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Learning from Suresh Kumar Koushal v. Naz Foundation Through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements

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Learning from *Suresh Kumar Koushal v. Naz Foundation* Through Introspection, Inclusion, and Intersectionality: Suggestions from Within Indian Queer Justice Movements

Siddharth Mohansingh Akali[†]

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I. INTRODUCTION

Section 377 of the Indian Penal Code (“Section 377”) criminalizes all “carnal intercourse against the order of nature,” including anal, oral, and other penetrative sex between homosexuals.¹ In July 2009, the Delhi High Court (“High Court”) decriminalized homosexuality by reading down² Section 377 in

1. PEN. CODE § 377 (India).

2. “Reading down” is a mechanism through which courts may save from invalidity a law that would be unconstitutional if given its broadest interpretation by giving the law a narrower interpretation that would preclude unconstitutional applications. . . . As such, the doctrine of reading down is rooted in notions of legislative intent: the narrowing interpretation is placed on the law because of a presumption that the legislature intended to act within the bounds of the Constitution.

PATRICK MACKLEM ET AL., CANADIAN CONSTITUTIONAL LAW 1409–1410 (4th ed. 2006). In *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, 1991 Supp. (1) SCC 600, 708, 1991 AIR 101, 1990 SCR Supp. (1)(142) (1990) (India), the Supreme Court of India noted that “[t]he presumption of validity [of legislation] leads naturally to the view that where a

Naz Foundation v. Government of the National Capital Territory of Delhi (“*Naz v. NCT Delhi*”).³ The High Court held that sex in private between consenting adults was not an offense under Section 377.⁴ However, a few years later, in December 2013, the Supreme Court of India (“Supreme Court”) overturned *Naz v. NCT Delhi*, and recriminalized homosexuality in *Suresh Kumar Koushal v. Naz Foundation* (“*Koushal*”).⁵

Only four months later, in *National Legal Services Authority v. Union of India* (“*NLSA v. UOI*”), the Supreme Court affirmed the rights of transgender people.⁶ Specifically, the Court ordered the government to adopt and develop strategies, such as reservation⁷ policies and other legal protections, for the social, economic, and political advancement of transgender people.⁸ In *NLSA v. UOI*, the Court acknowledged that Section 377 negatively impacted the transgender community.⁹ However, the Supreme Court refused to overrule *Koushal* and reasoned that *NLSA v. UOI* was concerned “with an altogether different issue” of “constitutional and other legal rights” of transgender people rather than the constitutionality of Section 377.¹⁰ These seemingly conflicting judicial opinions on the related issues of gender identity and sexual orientation raise interesting questions about what went wrong in *Koushal*.

This Article critiques the legal strategies that decriminalization advocates adopted in *Koushal*. While much of the literature has focused on criticizing the *Koushal* bench¹¹ for recriminalizing homosexuality, few have critically engaged with the decriminalization arguments put forward in the case. Decriminalization advocates must re-evaluate the legal strategies adopted in *Koushal* that failed to persuade the Court in that case. In particular, there is a need to scrutinize decriminalization arguments and assess whether they could have been more representative of marginalized queer people in India. This Article aims to fill that gap.

While many believe that judicial efficiency requires a focus on a single

statute cannot be held wholly valid it should be held valid at least to the extent that it is reasonably possible or practicable to do so.”

3. See *Naz Found. v. Gov’t of the Nat’l Capital Territory of Delhi* (*Naz v. NCT Delhi*), WP(C) No. 7455/2001, 2009 SCC OnLine Del. 1762 (Del. July 2, 2009).
4. See *id.* at 4.
5. See *Koushal v. Naz Found.*, (2014) 1 S.C.C. 1 (India).
6. See *Nat’l Legal Servs. Auth. v. Union of India* (*NLSA v. UOI*), (2014) 5 SCC 438 (India).
7. The term “reservation” in India is equivalent to “affirmative action” in the United States.
8. See *NLSA v. UOI*, (2014) 5 SCC at 508–09.
9. See *id.* at 463–64.
10. *Id.* at 464.
11. This Article uses the word “bench” rather than “court” to refer to the adjudicators in a case because “[a] decision of the Indian Supreme Court is almost never a judgment of the entire court. Instead, it is a decision of a bench of judges on a court that today can have up to thirty-one members. Most judgments are from benches of just two or three judges.” Nick Robinson, *The Indian Supreme Court and Its Benches*, SEMINAR (Feb. 2013), http://india-seminar.com/2013/642/642_nick_robinson.htm. Please note, however, that “a two judge decision is still a Supreme Court ruling and binding on the parties unless it is overruled by a larger bench (which occurs relatively rarely).” *Id.*

axis of discrimination,¹² this Article suggests that decriminalization arguments would have had greater force at the Supreme Court if advocates had taken a more intersectional approach. Indeed, queer antisubordination scholars and activists have provided helpful intersectional critiques of decriminalization arguments, which this Article considers.

By drawing on queer antisubordination perspectives and the Supreme Court's reasoning in *NLSA v. UOI*, this Article asserts that decriminalization arguments could have been stronger, and more effective in advancing social justice, if decriminalization advocates had adopted more inclusive and intersectional strategies in *Koushal*. By engaging with multiple axes of subordination, advocates would have addressed some of the gaps in their pro-decriminalization arguments that the Supreme Court found so troublesome. As a result, moving forward, decriminalization advocates must strive for more inclusive solutions that use intersectional ally building as a core strategy.

A. A Discussion of Terms and Their Usage

This Article employs terms from queer theory, postcolonial theory, and their intersections. For the sake of clarity, the following paragraphs define relevant terms as they are used in this Article.

The term “queer” refers to the complex politics and experiences of people who are divergent in ways that go beyond their genitalia and the genitalia of the people with whom they engage in sexual behavior.¹³ “Queer” is used to refer to the diverse experiences of those who are subordinated along multiple axes of oppression.¹⁴ In this Article, “queer” is not just a synonym or umbrella term for lesbian, gay, bisexual, or transgender (“LGBT”) people, even though that is how the term is sometimes used by LGBT folk.¹⁵ Rather, “queer” is “deployed as a critique of [LGBT] identity-based politics.”¹⁶ That is, the term refers to stances of “sharpened political awareness”¹⁷ and not to any particular identity group.

The term “queer antisubordination” refers to an intersectional politics that involves the “defiance of norms and practices and the formation of radical

12. See, e.g., Ratna Kapur, *Multitasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law*, 4 JINDAL GLOBAL L. REV. 36, 53 (2012), <http://www.jgls.edu.in/JindalGlobalLawReview/PDF/RatnaKapoorChapter-3-HR.pdf> [hereinafter Kapur, *Multitasking Queer*].

13. For an overview of what queer means, see generally Sharon Cowan, “What a Long, Strange Trip It’s Been”: *Feminist and Queer Travels with Sex, Gender and Sexuality*, in THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 105 (Margaret Davies & Vanessa E. Munro eds., 2013).

14. *Id.*

15. Kapur, *Multitasking Queer*, *supra* note 12, at 45.

16. Aniruddha Dutta, *Claiming Citizenship, Contesting Civility: The Institutional LGBT Movement and the Regulation of Gender/Sexual Dissidence in West Bengal, India*, 4 JINDAL GLOBAL L. REV. 110, 118 (2012), www.jgls.edu.in/JindalGlobalLawReview/PDF/AniruddhaDuttaChapter6HR.pdf.

17. Francisco Valdes, *Afterword & Prologue: Queer Legal Theory*, 83 CALIF. L. REV. 344, 345 n.1221 (1995) [hereinafter Valdes, *Afterword & Prologue*].

alternative alliances.”¹⁸ A focus on single issues, or a single axis of oppression, can blind advocates to broader issues of subordination. For this reason, queer antisubordination politics aims to establish shared values among those who are divergent and to foster collaboration among those whose liberation is bound up with one another.¹⁹ In this way, queer antisubordination offers a critique of single-issue, LGBT politics, which is embodied by the rights-based decriminalization movement in India and the liberal marriage equality movement in the United States and Canada.

The term “queer subaltern” is used to refer to lower-caste, lower-class, and otherwise oppressed queer people in India whose voices are so marginalized by systemic forces that they are denied true political agency.²⁰ To authentically fulfill its broader antisubordination goals, queer antisubordination politics must engage in humble solidarity with queer subalterns, else the term “queer antisubordination” be rendered meaningless.²¹

The term “queer justice movements in India” refers to a variety of queer people, groups, and entities that advocate or purport to advocate in good faith on behalf of antisubordination and queer justice. The word “justice” is used instead of “rights” because this Article calls for a substantive equality that goes beyond formalistic liberal human rights.²² Further, the plural form “movements” is used to reflect the diversity of queer people and their movements.

Even though decriminalization arguments did not authentically reflect queer antisubordination politics in *Naz v. NCT Delhi* and *Koushal*, this Article considers decriminalization advocates to be part of queer justice movements in

18. Kapur, *Multitasking Queer*, *supra* note 12, at 46.

19. *Id.* at 58. Lilla Watson’s quote is also illuminating: “If you have come here to help me, you are wasting your time. But if you have come because your liberation is bound up with mine, then let us work together.” See *Attributing Words*, UNNECESSARY EVILS (Nov. 3, 2008), <http://unnecessaryevils.blogspot.ca/2008/11/attributing-words.html>. Lilla Watson is an Australian Aboriginal activist and, to the author’s knowledge, not involved in Indian queer justice movements. However, the quote beautifully captures the heart of intersectional activism. Please note that Lilla Watson has indicated she is “not comfortable with being credited for something that had been born of a collective process” and that she prefers the quote to be credited to “Aboriginal activists group, Queensland, 1970s.” *Id.*

20. The term “subaltern” is used here in the way that it is used by critical postcolonial scholars. Ashley Tellis specifically applies the term to the LGBT context in India. See Ashley Tellis, *Ethics, Human Rights and LGBT Discourse in India*, in APPLIED ETHICS AND HUMAN RIGHTS: CONCEPTUAL ANALYSIS AND CONTEXTUAL APPLICATIONS 151, 161 (Shashi Motilal ed., 2010) [hereinafter Tellis, *Human Rights*].

21. *Id.* at 166.

22. See *id.* at 159–62 (critiquing the use of LGBT rights discourse and its lack of relevance to the most marginalized queers in India); VIVIANE NAMASTE, *SEX CHANGE, SOCIAL CHANGE: REFLECTIONS ON IDENTITY, INSTITUTIONS AND IMPERIALISM* 104–06 (1st ed. 2005). Namaste encourages transgender activists in North America “to question whether an invocation of ‘transgender rights’ is truly liberatory, or whether it is bound within specific social relations of domination, despite its rhetoric of justice and equality.” *Id.* at 104. Thus, Namaste suggests that the goal should be justice and not private liberal rights. Further, she encourages queer justice activists to take care that privatized liberal rights are not merely cloaked in the discourse of justice. See *id.* at 104–06, 113, 120.

India.²³ Professor Kapur takes issue with restrictive courtroom constructions of queer as an identity in *Naz v. NCT Delhi*.²⁴ She is also critical of decriminalization advocates' failure to adequately employ intersectional ally building and other tenets of queer antisubordination politics as part of their litigation strategy.²⁵ Nonetheless, this Article includes decriminalization advocates as part of queer justice movements in India because prominent decriminalization advocates have self-identified as queer;²⁶ however, it will also refer to them separately as decriminalization advocates when their approaches stray from queer antisubordination politics.

Because decriminalization advocates have professed their allegiance to queer politics, this Article suggests that they should engage with the views of queer antisubordination scholars and activists, rather than focus exclusively on critiquing the *Koushal* bench for its decision. Such introspection will allow decriminalization advocates to see where they can improve their legal and political strategies going forward.

B. Roadmap

In addition to the Introduction and Conclusion, this Article has four sections.

The first section provides an overview of Section 377, the law that criminalizes homosexuality in India, and provides detailed case summaries of the three recent cases that either implicated or directly challenged Section 377, including *Naz v. NCT Delhi*, *Koushal*, and *NLSA v. UOI*. The section also discusses the public and academic reactions to the three cases, and situates this Article in socio-legal understandings of the cases.

The second section describes queer antisubordination responses to *Naz v. NCT Delhi* and *Koushal*. Queer antisubordination scholars and activists offer critical perspectives on decriminalization arguments and the High Court's judgment decriminalizing homosexuality. At the same time, they advocate for the substantive equality of those engaging in homosexual behavior. These scholars and activists support queer justice; however, they critique the remedy *Naz v. NCT Delhi* provided and the arguments employed by decriminalization advocates during litigation in both *Naz v. NCT Delhi* and *Koushal*.²⁷ The section also provides an ethnographic discussion of homosexual behavior in India and

23. See Kapur, *Multitasking Queer*, *supra* note 12, at 45.

24. See *id.* at 42–43.

25. *Id.*

26. See, e.g., ARVIND NARRAIN, QUEER: DESPISED SEXUALITY LAW AND SOCIAL CHANGE, at vii (2004); Arvind Narrain & Alok Gupta, *Introduction to LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW*, at xi (Arvind Narrain & Alok Gupta eds., 2011).

27. *Koushal* was an appeal of *Naz v. NCT Delhi*. As such, the remedies sought and the arguments made by decriminalization advocates in both cases were similar. Thus, the critiques of decriminalization arguments in *Naz v. NCT Delhi* are equally applicable to decriminalization arguments in *Koushal*.

distinguishes between homosexual behavior, which is an embodied act, and homosexuality, which is an identity construct.

The third section points out the inadvertent parallels between queer antisubordination critiques of decriminalization arguments and the Supreme Court's reasoning in *Koushal*. Queer antisubordination scholars and activists and the Supreme Court have similar critiques of the High Court's reasoning in *Naz v. NCT Delhi*. Both wrote that there was an overreliance on foreign precedent in *Naz v. NCT Delhi*. Further, both indicated that privacy-based decriminalization arguments and remedies did not legalize homosexuality or protect queer subalterns from police brutality. If decriminalization advocates had addressed the concerns raised by queer antisubordination scholar/activists before arguing *Koushal*, the *Koushal* bench would not have been able to point to those gaps while rejecting advocates' pro-decriminalization arguments. The section also compares the Supreme Court's reasoning in *Koushal* with its reasoning in *NLSA v. UOI* to argue that use of intersectional strategies in *NLSA v. UOI* contributed to the pro-LGBT relief provided by the Supreme Court in that case. This suggests that using intersectional strategies, as proposed by queer antisubordination scholars and activists, would likely have produced a better outcome in *Koushal*.

The fourth section suggests that while there are real problems with the *Koushal* judgment, the *Koushal* decision provides valuable lessons for queer justice movements in India. *Koushal* teaches us that an approach rooted in inclusive intersectionality and ally building will ultimately produce more effective legal and political outcomes for queer people in India. To reject such valuable lessons by focusing exclusively on the significant shortcomings of the *Koushal* judgment would be to miss a key growth opportunity for queer justice movements.

