

“A riddled restitution”—The Indian journey from the recognition of the third gender towards the Queer

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Abstract

The queer movement in India celebrated a landmark with the decriminalization of Section 377 of Indian Penal Code in 2018. Another milestone was reached through the legal recognition of the transgender population of the Indian state in 2019. These developments point towards a positive progression of the queer movement in India. The change in the perspective of the state towards the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) shows a positive stance towards the concerns of the LGBTQI groups. However, the trajectory taken by the Indian state with respect to the concern of the queer community is riddled with a few challenges and roadblocks, which might create obstacles in furthering the concerns of the LGBTQI groups. The engagement with the heteronormative framework makes the sight of the state prismatic, which leads to lopsided and ineffective results. Thus, it is important to understand the specific nature of the concerns of the LGBTQI groups before embarking upon the task of restitution. This paper seeks to discuss the changing perspective of the Indian state towards the concerns of the LGBTQI and find the probable challenges that might be left unaddressed.

KEYWORDS

alternate sexualities, decriminalization, LGBTQI, NALSA, queer movement, section 377, transgender

1 | INTRODUCTION

India takes pride in being the largest democracy of the world, and having a government that is alleged to be—“of the people, for the people and by the people” (see Stern, 2000). But still, after more than six decades of independence, the Indian state appears to be ridden with numerous sites of injustice—in the form of caste, class, and ethnicity. The place of caste and class occupies a centrality in the Indian politics. Amidst such scenario, the concerns of the alternate sexualities remain severely undermined, if not unattended altogether. The alternate sexualities—comprising of the homosexual, bisexual, intersex, transgender, and several other groups¹—fall outside the heteronormative framework of society, and constitute a multifarious congregation, which is often confused and misunderstood in the social as well as scientific discourse (see Butler, 2011; Foucault, 1978; Hall, 2003). To some, this might be due to the lack of understanding about the concerns of the alternate sexualities, but a deeper examination of the issue reveals a systemic neglect of such concerns.

While the alternate sexualities have been existing in our society since times immemorial (see Bubb, 2009; Foucault, 1978; Jagose, 1996), the queer activism in the political and legal sphere is a relatively modern development. The concerns of the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) spread across different aspects of the society and extend from countering the immanent and visible forms of formal and informal subjugation, oppression, exclusion and harassment, towards a positive affirmation of their identity and rights (NALSA judgment 2014; Navtej Singh Johar case, 2018; The Humsafar Trust, 2015). The condition of the LGBTQI has remained severely subordinated and stereotyped under the provisions of the Indian Penal Code (IPC) which was fabricated under the aegis of the colonial framework (Bubb, 2009; Navtej Singh Johar case, 2018). However, with the unfolding of the democratic fervor in India and frequent testing of the constitutionality of the age-old legal structures, there has emerged a consciousness regarding the perceived injustices done to the queer community in India. This has led to a series of initiatives at several fronts and through various channels (AIDS Bhedbhav Virodhi Andolan, 1991; The Humsafar Trust, 2015). The Indian state² has also been moved by these concerns, and as a result, there have been some substantive developments in this area. However, the response to the call for justice has been differently perceived by different groups of LGBTQI. From NALSA judgment (2014) to the decriminalization of Section 377 (see Navtej Singh Johar case, 2018), several milestones have been achieved in the quest for justice for the queer. Unfortunately, there still remains an urgent need for change in the way we perceive the concerns of the alternate sexualities.

This paper seeks to examine the understanding by the Indian state of the concerns of the alternate sexualities. There is good reason to undertake such activity because the framework and understanding of the issues concerning the LGBTQI largely depends upon the manner in which these concerns are understood. More often than not, the concerns of the alternate sexualities are attempted to be understood under a heteronormative paradigm (see Butler, 1999), which fails to recognize the basic premise of the queer identity, and starts following a lop-sided trajectory. This imposition of the heteronormative parameters on the alternate sexualities proves to be a self-defeating exercise. I also make clear at the outset that my goal is not to refute the move towards recognition of the transgender and decriminalization of homosexual acts. In fact, these steps are certainly an important development in the path of securing justice to the alternate sexualities. What I have attempted in this paper, then, is to offer a corrective to the paradigm of understanding which appears to make certain presumption, which might become a hindrance in furthering the vindication of the rights of the alternate sexualities. Such

argument is not based on my whim but on the understanding of the normative differences between heteronormativism and a constructivist understanding of gender identity (Butler, 2011; Foucault, 1978; Jagose, 1996). These differences have also been agreed to in the NALSA judgment (2014) and Navtej Singh Johar case (2018).

