai ki sex work or begging nahi karna” (senior officer has sent an order to curb begging and sex work).”²¹

It has been noted that police often rely on provisions in state-level police laws to harass queer persons in public spaces. These state-level police Acts are the legal basis for certain police powers, and also set out specific, state-level criminal offences and their punishments. A report by the International Commission of Jurists²² notes instances where such acts have been misused and abused by enforcement authorities to restrict queer persons’ access to public spaces. In one of the cases mentioned in the report, two transgender women and a gay man were arrested for merely inhabiting a public space at night, on the wrongful allegation of causing “public nuisance” under the Meghalaya Police Act.²³ They were arrested, detained in police custody overnight and had to pay a fine of INR 5000 each to be released the next day. In another case, a queer person was similarly subjected to wrongful arrest for ‘riotous behaviour’ under the Kerala Police Act.²⁴

²¹ Living with Dignity: Sexual Orientation and Gender Identity-based Human Rights Violations in Housing, Work and Public Spaces in India 113, INTERNATIONAL COMMISSION OF JURISTS (‘ICJ’), (June 2019).

²² Unnatural Offences: Obstacles to Justice in India based on Sexual Orientation and Gender Identity 23, INTERNATIONAL COMMISSION OF JURISTS (‘ICJ’) (February 2017).

²³ The Meghalaya Police Act, 2010, §54(b).

²⁴ Kerala Police Act, 2011, §118.

In some cases, such police Acts have expressly given the police broad powers to regulate and arrest queer persons. For instance, in 2012, the Karnataka Police Act²⁵ was amended to add §36A which gave the commissioner of police the power to ‘regulate eunuchs’. The provision included “preparation and maintenance of a register of the names and places of residence of all eunuchs residing in the area under his charge and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or any other offences, or abetting the commission of such offences”.²⁶ The provision was discriminatory and criminalised an already stigmatised transgender community by incorporating a highly stigmatised term ‘eunuchs’ that presumed that transgender persons were emasculating and kidnapping boys or committing ‘unnatural offences’. Attaching the stigma of criminality to an entire community based on their gender identity and expression, is discriminatory and violates the fundamental rights to equality, liberty, life and dignity of transgender persons.²⁷

Another legal provision that replicates a colonial rhetoric by treating transgender persons as subjects to be controlled, rather than rights-bearing citizens, is the Bombay Prevention of Begging Act²⁸ that criminalises all forms of begging including “receiving alms in a public place, whether or not under any presence such as singing, dancing, fortune- telling, performing or offering any article for sale”.²⁹ Not only does the law regulate livelihood opportunities of thousands of hijras in India who depend on traditional forms of seeking alms at weddings and childbirth or on the streets through practices known as *mangti* and *toli-badhai*, but it also limits their access to public spaces. Police often arbitrarily arrest transgender persons under the pretext of anti-beggary laws whose vagueness allows for misuse and disproportionate violence against the most marginalised communities.³⁰

The contentious Transgender Persons (Protection of Rights) Act, 2019, also raises similar concerns as it enables the government to take steps for the

²⁵ The Karnataka Police Act, 1963, §36A.

²⁶ In January 2016, the Karnataka Sexual Minorities Forum approached the High Court of Karnataka arguing that the provision was unconstitutional. In the course of these hearings, the government agreed to amend Section 36A, drop the word “eunuch” from the provision, and replace it with “person”. In February 2017, newspapers reported that the word “eunuch” was replaced with “person” through a gazette notification. *Revoke Section 36 (A) of Police Act*, THE HINDU, November 7, 2013, available at <http://www.thehindu.com/news/cities/bangalore/revoke-section-36-a-of-police-act/article5322743.ece> (Last visited on September 21, 2019).

²⁷ The Constitution of India, 1950, Arts. 14, 19, 21.

²⁸ The Maharashtra Prevention of Begging Act, 2013.

²⁹ However, in a judgment delivered by the Delhi High Court in *Harsh Mander v. Union of India*, 2018 SCC OnLine Del 10427, it was held that the Act violated Articles 14 and 21 of the Constitution, thereby decriminalising begging in the State of Delhi.

³⁰ Ajita Banerjee, *Decriminalise the Margins*, August 20, 2019 available at <https://indianexpress.com/article/opinion/columns/supreme-court-transgenders-marginalised-begging-law-rules-arrest-5314698/> (Last visited on September 21, 2019).

