

# INTERROGATING THE FREEDOMS OF QUEER LIBERATION IN INDIA

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*The reception of the Supreme Court's reading down of Section 377 should be more circumspect, since there is much in the decision that offers reasons for concern. Rather than making a rupture with the contemporary majoritarian political climate, the decision is, in fact, a continuation of a longer nationalist project aimed at consolidating the ideal citizen subject of the Indian nation state.*

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## I. INTRODUCTION

There was much celebration that followed the judgement of the Supreme Court in the case *Navtej Singh Johar v. Union of India*<sup>1</sup> ('Navtej Singh Johar') which read down the infamous §377 of the Indian Penal Code, 1860 ('IPC'). The decision, which held that consensual sexual relations between two members of the same sex could not be considered criminal, was hailed as a step forward for LGBTIQ+ (lesbian, gay, bisexual, transgender, intersex, and queer/questioning individuals) rights. It also garnered high praise for its reliance on the concept of constitutional morality, rather than social morality, and for offering a ray of hope to minoritised groups at a time when the health of the Indian democracy, almost never in the best of strength, has been severely under threat from a majoritarian government that seems to be actively undermining the rule of law in the state.

This article suggests that as much as the reading down of §377 should be celebrated, the reception of this decision should have been more circumspect,

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

since there is much in the decision that offers reasons for concern.<sup>2</sup> Rather than making a rupture with the contemporary majoritarian political climate, the decision is, in fact, a continuation of a longer nationalist project aimed at consolidating the ideal citizen subject of the Indian nation state. While the recourse to constitutional morality in the judgement is laudable, the way in which this concept has been used suggests that the Court has not fully appreciated what constitutional morality might mean, and the decision in fact engaged in nation-building, rather than buttressing the rights of citizens. Further, rather than attending to the various kinds of citizens in the polity, what the Court did was to privilege the rights of upper-caste, upper-class citizens, even as both the petitioners and the Court rode on, and appropriated, the violence suffered by lower-class and lower-caste queer citizens.

## II. ‘CITIZEN’ IN THE NATIONALIST PROJECT

My review of the decision in *Navtej Singh Johar* must necessarily begin with a quick recounting of the Indian national project and the nature of the ideal citizen-subject desired for, and crafted by this project.<sup>3</sup> I use the word “project” in the sense of “a socially transformative endeavour that is localised, politicised, and partial, yet also engendered by longer historical developments and ways of narrating them”.<sup>4</sup> This understanding is critical because, while allowing space for individual agency, it also reminds us that so much of individual agency is caught within larger processes and ways of narration. As such, the Court’s decision can be seen not as opinions of individual judges, but as voices of a larger process that is unfolding. Indeed, as I will elaborate, once we appreciate the way in which the narrative of the petitioners in *Navtej Singh Johar v. Union of India*<sup>5</sup> framed their arguments within a longer national narrative, we will see that the decision of the justices of the Supreme Court is not necessarily as emancipatory as it has been perceived.

In the case of India, the orientalist production of a difference between the Europeans and colonised peoples operating alongside the binary logic of the Enlightenment, saw the production of the colonising British, or the West, as rational and the colonised, or the East, as irrational; the British as secular and the natives as religious; the British as urban and industrialised and the colonised as rural and primitive; and so on. Alongside these dichotomies was the liberal distinction, already in place in western Europe, between the public sphere of male participation in the state and community, and the private sphere of the home and domesticity. In his articulation of the process through which the nationalist groups constituting the elites of the Indian anti-imperial and national struggle,

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Sumathi Ramaswamy, *PASSIONS OF THE TONGUE: LANGUAGE DEVOTION IN TAMIL INDIA, 1891–1970*, 22-23 (University of California Press, 1997).

<sup>5</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

and subsequently the postcolonial state of India, negotiated modernity, Partha Chatterjee suggests that these elites determined that, for India, true modernity “would lie in combining the superior material qualities of Western cultures with the spiritual greatness of the East.”<sup>6</sup>

This modernity would be best—and only—achieved by establishing their own nation state outside of the sovereignty of the British Crown, producing in this process the national, in the sense of uniting the “Indian,” no matter how often this unity would be challenged, against the “foreign.” These nationalist elite feared that if they were to reform completely, that is, both in the materialistic—public and spiritual—private spheres, then the very distinction between West and East would vanish and the self-identity of national culture would itself be threatened.<sup>7</sup>

This duality has marked the proponents of the Indian national project into those who identify as secular—liberal or Hindu nationalists. Indian nationalism, supported by the same “civil society,” has thrived on the distinction between the public and the private. The public is amenable to the colonial touch; indeed, it is even celebrated, since other colonial impacts, which are problematic in their own right, like the Indian railways, police system, and judiciary, are all cherished. To the nationalist mind, the private—that is, the realm of sexuality—must remain untouched and indeed purged of the colonial touch. However, any reform of this private space, in particular, that of Hindu religious practices would be delayed until after national liberation. Until recently, it has been heteronormative female sexuality that has been policed, purged, and purified. However, with the rise, incorporation, and indeed celebration of the queer citizen in liberal democracies around the world, the disciplining and incorporation of homosexual and other queer sexualities has become part of the nationalist project. Therefore, Navtej Singh Johar can be seen as part of the continuing liberal project of Hindu reform.<sup>8</sup>

There are some who would still distinguish between Indian secularism and Hindu nationalism. Yet, this is a mistaken appreciation of the Indian national project. Both positions should be seen as part of a single continuum, differing from each other only in terms of emphasis and detail.<sup>9</sup> This commonality is especially evident when viewed from the perspective of those groups marginalised by the nationalist narrative—that is, non-Brahminical groups, who see more clearly that the context of Indian secular—nationalism is what Sanjay Srivastava

<sup>6</sup> Partha Chatterjee, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: THE DERIVATIVE DISCOURSE?*, 51 (Zed Book, 1986).

<sup>7</sup> Partha Chatterjee, *Colonialism, Nationalism, and Colonized Women: The Contest in India*, 16(4) *American Ethnologist* 623 (1989).