I have chosen to title the paper as “a riddled restitution” because the solution to the questions of securing justice to the LGBTQI is often riddled in our normative paradigms, which often become the prism through which we evaluate the questions of justice. Any attempt to address the concerns of justice through an inadequate prism of norms is bound to remain exclusionary of the very concerns that need to be addressed. Thus, my questioning of the positionality of our understanding is not a question on the intension of the state but an appendage to the task of such restitution. Such exercise forms an aspect of the Indian Constitution as a “living and organic document” (Navtej Singh Johar case, 2018, p. 66) which opens up the horizons of the State to accommodate greater and wider concerns of justice.

2 | DAWN OF CONSCIOUSNESS

There is little doubt that the Indian culture has a rich history of alternate sexualities. From the idea of fluidity of sexuality to literature on homosexuality, there exists a kaleidoscopic heritage in Indian culture when it comes to the subject of sexuality (AIDS Bhedbhav Virodhi Andolan, 1991; Bubb, 2009; Joseph, 1996; NALSA judgment 2014). But the social visibility and acceptance of the alternate sexualities seemed to have witnessed an erosion during the colonial era. As a result, several scholars have traced the homophobic attitude found in the legal-political structures to the colonial history of India (Agarwal, 2017; Bubb, 2009; Joseph, 1996).

The nature of the Indian constitution, however, treats every individual equally and does not consider one's sexuality as a criterion for discrimination itself. Article 5 of the Indian Constitution, for instance, “identifies the persons who are entitled to be citizens of India. None of the conditions specified therein require a determinate sex or gender identity as a pre-condition of acquiring citizenship” (Agarwal, 2017; Government of India, 1950). It is in the premise of the idea of constitutional equality that the LGBTQI movement found its abode.

The growth of the queer movement, in India, took place in the sphere of civil society before taking a form of direct political activism. Joseph (1996) has observed the spurt of several groups in and outside India after the mid-1980s to promote the concerns of the LGBTQI. Some of these include—“Trikone (US), KushKhayal (Canada), Shamakami (US), Dost (UK), Gay Scene (Calcutta), Bombay Dost (Bombay), Aarambh (New Delhi), Sakhi (Delhi), Kush Club (Bombay), Good As You (Bangalore), Counsel Club/Pravartak (Calcutta), Sisters (Madras), Red Rose (Delhi), Udan (Bombay) and Saathi (Delhi)” (2229). The growth of such civil society groups holds great significance when it comes to articulation of opinion in public sphere. Jagose (1996), for instance, has studied the growth of such groups in different countries and found a positive relation between the rise of civil society activism and social consciousness on such issues.

By the last decade of the 20th century, the civil society groups contesting for the cause of the LGBTQI became firmly grounded to launch their challenge at the legal-political sphere (The Humsafar Trust, 2015). The affirmation from the judiciary about the rights of the transgenders led to a series of positive changes for the transgender community and succeeded in setting an example before the society. Agarwal (2017) noted some of the examples of transgender persons who made into news—“Padmini Prakash became India's first transgender television anchor; Kamla Jaan became the world's first eunuch mayor but was asked by the HC to step down, as

the post was reserved for a female candidate... Shabnam “Mausi” Bano was the first transgender Indian to be an elected member of the Madhya Pradesh State Legislative Assembly from 1998 to 2003; Kalki Subramaniam is India's first entrepreneur” (p. 159).

The evolution of the consciousness on queer issues in India can be understood in two points: one with regard to the rights and recognition of the transgender community in India, and another with regard to the response to homosexuality and acceptance to the alternate sexualities. I have tried to focus on the recent developments in this regard, and avoid detailed discussion of the historical facts. In what follows, I will try to discuss the recent developments relating to the concerns of the transgender community and the alternate sexualities.

2.1 | Recognition of the transgender

The transgender individuals have always remained victims of systemic discrimination and harassment. The democratic structures have always neglected the aspects of distinct gender identity of the transgender individuals, which has led to several barriers to their full acceptance in society (Agarwal, 2017). After years of social activism, the government finally constituted an Expert Committee on issues relating to transgender persons (Ministry of Social Justice and Empowerment, 2014). The committee submitted its report in January 2014 which paved the way for the Transgender Persons (Protection of Rights) Act, 2019 (Government of India, 2019).

