



DATE DOWNLOADED: Fri May 26 05:01:01 2023

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Aniruddha Dutta, The End of Criminality? The Synecdochic Symbolism of Sec. 377, 13 NUJS L. REV. 412 (2020).

ALWD 7th ed.

Aniruddha Dutta, The End of Criminality? The Synecdochic Symbolism of Sec. 377, 13 NUJS L. Rev. 412 (2020).

APA 7th ed.

Dutta, A. (2020). The end of criminality? the synecdochic symbolism of sec. 377. NUJS Law Review, 13(3), 412-432.

Chicago 17th ed.

Aniruddha Dutta, "The End of Criminality? The Synecdochic Symbolism of Sec. 377," NUJS Law Review 13, no. 3 (July-September 2020): 412-432

McGill Guide 9th ed.

Aniruddha Dutta, "The End of Criminality? The Synecdochic Symbolism of Sec. 377" (2020) 13:3 NUJS L Rev 412.

AGLC 4th ed.

Aniruddha Dutta, 'The End of Criminality? The Synecdochic Symbolism of Sec. 377' (2020) 13(3) NUJS Law Review 412

MLA 9th ed.

Dutta, Aniruddha. "The End of Criminality? The Synecdochic Symbolism of Sec. 377." NUJS Law Review, vol. 13, no. 3, July-September 2020, pp. 412-432. HeinOnline.

OSCOLA 4th ed.

Aniruddha Dutta, 'The End of Criminality? The Synecdochic Symbolism of Sec. 377' (2020) 13 NUJS L Rev 412

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

# THE END OF CRIMINALITY? THE SYNECDOCHIC SYMBOLISM OF §377

Aniruddha Dutta\*

*The 2018 Navtej Singh Johar judgment of the Supreme Court of India that read down §377 of the Indian Penal Code, 1860 has been celebrated as a landmark moment heralding the progression of queer and transgender people from criminality to citizenship. However, this narrative is undermined by continuing forms of criminalisation and violence affecting trans and queer people, especially those from working class and Dalit backgrounds. In this context, this paper builds on an established trajectory of academic and activist critique to interrogate how §377 was made into an overarching symbol of homophobia and anti-LGBT discrimination in India, thus producing an aggrandised and homogenised narrative about its impact while eliding or downplaying various other forms of criminalisation and social violence. Further, this paper theorises the symbolic politics around §377 as a case of synecdochic symbolism wherein a part is made to stand in for the whole, arguing that anti-§377 campaigns strategically subsumed forms of violence or discrimination that were unrelated or very tangentially related to §377 under the sign of the law. The paper explores how synecdochic symbolism functioned as an appropriative mechanism to harvest the material violence faced by working class and Dalit transgender and queer people to strengthen the anti-§377 movement, while providing greater political benefits to queer and trans people from elite class/caste locations. It argues that synecdochic symbolism facilitated the emergence of an empowered queer citizen figure represented by elite LGBT people while offering only tentative protections to, and sometimes even endangering, less privileged trans and queer people.*

## TABLE OF CONTENTS

I. Introduction.....	413	IV. The Disjunctive Effects of 377-Related Symbolism .....	425
II. The Unstable Referents of §377.....	416	V. Conclusion.....	431
III. §377 Emerges as a Synecdoche.....	418		

---

\* Associate Professor, Gender, Women's and Sexuality Studies and Slavic Languages and Literatures, University of Iowa. I am grateful to my trans-*kothi-hijra* interlocutors, friends, and sisters, particularly Sumi Das, Raina Roy, and Disha Dey, for many conversations that sparked several ideas contained in this paper. I would also like to thank the editors for their feedback and Sayan Bhattacharya for providing helpful input on the paper.

## I. INTRODUCTION

On September 6, 2018, the Supreme Court of India passed a judgment in the case of *Navtej Singh Johar v. Union of India* (“Navtej Singh Johar”) that excluded consensual sex between adults from the purview of §377 of the Indian Penal Code, a colonial-era law that criminalised anyone who voluntarily had “carnal intercourse against the order of nature” - typically interpreted to mean penetrative, non-procreative sexual activity such as oral and anal sex.<sup>1</sup> While removing what one of the judges termed “homosexual sex and transgender sex between consenting adults” from the purview of the law, the judgment clarified that §377 would continue to apply to non-consensual sex and sexual activity with animals.<sup>2</sup> The verdict marked the culmination of a long history of mobilisation and legal struggle by queer (particularly gay) activists and collectives, who had campaigned against §377 as an archaic and regressive law used to prosecute, persecute and harass people from LGBT communities.<sup>3</sup>

Some strikingly contrasting tendencies were evident in the aftermath of the judgment. Lawyers and activists immediately hailed the verdict as a “historic victory”, a landmark progressive decision that affirmed the fundamental rights of LGBT people.<sup>4</sup> Media headlines within and outside India proclaimed that the court had struck down a ban on “gay sex” or “decriminalize(d) homosexuality”.<sup>5</sup> Other media reports saw the judgment more broadly as heralding “legal acceptance” for the “LGBTQ community” as a whole.<sup>6</sup> Jubilant community members gathered outside the Supreme Court were quoted as saying that they were “not criminals any more” and would henceforth “be able to live without being branded as criminals”.<sup>7</sup> One celebratory report interviewed several queer and transgender

<sup>1</sup> See Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, December, 2008, available at [https://www.hrw.org/sites/default/files/reports/lgbt1\\_208\\_webwcover.pdf](https://www.hrw.org/sites/default/files/reports/lgbt1_208_webwcover.pdf) (Last visited on August 26, 2020).

<sup>2</sup> *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, ¶97 (per R.F. Nariman, J.).

<sup>3</sup> See Alternative Law Forum, *Right to Love: Navtej Singh Johar v. Union of India: A Transformative Constitution and the Rights of LGBT Persons*, September, 2018, available at <http://altlawforum.org/publications/right-to-love-navtej-singh-johar-v-union-of-india-a-transformative-constitution-and-the-rights-of-lgbt-persons/> (Last visited on August 26, 2020).

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

<sup>5</sup> NEW YORK TIMES (Jeffrey Gettleman, Kai Schultz and Suhasini Raj), *India Gay Sex Ban is Struck Down. ‘Indefensible,’ Court Says*, September 6, 2018, available at <https://www.nytimes.com/2018/09/06/world/asia/india-gay-sex-377.html> (Last visited on August 28, 2020); HINDUSTAN TIMES (Bhadra Sinha), *Gay sex no longer a crime in India, rules Supreme Court on Section 377 in historic judgment*, September 6, 2018, available at <https://www.hindustantimes.com/india-news/on-section-377-supreme-court-rules-gay-sex-no-longer-a-crime-in-india/story-CEXF0q4BE-QXRWJIfZy9K.html> (Last visited on August 28, 2020); TIME (Abhisyant Kidangoor), *India’s Supreme Court Decriminalizes Homosexuality in a Historic Ruling for the LGBTQ Community*, September 6, 2018, available at <https://time.com/5388231/india-decriminalizes-homosexuality-section-377/> (Last visited on August 28, 2020).

<sup>6</sup> THE HINDU (Jaideep Deo Bhanj), *‘We Are Not Criminals Any More’*, September 7, 2018, available at <https://www.thehindu.com/news/cities/Delhi/we-are-not-criminals-any-more/article24886878.ece> (Last visited on August 26, 2020).