“rescue, protection and rehabilitation of transgender persons”.³¹ This could potentially give rise to police crackdown against transgender persons, especially those engaging in sex work. It might also grant impunity to the police for arbitrarily arresting transgender persons under the pretext of “rescuing” them and also use provisions of anti-beggary laws whose vagueness allows for misuse and disproportionate violence against the most marginalised communities.

There are also other seemingly neutral laws such as those relating to public nuisance that are often misused or abused by law enforcement officials to harass or detain queer persons. These provisions broadly target people deemed ‘undesirable’, ‘immoral’ or ‘illegal’ who might be suspected of criminal activity, and often target transgender persons and sex workers disproportionately and in a discriminatory way. Some of these are mere status crimes and the provisions allow the police to misuse their authority to arrest, harass or extort from transgender persons occupying public spaces such as streets or trains. Others provisions, such as §290 of the IPC, also are broadly drafted provisions that can effectively allow arrest simply for causing “annoyance to the public”; as a result, it is often used against queer persons.³²

Therefore, the state’s relationship to queer persons, under a regime of sodomy and other repressive laws that govern and regulate sexual expression and occupation, constructs a structure of observation and surveillance similar to the Panopticon and this produces a self-censuring gaze that Foucault calls ‘disciplining’.³³ The spectre of criminality and illegality around queer identities, thus, enables a hostile environment such that even when laws like §377 are declared unconstitutional, queer persons continue to remain vulnerable to harassment in public spaces by both state and non-state actors. One possible reason for sodomy statutes having such a powerful effect is the interpretation laypersons may give to these laws. This was exemplified by an incident in the city of Bangalore where a criminal complaint was filed against ‘homosexual men’ for allegedly engaging in ‘immoral’ activities in the park. Ironically, this complaint was made just a week after the *Navtej Singh Johar v. Union of India* (2018) (‘Navtej’) judgment.³⁴

³¹ The Transgender Persons (Protection of Rights) Bill, 2019, Chapter 4, Clause 8(4), available at https://www.prsindia.org/sites/default/files/bill_files/The%20Transgender%20Persons%20%28Protection%20of%20Rights%29%20Bill%2C%202019%20Bill%20Text.pdf (Last visited on February 22, 2020).

³² F’s story, Unnatural Offences: Obstacles to Justice in India based on Sexual Orientation and Gender Identity 3, INTERNATIONAL COMMISSION OF JURISTS (‘ICJ’) (February 2017).

³³ Foucault’s notion of disciplining draws on a prison model called the panopticon proposed by Jeremy Bentham. Bentham argued that once the prisoners became aware of being watched, they internalize the omniscient gaze and don’t need to be watched anymore.

³⁴ Rohith B.R. & Santosh Kumar, *Cubbon Park Walkers File Complaint against Homosexuals*, THE TIMES OF INDIA, September 13, 2018, available at <https://timesofindia.indiatimes.com/city/bengaluru/cubbon-park-walkers-file-complaint-against-homosexuals/articleshow/65791008.cms> (Last visited on February 22, 2020).

III. NAVIGATING ‘AMBIENT HETEROSEXISM’ IN PUBLIC SPACES

For marginalised groups such as women, queer persons, dalits, homeless persons, and persons living with disabilities - public spaces often become spaces of exclusion, discrimination, harassment, and abuse.³⁵ Public space, however, is not just a passive backdrop to social action, but serves as an active participant in the making of a particular social and political order. Urban spaces, for instance, provide sites for political action and are themselves politicised in contests over access, control, and representation.³⁶ It is essential to acknowledge the social and legal codes of conduct that discipline and punish those who challenge or disrupt or transgress the sexual and spatial order, highlighting how assumptions about the right of different groups to occupy space serve to reinforce hegemonic codes of class and heterosexuality.

In India, most public spaces either require or condone practices, that conform to a binary gendered and heterosexual presumption. Queer persons experience a certain tyranny in the gendered division of space that arises as they challenge the hegemonic expectations for ‘appropriately’ gendered behaviour in society. In India, security checks at airports, public toilets, train compartments, changing rooms in malls, and even religious places are strictly segregated along the binary codes of male and female. This dichotomisation has profound and painful consequences for gender non-conforming persons whose presence thwarts the social and moral codes of society’s norms. Queer persons are often subjected to disproportionate and excessive scrutiny during security checks at airports or metro stations, causing misgendering, humiliation, and harassment. One of the narratives from a report by the ICJ notes the struggles of a transman while accessing public transport.