The Act of 2019 is hailed as a landmark development for securing justice to the transgender community. It marks a point in history where the state has offered a formal legal recognition to the “transgender persons” as

“transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta. (Chapter 1(2)(k) of the Act)

The Act also provides for a structural framework to safeguard the interest and rights of the transgender persons. It provides for a National Council for Transgender Persons to be established with a clear mandate and objective of protection and promotion of the interest of the transgender persons (Chapter (2)(g)). Another important aspect of the Act relates to the attempt to bring a positive change in the society through “inclusive education”- wherein it is expected that the transgender students would learn together with other students without fear of discrimination, neglect, harassment or intimidation. The Act also hopes to create a system of teaching and learning which is suitably adapted to meet the learning needs of transgender students (Chapter 1(2)(d)).

Through the Act of 2019, the state has, probably for the first time, recognized the fact that our legal system and political framework makes a presumption of heteronormative values which result in the neglect and outcaste of the LGBTQI. A similar concurrence can also be seen in the Navtej Singh Johar case (2018) wherein the Court agreed to the presence of undue oppression and harassment upon the LGBTQI community. The Act of 2019 represents an instance of “*transformative constitutionalism*” referred to in the judgment of Navtej Singh Johar case (2018), which represents a conscious action by the state machinery to address the concerns of its citizens.

The Act also clearly lays down the offenses against the transgender persons and also reiterates the rights and entitlements of the transgender persons as a citizen of India. It specifically provides that no person shall be compelled to undergo any medical Sex Reassignment Surgeries (SRS) (see Chapter 2(3) and 8(18)). The offenses recognized under the Act 2019 are

[a] compels or entices a transgender person to indulge in the act of forced or bonded labour; [b] denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place; [c] forces or causes a transgender person to leave household, village; [d] harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine. (Chapter 8(18))

One of the interesting aspects of the Act relates to the procedure laid down for change in one's gender identity. This is an important aspect of the Act as it removes the notion of gender identity as fixed by birth. The Act provides that a "transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person" (Chapter 3 (5)). However, such application needs to be certified by the Medical Superintendent or Chief Medical Officer for confirmation of any SRS (Chapter 3(7)(1)). The same chapter also provides for revision in the gender identity through the same procedure. This process, though ridden with qualifications of medical certifications, introduces an angle of fluidity of gender identity.

The state has also remained responsive to the developments at the international level, and has attempted to remain abreast with the latest developments with regard to medical sciences. Thus, Section 5(15) of the Act specifically provides for set up of special units to attend to the distinct medical needs of the transgender persons, and to keep track of the developments at the international forums. The response of the Indian state towards the transgender community has been influenced by several reports and developments at the national and international levels. The prominent among these are the Yogyakarta principles (International Commission of Jurists (ICJ), 2006, 2017), UNDP reports on transgender communities in India (2016) and NACO (2020).

The legal recognition of the rights of the transgender persons is undoubtedly an important step in the vindication of the rights of the transgender. However, there still exist a number of challenges and loopholes which needs to be addressed in order pursue the best interest of the transgender persons.

2.2 | Towards welcoming of the queer

The issue of the alternate sexualities (homosexual persons, bisexuals, intersex persons, and others) poses a more complex challenge than the issue of transgender groups. This might be because of the intricate nature of sexuality as well as the deeply entrenched heteronormativism in society. The draconian Section 377 of the Indian Penal Code (IPC) remained one of the main hurdles in pursuing the concerns of the queer groups. In fact, a significant part of history of the Indian queer activism relates to the contestation over the legality of Section 377 itself. The noteworthy instances of this struggle include the decision of the Delhi High Court in 2009, wherein the Section 377 of IPC was read down for being violative of articles 14, 15 and 21 of the Indian



Constitution (Naz Foundation Case, 2009). However, the decision was soon reversed by the Supreme Court in December 2013 (Li et al., 2017). The contestation over the meaning of terms like citizenship, fundamental rights, transformative constitutionalism and justice has seen a thorough churning since then. These contestations culminated in the celebrated judgment in the Navtej Singh Johar case (2018) which finally reinstated the decision of Delhi High Court of 2009 and effectively decriminalized homosexuality as defined under Section 377 of IPC.

The issue of decriminalization of homosexual conduct is not the penultimate end sought by the queer movement. It is just a teleological checkpoint that signals that the queer movement is following a right trajectory. The substance of the queer movement, in fact, is towards a “radical democracy” (Fraser, 1997) which would allow a free space to different groups for pursuing their self-defined ends. While the recognition and protection offered by the state is an important means for vindication of the rights of the alternate sexualities, it is ultimately the participation in the deliberative democratic processes which would ensure the inclusion of the concerns of the alternate sexualities in the project of growth and development.

