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'WHAT USE IS POETRY?' EXCAVATING TONGUES OF JUSTICE AROUND *NAVTEJ SINGH JOHAR* V. *UNION OF INDIA*

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Abstract The Supreme Court of India, in *Navtej Singh Johar* v. *Union of India*, read down Section 377 Indian Penal Code ('S. 377'), decriminalizing sexual relations between consenting adults, irrespective of sexual orientation or gender identity. This marks the culmination of a long struggle for the rights of queer peoples in India and sets up several signposts for a transformative constitutionalism that bear recall. The judicial discourse on the category of "sex" in *Johar* points us towards pathways to historicise law as a site of cultural production. This essay looks at interpretive strategies, sources, intellectual and constitutional histories that *Johar* draws upon, as also the intersections and interconnections between this and other (earlier and later) judgments in India on the right to personal liberty exploring in depth the renewed emphasis on the criticality of autonomy, liberty and dignity in *Johar*. It is argued also that the eclectic approach to decriminalizing homosexuality that we see in *Johar* – through song, performance, poetry and the outpouring of emotion is testimony to the far-reaching influence of peoples' movements on courtroom cultures in India.

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I. INTRODUCTION

"Oh my body, make of me always a man who questions!"

Frantz Fanon, *Black Skin White Masks*[1]

The Supreme Court of India, in *Navtej Singh Johar* v. *Union of India*,[2] read down Section 377 Indian Penal Code ('S. 377'), decriminalizing sexual relations between consenting adults, irrespective of sexual orientation or gender identity. A process that began with the 2009 judgment of the Delhi High Court in *Naz Foundation* v. *State (NCT of Delhi)*,[3] this decision, delivered while a curative petition filed by Naz Foundation and other petitioners was pending before the Supreme Court, marked the culmination of the judicial twists and turns in the matter of homosexuality and the rights of Lesbian, Gay, Bisexual, Transgender, Queer, Intersex (LGBTQI+) persons and Gender Nonconforming (GNC) persons. Henceforth in this essay I use "queer" to designate all peoples who through their lives, choices and movements uproot/challenge the heteronorm. In speaking about *Johar* likewise I signal the large and diverse constituency of queer communities, queer rights advocates and queer movements in the country whose incessant campaigns, petitions and determination at enormous personal and collective risk left the Supreme Court with little option but to review its stand on Section 377 IPC.

The reading down of S. 377 IPC by the five-judge bench is historic for several reasons: gains to do with liberty and freedom on the ground; constitutional interpretation; court craft and the uses of emotion, literature and empathy in law; turns in jurisprudence and the use of analogous grounds with far-reaching implications; the creation of courtroom utopias through the deployment of the language of resistance; and a trenchant critique of majoritarianism. Most importantly however, in this essay, I hope to point to the genealogies of insurgent and transformative constitutionalism in India that this judgment purports to 'inaugurate' – if only to trace an intellectual history of rights on the Indian sub-continent that undergird and anticipate the constitution, and cut a path through the dense, thorny thickets of 'tradition' towards the rainbows on the horizon. Important as this judgment is, it needs to be situated within the larger discourse of civil and political rights imperiled in the present moment of right wing Hindu majoritarianism and its dismantling of constitutional regimes at different levels in India today.

Constitutional jurisprudence, now as before, is a political project, and I hope to signpost the contours of this politics in the present endeavour. Because this

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1 Fanon, Frantz, Black Skin, White Masks 181 (Charles Lam Markman trans., London, Pluto Press, 2008) (1952).

2 (2018) 10 SCC 1 : AIR 2018 SC 4321 ('*Johar*').

3 2009 SCC OnLine Del 1762 : (2009) 160 DLT 277 ('*Naz*').

judgment, in my view, does not lend itself to a plain and linear reading of 'the law' or 'the Constitution' or 'rights' in Blackstonian terms, I will engage a different method (or anti-method) in the reading that I present here. I hope that this will help us excavate the constitutional archive and the languages of justice, which like the constitution are spatially rooted. We may then understand better the shards and fragments of historical memory (including constitutional memory) in relation to the Constitution and its specific, analogic and generic possibilities.

II. CONSTITUTIONAL LYRICISM/ LYRICAL CONSTITUTIONALISM

In trying to answer the question put to her, "What use is poetry?" poet Meena Alexander reflects poignantly on the place of poetry in our life worlds:

> "We might think of history as what is rendered up of the past in recorded memory, recorded by those who are in a position to do so, having access to the power of public inscription. But there is an important underground stream of history I have learnt to recognize: secret letters, journals, inscriptions, scribblings on bits of paper smuggled out of prisons. Poetry closer in intent, it seems to me, to this buried stream… *takes as its purview what is deeply felt and is essentially unsayable*; that is the paradox on which the poem necessarily turns. A poet uses language as a painter uses colour, a primary material out of which to make art. But language that is used all the time and all around us…needs to be rinsed free so that it can be used as the stuff of art".[4]

The striking element in *Johar* is precisely the Court's struggle with language – its struggle to find a language that is "rinsed free" of the accretions of prejudice and the tyranny of the written record that it was deliberating on. Carnivalesque recall of song, ballad, theatre, poetic lament and the performance of public apology help free constitutional interpretation from the shackles of precedent, even while excavating and resurrecting dissents. Although the court's move is driven by the absolute power it wields over authoritative interpretation (and herein lies the contradiction), the languages of the law, it would seem from a plain reading of this judgment, are inept in expressing the raw emotion of unshackling sexual expression and unburdening the guilt 'history' has imposed on the Constitution; the Court then takes measured, authoritative steps through cases, interpretive hurdles, analogies, sites of memory, dissents,

[4] Meena Alexander, *What Use is Poetry?* (2013), https://www.worldliteraturetoday.org/2013/september/what-use-poetry-meena-alexander (last visited Nov. 26, 2018) (emphasis added).

and narrations of lived experience – individual and collective, to decisively rule that S. 377 can no longer be applied to consenting adults.

Since the invocation in each judgment presents a discursive rupture in constitution-speak from the bench, it is pertinent to begin with a look at the literary overtures (that figure either at the very beginning or very early in each judgment). With the exception of Justice Indu Malhotra, the literary is spectacular and for a moment when time stands still, the bench, the petitioners, and their counsel stand at the borders together, celebrating being-at-the-borders, as the (shared) defining trait of the radical subject.

Paraphrasing Goethe, Justice Dipak Misra opens with: "I am what I am, so take me as I am"[5]

Shakespeare, *Romeo and Juliet*, Act 2, Scene 2 (the iconic balcony scene): Juliet- "…What's in a name? That which we call a rose by any other name would smell as sweet."[6]

"'The love that dare not speak its name' is how the love that exists between same-sex couples was described by Lord Alfred Douglas, the lover of Oscar Wilde, in the poem *Two Loves* published in 1894 in Victorian England."[7]

> Leonard Cohen: "Democracy
>
> It's coming through a hole in the air
>
> …
>
> It's coming from the feel
>
> that this ain't exactly real
>
> or it's real, but it ain't exactly there,
>
> from wars against disorder,
>
> from the sirens night and day,
>
> from the fires of the homeless

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[5] *Johar*, Misra, J., ¶ 1. Goethe's lines in the last stanza of his poem *Lover in all Shapes* (1815) are: "As nought diff'rent can make me/As I am thou must take me!/If I'm not good enough,/ Thou must cut thine own stuff/As nought diff'rent can make me,/As I am thou must take me!"

[6] *Johar*, Misra, J., ¶ 3.

[7] *Johar*, Nariman, J., ¶ 270.

from the ashes of the gay

Democracy is coming…"[8]

Drawing on an archive of collective memory, Justice Indu Malhotra:

> "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution."[9]

This lyrical opening of the Constitution unmasks the history of violence visited on queer peoples, both state (including judicially sanctioned violence) and non-state (actors ranging from immediate families and kin to mobs in public places) - the violence of incarceration (can we read Alfred Douglas without recalling Oscar Wilde's *Ballad of Reading Gaol* and the price he paid for being gay?); the pain of death; the violence of exclusion, excommunication, profiling, segregation, and stigma perpetrated by violent legal regimes for seven decades in the constitutional era.

"Through love's great power to be made whole

In mind and body, heart and soul –

Through freedom to find joy, or be

By dint of joy itself set free

In love and in companionhood:

This is the true and natural good.

To undo justice, and to seek

To quash the rights that guard the weak –

To sneer at love, and wrench apart

The bonds of body, mind and heart

With specious reason and no rhyme:

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[8] *Johar*, Chandrachud, J., ¶ 385.
[9] *Johar*, Malhotra, J., ¶ 644.