<sup>8</sup> *Id.*

<sup>9</sup> Nivedita Menon, “LIVING WITH SECULARISM,” *THE CRISIS OF SECULARISM IN INDIA* 130-131 (Rajeswari Sunder Rajan & Anuradha Dingwaney Needham, Permanent Black, 2010); Anuradha Dingwaney Needham & Rajeswari Sunder Rajan, Introduction in *THE CRISIS OF SECULARISM IN INDIA*, 14 (Permanent Black, 2010); Shabnum Tejani, *INDIAN SECULARISM: A SOCIAL AND INTELLECTUAL HISTORY 1890–1950*, 41 (Permanent Black, 2010).

eloquently calls “Hindu contextualism;” the hierarchised arrangement of Indian secular–nationalism that gives Hinduism, and primarily North Indian and upper-caste notions of Hindu-ness a pre-eminence by recognising these forms as eminently Indian.<sup>10</sup>

Hindu contextualism would dictate that any population group—in the present case, queer communities—must craft an identity that conforms to such an understanding of Hinduism.

Indian nationalist modernity has also involved a curious arrangement with caste. Elucidating the place of caste in the secular space, Vivek Dhareshwar points out that to be modern is not only to be upper caste, but also to banish or repress references to caste from the public space in the process of producing a localised form of liberal politics.<sup>11</sup> When caste is mentioned in the public space, it is seen as the articulation of a primitivism best shed, an element that “contaminates and corrupts” the secular space, and those in civil society.

Thus, despite the insistence on the unmarked subject, when this central location of secularism or upper-caste Hindu-ness is contested by other particularisms, be it tribal or peasant defence of their lands from state expropriation or the assertion of difference by religious or Dalit groups, even the ordinarily secular–liberal voices challenge these assertions as being communal or non-secular. This is where Srivastava’s formulation of Indian secular–nationalism as Hindu contextualism is particularly appropriate, for it underlines the hierarchical nature of secular cultures,<sup>12</sup> captured in Balibar’s suggestion that “differences are not always suppressed; often they are relativised and subordinated to the national culture”.<sup>13</sup> This relativisation and subordination also ensure that law is transformed from a tool for realising rights into a tool of governmentality, as members of the polity are converted into population groups. Further, as I will point out in my discussion of the Shikhandi manoeuvre, the relativisation of caste also ensures that the oppression suffered by marginalised castes is appropriated when dominant castes speak for them while simultaneously suppressing any serious discussion of the implications of caste-based discrimination in the public sphere.

### III. QUEER RIGHTS OR HINDU REFORM?

I suggest that one should view the judgement in *Navtej Singh Johar v. Union of India*<sup>14</sup> not merely as affirming the right to engage in non-heterosexual

<sup>10</sup> Sanjay Srivastava, CONSTRUCTING POST- COLONIAL INDIA: NATIONAL CHARACTER AND THE DOON SCHOOL 81-118 (Routledge 1998).

<sup>11</sup> Vivek Dhareshwar, *Caste and the Secular Self*, No. 25-26, JOURNAL OF ARTS AND IDEAS, 116 (1993).

<sup>12</sup> Sanjay Srivastava, CONSTRUCTING POST - COLONIAL INDIA: NATIONAL CHARACTER AND THE DOON SCHOOL 81-118 (Routledge 1998).

<sup>13</sup> Aditya Nigam, THE INSURRECTION OF LITTLE SELVES 43 (2006).

<sup>14</sup> *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

*practices, but as a continuation of the project of the Hindu law reform—a project that faced resistance under British sovereignty and was only taken up after Indian independence.*<sup>15</sup>

I make this suggestion largely because of how §377,<sup>16</sup> and the homophobic violence that arguably issues from it, has been pinned squarely on Victorian and Christian values and the subtext suggesting that Indian (that is, Hindu) values would be allowed to surface once this manifestation of colonial violence on the Indian psyche has been dealt with.

Three of the four opinions in Navtej Singh Johar judgement trace the origins of §377<sup>17</sup> to Victorian morality. While Chief Justice Dipak Misra spends little time on this matter, the opinions of Justices R.F. Nariman and D.Y. Chandrachud give the origins substantial attention. In all three of these opinions, however, and as demonstrated in Justice Misra's observation in paragraph seventeen as cited below, there is a suggestion that §377<sup>18</sup> alone has been primarily responsible for the persecution of homosexuals in the Indian polity:

“It is urged by the learned counsel for the petitioners that individuals belonging to the LGBT group suffer discrimination and abuse throughout their lives due to the existence of §377 IPC which is nothing but a manifestation of a mindset of societal values prevalent during the Victorian era where sexual activities were considered mainly for procreation.”<sup>19</sup>

In paragraph seven of his opinion, Nariman lays out a history of §377,<sup>20</sup> beginning with the following: “In the western world, given the fact that both Judaism and Christianity outlawed sexual intercourse by same-sex couples, offences relating thereto were decided by ecclesiastical courts.”<sup>21</sup>

Thus, the Christian heritage of the section is clearly indicated, and it is referenced a second time in paragraph thirty one where referring to the decision in an American case, he notes, Chief Justice Burger, concurring, again relied heavily on “ancient roots,” stating that throughout the history of western civilisation, homosexual sodomy was outlawed in the Judeo-Christian tradition, which the Georgia legislature could well follow.<sup>22</sup>

<sup>15</sup> Partha Chatterjee, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: THE DERIVATIVE DISCOURSE?* 51 (Zed Book, 1986); Partha Chatterjee, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (Oxford University Press, 1993).

<sup>16</sup> The Indian Penal Code, 1860.

<sup>17</sup> *Id.*

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

<sup>19</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶17 (per Deepak Misra J.).

<sup>20</sup> The Indian Penal Code, 1860.

<sup>21</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶7 (per R.F. Nariman J.).

<sup>22</sup> *Id.*, ¶31 (per R.F. Nariman J.).