The opposition to the Section 377 of IPC was made on several fronts for being oppressive and irrational towards the LGBTQI communities. Some scholars argue that the section was a product of the colonial discourse and thus alien to the Indian culture (Bubb, 2009; Sebastian, 2018). Another objection is raised by the legal experts on the pretext that the existence of Section 377 created confusions interpreting the IPC. For instance, a reading of the Section 377 in light of Section 375 created a lot of confusion and misinterpretation. The amended Section 375 of the IPC expanded the scope of “sexual intercourse” beyond penile-vaginal penetration. However, when contrasted with Section 377, the inferences became self-contradictory and lopsided (Agarwal, 2017; Navtej Singh Johar case, 2018; Sebastian, 2018). Also, a reading of the amended Section 375 indicated that consensual “carnal” acts between two heterosexual adults were not against law, while those between two homosexual adults were still a crime (ibid). Legal experts thus raised questions over the legality and rationality of the sec. 377 itself and found it discriminatory towards the alternate sexualities.

The opening up of the Indian state to the LGBTQI can be inferred from the welcome step of the Supreme Court in reading down the Section 377. The Navtej Singh Johar judgment (2018) in itself is a result of vigorous study and research based on several developments in the judicial history as well as international deliberations on the rights of LGBTQI. From NALSA case (2014) to international deliberations like Yogyakarta principles (2006), the Supreme Court considered a number of sources to develop an understanding on the concerns of the LGBTQI in India. The judgment of the Navtej Singh Johar case (2018) is thus an elaborate piece of information and authority in India, which holds repercussions for several aspect of the Indian Constitution. In terms of substantive aspects, the Navtej Singh Johar judgment (2018) drew upon the previous decision in the NALSA case (2014) which laid the foundations for a consciousness towards the issues of alternate sexualities. Breaking the presumptions of heteronormativity, the NALSA judgment opined that

Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no

one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. (NALSA judgement, 2014, pp. 18–19)

Some of the important aspects of the Navtej Singh Johar case (2018) are worth mentioning in my attempt to understand the trajectory of the LGBTQI movement in India. These aspects hold the potential from where the liberatory politics for the queer rights could be sought in future. From a study of the judgment, I will try to explore its repercussions on four lines, namely: Nature of Indian Constitution, scope of Fundamental Rights, Right to Self-expression and the Legal aspects of Section 377. This discussion, I hope, shall clarify the changing mindset of the Indian state towards the concerns of the alternate sexualities.

The legal contestations over any claim by any individual or group commence with an acquaintance with the underlying philosophy of the Indian Constitution. The nature of the Indian Constitution is precisely laid down in the Preamble to the Indian Constitution (1950). However, the values enunciated in the Constitution have more of a guiding and suggestive role. Several judgments, including the Navtej Singh Johar (2018), have emphasized upon the nature of the Indian Constitution as “an organic and breathing document with senses which are very much alive to its surroundings” (p. 57). Thus, the Indian state is always attentive to the concerns of its citizens. These concerns are not bound by any historical or normative structure, but grow and adapt to the changing needs of time and understanding. “Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual” (p. 59).

The tussle over the constitutionality of Section 377 has led to another chapter in the history of Indian Constitutionalism. It has given a fresh zest to the concept of “transformative constitutionalism” which is the key behind the dynamic nature of the Indian Constitution. Commenting upon the idea of transformative constitutionalism, the Navtej Singh Johar judgment (2018) informs that

the principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. (Navtej Singh Johar case, 2018, p. 73)

A concept, besides transformative constitutionalism, which has helped in pursuing the dynamic goal of justice to its citizenry, is that of “constitutional morality” which can be observed as the guiding factor behind the ideas like “basic structure doctrine” proposed by the Supreme Court in Kesavananda Bharti case (1973). The notion of constitutional morality, as enunciated in the Navtej Singh Johar judgment (2018), is

The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. (Navtej Singh Johar case, 2018, p. 74)



The Supreme Court pursued a logical trajectory in making a case for refutation of the age-old practice of criminalization of homosexual acts by finding a space within the framework of the Indian Constitution. Once a premise was found to support the claims of the LGBTQI, the Court then explored the sites which are violated by the presence of Section 377. Taking due consideration of the insights given in the NALSA case (2014), the Court was quick to observe the clear violation of the Fundamental Rights due to the enforcement of the provisions of Section 377. Both the Delhi High Court and the Supreme Court found Section 377 as violative of Rights enumerated under Articles 14, 15 and 21 (see Government of India, 1950) of the Constitution.³ The Court also observed that nowhere does the Indian Constitution make a distinction on the basis of gender or sexuality of the citizens. The Supreme Court also specifically clarified that the Constitution and laws cannot be used to perpetuate the interests of the majority population (pp. 108–109). Thus, the logic of practice does not stand qualified on pretext of tradition.