II. SECTION 377, RELATED CONSTITUTIONAL CHALLENGES, AND REACTIONS TO COURT CASES

This section is divided into three subsections. The first subsection provides a brief overview of Section 377 and its interpretation by Indian courts. The next subsection provides more detailed case summaries of the three main recent constitutional cases in India related to sexual orientation and gender identity: *Naz v. NCT Delhi*, *Koushal*, and *NLSA v. UOI*. The third subsection discusses public and academic responses to the court cases challenging Section 377.

A. Overview of Section 377 and Its Interpretation by Indian Courts

Section 377, and its accompanying advisory note, read as follows:

377. Unnatural Offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either

description for term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.²⁸

In *Naz v. NCT Delhi*, the Delhi High Court noted that the term “carnal intercourse against the order of nature” lacked a precise definition and discussed how Section 377 has been subject to a variety of judicial interpretations.²⁹ Indian courts have interpreted the provision to apply to sex that is “non-procreative” or “imitative,”³⁰ or, more broadly, to acts of “sexual perversity.”³¹ Specifically, Indian courts have held that Section 377 outlaws oral sex, anal sex, and the penetration of other orifices, such as the space between the thighs or folded palms.³² In sum, Section 377 has been understood to criminalize all sex that is not a penis penetrating a vagina on the ground that such acts are perverse, non-procreative and thus against the order of nature.³³

Section 377 has been used to prosecute underage and nonconsensual sex.³⁴ In *Naz v. NCT Delhi*, the Indian Ministry of Home Affairs argued that Section 377 should be left untouched because it had been invoked to prosecute cases of child sexual abuse and to address “lacunae in the rape laws.”³⁵ However, the plain language of Section 377 is a blanket prohibition of “unnatural” intercourse and does not make consent or age of the person relevant as a defense.³⁶

28. PEN. CODE § 377 (India).

29. *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *5.

30. “Imitative” sex is sex that imitates a penis entering a vagina, such as penile penetration of the space between the thighs or folded palms. See Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 41 ECON. & POL. WKLY. 4815, 4817 (2006).

31. See *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *5. In *Naz v. NCT Delhi*, the High Court provided a helpful summary of the legal tests Indian courts have used to determine what is included in “carnal intercourse against the order of nature.” See *id.* The High Court explained that the court in *Khanu v. Emperor* held that “the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* [oral sex] is impossible.” *Id.* (citing *Khanu v. Emperor*, AIR 1925 Sind 286). The High Court acknowledged that before *Khanu*, colonial Indian courts had held “that inserting the penis in the mouth would not amount to an offence under Section 377.” *Id.* (citing *R. v. Jacobs*, (1817) Russ & Ry 331 C.C.R.; *Govindarajula In re.*, (1886) 1 Weir 382). However, more recently, after *Khanu*, Indian courts interpreted Section 377 to prohibit “oral sex, anal sex, and penetration of other orifices.” *Id.* There is also Indian jurisprudence in which a court relied on references in the *Corpus Juris Secundum* “relating to sexual perversity and abnormal sexual satisfaction as the guiding criteria” to determine whether the act in question was prohibited under Section 377. *Id.* (citing *Calvin Francis v. Orissa*, 1992 (2) Crimes 455). Further, the court in *Fazal Rab Choudhary v. State of Bihar*, AIR 1983 SC 323, “observed that Section 377 implied ‘sexual perversity.’” *Id.* (citing *Fazal Rab Choudhary v. State of Bihar*, AIR 1983 SC 323). A review of these cases illustrates that the sex acts prohibited by Section 377 have changed over time from the “non-procreative,” to the “imitative,” to any form of “sexual perversity.” See *id.*

32. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 39–40 (India).

33. See *Naz v. NCT Delhi*, 2009 SCC Online Del. 1762, at *5.

34. *Id.* at *8.

35. *Id.*

36. *Id.* at *5.

The broad and vague language of Section 377 has also been understood to criminalize homosexuality in India. The Lawyers Collective, an Indian public interest legal advocacy group that was intimately involved in the constitutional litigation of Section 377, argued that although Section 377 ostensibly applied to both heterosexuals and homosexuals, it specifically criminalized homosexuality because it completely prohibited all “penetrative sexual acts” between homosexual men.³⁷ The High Court agreed with the Lawyers Collective and read down Section 377 in *Naz v. NCT Delhi* to exclude sexual acts between consenting adults in private.³⁸ As noted previously, however, the Supreme Court’s decision in *Koushal* overruled the High Court’s judgment and recriminalized homosexuality.³⁹

B. Case Summaries: Recent Constitutional Challenges Related to Sexual Orientation and Gender Identity

This subsection provides a more in-depth discussion of recent cases either implicating or directly challenging Section 377, including *Naz v. NCT Delhi*, *Koushal*, and *NLSA v. UOI*. The core issue before the courts in *Naz v. NCT Delhi* and *Koushal* was the constitutionality of Section 377 and its apparent criminalization of homosexuality. The core issue before the Supreme Court in *NLSA v. UOI* was the recognition of transgender as a distinct gender identity and the comprehensive socioeconomic equality of transgender people.

All three cases are Public Interest Litigations (“PILs”), which are only allowed for certain kinds of cases and are governed by specific rules within the Indian judicial system.⁴⁰

37. *LGBT Section 377*, LAWYERS COLLECTIVE, <http://www.lawyerscollective.org/vulnerable-communities/lgbt/section-377.html> (last visited Dec. 18, 2015).

38. *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *58.

39. *Koushal*, (2014) 1 SCC at 81.

40. The Supreme Court of India has released guidelines on the kinds of cases that will be entertained as PILs. Those guidelines provide that the following categories of cases are permitted as PILs:

- (1) Bonded Labour matters.
- (2) Neglected Children.
- (3) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).
- (4) Petitions from jails complaining of harassment . . . [or] death in jail, . . .
- (5) Petitions against police for refusing to register a case, harassment by police, and death in police custody.
- (6) Petitions against atrocities on women; in particular harassment of bride, bride burning, rape, murder, kidnapping, etc. . . .
- (7) Petitions complaining of harassment or torture of villagers by co- villagers [sic] or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.
- (8) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life [sic], and other matters of public importance.
- (9) Petitions from riot-victims [sic].
- (10) Family Pension.

Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation, SUPREME COURT OF INDIA, [SupremeCourtOfIndia.nic.in](http://supremecourtindia.nic.in), <http://supremecourtindia.nic.in/circular/guidelines/pilguidelines.pdf> (last visited Dec. 18,

This subsection is divided into five parts. The first part provides information on PILs generally; the following three parts go into greater detail about each of the three cases highlighted above, in chronological order. The last part discusses the relationship between the three cases and the connection between orientation and gender identity cases more generally.

1. Public Interest Litigations

Indian courts'⁴¹ PIL mechanism is unique and has been extensively analyzed.⁴² Indian courts have acknowledged the inherent inequality within the adversarial court system.⁴³ To foster greater access to justice in public interest matters, the Indian judiciary has adapted several common law court processes to give voice to the poor and disadvantaged in PILs.⁴⁴ One of the adaptations for PILs are relaxed standing rules that allow anyone to file a claim in the public interest.⁴⁵ As Professor Avani Mehta Sood explains, "The key feature of PIL is its liberalization of the traditional [standing rule], which [otherwise] requires litigants to have suffered a legal injury in order to maintain an action for judicial redress in Indian and U.S. courts alike."⁴⁶ In fact, PILs can be initiated in a variety of ways, including postcards or letters to judges.⁴⁷

Other adaptations for PILs include a more investigative, fact-finding role for courts, with the expectation that parties will take on a more collaborative problem-solving approach;⁴⁸ greater judicial engagement in areas considered to fall within the political realm;⁴⁹ the issuance of short-term mandatory orders

2015).

41. For more information on the Indian court system, see Nick Robinson, *India's Judicial Architecture*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW (Sujit Choudhry, Madhav Khosla & Pratap Mehta eds., forthcoming 2016).
42. See Sandra Fredman, *Restructuring the Courts: Public Interest in the Indian Courts*, in HUMAN RIGHTS TRANSFORMED 124, 124–25 (2008).
43. *Id.* at 124.
44. *Id.*
45. See Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 839–40 (2008). The Supreme Court of India has held that for cases involving violations of constitutional rights of particular persons or classes of persons who are "by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ . . . seeking judicial redressal for the legal wrong or injury." *S. P. Gupta v. Union of India*, (1982) 2 SCR 365 (India).
46. Sood, *supra* note 45.
47. *Id.* Sood writes, "The Court further expanded access to justice by establishing 'epistolary jurisdiction,' stating that judges would 'readily respond' to letters or postcards alerting them to constitutional rights violations and treat such submissions as formal writ petitions for PIL purposes." *Id.* Sood points out that the Court justified its relaxation of standing rules by arguing that it did not want to let procedural irregularities get in the way of justice. *Id.*
48. In *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235, 242 (India), the Court explained, "Public interest litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges."
49. Fredman, *supra* note 42, at 124–25.

(often against the government);⁵⁰ and active judicial supervision of court orders.⁵¹ Understandably, even as some champion PILs for “energizing the political process,” others are cautious of courts encroaching on the legislative and executive branches of government.⁵² Nevertheless, these unique aspects of Indian PILs, especially with respect to matters of party standing, had procedural and substantive impacts on *Naz v. NCT Delhi*, *Koushal* and *NLSA v. UOI*, all three of which were PILs.

2. *Naz Foundation v. Government of the National Capital Territory of Delhi*

Naz Foundation (India) Trust (“Naz Foundation”), a non-governmental organization (“NGO”) based in Delhi, India, challenged the constitutional validity of Section 377 in *Naz v. NCT Delhi*.⁵³ Naz Foundation was founded in 1994 through the support of Naz Foundation International, an NGO based in London.⁵⁴ Naz Foundation provides support for people living with HIV/AIDS (including children) and does HIV prevention work.⁵⁵ Part of its HIV prevention is focused on homosexuals and men who have sex with men (“MSMs”).⁵⁶ Through its outreach, Naz Foundation determined that Section 377 forced homosexuals and MSMs underground due to fear of prosecution under the law.⁵⁷ Naz Foundation viewed Section 377 as a significant impediment to homosexuals’ and MSMs’ ability to access sexual health services.⁵⁸ As a result, in 2001, the Lawyers Collective filed a writ petition in the Delhi High Court on behalf of the Naz Foundation, challenging Section 377 on the grounds that it violated the fundamental rights enshrined in the Constitution.⁵⁹ Specifically, the Naz Foundation argued that Section 377 violated the “right to privacy, dignity, and health” guaranteed under Article 21 of the Indian Constitution; equal protection of law and nondiscrimination guaranteed under Articles 14 and 15;

50. *Id.* at 124–25.

51. In an email to Mehta Sood, the Supreme Court described its role in PIL as follows:
[T]he court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the organi[z]ation of the proceedings, moulding of the relief and . . . supervising the implementation. . . . This wide range of responsibilities necessarily implies correspondingly higher measures of control over the parties, the subject matter and the procedure.”

Sood, *supra* note 45, at 843.

52. Fredman, *supra* note 42, at 124–25.

53. *LGBT Section 377*, *supra* note 37.

54. *See About Us: Naz India*, NAZ FOUND. (INDIA) TRUST, <http://nazindia.org> (last visited Dec. 18, 2015); *Naz Foundation International*, INST. OF DEV. STUDIES, <https://www.ids.ac.uk/idsorganisation/naz-foundation-international> (last visited Dec. 18, 2015).

55. *See About Us: Naz India*, *supra* note 54.; *see also LGBT Section 377*, *supra* note 37.

56. *LGBT Section 377*, *supra* note 37.

57. *See id.*

58. *See id.*

59. *See id.*

“and freedom of expression under Article 19.”⁶⁰

In 2004, the High Court dismissed the petition on the ground that it failed to state a cause of action, as there was no plaintiff being prosecuted under Section 377.⁶¹ The Court did not want to engage in what it perceived as a purely “academic challenge to the constitutionality of the legislation.”⁶² Naz Foundation filed a review petition of the High Court’s order, which the High Court dismissed.⁶³ The petitioners subsequently appealed the High Court’s refusal to hear the matter to the Indian Supreme Court.⁶⁴ The Supreme Court ordered the High Court to reconsider the challenge, holding that because *Naz v. NCT Delhi* was a PIL, a specific aggrieved plaintiff was not required, and the High Court’s grounds for dismissal did not apply.⁶⁵

In 2009, the High Court reconsidered the issue of whether to decriminalize homosexuality. In its opinion in *Naz v. NCT Delhi*, it read down Section 377 to decriminalize consensual sexual acts between adults in private.⁶⁶ The court accepted the public health argument that criminalizing homosexuality drove homosexual activity underground and affected homosexuals’ ability to access services related to HIV/AIDS prevention and treatment.⁶⁷ In its opinion, the court focused on constitutionally enshrined rights to dignity, privacy, equality, and non-discrimination.⁶⁸ Further, it explored the nexus between dignity and privacy and the autonomy to make one’s own sexual choices.⁶⁹ The court agreed that Section 377 disproportionately penalized homosexuals because their sexual acts were frequently interpreted as “carnal intercourse against the order of nature.”⁷⁰ In sum, the High Court concluded that Section 377 discriminated against homosexuals and violated their constitutional right to express a core aspect of their personal identities.⁷¹

60. *See id.*

61. *See id.*

62. *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *4.

63. *LGBT Section 377*, *supra* note 37.

64. *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *4.

65. *Id.*

66. *Id.*

67. *Id.* at *40–45.

68. ALT. LAW FORUM, THE RIGHT THAT DARES TO SPEAK ITS NAME 12 (2009), <http://altlawforum.org/publications/the-right-that-dares-to-speak-its-name/>.

69. *See id.* at 13-14.

70. *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *44–45.