<sup>7</sup> *Id.*

people from middle class backgrounds about no longer being “outlaws” although their narratives did not mention any instance of them having been targeted by the law through either direct prosecution or the threat thereof.<sup>8</sup>

Meanwhile, however, queer and trans people from working class and Dalit backgrounds, whose vulnerability to social discrimination and police violence had been repeatedly cited in the anti-377 campaign, did not seem to be rid of the stigma of criminality after the judgement.<sup>9</sup> Indeed, in some cases, they seemed to become renewed targets of institutionalised brutality in its immediate aftermath. A report published on September 17, 2018 documented that in Delhi, police violence on *kinnaras* or *hijras* (a community of feminine-identified people usually assigned male at birth with distinct customs and professions) appeared to have “escalated ever since the Supreme Court judgement against §377”.<sup>10</sup> As the report states, “the brutality began the very day of the judgement”. “Two-three policemen picked us up and took us in custody, we were hung against walls and tortured. They abused us verbally for a long time and then they raped us. We had only been sitting and talking amongst ourselves [...] Is it a crime to exist?’ said a kinnara woman”.<sup>11</sup> Another survivor is quoted as saying, “we beg for a living as nobody wishes to give us work, because we are kinnaras. But if the police sees us talking to other people, they chase us away or beat us, accusing us of prostitution and public nuisance”.<sup>12</sup> This statement points to a long history of laws on public order and sex work being evoked to prosecute or to extra-judicially harass and persecute *hijras* and other gender non-conforming people - a practice that seems to continue with impunity after the judgement.<sup>13</sup>

Departing from these contradictory narratives about criminality and decriminalisation, this paper interrogates how the activist and media discourse around §377 transmuted it into the primary symbol of homophobia and (more broadly) anti-LGBT discrimination in India. This interrogation expands on an established strain of activist and academic critique.<sup>14</sup> As Jyoti Puri states, the le-

<sup>8</sup> GOVERNANCE NOW (Deexa Khanduri), *Outlaws no Longer*, September 19, 2018, available at <http://www.governancenow.com/news/regular-story/outlaws-no-longer> (Last visited on August 28, 2020).

<sup>9</sup> See *Naz Foundation v. State (NCT Delhi)*, 2009 SCC OnLine Del 1762, ¶21 (During an earlier phase of the legal struggle against § 377 in the 2000s, the coalition ‘Voices Against 377’ made repeated allusions to violence against working class queer/transgender people in its submissions to the Delhi High Court).

<sup>10</sup> THE CITIZEN (Vartika Rastogi), *Transgender Community Face Increasing Violence Since 377 Ruling*, September 17, 2018, available at <https://www.thecitizen.in/index.php/en/NewsDetail/index/7/15000/Transgender-Community-Face-Increasing-Violence-Since-377-Ruling> (Last visited on August 28, 2020).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> International Commission of Jurists (ICJ), “UNNATURAL OFFENCES”: OBSTACLES TO JUSTICE IN INDIA BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, February 27, 2017, available at <https://www.refworld.org/pdfid/58d4fc074.pdf> (Last visited on August 28, 2020).

<sup>14</sup> TIME OUT BENGALURU, *The Edict Desk*, April 27, 2012, available at [https://pdfhost.io/v/SN6jBY4BL\\_Nithin\\_ManayathThe\\_Edict\\_Desk2012Time\\_Out\\_Bengaluru.pdf](https://pdfhost.io/v/SN6jBY4BL_Nithin_ManayathThe_Edict_Desk2012Time_Out_Bengaluru.pdf) (Last visited

gal struggle against §377 “reinforced the view that §377 was the primary instrument of the state’s symbolic and material persecution of the homosexual [...] §377 was made to carry the weight of showing how same-sex sexualities are unfairly targeted.”<sup>15</sup> While §377 undoubtedly had real adverse effects for LGBTQ people, the anti- 377 campaign aggrandised the law into what Nithin Manayath terms a “mythical monster”.<sup>16</sup> As such, the struggle was “(u)nable to mount an offensive deriving from the ensemble of laws, practices, policies, and discourses—vagrancy laws, policies against sex work, views of hijras as criminals, among others—through which sexual and gender minorities bear the brunt of governance”.<sup>17</sup>

I further argue that the symbolism constructed around §377 is synecdochic, wherein a part is made to represent the whole - at many points during the advocacy and legal mobilisation against §377, the law is made to stand in for various broad and complex forms of discrimination which are collapsed under its name, even if they are unrelated or very tangentially related to specific applications of the law.<sup>18</sup> This symbolic construction has both politically productive and violent consequences, with the empowering effects being available more to cisgender queer people from privileged class/caste locations, while the negative impacts are felt more by working class and Dalit trans and queer people. Saptarshi Mandal and Radhika Radhakrishnan, among others, have argued that the Navtej Singh Johar judgment served to primarily benefit privileged gay men while having limited gains for more marginalised queer and transgender people.<sup>19</sup> I examine how the synecdochic symbolism of §377, which predates and informs the judgment, contributes to this discrepancy. The construction of §377 as an overarching symbolic representative of anti-LGBT discrimination helps to secure a broader affirmation of LGBT rights through the Navtej Singh Johar judgment than a mere reading down of the law might have achieved, but also serves to downplay other forms of criminalisation and offers an illusion of their demise. Further, synecdochic symbolism serves to appropriate working class and Dalit bodies and narratives to strengthen the case against §377 without benefitting them as much as privileged queer people or offering them adequate protection against the manifold

---

on September 28, 2020); THE CONVERSATION (Aniruddha Dutta and Paul Boyce), *Vulnerability of gay and transgender Indians goes way beyond Section 377*, December 15, 2013, available at <https://theconversation.com/vulnerability-of-gay-and-transgender-indians-goes-way-beyond-section-377-21392> (Last visited on August 28, 2020).

<sup>15</sup> Jyoti Puri, *SEXUAL STATES: GOVERNANCE AND THE STRUGGLE OVER THE ANTISODOMY LAW IN INDIA*, Duke University Press, Durham, 124 (2016).

<sup>16</sup> TIME OUT BENGALURU, *supra* note 14.

<sup>17</sup> PURI, *supra* note 15, 124.

<sup>18</sup> See Guruchandali (Aniruddha Dutta), 377 Dharar Proteeki Rajneeti: Aporadhikoroner Aboshan?, October 6, 2018, available at <https://www.guruchandali.com/comment.php?topic=16069> (Last visited on August 28, 2020). (Some of the arguments I make here were published in an earlier form in a Bengali article and have been revised and updated in the context of this paper).

<sup>19</sup> ECONOMIC AND POLITICAL WEEKLY (EPW) (Saptarshi Mandal), *Section 377: Whose Concerns Does The Judgment Address?*, September 12, 2018, available at <https://www.epw.in/engage/article/section-377-whose-concerns-does-judgment> (Last visited on August 26, 2020); Radhika Radhakrishnan, *How Does the Center Appear From the Margins? Queer Politics After Section 377*, NUJS Law Review, 12(3-4), (2019).

intersecting oppressions that are reductively collapsed under the symbolic umbrella of §377. Despite the expanding interpretation of constitutional rights such as the right to privacy offered by the Navtej Singh Johar judgment, such symbolism might have even increased their vulnerability to social and (extra)judicial violence in some contexts.

The following sections elaborate these arguments, drawing from ethnographic fieldwork in West Bengal, India, as well as textual analysis and previous scholarship.<sup>20</sup> Part I explores the unstable referents of §377 and shows how the law may apply to a variety of acts and identities in contextually variable ways. In Part II, I trace how §377 emerged as a synecdoche, becoming associated with the criminalisation of homosexuality on one hand and symbolically subsuming various other forms of violence on the other. Part III explores the contradictory effects of this synecdochic symbolism, which has had positive political effects for queer people from elite class/caste backgrounds and enabled their public emergence as legally empowered citizens, while offering less benefits to, and sometimes even endangering, working class and Dalit transgender and queer people. Overall, the paper is less a critique of the Navtej Singh Johar judgment per se and more of the symbolic politics around §377 in activist and media discourse, which also influences and limits the judgment in important ways.