The unfolding of the understanding put forth by the Supreme Court judgment in Navtej Singh Johar case (2018) was premised upon the cardinal principle of Right to Life, as enumerated in Article 21 of the Indian Constitution. The Court dwelled upon the principle to believe that a right to self-identity constitutes an inviolable aspect of the Right to Life (NALSA judgment 2014; Navtej Singh Johar case, 2018). The judgment in Navtej Singh Johar case (2018) agreed to the fact that it is not possible to realize one's true identity without being able to express oneself or live as per one's self-defined values (pp. 3–4).

The judgment also reiterated the fact that the self-perceived aspects of “the personality of a person has to be respected and not despised or looked down upon” (p. 6). An imposition of the norms that are incompatible to the self-perceived identity of an individual would necessarily lead to “destruction of individual identity and crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions” (ibid).

The judgment also accepted the fact that one's sexuality cannot be linked to biological markers (pp. 10–11). This recognition of the fluidity of sexuality holds the key to pursuing the concerns of the alternate sexualities. The judgment, in this way, maintains the centrality of the right to self-identity as well as self-determination of ways to pursue one's life. In a rather astute decision, the Court upheld the “distinction between the constitutional morality and social morality or ethicality”, and recognized the need to protect the former from the invasion of the latter (ibid). On the basis of this distinction, and the inalienable right to self-identity, the Court has ensured that even the smallest part of society has the right to set the course of their life (pp. 76–77).

With regard to the social aspects of the concerns of the LGBTQI, the Court recognized the emotive aspects of the homosexual relationships, which have generally been subdued by the preoccupation of the public debates with gender identity and coitus. The judgment recognized the legality of such relations “so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others” (p. 99).

The welcome of the queer identity through the decriminalization of Section 377 opened up the coerced self-confinement of the persons having queer sexualities. It took decades for the Indian state to recognize the fact that the presence of Section 377 was abrogative of the fundamental set of freedoms ensured by the Indian Constitution. In this sense, the Section 377 was found to “abridge both human dignity as well as the fundamental right to privacy and choice of the citizenry” (Navtej Singh Johar case, 2018, p. 142). The Supreme Court concurred to the reading of Article 19 and 21 as encapsulating the right to express one's choices in terms of “sexual inclination without fear of persecution or criminal prosecution” (p. 143). While recognizing the private aspects of the consensual acts of adults, the judgment referred to the notion

of *domus sua cuique est tutissimum refugium* (A man's house is his castle) to underline the fact that the state or the society might not have the right to intervene in such private affairs of the individual (pp. 151–152).

In short, Section 377 was nothing more than an instrument of subjugation of the LGBTQI groups by the dominant heteronormative discourse. When contrasted with the idea of constitutional rationality, it loses its ground in terms of legality as well as rationality. The Court took note of the impact of the Section 377 on the lives of the LGBTQI community and observed that “it shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves” (p. 152).

For these reasons, the Supreme Court read down the Section 377 and declared it as “an anathema to the concept of fraternity as enshrined in the Preamble to our Constitution and the Indian Constitution mandates that we must promote fraternity amongst the citizens sans which unity shall remain a distant dream” (p. 25).

3 | CHALLENGES AND UNANSWERED QUESTIONS

Having discussed the broader framework in which the Indian state has been responding to the concerns of the LGBTQI, I now come to the discussion over the possible challenges and road-blocks pertaining to this issue. It is certainly a positive sign that the state has recognized the presence of subordination and oppression of the alternate sexualities under the normative framework of the society. The deliberations done through the Expert groups and judicial exercises have, indeed, touched areas that are considered as remote spaces of jurisprudence and administration. However, there are areas which still haunt the framework of imagination of the state, when it comes to addressing the concerns of the alternate sexualities.

The state institutions have been making an *ab initio* error by treating the alternate sexualities as a cohesive group. The terms of reference to understand the concerns of the alternate sexualities still remain prisoned within a performative and heteronormative framework. Due to this fundamental lapse of understanding, the resultant statutes and verdicts prove to be lopsided, and tend to crystallize the identities. A better alternate shall be to understand the idea that gender identity as a floating concept (see Butler, 1999), which cannot be defined through medical certifications. It needs to be recognized that the concerns of the alternate sexualities cannot be addressed from within the framework of heteronormativity, which works on the logic of binary (see Foucault, 1978). The attitude towards the concerns of the LGBTQI should not be shaped by concerns for equality. Rather, it is the primacy of equity which should be the guiding framework to deal with the peculiar spatiality of the alternate sexualities. The task of the public discourse on alternate sexualities is not to produce a discourse on queer politics in contradistinction to the heteronormative discourse (Mule, 2018, pp. 140–141) but to allow the freedom to the alternate sexualities to create and follow their self-defined norms.