In paragraph fifteen of his opinion, Chandrachud directly attributes the origin of the logic of §377<sup>23</sup> to this so-called “Judeo– Christian” morality, following the work of the Australian Justice Michael Kirby: “In order to understand the colonial origins of §377, it is necessary to go further back to modern English law’s conception of anal and oral intercourse, which was firmly rooted in Judeo–Christian morality and condemned non-procreative sex.”<sup>24</sup>

His ensuing discussion of the Judeo–Christian origins of homophobia is fairly elaborate, occupying several paragraphs, in which he discusses, among other cases, the Biblical story of the city of Sodom. Despite the enthusiasm for the archaeology of the origins of homophobia, and the apparent concern for queer individuals, Chandrachud surprisingly makes no reference to the fact that the moral lesson drawn from the story of Sodom and Gomorrah is far from settled and has been challenged by Islamic and Christian scholars.<sup>25</sup>

These scholars highlight that the residents of these two cities were not punished for anal intercourse; but rather for their violation of a host’s obligations to a traveller and the attempted rape of a traveller, a vulnerable person. Chandrachud may have also benefited from such discussions as that in Kyle Harper’s ‘From Shame to Sin’,<sup>26</sup> where the author argues that the Christian proscription of sex outside of marriage and for reasons of procreation alone was born in the context of the Roman Empire, which took freedom for granted. Freedom for the early Christians was not simply worldly freedom, but one that meant freedom from “the world”—that is, the Roman society, where unfreedom was shown in its darkest light by the trading and sexual abuse of unfree bodies, both male and female.<sup>27</sup>

A mere reference to this historical complexity and contestations within the many Islamic, Jewish, and Christian traditions would have gone far towards acknowledging the diversity within these groups, rather than contribute what Talal Asad indicates as the liberal tendency to define religion, and the dominant Indian practice of seeing religious communities as monolithic.<sup>28</sup> Indeed, fracturing the dominant perspective in seeing non- dominant castes if Hindu groups as members of a single monolithic community holding a unanimous perspective

<sup>23</sup> The Indian Penal Code, 1860.

<sup>24</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶15 (per D.Y. Chandrachud J.).

<sup>25</sup> Derrick Sherwin Bailey, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* (Longmans Green, 1955); Michael Carden, *Sodomy* (Equinox, 2004); Scott Kugle & Stephen Hunt, *Masculinity, Homosexuality and the Defence of Islam: A Case Study of Yusuf Al-Qaradawi’s Media Fatwa*, 2(2) *Religion And Gender* 271-272 (2012).

<sup>26</sup> Kyle Harper, *FROM SHAME TO SIN: THE CHRISTIAN TRANSFORMATION OF SEXUAL MORALITY IN LATE ANTIQUITY* (Harvard University Press, 2013).

<sup>27</sup> Peter Brown, *Rome: Sex & Freedom*, *THE NEW YORK REVIEW OF BOOKS*, December 19, 2013, available at [www.nybooks.com/articles/archives/2013/dec/19/rome-sex-freedom/](http://www.nybooks.com/articles/archives/2013/dec/19/rome-sex-freedom/) (Last visited on October 26, 2020).

<sup>28</sup> Talal Asad, *Trying To Understand French Secularism*, *POLITICAL THEOLOGIES: PUBLIC RELIGIONS IN A POST-SECULAR WORLD* 494-526 (Hent Vries & Lawrence Eugene Sullivan, Fordham University Press, 2006).

would have gone a long way in not merely challenging this tradition, but in showing sensitivity to queer persons within the increasingly beleaguered minoritised communities.

Had Nariman paid similar attention to the casual way in which he invokes the so-called Judeo-Christian tradition, he might have noticed how complexities within various traditions are flattened out to create a broader consensus. But, what is the consensus that the term “Judeo-Christian” represents? While the early Christian tradition was undoubtedly influenced by such Jewish thinkers as the Apostle Paul, what must also be noted is that the Judeo-Christian formula is of a more recent provenance, emerging in an American context in the late 1930s and becoming widespread during World War II, when the United States (US) democracy was contrasted to Nazi despotism, with the latter’s glaring disregard for the sanctity of the human person and basic human rights. This tendency dovetailed into a movement in the US to unite the three major religious groups— Protestants, Catholics, and Jews—in what was often referred to as a “tri-faith” nation.

It was subsequently enshrined during the early years of the Cold War when the fight against what was seen as “godless communism” made it seem imperative to view the US as a religious nation.<sup>29</sup> It must be remembered that prior to this moment, Catholicism had been seen as a threat and an outsider to the US polity.<sup>30</sup> Nor did the term have a particular resonance within Christian theology, given that any reference to the Jewish origins of Christianity was essentially to emphasise how, through the person of Jesus Christ and his teachings, Christianity had superseded and fulfilled Judaism.<sup>31</sup> If there is a possible prehistory to this term, it is probably in the usage of pre-liberal thinkers of the Enlightenment, like Voltaire, who were motivated by a desire to displace both Jews and Catholics from centrality in European politics even as they valorised the figure of the Aryan.<sup>32</sup>

Therefore, the term “Judeo-Christian” not only flattens out the complexities within a variety of diverse religious traditions but is also rooted in a secular-liberal discomfort with, if not hatred for these religious traditions.<sup>33</sup> In the context of the Navtej Singh Johar case, the term “Judeo-Christian” appears to once again been used for the purpose of secular-liberal legislation.

<sup>29</sup> Katherine Healan Gaston, *Interpreting Judeo-Christianity in America*, 2(2) *Relegere: Studies In Religion And Reception* 292 (2012).

<sup>30</sup> Philip Hamburger, *Separation of Church and State: A Theologically Liberal, Anti-Catholic, and American Principle*, No. 43, *University Of Chicago Law Occasional Papers* (2002).

<sup>31</sup> Katherine Healan Gaston, *Interpreting Judeo-Christianity in America*, 2(2) *Relegere: Studies In Religion And Reception* 295 (2012).

<sup>32</sup> Dorothy M. Figueira, *ARYANS, JEWS, BRAHMINS: THEORIZING AUTHORITY THROUGH MYTHS OF IDENTITY* 49 (Navayana, 2015).

<sup>33</sup> Ari Joskowicz, *THE MODERNITY OF OTHERS JEWISH ANTI-CATHOLICISM IN GERMANY AND FRANCE* 30-31 (Stanford University Press, 2013); Samuel Moyn, *CHRISTIAN HUMAN RIGHTS* 20 (University of Pennsylvania Press, 2015).