71. *Id.* at *22. The court states:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the

3. *Suresh Kumar Koushal v. Naz Foundation*

The government did not appeal *Naz v. NCT Delhi*.⁷² Instead, the High Court's decision was appealed by astrologer Suresh Kumar Koushal, religious individuals, and faith-based groups, including Hindus, Muslims, and Christians.⁷³ As legal practitioner and scholar Vikram Raghavan notes, the appellants "shared no particular religious or ideological creed" and were united only in their belief that "homosexuality is an abomination."⁷⁴ Many of the appellants were not even parties to the Delhi High Court's decision in *Naz v. NCT Delhi*; "[w]hen asked about their standing, they claimed that homosexuality hurt[] their religious sentiments" or that it "was against public morality."⁷⁵ The Supreme Court gave special leave to every appellant, even though none of the primary parties before the High Court in *Naz v. NCT Delhi* (that is, neither the Union of India, the Delhi government, nor Naz Foundation) wanted to appeal the matter.⁷⁶

Raghavan was critical of the Supreme Court's choice to allow an appeal from a party that did not participate in the High Court's proceedings.⁷⁷ He argued that "the Court did not seriously inquire whether Koushal and his cohorts had adequate standing to maintain their appeals," nor did the judges "meaningfully examine what harm Koushal suffered" as a result of the High Court's ruling.⁷⁸ Raghavan further suggested that the Indian Supreme Court should have taken the approach of the U.S. Supreme Court in *Hollingsworth v. Perry*.⁷⁹ In that case, the U.S. Supreme Court rejected an appeal from a lower court decision overturning Proposition 8, a California state ballot measure that outlawed same-sex marriage.⁸⁰ The Court rejected the appeal on the basis that the petitioners lacked standing.⁸¹ Much like in *Koushal*, the California state government had not appealed the lower court's ruling.⁸² Rather, the petitioners were official proponents of the Proposition 8 ballot initiative who were against

Constitution. *Id.*

72. For a summary of the parties at the Supreme Court, see *Koushal*, (2014) 1 SCC at 24–28; Vikram Raghavan, *Taking Sexuality Seriously: The Supreme Court and the Koushal Case—Part I*, L. & OTHER THINGS (Dec. 14, 2013, 8:48 AM), <http://lawandotherthings.blogspot.ca/2013/12/taking-sexuality-seriously-supreme.html>, [hereinafter Raghavan, *Part I*].

73. *Koushal*, (2014) 1 SCC at 24–28.

74. Raghavan, *Part I*, *supra* note 72.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See generally* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

80. *See id.* at 2668. Proposition 8 amended California's state constitution to prohibit same-sex marriage. *Id.* at 2659.

81. *Id.* at 2668. The U.S. Supreme Court held that they "have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." *Id.* They declined to do so for the first time in *Hollingsworth*. *Id.*

82. *Id.* at 2660.

gay marriage.⁸³ Similar to the California state government, neither the Delhi government nor the Government of India appealed the High Court's ruling in *Naz v. NCT Delhi*, even though the court had read down Section 377. Raghavan argued that the Indian Supreme Court should have adopted the same approach as the U.S. Supreme Court in *Hollingsworth* and declined to hear the appeal.⁸⁴

However, the Indian Supreme Court's willingness to allow non-parties to appeal and intervene in *Koushal* was less surprising given the relaxed standing rules for PILs.⁸⁵ In fact, there is precedent to suggest that once a matter is brought before the Court, the original petitioner cannot withdraw the case, as it becomes the Court's investigation.⁸⁶ Thus, the Indian Supreme Court's decision to hear the appeal and allow new intervenors may not have been unprincipled, as Raghavan suggests, but rather grounded in the relaxed standing rules for PILs.⁸⁷

The Supreme Court in *Koushal* determined that because of the presumption of constitutionality for every piece of legislation enacted by Parliament,⁸⁸ courts must exercise judicial restraint when asked to read down legislation.⁸⁹ The Court reasoned that the abuse of Section 377 by police officers and others in power to target and harass innocent queer people did not affect the constitutionality of the law, as legislation is not unconstitutional simply because it is misused.⁹⁰ The Supreme Court also reasoned that the High Court relied too heavily on international precedent while failing to adequately consider whether such precedent should apply in the Indian context.⁹¹ For these reasons, the Supreme Court upheld Section 377 as constitutional and refused to read down the law to decriminalize homosexuality. The Court stated, however, that Parliament was free to amend or eliminate Section 377 as it deemed fit.⁹²

The Court's reasoning in *Koushal* has significant jurisprudential and technical shortcomings. For example, the *Koushal* bench inadvertently cited

83. *Id.*

84. Raghavan, *Part I, supra* note 72. Raghavan wrote that since "neither the petitioner nor respondents" in *Naz v. NCT Delhi* challenged the High Court's decision, the "third-party appellants must establish how and why their interests [were] affected by it." *Id.* In Raghavan's opinion, since "the principal adversaries" in the underlying matter had accepted the High Court's findings, the Supreme Court should have been "extremely wary of reopening the case." *Id.* To explain his position, Raghavan used the following cricket analogy: "[T]he two teams have left the stadium after a full and fair game. They are content with the umpire's rulings and the final outcome. It seems inconceivable that spectators can now come out to the pitch and demand a rematch involving them." *Id.*

85. Sood, *supra* note 45, at 839–40.

86. *Id.* Sood explains that once a party brings forward a PIL, they cannot withdraw the PIL. *Id.* at 840. The reasoning is that "[t]he 'rights' of those who bring the action on behalf of others must necessarily be subordinate to the 'interest' of those for whose benefit the action is brought." *Id.* In effect, once a PIL is initiated, it is a public process, like an inquiry, and the originating private party loses procedural control. *Id.*

87. Raghavan, *Part I, supra* note 72.

88. *Koushal*, (2014) 1 SCC at 49.

89. *Id.* at 54.

90. *Id.* at 76–78.

91. *Id.* at 78.

92. *Id.* at 81.

cases where the Court had overturned colonial-era laws to support its position that the Court had historically afforded great deference to such laws, including Section 377.⁹³ Further, the *Koushal* bench's rejection of foreign precedent appears contrary to existing Indian jurisprudence that does engage with foreign and comparative law.⁹⁴ Additionally, many have criticized the Court's adherence to judicial restraint as hypocritical given its activist history in PILs.⁹⁵

The writing quality in the opinion is also rather poor. *Koushal* was the last judgment Justice Singhvi wrote and delivered before he retired; it was also the last of nineteen opinions that he wrote or co-authored in his final thirty days on the bench.⁹⁶ As Raghavan suggests, it is apparent from the quality of the writing that "Justice Singhvi drafted his *Koushal* opinion in a great hurry."⁹⁷ Legal analysis constitutes only a small portion of the ninety-eight-page judgment.⁹⁸ In addition, there are pages of block quotes from the written submissions as well as from other cases, with very little explanation of how those passages apply to the issues in *Koushal*.⁹⁹ As a result, the legal analysis in *Koushal* is superficial, and the Supreme Court has left itself open to criticism.¹⁰⁰

Promptly after the Supreme Court issued the opinion in *Koushal*, both the government of India¹⁰¹ and decriminalization advocates filed a review petition

93. *Id.*

94. See Arun K. Thiruvengadam, *Forswearing "Foreign Moods, Fads or Fashions"?: Contextualising the Refusal of Koushal to Engage with Foreign Law*, 6 NUJS L. REV. 595, 603–06 (2015), http://nujlawreview.org/wp-content/uploads/2015/03/04_arun_thiruvengadam.pdf; Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER RACE & JUST. 1, 44–45 (2015); Siddharth Narrain, *We Dissent*, ORINAM 4–5 (2013), <http://orinam.net/377/wp-content/uploads/2013/12/nazsc-response.pdf> [hereinafter Narrain, *We Dissent*].

95. Vikram Raghavan, *Taking Sexuality Seriously: The Supreme Court and the Koushal Case — Part II*, L. & OTHER THINGS (Dec. 16, 2013, 3:49 AM), http://lawandotherthings.blogspot.ca/2013/12/taking-sexuality-seriously-supreme_16.html [hereinafter Raghavan, *Part II*].

96. *Id.*

97. *Id.*

98. See Boyce, *supra* note 94, at 42. As will be clear to anyone reading the judgment, the first half of the judgment is comprised almost entirely of a lengthy summary of the High Court's decision and the arguments of the parties on appeal before the Supreme Court. *Id.*; see *Koushal*, (2014) 1 SCC at 15–43. As Boyce notes, "[a] further five pages are devoted to verbatim quotations of constitutional provisions." Boyce, *supra* note 94, at 42 n.294; see *Koushal*, (2014) 1 SCC at 43–47. Then there are eight pages acknowledging that while "courts have the power to invalidate laws if they violate the Constitution," courts must not exercise that power "simply because [the laws] are bad public policy or have lost social legitimacy." Boyce, *supra* note 94, at 42 n.294; see *Koushal*, (2014) 1 SCC at 57–54. Next, there are four pages "of block quotes from statutory provisions and entries in Black's Law Dictionary" with little explanation of their relevance. Boyce, *supra* note 94, at 42 n.294; see *Koushal*, (2014) 1 SCC at 54–57. This is followed by "three pages on history of sodomy legislation in England and India." Boyce, *supra* note 94, at 42 n.294; see *Koushal*, (2014) 1 SCC at 57–59.

99. Boyce, *supra* note 94, at 42; see *Koushal*, (2014) 1 SCC at 57–59.

100. Raghavan, *Part II*, *supra* note 95.

101. It may seem counterintuitive that the Government of India chose to file a review petition against a decision that upheld the constitutionality of its own legislation. As Professor Tarunabh Khaitan notes, "the government had—rather unusually—admitted before the Court

calling for immediate technical review of *Koushal*, based on errors of law on the face of the record.¹⁰² Unfortunately, the Supreme Court rejected their review petition.¹⁰³ Decriminalization advocates subsequently filed a curative petition with the Supreme Court.¹⁰⁴ Instead of calling for immediate technical review, this petition alleged “that there [was] a larger, gross miscarriage of justice that [had to] be corrected.”¹⁰⁵ As of the writing of this Article, the Supreme Court has not yet issued a decision on the merits of the curative petition.¹⁰⁶

4. *National Legal Services Authority v. Union of India*

The petitioner in *NLSA v. UOI* was the National Legal Services Authority (“NLSA”), a publicly funded organization created by the government of India “to provide free legal services to the weaker and other marginalized sections of the society.”¹⁰⁷ Laxmi Narayan Tripathy, who identified as a *Hijra*,¹⁰⁸ was an intervenor.¹⁰⁹ NLSA and Tripathy had moved the Supreme Court to recognize

that the criminali[z]ation of sodomy was unconstitutional.” Tarunabh Khaitan, *NALSA v. Union of India: What Courts Say, What Courts Do*, L. & OTHER THINGS (May 1, 2014, 7:59 PM), <http://lawandotherthings.blogspot.ca/2014/05/nalsa-v-union-of-india-what-courts-say.html>. The Government indicated it chose not to appeal *Naz v. NCT Delhi* because it wanted the Indian Supreme Court to affirm the High Court’s decision. *Id.* Khaitan writes that ministers publicly endorsed gay rights only after the Court overturned *Naz v. NCT Delhi*. *Id.* It is ironic, however, that the government’s “response was to seek judicial review rather than go to Parliament.” *Id.* Khaitan explains that the government’s response was unsurprising, given that the executive in India often relies on the judiciary to legislate, or strike down legislation, because Parliament is paralyzed by obstructionist politics. *Id.*

102. See *Home*, ORINAM SECTION 377, <http://orinam.net/377/> (last visited Dec. 19, 2015) [hereinafter ORINAM SECTION 377]; *Voices Against 377 Files Review Petition*, OUR VOICES, THE ORINAM BLOG, (Jan 10, 2014, 6:50 PM), <http://orinam.net/377/voices-377-files-review-petition/> [hereinafter *Voices against 377*]; *Curative Petitions March 31, 2014*, OUR VOICES, THE ORINAM BLOG (Mar. 31, 2014, 1:00 AM), <http://orinam.net/377/curative-petitions-march-31-2014/> [hereinafter *Curative Petitions*].

103. ORINAM SECTION 377, *supra* note 102.

104. *Curative Petitions*, *supra* note 102.

105. *Id.*

106. It is possible that the Court may respond to the curative petition in favor of the decriminalization advocates. However, the critiques expressed in this Article, based on the principles of ally building and intersectionality, are still relevant for decriminalization advocates as they consider next steps in the advancement of LGBT rights in India.

107. *NLSA v. UOI*, (2014) 5 SCC at 459.

108. As the Court explained in *NLSA v. UOI*, *Hijras* are people who were assigned male at birth, or were born with male intersex variation, but reject their masculine identity. *Id.* at 480. They “identify either as women, or ‘not-men,’ or ‘in between man and woman,’ or ‘neither man nor woman.’” *Id.* While *Hijras* may be compared to “the western equivalent of transgender/transsexual (male-to-female) persons,” they are also different because “*Hijras* have a long tradition/culture [in the Indian Subcontinent] and have strong social ties formalized through a ritual called *reet* (becoming a member of *Hijra* community).” *Id.* at 480–81. The Court acknowledged that “*Hijras* may earn through their traditional work: *Badhai* (clapping their hands and asking for alms), blessing new-born babies, or dancing in ceremonies.” *Id.* at 481. Other *Hijras* may “engage in sex work for lack of other job opportunities,” and “some may be self-employed or work for non-governmental organi[z]ations.” *Id.* *Hijras* in Delhi may prefer to use the term *Kinnars*, and in Tamil Nadu, *Hijras* prefer the term *Aravanis*. *Id.*

109. *Id.* at 459.

the gender identity of transgender people—people whose gender identity and/or expression is different from the cultural expectations surrounding the sex they were assigned at birth.¹¹⁰ Additionally, they asked that *Hijras* be recognized as a third gender, with all the corresponding constitutional protections.¹¹¹ Even though the case name suggests that the government opposed the petitioners, the government actually agreed that the problems of the transgender community were serious and required the Court’s ameliorative action.¹¹² All parties thus supported the declaratory relief sought by the petitioners.¹¹³

On April 15, 2014—four months after *Koushal*, but before the hearing on the curative petition—the Supreme Court released the *NLSA v. UOI* judgment, which recognized transgender identity as a distinct, third gender identity.¹¹⁴ The Court also ordered the Indian states and national government to adopt and implement policies to ensure the equal treatment of transgender people.¹¹⁵

In reaching its holding in *NLSA v. UOI*, the Supreme Court discussed in detail the historical and contemporary issues facing transgender people in India and called for their equal treatment on the basis of Indian and international precedent.¹¹⁶ Although the Court used the umbrella term “transgender,” it explicitly limited its holding to transgender identities that are considered culturally indigenous to India.¹¹⁷ However, the specific transgender identities the Court named in its opinion—*Hijras*, *Aravanis*,¹¹⁸ *Kothis*,¹¹⁹ *Jogtas/Jogappas*,¹²⁰

110. *Id.*

111. *Id.*

112. *Id.* at 461.

113. *Id.* at 459–461. It is not uncommon for opposing parties to work together in the context of PILs, in which courts take on an investigative problem-solving approach and actively work with the legislative and executive branches of government in response to governmental policy paralysis. See Khaitan, *supra* note 101; see generally Fredman, *supra* note 42; Sood, *supra* note 45.

114. *NLSA v. UOI*, (2014) 5 SCC at 508.

115. *Id.*

116. See *id.* at 463–64, 465–80, 482.

117. *Id.* at 501–02.