The spatiality of the alternate sexualities follows the logic of a “plurality of public spheres” (see Fraser, 1997, p. 181) wherein the terms of social action and understanding are defined by each group for itself, and not for other. Thus, the LGBTQI groups should be understood in terms of values decided by such groups. The spatiality of the alternate sexualities is complicated, at least when we consider the wide array of the identities that constitute the part of alternate sexualities. Thus, while it is possible to garner formal recognition to the groups such as the transgender community, the same might not be possible in case of groups while are more fluid



or incoherent. The example of the Indian state, when analyzed through the framework of recognition–redistribution of Fraser, gives substance to this argument because it is the evident spatiality of the transgender group which has been accepted and accommodated by the state. The presence of the other alternate sexualities needs to be brought to fore before they might be rendered any formal recognition. However, such exercise is riddled due to the very fluidity and latent aspects of sexuality. The aspects of Frasers understanding of “radical democracy” help in this context by allowing us to image a plurality of public spheres within the same democratic structure. Such plurality helps in a better articulation of interest and opinion by the groups which are otherwise invisible or mobile.

Second, there is a tendency within the state structures to define the sexuality of the individuals in terms of biological markers, which can be studied and classified through medical sciences. However, such binding of the LGBTQI identity might lead to inconsistent results and observations. Foucault (1978) has observed the attempt of the social discourse to control and suppress the sexualities of the individuals through stereotyping of the sexuality itself. Through such stereotyping of alternate sexualities, the majority attempt to rip the LGBTQI off their moral integrity as an equal citizen of the state, and thus degrade the dignity of the individual. The Transgender Persons Act of 2019 (Government of India, 2019) is also based on similar biological markers for identification of the transgender status. Such understanding, when linked with the conditionality of undergoing SRS creates further stereotype for the persona having alternate sexuality. The ILGA (2020b) report did a comparative study of the legal framework in different countries regarding the status of gender identity and provisions regarding the same and came out with the observation that though India recognizes the transgender identity and provides for a legal procedure for change in one's transgender identity, the conditions of medical certification become a hindrance in the process. Another report by ILGA (2020a) took note of the impact and implications of the so-called “conversion therapies” for LGBTQI groups and argued that most of the medical frameworks are based on certain stereotyping and heteronormative understanding of the alternate sexualities, which tend to view the LGBTQI groups as suffering from some anomaly. This maligns the very premise of a benevolent concern towards the alternate sexualities. While a change in this perception is already under way at the international forums, the same is yet to be adhered to in national laws and outlook.

Thirdly, any rational understanding of the alternate sexualities and gender identity should recognize the fluid nature of such identity. Since the gender identity and sexuality is more a function of choice, it cannot be marked through biological markers. Butler (1999, 2011) has understood the gender identity in terms of a performative exercise which is carried out within a normative framework. Given the multiplicity of social roles performed by any individual, the contextual normative framework of the individual keeps changing, and so does the performative role of any gender. Thus, by crystallizing the sexuality of the persons, the state might again be fixating a certain identity which may or may not be desired by such person. It needs to be recognized that the choice of self-expression of one's sexuality should be allowed to be exercised without any crystallization of identity in terms of stereotypes and tags. This is probably the reason behind a sizable proportion of persons having alternate sexualities not revealing their sexual identity before the society (AIDS Bhedbhav Virodhi Andolan, 1991; UNDP, 2016). By following a blanket approach of defining alternate sexualities under the umbrella term of “transgender”, the state organizations often add to the stereotyping of the persona with alternate sexualities (UNDP, 2016; NALSA judgment 2014). The intention of the state, in such context, should be to ensure that no one is forced to express one's sexuality without one's choice. For doing this, it might not be necessary to formulate specific population registers or identity cards.

Just like a heterosexual person is not asked to reaffirm one's heterosexual status, a person having a queer identity should not be forced to confirm one's identity.