“When I started expressing myself as a ‘tomboy’ pre-surgery, the security checks became very difficult. The guards, while scanning me would look at my breasts and touch me inappropriately to figure out who I am. At metro stations also it is very difficult to navigate the security check. Once my binder got detected [by the metal detector] at the airport and they took me inside for more scrutiny. I told them it’s a medical thing, but they insisted on me stripping down. I had no choice but to strip down.”³⁷

³⁵ *Wasn't this City made for you and me? Sex Workers and their Shrinking Spaces*, THE NEWS MINUTE, February 21, 2018, available at <https://www.thenewsminute.com/article/wasn-t-city-made-you-and-me-sex-workers-and-their-shrinking-spaces-76792> (Last visited on September 21, 2019).

³⁶ FRANK TONKISS, *SPACE, THE CITY AND SOCIAL THEORY: SOCIAL RELATIONS AND URBAN FORMS* 59 (2005).

³⁷ D’s case study, *Living with Dignity: Sexual Orientation and Gender Identity-based Human Rights Violations in Housing, Work and Public Spaces in India* 124, INTERNATIONAL COMMISSION

An important account of what it means to navigate public spaces like toilets as a non-binary person has been captured in this study.

“Public bathrooms have become a source of great anxiety for me, especially when there are bathroom attendants. In the past two and a half months, I have been physically assaulted seven times in women’s bathrooms with women putting their hands on my chest and attempting to push me out. This was done both by the bathroom attendants as well as by the others who were using the bathroom. Two weeks ago, at a bank, a woman grabbed me by my arm, dragged me out of the bathroom, and demanded to see my ID card. She was just another customer at the bank. It’s come to a point where I don’t drink water when I’m outside simply so that I can avoid using the bathroom.”³⁸

Lack of access to public spaces such as toilets and transportation also has a direct impact on a queer person’s ability to access education, employment or healthcare. The landmark judgment in NALSA had also noted that

“Hijras face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.”³⁹

Further, by choosing not to access public space without a purpose, transgender persons not only accept the gendered boundaries but also reinforce them without wanting to do so. This renders them outsiders to public space; always commuters and bystanders but never possessors of public spaces.

IV. SEXUAL CITIZENSHIP: RIGHT TO SEXUAL PRIVACY

“Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, §377 IPC, so long as it criminalises consensual sexual acts

OF JURISTS (‘ICJ’) (June 2019).

³⁸ Smita Vanniyar, *Where do I Go?*, April 1, 2019, available at <http://www.tarshi.net/inplainspeak/safe-spaces-for-nonbinary-people/> (Last visited on September 21, 2019).

³⁹ National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶55.

of whatever nature between competent adults, is manifestly arbitrary.⁴⁰

Navtej was clear that the guarantee of equality for queer persons, at its heart, was the guarantee of equal citizenship. The criminalising ambit of §377 violated this guarantee as it singled out queer persons, based on their identity and private choices and marked them as ‘less than citizens – or less than human’. The harm caused by the existence of §377, thus, was not limited to the prohibition of a certain form of sexual choice but the fact that it encoded within it a certain stereotypical morality which had deep ranging social effects on the lives of queer persons. §377 perpetuates a certain hostile culture based on homophobic attitudes which makes it impossible for queer persons to enjoy equal rights and access justice.

“§377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21 of the Constitution. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without companion, or lead a closeted life as unapprehended felons.”⁴¹

Queer persons often feel free to express their identity only in certain (and principally private) spaces, with the streets being experienced as exclusionary spaces where heterosexuality is aggressively asserted as the norm. Compulsory heterosexuality and respectability also pervade more personal spaces such as access to housing in the form of rented accommodations as most landlords often declare how they do not wish to rent their house to ‘bachelors’ and prefer a married couple or a family as tenants. Queer couples, in such cases, even if they are able to pass, do so at the cost of concealing their romantic or intimate relationship, curbing their self-expression or other signs of their sexual identity due to the fear of being outed. A report by the ICJ records similar narratives of queer couples who feel the need to constantly police themselves ‘including changing their attire and manner of expression in their interactions with neighbours’ which creates the fear of being outed and being evicted from the premises on the basis of their gender identity and sexual orientation.⁴² Many queer individuals continue to live in a state of continuous anxiety because of the way that their lives divide into an outwardly ‘straight’ persona and a privately queer existence. Being outed in a public space or one’s workspace could invite harassment, discrimination and even abuse.

⁴⁰ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶239.

⁴¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶16 (per Indu Malhotra J.).