It is not by chance that the Supreme Court has offered this reading, given that it most definitely relied on the documents provided by the petitioners. It has been commonplace for years now to legitimise the mobilisation against §377 on the basis of it being part of a colonial and non-Indic mentality, the petitioners in the *Naz Foundation v. State (NCT of Delhi)* ('Naz Foundation') arguing that "Section 377, at its origin, did not respond to Indian society or its 'values or mores' at all. British colonial governors imposed it on India undemocratically.<sup>34</sup> It reflected only the British Judeo-Christian values of the time".<sup>35</sup> The suggestion is therefore that were it not for the colonial- vintage IPC, inspired by the so-called Judeo-Christian values, which privilege sex for procreation alone, we would not have had a §377.<sup>36</sup>

There are several problems with this articulation. First, it suggests a certain authentic "Indianness"—a sensibility and selfhood untouched by colonisers—which can be recovered by the mere repealing of §377.<sup>37</sup> However, it is not merely in the activism around §377 that this logic has manifested. This simplistic reasoning has allowed for the docile acceptance of changes in city names in India. The shift across the country towards vernacular names for cities should not be seen as a mere recovery of a native, subaltern identity from the suppression of alien colonialism. On the contrary, these shifts have been the result of the growing Hindu nationalism that has displayed a capacity to accommodate subnationalisms only if they fit within the larger rubric of Hindu nationalism.

Further, these changes in nomenclature were legislatively effected, thus negating an existing pluralism in the names of cities. As such, as per law, it is henceforth only Mumbai and not Bombay, or the variety of other names that exist for this city; only Kolkata and not Calcutta; and so on. Beyond changing the names of cities, these acts of legislation have, in fact, delegitimised and erased the ways of various minoritised groups of claiming and belonging to their city, and they are problematic, therefore, beyond their assertion of the power (and violence) of law. While pockets of resistance to these name changes continue, it should be noted that most dominant queer mobilisations in the country have fallen in line with these changes, thus celebrating a "Bengaluru Pride" or "Kolkata Pride."

In keeping with the suggestion that a precolonial Indianness was unmarked by homophobia, one can also observe the manner, as evidenced by Devdutt Pattanaik,<sup>38</sup> in which the "Abrahamic faiths" have been othered to provide textual Brahminical Hinduism as a mild, "generally liberal" attitude towards

<sup>34</sup> *Naz Foundation v. State (NCT of Delhi)* 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1.

<sup>35</sup> Alok Gupta, THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM, Human Rights Watch, December 17, 2008, available at <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism> (Last visited on October 26, 2020).

<sup>36</sup> The Indian Penal Code, 1860.

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

<sup>38</sup> Devdutt Pattanaik, *What Do Manusmriti and Dharmashastra Have to Say about Homosexuality?*, DAILY O, December 31, 2016, available at <https://www.dailyo.in/lifestyle/>

non-heteronormative and non-procreative sexual practices. In his article, Pattanaik recognises the varying possible interpretations of the Biblical story of Sodom and Gomorrah, but, nevertheless begins by asserting link of the colonial genesis of §377<sup>39</sup> with “Abrahamic mythology.”<sup>40</sup> He goes on to suggest that “Such tales, of God prohibiting certain sexual acts but allowing others, are not found in Hindu mythology.”<sup>41</sup> While acknowledging that the “Dharmashastras clearly value heterosexual marriage and sex that result in production of sons,” he diminishes this privileging by suggesting the following: “They do acknowledge, albeit grudgingly, the existence of other forms of non-vaginal sex, heterosexual as well as homosexual, and seek to restrain them with fines and penance, without overtly condemning them in religious or moral terms.”<sup>42</sup>

What is sauce for the Abrahamic or Judeo-Christian goose, therefore, is not quite sauce for the Brahminical gander. What such statements and positions (and movements) eventually result in, is the consolidation of a certain legitimate national subject, wholly authentic and bearing none of the stains of colonial impact.

#### IV. OTHERING PROCESS

As should be obvious, this framing of sexuality is very much in keeping with the Indian nationalist distinction between the public and the private. While the public sphere is amenable to colonial touch, to the nationalist mind, the private, the realm of sexuality, must remain untouched and purged of the colonial touch. This distinction between public and private, and the apparent decolonisation of the private, was succinctly made by a comment on social media soon after the Naz Foundation decision: “one last British relic was overturned in India.<sup>43</sup> Cricket and marmalade can stay.” Therefore, it is clearly part of a larger project, or appealing to it, that homophobia in India is to be presented as the result of colonial Christian intervention.

But, it is not just Christianity that has been othered by the decision in the Navtej Singh Johar case. Though largely unreferenced, Islam, the original “other” of Indian nationalism, too finds mention in a seemingly innocuous reference in the opinion of Justice Chandrachud. In paragraph 125, he states the following: “According the [sic] International Lesbian, Gay, Bisexual, Trans and Intersex Association, 74 countries (including India) criminalise same-sex sexual conduct,

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dharmashastra-manusmriti-karma-devdutt- pattanaik-mythology-hindu-epics/story/1/14814.html (Last visited on October 26, 2020).

<sup>39</sup> The Indian Penal Code, 1860.

<sup>40</sup> Pattanaik, *supra* note 38.

<sup>41</sup> Pattanaik, *supra* note 38.

<sup>42</sup> Pattanaik, *supra* note 38.

<sup>43</sup> Naz Foundation v. State (NCT of Delhi) 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1.

as of 2017. Most of these countries lie in the Sub-Saharan and Middle East region. Some of them prescribe death penalty for homosexuality.<sup>44</sup>

He then indicates in paragraph 126 that “In the march of civilisations across the spectrum of a compassionate global order, India cannot be left behind.” In addition to blaming colonialism, and Judeo-Christian morality, Chandrachud seeks to distinguish India from largely Muslim countries in Africa and West Asia.<sup>45</sup> That this veiled reference to barbarous Muslims is gratuitous is evident in the fact that the report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association was referenced in the opinion of Justice Malhotra, who chose to phrase the statistics of the association’s report more positively, affirming in paragraph ten that “124 countries no longer penalise homosexuality”.<sup>46</sup>

## V. FAILING CITIZENSHIP

Having phrased the proscription against homosexual behaviour as the imposition of an alien mentality on Indians, it is little wonder that the Supreme Court also phrased the reading down of §377 in terms of freedom from the colonial yoke. While striking down the Delhi High Court’s decision in *Suresh Kumar Koushal v. Naz Foundation*<sup>47</sup> the Supreme Court affirmed a constitutionality that attaches to pre-constitutional laws, such as the IPC, which have been adopted by Parliament and used with or without amendment, suggesting that these are manifestations of the will of the people of India through Parliament, and hence, they are presumed to be constitutional.