## II. THE UNSTABLE REFERENTS OF §377

§377 of the Indian Penal Code was worded vaguely by its colonial authors on purpose. To quote Thomas Babington Macaulay, who in 1837 drafted an earlier version of the law, it relates to “an odious class of offences respecting which it is desirable that as little as possible should be said” so as to prevent any “public discussion on this revolting subject”.<sup>21</sup> On the face of it, the law applied to not any specific kind of person but rather to particular sexual acts deemed to be unnatural and known as “sodomy” or “buggery” in the colonial context.<sup>22</sup> Sodomy was considered a moral vice that might potentially afflict anyone, including British soldiers and administrators.<sup>23</sup> However, gender-variant persons such as *hijras*, termed “eunuchs” in the colonial record, were thought to be particularly susceptible to such vices and one of the earliest reported cases under §377 targeted a “eunuch” who was labelled as a “habitual” sodomite.<sup>24</sup> This suggests the unstable connotations of ‘sodomy’ as a category in the 19th century - its potential, on one hand, to

---

<sup>20</sup> The fieldwork undergirding this paper is part of a larger ethnographic project on feminine-identified trans/queer communities, who go by various names including *kothi* and *hijra*, conducted between 2007 and 2018 in West Bengal. The paper makes use of material about § 377 collected tangentially during this project.

<sup>21</sup> HUMAN RIGHTS WATCH, *supra* note 1, 17.

<sup>22</sup> *Id.*, 11-15.

<sup>23</sup> *Id.*, 16.

<sup>24</sup> *Id.*, 30-31.

signify acts without denoting identity, and on the other, to feed into the evolving modern construction of gender/sexual identities and communities.<sup>25</sup>

This foundational instability that marks the inception of §377 is reflected in the ambiguous relation between the law and its shifting referents or targets in the post-independence period. Formal prosecutions and convictions under the law have been relatively rare and sporadic through most of its history. The highest available estimate for the number of recorded cases that moved through higher courts between 1860 and 2013 is 140, which Puri notes is much less than the “voluminous case law for rape.”<sup>26</sup> Many, if not most, of these cases refer to child abuse rather than consensual sex among adults.<sup>27</sup> When applied to sex between adults, it has been used in some cases to prosecute both consensual and non-sexual anal sex among heterosexual partners, rather than being exclusively confined to same-sex activity.<sup>28</sup>

However, activists campaigning against §377 have argued that despite the relative paucity of convictions and its application beyond same-sex acts, the law has been specifically used to stigmatise and persecute queer and transgender people in less formalised and yet pervasive ways.<sup>29</sup> In this regard, Mandal makes a useful distinction between the symbolic and material harms of §377.<sup>30</sup> In terms of symbolic harm, §377 has been used to perpetuate stigma against LGBT persons and create pejorative and pathologised social identities for queer people in general - as when judges decry the accused in cases of same-sex conduct as perverse or morally depraved, while only condemning the act for their heterosexual counterparts. More materially, §377 serves as a tool used by the police and other perpetrators of violence to threaten, harass, extort money from, extrajudicially arrest and torture queer and trans people, particularly those from working-class backgrounds who do sex work or solicit partners in public spaces.<sup>31</sup>

Yet, as a tool of both symbolic and material persecution, §377 is only one of several laws - in many contexts, perhaps not even the most salient one. As Manayath notes, *hijras* and *kothis* (a spectrum of feminine-identified people including both feminine males and transgender women) in south India during the mid-2000s, who routinely faced both social stigma and police violence, were only vaguely aware of the existence of §377 and thought that activists were fighting against “some number”.<sup>32</sup> The police more commonly used other laws such as the Immoral Trafficking (Prevention) Act, meant to regulate sex work and trafficking,

<sup>25</sup> See Aniruddha Dutta, *Retroactive Consolidation of ‘Homophobia.’*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW, (2011).

<sup>26</sup> PURI, *supra* note 15, 50.

<sup>27</sup> *Id.*, 70.

<sup>28</sup> EPW, *supra* note 19.

<sup>29</sup> Naz Foundation v. State (NCT Delhi) 2009 SCC OnLine Del 1762, ¶7.

<sup>30</sup> EPW, *supra* note 19.

<sup>31</sup> *Id.*

<sup>32</sup> TIME OUT BENGALURU, *supra* note 14.

to persecute *hijras* and to cast them as deviant.<sup>33</sup> Manayath thus concludes that “the connection between stigma and violence on the one hand and §377 on the other seems very tenuous.”<sup>34</sup> As I elaborate later, I heard similar comments about the irrelevance of §377 to their lives from some of my transgender and *kothi* interlocutors in West Bengal.

Meanwhile, in some cases, §377 might have adverse symbolic and/or material effects on identities marginalised through other markers such as religion, rather than just or primarily affecting LGBT people. Based on her ethnographic fieldwork among police forces in Delhi, Puri notes that the police commonly evoked §377 to stigmatise Muslims and Sikhs as practitioners of “unnatural sex” irrespective of their sexuality.<sup>35</sup> This observation further complicates and destabilises the relationship between §377 and its referents or targets even when broader forms of stigmatisation and persecution, beyond prosecution or conviction, are considered. If we compare Manayath’s experiences in south India with Puri’s ethnography in north India, it seems that the potential of §377 to criminalise not only acts but also identities might have been more relevant for religious minorities (irrespective of sexual identity) in certain locations than it was for at least some queer or transgender communities. Rather than abstractly and uniformly affecting LGBT identities, the specific referents and impacts of the law have thus been socially and geographically situated and contextually variable.

### III. §377 EMERGES AS A SYNECDOCHE

While the first legal challenge against §377 dates back to the 1990s, §377 gained widespread public attention and entered transnational activist discourse in 2001 during the arrest, custodial detention and trial of staff doing HIV-prevention work for Bharosa Trust and Naz Foundation International, non-governmental organisations that promoted sexual health among MSM or “men who have sex with men” in Lucknow, Uttar Pradesh.<sup>36</sup> The workers, who were variously identified in reports as *kothi* and MSM (a term that was used to designate a ‘high-risk group’ for HIV transmission within the emerging HIV-AIDS sector), were charged under §377 for abetting and conspiring to commit “carnal intercourse against the order of nature”, but also under other laws related to obscenity and decency, particularly §292 of the Indian Penal Code for the distribution of ‘obscene’ literature pertaining to safer sex.<sup>37</sup> Shivananda Khan, a well-known transnational activist based in London and associated with Naz Foundation, “was

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> PURI, *supra* note 15, 81.

<sup>36</sup> Outright Action International, *India: Sodomy, Obscenity Charges Formally Filed in Trial of ‘Lucknow Four’*, November, 2002, available at <https://outrightinternational.org/content/india-sodomy-obscenity-charges-formally-filed-trial-lucknow-four> (Last visited on August 27, 2001).