118. In the Indian state of Tamil Nadu, some *Hijras* identify as *Aravani*. *Id.* at 481. They are “biological males who self-identify themselves as a woman trapped in a male’s body.” *Id.* Some *Aravani* activists prefer the term *Thirunangi*. *Id.*

119. As the Court explained in *NLSA v. UOI*, “*Kothis* are a heterogeneous group.” *Id.* They are typically persons designated male at birth who express “varying degrees of ‘femininity.’” *Id.* However, their expression of femininity “may be situational” and may fluidly change with context. *Id.* “Some proportion of *Kothis* have bisexual behavior and get married to a woman.” *Id.* Some *Hijras* may also identify as *Kothis*; but not all *Kothis* identify as transgender or *Hijras*. *Id.* *Kothis* tend to be of a “lower socioeconomic status and some engage in sex work for survival.” *Id.*

120. *Jogtas* or *Jogappas* are male servants of “the goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka.” *Id.* One can become a *Jogata* “if it is part of their family tradition” or if one finds a *Guru* (or a priest) “who accepts them as a *Chela* or *Shishya* (disciple).” *Id.* “Sometimes, the term *Jogti Hijras* is used to denote those male-to-female transgender persons who are devotees/servants of Goddess Renukha Devi and who are also in the *Hijra* communities.” *Id.* However, *Jogti Hijras* are different from *Jogtas*, who are heterosexual men and “may or may not dress in woman’s attire when they worship the Goddess.” *Id.* Additionally, it is important to note that some *Jogti Hijras* may

and *Shiv-Shakthis*¹²¹—can be fairly fluid, internally heterogeneous, and can shift over time and depending on context.¹²²

The Court began its discussion by acknowledging the “trauma, agony and pain” of members of the transgender community in India, including the ridicule and abuse they experience in “public spaces like railway stations, bus stands, schools, workplaces, malls, theatres, [and] hospitals.”¹²³ The Court compared the contemporary treatment of transgender people in India to the experiences of “untouchables,”¹²⁴ who face the most extreme form of systemic discrimination in India.¹²⁵ The Court described in detail the historical treatment of transgender people in India, from their celebration in ancient mythology and religious texts to the criminalization of their identities by the British.¹²⁶ The Court noted that while the British laws that criminalized transgender identity were repealed in 1949—two years after India’s independence from the British—discrimination against transgender people remains.¹²⁷

The Court relied heavily on Indian precedent, as well as best practices from other South Asian countries, to identify *Hijras* specifically as a “distinct socio-religious and cultural group,” which, along with other transgender identities, must be considered a separate “‘third gender,’ apart from male and female.”¹²⁸ The Court noted with approval that certain Indian states, such as Tamil Nadu, already had “welfare measures to safeguard the rights of” transgender people.¹²⁹ In addition, states such as Kerala, Tripura, and Bihar had recognized transgender

use the female form of the word *Jogta*, and refer to themselves as *Jogtis*, while others may prefer to identify as *Hijras*, or even as *Jogtas*. *Id.*

121. *Shiv-Shakthis* are men who are possessed by a goddess and thus have feminine gender expression. *Id.* at 482. *Shiv-Shakthis* have unique norms, customs, and rituals that are taught to them by their guru. *Id.* As part of being inducted into the *Shiv-Shakthi* community, persons “are married to a sword that represents male power” or the *Shiva*, a male deity. *Id.* Occasionally, *Shiv-Shakthis* cross-dress. *Id.* Most *Shiv-Shaktis* “belong to [a] lower socioeconomic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms.” *Id.*
122. Boyce, *supra* note 94, at 25.
123. *NLSA v. UOI*, (2014) 5 SCC at 459.
124. “Untouchables” or *Dalits*, as they prefer to be called, are those persons who are outcastes and fall outside the traditional Indian four-caste system. See *Who Are Dalits? & What Is Untouchability?*, NAT’L CAMPAIGN ON DALIT HUMAN RIGHTS, <http://www.ncdhr.org.in/ncdhr/general-info-misc-pages/wadwui> (last visited Dec. 29, 2015). The term untouchable comes from the notion that some people are so impure by virtue of their birth that if a higher caste person comes into contact with them, that person’s body and spirit will become polluted. *Id.* While untouchability is legally prohibited in India, *Dalits* continue to be oppressed by higher caste people and face significant social, economic, and political exclusion. *Id.* Expressions of untouchability may include prohibiting untouchables from eating with other members of society, providing separate utensils to untouchables, and prohibiting untouchables from entering temples, burial grounds, homes of higher caste people, and wells. *Id.* Untouchables may also be subject to bonded labor. *Id.*
125. See *NLSA v. UOI*, (2014) 5 SCC at 459.
126. *Id.* at 463–64.
127. *Id.* at 464, 502–03.
128. *Id.* at 491.
129. *Id.*

as a third gender or sex.¹³⁰ The Court even reprimanded the Indian state of Punjab for legally treating all transgender people as male.¹³¹

In coming to its decision, the Court specifically engaged with the fundamental rights in the Indian Constitution and considered how those rights were being violated with respect to transgender people in India.¹³² The Court also discussed potential constitutional grounds for providing declaratory relief.¹³³ These grounds include Article 14, which requires equality under the law; Articles 15 and 16, which prohibit discrimination on certain enumerated grounds including “sex”; Article 19, which ensures freedom of speech and expression (which the Court interpreted as the right to freely express one’s self-identified gender); and Article 21, which protects life and liberty (which has been interpreted to include the right to dignity).¹³⁴

While *NLSA v. UOI* was largely based on the protection of fundamental rights under the Indian Constitution,¹³⁵ the Court also referred to jurisprudence from neighboring South Asian countries, such as Pakistan and Nepal, that affirmed the rights of transgender people.¹³⁶ The Court placed special importance on “the historical presence of the third gender” in India and other South Asian countries with close cultural ties to India.¹³⁷

In addition to relying on South Asian legal precedent, the Court also considered authority from the broader international community, including the United Nation’s support for “the protection and promotion of rights of sexual minorities, including transgender persons.”¹³⁸ The Court noted that Indian courts can apply international human rights law to Indian conditions as long as India is a party to the applicable international agreements and the agreement is not in conflict with Indian law.¹³⁹ However, before applying international precedent in *NLSA v. UOI*, the Court went into greater depth about the “Indian Scenario,” or the economic, social, and legal mistreatment of transgender people in India.¹⁴⁰ Thus, although the Court applied international precedent in *NLSA*, it also accounted for the unique experiences of transgender people in India.¹⁴¹

In its conclusion, the Court provided “various directions to safeguard the

130. *Id.*

131. *Id.*

132. *Id.* at 487–91.

133. *Id.*

134. *Id.*

135. Ratna Kapur, *Beyond Male and Female, the Right to Humanity*, THE HINDU (Apr. 19, 2014), <http://www.thehindu.com/opinion/op-ed/beyond-male-and-female-the-right-to-humanity/article5926142.ece> [hereinafter Kapur, *Beyond Male and Female*].

136. *NLSA v. UOI*, (2014) 5 SCC at 491–92.

137. *Id.*

138. *Id.* at 465–42.

139. *Id.* at 485. For a discussion on the legal basis for Indian courts to follow international covenants, see generally *id.* at 484–87.

140. *Id.* at 480–84.

141. *Id.* at 484–87.

constitutional rights of the members of the [transgender] community” in India.¹⁴² The Court declared that *Hijras* be recognized as a third gender.¹⁴³ The Court also upheld the rights of transgender people to determine their own gender identity—be it male, female, or third gender—and to have the government recognize their chosen gender identity.¹⁴⁴ The Court instructed the Indian and state governments to implement affirmative action policies to increase admission of transgender people in education and public appointments, to implement social welfare schemes for transgender people, to address the social exclusion of transgender people, and to establish measures to address their physical and mental health.¹⁴⁵ The Court also asked the government to set up separate public toilets and other facilities for transgender people.¹⁴⁶

There are concerns that the remedies granted in *NLSA v. UOI* are “vague and unrealistically sweeping.”¹⁴⁷ For example, some have suggested that given the fluidity of identities covered in the judgment, the affirmative action mechanisms suggested by the Court will likely be an administrative nightmare.¹⁴⁸ Professor Bret Boyce questions whether, in a country where nearly half the population has no toilet at all, it is realistic to expect national and state governments to actually “implement the Court’s order [and] provide separate public toilets to transgender persons.”¹⁴⁹ Professor Tarunabh Khaitan acknowledges that implementation of *NLSA v. UOI* will fall short of the Court’s order.¹⁵⁰ However, he argues that there is still value in the Court’s judgment because it will influence public discourse: over time, Indian society as a whole will be made more aware of the issues faced by transgender people and society will become more inclusive as a result of this awareness.¹⁵¹ Khaitan suggests that by influencing public discourse, the Court’s judgment in *NLSA v. UOI* will “lay the foundations for future judicial and legislative development.”¹⁵²

5. The Relationship Between the Three Cases, Sexual Orientation, and Gender Identity

This Article analyzes *NLSA v. UOI*, which is primarily about gender identity, in conjunction with *Naz v. NCT Delhi* and *Koushal*, which concern sexual orientation; however, it is important to acknowledge that sexual orientation and gender identity are distinct concepts. At the same time, the two

142. *Id.* at 493.

143. *Id.* at 508.

144. *Id.*

145. *Id.*

146. *Id.*

147. Boyce, *supra* note 94, at 54.

148. *Id.*

149. *Id.*

150. Khaitan, *supra* note 101.

151. *Id.*

152. *Id.*

concepts are closely related and often juxtaposed in queer politics.¹⁵³ While considering “the goals, strategies, and methods of Queer legal theory,” American queer legal theorist Professor Francisco Valdes points out that “queer” basically is to “gay/lesbian/bisexual/trans/bi-gendered” what “feminist” is to “woman.”¹⁵⁴ Valdes does not use queer as an umbrella term for sexual orientation minorities and gender minorities; rather, he defines queer as a “sharpened political awareness” that “produces various shades of opinion on issues of common concern” among minorities that experience othering due to their gender identity and/or sexual orientation.¹⁵⁵ Thus, the term queer inserts an intersectional perspective into discussions of both sexual orientation and gender identity.

Gender identity and sexual orientation also have some jurisprudential overlap in India. For example, *Hijras* experience othering based on their gender identities and sexual orientation¹⁵⁶ and were mentioned as aggrieved parties in all three cases: *Naz v. NCT Delhi*, *Koushal*, and *NLSA v. UOI*.¹⁵⁷ Additionally, *Hijras*, while assigned a male gender at birth, may identify as female or as outside the gender binary¹⁵⁸ and thus experience discrimination on the basis of gender identity. The Supreme Court recognized this issue in *NLSA v. UOI*.¹⁵⁹ However, as advocates argued in *Naz v. NCT Delhi* and *Koushal*, Section 377 may also apply to *Hijras* who engage in non-procreative, “imitative,” or “perverse” forms of sexual penetration, since the statute criminalizes sodomy.¹⁶⁰

In fact, the Court addressed Section 377 in *NLSA v. UOI*, acknowledging

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153. For a discussion of the relationship between sex, gender, and sexuality, see Cowan, *supra* note 13; Valdes, *Afterword & Prologue*, *supra* note 17; Sam Killermann, *The Genderbread Person* v3, [ITS PRONOUNCED METROSEXUAL.COM](http://itspronouncedmetrosexual.com/2015/03/the-genderbread-person-v3/), <http://itspronouncedmetrosexual.com/2015/03/the-genderbread-person-v3/> (last updated Mar. 16, 2015). Sexual orientation is an interesting concept because it is relational. It therefore depends on assumptions about a person’s gender and sex, as well as the gender and sex of those with whom they have sex. Further, it is unclear if sexual orientation is determined based on the sex or gender of persons. For instance, if a male-bodied, male-identifying person desires a male-bodied, female-identifying person, are they gay or straight? For a discussion of constructions of sexuality, see Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 550–53 (1994).
154. Valdes, *Afterword & Prologue*, *supra* note 17, at 345 n.1221.
155. *Id.*
156. *Hijras* also experience discrimination on the basis of class, caste, education, and other axes of oppression. *NLSA v. UOI*, (2014) 5 SCC at 459, 480–81.
157. *See id.* at 459; *Naz v. NCT Delhi*, 2009 SCC OnLine Del. 1762, at *459, *480–81; *Koushal*, (2014) 1 SCC at 34 (referring to the Bangalore incident in which a *Hijra* was tortured by the police).
158. *NLSA v. UOI*, (2014) 5 SCC at 480–81.
159. *Id.* at 508.
160. *See* Written Submissions Filed on Behalf of Intervenor No. 8, Minna Saran and Eighteen Others (Parents of LGBT Children) by Fali S. Nariman at 19, *Koushal*, (2014) 1 SCC 1, http://orinam.net/377/wp-content/uploads/2013/12/SC_ParentsOfLGBTChildren_WrittenSubmissions.pdf; Written Submissions on Behalf of “Voices Against 377” at 16, *Koushal*, (2014) 1 SCC 1, http://orinam.net/377/wp-content/uploads/2013/12/SC_VoicesAgainst377_WrittenSubmissions.pdf [hereinafter Submissions on Behalf of “Voices Against 377”].

that the provision “was used as an instrument of harassment and physical abuse” against transgender people during British rule.¹⁶¹ However, nowhere in the judgment did the Court mention any abuse of Section 377 after Indian independence. In fact, the Court in *NLSA v. UOI* unconvincingly avoided a discussion of Section 377 by stating that another bench of the Supreme Court had already addressed the provision’s constitutionality.¹⁶² According to the Court, the focus of *NLSA v. UOI* was “an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.”¹⁶³ Thus, the Court acknowledged that sexual orientation and gender identity are related, even as it held that the constitutional validity of Section 377 was distinct from the rights of transgender people.¹⁶⁴

Despite the Supreme Court’s attempt to distinguish between *NLSA v. UOI* and *Koushal*,¹⁶⁵ scholars, legal practitioners, and queer justice activists have continued to compare the two cases, since they address sexual orientation and gender.¹⁶⁶ *NLSA v. UOI* thus has important implications for sexual orientation cases, which is why decriminalization advocates asked the Supreme Court to follow its holding in *NLSA v. UOI* in the curative petition hearing for *Koushal*.¹⁶⁷

For these reasons, this Article analyzes *NLSA v. UOI* in conjunction with *Naz v. NCT Delhi* and *Koushal*, even as it acknowledges that gender identity and sexual orientation should not be uncritically conflated.

C. Reactions to *Naz v. NCT Delhi*, *Koushal*, and *NLSA v. UOI*

The courts’ decisions in *Naz v. NCT Delhi*, *Koushal*, and *NLSA v. UOI* elicited strong reactions from the socio-legal academy, activists, and society at large. This subsection discusses those reactions, with the aim of positioning this Article as a response to the courts’ holdings in the three cases and the reactions those judgments provoked.