> This is the true unnatural crime."[10]
>
> (Vikram Seth)

The play "Contempt" by Danish Sheikh[11] written and performed after *Suresh Kumar Koushal* v. *Naz Foundation*[12] as also the poem by Vikram Seth (above) written at the same time, and Justice Leila Seth's calling out of "judicial pusillanimity" are poignant and memorable inscriptions of the courtroom travails — indeed the *judicial humiliation* —of queer peoples in India and the actual and palpable dangers of the deeply entrenched heteronorm that drives the homophobic blurring of the distinct spaces of court and street.[13]

The continuities between the lyrical constitutional reasoning in *Johar* and similar situations that are analogous at different levels would require a close examination if we are to grasp the full import of this decision. What does violence and the loss of liberty do to our lifeworlds? Resistance literatures have shaped the civil liberties and human rights struggles for civil and political rights across the country over decades into the continuing present. Where does poetry (and literature) derive its power from?

> "There have been moments in our shared human history in particular parts of the world where poets and also singers have been banned. But why? What is there to fear? Precisely this: the force of the quicksilver self that poetry sets free— desire that can never be bound by laws and legislations. This is the force of the human, the spirit level of our lives."[14]

These lines certainly allude to the time Alexander spent in India in the 1970s, and the memory of lives and literatures in peril, but also importantly the power of 'quicksilver selves set free.' In 1971, when three revolutionary poets were arrested under the *Andhra Pradesh Preventive Detention Act* 1970, arguing in their defense civil liberties lawyer KG Kannabiran forced the court to witness the performance of revolutionary poetry:

> "The hearing was totally uninhibited and free. The courtroom was packed and our request to permit the poets to read out the poems impugned by the detention orders was acceded to… [T]he best was Cherabandaraju's reading. It was a fine satire on Indira Gandhi's socialism set to rhythm and tune.

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[10] Quoted in *Johar*, Chandrachud, J., ¶ 406.

[11] DANISH SHEIKH, *Contempt*, *in* GLOBAL QUEER PLAYS (London, Oberon Books, 2018).

[12] (2014) 1 SCC 1 : AIR 2014 SC 563.

[13] For a useful discussion on humiliation see HUMILIATION: CLAIMS AND CONTEXT (Gopal Guru ed., New Delhi, Oxford University Press 2009).

[14] Alexander, *supra* note 4.

> This device demonstrated the untenability of the detention orders against these three poets."[15]

These were petitioners under arrest, challenging their incarceration by presenting the possibilities of constitutional utopias to the court in verse.[16] This, then, is but one fragment of the genealogy of the *constitutional lyricism* that is embodied and situated within the particularities of place, cultural politics and history uniquely Indian, urging us to excavate deeper layers of knowledge and reasoning embedded within the intellectual histories of constitutionalism in India. Tracing this genealogy leads us to a different place. It is true that poetry and the literary imagination know no boundaries, and has a peculiarly universal ring even while being rooted in place and marked in time. And yet, the specificities of location enrich and deepen the literary in unfathomable ways. we consider for instance, the poetry of the Ambedkari Shahirs who recited, sang and performed the constitution of free India even while freedom (and indeed the constitution) was still in the making, our senses and sensibilities open out to the rich and continuing traditions of *Ambedkari Chalwal* now facing the threat of criminalization for singing truth to power:

> "Know Bhim, ignorant one
>
> It is the majesty of Bhim that has broken the shackles of slavery
>
> Aaji brought home joothan from the village
>
> Never any warm bhakar-bhaji in your home
>
> Your family name, village slave – not the name of your family
>
> Clothes from the dead covered your body
>
> Even so, half covered, half naked
>
> The wealth of the taluk stayed in the treasury
>
> Ajoba walked all the way to pay his dues

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[15] K.G. Kannabiran, The Wages of Impunity: Power, Justice and Human Rights 300 (Hyderabad, Orient Longman, 2003). K. Yadava Reddy @ Nikhileswar, B. Bhaskar Reddy @ Charabanda Raju, A.V. Raghavachari @ Jwalamukhi v. Commissioner of Police, AP & State of AP, WP Nos. 3115, 3116 & 3117 of 1971. High Court of Judicature at Hyderabad, September 20, 1971. O. Chinnappa Reddy, J. & A.D.V. Reddy, J. (On file with author); Jwalamukhi v. State of A.P., ILR (1973) AP 114.

[16] A detailed discussion of these cases is presented in Kalpana Kannabiran, "The Struggle is its Own Reward", SEMINAR 721 September at 29-38 (2019) 2019.

> The majesty of Bhim brought motor gaadi to your doorstep
>
> Bhim's compassion has made us all Sahabs, Waman
>
> All have become Sahabs, have you been left behind?
>
> Bhim took leave saying, 'henceforth you are your own master.'"[17]

Wamandada Kardak (1922-2004)

In enacting ways of being human, says Eze, "[n]arratives…script human rights."[18] This reflection on the power and place of the literary in our constitutional imaginary takes us to a long history of resistance against authoritarianism, arbitrary rule and the orders of caste and brahmanical patriarchy ('rules by law') by poets and creative writers in independent India (and also to Wilde, Goethe, Shakespeare and Cohen no doubt). Needless to say, these are socio-political and legal regimes premised on the violently enforced norms of what Mieli calls "genital heterosexuality" and "educastration."[19] Through *Johar*, we interrogate punitive and repressive legal regimes and homophobic social orders that militate against constitutionalism with the ever-present threat of violence, incarceration and criminalization. What turn does this embodiment of the constitution signal to us, in terms of other embodiments, and performances of resistance against the repressive hetero-state and hetero-majoritarian regimes? These are compelling questions that must steer the court to constantly keep sight of its own moral moorings.

III. EMOTION, EMPATHY AND JUDICIAL REASON

> "I am who I am, doing what I came to do, acting upon you like a drug or a chisel to remind you of your me-ness, as I discover you in myself"[20]

Johar offers us a way of absorbing the coruscating legal filters that illuminate emotions, testimonies and suffering rooted in life under a criminal law

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[17] Quoted in Vaishali Sonavane, "Lived Experiences and Cultural Renaissance: A Study of Dalit Women in Urban Employment in Maharashtra" (October 2018) (unpublished Ph.D. dissertation, Council for Social Development & Tata Institute of Social Sciences, Hyderabad) (on file with author).

[18] Chielozona Eze, Ethics and Human Rights in Anglophone African Women's Literature: Feminist Empathy vii (Chicago: Palgrave Macmillan, 2016).

[19] "The objective of educastration is the transformation of the infant, in tendency polymorphous and "perverse", into a heterosexual adult, erotically mutilated but conforming to the Norm." Mario Mieli, Towards a Gay Communism: Elements of a Homosexual Critique 4 (David Fernbach and Evan Calder Williams trans., London: Pluto Press, 2018).

[20] Audre Lorde, Sister Outsider: Essays and Speeches 301 (Berkeley, Crossing Press, 2007).

regime that enforces silence, the muting of expression and the denial of dignity – so vital to a minimalist sense of self and identity. The emotion-reason binary comes apart in the process, with emotion suffusing reason in the interpretation of fundamental freedoms. In the process however, there is another binary that is installed: the juxtaposition of the right to love against "just the sexual act,"[21] also expressed through the assertion that "the right that makes us human is the right to love."[22] The traditional approach to reckoning with emotion in the deliberations around law has been that although raw emotion will indeed figure in courtrooms, not all emotion need be admissible – "the conventional story of law is that before judgment these feelings will be categorized as admissible or inadmissible, and disregarded when necessary."[23] In this hierarchy of emotion then, "love" in a heterosocial order must be elevated to the quintessentially human (therefore legitimate emotion) and sifted apart from the more base ("animal") pleasures of the body — desire, sexual activity and sexual expression as ends in themselves. What the appeal to the "right to love" in the *Johar* court does, perhaps inadvertently, is to fit homoeroticism into the strai[gh]tjacket of heterosexual norms, undermining thereby the multiplicities of autonomy, choice and indeed emotion. Yet, as Sara Ahmed observes, "emotions 'matter' for politics; emotions show us how power shapes the very surface of bodies as well as worlds. So in a way, we do 'feel our way'"[24] – in courts of law and outside. How do we move towards a better comprehension of the emotional terrains of sexual activity?