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



able to coordinate an international response, obtaining encouraging support [...] from international NGOs and human rights organisations”.<sup>38</sup>

Despite the multiplicity of laws and discriminatory logics involved in the charges, the international response and subsequent public interest litigation filed by Naz Foundation in the Delhi High Court focused primarily on §377, partly for strategic reasons of legal expediency.<sup>39</sup> As cited in the text of the 2009 Delhi High Court judgment that eventually resulted from the case, the Naz Foundation petition sought to challenge the “discriminatory attitudes exhibited by state agencies towards gay community, MSM or trans-gendered individuals, under the cover of enforcement of §377 IPC”.<sup>40</sup> As a “result of” §377, “basic fundamental human rights of such individuals/groups (in minority) stood denied and they were subjected to abuse, harassment, assault from public and public authorities.”<sup>41</sup> Thus, §377 became singled out as the most salient mechanism used to discriminate against and deny the rights of queer and transgender people, which - as lesbian feminist groups critiqued early on during the mobilisation - focused overly on the law and the state and failed to address other sources of structural discrimination such as the family.<sup>42</sup> Meanwhile, a pioneering report on violence on *hijra* and *kothi* sex workers in Bengaluru detailed the impacts of various other laws relating to public order, decency and sex work in addition to §377, thus again complicating an exclusive focus on the law.<sup>43</sup>

However, as the legal process unfolded, the State also played into the aggrandisement of §377. While the health ministry, which was involved in coordinating the national HIV-AIDS prevention programme that received international HIV funding, argued against the retention of §377 as detrimental to public health objectives, the home ministry in 2003 put forth a moralist and culturally conservative argument against decriminalisation in its response to the petition.<sup>44</sup> As stated in their submission cited in the Delhi High Court judgment text,

“[the] Union of India argues that Indian society is yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality. Making out a case in favour of retention of Section 377 IPC [...] Union of India relies on the arguments of public morality, public health and healthy environment claiming that Section 377 IPC serves the purpose.”<sup>45</sup>

<sup>38</sup> *Id.*

<sup>39</sup> PURI, *supra* note 15, 107-124.

<sup>40</sup> Naz Foundation v. State (NCT Delhi) 2009 SCC OnLine Del 1762 : (2009)160 DLT 277, ¶6.

<sup>41</sup> *Id.*

<sup>42</sup> PURI, *supra* note 15, 110.

<sup>43</sup> People’s Union for Civil Liberties, Karnataka (PUCL-K), *Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore*, 2003, available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf> (Last visited on August 27, 2020).

<sup>44</sup> PURI, *supra* note 15, 114.

<sup>45</sup> Naz Foundation v. State (NCT Delhi), 2009 SCC OnLine Del 1762, ¶13.

This insistence on §377 as central to the maintenance of “public morality” by criminalising homosexuality was inconsistent with other parts of the government’s response which asserted that §377 was mostly used to punish child abuse rather than penalise homosexuality.<sup>46</sup> Thus, in both the Naz Foundation petition and the government response, there was an overarching emphasis on §377 and the reinforcement of a symbolic association between §377 and the criminalisation of homosexuality (whether this was condemned or upheld), which elided the multi-layered aspects of the Naz Foundation case and the multiple inconsistent referents and applications of the law.

Queer activist groups in Delhi and other metropolitan cities, some of whom were initially critical of the Naz Foundation strategy, rallied against the government’s hostile response and internal disagreements were subsumed under a more unanimous front presented to the media.<sup>47</sup> This served to strengthen the singular symbolic connection between §377 and homophobia or anti- LGBT discrimination more broadly, as evident from my fieldwork experiences in West Bengal.<sup>48</sup> In the ‘Rainbow Pride Walks’ that I attended in Kolkata between 2005 and 2009, which had many *kothi-hijra* participants but were organised by collectives led by relatively elite gay and MSM activists, §377 became the chief target and overarching rallying cry. The heading for the leaflet for the 2009 Pride Walk, which I helped draft alongside other volunteers, proclaimed in bold fonts: “Walk with us to end violence and stigma against lesbian/gay/bisexual/transgender and other sexually marginalised people! Join us to protest against IPC 377 that violates fundamental rights to equality and personal liberty!” The body of the leaflet explicated that “though it applies as much to heterosexual couples as it does same-sex couples, it is the latter who are singled out to bear the brunt of the law.” The potential applicability of §377 to acts other than consensual same-sex activity became more of a technicality rather than a fundamental ambiguity within the law, and ending “violence and stigma” against LGBT people became positioned as coterminous with the dismantling of §377.

This framing - which then seemed commonsensical to me, reflecting the general hegemonic acceptance of the anti-377 strategy among urban middle-class queer people - resulted in the synecdochic reduction of many distinct forms of stigma and violence into the symbol of §377. For instance, in 2007, Disha, a trans and *kothi*-identified activist from Barrackpore, a small town north of Kolkata, was physically abused by a few goons while returning from HIV outreach work. When she went to register a complaint against her assailants, the police harassed her in their own turn and sent her away. Years later, we became friends and she described the incident to me in a conversation in 2013:

---

<sup>46</sup> PURI, *supra* note 15, 115.

<sup>47</sup> *Id.*, 113.

<sup>48</sup> All observations related to my fieldwork are taken from field notes recorded between 2007 and 2018; some conversations are translated from the original Bengali.

“I wouldn’t dress up like I do now, but still they realised I was *kothi* after seeing me... They laughed hearing my words, then they got up and left in the middle of my account, came back after a long interval... asked me again, what happened to you? I finally said you will understand what happened only if someone like me is born in your family... now, even if I tell you, you will not understand!”

A year after the assault on Disha, I volunteered to be part of a team working on the leaflet for the Kolkata Rainbow Pride Walk 2008, which sought to explicate the harmful effects of §377 on LGBTQ people. Among two other incidents, we also included Disha’s experience, narrated to us by an intermediary, as an example of social violence and police harassment abetted by criminalisation under §377. As mentioned above, the connection between such violence and §377 seemed obvious to me at that point; it was only after becoming friends with Disha and listening to her experience in person that I questioned whether there was an actual link between her specific case and §377. When I asked her, she responded, “when the police harass *kothis* here, I don’t think they do it after knowing about Section 377... they do it just like that! I think *thung- thang* (fragile, elite) *kothis* face more of a problem due to 377!” Disha’s sarcastic remark pointed to the discrepancy between the symbolic importance placed on §377 and its harms by elite and fragile *kothis* - by which she meant metropolitan, class-privileged gay and queer people like myself - in contrast to the lack of its material impact on people like her.

This conversation brought home to me how §377 had become a generic symbol of socio-legal discrimination: thus, while drafting the leaflet we did not even notice that while the police harassed and refused to help Disha, they did not specifically evoke §377 to threaten her. In retrospect, I realised that the two other cases we had cited in the 2008 leaflet also had no specific connection with §377. In seeking to build a powerful case against §377, we had conflated various kinds of discrimination and harassment under its common symbol. After this realisation, I spoke to other activists working in small-town and rural areas about the relevance or otherwise of §377 in their experience. Sumi Das, a trans/*kothi* activist working in rural areas of the Cooch Behar district in northern West Bengal, told me during a conversation in 2013 that the law was not relevant in her region: “people here do not know about 377... we are placing too much importance on Section 377... it is not fruitful to make such a big deal out of it!” She further opined that the impact of §377, whatever it may be, was probably confined more to metropolitan cities like Kolkata or Delhi. Both Disha and Sumi, therefore, suggested the uneven and differentiated impact of §377. Sumi suggested that its effects were differentiated by geographical area and the urban/rural divide, while Disha pointed to its greater importance for “fragile” upper/middle-class people who felt much more keenly hurt by its existence than those like herself who faced violence at a more material level. This echoes the distinction between the symbolic

and material harms of §377 made by Mandal.<sup>49</sup> Further, in the aforementioned case of pride organising, a variety of material violences - not even necessarily caused or abetted by §377 - are conflated with the symbolic harm of §377 as felt by elite community members, which overall dovetails into the synecdochic construction of §377 as the primary symbol of stigma and discrimination. Akshay Khanna has argued how §377 was given a “social life” through the LGBT movement, which constituted the law as “a space where ‘diffuse criminality’ may articulate as tangible and therefore as juridically knowable and actionable” - condensing various forms of criminalisation into a coherent object for legal action.<sup>50</sup> But as the above incidents suggest, the “social life” that §377 acquired was crucially based on an elite-led form of synecdochic symbolism that drew from its symbolic importance for relatively privileged queer people but did not always tally with its contextually varied social impacts (or lack thereof) on less privileged communities.