Many criticized the High Court’s holding in *Naz v. NCT Delhi*. Certainly, religious and social conservatives were not pleased with the High Court’s decriminalization of homosexuality, and, as noted, a segment of them successfully appealed the High Court’s decision to the Supreme Court. On the other end of the political spectrum, many celebrated the High Court’s decision as

161. *NLSA v. UOI*, (2014) 5 SCC at 464.

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.*

166. *E.g.*, ORINAM SECTION 377, *supra* note 102; Boyce, *supra* note 94; Darshan Datar, *Reconsidering Naz: The Theoretical Shortcomings of a Privacy Based Approach to Homosexuality*, KING’S STUDENT LAW REVIEW HUMAN RIGHTS BLOG (Feb. 3, 2014), <https://blogs.kcl.ac.uk/kslr/?p=483>.

167. *See Gay Plea in Supreme Court to Cite Third Gender Verdict*, THE ECON. TIMES (Apr. 20, 2014), http://articles.economictimes.indiatimes.com/2014-04-20/news/49266178_1_transgenders-curative-petition-legal-rights.

a victory for LGBT rights; at the same time, however, queer scholars and practitioners produced a wealth of progressive literature that drew on queer antisubordination perspectives to critique the High Court's pro-LGBT decision.¹⁶⁸ These queer antisubordination scholars disagreed with the way that the judges and advocates in *Naz v. NCT Delhi* ascribed homosexual behavior in India to a homogenous LGBT identity group, similar to how LGBT identity is constructed in the West.¹⁶⁹ As scholars pointed out, such constructions do not typically apply to lower-caste, lower-class queers in India whose gender/sexual identities may be unrelated to sexual behavior and based instead on family roles.¹⁷⁰ Queer antisubordination scholars further criticized how decriminalization advocates grounded their arguments in international precedent.¹⁷¹ Additionally, some argued that the remedy sought in the case only protected those who had access to private space in which to have consensual sex.¹⁷² Thus, although the High Court decriminalized private homosexual conduct, scholars argued that the decision primarily benefited upper- and middle-class urban gay men and did little for queer subalterns who often lack access to private space and do not ascribe to a globalized LGBT identity.¹⁷³

As noted above, however, many LGBT rights activists and their allies, both in India and abroad, celebrated the High Court's ruling in *Naz v. NCT Delhi* and subsequently criticized the Supreme Court's decision to recriminalize homosexuality in *Koushal*. Legal scholars and practitioners critiqued the Supreme Court's legal reasoning, pointing out its inconsistencies and shortcomings;¹⁷⁴ prominent LGBT people and allies called the Supreme Court's

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168. See, e.g., Kapur, *Multitasking Queer*, *supra* note 12; Dutta, *supra* note 16. For a broader selection of queer antisubordination critiques of *Naz v. NCT Delhi*, see Oishik Sircar & Dipika Jain, *New Intimacies / Old Desires: Law, Culture and Queer Politics in Neoliberal Times*, 4 JINDAL GLOBAL L. REV. 1 (2012), http://www.jgls.edu.in/JindalGlobalLawReview/PDF/OishikSircarDipikaJainChapter-1_F_HR.pdf; Neil Cobb, *Contagion Politics: Queer Rights Claims, Biopower and the "Public Health" Rationale for the Repeal of Sodomy Laws*, 4 JINDAL GLOBAL L. REV. 60 (2012), <http://www.jgls.edu.in/JindalGlobalLawReview/PDF/NeilCobbChapter4HR.pdf>; Zaid Al Baset, *Section 377 and the Myth of Heterosexuality*, 4 JINDAL GLOBAL L. REV. 89 (2012), <http://www.jgls.edu.in/JindalGlobalLawReview/PDF/NeilCobbChapter4HR.pdf>.
169. See Ashley Tellis, *Disrupting the Dinner Table: Re-thinking the "Queer Movement" in Contemporary India*, 4 JINDAL GLOBAL L. REV. 142, 146, 150–52 (2012) [hereinafter Tellis, *Re-thinking Queer*], <http://www.jgls.edu.in/JindalGlobalLawReview/PDF/AshleyTellisChapter7HR.pdf>.
170. Tellis, *Human Rights*, *supra* note 20, at 159–62; Shivananda Khan, *Culture, Sexualities, and Identities*, 40 J. HOMOSEXUALITY 99, 106–07 (2001), http://dx.doi.org/10.1300/J082v40n03_06.
171. See Ashley Tellis, *Why I Can't Join the Party*..., THE HINDU (July 12, 2009), <http://www.thehindu.com/todays-paper/tp-features/tp-sundaymagazine/why-i-cant-join-the-party/article661686.ece> [hereinafter Tellis, *Party*].
172. See Jason Keith Fernandes, *The Dilemma After the Decision: Stray Thoughts After Gay Liberation*, TEHELKA (Aug. 14, 2009), http://archive.tehelka.com/story_main42.asp?filename=Ws220809The_Dilemma.asp.
173. See, e.g., Fernandes, *supra* note 172; Tellis, *Party*, *supra* note 171.
174. See Narrain, *We Dissent*, *supra* note 94; Thiruvengadam, *supra* note 94.

decision “retrograde”¹⁷⁵ and a “disgrace;”¹⁷⁶ and many private blogs openly denounced the *Koushal* judgment as homophobic.¹⁷⁷ The Supreme Court’s verdict even spurred worldwide protests, including a “Global Day of Rage.”¹⁷⁸

In contrast to the reactions provoked by the *Koushal* decision, many human rights groups celebrated when the Supreme Court issued its ruling in *NLSA v. UOI*.¹⁷⁹ Commentators pointed out the inconsistencies between the Court’s reasoning in the two cases and highlighted the logical shortcomings in *Koushal* that were absent in *NLSA v. UOI*.¹⁸⁰ Professor Kapur took a more nuanced approach, comparing *NLSA v. UOI* with *Naz v. NCT Delhi*, which advocates had also considered a human rights victory. She pointed out that *NLSA v. UOI* was a “dynamic” decision because it embedded “the rights of transgender persons primarily within the right to equality in the Indian Constitution,”¹⁸¹ in contrast to the decriminalization arguments put forth in *Naz v. NCT Delhi* and *Koushal*, which were “largely based on the right to privacy.”¹⁸²

In examining the Indian Supreme Court’s recent jurisprudence on sexual orientation and gender identity, it is important to consider whether *Koushal* and *NLSA v. UOI* are “flatly inconsistent,” as U.S. constitutional and comparative law scholar Bret Boyce argues,¹⁸³ or whether there is a logical explanation for a seemingly progressive outcome in one case and a regressive outcome in the other. Boyce argues that the two cases cannot be reconciled and that *Koushal* must be overturned.¹⁸⁴ For him, *NLSA v. UOI* “exemplifies the best of Indian constitutional tradition” and offers the metaphorical golden thread of “harmonized universal values” on which a more inclusive jurisprudence may be built.¹⁸⁵ Boyce posits that the incongruence between *Koushal* and *NLSA v. UOI* is merely an example of the failure of the Supreme Court’s numerous benches to

175. See Press Release, Student Bar Ass’n, Nat’l Law Sch. of India Univ., On *Koushal v. Naz* and LGBTQ Rights (Dec. 14, 2013), <http://orinam.net/377/wp-content/uploads/2013/12/NLSIU-SBA-Koushal-Press-Release1.pdf>.

176. See Sundeep Dougal, *S 377 Judgment “A Stain” On SC: Vikram Seth*, OUTLOOK (Dec. 11, 2013, 11:11 PM), <http://www.outlookindia.com/blogs/post/s-377-judgment-a-stain-on-sc-vikram-seth/3097/5>.

177. See, e.g., Ankur Chakravarthy, *India’s Supreme Court Has a Homophobic Brain Fade. . .*, EXPLORABLE: OF SCIENCE & SKEPTICISM (Dec. 12, 2013), <https://exploreable.wordpress.com/2013/12/12/indias-supreme-court-has-a-homophobic-brain-fade/>

178. *377 GDoR Images From Across the Globe*, ORINAM (Dec. 13, 2013), <http://orinam.net/377/377-gdor-images/>.

179. See, e.g., *Supreme Court Recognises the Right to Determine and Express One’s Gender; Grants Legal Status to “Third Gender”*, LAWYERS COLLECTIVE, <http://www.lawyerscollective.org/updates/supreme-court-recognises-the-right-to-determine-and-express-ones-gender-grants-legal-status-to-third-gender.html> (last visited Dec. 30, 2015) (calling the Court’s ruling in *NLSA v. UOI* “path-breaking”).

180. See, e.g., Boyce, *supra* note 94; Thiruvengadam, *supra* note 94.

181. Kapur, *Beyond Male and Female*, *supra* note 135.

182. *Id.*

183. See Boyce, *supra* note 94, at 3.

184. *Id.* at 64.

185. *Id.*

reliably follow precedent.¹⁸⁶

However, as will be discussed in the remaining sections of this Article, the conflicting outcomes in *Koushal* and *NLSA v. UOI* can also be explained by the inherent weaknesses of the pro-decriminalization arguments put forward in *Koushal*. Fortunately, many of these weaknesses did not exist in *NLSA v. UOI*. This may explain, at least in part, why *NLSA v. UOI* resulted in a more favorable outcome for Indian queer justice movements.

The next section discusses queer antisubordination critiques of the legal arguments made by decriminalization advocates in *Koushal*. These critiques highlight the many shortcomings of both the legal strategy employed in *Koushal* and decriminalization advocates' general approach to queer justice.

III. COMPARATIVE ANALYSIS OF QUEER ANTISUBORDINATION PERSPECTIVES IN INDIA AND THE WEST

This section engages in a comparative analysis of queer socio-legal theory in India and the West. It points out the similarities and differences between queer antisubordination perspectives in the two regions. The section uses this comparative analysis to illustrate that, in both India and the West, intersectional queer antisubordination approaches are better suited to achieving broader social justice than liberal LGBT rights approaches. Although the issues being contested by mainstream LGBT activists in the West and in India may be different, the single-issue politics adopted by activists in both regions is often underinclusive and does not account for the experiences of those who are subordinated.

There are many LGBT rights scholars who uncritically support the adoption of Western human rights and sexual orientation jurisprudence to decriminalize homosexuality in India.¹⁸⁷ While decriminalization is an important goal, the focus on privacy in decriminalization arguments, and the focus on decriminalization within the Indian LGBT rights movement more broadly, is problematic. Such a focus suggests that decriminalization advocates and their supporters believe that legal reform around sexual orientation in India should

186. See *id.* Legal scholar Nick Robinson has called the Indian Supreme Court a “polyvocal court.” See Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 184 (2013) [hereinafter Robinson, *Structure Matters*]. Current law provides for thirty-one judges on the Indian Supreme Court. Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court’s Workload*, 10 J. EMPIRICAL LEGAL STUD. 570, 570 (2013) [hereinafter Robinson, *A Quantitative Analysis*]. Further, Article 145(3) of the Indian Constitution requires cases raising a substantial issue of constitutional law to be heard by a five-judge constitutional bench. Robinson, *Structure Matters, supra*, at 180. However, due to staffing issues and large caseloads, two-judge benches have become the norm for the Supreme Court. Robinson, *A Quantitative Analysis, supra*, at 578. Robinson has suggested that the proliferation of two-judge benches, which were once considered “weak benches,” has resulted in “the numerous benches of the Supreme Court . . . not . . . reliably following precedent themselves and/or giving conflicting precedent.” *Id.* at 578, 582.

187. See, e.g., Boyce, *supra* note 94; Thiruvengadam, *supra* note 94.

follow a path similar to that taken in the West.¹⁸⁸ This path would involve decriminalization of homosexuality followed by marriage equality.¹⁸⁹ However, the identity-based, liberal politics underlying LGBT rights reform in the West has left many marginalized queers further marginalized.¹⁹⁰ In fact, queer antisubordination scholars in the West have criticized mainstream liberal LGBT politics for being underinclusive of and even harmful to more marginalized queer people.¹⁹¹ Thus, to better understand Indian queer politics, as well as antisubordination critiques of decriminalization arguments in India, it is important to consider the failure of Western LGBT identity-based movements to produce social justice for all.

Indeed, Indian queer antisubordination scholars/activists have critiqued decriminalization advocates for adopting a Western, LGBT, identity-focused politics in India that fails to account for the experiences of many subordinated queers.¹⁹² These scholars and activists have provided contextual information regarding social understandings of homosexual behavior in India and have offered insightful critiques of the legal strategies employed by decriminalization advocates in *Naz v. NCT Delhi* and *Koushal*.¹⁹³

This section begins with an overview of queer antisubordination perspectives in the West followed by ethnographic background on homosexual behavior in India. The section concludes with an analysis of socio-legal critiques of the Delhi High Court's judgment in *Naz v. NCT Delhi* and the decriminalization arguments put forth in *Naz v. NCT Delhi* and *Koushal*.

188. See Fernandes, *supra* note 172. Fernandes argues that recognizing the “right to intercourse between two consenting partners of the same sex” is merely a stepping-stone toward demanding marriage equality for same-sex couples in India. *Id.* He points out that the path from decriminalization to marriage equality mirrors the path taken by white LGBT rights activists in the West. *Id.*

189. *Id.*

190. *Id.* Fernandes points out how the pursuit of marriage equality in the West “effectively suffocated the larger question of marriage supporting patriarchal notions of family and property ownership.” *Id.* He suggests that the ultimate goal of marriage for decriminalization advocates “imperils the liberative potential of the gay movement in India.” *Id.*; see also Chong-suk Han, *They Don't Want to Cruise Your Type: Gay Men of Color and the Racial Politics of Exclusion*, 13 SOC. IDENTITIES 51 (2007) (discussing the social exclusion of gay men of color due to homo-assimilationist LGBT politics in the West and how that social exclusion negatively affects the self-esteem and emotional well-being of gay men of color).

191. See, e.g., Han, *supra* note 190, at 54. Han points out how the focus on gay marriage in the United States “has meant ignoring the ‘non-gay issues’ that impact the lives of gay men and women of color as members of racial minority groups such as affirmative action, unemployment, educational access, etc.” *Id.* He is critical of how mainstream gay media in the United States has intentionally “ignored immigration debates,” as evidenced by an Advocate.com editorial, “which suggested that focusing on immigrant rights would take away from gay rights.” *Id.*

192. See Dutta, *supra* note 16 (critiquing the marginalization of lower-caste, lower-class, gender nonconforming individuals and communities by the institutionalized LGBT movement in West Bengal, India); Tellis, *Re-thinking Queer*, *supra* note 169 (arguing that the mainstream LGBT rights movement in India is classist, sexist, and oppressive).

193. See Dutta, *supra* note 16; Tellis, *Re-thinking Queer*, *supra* note 169; Khan, *supra* note 170 (providing an ethnographic overview of men who engage in homosexual behavior in India).