⁴² R’s account, Living with Dignity: Sexual Orientation and Gender Identity-based Human Rights Violations in Housing, Work and Public Spaces in India 50, INTERNATIONAL COMMISSION OF JURISTS (‘ICJ’) (June 2019).

The ostensible normality of heterosexuality noted in Navtej as “ambient heterosexism” is maintained through regulatory legal regimes that control people’s use of space and penalise those who transgress sexual and spatial order. Laws, such as §377, impact people’s lives by supporting homophobic behaviour and prejudice both inside and outside the family. Many queer persons, are threatened by their own families or by others such as employers and peers who rhetorically invoke the law to express their disapproval of queerness. In *Loving Women*,⁴³ similar struggles of working-class queer women have been captured. One incident involves a woman who “dares” to elope with another woman being beaten and stripped in public, having her face blackened and being paraded around a village with a garland of shoes on her neck.⁴⁴ Another important moment that that can be referenced while identifying the beginning of the greater public discourse on queer issues and the relationship with the ‘public’ is in the story of Leela and Urmila, two constables, who got married at a temple in 1987. Their subsequent dismissal from service and the harassment that followed was a classic case of denial of rights based on their sexual orientation.⁴⁵ In this manner, questions of sexual identity can be seen to intertwine with those of citizenship in a number of profound ways for queer persons who often feel free to express their sexuality only in certain (and principally private) spaces.

Many parents, especially in the case of queer women, introduce the spectre of the state’s criminal enforcement apparatus by threatening to take legal action against them and their partner. In a report by the International Commission of Jurists (ICJ), the experience of a queer woman and her transman partner, described how they had to keep shifting houses for months while being chased by family members and police.

“The environment had become very hostile and unsafe, so we decided to go far away to a village where it was difficult to track us. I come from the caste where honour killings are common, and prestige is a very big thing. I feel that if my parents find us, they will kill us. For a very long time, people from my village, around 150 men, were roaming around with swords looking for us at all of the railway stations.”⁴⁶

⁴³ MAYA SHARMA, *LOVING WOMEN: BEING LESBIAN IN UNDERPRIVILEGED INDIA* (2006).

⁴⁴ *Id.*, 43.

⁴⁵ *Hum.Jinsi: A Resource Book on Lesbian, Gay & Bisexual Rights in India*, February 1999, INDIAN CENTER FOR HUMAN RIGHTS AND LAW, available at <http://www.unipune.ac.in/snc/cssh/HumanRights/07%20STATE%20AND%20GENDER/20.pdf> (Last visited on September 22, 2019).

⁴⁶ I’s account, *Living with Dignity: Sexual Orientation and Gender Identity-based Human Rights Violations in Housing, Work and Public Spaces in India* 50, International Commission of Jurists (‘ICJ’) (June 2019).

The effect of police's presence in public spaces or parents being on the lookout for runaway queer couples, illustrates the nexus between public conformity and the legal realm. The law then, rather than generalized homophobia, has a unique place in the regulation of their behaviours and their relationship to public space. The ICJ report documents a transgender woman's struggle when her mother called the police to their house after she discovered feminine clothing in her bags. The police took her to the police station, asked her intrusive questions about her body and she was eventually admitted to a psychiatric hospital for the two months.⁴⁷ After she was brought back home, she finally managed to escape but her parents filed a habeas corpus petition to force her to appear in court. The High Court of Kerala however, rejected the parents' habeas corpus petition and upheld the fundamental right of a transgender person to speech and expression, and free movement. However, arguably, it did so after psychologically evaluating whether the transgender person was really transgender.⁴⁸

Some parents often file a writ of habeas corpus asking for their ward to be "found" and brought home after they have eloped together. Often, a criminal complaint against the partner of the daughter charging them with rape, abduction and/or kidnapping has served as a stabilised legal strategy to 'recover' a daughter who enters into an 'improper' alliance. This may be accompanied with a habeas corpus petition that claims that the daughter is held in private detention. In these cases, *habeas corpus* petitions have enabled the harassment of adult queer individuals and enabled the law and law enforcement machinery to deprive queer persons of their autonomy freedom of expression and movement. The resourcefulness with which the laws on rape, abduction, and kidnapping are deployed by the natal family in consultation with lawyers and police, then follows a rather efficient police procedure. The police hunt the couple down. After finding the couple, they are brought to the police station for questioning. If the woman states that she was not abducted or raped and chooses to stay with her partner, she may be detained against her wishes in a state-run institution for women.⁴⁹

In 'Queer Women and Habeas Corpus in India' Arasu and Thangarajah show how the laws of abduction and kidnapping have been used against adult queer women in India. They document how criminal law has been deployed against 'runaway' lesbian couples, which results in charges of abduction against one of the women. While in some cases, the couples have been successfully separated whereby Judges have prescribed medical treatment as a 'cure'

⁴⁷ *Id.*, 46.