The fourth riddle in the course of securing the concerns of alternate sexualities relates to the strategy to be adopted for the LGBTQI groups. The case of the alternate sexualities is unique owing to its dispersed presence throughout the social fabric. The minority status of the LGBTQI cannot be seen at par with the status of the oppressed castes or classes. The spatiality of concerns that distinguish the LGBTQI as a group is based on “yardsticks of discrimination, social acceptance and constitutional guarantee to freedom and liberty” (Joseph, 1996, pp. 2229). Thus, the concerns of the LGBTQI might not be adequately addressed through strategies of redistributive justice, as done in the case of caste and class issues. Instead of an attempt to follow an approach of redistributive justice (see Fraser, 1997), what is needed is a recognition of the differences and an accommodative stance, for which state can perform a role of a facilitator. There is an urgent need to move beyond a restrictive understanding of identity. Such broader understanding would not only allow the state to approach the issues in a more inclusive manner, but also make the invisible instances of injustice and subordination of the multifarious congregation of alternate sexualities come to fore. Such change might not be possible with the help of legal system alone. It would require a coordinated and multi-sited effort to facilitate a change in the ways the we understand the society. It is also important to remember that the path of redistributive justice might further complicate the challenges faced by alternate sexualities. Thus, a prudent option appears to be a path of identity affirmation and acceptance of difference, rather than resorting to a deconstructive strategy (see Fraser, 1997).

Finally, a major challenge in the schema of justice to the alternate sexualities lies in the political implications of decisions of the state. When the status of the LGBTQI is affirmed by the state, it creates a space of deliberation for the consequential rights of the LGBTQI, which have been hitherto suppressed due to their “invisible” status. For instance, when the act of homosexuality is decriminalized, it paves the way towards the possibility of same-sex couples and families, which in turn raises the issue of another set of rights relating to a family comprising of same-sex partners. Another set of rights that become possible to imagine are the legal recognition of same-sex partners as legal heirs to the each other.⁴ The change in the understanding of gender identity is bound to have a spill-over effect on the understanding of concepts like—family and parenthood⁵ (Butler, 2011; Menon, 2012).

Given the nature of fluidity of sexuality, it might be difficult to form crystallized framework for institutions like family. Similarly, it would be unfair and discriminatory to form established norms or rules for parenting. A prudent framework that comes to my mind is the one based on parameters of care and mutual respect, rather than biological/gender relations. Such revised understanding of concepts like family and such other relations would allow the necessary fluidity to the interpersonal relations, while also giving the state a room to maintain its sovereign care-takers role. However, for this to happen there is a need to escape the gendered perspective on private matters and a shift towards a framework of care and concern.

The modern state, as I understand it, is an institutional arrangement with its faith in democracy. The parochialism of the states perspective is due to the foundational presumptive framework of understanding which is based on the logic of binary. However, the democratic underline of the state also gives it a path to welcome the revision in the understanding and meaning of the present practices and traditions. Not to argue that the shift from such binary understanding to an open understanding would lead to an overhaul of the state structures, but the foundational premise of the modern state would remain well founded in the democratic tradition. In this sense,



while the core principles guiding the state would continue to remain the same, it is the set of foundational presumptions that is bound to change with the widening of the perspective.

It appears that the decriminalization of the Section 377 is only the inaugural step in the ambitious, but indispensable, pursuit of justice to the alternate sexualities. Joseph (1996) has argued that “discrimination, tolerance, acceptance and equality can be seen as a continuum” (p. 2229). To use this continuum as a yardstick to measure how far the Indian state has traveled in its pursuit to deliver justice to the alternate sexualities, it would not be incorrect to argue that the Indian state seems to be facing the riddles amidst toleration and acceptance. While there is a long way to go before the alternate sexualities in India could find an unrestricted atmosphere to express their individuality, the trajectory taken by the queer movement as well as the Indian state appears to be moving in a right direction.

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ENDNOTES

- ¹ The alternate Sexualities are often referred to as the LGBTQI+ (lesbian, gay, bisexual, transgender, queer and intersex). Though the term is not exhaustive of the diversity of gender identities, it is used as a generic term to refer to those who do not fit into the heteronormative framework of the society (See ILGA 2020). While there are some differences in the terms—of queer, LGBTQI and alternate sexualities, I admit to have used these terms in an interchangeable manner. (See ILGA 2020)
- ² Here, by “Indian state” I am referring to all the constitutive elements of the state machinery, that is- the executive, the legislature and the judiciary. It is important to make this clarification because each organ of the state has played a significant role in evolving the nature of the Indian Constitution.
- ³ I have deliberately avoided the detailed discussion on how the Section 377 is violative of the Fundamental Rights, as it would take the discussion away from the matter at hand. For a detailed commentary on this aspect (See Navtej Singh Johar case, 2018; NALSA judgment 2014)
- ⁴ This is especially important with regard to issues such as pension and insurance claims, where the norm of heterosexual family is the only logic. Once the status of same-sex families is identified, there would be a need for a subsequent change in such laws.
- ⁵ It is to be noted that “Family” has been defined by the Transgender Person Act, 2019 as a group of people related by blood or marriage or by adoption made in accordance with law. (Chapter 1(2)(c)). While the Act has defined the meaning of the term family, it does not comment anything about the possibility of same-sex family.