A. Queer Antisubordination Perspectives in the West

The word “queer” originally had a derogatory connotation;¹⁹⁴ however, it was “reclaimed and deployed” by sexual orientation scholars in the United States and other English-speaking, predominately white, “developed” countries in response to the “‘first stage’ of sexual orientation scholarship.”¹⁹⁵ First stage, single-issue scholarship had focused on the issues of a unified and coherent gay subject who was white, male, middle-class, able-bodied, and privileged in every way but his sexual orientation.¹⁹⁶ To better address issues of race and ethnicity, “second stage” sexual orientation scholars began using the term “queer” as a mode of identification separate from “gay” or “lesbian”—terms that had come to be associated with more privileged groups in the LGBT community.¹⁹⁷ Thus, rather than focus on the single issue of heteronormative oppression, many second-stage queer scholars deployed the term queer to signify a “prideful, iconoclastic and egalitarian political stance” against “all forms of subordination.”¹⁹⁸ Underlying these queer antisubordination perspectives is the notion that all forms of oppression work together, therefore any meaningful project to liberate marginalized people must confront the entire system of interrelated hierarchies rather than focus on a single axis of oppression.¹⁹⁹

Significantly, queer antisubordination scholarship drew on the work of intersectional feminists, such as Kimberlé Crenshaw, to develop an intersectional response to queer subordination.²⁰⁰ Intersectionality is the concept that biases operate on multiple axes of oppression (such as race, class, ability, gender, sexual orientation, and indigeneity) simultaneously to oppress and subordinate.²⁰¹ Law professor Rebecca Johnson writes that an intersectional analysis means focusing on the lives of those who are at the “margins of mainstream theorizing.”²⁰² However, the goal of intersectional theory is not solely to document differences between those at the margins of “traditional

194. Valdes, *Afterword & Prologue*, *supra* note 17, at 347.

195. Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of Sexual Orientation*, 48 HASTINGS L.J. 1293, 1295 (1996–1997) [hereinafter Valdes, *Queer Margins*].

196. Allan Bérubé, *How Gay Stays White and What Kind of White It Stays*, in THE MAKING AND UNMAKING OF WHITENESS 234 (Birgit Rasmussen, Eric Klineberg, Irene Nexica, & Matt Wray eds., 2001).

197. Valdes, *Queer Margins*, *supra* note 195.

198. *Id.*

199. *Id.* at 1339–40.

200. For a discussion on the concept of intersectionality, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 U. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*].

201. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 200, at 140.

202. REBECCA JOHNSON, TAXING CHOICES: THE INTERSECTION OF CLASS, GENDER, PARENTHOOD, AND THE LAW 7 (2002).

theorizing” and those at its center.²⁰³ Nor is the goal to “encourage guilt.”²⁰⁴ Rather, as Johnson points out, “[t]he point . . . is to see whether or not the experiences of those located at the intersections can provide insights crucial to the constructions of better theories.”²⁰⁵ This Article draws on queer antisubordination perspectives for that very purpose—to see if they can provide stronger social, legal, and political theories that are more inclusive and just, and that carry stronger liberative potential for all.

Recent queer antisubordination scholarship in North America has criticized the assimilationist and homonormative techniques used to gain legal acceptance for those with alternative sexualities. These critiques highlight the different ways in which a single-issue, identity-based politics has failed to meaningfully help the most marginalized queer people in the West, and has, in some instances, even harmed them.

1. Queer Antisubordination Critiques of Marriage Equality Arguments in North America

Queer antisubordination scholars criticized the marriage equality movements in the United States and Canada for making gay marriage the focus of mainstream political discourse.²⁰⁶ Not only did Western LGBT rights activists fail to engage with critiques of the institution of marriage, but marriage equality jurisprudence itself did very little to foster true sexual freedom.²⁰⁷

Intersectional queer feminists have made compelling arguments against the privatization of the state’s economic responsibility through the institution of marriage.²⁰⁸ Professors Claire Young and Susan Boyd have highlighted how the legalization of same-sex marriage marginalizes such feminist perspectives.²⁰⁹ They point out that arguments supporting gay marriage were framed primarily in terms of a false dichotomy between pro-marriage equality and anti-marriage equality.²¹⁰ In fact, this binary choice concealed marriage’s role in the subordination of women and other marginalized people.²¹¹

For example, Young and Boyd note that “despite social changes such as the increased participation of married women in the labour force, marriage

203. *Id.*

204. *Id.* As Johnson notes, “guilt and denial have been common responses to intersectional critiques.” *Id.*

205. *Id.*

206. See, e.g., Claire Young & Susan Boyd, *Losing the Feminist Voice? Debates on Legal Recognition of Same-Sex Partnerships in Canada*, 14 FEMINIST LEGAL STUDIES 213, 217–22 (2006) (discussing feminist critiques of marriage and marriage-like relationships).

207. See Cossman, *infra* note 234, at 245–48, and accompanying text.

208. For a survey of feminist critiques of marriage and marriage-like relationships, see Young and Boyd, *supra* note 206, at 217–22.

209. *Id.* at 220–22.

210. *Id.* at 231–32, 235.

211. *Id.* at 235–36.

remains an inherently patriarchal institution.”²¹² Women continue to bear an unequal share of caregiving and reproductive responsibility within monogamous marriage.²¹³ Further, “[d]espite changes to family law, many fought for by feminists, economic remedies available on marriage breakdown have not been especially successful in addressing the inequalities stemming from women’s continuing provision of the reproductive labour.”²¹⁴

By focusing on marriage, a private relationship, instead of broader social welfare, LGBT rights activists reinforced the larger societal trends of privatization and individualism.²¹⁵ Professor Janet Halley notes that there are many rights, privileges, and benefits that flow from marriage: when two persons enter a marriage contract, they are entering a “private welfare system” that alleviates the economic burden on the neoliberal state.²¹⁶ That is, the state uses the institution of marriage to pass its welfare responsibilities to the conjugal family unit.²¹⁷ Young and Boyd point out that one of the Supreme Court of Canada’s main rationales for extending spousal recognition to same-sex couples “was to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to family members.”²¹⁸ As a result, “extending spousal status to lesbians and gay men” in Canada had the effect of reinforcing “the neo-liberal privatization of economic responsibility by placing it on family members, rather than the state.”²¹⁹

Thus, by pursuing marriage equality for same-sex couples, activists have reinforced marriage as a desirable norm without interrogating the ways in which the institution promotes economic dependency and discrimination.²²⁰ There is a significant body of scholarship on how the capitalist economy consistently undervalues women’s labor.²²¹ In such a context, transferring the state’s economic welfare responsibilities to the marital unit further exacerbates women’s economic dependence on men.²²² In short, marriage equality arguments have failed to “problematiz[e] marriage as a social and economic institution.”²²³

Further, Western LGBT movements’ focus on marriage equality failed to account for the needs and experiences of those marginalized along multiple axes of oppression.²²⁴ Through her birdcage metaphor, feminist theorist Marilyn Frye

212. *Id.* at 218.

213. *Id.*

214. *Id.*

215. *Id.* at 215.

216. *Id.* at 228.

217. *Id.* (citing Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 91, 100 (R. Wintemute & M. Andenaes eds., 2001)).

218. *Id.* at 221.

219. *Id.* at 215.

220. *Id.*

221. See J. K. GIBSON-GRAHAM, *A POSTCAPITALIST POLITICS* 57 (2006).

222. Young and Boyd, *supra* note 206, at 221–22.

223. *Id.* at 214.

224. *Id.* at 220–21. Young and Boyd write, “[t]he affidavits in the same-sex marriage cases

exposes the shortcomings of a single-axis focus.²²⁵ According to Frye, if one looks “very closely at just one wire in the cage,” it remains unclear “why a bird would not just fly around the wire” and become liberated.²²⁶ If one looks at another wire in the cage in isolation, they will reach the same conclusion.²²⁷ Frye explains that it is only when one steps back, stops looking at the individual wires, and instead starts looking at the cage as a whole, that one will see why “the bird does not go anywhere.”²²⁸ The bird cannot escape because it “is surrounded by a network of systematically related barriers,” which, “by their relations to each other, are as confining as the solid walls of a dungeon.”²²⁹ Frye’s birdcage metaphor demonstrates that a single-axis analysis provides an incomplete conceptualization of the experiences of those marginalized along multiple axes of difference.²³⁰ For example, while marriage equality may be the most pressing issue for someone who is marginalized on the basis of sexual orientation, it may be less salient for an individual who experiences oppression along multiple other axes. Even if the single “wire” of marriage inequality is removed, that individual will remain trapped by the larger cage of oppression.

LGBT movements’ focus on marriage equality was not only an ineffective strategy for addressing intersectional oppression, but it also prompted advocates to set aside other important social issues.²³¹ American sociologist and professor Chong-suk Han highlights, for example, how the adoption of an assimilationist politics led mainstream gay activists in the United States to ignore supposedly “non-gay” issues, including “homelessness, unemployment, welfare, universal health care, union organizing, affirmative action, and abortion rights.”²³² However, these non-gay issues were more pressing for marginalized individuals within the LGBT community, such as uniquely abled people, people of color, the homeless, and the unemployed.²³³ Had members of the LGBT rights movement listened to the priorities of those who were most marginalized among them—that is, those who experience oppression along multiple axes—queer justice movements in the United States and Canada would have looked very different.

emphasised factors such as joint finances, reciprocal wills, [and] monogamy . . .” *Id.* at 219. Further, in their affidavits, same-sex couples expressed a “desire to be ‘just like’ other [propertied] couples.” *Id.* However, this underlying assumption about the ownership of wealth and property excludes queer people who lack economic wealth and/or a conjugal partner and require the assistance of the state. *See id.* In short, the “equality rights framework, which requires a comparison between the advantaged group and the disadvantaged group,” tends to render invisible the diversity of gays and lesbians and the diversity of their relationships. *Id.*

225. *See* MARILYN FRYE, *Oppression*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 4–5 (1983).

226. *Id.* at 4.

227. *Id.* at 4–5.

228. *Id.* at 5.

229. *Id.*

230. *See id.*

231. Han, *supra* note 190, at 53–54.

232. *Id.*

233. *Id.* at 53.

Finally, the centering of marriage equality in Western LGBT rights movements has served to further normalize certain kinds of relationships while marginalizing others. According to Professor Brenda Cossman, liberal rights discourse in Canada has done little to foster true sexual freedom, instead constituting some queers as “legal subjects in law” and “reinscrib[ing]” others as “outlaws.”²³⁴ She argues that although there have been formal legal victories under the *Canadian Charter of Rights and Freedoms*, such as the recognition of same-sex relationships, sexual freedom still remains largely unprotected in Canada.²³⁵ For example, she points out that the Supreme Court of Canada refused to overturn legislation under which homosexual erotic material could be stopped at the Canadian border.²³⁶ Thus, the “erotically charged” homosexual, who engages in nonmonogamous sex in bathhouses and buys kinky pornography, “remains a sexual outlaw,” despite formal legal victories recognizing same-sex relationships.²³⁷ In effect, Canadian law constructs “lesbian and gay subject[s]” as living in “monogamous and respectable” relationships.²³⁸ These homonormative legal constructions work to assimilate queer relationships within the hetero-patriarchal family model of monogamous marriage.²³⁹ In this way, marriage equality reinforces the notion that “care giving and support” are to be accessed primarily within the private conjugal family, rather than through a broader public welfare system.²⁴⁰

2. Co-optation of LGBT Rights Discourse by Neoliberal Western Imperialism

In addition to critiquing marriage equality discourse, queer antisubordination scholars have traced other ways in which liberal LGBT rights discourse can be classist and racist. Assimilationist, mainstream LGBT discourse in the West tends to exclude unemployed and racialized queers and, in effect, supports a capitalist and white supremacist imperial agenda.

For example, while providing an anti-capitalist critique of the lack of intersectionality in mainstream transgender rights movements in the United States and Canada, trans academic Dr. Vivian Namaste argues that such activism is “deeply embedded in a broader project of imperialism.”²⁴¹ She uses the word “imperialism” in two ways.²⁴² First, imperialism refers to “economic practices outside the United States that are destined to benefit the interests of American

234. Brenda Cossman, *Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms*, 40 OSGOODE HALL L.J. 224, 224–249 (2002).

235. *Id.* at 224–25, 238–42.

236. *Id.* at 238–42.

237. *Id.* at 247.

238. *Id.* at 246.

239. *Id.*

240. *Id.*

241. NAMASTE, *supra* note 22, at 140.

242. *Id.*

business.”²⁴³ Second, it is “the imposition of a particular world view and conceptual framework across nations, languages, and cultures.”²⁴⁴

Namaste examines the celebratory statements made after the city of San Francisco broadened the health care benefit it provided its own employees to include transgender medical care.²⁴⁵ These statements suggested that the extension of employment-based health care benefits would trickle down to others.²⁴⁶ However, Namaste is critical of the assertion that the city’s decision was a victory for transgender people everywhere.²⁴⁷ While the city’s decision was a victory, it did not address the fact that, in the United States, health care is often tied to employment.²⁴⁸ When health care is tied to employment, those who are unemployed do not have health benefits. This is particularly problematic for transgender persons who face high levels of employment discrimination. In effect, the mainstream transgender rights advocates failed to address intersectional harms, such as the inability of some transgender persons to get medical care because they are both transgender and unemployed.

At a conceptual level, Namaste questions whether it is fair and just to deliver health care through the market. She argues against the commodification of human health and well-being because it excludes unemployed transgender persons.²⁴⁹ She also suggests that when transgender activists focus their advocacy efforts on extending privatized, employment-based health insurance to cover transgender-related medical care, the activists participate in and legitimize a system that assumes health care is only for those who are employed.²⁵⁰ While there is certainly a benefit in extending health care to some employed transgender persons, Namaste questions whether such change helps unemployed or otherwise marginalized transgender people.²⁵¹ However, it is easy to miss the complexity Namaste highlights if one focuses on the single issue of gender identity to the exclusion of other axes of oppression, such as class and unemployment.

In addition to offering anti-capitalist critiques of mainstream LGBT rights activism, queer antisubordination scholars in the West have critiqued mainstream women’s rights and gay rights movements for deploying xenophobic and racist strategies while claiming to speak for all women and gay people. For example,

243. *Id.*

244. *Id.*

245. *Id.* at 143.

246. *Id.*

247. *Id.*

248. *Id.* at 144.

249. *Id.* at 144, 147.

250. *Id.* at 147.