Disagreeing with this admittedly bizarre proposition, Justice Nariman suggests the following in paragraph ninety: “Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain<sup>48</sup> It is therefore clear that no such presumption attaches to a pre-constitutional statute like the IPC.

What is striking about Nariman’s reasoning is that he qualifies the legislature as foreign.<sup>49</sup> Given his recourse to the much-celebrated key phrase in this judgement—that of constitutional morality—there is no need to call it foreign, as nationalism is eminently the extension of social morality. Constitutional morality would merely recognise this legislature as a pre-constitutional body with a will that is out of sync with an extant constitutional vision. The fact that there is recourse to this term, however, demonstrates the firm rooting of the case for reading down §377 in a nationalist claim to liberation.

<sup>44</sup> Navtej Singh Johar v. Union of India (2018) 10 SCC 1, ¶125 (per D.Y. Chandrachud J.).

<sup>45</sup> *Id.*, ¶126 (per D.Y. Chandrachud J.).

<sup>46</sup> *Id.*, ¶10 (per Indu Malhotra J.).

<sup>47</sup> Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1.

<sup>48</sup> Navtej Singh Johar v. Union of India (2018) 10 SCC 1, ¶190 (per R.F. Nariman J.).

<sup>49</sup> *Id.*

Colonialism in Indian discourse—something that the Supreme Court seems to share in going by this decision—is limited to the period prior to formal decolonisation under British sovereignty. It does not acknowledge the coloniality of power. This concept was developed within the Latin American tradition, marked not only by metropolitan Spanish sovereignty, but also by the harsh power relations within the nominally liberated national polities that succeeded the Spanish Empire. Coloniality of power does not limit colonialism to sovereignty, by a European power as much as it identifies and describes the living legacy of colonialism in contemporary societies in the form of social discrimination that has outlived formal colonialism and becomes integrated with succeeding social orders.<sup>50</sup> While identifying European colonialism as introducing inequalities into Latin American polities, the concept suggests that a caste system was introduced, with the metropolitan Spanish at the top of the caste pyramid, and the conquered and enslaved at the bottom.<sup>51</sup> This was coupled with racist epistemologies that ascribed to these subaltern groups not just inferior status, but also inferior capacities.

Knowing his lifelong struggle against Brahminism and Brahminical elites, B R Ambedkar, who is receiving renewed attention at the moment and quoted in the decisions, would have appreciated the use of this concept. Unfortunately, rather than subscribe to this broader understanding of colonialism, the decision in the Navtej Singh Johar case restricts the meaning of colonialism to the conditions under a period of non-national, that is, British sovereignty.<sup>52</sup> In doing so, the Court is unable or refuses to see that in the *Laws of Manu*, both the text and the social practices related to it, the coloniality of power pre-existed the establishment of European sovereignty on the subcontinent and has continued since the departure of the British. Thus, colonialism is used in this judgement to place culpability for §377 on the British, and as so elaborately discussed in Justice Chandrachud's decision, Judeo-Christian morality.<sup>53</sup>

This choice has several implications. First, it evinces a fundamental misunderstanding of how the problem of homophobia in the Indian polity is sustained. While queer Indians may have feared arrest and criminal prosecution under Section 377, this has never been their only fear. High on the list of fears would be that of being ripped from the family unit. This is not merely the fear of being disinherited, but of being torn from the networks of privilege that come with being a member of a family and caste. Caste is firmly entwined with patriarchy and the production, not merely of children, but of sons. If the female body is especially disciplined, so too is the male body. It is not uncommon to hear homosexual men in India argue that traditionally, as long as one produced children, no one cared what one did outside of the marriage.

<sup>50</sup> Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1(3) *NEPANTLA: VIEWS FROM SOUTH* 533–580 (2000).

<sup>51</sup> *Id.*

<sup>52</sup> Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

<sup>53</sup> *Id.*, (per D.Y. Chandrachud J.).

However, caste has a darker role to play than merely controlling sexuality. Caste is also about a relationship of power, where one is sycophantic to those above and harsh to those below. Caste notions of justice ensure that not only are some superior and others ranked inferior, but that one exploits one's superior position in the hierarchy. Perhaps Choudhury captures it best while contemplating Ambedkar's formulation of caste as *anathema*, by suggesting that the Indian polity is anti-social.<sup>54</sup> In this vein, Choudhury also points to Ambedkar in likening castes to *gangs*: "narrow cliques" governed by "intense loyalty to their own codes."<sup>55</sup> This insight into the anti-social nature of caste would explain the kind of homo-phobic violence that one sees in India.

Especially after Section 377 came to be more widely known and upheld by the Supreme Court in *Suresh Kumar Koushal and Another v. Naz Foundation and Others*, its use became more widespread, especially as a tool of blackmail. What is striking about some portions of this judgement is that while copiously referring to scholarly articles exploring the problems of being forced into the closet in the global North, there is almost no sociological, anthropological, or sociolegal discussion of the Indian polity. Dore's investigative journalism has indicated that in 2014, 94 people were booked under §377, and another 68 up to 30 August 2015. She contrasts this number with the mere 22 cases in 2010, 22 in 2011, 38 in 2012 and 62 in 2013, before the Supreme Court judgement in *Suresh Kumar Koushal v. Naz Foundation*.<sup>56</sup> Most interestingly, Dore points to instances where §377 was invoked by jilted partners.<sup>57</sup>

This kind of violence cannot simply be put down to the existence of this section from the IPC; it speaks to the way in which, drawing from the violence of the caste system, the law and state institutions are used in Indian polity. The second implication of making colonialism responsible for homophobic violence is that it underlines the Hindu nationalist rhetoric of an arcadian Indian prior to invasion (whether European or the so-called Islamic). Thus, even if not explicitly, the idea of undoing the colonial yoke suggests a return to an authentic and precolonial Indianness—an idea which is wide-spread among Indian activists in support of hegemonically understood gay rights.