This judgment, *Johar*, marks the figure of Oscar Wilde (through his lover Lord Alfred Douglas) -- Wilde has earlier been referred to in rather demeaning fashion by Justice Krishna Iyer in confirming the sentence of a 70-year old man convicted of raping a 6-year old child, a girl: "No one is too old to become good and De Profundis was written in prison by a sex pervert who was also a literary genius."[25] Requiring close, critical scrutiny is both the description of Wilde and the easy equivalence between a man convicted for the crime of rape that involves the infliction of immeasurable harms (in this case on a child) and a person convicted for triggering (judicial) disgust because he is homosexual – not on the finding of inflicting any harms on another person. It would appear that in this assertion, Iyer, J. is following in the footsteps of Gandhi who is reported to have responded to a question on the relationship between arts and society by saying the "artists can be highly immoral, citing

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[21] *Section 377: The Supreme Court Spoke for 1.3 Billion Indians*, Bar and Bench, https://barandbench.com/menaka-guruswamy-interview-section-377-lgbtq/ (last visited Jan. 2, 2019).

[22] Justice Leila Seth quoted by Chandrachud, J. in the opening para of his judgment. Johar, Chandrachud, J., ¶ 1.

[23] Susan Bandes, *Introduction*, in The Passions of Law 1, 1 (Susan Bandes ed., New York & London, New York University Press, 1999).

[24] Sara Ahmed, The Cultural Politics of Emotion 12 (Edinburgh, Edinburgh University Press, 2004).

[25] Ram Kishan Aggarwala v. State of Orissa, (1976) 2 SCC 177 : AIR 1976 SC 1774. Justice Krishna Iyer and Justice Y.V. Chandrachud.

the example of Oscar Wilde."[26] Martha Nussbaum dwells on the powerful role that disgust plays in law, citing the instance of the trials of Oscar Wilde, where even while refusing to name the acts being punished, the judge makes his disgust amply evident through his sentences.[27]

We witness a mirroring of this translation of disgust into judicial reasoning and legislative enactment in the Indian context – i.e., to use Redding's words, the "legalized operation of the political emotion of disgust — or put another way, the '*rule of disgust*'".[28] The Delhi High Court in *Naz* specifically called out disgust in its reading down of S. 377, rejecting the arguments of the Additional Solicitor General that "In our country, *homosexuality is abhorrent and can be criminalised* by imposing proportional limits on the citizens' right to privacy and equality" and taking on board the petitioners' plea that "[p]ublic animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14."[29]

In a shocking reversal of *Naz*, the Supreme Court, in *Koushal*, in 2013, did precisely this by taking on board arguments by the petitioners that "carnal intercourse was criminalized because such acts have the tendency to lead to unmanliness and lead to persons not being useful in society";[30] that "[t]he High Court is not at all right in observing that Section 377 IPC obstructs personality development of homosexuals or affects their self-esteem because that observation is solely based on the reports prepared by the academicians and such reports could not be relied upon";[31] that any insertion into the body with the aim of satisfying unnatural lust would constitute carnal intercourse";[32] that "the basic feature of nature involved organs, each of which had an appropriate place. Every organ in the human body has a designated function assigned by nature. The organs work in tandem and are not expected to be abused. If it is abused, it goes against nature. The code of nature is inviolable. Sex and food are regulated in society. What is pre-ordained by nature has to be protected, and man has an obligation to nature" and "that if the declaration made by the High Court is approved, then India's social structure and the institution

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[26] Martha C. Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, in The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US 164, 175 (Zoya Hasan et. al. eds., New Delhi, Oxford University Press, 2018).

[27] Martha C. Nussbaum, *Secret Sewers of Vice: Disgust, Bodies and the Law*, in The Passions of Law 19-62 (Susan Bandes ed., New York & London, New York University Press, 1999); *See also* Sara Ahmed, The Cultural Politics of Emotion 82-100 (Edinburgh, Edinburgh University Press, 2004).

[28] Jeffrey A. Redding, *The Rule of Disgust? Contemporary Transgender Rights Discourse in India*, in The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US 195, 198 (Zoya Hasan et. al. eds., New Delhi, Oxford University Press, 2018). (emphasis added)

[29] *Naz*, ¶ 91. (emphasis added).

[30] *Koushal*, ¶ 16.9.

[31] *Koushal*, ¶ 16.4.

[32] *Koushal*, ¶ 16.10.

of marriage will be detrimentally affected and young persons will be tempted towards homosexual activities";[33] that the right to sexual orientation "can always be restricted on the principles of morality and health;" that "promotion of majoritarian sexual morality was a legitimate state interest";[34] that the reading down of S. 377 by the Delhi High Court was nothing short of legislating from the bench;[35] and finally, the *de minimis* reasoning which legitimized judicial disgust and judicial contempt in a constitutional court:

> "While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."[36]

The adoption of a 'disinterested' stance with respect to a penal provision for individual actions and ways of life that did not willfully or otherwise inflict harm on another person or society, results in the judges "unwittingly giving disproportionate weight in [their] doctrinal calculus to the interests of those whose perspectives come most naturally to [them]".[37]

Although *Naz* was struck down by the Supreme Court in *Koushal*, the Privacy Bench in *K.S. Puttaswamy* v. *Union of India*[38] opened *Koushal* for detailed re-examination and prepared the ground for *Johar*. With reference to the reasoning in *Koushal* that "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted," the court observed that this "is not a sustainable basis to deny the right to privacy", and that "the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular."[39]

Dismissing the second part of the reasoning in *Koushal* that S. 377 is a largely unenforced provision, the Privacy Bench observed,

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[33] *Koushal*, ¶ 16.12.
[34] *Koushal*, ¶ 16.14.
[35] *Koushal*, ¶ 16.14.
[36] *Koushal*, ¶ 43.
[37] Thomas B. Colby, *In Defense of Judicial Empathy*, 96 Minnesota Law Review 1944, 1946 (2012).
[38] (2017) 10 SCC 1 : AIR 2017 SC 4161.
[39] *Puttaswamy*, Chandrachud, J., ¶ 126.

> "sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment…The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfillment of one's sexual orientation, as an element of privacy and dignity."[40]

While S. 377 targets homosexuality as a practice, the *Andhra Pradesh Telangana Areas Eunuchs Act* ('Eunuchs Act') is a declaration of the illegality of transgender persons – transwomen – for being transgender, in addition to bringing them under the punitive shroud of S. 377. Playing a powerful role in law, disgust in this case has historically focused not merely on the *acts* of persons, but on the entire category of persons themselves, bolstering social avoidance with criminal legislation that has no *prima facie* justification. How is disgust represented in the law?[41]

Sexual identities and practices of embodiment that challenge the heteronorm have had a historical presence on the Indian subcontinent.[42] Transgender persons have also had a presence recognized and regulated by law in India — the recognition was of stigmatized, criminalized practices of embodiment that were subjugated by the state. It is from this position that the transgender subaltern speaks.[43] The *Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 F*,[44] an enactment "for the registration and control of eunuchs" was enacted in the Nizam's Dominions, retained on the statute books in Andhra Pradesh after independence, has been in force since 1919 explicitly to control "eunuchs" — i.e. people who were both "males in female dress" and those who had undergone "emasculation."

Section 1-A of this Act states, "a eunuch shall for the purpose of this Act include all persons of the male sex who admit to be impotent or who clearly appear impotent on medical inspection." Section 2 of the Act provides for the maintenance of a register by the government that will contain "the names and place of residence of all eunuchs residing in the City of Hyderabad or at any

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[40] *Puttaswamy*, Chandrachud, J., ¶¶ 127-8.

[41] Martha C. Nussbaum, *Secret Sewers of Vice: Disgust, Bodies and the Law*, in The Passions of Law 19-62 (Susan Bandes ed., New York & London, New York University Press, 1999.

[42] Leonard Zwilling and Michael J. Sweet, "*The Evolution of Third-Sex Constructs in Ancient India: A Study in Ambiguity*, in Invented Identities: The Interplay of Gender, Religion and Politics in India 99-132 (Julia Leslie and Mary McGee eds., New Delhi, Oxford University Press, 2000); Devdutt Pattanaik, "The LGBTQ Movement in India", Seminar 713, January at 104-107 (2019).

[43] Kalpana Kannabiran, "The Complexities of the Genderscape in India", Seminar 672, August at 46-50 (2015).

[44] Act No. XVI of 1329-F ('Eunuchs Act') (on file with author).

other place…and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or abetting the commission of the said offences…" Unnatural offences were those acts covered under S. 377. Section 4 of the Act titled: "Registered eunuch found in female clothes" reads as follows: "Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with imprisonment for a term which may extend to two years or with fine or both." Section 5 provides for the punishment of a eunuch with imprisonment if it is found that he "has with him or in his house or under his control" a boy who is less than sixteen years old. There is no exception made for the possibility that this boy may be a biological or adoptive child of said person. Section 6 provides that the District Magistrate may direct that any such boy be delivered to his parents or guardian, "if they can be discovered and they are not eunuchs; if they cannot be discovered or they are eunuchs, the Magistrate may make such arrangement as he thinks necessary for the maintenance, education and training of such boy…" Sections 5 and 6 explicitly bar eunuchs from the right to relationship, family, child custody and parental autonomy. Finally, Section 7 penalises consensual and non-consensual emasculation and abetment to emasculation with imprisonment for a term, which may extend to seven years.