251. *Id.* at 144; *see also id.* at 146 (“So while Green and other San Francisco activists would have us focus on the ‘victory’ of being included within an insurance pool, I would encourage us to reflect on the broader socioeconomic system that this pool supports: namely, one wherein health care is offered as a commodity to be bought and sold on a market. Will such a model really ensure that, in Green’s words, ‘trans people everywhere will be able to get the medical treatment they need and deserve, just like everyone else?’”).

professors Jin Haritaworn, Tamsila Tauqir, and Esra Erdem argue that gay rights and women's rights discourse in Britain has been co-opted by the War on Terror, which they label as an imperialist exercise.²⁵² They document how in the War on Terror, "[f]reedom of speech, democracy, women's liberation and gay rights are all invoked to legitimate Islamophobia"²⁵³ For instance, the oppression of women in Muslim countries is often used to justify bombing Iraq and Afghanistan.²⁵⁴ Civil liberties are framed as the achievements of the West that must be protected from homophobic, misogynistic, and barbaric Muslim terrorists.²⁵⁵ Haritaworn, Tauqir, and Erdem suggest that in the War on Terror, "white people are once again able to identify themselves as the global champions of "civiliz[ation], "modernity," and "development."²⁵⁶ They highlight how, in addition to heralding democracy and economic development, Europeans now also claim women's equality and gay rights as further evidence of their superior civilization.²⁵⁷ While Haritaworn and their co-authors welcome the development of women's equality and gay rights within mainstream discourse in Europe, they note that its "main basis is not a progress in gender and sexual politics but a regression in racial politics."²⁵⁸

Haritaworn and their colleagues observe that in the context of the War on Terror, LGBT rights activists often construct racialized people and homosexuals as two separate, mutually exclusive categories.²⁵⁹ Therefore, "gay" automatically connotes "white" and "racialized" connotes "straight."²⁶⁰ Such essentialist simplifications support the construction of racialized men as straight, misogynistic, and homophobic, while white men (who in this context are soldiers) are constructed as saviors who vanquish the barbaric others.²⁶¹ Unfortunately, such simplistic binary constructions within the War on Terror have strong undertones of Islamophobia and racism.²⁶²

In summary, various queer antisubordination scholars from North America and Europe espouse intersectional politics. In the United States and Canada, scholars point out how a single-issue focus on marriage rights obfuscated various

252. Jin Haritaworn, Tamsila Tauqir, & Esra Erdem, *Gay Imperialism: Gender and Sexuality Discourse in the "War on Terror,"* in *OUT OF PLACE: INTERROGATING SILENCES IN QUEERNESS/RACIALITY* 71–90 (Adi Kuntsman & Esperanza Miyake eds., 2008).

253. *Id.* at 86.

254. *See id.* at 74. Haritaworn et al. point out that "the blown-up face of a woman in a burqa" was used in a mainstream LGBT magazine issue that focused on "the military invasion of Afghanistan." *Id.* at 75. They note that, "the young, tan face, its large brown eyes cast upwards at the camera, clearly followed Orientalist scripts." *Id.* They suggest that the magazine's presumed logic was that the Muslim woman looking victimized "was the perfect symbol for the newfound prowess of white gay masculinity." *Id.*

255. *Id.* at 86.

256. *Id.* at 78.

257. *Id.* at 79.

258. *Id.*

259. *Id.* at 72.

260. *Id.*

261. *Id.* at 78.

262. *Id.*

underlying issues of intersectional justice.²⁶³ Similarly, in Europe, academics have documented how a one-dimensional focus on gay rights and women's rights has resulted in progressive discourses being used to justify racist views in the context of the War on Terror.²⁶⁴ Ultimately, these queer antisubordination scholars encourage their readers to move beyond single-issue politics and to more closely examine the interactions of different kinds of oppression. Ignoring the intersection of systemic oppression leads to half-solutions, non-solutions, or worse still, more issues.

B. The Indian Context

In the same way that mainstream LGBT rights movements in the United States and Canada have focused on gay marriage, LGBT rights discourse in India has focused on decriminalizing homosexuality.²⁶⁵ By focusing all their efforts on the single issue of decriminalization, Indian LGBT activists have invariably ignored a myriad of other intersectional harms that affect lower-caste, lower-class queers.²⁶⁶ Legal and social scholars, activists, and practitioners have provided insightful critiques of the ways in which decriminalization advocates constructed homosexual behavior as an identity in *Koushal*.²⁶⁷

Decriminalization might intuitively seem more fundamental than marriage equality, as the threat of criminal penalties posits the individual against the heavy hand of the state. In the West, homosexuality was decriminalized before the public debates turned to marriage equality.²⁶⁸ Thus, decriminalization may appear to be an essential pre-condition to any kind of meaningful liberation. To be clear, this Article does not oppose the decriminalization of homosexuality, nor does it suggest that decriminalization and marriage equality are identical issues. Rather, the Article argues that identity-based LGBT politics that focus on single issues such as decriminalization or marriage rights tend to benefit those who experience oppression along a single axis—their sexual orientation. Such

263. See Young and Boyd, *supra* note 206, at 228 (suggesting that extending marriage to same-sex couples furthers a private welfare system and does little to help those who are in need of a public welfare system).

264. Haritaworn et al., *supra* note 252, at 79.

265. Fernandes, *supra* note 172. Interestingly, Fernandes suggests that decriminalization is being pursued primarily as a stepping-stone to marriage. See *id.*

266. See Tellis, *Re-thinking Queer*, *supra* note 169, at 145; Fernandes, *supra* note 172.

267. E.g., Datar, *supra* note 166. For critiques of the ways in which decriminalization advocates constructed Indian homosexuality in *Naz v. NCT Delhi*, the arguments they put forward, and how they justified the remedy they were seeking, see Kapur, *Multitasking Queer*, *supra* note 12, at 50–54; Tellis, *Re-thinking Queer*, *supra* note 169. The critiques relating to *Naz v. NCT Delhi* are also applicable to *Koushal*, since the parties and legal arguments supporting decriminalization were the same in both cases.

268. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (invalidating a state statute criminalizing homosexual sodomy as unconstitutional under the Due Process Clause of the Fourteenth Amendment); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (holding, twelve years after the Court's decision in *Lawrence*, that same-sex couples have a constitutional right to marry).

liberal politics, however, leave unquestioned numerous other intersecting axes of oppression that simultaneously operate to subordinate many queer people.²⁶⁹ Thus, the critiques of decriminalization efforts in India have to be understood through an intersectional lens (which includes perspectives of queer subalterns) and situated in the Indian context.²⁷⁰

Scholar Ashley Tellis argues that it is important for LGBT activists, human rights activists, and international donors to learn more about subjects such as *Hijras* and men who have sex with men (“MSMs”) in India before trying to fit them into identity-focused liberal discourse.²⁷¹ By focusing on a single axis of oppression such as sexual orientation, this rights-based discourse reduces complex intersectional identities to homogenous sexual orientation and gender-based labels, such as “gay,” “lesbian,” or “transgender.” Tellis suggests it is important to understand the experiences of individuals for whom gender- and sexual-orientation-based oppression are less relevant than other intersecting grounds of marginalization, such as class or caste.²⁷² Further, this contextual, intersectional understanding must inform the pursuit of broader projects of justice and liberation.²⁷³

Tellis points out that Western concepts of homosexuality have developed in a particular historical and geographic context and cannot be applied to the experiences of all queer people in India.²⁷⁴ Rather, privileged members of LGBT communities in India must begin to learn from the less privileged through a non-pious, dialogic collaboration.²⁷⁵ The first step is to recognize that those who are marginalized have “knowledge” that more privileged folk are “not equipped to understand by the reason of [their] social positions.”²⁷⁶ Scholars Paulo Ravecca and Nishant Upadhyay have argued that to be truly queer, one must make political and theoretical efforts to build “a different relationship with

269. Tellis, *Re-thinking Queer*, *supra* note 169, at 156 (commenting favorably on critiques of liberal LGBT rights movements in the United States and Europe and suggesting that similar critiques are also necessary in the Indian context); FRYE, *supra* note 225.

270. Tellis, *Re-thinking Queer*, *supra* note 169, at 156; *see also* FRYE, *supra* note 225.

271. Tellis, *Human Rights*, *supra* note 20, at 161–62.

272. *Id.* at 165–66.

273. *Id.*

274. *Id.* at 164–65.

275. *Id.* Tellis writes that LGBT politics in India has to undertake a “fully historical” and contextual analysis grounded in the real experiences of oppression by the most marginalized queers in India. *Id.* He suggests “[t]his is only possible through what Gayatri Spivak has called ‘learning to learn from below’ [or] ‘unlearning of one’s privilege as one’s loss.’” *Id.* Tellis explains that this work can only be done “through a non-pious but rather dialogic collaboration across the thorny reality of difference,” which “demands being simultaneously inside and outside the object of one’s inquiry and, therefore, of oneself, in necessarily careful ways.” *Id.*

276. Paulo Ravecca & Nishant Upadhyay, *Queering Conceptual Boundaries: Assembling Indigenous, Marxist, Postcolonial and Queer Perspectives*, 4 JINDAL GLOBAL L. REV. 357, 360 (2013), [http://www.jgls.edu.in/JindalGlobalLawReview/PDF1/Paulo_Ravecca_Nishant_Upadhyay_\(Chapter%2014\).pdf](http://www.jgls.edu.in/JindalGlobalLawReview/PDF1/Paulo_Ravecca_Nishant_Upadhyay_(Chapter%2014).pdf) (citing Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 271-315 (Cary Nelson & Lawrence Grossberg eds., 1988)).

otherness.”²⁷⁷ Only then can one recognize “one’s privilege as one’s loss.”²⁷⁸ That is, those who are more privileged have to unlearn their privilege and recognize that they may be situated differently from queer subalterns.²⁷⁹ Urban, middle-class LGBT folk in India have to realize and acknowledge that the solutions that benefit them may not benefit lower-class, lower-caste queers.²⁸⁰

This subsection aims to rise to Tellis’s call to recognize the knowledge of queer subalterns. The first part provides an ethnographic overview of homosexual behavior in India. The second part discusses queer antisubordination critiques of decriminalization arguments, which are based on a deeper ethnographic understanding of homosexual behavior in India.

1. Ethnographic Discussion of Same-Sex Sexual Behavior in India

The vast majority of homosexual expression in India does not occur within rigid LGBT identity boundaries. Instead, for many queer subalterns, homosexuality is primarily a behavior or activity, as opposed to an identity construct like it often is for gays and lesbians in India or the West.

The late Shivananda Khan, an activist, sex worker, and scholar, wrote an informative ethnographic analysis on homosexual behavior in India, in which he points out the shortcomings of assigning a homosexual identity to Indian queer subalterns.²⁸¹ Khan’s analysis is based on MSMs²⁸² and gay-identifying men²⁸³ with whom he had direct contact.²⁸⁴ Khan provides helpful contextual information in his area of analysis. For example, many of the MSMs are lower-

277. *Id.*

278. *Id.*

279. *Id.*

280. See Tellis, *Human Rights*, *supra* note 20, at 166.

281. Khan, *supra* note 170, at 104–05. Incidentally, Khan was a founder of the Naz Project in the United Kingdom, the parent organization to the Naz Foundation in India. Press Statement, UNAIDS, UNAIDS Saddened by Death of Human Rights Activist Shivananda Khan (May 21, 2013), <http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2013/may/20130521psshivkhanen>. Khan was also a leader in the Naz Foundation. *Id.* The relationship between Khan and the Naz Foundation is significant because the Naz Foundation was the primary plaintiff or petitioner seeking decriminalization of homosexuality by reading down Section 377 in *Naz v. NCT Delhi and Koushal*. See *Naz Found. v. Gov’t of the Nat’l Capital Territory of Delhi (Naz v. NCT Delhi)*, WP(C) No. 7455/2001, 2009 SCC OnLine Del. 1762, at *4–6 (Del. July 2, 2009); *Koushal v. Naz Found.*, (2014) 1 SCC 1, 15 (India). This further confirms one of the underlying assumptions of this Article: that decriminalization advocates should be included within queer justice movements in India. It also suggests that decriminalization advocates do not have to look far for insights on how to be more representative and inclusive in their strategies to achieve justice.

282. “MSM” is used in this Article to refer to men who have sex with men, or males who have sex with males, but who may not identify as homosexual.

283. Khan, *supra* note 170, at 100. Khan concedes that by focusing on male sexualities to the exclusion of female sexualities, his analysis is grossly incomplete. See *id.* He justifies the inadequacy of his assessment by citing the lack of literature and research on “female to female sexual behaviors and constructions of lesbianism in India.” *Id.*

284. *Id.* at 100–02.

income, working-class persons who experience economic poverty far worse than economic poverty in Western countries.²⁸⁵ Some of them are married to women and have children, or expect to get married to women.²⁸⁶ Some do not identify as homosexual and actually desire heterosexual marriage.²⁸⁷

Khan includes a wide range of individuals in his ethnographic study.²⁸⁸ For instance, one subject is a male sex worker who enjoys homosexual sex and appreciates the money but does not call himself homosexual.²⁸⁹ Two others are municipal sweepers (a low-caste job in India) who live together as lovers.²⁹⁰ They do not believe that their same-sex relationship makes them any different from others or gives them a distinct identity.²⁹¹ Another subject is an urban, English-speaking, gay-identifying person.²⁹²

Khan suggests that many MSMs do not characterize their same-sex sexual experiences as “real sex.”²⁹³ They refer to their sexual relations as *masti*, loosely translated as mischievous fun.²⁹⁴ Khan argues that “[t]he recognized object of desire is still a woman.”²⁹⁵ However, because there is gender segregation of social spaces and because women’s ability to express their sexuality is restricted in India, female sexual partners are inaccessible outside of marriage.²⁹⁶ Oftentimes, homosexual male behavior occurs in the context of a pervasive homosocial and homoaffectionalist culture, where it is common for men to express physical affection towards each other.²⁹⁷ Khan therefore does not “deny

285. *See id.* Economic poverty and income inequality is a significant issue in India. According to the World Bank, in 2011 nearly 60% of Indians lived on less than \$2 a day. *See* THE WORLD BANK, DATA POVERTY HEADCOUNT RATIO AT \$3.10 A DAY (2011 PPP) (% OF POPULATION), <http://data.worldbank.org/indicator/SI.POV.2DAY> (last visited Jan. 24, 2016).

286. Khan, *supra* note 170, at 100–02.

287. *Id.*

288. *Id.*

289. *Id.* at 101.

290. *Id.* at 101–02.

291. *Id.* at 102.

292. *Id.* at 101.

293. *Id.* at 110.

294. *Id.* Professor Halley discusses the concept of “sex constructivism,” which “assumes that the sheer recognition of certain bodily sensations as *sexual* is constructed.” Halley, *supra* note 153, at 559. As Halley notes, “[t]his is not merely to say . . . that living in a culture that ‘implants’ ‘sex drive’ would be a different thing than living in a culture in which sex originates in an ‘appetite.’” *Id.* at 559–60. Rather, “[i]t is to insist that culture supplies the very terms for understanding bodily sex, in or between persons, as distinct from other modes of physical configuration, action, or sensation.” *Id.* at 60. If which acts are sexual is socially constructed, then it is entirely plausible that what counts as sex in one society or culture can be different than what counts as sex in another society or culture.