REFERENCES

- Agarwal, S. (2017). Civil and political rights of transgenders Indian constitutional perspective. *International Journal of Law and Legal Jurisprudence Studies*, 4(4), 144–160.

- AIDS Bhedbhav Virodhi Andolan. (1991). *Less than gay- a Citizens' report on the status of homosexuality in India*. AIDS Bhedbhav Virodhi Andolan (ABVA).
- Bubb, A. (2009). Blustering sahibs and section 377. *Economic and Political Weekly*, 44(35), 25–28.
- Butler, J. (1999). *Gender trouble—Feminism and the subversion of identity*. Routledge.
- Butler, J. (2011). *Bodies that matter: On the discursive limits of "sex"*. Routledge.
- Foucault, M. (1978). *The history of sexuality volume 1: An introduction*. Pantheon Books.
- Fraser, N. (1997). *Justice interruptus—Critical reflections on the postsocialist conditions*. Routledge.
- Government of India. (1950). The Constitution of India. <https://legislative.gov.in/constitution-of-india>
- Government of India. (2019). Transgender persons (Protection of Rights) Act 2019.
- Hall, D. E. (2003). *Queer theories*. Palgrave Macmillan. <https://doi.org/10.1007/978-1-4039-1356-2>
- ILGA. (2020a). *Curbing deception: A world survey on legal regulation of so-called 'conversion therapies'*. ILGA.
- ILGA. (2020b). "Trans legal mapping report 2019: Recognition before the law." ILGA. World: ILGA.
- International Commission of Jurists (ICJ). (2006). "The Yogyakarta Principles- Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity". http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf
- International Commission of Jurists (ICJ). (2017). "The Yogyakarta Principles Plus 10—Additional principles and state obligation on the application of international human rights law in relation to sexual orientation, gender expression and sex characteristics to complement the Yogyakarta Principles.": International Commission of Jurists (ICJ).
- Jagose, A. (1996). *Queer theory- an introduction*. New York University Press.
- Joseph, S. (1996). Gay and lesbian movement in India. *Economic and Political Weekly*, 31(33), 2228–2233.
- Kesavananda Bharti case. (1973). Kesavananda Bharati and Ors. v. State of Kerala. Writ Petition (Civil) 135 of 1970. <https://indiankanoon.org/doc/257876/>
- Li, D. H., Rawat, S., Rhoton, J., Patankar, P., Ekstrand, M. L., Simon Rosser, B. R., & Michael Wilkerson, J. (2017). Harassment and violence among men who have sex with men (MSM) and Hijras after reinstatement of India's 'Sodomy Law'. *Sexuality Research & Social Policy*, 14, 324–330. <https://doi.org/10.1007/s13178-016-0270-9>
- Menon, N. (2012). *Seeing like a feminist*. Penguin.
- Ministry of Social Justice and Empowerment. (2014). "Report of the expert committee on the issues relating to transgender persons." New Delhi.
- Mule, N. J. (2018). Human rights questioned: A queer perspective. *Canadian Social Work Review*, 35(1), 139–146. <https://doi.org/10.7202/1051107ar>
- NACO. (2020). *NACO annual report 2018–19*. National AIDS Control Organization. <https://main.mohfw.gov.in/sites/default/files/24%20Chapter%20496AN2018-19.pdf>
- NALSA judgement. (2014). Writ Petition (CIVIL) No. 400 of 2012 (NALSA Judgement). Vol. 5 SCC. 438.
- Navtej Singh Johar case. (2018). Navtej Singh Johar vs Union of India. Writ Petition (Criminal) No. 76 of 2016. https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf
- Naz Foundation Case. (2009). Naz Foundation vs Government Of Nct Of Delhi.
- Sebastian, J. (2018). The opposite of unnatural intercourse: Understanding section 377 through section 375. *Indian Law Review*, 1, 232–249. <https://doi.org/10.1080/24730580.2018.1453748>
- Stern, P. V. D. (Ed.) (2000). *The life and writings of Abraham Lincoln*. The Modern Library.
- The Humsafar Trust. (2015). "Mission Azadi document (MAD)—An advocacy reference manual for LGBTQH rights in India." The Humsafar Trust. <https://humsafar.org/wp-content/uploads/2018/08/Mission-Azaadi-Documents-2015.pdf>
- UNDP. (2016). "Uptake of social protection schemes by transgender population in India." United Nations Development Program.

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