This phenomenon is not confined to the above instance, but characterises a wider tendency within the mobilisation against §377. The 2009 Delhi High Court judgment responded favourably to the Naz Foundation petition and read down §377 to exclude consensual sex between adults in private from its purview.<sup>51</sup> The judgment drew upon materials submitted to the court by the respondent ‘Voices against 377’, a coalition of various rights-based groups and activists, which evoked cases of violence faced by working class trans/queer people in public spaces only to elide their implications.<sup>52</sup> Based on these submissions, the judgment cites five specific cases of violence, out of which §377 seems to be relevant to only two.<sup>53</sup> The first case involves the aforementioned arrest of MSM/*kothi* outreach workers of Naz Foundation in 2001 under both §377 and §292.<sup>54</sup> The second and third cases involve the arbitrary arrest, detention, rape and torture of two *hijras* in south India, who were picked up by policemen from public spaces: while brutal, neither incident seems to involve any charge or threat based on §377 (indeed, the policemen themselves would be offenders under the law).<sup>55</sup> The fourth case involves two adult women in a relationship, one of whom was charged with abducting the other under §366 IPC; an allegation of offence under §377 was only added later.<sup>56</sup> The fifth case involves the custodial detention and rape of a person assigned male at birth who was picked up by the police and alleged to be homosexual; again §377 was not invoked and the policemen themselves were potential offenders.<sup>57</sup> Thus in three out of the five cases, §377 was not invoked at all, and it was not the only law relevant to the two remaining ones. Yet, the submission by ‘Voices against 377’ and the judgment itself elide all these other

<sup>49</sup> EPW, *supra* note 19.

<sup>50</sup> Akshay Khanna, *Sexualness*, New Text, New Delhi, 187 (2016).

<sup>51</sup> Naz Foundation v. State (NCT Delhi), 2009 SCC OnLine Del 1762, ¶132.

<sup>52</sup> *Id.*, ¶21-22.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, ¶21.

<sup>55</sup> *Id.*, ¶22.

<sup>56</sup> *Id.*

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

modes of criminalisation and abuse to focus on §377. As the judgment text states after narrating the cases, “the material on record, according to the respondent No. 8, clearly establishes that the continuance of Section 377 IPC on the statute book operate to brutalise a vulnerable, minority segment of the citizenry for no fault on its part.”<sup>58</sup> Further, the remedy sought by the petitioner and offered by the judgment - the decriminalisation of consensual adult sexual relationships “in private” - failed to address the ways in which §377 and other laws were actually applied to target gender-variant persons in public spaces even while using these instances to bolster the case against §377.<sup>59</sup> Even though the judgment interpreted the right to privacy to not just include the “negative right to occupy a private space free from government intrusion” but also decisional privacy - the “right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalisation” - this aspect of the right to privacy was primarily understood as the personal autonomy of choosing one’s sexual/romantic partners rather than, say, the autonomy to do sex work or solicit sex from strangers in public.<sup>60</sup> The abstract decisional privacy offered by the judgment thus did not adequately consider the concrete specifics of vulnerability in public spaces, based on both gender presentation and class/caste location, that are suggested by at least three of the five aforementioned cases. Further, the final declaration offered by the judgment brought back a more spatially constrained idea of privacy by clearly specifying that “consensual sexual acts of adults in private” would be excluded from the purview of §377.<sup>61</sup>

Thus, in effect if not in intention, the trajectory of argumentation in the text of the judgment, based on the petitioner’s and respondents’ submissions, ended up harvesting the narratives and bodily injuries of queer and trans people from unprivileged class/caste locations to secure the rights of primarily those with access to private spaces. Scholars such as Jason Keith Fernandes, Akhil Kang and Vqueeram Aditya Sahai have pointed out that the anti-§377 movement has repeatedly cited violence against Dalit and working class queer-trans persons but not centered their voices or demands, coopting their narratives to serve the agendas of middle class, upper caste queer people in various ways.<sup>62</sup> As I show above, the synecdochic symbolism of §377 is crucial to this process as it has permitted the appropriation of social violence against working class/Dalit bodies for elite ends through the subsumption of varied material violences under the singular sign of

---

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, ¶132.

<sup>60</sup> *Id.*, ¶40.

<sup>61</sup> *Id.*, ¶132; See also Zaid Al Baset, *Section 377 and the Myth of Heterosexuality*, Jindal Global Law Review, 4 (2012) (for an extended critique of the right to privacy argument in the Naz Foundation case.)

<sup>62</sup> ECONOMIC AND POLITICAL WEEKLY (EPW) (Jason Keith Fernandes), *Probing into the Freedoms of Queer Liberation in India*, January 04, 2020, available at <https://www.epw.in/journal/2020/11/special-articles/probing-freedoms-queer-liberation-india.html> (Last visited on September 28, 2020); AKADEMI MAG (Akhil Kang and Vqueeram Aditya Sahai), *Guruswamy and Katju, Your rainbow doesn't hide your casteism*, September 24, 2020, available at <https://www.akademimag.com/guruswamy-katju-rainbow-casteism> (Last visited on September 28, 2020).

the law. The media coverage of the Naz judgment, which typically asserted that the judgment had decriminalised gay sex or homosexuality without much reference to the implications of the judgment for non-normative gender identities or expressions, only contributed further to this process of appropriative subsumption and erasure.<sup>63</sup>

Similar tendencies become evident in the legal mobilisation after the Naz Foundation judgment of 2009 was overruled by the Supreme Court in 2013.<sup>64</sup> The writ petition by Navtej Singh Johar and four others, which challenged the 2013 verdict and initiated the Navtej Singh Johar case, contains only a couple of references to the impact of §377 on the petitioners' lives - specifically, in the narratives of the second petitioner Sunil Mehra and the fifth petitioner Ayesha Kapur - and spends much more space elaborating the careers and achievements of the celebrity petitioners, underlining their elite and exceptional status.<sup>65</sup> Even these fleeting references do not mention any actual use of §377 to prosecute, threaten or harass the petitioners, but rather, their fears regarding the *potential* of such use. With respect to Mehra, the petition reads: "Petitioner no. 2 has written and spoken about having experienced violence as a gay man and being unable to approach the police because of fear of prosecution under the impugned Section 377 of the Indian Penal Code, 1860."<sup>66</sup> Regarding Kapur, the petition asserts: "Petitioner No. 5 first hand experienced the social stigma that attaches to LGBT persons as a result of Section 377 IPC [...] (she) did not reveal her sexual orientation to even her mother much less her extended family or friends until she was already in her mid-thirties [...] Even today, the Petitioner No. 5 is unable to accompany or be accompanied by her committed partner at social and family occasions."<sup>67</sup> Thus, we again see the pervasive pattern wherein various kinds of actual or potential discrimination, such as the fear of police harassment or the lack of familial acceptance, are conflated and reduced to §377. It becomes positioned as the primary cause - social stigma "attaches to LGBT persons as a result of Section 377 IPC."<sup>68</sup>

This inflation of the symbolic harms of §377 based on potential rather than actual encounters with the law is accompanied by the subsumption of diverse material violences under its sign. Referencing the aforementioned petition,

<sup>63</sup> LIVEMINT (PTI), *Delhi High Court Decriminalizes Homosexuality*, July 2, 2009, available at <https://www.livemint.com/Politics/sl3bjL7PX8MzUeOhPGejy/Delhi-high-court-decriminalizes-homosexuality.html> (Last visited on August 28, 2020); BBC, *Gay sex decriminalised in India*, July 2, 2009, available at [http://news.bbc.co.uk/2/hi/south\\_asia/8129836.stm](http://news.bbc.co.uk/2/hi/south_asia/8129836.stm) (Last visited on August 28, 2020).