## VI. CITIZENS AS NATIONALS

This nationalist reading demonstrates, to make use of Arendt's powerful insight, how the Indian polity is marked by a conquest of the state by the

<sup>54</sup> Soumyabrata Choudhury, *Caste as Gang: Why Hindu Society Is 'Anti-Social'*, OUTLOOK, April 18, 2018, available at <https://www.outlookindia.com/magazine/story/caste-as-gang-why-hindu-society-is-anti-social/296958> (Last visited on October 26, 2020).

<sup>55</sup> *Id.*

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

<sup>57</sup> *Id.*

nation. It was this conquest, she argues, that transformed the state from an instrument of law into an instrument of the nation that defined citizens as nationals.<sup>58</sup> With this transformation, the struggles for recognition of those groups that were within the state, but remained out of the nation, would be transformed from struggles for rights into struggles for recognition as groups deserving of the state's attention.<sup>59</sup> In this context, we would do well to recollect Chatterjee's insight that what T H Marshall notes as the expansion of citizenship, from civic to political, to include social rights, was, in fact, a "category confusion".<sup>60</sup> What occurred instead was an unprecedented proliferation of governmentality, which laid the foundation for the conversion of governance from the realm of citizenship to that of managing populations.

With the Navtej Singh Johar judgement, the Supreme Court is not so much recognising the rights of all citizens as much as it is participating in transforming the state from an instrument of law, which recognises the rights of citizens, to an instrument of the nation, which produces nationally compliant population groups.<sup>61</sup> In an early critique of the judgement, Mandal points out that "Like the other judges, Justice Misra frames sexual orientation to be natural, innate and immutable."<sup>62</sup> He goes on to argue the following:

"[A]rguments based on immutability provide weak foundations and limited scope to recognition of the rights of those marginalised on account of their sexual orientation or gender identity. The main work done by arguments from immutability is to create the figure of a victim who has been wronged for no fault of theirs, and who the law now must protect from any further wrongs."<sup>63</sup>

As evidenced in the work of Das on the 1984 gas leak disaster in Bhopal, the interpellation of the figure of the suffering victim is an old strategy of the Supreme Court, where the mobilisation of this "suffering" and "agony" has allowed the judiciary "to create a verbal discourse which legitimised the position of the government as guardian of the people and the judiciary as the protector of the law".<sup>64</sup> In other words, the figure of the suffering citizen is articulated largely to strengthen the state mechanism, which promises to cater to this subject.

<sup>58</sup> Hannah Arendt, *THE ORIGINS OF TOTALITARIANISM* 275 (Harcourt Brace Jovanovich, 1968).

<sup>59</sup> *Id.*

<sup>60</sup> Partha Chatterjee, *THE POLITICS OF THE GOVERNED*, DELHI: PERMANENT BLACK 36 (2007).

<sup>61</sup> Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

<sup>62</sup> Saptarshi Mandal, *Section 377: Whose Concerns Does the Judgment Address?*, Vol. 50(23), *ECONOMIC & POLITICAL WEEKLY*, 7-8 (2018).

<sup>63</sup> *Id.*

<sup>64</sup> Veena Das, *CRITICAL EVENTS: AN ANTHROPOLOGICAL PERSPECTIVE ON CONTEMPORARY INDIA* 159 (Oxford University Press, 1996); See also Anuj Bhuwania, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* 38 (Cambridge University Press, 2016).

This is where governmentality and the nationalist project intersect. Rather than recognition of the rights of all citizens, we see the crafting of a nationalist project where the nation state will receive a population group—in this case, members of queer communities—that is similarly charged with forming itself into a nationally compliant group. This process is perhaps best illustrated by Justice Misra’s opinion, which calls on transgender citizens to join the “mainstream”—a term long used in Indian secularism to denote the community formed by the unmarked citizen, which errant minoritised groups that articulate their difference are urged to join.<sup>65</sup> The requirement for this participation, however, is that they articulate their difference within nationally acceptable norms. Justice Misra continues that the transgender citizens will have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realisation of their potential and equal opportunities in all walks of life.<sup>66</sup> (emphasis added)

As I will point out, the transgender figure is utilised in the decision, and in Indian queer politics in general, as the trope through which queer communities gain legitimacy in the official discourse of Indian politics. What Justice Misra, like other justices, requires, however, is that these transgender and other queer groups comport themselves according to middle-class and dominant-caste standards of privacy.

What is striking about all of the opinions in Navtej Singh Johar judgement is the place that privacy has in delimiting the rights of consensual homosexual practice. In his opinion, Justice Misra affirms that any display of affection amongst the members of the LGBT community towards their partners in the public *so long as it does not amount to indecency or has the potentiality to disturb public order* cannot be bogged down by majority perception.<sup>67</sup> (emphasis added)

While, on the face of it, this formulation sounds like a reasonable restriction, the question is whether in a polity marked by ever-increasing violence, where social norms are determined according to dominant Hindu caste and Hindu bourgeois notions of appropriate behaviour, and where caste norms and values do not receive substantial discussion or treatment in the decision, this formulation, in fact, leaves the rights of queer minorities open to executive interpretation, such as through violent mobs and an often equally violent police force. Earlier, in paragraph 242, Justice Misra stresses that consensual carnal intercourse “amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their *most* private and intimate spaces” (emphasis added).<sup>68</sup> This emphasis on the private nature of sexual engagement is re-emphasised in the summary of Misra’s reasoning: “Consensual carnal

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<sup>65</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶249 (per Dipak Misra J.).

<sup>66</sup> *Id.*, ¶249 (per Dipak Misra J.).

<sup>67</sup> *Id.*, ¶246 (per Dipak Misra J.).

<sup>68</sup> *Id.*, ¶242 (per Dipak Misra J.).

intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality”.<sup>69</sup>

Justice Malhotra similarly applies a restriction on the rights of queer persons by indicating that insofar as §377 “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, [it] is violative of Article 21”<sup>70</sup> (emphasis added). This begs the question: What happens when the sexual relationship is deemed not dignified?