This legislation — challenged in the High Court at Hyderabad in *Vyjayanti Vasanta Mogli* v. *State of Telangana* in 2018 and suspended pending final decision in the case[45] — urges us to crack open the crevices that shield homophobia/transphobia from view, and map its different locations and forms, institutional, social and emotional, as also the proliferating vulnerabilities it produces.

Judicial and legislative discourse on the transgender question is riven with contradiction. While on the one side the *Eunuchs Act* foregrounds the repressive regimes of "rule by law,"[46] three documents belonging each to the legislature, executive and judiciary[47] articulate clearly the "ontoformative character of

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[45] IA No. 1 of 2018 in WP (PIL) No. 44 of 2018. The High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, September 18, 2018 (On file with author) ('*Vyjayanti Mogli*').

[46] *Johar*, Chandrachud, J., ¶ 5.

[47] (1) Report of the Expert Committee on the Issues Relating to Transgender Persons, Ministry of Social Justice and Empowerment, Government of India, January 2014; (2) Bill No. XLIX of 2014, *The Rights of Transgender Persons Bill*, 2014, passed by the Rajya Sabha on 24 April, 2015, the first private member's bill to be passed in 45 years; (3) Supreme Court of India in *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438 : AIR 2014 SC 1863 ('*NALSA*').

gender."[48] Through a "complex co-construction,"[49] they rupture the seamlessness of Article 15.

The Report of the Expert Committee moved the Supreme Court to declare in *NALSA* that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.[50] In dislodging the binary of sex and its stability, the Expert Committee states quite plainly that "we first need to understand that *none of us are born with a gender…*"[51] The most eloquent discursive shift is in the conceptual leap from "emasculation" (a punishable offence in the *Eunuchs Act*) to "sex reassignment surgery" (articulated as a pro-active remedial measure in the bill).

There are many different ways in which emotions were carried into the court – *Naz*, *Koushal*, *NALSA*, and *Johar*, not to speak of the many different ways in which emotions strike at an unflinchingly repressive pre-court criminal justice system, notably the police. There is also a layering of this emotion that seems to roughly correspond to the enduring queer diversities – for there is here a layering of legitimacy, voice and visibility and complex intersections in status, position, politics and lived realities that do not allow for a seamless approach to 'LGBT rights' unmindful of class, caste, community and cis/non-cis persons.[52] In terms of criminalization as well, there is no single standard of mis-treatment, as we saw with the *Eunuchs Act*. While S. 377 could be applied to entire communities of queer persons, states like Telangana have additional punitive regimes that magnify and intensify suffering and juridical humiliation through the perpetuation of stigma and disgust by law for transwomen, or 'eunuchs' as the law calls them. The suffering of transmen does not enter this account and is obfuscated and invisibilised through homogenizing discourses on/of homophobia. Transgender persons were not confined by this special legislation alone – nor were they the only 'class' to be confined in this manner. The Delhi High Court in *Naz* makes a reference to the *Criminal Tribes Act*, 1871 ('CTA'), which the judges say "was amended to include eunuchs" as a 'criminal tribe':

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48 Raewyn Connell, *Transsexual Women and Feminist Thought: Toward New Understanding and New Politics*, 37(4) SIGNS 857, 866 (2012).

49 *Id.*, at 867.

50 *NALSA*, ¶ 1.

51 Report of the Expert Committee on the Issues Relating to Transgender Persons, 6 (Government of India: Ministry of Social Justice and Empowerment, January 2014) (emphasis added).

52 The statement by Brahmin transwoman Lakshmi Narayan Tripathi endorsing the construction of the Ram temple in Ayodhya and the statement by LGBTQI+ persons and collectives condemning it, is a case in point. https://www.thenewsminute.com/article/lgbtqia-community-condemns-trans-activist-laxmi-narayan-tripathis-ram-temple-comment-92152 (last visited Dec. 2, 2018).

> "During Colonial period in India, eunuchs (hijras) were criminalised by virtue of their identity. The Criminal Tribes Act, 1871 was enacted by the British in an effort to police those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal. In 1897, this Act was amended to include eunuchs. According to the amendment the local government was required to keep a register of the names and residences of all eunuchs who are 'reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 IPC.'"[53]

The Criminal Tribes Act,1871 (Act XXVII of 1871 dated 12 October 1871) was sub-titled "An Act for the Registration of Criminal Tribes and Eunuchs"—the first part of the Act pertained to criminal gangs and tribes, the second part to eunuchs. According to Section 24 of the act, a eunuch was 'deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent'. There are here multiple levels in which the surveillance is embedded for "eunuchs" – while deportment is one, masculinity in the law is defined as the capacity for heterosexual performance, which has a far wider and loosely constructed ambit. The limitless illegality of this legal construction is one bears important lessons for our understanding of what Chandrachud, J. calls "rule by law"[54] in the present time. The creation of an environment of revulsion (caused by the *legal* validation of the "addiction" of certain communities to crime, kidnapping and castration of male children) serves to justify restraints and restrictions by law to be placed on certain bodies constructed as Other within the political context of colonisation.[55] In the CTA we see the coming together of heterosexualisation and racialization (racial profiling in fact) that lie at the foundations of the hetero-colonial state in very

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[53] *Naz*, ¶ 50. Martha Nussbaum makes a reference to this criminalisation eunuchs "as a 'criminal tribe,' that is, as outlaws by nature, in 1871" but the legislative history of the CTA is presented inaccurately by the Delhi High Court in *Naz*, an inaccuracy repeated by Nussbaum in her recent essay. Martha C. Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, in THE EMPIRE OF DISGUST: PREJUDICE, DISCRIMINATION, AND POLICY IN INDIA AND THE US 164, 175 (Zoya Hasan et. al., eds., New Delhi, Oxford University Press, 2018). *See* note 55 below for the legislative history in a nutshell.

[54] *Johar*, Chandrachud, J., ¶ 5.

[55] The Criminal Tribes Act, 1871 was amended by Act II of 1897 introducing changes in the definition of criminal tribes and introducing reformatory settlements for children forcibly separated from their parents. The 1897 amending act makes no reference to "eunuchs" nor does it amend the sub-title. Subsequently, the Criminal Tribes Act, 1911 (Act III of 1911) which replaces Act XXVII of 1897, drops the section pertaining to "eunuchs". Eight years later in 1919, the Nizam's government in Hyderabad introduced the *Andhra Pradesh* (*Telangana Areas*) *Eunuchs Act* that reproduced the provisions of CTA, 1871 pertaining to "eunuchs," and introduced the forced removal of children provisions of CTA, 1911 for "eunuchs" as well. This law was challenged in 2018 in the High Court at Hyderabad in *Vyjayanti Mogli*.

similar ways with distinct consequences for the large number of groups incarcerated by this law even after its repeal. The Delhi High Court, though, in Naz takes a rather simplistic view of this co-habitation within the frame of the law. It is this interdisciplinary intersectionality that seems to escape the attention of the court (even though it relies on an essay on the continuing criminalization of the de-notified tribes) when it declares rather flatly that "[w]hile this Act has been repealed, the attachment of criminality to the hijra community still continues."[56] The attachment of criminality on all communities listed in the CTA continues in the colonial mode under constitutionalism – and herein lies a deep contradiction. The complex networks of intersecting analogies will be the focus of a following section.

The recitation of freedom and dignity in *Johar* foregrounds the centrality of empathy to judicial reasoning.[57] This could, as we saw earlier involve the recitation of poetry by the client in an attempt to draw the judge into a circle of empathy, just as the expression of judicial empathy could be the recitation of poetry by the bench. Important also, as Justice Stephen Breyer writes, is the capacity of a judge to empathise with those unlike him – for a judge to say quite plainly as he did, "I'm asking because I don't know,"[58] – not merely stay on the side of those who share our lifeworlds:

> "…[W]hen you are a judge…it's important to be able to imagine what other people's lives might be like, lives that your decisions will affect. People who are not only different from you, but also very different from each other… And this empathy, this ability to envision the practical consequences on one's contemporaries of a law or a legal decision, seems to me to be a crucial quality in a judge."[59]

Or we could, after Mieli, simply pose the question: Does the recourse to poetry signal the move by the judge to step out towards a homoerotic utopia unfettered by the repressive heteronorm? Is the literary invocation in this instance a necessary condition to be able to *think queer*, both from a personal position of embeddedness within heterosociality and within a hetero-court governed by the "ideology of heterosexual primacy as simply *natural*"?[60]

It is on this overture to interrogate the self that *Koushal* falls woefully short – a gross failing condemned by *Puttaswamy* and in *Johar* after it for

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[56] *Naz*, ¶ 50.