<sup>64</sup> TIMES OF INDIA (TOI) (Dhananjay Mahapatra), *Supreme Court Makes Homosexuality a Crime Again*, December 12, 2013, available at <https://timesofindia.indiatimes.com/india/Supreme-Court-makes-homosexuality-a-crime-again/articleshow/27230690.cms> (Last visited on August 28, 2020).

<sup>65</sup> Writ Petition (Criminal) in the Matter of Navtej Singh Johar and others, available at <http://orinam.net/377/wp-content/uploads/2016/06/Johar-UoI-2016.pdf> (Last visited on August 27, 2020).

<sup>66</sup> *Id.*, ¶8.

<sup>67</sup> *Id.*, ¶16.

<sup>68</sup> *Id.*

the Navtej Singh Johar judgment states: “Even though the government is not proactively enforcing a law that governs private activities, the psychological impact for homosexuals who are, for all practical purposes, felons in waiting, is damaging in its own right”.<sup>69</sup> The judgment text then cites the “everyday violence” faced by *kothis* and *hijras* in streets and public spaces in support of the above point, without elaborating the diverse causes and mechanisms of such violence, including but not restricted to §377.<sup>70</sup> Again, we see the synecdochic symbolism of §377 in action - the material violences faced by unprivileged queer/trans people are appropriated to both substantiate the symbolic threats felt by more elite people and to aggrandise §377 itself as the overarching symbol of criminalisation and discrimination.

#### IV. THE DISJUNCTIVE EFFECTS OF 377-RELATED SYMBOLISM

Even as the mobilisation against §377 inflated its effects and downplayed other structural drivers of discrimination, the growing publicity of the law due to its aggrandisement as a symbolic target actually created the potential for its increased impact on non-elite trans and *kothi-hijra* communities. In some cases, middle class gay and queer people faced increasing threats as well. In a conversation in 2013, Raina Roy, a Kolkata-based trans activist, told me: “it is only because the movement happened that most people came to know about 377... we are ourselves taking on 377 and applying it onto our bodies!” This suggests that the excessive attention on §377 might have actually contributed to its harmful potential and strengthened related social stigma. Khanna notes how the increasing social currency of the law might have resulted in its growing usage by the police in Kolkata in the 2000s, even though older *kothis* from the city barely knew of its existence.<sup>71</sup>

The escalating effects of the law became particularly apparent after the Supreme Court reinstated §377 in December 2013 in response to legal challenges to the Naz Foundation verdict.<sup>72</sup> Following the reductive symbolic association between §377 and \_ecriminalizati established during the Naz Foundation campaign, the media \_ecriminal that homosexuality was a crime again in India, even though the judgment itself denied that the law specifically discriminated against homosexuals.<sup>73</sup> A few months later, I heard about two incidents of sexual assault from activists in northern West Bengal, which went largely unreported in the media. In February 2014, a trans or *kothi*-identified person in Siliguri, north Bengal, was raped by a group of local men who threatened her, stating that if she protested, they would report her to the police as someone who had ‘criminal’ sex regularly. However, these men would have been ‘criminals’ just as much under §377 for participating in forcible anal sex with someone assigned male at birth. But

<sup>69</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶23 (per D. Y. Chandrachud, J).

<sup>70</sup> *Id.*

<sup>71</sup> KHANNA, *supra* note 50, 177.

<sup>72</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

<sup>73</sup> TOI, *supra* note 64.

from their threat, it seems that they did not think of the label of either homosexuality or criminality as being applicable to them – as per their logic, the charge of criminal same-sex activity is applicable only to the socially marked and \_ecriminaliz gender-variant person, not to mainstream men. Similarly, in the district of Cooch Behar, where, as per Sumi’s aforementioned account there had been no known cases of §377-based harassment prior to 2013, a *kothi* was sexually assaulted in 2014 and the perpetrators threatened her with §377 if she dared to report the incident. In neither incident were the perpetrators charged under any law, §377 or otherwise.

Thus, while for most of its history, §377 was applied in an uneven and regionally variegated manner, the outsized focus on the law ensured that it got substantial coverage and attention in the media and public sphere after the 2013 judgment. This disseminated the reductionist narrative that §377 exclusively \_ecriminaliz homosexuality or ‘gay sex’. As a result, it was transmuted into a more dangerous tool than it had been, increasing in its trans-regional reach and impact. As per Raina’s quote above, the stigma of §377 was being powerfully remapped onto bodies marked by gender/sexual difference, a process inadvertently bolstered by elite activist discourse at the cost of endangering working class and Dalit queer and trans people further. In a 2015 report, the lawyer Anand Grover stated, “the discourse following the Delhi High Court verdict has made many more aware of the law. With the SC verdict reinstating it, they are now in a better position to use it.”<sup>74</sup> Middle class people did not remain immune either, and cases of blackmail, extortion and even arrest under §377 were reported more frequently.<sup>75</sup> As per statistics from the National Crime Records Bureau, cases registered under §377 increased markedly after the 2013 verdict, although most of them still related to child abuse and it is not clear what percentage of the other cases applied to consensual as opposed to non-consensual sex.<sup>76</sup>

However, even the increasing effects did not necessarily follow either the script of §377 itself as \_ecriminal all “carnal intercourse against the order of nature” or the activist narrative around the law as particularly \_ecriminaliza consensual same-sex activity. Rather, other social discourses, particularly ideas of gendered stigma, significantly influence its application. The incidents from northern West Bengal show how a selective interpretation of the law is used to threaten trans/*kothi* people by perpetrators who would themselves be criminals under §377.

<sup>74</sup> HINDUSTAN TIMES (Poulomi Banerjee), *Section 377 and the Biases Against Sexual Minorities in India*, October 4, 2015, available at <https://www.hindustantimes.com/india/section-377-and-the-biases-against-sexual-minorities-in-india/story-qGJGC9jMxGiirCGgooYMKK.html> (Last visited on August 28, 2020).

<sup>75</sup> THE CARAVAN (Bhavya Dore), *How Section 377 Is Being Exploited By The Police and Blackmailers To Extort Men*, November 4, 2015, available at <https://caravanmagazine.in/vantage/how-section-377-became-payday-extortionists-and-police-alike> (Last visited on August 28, 2020).

<sup>76</sup> LIVEMINT, *Section 377 Verdict: Some of These 4,690 Cases are no Longer Crimes*, available at <https://www.livemint.com/Politics/LlqSpXABN7V8mmuHGV2x0O/Section-377-verdict-These-4690-crimes-are-no-longer-crimes.html> (Last visited on August 28, 2020).