Fortunately, both Justices Chandrachud and Nariman complicate this focus on privacy. In paragraph 62, Chandrachud highlights the harassment of sexual minorities in public spaces and stresses the right of these persons “to navigate public places on their own terms, free from state interference.”<sup>71</sup> Similarly, Justice Nariman refers to decisions on honour killings in the case *Shakti Vahini v. Union of India*<sup>72</sup> and the freedom to make one’s own matrimonial choice (referencing the Hadiya case), which helps to correct the troubling silences in Chief Justice Misra’s and Justice Malhotra’s understanding of privacy. Nevertheless, without an elaborate discussion of the role of state violence against minoritised groups, one fears that such qualifications will remain peripheral, and what one has is a reception of queer people as a population group as long as they discipline themselves within the frames of public behaviour that is deemed acceptable to the national cultural matrix.

## VII. THE SHIKHANDI MANOEUVRE

Shikhandi is a character in the *Mahabharata* epic. Despite fulfilling male functions—not least being a warrior—Shikhandi is considered, for various reasons, to be a woman or eunuch. To vanquish the invincible Bhishma and bring the battle to an end, Krishna suggests that Arjuna stand behind Shikhandi and attack Bhishma. Given that Bhishma does not attack women, he refuses to shoot arrows in the direction of Shikhandi, and Arjuna remains unscathed even while attacking, and eventually killing, Bhishma.

I was first alerted to the uncanny echo of this episode in contemporary Indian gender politics a few years before the Delhi High Court’s Naz Foundation judgement<sup>73</sup> when viewing the film *Between the Lines, India’s Third Gender*.<sup>74</sup> The film documents the lives of several *hijras*—transsexual persons who generally lead lives of poverty and eke out a livelihood through begging or sex work.<sup>75</sup>

<sup>69</sup> *Id.*, ¶253 (xvi) (per Dipak Misra J.).

<sup>70</sup> *Id.*, ¶16.1 (per Indu Malhotra J.).

<sup>71</sup> *Id.*, ¶62 (per D.Y. Chandrachud J.).

<sup>72</sup> *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

<sup>73</sup> *Naz Foundation v. State (NCT of Delhi)* 2009 SCC OnLine Del 1762.

<sup>74</sup> *BETWEEN THE LINES, INDIA’S THIRD GENDER* (Thomas Wartmann, & Thomas Riedelsheimer, 2005).

<sup>75</sup> *Id.*

Although the film is very sympathetic to the subjects that it follows, I felt that, just as in the Shikhandi episode of the *Mahabharata*, the film was articulating a certain upper-caste/ upper-class agenda while adopting the subaltern image of the transgender Indian as a symbol of the movement. Thus, I term this use of the hijras the “Shikhandi manoeuvre.”

This manoeuvre allowed the movement for queer rights in India to gain a cultural rootedness that may not have been possible had it remained restricted to urban, upper- and middle- class groups from dominant caste backgrounds, who are seen as westernised and, in the context of cultural politics around issues of sexuality, as not being Indian enough. As discussed earlier, this cultural rootedness was particularly important

because it allowed for homophobia in India to be laid entirely at the door of the British and Judeo-Christian morality, claiming in this way the support of Hindu nationalist groups. The Shikhandi manoeuvre was also important for those members of the movement who wished to convince themselves that they were not acting merely in their own interests, but in the interests of a wider, and subjugated, community.

The problem with these strategies, however, is that the public interest litigation (PIL) route that eventually led to the Naz Foundation decision was based largely on the anti-politics, middle-class, dominant caste predilections of the groups that led, and eventually largely benefit, from the way in which the law structures the field.<sup>76</sup> Further, it does not appear that the Shikhandi manoeuvre was altogether absent from the decision in the Navtej Singh Johar case, even though there appears to have been a genuine attempt by some activist groups to be as inclusive and democratic as possible.<sup>77</sup> On the contrary, it is strikingly obvious if one knows where, and how, to look.

The use of the manoeuvre is strikingly obvious in Justice Chandrachud’s decision. In his decision, Chandrachud notes the observations in the Naz Foundation decision, emphasising the way in which “a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised”.<sup>78</sup> He goes on to point to the fact that in the Naz Foundation case, the Delhi High Court relied on the extensive records and affidavits submitted by the Petitioners that brought to fore instances of custodial rape and torture, social boycott, degrading and inhuman treatment and incarceration.<sup>79</sup>

<sup>76</sup> Naz Foundation v. State (NCT of Delhi) 2009 SCC OnLine Del 1762.

<sup>77</sup> Vivek Divan, *On the Verge of a Kind of Freedom: Ridding India of Section 377*, ARC INTERNATIONAL, August 16, 2018, available at <http://arc-international.net/blog/on-the-verge-of-a-kind-of-freedom-ridding-india-of-section-377/> (Last visited on October 26, 2020).

<sup>78</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶42 (per D.Y. Chandrachud J.).

<sup>79</sup> *Id.*

Having made these observations, however, there is no recognition of the class character of these victims of abuse. There is simply the observation that the presence and operation of §377 “created a systemic pattern of disadvantage, exclusion, and indignity for the LGBT community, and for individuals who indulge in non-heterosexual conduct”.<sup>80</sup> The suffering subject, it appears, is not given a name, or identity, nor identified by socio- economic location, but subsumed within the larger category of the population group that has been created, erasing in this manner the specificity of the violations they suffer.

Subsequent paragraphs of Chandrachud’s decision offer further evidence of how the socio-economically marginalised are occluded. In paragraph 48, citing the text “‘Unnatural Offences’: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity,’ authored by the International Commission of Jurists,<sup>81</sup> he points to the huge number of arrests under §337. “The report documents numerous violations inflicted on people under the authority of Section 377. According to the National Crime Records Bureau, 1,279 persons in 2014 and 1,491 in 2015 were arrested under §377”.<sup>82</sup> But, he does not go into the class location of the people who are at the butt end of this violence. Rather, in the subsequent paragraph, perfectly emblematic of the switch involved in the Shikhandi manoeuvre, the sympathy is delivered to “alumni of Indian Institutes of Technology across the country” and “Petitioners [who] are a group of persons belonging to the LGBTQ community, each of whom has excelled in their fields but suffer immensely due to the operation of Section 377”.<sup>83</sup>

In pointing to the scholastic and professional excellence of the petitioners, Chandrachud, in fact, continues a long dominant-caste discursive tradition against reservation, which privileges “merit.” Merit, or excellence, is how dominant caste groups in the country distinguish themselves from members of communities that are listed as Other Backward Classes, Scheduled Castes, or Scheduled Tribes. These communities, by virtue of benefiting from positive affirmation, are not only alleged to deprive those with “merit,” but also dominant-caste candidates who lack the same “merit.” The Shikhandi manoeuvre, therefore, allows those from upper-caste and upper-class backgrounds to ride on, or appropriate, the violations suffered by socio- economically marginalised groups.