⁴⁸ Surabhi Shukla, *Tessy James v. The Director General of Police, Thiruvananthapuram, W.P. CrI. No. 215/2018*, LAW AND SEXUALITY, available at <https://lawandsexuality.com/2018/08/09/tessy-james-v-the-director-general-of-police-thiruvananthapuram-and-ors-w-p-crl-no-215-2018/> (Last visited on February 22, 2020).

⁴⁹ Pratiksha Baxi, *Habeas Corpus Juridical Narratives of Sexual Governance* (CENTRE FOR THE STUDY OF LAW AND GOVERNANCE, JAWAHARLAL NEHRU UNIVERSITY, WORKING PAPER SERIES, Paper No. CSLG/WP/09) available at <https://www.jnu.ac.in/sites/default/files/u63/09-Habeus%20%28Pratiksha%20Baxi%29.pdf> (Last visited on February 22, 2020).

to lesbian love, in other cases charges of abduction do not succeed since use of force is not established. In *habeas corpus* cases, the court has often ordered the woman, whose custody is contested by her parents, to live in a women's shelter. In other cases, Magistrates have ruled that if an adult woman chooses not to live with her parents, then she cannot be held in detention by anyone. Unlike heterosexual love, in such cases lesbian love remains a muted category, although the dominant issue in the *habeas corpus* cases remains whether the *adult* woman is held in illegal detention, underscoring thereby the status of the woman as an adult rather than her sexual preferences. While recovery of daughters seems to be the driving force of the criminal complaints of abduction, the argument that tests the legality of detention seems to hinge on whether the woman is an adult.

The criminalisation of marriages of choice in state law narrates the techniques by which politics of honour is folded into state law. Such privatisation of state law co-exists with the suspension of legal action against those bodies, in a plural legal context, that act to punish transgressive subjects. This issue gains particular poignancy when children or young people are the subjects of accusation of dishonour brought to a community by extra-judicial bodies such as the caste panchayat. For instance, caste panchayats in Haryana have meted out various forms of sanctions against alliances between couples considered to be 'illicit' violating norms of fictive kinship, village exogamy and caste norms. Young girls are often subjected to sanctions on the grounds of suspicions of having consented to 'illicit' sexual relationships. Apart from forcing the family or community of the accused couple to pay fines and go through rituals of public humiliation, social boycott or ostracisation. In September 2018, a few days after the *Navtej* judgment, a nineteen year-old tribal girl from Madhya Pradesh was arrested for allegedly kidnapping a seventeen year-old tribal girl who she was in a relationship with. The matter was raised by the younger girl's family before a tribal panchayat, which had punished the elder girl's family with Tor (love penalty) of Rs 77,000 along with a goat. As per the Bheel tribal panchayat's diktat, the elder girl's family had to bear the penalty along with an assurance that their daughter will have no contact in future with the younger girl. However, the girls eloped again after which the younger girl's family lodged a case of kidnapping against the elder one. Soon after this, the elder girl was arrested.⁵⁰

This is precisely why Malhotra J. in her judgment noted, "History owes an apology to the members of this community... for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution."⁵¹ The stereotypes fostered by § 377 have had an impact

⁵⁰ Anurag Dwary, *Madhya Pradesh Woman, 19, Elopes with Teen Same-Sex Partner, Arrested*, NDTV, September 3, 2019, available at <https://www.ndtv.com/india-news/madhya-pradesh-woman-19-elopes-with-teen-same-sex-partner-arrested-2095181> (Last visited on February 22, 2020).

⁵¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶16 (per Indu Malhotra J.).

on how other individuals and non-state actors treat queer persons. While this behaviour was not sanctioned by §377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces.⁵² Whether it is streets, parks, toilets, or public transport, the articulation of sexual privacy, could protect or provide a remedy when queer individuals are harassed for expressing their identity in a public space. Through *Navtej*, the Court has made an attempt to recognise the element of vulnerability with respect to an individual's ability to express private autonomy in public spaces. Chandrachud J. noted how "Privacy creates tiers of reputable and disreputable sex, only granting protection to acts behind closed doors and relegating 'homosexual' acts into the private sphere, would in effect reiterate the *ambient heterosexism* of the public space."⁵³ He further noted how, "The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference."⁵⁴

As articulated by Misra J. in *Navtej*:

"In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher."⁵⁵

In this sense, questions of sexual identity can be seen to intertwine with those of citizenship in a number of profound ways for queer persons, who are often reduced to 'partial citizens'. Even when they are granted formal political recognition and rights, as declared in landmark cases such as *NALSA*, their branding as 'less than equal' or 'unnatural' by other individuals may prevent them from participating in society.