[57] *See* Thomas B. Colby, "*In Defense of Judicial Empathy*, 1944, 1982, MINNESOTA LAW REVIEW 96 (2012).

[58] Cited in *id* at 2005.

[59] Stephen Breyer, "*On Reading Proust*, THE NEW YORK REVIEW OF BOOKS 30, 32 (Nov. 7, 2013).

[60] MARIO MIELI TOWARDS A GAY COMMUNISM: ELEMENTS OF A HOMOSEXUAL CRITIQUE 2 (David Fernbach and Evan Calder Williams trans., London: Pluto Press, 2018).

its inability to uphold core constitutional values – it is also the failing that is called out evocatively in the play "Contempt."[61]

There is then a thread between lyricism, emotion and empathy especially in constitutional jurisprudence around the right to personal liberty, if we were to follow the trajectory of this case. Feminist writing has long challenged the cognitive confinement of sex within procreation under patriarchal heterosexuality. In the words of the inimitable Audre Lorde:

> "The erotic is a measure between the beginnings of our sense of self and the chaos of our strongest feelings. It is an internal sense of satisfaction to which, once we have experienced it, we know we can aspire. For having experienced the fullness of this depth of feeling and recognizing its power, in honor and self-respect we can require no less of ourselves".[62]

The acknowledgment of sexual intimacy and desire – and indeed unfulfilled longing ("the love that dare not speak its name") within court-speak was virtually unheard of prior to *Johar*, where it figures prominently as a measure of judicial empathy. It is not therefore merely in formalistic terms of affirming the right to life and liberty that empathy is expressed. Justice Indu Malhotra, for instance, observes that "LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377."[63] Reiterating Eve Kosofsky Sedgwick's statement that "the closet is the defining structure for gay oppression in this century,"[64] Justice Chandrachud challenges the presumption of heternormativity and the standard of procreative sex:

> "The existing heteronormative framework – which recognises only relations that conform to social norms – is legitimized by the taint of 'unnaturalness' that Section 377 lends to sexual relations outside this framework…Sexual activity between adults and based on consent must be viewed as a "natural expression" of human sexual competences and sensitivities. *The refusal to accept these acts amounts to a denial of the distinctive human capacities for sensual experience outside the realm of procreative sex*."[65]

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[61] Danish Sheikh, *Contempt*, in Global Queer Plays. (London, Oberon Books, 2018).

[62] Audre Lorde, Sister Outsider: Essays and Speeches 113 (Berkeley, Crossing Press, 2007).

[63] *Johar,* Malhotra, J., ¶ 17.1.

[64] *Johar*, Chandrachud, J., ¶ 57.

[65] *Johar*, Chandrachud, J., ¶ 59 (emphasis added). In doing this he also implicitly rejects the love-sex binary.

The centrality of judicial empathy in this cluster of cases is also seen through expressions of anger –Justice Leila Seth's sharp response after *Koushal* juxtaposes judicial empathy against judicial pusillanimity:

> "The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization, or worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display *judicial pusillanimity*, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter."[66]

It is this anger, to echo Lorde, and the fury in the older text in the Satyoshodhak tradition *Stree Purusha Tulana* by Tarabai Shinde (1882) – also importantly the anger in the writings of Jotiba Phule and Dr. Ambedkar that contain within them a collective vision for a liberating future, and guides action with empathy towards the goals of justice.

Before moving to the next section, however, it is pertinent to ask which citizens/subjects does the court deem worthy of empathy, and what may be the differing degrees/intensities of the expression of judicial empathy. If *Johar* is at one end of the continuum of judicial empathy – heightened empathy, which kinds of cases occupy the other end – judicial apathy? In the affective conduct of courts, we may clearly distinguish four signposts: judicial empathy on the one end, and on the other, judicial humiliation, judicial pusillanimity and "jurisprudential dissociation."[67]

IV. INTERSECTIONS, ANALOGIES, RESURRECTIONS

Naz represents a unique moment in intersectionality jurisprudence, not confined to gender or sexual orientation, and in that single move it is both insurgent and transformational.

The insurgent jurisprudence relevant to our present purposes is co-produced by the parties, their lawyers and the bench especially in cases that concern non-discrimination, untouchability and Article 21 rights with the goal of reimagining/reinstating democratic citizenship and deepening radical

[66] Quoted in *Johar*, Chandrachud, J., ¶ 1 (emphasis added).

[67] I use "jurisprudential dissociation" to refer to "a strategy devised by constitutional courts in India to circumvent providing critical protections to vulnerable communities against discrimination and loss of liberty, even while acknowledging in unequivocal terms, in the same case, that it was the duty of the court to protect the fundamental rights of every citizen". Kalpana Kannabiran, Tools of Justice: Non-Discrimination and the Indian Constitution 71 (New Delhi, Routledge 2012).

constitutionalism.[68] Drawing on Dr. Ambedkar and Antonio Negri, Upendra Baxi argues that the very idea of the constitution involves its 'other', namely constitutional insurgencies – the incessant struggles by the multitude to redefine the terms in which their lifeworlds are organised.[69] It is useful to recall Ranajit Guha's idea of insurgency as

> "fundamentally a struggle for justice —the site where . . . two mutually contradictory tendencies . . . that is, a conservative tendency made up of the inherited and uncritically absorbed material of the ruling culture and a radical one oriented towards a practical transformation of the rebel's conditions of existence — [meet] for a decisive trial of strength."[70]

In this context, as K.G. Kannabiran reminds us,[71] the Constitution of India presents us with a break from the tyrannies of colonization and social domination and Baxi holds out Article 17 as an illustration of the Indian constitution being a "tremendous advance from liberal constitutionalism"[72] – a constitutional penal provision addressed to state, civil society and citizen.

The insurgency originates in the refusal of queer peoples to be subjugated under heteronormative regimes that criminalise assertions of gender that do not fit into the repressive regulatory classifications of heterosexual criminal law - oftentimes by sheer persistence in being, becoming and staying queer. And in this, queerness is one of several attributes (for the most part social/collective) subjugated through techniques of control and the exercise of biopower that rein people into intersecting and concentric circles of domination – social, corporeal, economic.

Against this backdrop, analogies present themselves in several hues. The idea of horizontal rights embodied in Article 15(2) and Dr. Ambedkar's speech in the Constituent Assembly calling for 'constitutional morality' is invoked in *Naz* for the articulation of non-discrimination on grounds of sexual orientation which is held to be analogous to 'sex.'[73] By the court's argument, this expansive reading of 'sex' "enables construction of prohibited grounds of discrimination beyond 'gender simpliciter' and prevents differential treatment of people

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[68] *See id* at 444-468.

[69] Upendra Baxi, "Preliminary Notes on Transformative Constitutionalism," Presented at BISA Conference: Courting Justice II, Delhi, 27–29 April 2008. Unpublished.

[70] Ranajit Guha, Elementary Aspects of Peasant Insurgency in Colonial India 11(New Delhi, Oxford University Press, 1983).

[71] K.G. Kannabiran, Wages of Impunity: Power, Justice and Human Rights (Hyderabad, Orient Longman, 2003).

[72] Kalpana Kannabiran. *Frontiers of Law and Society in India: Interview with Upendra Baxi*, in Collected Works of Upendra Baxi, Volume 3: Law and Society. (Kalpana Kannabiran ed., Oxford University Press, forthcoming 2020).

[73] Naz, ¶¶ 79, 104.

who do not conform to 'normal' or 'natural' gender roles."[74] In *Johar* Justice Misra elaborates on constitutional morality further.

> "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. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State."[75]

However, Dr. Ambedkar's references to constitutional morality are of course distinct, emphasizing "self-restraint, respect for plurality, deference to processes, scepticism about authoritative claims to popular sovereignty, and the concern for an open culture of criticism" as embedded in the core of constitutional forms.[76] His stern reminder to the Constituent Assembly that "[d]emocracy in India is only a top dressing on an Indian soil, which is essentially undemocratic" harks to the fraught realities of Hindu society broken by caste, where the particularity and pervasiveness of caste defeats the formation of a constitutional culture. In drawing an analogy from this context, not just in the invocation of constitutional morality,[77] but also in the deployment of Article 15(2), both the *Naz* and *Johar* courts set up an excavation of constitutional possibilities through an exploration of intersecting, co-constitutive and analogous performative and corporeal particularities of gender and caste.[78]

This exercise is rooted in the intellectual histories of constitutional insurgencies on the subcontinent into the continuing habitations of *Ambedkari chalwal* that seeks to entrench constitutional morality within public imaginaries and interrogates public morality in the everyday through micro practices of

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[74] Naz, ¶ 99.