This manoeuvre is also palpable when reading the decision of Chief Justice Misra. In his opinion, there is a sudden switch from paragraph 247, where he refers to §377 as an “archaic law which is incompatible with constitutional values,” to paragraph 248, where he speaks of the pain of transgender people.

<sup>80</sup> *Id.*

<sup>81</sup> INTERNATIONAL COMMISSION OF JURISTS, “UNNATURAL OFFENCES”: OBSTACLES TO JUSTICE IN INDIA BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (February 2017), available at <https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf> (Last visited on October 26, 2020).

<sup>82</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶48 (per D.Y. Chandrachud J.).

<sup>83</sup> *Id.*, ¶112 (per D.Y. Chandrachud J.).

Yet, in this brief paragraph, which faults “[b]igoted and homophobic attitudes,” there is no discussion of the kind of police violence that members of these groups face.<sup>84</sup> Without reference to police violence, the bigotry and homophobic attitudes that he describes are not firmly rooted anywhere, least of all in state practice. As elaborated above, Misra requires transgender citizens to join the “mainstream,” but, as he begins that particular paragraph by suggesting that “The very existence of Section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people”<sup>85</sup> and coyly refuses to name state violence, it is as if §377 alone, and not police violence, rooted in long-standing social practices related to caste dominance and violence, is the basis of discrimination.

Having pinned homophobic violence on the colonial system and refusing to locate precolonial and contemporary indigenous sources of violence, the Court and dominant-caste queer activists are at a loss to properly identify and redress the sources of this violence. Indeed, while some have drawn attention to Justice Nariman’s requirement that police be subjected to sensitisation programmes (John 2018),<sup>86</sup> as opposed to the decision in the

*National Legal Services Authority v. Union of Indian and Others*, there is almost no reference to police violence. As this systemic abuse of state power is not mentioned by the Court, it is difficult to see how the decision can be construed as empowering members of these marginalised communities.

Thus, we continue to see the Shikhandi manoeuvre because, despite using this class of persons to challenge §377, the varied problems that they face are not even mentioned. Rather, this violence is discursively appropriated and translated into sympathy for members of dominant castes and classes. The failure to structurally locate the varied types of violence faced by diverse LGBTIQ+ groups ensures that it is the ideal citizen-subject who overwhelming benefits from the freedoms released by this judgement.

Indeed, as indicated by transgender activist A Revathi in an interview conducted by Bhanaumathi soon after Navtej Singh Johar judgement,

“Murders, rapes, thefts, false charges, shootouts and lots of other problems will not allow us to celebrate for 377 tomorrow. We all know who is going to benefit out of it. For me, the basic needs are education, job, family recognition, property rights. Even love, marriage, sex rights follow only after that. I fear that

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<sup>84</sup> *Id.*, ¶248.

<sup>85</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>86</sup> Arshu John, “*The beauty of the Constitution is that it compels us to unlearn our prejudices*”: Menaka Guruswamy discusses the Section 377 judgment, CARAVAN MAGAZINE, September 10, 2018, available at <https://caravanmagazine.in/gender-sexuality/menaka-guruswamy-discusses-section-377-judgment> (Last visited on November 17, 2020).

if one can attain all other rights with sex rights [sic]. This is the fear of my community as well.”<sup>87</sup>

A more honest appraisal of the issues facing the diversity of queer communities, especially those at the bottom of the social pyramid and the long-standing victims of the existing coloniality of power in India, would have perhaps ensured that the strategy for securing the rights of queer communities in India included a focus on the rights articulated by Revathi. However, a failure to honestly engage with the reality of the Indian polity and confront the existence of caste and patriarchal violence, the decision to pin homophobic violence on the presence of §377 alone, and executing the Shikhandi manoeuvre have resulted in a decision that, while paving the way for rights to queer marriage and adoption, may continue to leave marginalised segments of the polity wanting for protection.

## VIII. CONCLUSION

In this article, I have suggested that the reception of the Navtej Singh Johar decision ought to be more circumspect. As I have demonstrated, the Court seems to have articulated a decision which, while definitely decriminalising homosexual activity among consenting adults, may have actually also worked within a larger majoritarian tradition in the country. Critical of this decision, Pasha cites a string of cases where the Court has failed to check a government that brooks no dissent and suggests that most of the cases being celebrated as landmark are, in fact, the plucking of the “low-hanging fruit.” He points out that while the decision in Naz Foundation may indeed have been a bold one, in this particular case, where the government and popular opinion supported §377, with the central government quite pointedly choosing to take no position on the case and famously leaving it to “the wisdom of the Court” to decide the matter, the Supreme Court articulated a decision in keeping with the majority position.<sup>88</sup>

Interestingly, this evaluation corresponds with that of Bhuwania, who in an evaluation of the tradition of PIL of the Supreme Court points out that it is precisely in the areas where the courts can play a crucial role in protecting democratic institutions—the upholding of the rights to free speech, publication and political association, and the right to vote—and curbing the excessive delegation of the legislative function to unelected administrators, that the Indian appellate judiciary has been remarkably timid.<sup>89</sup> To the extent that significant portions of the decision relied on the othering of Christianity, the rejection of the existence

<sup>87</sup> Iniyavan Bhanamathi, *Even without 377, There Are Struggles Ahead; Says Revathi*, MAKTOOB, September, 2018, available at <https://maktoobmedia.com/2018/09/06/even-without-377-there-are-struggles-ahead-says-revathi/> (Last visited on October 26, 2020).

<sup>88</sup> Nizam Pasha, *Section 377 Ruling May Be Landmark, But SC is Yet to Pass the Real Test*, WIRE, September 13, 2018, available at <https://thewire.in/law/supreme-court-377-ruling> (Last visited on October 26, 2020).

<sup>89</sup> Anuj Bhawania, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* 140 (Cambridge University Press, 2016).

of domestic coloniality of power, the continuation of the project of governmentality, and the occlusion of caste, the decision is deeply problematic.