As Sumi said, “these men did not bother to think so deeply whether they themselves were criminals or not... they assumed what they saw in the media, that only *samakami* (homosexual) people were criminals!” Implicit in Sumi’s statement is the gendering of the Bengali term *samakami* in popular imagination, its association with gender-variant queer people rather than cisgender gay men as in more metropolitan or elite imaginations of gay identity. In that context, cisgender, masculine men who engage in sexual activity with people assigned male at birth may avoid the stigma of illegality and even evoke §377 to silence their victims without the fear of legal reprisal.

After the Navtej Singh Johar judgment in September 2018, there was yet another discursive reversal which proclaimed that homosexuality was no longer illegal, or that LGBT people were criminals no more.<sup>77</sup> However, the effects of this shift have not followed a straightforward script of decriminalisation, but reflect how the symbolism constructed around the law have impacted different constituencies in disjunctive ways.

One of the politically productive consequences of the synecdochic positioning of §377 as a broad symbol of anti-LGBT discrimination is that in the process of countering the law, the 2018 judgment provides an expansive affirmation of LGBT rights rather than just reading it down on narrowly specific or technical grounds. As Chief Justice Dipak Misra states, “The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights.”<sup>78</sup> Such affirmations, scattered through the judgment, provide a sense of positive historic movement from *criminalization* to citizenship and rights, rather than just the negative freedom of no longer being restrained by a law on particular sexual acts. However, while relatively elite sections of LGBT communities assert their claim on this narrative of *criminalization* and fuller citizenship, less privileged sections might be bogged down by their association with criminality in renewed ways.

A few days after the 2018 judgment, an article titled ‘Outlaws no longer’ featured five queer and trans persons from middle class backgrounds who shared their struggles in the pre- verdict period and voiced their hopes regarding the post-verdict future.<sup>79</sup> One musician, for instance, shared various experiences of discrimination he faced during his education and working life, and said, “I’m happy to know that we aren’t criminals, but we need to fight for same-sex marriages and the right to adopt a child.” Another respondent opined, “with the law no longer against us, it is the beginning of a struggle for LGBTQ rights, political and economic.” Another hoped for the right to “adopt a child with my partner”,

<sup>77</sup> See TIME, *supra* note 5; HINDU, *supra* note 6.

<sup>78</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶240 (per D. Misra, CJI.).

<sup>79</sup> GOVERNANCE NOW, *supra* note 8.

the right “to have a joint bank account” and “also property rights for the LGBTQ community.”<sup>80</sup>

The narrative of historical progression in the article positions the 2018 judgment both as an endpoint and a beginning – the end of overt legal discrimination and \_riminalization, and the beginning of a struggle for broader social and legal rights, particularly those needed to access a settled upper/middle class lifestyle similar to heterosexual families. However, like the aforementioned writ petition filed by Navtej Singh Johar and others, none of the featured narratives mention any actual instance of prosecution or even threat or harassment due to §377 – rather, they speak of social discrimination and familial abuse. One of the interviewees, a left-wing student leader, even mentions that he was protected by the Delhi police after being targeted in a right-wing attack. Thus, being an “outlaw” under §377 does not seem to have been applicable in any literal sense for these people. Rather, just as §377 subsumes multifarious symbolic and material harms in a synecdochic manner, the putative status of criminality stands in for various other forms of victimhood which, while serious, do not bear the mark of juridical or police violence. It is perhaps only relatively privileged queer people, who do not have to worry about the actual possibility of criminality, who can claim the figure of the criminal or outlaw as a metaphor for non-legal forms of discrimination. Further, the symbolic assumption of criminality is used to assert a clean exit from such a status into legality (“outlaws no longer”) – it strategically claims victimhood to affirm the trajectory to a fuller citizenship that ostensibly encompasses the LGBTQ community as a whole, as evident in the unmarked, \_riminalizati “we” claimed by some of the narrators above.

However, how secure do people for whom criminality is not just a symbolic or metaphorical status but a lived reality become through the judgment? Relative to the Naz Foundation verdict, the Navtej Singh Johar judgment offers a more expansive understanding of the right to privacy and extends the concept of decisional privacy further.<sup>81</sup> This might help provide a more secure legal grounding for the rights of non-elite trans and queer people in public spaces. While in the 2009 judgment, the evocation of decisional privacy as personal autonomy becomes limited by the return to spatial privacy in the final declaration, the 2018 judgment, at certain points, explicitly notes the limitations of a spatial concept of privacy and extends decisional privacy to public spaces.<sup>82</sup> Justice Chandrachud notes, via an extensive citation of academic critiques of privacy, that “privacy creates ‘tiers of ‘reputable’ and ‘disreputable’ sex’”, only granting protection to acts behind closed doors [...] the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces

---

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

<sup>81</sup> Danish Sheikh, *Privacy in Public Places: The Transformative Potential of Navtej Johar v. Union of India*. Criminal Legalities in the Global South (Routledge) (2019). (On the expansion of the right to privacy in the judgment.)

<sup>82</sup> *Id.*, 16.

on account of their sexuality and appearance.”<sup>83</sup> He further asserts, “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.”<sup>84</sup> The mention of not just sexuality but also “appearance” potentially extends decisional privacy to matters of gender presentation and expression, rather than only the personal autonomy of intimate partner choice. Further, the right to navigate “public spaces on their own terms” potentially extends it even further to other behavioural or occupational spheres such as the rights of trans sex workers to inhabit public spaces without decriminalisation.

However, decisional privacy becomes more limited and conditional in other parts of the judgment. Chief Justice Misra notes the criminalisation of transgender people and advocates their right to move beyond “narrow claustrophobic spaces”, stating that the “very existence of Section 377 IPC criminalising transgenders casts a great stigma [...] This stigma, oppression and prejudice has to be eradicated and the transgenders 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 realization of their potential and equal opportunities in all walks of life.”<sup>85</sup> However, elsewhere he notes, “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>86</sup> Significantly, “indecency” and the potential to disturb “public order” - terms that are subjective, vague and impossible to define without some recourse to “majority perception” - are precisely some of the most salient charges through which trans, *hijra* and *kothi* people from working class backgrounds have been criminalised and stigmatised.

Moreover, in some later sections of the judgment, the idea of spatial privacy as defining the bounds of legitimate sexual conduct returns. Justice Indu Malhotra, unlike the other judges, explicitly constrains the scope of her decision to decriminalising “consensual sexual acts of adults [...] in private”.<sup>87</sup> The right to decisional autonomy in matters such as choosing partners also seems to be, at points, grounded in an idea of immutable or inherent sexual orientation, which might limit the scope of such autonomy to aspects of personhood considered to be innate and fixed. As Justice Malhotra notes, “sexual orientation is an innate attribute of one’s identity, and cannot be altered. Sexual orientation is not a matter of choice.”<sup>88</sup> Based on this logic, she concludes that §377 “takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which

---

<sup>83</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶62 (per D.Y. Chandrachud, J.).

<sup>84</sup> *Id.*, ¶62.

<sup>85</sup> *Id.*, ¶249 (per D. Misra, CJI.)

<sup>86</sup> *Id.*, ¶246.

<sup>87</sup> *Id.*, ¶21(i) (per I. Malhotra, J.).

<sup>88</sup> *Id.*, ¶13.1.

would further a dignified existence and a meaningful life as a full person.”<sup>89</sup> Chief Justice Misra makes an analogous point: “Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual [...] any discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression.”<sup>90</sup> As Mandal argues, “arguments 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 [...] It will be instructive to see what traits are deemed intrinsic and core, and what traits are not, in future cases.”<sup>91</sup> The implicit hierarchy between intrinsic and non- intrinsic traits or behaviours further limits the potential of the judgment to deliver decisional autonomy to the most vulnerable among transgender and queer people, such as sex workers. In that light, the judgment, despite its more expansive notion of privacy relative to the Naz Foundation decision, yet again cites the violence on transgender and *kothi-hijra* bodies to bolster the symbolism of §377 and support decriminalisation for more privileged subjects while offering unprivileged trans and queer people with a more tentative and conditional access to rights.