[75] *Johar*, Misra, J., ¶ 111. Judges in *Johar* juxtapose constitutional morality variously to social morality (Misra, J.)/Victorian morality (Nariman, J.)/Judaeo-Christian & public morality (Chandrachud, J.)/majoritarian orthodoxies (all Judges).

[76] Pratap Bhanu Mehta, *What is Constitutional Morality?,* SEMINAR 615 (2010) http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (last visited Nov. 22, 2018).

[77] Quoted in *Johar*, Chandrachud, J. ¶ 140.

[78] Martha Nussbaum flattens out the complexity of this argument when she observes after *Naz*, "The Delhi High Court has it right: laws against same-sex conduct are forms of caste hierarchy that identify a group as untouchable and stigmatize them as criminals by nature." Martha C. Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, in THE EMPIRE OF DISGUST: PREJUDICE, DISCRIMINATION, AND POLICY IN INDIA AND THE US 164, 194 (Zoya Hasan et. al. eds., New Delhi, Oxford University Press, 2018).

resistance and through collective struggle. This is the third analogical aspect contained within this reference to constitutional morality and Article 15(2) – collective resistance as the tool of insurgent constitutionalism. Whether with the poets who recited freedom in courts during Emergency, or the Ambedkari shahirs, or queer communities-in-struggle co-inventing constitutional lyricism as jurisprudence, the place of struggles and collective resistance is irreplaceable.

That the intersectional articulation of rights is a method and need not represent a shared outcome or a shared judicial path is evident from the echoes in *Johar* of the decision of the Supreme Court in the troubled case of *Shafin Jahan* v. *Asokan K.M.*[79] (the Hadiya case), where personal autonomy and the freedom of choice granted in *Shafin Jahan* is reaffirmed for queer persons:

> "Consensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect…[I]t is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner."[80]

While the question of the freedom of choice is one that stretches between the two cases, the trajectory of the Hadiya case can scarcely be forgotten – the role of the Kerala High Court in handing over custody of an adult woman who had gone through a valid marriage to her father despite her clear objection; the absorption of the violently majoritarian rhetoric of 'love jihad' by the court; the Supreme Court's decision to grant custody to the educational institution rather than permit her to go with her husband in accordance with her wishes; and the ordering of a probe by NIA into conversions by the Supreme Court even while it ruled on Hadiya's right to choice and the validity of her marriage. These facts concerning the judicial process in *Shafin Jahan* ruptures the seamlessness of the positive reference in *Johar* to the Hadiya decision, and mark instead the troubling equivocation with respect to strident majoritarianism in institutions of justice and security. The reference to *Shafin Jahan* needs to be understood in the context of the string of observations in *Johar* on the urgency of obstructing the potential damage to the social and constitutional fabric by majoritarianism.

As the last reference to intersections, the observation of Chief Justice Misra in *Indian Young Lawyers Assn.* on constitutional morality is followed by an entire section in the judgment of Justice D.Y. Chandrachud titled "Article 17, 'Untouchability' and the notions of purity," where he recalls in painstaking detail, the legislative history of Article 17:

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[79] (2018) 16 SCC 368 : AIR 2018 SC 1933.

[80] *Shafin Jahan*, Chandrachud, J., ¶ 67.

> "The incorporation of Article 17 into the Constitution is symbolic of valuing the centuries' old struggle of social reformers and revolutionaries. It is a move by the Constitution makers to find catharsis in the face of historic horrors. It is an attempt to make reparations to those, whose identity was subjugated by society. Article 17 is a revolt against social norms, which subjugated individuals into stigmatised hierarchies. By abolishing "untouchability", Article 17 protects them from a repetition of history in a free nation."[81]

In tracing the intellectual history of this fundamental right, he recalls the anger of Savitribai Phule, that iconic leader of the anti-caste struggle:

> "Arise brothers, lowest of low shudras
>
> wake up, arise.
>
> Rise and throw off the shackles
>
> put by custom upon us.
>
> Brothers, arise and learn…
>
> We will educate our children
>
> and teach ourselves as well.
>
> We will acquire knowledge
>
> of religion and righteousness.
>
> Let the thirst for books and learning
>
> dance in our every vein.
>
> Let each one struggle and forever erase
>
> our low-caste stain."[82]

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[81] *Indian Young Lawyers Assn.*, Chandrachud, J., ¶ 75.

[82] Quoted in *Indian Young Lawyers Assn.*, Chandrachud, J., ¶ 74. In their recent work on intersectionality, Collins and Bilge foreground the figure of Savitribai Phule as someone who understood and used intersectionality without necessarily naming it as such when she "confronted several axes of social division, namely caste, gender, religion, and economic disadvantage or class," in the course of her life and work. PATRICIA HILL COLLINS & SIRMA BILGE, INTERSECTIONALITY 4 (Cambridge, Polity Press, 2016).

Interestingly in traversing the discourse on untouchability, Justice Chandrachud dwells at length on manual scavenging and on the violence against Dalits in contemporary India – both clearly outside the formal scope of the questions of fact and law before the court. Yet, it is historic in that this is perhaps a rare, if not first judicial acknowledgement of the routine violence of caste orders on Dalits in India today. Although he does not cite the cases brought before the court by the Safai Karamchari Andolan (SKA), nor is there a mention of Bezwada Wilson's untiring mobilization and resistance, the expression of judicial horror over institutionalized caste violence is a major departure made possible by the very presence of the SKA in the court over decades, and their successful crusade to list "manual scavenging" as caste atrocity under The Scheduled C[illegible] and The Scheduled Tribes (Prevention of Atrocities) Amendment Act, 210[illegible]

The discussion on Dr. Ambedkar's *Annihilation of Caste* in *Indian Young Lawyers Assn.* follows from the delineation of the duty of the court to protect citizens – minorities especially, from majoritarian rule.

Mindful of the historical contexts of these interlinkages between caste, gender, religion and untouchability, the key question is a simple one. Should women be prohibited from entering this temple/place of worship? There is no denying discrimination based on gender – women as a class are barred entry for forty years of their life extending from minority to late adulthood – and it does not affect men in similar ways. The prohibition is 'pre-constitutional'; sati and untouchability were ancient pre-constitutional customs – although ancient custom has the force of law, in the constitutional era it must pass the test of manifest arbitrariness. There cannot, as was held in *Johar* and *Naz*, be a presumption of constitutionality for pre-constitutional laws. Tied to this last point is the argument on essential features of a religion – the guarantee of equality extends into 'private' domains of family and community, implicitly and explicitly proscribing structural exclusion or violence within these institutions.[83]

On another track of exclusion and stigmatization, while homosexuality and sodomy were at the centre of S. 377 debates in and out of courts, the transgender question also attracted penalties under this section, in addition to special criminal legislations that targeted transgender persons in unprecedented ways. That the targeting of transgender persons was part of a larger project of colonial regulation and control of the liberty of 'non-compliant' subjects, is evident in the inclusion of 'eunuchs' among 'criminal tribes' by the British government, and their regulation in identical ways. What has continued is the attachment of criminality to all sections named in the CTA, albeit in different, but pervasive ways. The understanding of the erosion of the basic rights of queer

[83] Kalpana Kannabiran, *Denying Women Entry to the Sabarimala Temple Amounts to Untouchability,* The Wire, (July 19, 2018) https://thewire.in/law/sabarimala-temple-women-entry-supreme-court (Last visited Dec. 02, 2018).

peoples therefore interlocks in constitutive ways with the erosion of the rights of other minorities.

> "Koushal fails to appreciate that the sustenance of fundamental rights does not require majoritarian sanction."[84]

> "Rights are not determined on the basis of percentage of populace but on a real scrutiny of the existence of a right and denial of the same."[85]

> "This court should not take upon itself the guardianship of changing societal mores…The very purpose of the fundamental rights chapter [is to place liberty and dignity] beyond the reach of majoritarian governments so that constitutional morality can be applied …to give effect to the rights…of 'discrete and insular' minorities…And it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality."[86]

> "There must come a time when the constitutional guarantee of equality and inclusion will end the decades of discrimination practiced based on a majoritarian impulse of ascribed gender roles. That time is now."[87]

> "[M]inorities like all other citizens are protected by the solemn guarantee of rights and freedoms under Part III."[88]

At a time when the majoritarian impulse is strident in the public domain in India, perhaps one of the most significant interventions made in *Johar* is the affirming of the rights of minorities. While the application in this specific case is to sexual minorities, taking a leaf from the analogies, extensions and extrapolations – the interpretive strategies – from *Naz* to *Johar,* these statements may reasonably be understood as speaking of minority rights in India in general from the vantage point of queer rights. The interlocking between caste orders, majoritarianism and heteronormative regimes produces specific proscriptions of speech and curtailment of liberties not confined to minorities but extending to those who speak with them.