V. CONCLUSION

"Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation," by recognizing that Section 377 alters the prism through which

⁵² *Id.*, ¶51.

⁵³ *Id.*, ¶136 (per D.Y. Chandrachud J.).

⁵⁴ *Id.*

⁵⁵ *Id.*, ¶122 (per Dipak Misra J.).

LGBTQI individuals are viewed and perpetuates a culture of hatred and prejudice against them.”⁵⁶

By making queer sexualities invisible, it is understood that these sexual ‘others’ have no claims or lesser claims to citizenship alongside the ‘good’, law abiding, heterosexual subjects. This was the basis of Chandrachud J.’s judgment in *Navtej* wherein he stressed the importance of “full moral citizenship” beyond decriminalization. “Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is the first step. The constitutional principles on which it is based have application to a broader range of entitlements.”⁵⁷

An essential part of *Navtej* is the manner in which it breathes life into the right to privacy, so to say, that it is not only important to have the right to be intimate with a partner of your choice but also to have spaces that would allow you to safely express yourself. The judges relied on *K.S. Puttaswamy v. Union of India*⁵⁸ (Puttaswamy), which gave an expansive interpretation of privacy as not being limited to the confines of one’s home but also encompassing the right to express one’s identity in public. The Court had noted that the right to privacy recognises personal choices governing a way of life, that it is not lost or surrendered merely because an individual is in a public space. In *Navtej* the judges further expanded the ambit of privacy. “The right to privacy is not simply the ‘right to be let alone’, and has travelled far beyond the initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice”.⁵⁹ The judgment noted that any display of affection amongst queer persons towards their partners in the public, so long as it does not amount to indecency or has have the potential to disturb public order cannot be bogged down by majority perception.

Starting from the proposition that public places are heteronormative, Justice Chandrachud notes that relegating homosexual acts into the private sphere, would in effect reiterate the “ambient heterosexism of the public space”.⁶⁰ Public intimacy here is not a casual act—it has world-altering consequences. To perform queer intimacy in the public sphere then would challenge this “ambient heterosexism” in a way that a merely private exercise of the same intimacy may not. From recognizing the importance of protecting the performance of the “homosexual act”, Justice Chandrachud proceeds to frame it within the importance of protecting the individual’s right to “engage in sexual relations on their own terms”, identifying a broader right to intimacy.⁶¹ This enables “an exercise of the individual’s sexual agency, and includes the individual’s right to the choice of partner as well

⁵⁶ *Id.*

⁵⁷ *Id.*, ¶ 126 (per D.Y. Chandrachud J.).

⁵⁸ *K.S. Puttaswamy v. Union of India*, (2018) 1 SCC 809.

⁵⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶42 (per Indu Malhotra J.).

⁶⁰ *Id.*, ¶136 (per D.Y. Chandrachud J.).

⁶¹ *Id.*, ¶164.

as the freedom to decide on the nature of the relationship that the individual wishes to pursue.⁶²

If we are to take the mandate in *Navtej* seriously, we must grapple with the element of vulnerability with respect to expressing private autonomy in public spaces. In its recognition of privacy as a right linked to a person's autonomy and their navigation of space, Puttaswamy has allowed us to think about the myriad ways in which public spaces can be made safer and inclusive for queer persons to express and assert their identity. The mandate in Puttaswamy and *Navtej* might push us to think about how the state must proactively ensure that all public spaces are rendered safe and accessible for queer persons, not limited to the state refraining from persecution, but actively protecting an individual's right to privacy, autonomy, and dignity.⁶³

⁶² Danish Sheikh, *Privacy in Public Places: The Transformative Potential of Navtej Johar v. Union of India*, CRIMINAL LEGALITIES IN THE GLOBAL SOUTH (Routledge), 2019, available at https://www.academia.edu/38366519/Privacy_in_Public_Places_The_Transformative_Potential_of_Navtej_Johar_v_Union_of_India (Last visited on February 22, 2020).

⁶³ Sheikh, *supra* note 6.