Notwithstanding such contradictions and limitations, the judgment has proved to be helpful in other legal battles for transgender/*hijra* rights. In September 2018, the Hyderabad High Court in the state of Telangana temporarily suspended the use of Telangana Eunuchs Act, a law that had been used by the police to criminalise and abuse transgender and *hijra* people, until further orders.<sup>92</sup> The direction cited the recent Navtej Singh Johar judgment to condemn the violation of the self-respect of transgender persons.<sup>93</sup> While the order did not offer a permanent reprieve from the law, it still points to the potential for the Navtej Singh Johar judgment to further the legal struggle for the rights of people from the transgender and *hijra-kothi* spectrum.

However, despite such limited legal gains, many people from these communities also suffer from backlash and renewed forms of violence in the aftermath of the judgment, as noted in the introduction. As the judgment gained widespread coverage, the symbolism around §377 acquired a new twist such that the number ‘377’ itself was transmuted in some contexts into an insulting label used to mark bodies and identities as deviant. According to Alo Ghoshal, an activist based in Siliguri, West Bengal, a Bengali meme began to circulate on Facebook on September 8, two days after the judgment, which read: “a new insult for your friends has arrived on the market: Are you a man or 377?” Later in September 2018, Nilanjana, a trans woman and *hijra* community member from a northern

<sup>89</sup> *Id.*, ¶16.2.

<sup>90</sup> *Id.*, ¶253(vii) (per D. Misra, CJI).

<sup>91</sup> EPW, *supra* note 19.

<sup>92</sup> DECCAN CHRONICLE (S.A. Ishaqui), “Hyderabad High Court Suspends Use of Eunuchs Law”, September 19, 2018, available at <https://www.deccanchronicle.com/nation/current-affairs/190918/hyderabad-high-court-suspends-use-of-eunuchs-law.html> (Last visited on August 28, 2020).

<sup>93</sup> *Id.*

suburb of Kolkata, was insulted as ‘377’ alongside other labels like *chhakka* (a pejorative term for feminine-identified or effeminate queer/trans people). As she recounted to me, “people are making it difficult to walk in the streets... they are calling names like 377, *chhakka*... I was walking with my headphones on... a guy was coming towards me, saying, 377, *chhakka*... look at this sin of society, this dirt of society... while saying all this he came very close and deliberately bumped into me... his clear intention was to incite a fight... after 377 being knocked out, it seems that people from society have strung themselves like a noose across our necks all the more!”

In these cases, we see that despite the verdict, or perhaps precisely due to the publicity it attracts, ‘377’ has become a symbol of hated marginality: a synonym for *chhakka*, a label connoting sin and social deviance through which non-elite trans and queer people become marked and stigmatised. This is the synecdochic symbolism of §377 in reverse - while in activist discourse the symbolic construction of §377 served to conflate various kinds of socio-legal discrimination and violence into a singular legal target whose dismantling would ensure legality and citizenship for LGBT people, here the figure of 377 serves to congeal social understandings of sin and deviance into the form of an insult, used to deny such gains and recast stigma. In another version of this phenomenon, a Facebook friend of mine shared that soon after the verdict, he received a message through an anonymous messaging site that said, “Are you people now going to spread AIDS? They have made 377 legal now!” Here, rather than a law that has been read down, 377 becomes a synonym for forms of sexual activity that despite their newfound legality, are still regarded pejoratively and whose practitioners are stigmatised for spreading a putative disease.

From these examples, we see how ‘377’ as a symbol may acquire various contradictory meanings and usages. For some queer-trans people from relatively economically privileged backgrounds, §377 is less a literal threat and more a generic symbol of discrimination. Thus, even though they were not directly targeted or threatened by the law, the 2018 judgment is used to construct a narrative of historical progression from criminality to rights and citizenship, of which people from privileged class/caste locations are the protagonists. However, for others from less elite backgrounds, the narrative of decriminalisation is less simple and linear. Some people such as the *hijras* from Delhi continue to be criminalised through accusations of prostitution or causing public nuisance.<sup>94</sup> Others become marked through the symbol of 377 in ways that they might not have been before the expansion of public discourse on the law.

## V. CONCLUSION

§377 only gains salience in intersection with various other social factors, such that while the law was fully in effect, normatively masculine men such

<sup>94</sup> CITIZEN, *supra* note 10.

as the perpetrators in the aforementioned cases of sexual assault in northern West Bengal could engage in anal rape without being branded as criminals. However, even after the 2018 judgment, trans and *hijra-kothi* people may be regarded as criminals and even called ‘377’ itself as a stigmatising label. Such ironies suggest that in many cases where §377 is invoked, social discourses that exist beyond the penal code and particular judgments are at least as significant as the law itself, if not more. However, the symbolic politics around §377 in the media and activist spheres has often tended to treat it as an abstract symbol of generic criminality, rather than contextualised its specific relevance or irrelevance in particular social contexts, as if the key to criminalisation and decriminalisation was contained within this particular law in itself. To recall one example narrated above, during the preparations for the pride walk in Kolkata in 2008, we - volunteers and activists from a relatively elite background - conveniently categorised Disha’s experience of assault and other similar cases under the marker of §377, as it was easier for us to construct a symbolic enemy than to untangle the complex intersection of socio-political factors that enable such incidents of social violence and police harassment. After the demise of this symbolic enemy, people who had perhaps the least to fear from this law seem to be the most visible and vocal in claiming that they - and indeed LGBTQ people in general - are criminals no more, even as criminalisation and marginalisation continue in various forms.<sup>95</sup> The valorisation of §377 as a synecdochic symbol over the material or social aspects of the law facilitates the emergence of elite LGBT people as fuller citizens and as abstract, universal subjects of queer liberation, while eliding the concrete specifics of violence on people with less access to such status.

In an article that strikes a cautious note about celebrating the Navtej Singh Johar judgment, LGBT activist Chandra Moulee states, “Section 377 did take a lot of our energy and time while talking about LGBTQ rights in our country [...] While it is ‘natural’ for the flow of the discussion to move towards same-sex marriage and other related issues, the conversation on legal protection and empowerment of queer individuals in all spaces should not be ignored.”<sup>96</sup> Even as we might look to the Navtej Singh Johar judgment for the expansive potentialities that it offers, the time is ripe to shift the conversation to the “empowerment of queer individuals in all spaces” and regain focus on the various issues that §377 synecdochically subsumed.

<sup>95</sup> THE HINDU (PTI), *Two Years Since Article 377 Annulment, LGBTQ Community Still Battling Prejudice*, September 6, 2020, available at <https://www.thehindu.com/news/national/two-years-since-article-377-annulment-lgbtq-community-still-battling-prejudice/article32534479.ece> (Last visited on September 29, 2020).

<sup>96</sup> FIRSTPOST (FP Staff), *Trans Sexuality a Complex Mix of Identities: Transgender-Homosexuals are Wary of Celebrating Section 377 verdict*, September 11, 2018, available at <https://www.firstpost.com/india/trans-sexuality-a-complex-mix-of-identities-transgender-homosexuals-are-wary-of-celebrating-section-377-verdict-5136481.html> (Last visited on August 27, 2020).