How may we open out the counter-majoritarian tenor in queer jurisprudence to the Article 15 grounds of caste, religion, tribe and sex — in conjunction

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84 *Johar*, Misra, J., ¶ 190.
85 *Johar*, Misra, J., ¶ 34.
86 *Johar*, Nariman, J., ¶ 81.
87 *Johar*, Chandrachud, J., ¶ 53.
88 *Johar*, Malhotra, J., ¶ 17.

with each other and severally/separately? And importantly to political dissent? This takes us directly to two aspects of queer jurisprudence that have emerged as central: the resurrection of dissents and state violence — specifically the impunity of the hetero-state. It is to a discussion of *Puttaswamy* that we turn to look at dissent (expression) and state violence, both of which are at the heart of queer rights deliberated on at length in *Johar*.

V. PRIVACY, DIGNITY, AUTONOMY

> "Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual."[89]

The core value that *Puttaswamy* is built around is dignity. Constitutional courts in India, in the course of expanding the reach of fundamental (justiciable) rights under Part III of the Indian constitution, have interpreted dignity as being an intrinsic part of the right to life – the right to life means the right to life with dignity, as absent dignity, there can be no affirmation of life – the right to life cannot be based on an interpretation of life as 'bare life', for instance. But how may dignity be understood? The only place in the constitution that mentions dignity is the preamble: 'We the people of India having solemnly resolved… to secure to all its citizens, 'Fraternity assuring the dignity of the individual and the unity and integrity of the Nation;' It is significant importantly because it provides a counter to the virulent, violent, post-truth right-wing political moment in the country – and must be understood in relation to its location in this moment. The resurrection of older memories of older forms or moments of authoritarian rule serve to signpost the criticality of the pervasiveness of emergency powers and impunity in statecraft, without in fact making a direct reference.

Embedded in the elaboration of dignity by the court is the notion of resistance in the absence of dignity, which then gets welded to the idea of dignity. The focus on human dignity as the measure of the right to life and personal liberty – and the embedding of privacy in human dignity, paves the way for a new constitutional commonsense that in fact draws on fact finding reports and petitions of civil liberties defenders in the context of torture, illegal detentions and excesses in custody. The duty of care to be exercised by the state in its treatment of citizens has hinged on the right of citizens to be free of state intrusion (in the older sense of surveillance through domiciliary visits – the

[89] *Puttaswamy*, ¶ 2.

midnight knock), and to be treated with care (the *D.K. Basu* guidelines[90]). Rather than reported case law, this connection is evident from fact finding reports that make constitutional claims on the criminal justice system – some of which reach courts, while others travel to commissions of enquiry and yet others find their way to people's tribunals.

It is interesting to look at the specific instances picked up in *Puttaswamy* in tracking the travails of the right to dignity (and by that token privacy, as early in the judgment the two are fused and indistinguishable from each other): The first was the 1950 case of communist leader A.K. Gopalan (where he challenged his incarceration under preventive detention laws of the newly independent country) where with the exception of Justice Fazl Ali all judges on the bench read fundamental rights in restrictive, reductionist terms, rejecting the interpretation of the intersections and interlinkages between different rights.[91] The second was the 1963 case of *Kharak Singh* apprehended on suspicion of being a dacoit in 1941 (prior to Indian independence) and released for want of evidence but was subjected to regular surveillance by the police 23 years since he was first apprehended and India had moved from being a colony to a constitutional democracy.[92] The debate, ironically, circulated around whether surveillance regimes under British colonialism were violative of fundamental rights of Indian citizens. With the exception of Justice Subba Rao, the court held that the right to privacy is not guaranteed by the Indian constitution. The third case of *ADM, Jabalpur* v. *Shivakant Shukla*[93] turned on whether emergency powers of the President under the constitution (Article 359(1)) suspends the right of every person who is preventively detained from petitioning the court for the protection of their right to personal liberty. The argument of the petitioners was that even under Emergency, the rule of law and fundamental rights could not be suspended. Four judges in a five-judge bench – Justice Y.V. Chandrachud and Justice P.N. Bhagwati among them – held that fundamental rights stood suspended – there was a notional surrender of freedoms – during Emergency. Justice H.R. Khanna dissented.

ADM, Jabalpur was preceded by the travails of personal liberty in the Andhra Pradesh High Court in *P. Venkataseshamma* v. *State of A.P.*,[94] a petition for a writ of Habeas Corpus in which a lawyer representing Naxalites in court was detained under the Maintenance of Internal Security Act 1971 (so strongly reminiscent of our own times as evident in *Romila Thapar* v. *Union of India*[95]), where the three-judge bench unanimously held that

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[90] D.K. Basu v. State of W.B., (1997) 1 SCC 416 : AIR 1997 SC 610.

[91] A.K. Gopalan v. State of Madras, AIR 1950 SC 27. For a detailed discussion of this case, *see* K.G. Kannabiran, Wages of Impunity: Power, Justice and Human Rights (Hyderabad, Orient Longman 2003).

[92] Kharak Singh v. State of U.P., AIR 1963 SC 1295.

[93] ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521 : AIR 1976 SC 1207.

[94] 1975 SCC OnLine AP 193 : AIR 1976 AP 1.

[95] (2018) 10 SCC 753 : AIR 2018 SC 4683.

> "the right [to move any Court] against the arbitrary exercise of power of arrest and detention conferred on [the petitioner] by the enactment in contravention of Articles 14, 21 and 22… is taken away by the declaration under Article 359(1) by the President. There is therefore, no escape from the fact that while the law may be incompetent…the right to move the Court having been taken away the court is precluded from pronouncing the law to be void and consequently holding the arrest and detention under that law to be bad."[96]

Puttaswamy upholds Justice Khanna's dissent and unanimously overrules the majority decision in *ADM, Jabalpur* and all decisions that followed that reasoning: "The view taken by Justice Khanna must be accepted, and accepted with reverence for the strength of its thoughts and the courage of its convictions."[97] And further, "When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been… ADM Jabalpur is …overruled."[98] Upendra Baxi's delineation of constitutional renaissance is immediately relevant in drawing together the different strands that interweave into the tapestry of an insurgent and transformative constitutionalism. Constitutional renaissance, he observes so pertinently,

> "has a beginning but knows no end because everyday fidelity to the vision, spirit and letter of the Constitution is the supreme obligation of all constitutional beings…[A]n 'acceptance of constitutional obligations' [is evident] not just within the text of the Constitution but also its 'silences'… Second, courts should adopt that approach to interpretation which 'glorifies the democratic spirit of the Constitution.' 'Reverence' for the Constitution (or constitutionalism) is the essential first step towards constitutional renaissance. Third, people are the true sovereigns, never to be reduced to the servile status of being a subject; rather as beings with rights, they are the source of trust in governance and founts of legitimacy. The relatively autonomous legislative, executive, administrative and adjudicatory powers are legitimate only when placed at the service of constitutional ends. All forms of public power are held in trust. And political power is not an end but a means to constitutional governance."[99]

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[96] *Venkataseshamma*, ¶ 55.

[97] *Puttaswamy*, Chandrachud, J., ¶ 120.

[98] *Puttaswamy*, Chandrachud, J., ¶ 121.

[99] Upendra Baxi, *A Constitutional Renaissance*. Indian Express (July 16, 2018) https://indianexpress.com/article/opinion/columns/a-constitutional-renaissance-indian-judiciary-delhi-lg-powers-5260959/ (last visited Jan. 9, 2019).

This also brings to mind Jack Balkin's delineation of constitutional renaissance as consisting of constitutional fidelity, democratic constitutionalism and redemptive constitutionalism[100] — as both Baxi and Balkin suggest in distinct ways in different contexts (and indeed using different lenses), the Constitution is deeply aspirational, and pledging fidelity to the Constitution means working on an incessant 're-awakening' of our society to achieve its ideals of freedom and dignity. In a clear expression of "redemptive constitutionalism," the resurrection of dissents ("Three Great Dissents" as Justice Rohinton Nariman called them in *Puttaswamy*[101]) enables the future possibility of a cascading reversal of legislative and judicial derogations of fundamental rights that travel between Articles 14, 15, 17, 19 and 21 importantly, but also other protections in the Constitution. It also enables an appreciation of the value of dissent to constitutionalism – not merely judicial dissent, but dissent by a watchful citizenry (of which the judiciary is part) that educates the judiciary on the meanings of justice and demonstrates the corporeal, political and moral consequences of the loss of rights.

The emphasis on dignity in *Puttaswamy*, which then informs the reading and deliberations of gender cases and queer jurisprudence that precede it and follow helps make a sharp departure from "honour" discourses that belong in the realm of public morality as opposed to constitutional morality where privacy belongs.

The gender and privacy question is particularly knotted and complex and can be understood only by placing dignity and autonomy (personal, sexual, reproductive, decisional) at the centre of any articulation of the right to privacy as it intersects with the gender question. The distinction between the construction of the "private" (as in the private/public dichotomy critiqued in feminist discourse) as "inviolable" and the right to privacy (centering of individual autonomy but also the inalienable right to dignity and full citizenship) even within the private domains of intimacy/family/relationship is an important one, especially in a context where reproductive rights are conditional and marital rape is not covered by the definition of rape.

In the cases under discussion, the construction of the space of religious community as inviolable and protected under Article 25 of the Constitution has grave implications for our understanding of the right to religious freedom, choice in marriage/relationship, the right not to be bound down by immutable characteristics and the specific ideological moorings of biological determinism – would properly fall within the interlocking domains of autonomy-dignity. While the presumption of heteropatriarchy in the ordering of the state,

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[100] Jack Balkin, *The Return of Liberal Constitutionalism – And a Note on Democratic Constitutionalism* (May 31, 2009) http://balkin.blogspot.com/2009/05/return-of-liberal-constitutionalism-and.html. (last visited Oct. 7, 2017.

[101] *Puttaswamy*, Nariman, J., ¶ 18.

family-community and judicial institutions (the "ambient heterosexism of the public space" as Justice Chandrachud describes it in *Johar*[102]) folds into a complex and dispersed surveillance regime that vests power in the dominant publics (majoritarian, hetero and caste supremacist), the insistence on constitutional morality speaks to the possibilities of dislodging this presumption and the structures it proliferates. The understanding of sexual violence, sexualized violence and sexual humiliation – of men, women, queer peoples – in state custody, within intimate spaces, in public spaces, in representational forms for instance, may only be articulated in the first instance in terms of privacy-autonomy-dignity.

VI. SETTING OUT THE PRINCIPLES

> "Rule of law requires a just law which facilitates equality, liberty and dignity in all its facets. Rule by law provides legitimacy to arbitrary state behavior."[103]

The Supreme Court of India in *Johar* sets up several signposts for a transformative constitutionalism that bear recall. In the method of interpretation, the garnering of an array of sources from the literary-performative to the philosophical (constitutional, feminist, anti-caste, anti-racist among others) to consolidate and seal an argument on the inviolability of the right to dignity, autonomy, liberty and personhood is perhaps unprecedented in Indian constitutional jurisprudence. Reading Dr. Martin Luther King's letter from Birmingham jail "…when you are forever fighting a degenerating sense of 'nobodyness' — then you will understand why we find it difficult to wait…" with his enduring line "the arc of the moral universe…bends towards justice,"[104] the court is seized by a sense of urgency, immediacy and irrevocability of the moment. As an intrinsic element in this method, the melding and synchronizing of *obiter* and *ratio* throughout the judgment – and the constant extrapolation from the ratio to an open-ended statement leads to (a) minimising of the old interpretive habit of jurisprudential dissociation; (b) keeping the door open to the deployment of the method and the specific observations across a "different" canvas just as the court has in this cluster of cases drawn from diverse sources creatively stacked in a homologous (not homogenous) fashion; (c) enhancing the possibilities of the principle of non-retrogression (a looming threat especially in an environment of the majoritarian 'rule of disgust' where a roll-back like *Koushal* seems imminent[105]).

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[102] *Johar*, Chandrachud, J., ¶ 62, where he is in fact quoting from an article by Zaid Al Baset.

[103] *Johar*, Chandrachud, J., ¶ 5.

[104] *Johar*, Chandrachud, J., ¶ 23.

[105] We witness the undermining of the principle of non-retrogression especially in the governmental move in December 2018 to enact a drastically amended version of the *Transgender Persons (Protection of Rights) Bill*, 2016. While a detailed discussion of this law and its implications for our understanding of the principles set out in *Johar* must form the subject of another paper, suffice it to say that this Bill represents a roll-back from *NALSA*, *Johar* and

The reiteration of the constitution as a "Living Document" (dynamic, vibrant and pragmatic interpretation its hallmark) that guarantees the "progressive realization of rights" through the doctrines of analogous grounds, "non-retrogression" and rule of law (as distinct from rule by law) whose primary purpose is the transformation of society bears infinite recall. The four pillars on which the constitution rests, according to Justice Misra - individual autonomy and liberty, equality sans discrimination, recognition of identity with dignity, and the right to privacy – rest on a social reality characterized by prejudice, stereotype, parochialism, bigotry, social exclusion and segregation. Following from this, "[i]ntrinsic dignity cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions."[106]

The progressive realization of rights, as also the doctrine of non-retrogression in *Johar* affirm equality, non-discrimination, freedom of expression, associational freedoms, shelter, life with dignity, personal liberty and fundamental freedoms, special protections, choice, faith, intimacy, health (full health care access and recognition of psychosocial health impacts of criminalization), privacy, sexual privacy and autonomy, among others. Especially for our present purposes, in the light of the demolition of the majority opinions in *Gopalan*, *ADM, Jabalpur* and *Kharak Singh* in *Puttaswamy* and the renewed emphasis on the criticality of autonomy, liberty and dignity in *Johar*, the constitutionality of the claim to liberty and the demand to reject the rule by law in *Romila Thapar* as also the case of Dr. G.N. Saibaba[107] spins into view urging judicial empathy and constitutional lyricism from courts in their re-affirmation of democratic constitutionalism.

The judicial discourse on sex that has been the subject of this essay points us towards pathways to historicise law as a site of cultural production.[108] Because of its imbrication in statecraft at this moment of violent and exclusionary nationalism and rule of caste, heightened forms of violence against women, the strident rise of the neo-liberal economy and its constitutive colonisations, the emergence of new official sensibilities on the gender order need to be celebrated while being situated in this larger political economy of disentitlement for we can scarcely forget that "[i]n the gender order as a whole, gendered embodiment establishes relations between changing bodies and

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Puttaswamy — defining a transperson in deeply problematic, stigmatizing and exclusionary ways; erasing the protections and deliberations around affirmative action; returning to medical certification as evidence of gender identity rather than self-declaration, for instance. For a detailed statement *see* http://orinam.net/resources-for/law-and-enforcement/nalsa-petition-tg-rights-india/trans-persons-protection-rights-bill-2016/ (last visited Jan. 8, 2019).

[106] *Johar*, Misra, J., ¶ 4.

[107] State of Maharashtra v. Mahesh Kariman Tirki, Sessions Case Nos. 13 of 2014 and 130 of 2015, decided on 7-3-2017.

[108] *See* Andrew Sharpe, Transgender jurisprudence: Dysphoric bodies of law (London, Cavendish Publishing, 2002).

changing structures of gender relations."[109] The disruption of the multi-sited, standard heteronormative legal construction of gender may also be seen as rupturing virulently patriarchal and misogynist statecraft, and is in a sense the state speaking against itself. In an important sense, these judgments – and the resurrections they craft – are hard-won gains of longstanding movements for women's rights and the rights of sexual minorities, not to speak of anti-caste philosophers, workers, free thinkers and human rights defenders. To extract the fundamental general principle of the right to liberty from the enunciation of women's right to bodily integrity or the right of transgender persons to personal autonomy, or the right of women with disabilities to reproductive autonomy and dignity opens out for us the trajectories of democratic constitutionalism that have emerged importantly from a peoples' understanding of constitutional morality long before it was signposted in *Naz*. The eclectic approach to decriminalizing queer rights that we see in *Johar* – through song, performance, poetry and the outpouring of emotion is testimony to the far-reaching influence of peoples' movements on courtroom cultures.

And in the final analysis, we must return to that prescient preceptor of constitutional sensibilities who anticipated the principle of non-retrogression and the need for its re-affirmation and re-calibration from time to time to sidestep the perils and pitfalls that majoritarian rule poses to the futures of the Constitution:

> "If things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."
>
> —Dr. B.R. Ambedkar, Constituent Assembly, 1948.[110]

[109] Raewyn Connell, *Transsexual Women and Feminist Thought: Toward New Understanding and New Politics* 37(4) Signs 857, 866 (2012). Also, importantly Mario Mieli, Towards a Gay Communism: Elements of a Homosexual Critique (David Fernbach and Evan Calder Williams trans., London: Pluto Press, 2018).

[110] Dhananjay Keer, Dr Ambedkar: Life and Mission 410. (Mumbai, Popular Prakashan, 1990) (1954).