295. Khan, *supra* note 170, at 110.

296. *See id.*

297. Khan, *supra* note 170, at 110, 113. For a discussion on homosocial and homoaffectionalist culture, see generally *id.* at 113 n.10. Khan states:

I use homoaffectionalism to mean social acceptance of the public display of male/male or female/female physical affection. I use the term homosocial to mean a social framework of strong male or female bonding, and gender segregation of social spaces. For example, in India it is very common to see two

expressions of romantic and passionate love among males.”²⁹⁸ In fact, he adds that “[i]ntense friendships between males in a homosocial and homoaffectionalist culture create boundaries that are easily crossed in sexual play.”²⁹⁹ However, “the goal of marriage and children remains.”³⁰⁰ For such persons, homosexuality is not an identity; it is a behavior.³⁰¹

Khan further suggests that the notion or practice of placing “sexual desire and a sexual sense of self as the center of a personal self” arises out of Western constructions of the liberal self “as a distinct entity separate and separated from his/her family, kinship group, and social milieu.”³⁰² In India, where family and community are traditionally more important than the self, MSMs do not necessarily construct their identities around their same-sex sexual behavior.³⁰³ Thus, in the Indian context, it is inappropriate to assume that “one’s self-concept as a sexual being is consistent with one’s sexual behavior” or that “sexual identity is fundamental to the sense of self.”³⁰⁴

Instead, many Indian men construct their identities around familial roles, such as father, husband, and child, and are thus more often oriented towards family and marriage.³⁰⁵ The majority of people who engage in homosexual behavior are still bound by tradition, custom, and culture.³⁰⁶

Additionally, engaging in homosexual sex while being a husband to a woman may not be incongruous to a man’s familial identity as a heterosexual husband.³⁰⁷ Sexual identity in India is not as rigid as it is in the West, and, as noted previously, homosexual acts between men may not be considered sex by those who engage in it.³⁰⁸ For those who equate homosexual behavior with homosexual identity, it may be challenging to grapple with the lack of continuity

women or two men holding hands or putting their arms around each other or sharing a bed, and so on. Public space is socially owned by males. Homoaffectionalism and homosexual behaviors are not the same.

Id. at 113.

298. *Id.* at 110.

299. *Id.*

300. *Id.*

301. *Id.* at 106.

302. *Id.*

303. *See id.*

304. *Id.* at 102.

305. *Id.* at 106. In the American context, scholar Tomas Almaguer suggests that since Chicanos are subordinated in the United States, the support they receive from their family life is fundamental to their survival. *See* Tomas Almaguer, *Chicano Men: A Cartography of Homosexual Identity and Behavior*, in *THE LESBIAN AND GAY STUDIES READER* 255, 264 (Henry Abelove, Michele Barale, & David Halperin eds., 1993). As a result of strong family ties in the context of broader economic and social disprivilege, Chicanos do not as readily adopt “gay” or “lesbian” as a primary basis of identity. *See id.* Analogously, in India, strong family and community ties and the effects of economic and social disprivilege might contribute to a focus on identity as a relational concept rather than an individual one, as it is constructed by more economically and socially privileged persons in India and the West.

306. Khan, *supra* note 170, at 104–05.

307. *Id.* at 106.

308. *Id.* at 106, 110.

in how these fluid sexual identities are constructed. However, homosexual behavior in heterosexual relationships is not necessarily inconsistent.³⁰⁹ Khan explains that in the Indian context, especially for lower-caste, lower-class men, “[i]dentities shift, change, and shape themselves according to context, place, social situation, need, and desire.”³¹⁰ As a result, it is inappropriate “to fit Indian sexual and cultural histories as well as contemporary behaviors and identities into a Western sexual discourse.”³¹¹

Unfortunately, despite the complexity of sexual expression and identity in India, international organizations, the Indian medical profession, and many gay men in India and the West have attempted to simplify Indian sexual behavior by using essentialist binaries.³¹² Khan challenges these Western approaches that reduce sexual behavior in India to sexuality categories like homosexual and heterosexual.³¹³ Khan acknowledges that English-speaking, urban, middle class Indian MSMs have increasingly begun to self-identify with labels such as gay and homosexual.³¹⁴ However, he characterizes these identifications as “emergent

309. Almaguer suggests that the lack of continuity may produce cognitive dissonance in Mexican men who engage in male homosexual contact. *See* Almaguer, *supra* note 305, at 261. However, I find the term “cognitive dissonance” to be both too pejorative and medicalized; Khan’s constructions of fluidity in identity are more resonant.

310. Khan, *supra* note 170, at 106.

311. *Id.* at 105. Additionally, Professor Halley discusses the concept of “sexuality constructivism,” which “distinguishes between a raw physical capacity for erotic pleasure and the organization of that capacity into a coherent, patterned element of the self.” *See* Halley, *supra* note 153, at 559. According to Halley, “[t]he former is part of being human, but the latter is the product of complex historical contingencies, which, once in place, are as inescapable as the capacity for orgasm.” *Id.* Professor Halley further notes that “[o]bject choice, behavioral repertoire, social meaning, and sexual emotion all fall within the domain of sexuality, and are produced by its means.” *Id.* She cites David Halperin, who argues “that homosexuality is quite a recent invention.” *Id.* Halperin’s position is that “sexuality is a cultural production” distinct from sex. *Id.* Halley quotes him as saying that it is the “appropriation of the human body and of its erogenous zones by an ideological discourse,” which may make it an alien concept for some cultures. *Id.* While Halperin does not deny that there really are people who identify as homosexuals and heterosexuals, he suggests such identities are “produced by social rather than natural causes.” *See id.* If, as both Halley and Halperin argue, sexuality is socially constructed, then understandings of sexuality can certainly differ from culture to culture, and constructions of homosexuality and heterosexuality may not apply in all cultures.

312. Khan traces constructions of homosexual identity in India to constructions of homosexual identity in the West. *See* Khan, *supra* note 170, at 99. Khan indicates that while working on sexual health and HIV/AIDS-related issues in India, “UNAIDS representatives, international donor agencies, the Indian medical profession, and many Western and Indian gay men” often constructed sexuality in essentialist binaries. *Id.* at 99, 103. This construction was reflected in the idea that “same-gender sexual behaviors must mean the person is a homosexual, or gay, while male to female sexual behavior must mean that the person is a heterosexual.” *Id.* at 103. Because of his social work, Khan began to question the fundamental assumptions that were being made about South Asian men who engage in homosexual behavior. *Id.* at 99–100. In his words, this led him to “read, listen, and learn about constructions of sexuality and their historical and contemporary significance.” *Id.* at 100. Based on his ethnographic research, Khan believes that ascribing such persons a monolithic homosexual identity is “reductionist.” *See id.* at 103.

313. *See id.* at 111.

314. *See id.* (“Among the educated middle classes, there is a small, but growing, movement of

identities” that imitate Western constructions of sexuality.³¹⁵ He argues that such simplistic constructions of identity “have very little contemporary or historical validity in India.”³¹⁶ Khan posits that there are “elements of [sexual] neo-colonialism, racism, and Western imperialism” in the labeling of MSMs in India as homosexual or gay.³¹⁷ He therefore distinguishes homosexuality (which he views as a Western identity construct that has been imported into India) from homosexual behavior (which he indicates is viewed as an activity by many Indian men who engage in it).³¹⁸

Ultimately, LGBT politics that promote constructions of homosexuality as an identity rather than a behavior or activity come at a cost. Labeling a person engaging in homosexual behavior as gay or lesbian can be inaccurate and even destructive. Khan draws on the words of gay Indonesian activist Dede Oetomo to suggest that the prominence of gay identities is destroying “local homoaffectionalist and homosocial structures . . . for the fear of being labeled ‘gay.’”³¹⁹ Khan questions whether decriminalization activists in India are promoting this trend by labeling homosexual behavior homosexuality—an identity construct with little historical and contextual relevance for lower-class, lower-caste queers.³²⁰

Further, some LGBT activists have used their privilege to silence and

people whose sense of personal identity is separate from that of their family, kin group, and community and who are beginning to create new forms of sexual identity. Many of these may well call themselves lesbians, gay men, homosexuals, bisexuals, and even heterosexuals.”).

315. *Id.* (“[T]hese evolving and emerging identities are arising with the growth of urban, industrialized, and commercial cultures, concomitant with which is a rising sense of individuality, personal privacy, and private space. This cultural change appears to be associated with the development of nuclear family lifestyles, the expansion of education, and the power of the English-speaking middle-classes to access Western literature and to make more choices about their lives. It is mostly people from these backgrounds who meet, socialize, discuss and debate (usually in English) issues of sexual identities and ‘coming out.’”)

316. *Id.* at 103.

317. *Id.*

318. *Id.* Khan provides a helpful endnote on the distinction between “homosexual behavior” and “homosexuality.” *See id.* at 112 n.5. While “sexual behavior” and “sexuality. . . are often used interchangeably,” Khan makes an important distinction: “sexuality refers to self identity in reference to sexual desire and gender,” while sexual behavior refers purely to the act of sex. *Id.* Many of the MSMs that Khan interviewed indicated “they sexually desire women.” *Id.* Others indicated “they were [more] interested in the sexual act itself . . . than the person with whom they had sex.” *Id.* Calling this “discharge sex,” Khan notes that “factors other than sexual desire play a role in the sexual partner choice.” *Id.*

319. *Id.* at 103.

320. *See id.* Khan writes:

Gay activism in India is growing and has begun to challenge laws which criminalize homosexuality and which were inherited from the British Raj. It remains to be seen whether these emerging identities will reflect (or perhaps imitate) Western constructions and whether those who adopt these identities will attempt to live these out within Indian cultures, or whether differing identities will be constructed.

Id. at 111.

assimilate more traditional, indigenous expressions of queerness.³²¹ For example, in her ethnographic study of the sexual minority rights movement in West Bengal, queer feminist scholar Anirudha Dutta describes how privileged, urban, gay men further marginalize already marginalized queers³²² by adopting assimilationist strategies to claim legitimate citizenship within Indian society.³²³ Accordingly, Dutta is critical of prominent members of the decriminalization movement and the ways in which they police the boundaries of acceptable behavior by queers who are lower-caste, lower-class, and/or gender nonconforming.³²⁴

For example, Dutta analyzes an article that was published in a national English language newspaper in India.³²⁵ The article reported on a pride march in Kolkata, West Bengal to mark the first anniversary of *Naz v. NCT Delhi*.³²⁶ The march expressed the diversity of queers in India. Some urban, middle-class queers at the march emulated Western, consumption-oriented “visibilization of queer difference,” such as by wearing T-shirts with two London Bobbies kissing.³²⁷ In contrast, some *Hijras* and *Kothis* celebrated and expressed their queerness at the march by lifting their skirts to reveal their genitalia and using the *Thikri*, a loud clap commonly used as a gesture for “public assertion.”³²⁸ The newspaper article, however, celebrated the Westernized performances of homosexual identity as “progressive” and while criticizing *Hijras’* and *Kothis’* performances of their indigenous queer identities as being too crass.³²⁹

Unfortunately, prominent members of the decriminalization movement also police lower-caste, lower-class, gender nonconforming expressions of queerness by *Hijras* and *Kothis* in other ways.³³⁰ *Kothis* and *Hijras* have been asked to act more “respectably” in political demonstrations, which Dutta suggests is code for

321. Dutta, *supra* note 16, at 110–13.

322. Interestingly, Dutta is clear that the word “queer” is rarely employed by “lower class gender/sexual” variant persons in India to describe themselves. *Id.* at 119. However, even though it may be deeply problematic to ascribe the term queer to, or co-opt into queer politics, persons who may not self-identify as queer, Dutta suggests the defiance of “identitarian boundaries” by lower-class, lower-caste, gender nonconforming persons may be understood as queer. *See id.*

323. *Id.* at 110–16. In the Introduction to her article, Dutta writes,

I locate and examine these regulatory tendencies as part of the contested processes through which institutions and activists in India in general, and West Bengal in particular, construct and assimilate “sexual minority” groups into legitimate citizenship through claims upon both cultural nationhood and transnational discourses such as LGBT and human rights, corresponding to an aspirationally cosmopolitan middle class civil society.

Id. at 112–13.

324. *Id.* at 110–16.

325. *Id.* at 110.

326. *Id.*

327. *Id.* at 129–30.

328. *Id.* at 130.

329. *Id.* at 130–31.

330. *Id.*

urban, Western, middle-class behavior.³³¹ Additionally, GayBombay, an urban gay group in Mumbai, India, specifically prohibits cross-dressing or drag in its events, thereby excluding *Hijras* and *Kothis* who may prefer to wear women's clothes.³³² This forced pedagogical assimilation of *Hijras* and *Kothis* into more "respectable" middle-class expressions of gayness is analogous to the assimilationist techniques that marriage equality activists employed in the United States.³³³

Both Dutta and Khan associate the decriminalization movement in India with a transnational, Westernized, privileged LGBT identity that displaces and attempts to assimilate more traditional Indian expressions of queerness.³³⁴ In fact, many decriminalization advocates have publicly indicated their allegiance to a globalized gay identity. For example, Siddharth Narrain (a scholar, legal activist, and lawyer involved in the case) argues that "[t]he implication [of the Supreme Court's holding in *Koushal*] . . . is that Indian social conditions and morality differ from the West and so Western judgments cannot be used as a point of comparison."³³⁵ This reasoning, he asserts, "completely ignores the commonalities of LGBT experience."³³⁶

Narrain's homogenizing notion of a common transnational globalized LGBT experience, while well-intentioned, has blind spots. There is a huge privilege gap between the white, able-bodied men dancing shirtless in Toronto circuit parties and the *Hijras* struggling to survive by asking for money in trains and other public spaces in India.³³⁷ Conflating the vastly dissimilar experiences and identities of queer persons around the globe and presenting them as a singular, homogenous block is an oversimplification. This notion of a single LGBT experience or identity is not only inaccurate, it also erases the unique experiences and identities of those who are most vulnerable.

Any critique of the Indian Supreme Court that asserts the commonality of

331. See *id.* at 131. Ironically, in *NLSA v. UOI*, the Supreme Court of India acknowledged the economic poverty of *Hijras*, and recognized *Hijra* practices—such as clapping, including *badhai* and *thikri*—to ask for alms. Nat'l Legal Servs. Auth. v. Union of India (*NLSA v. UOI*), (2014) 5 SCC 438, 481 (India). In this way, the Supreme Court accepted *Thikri* as a way in which *Hijras* earn their livelihood. *Id.* While the Supreme Court was able to celebrate *Hijra* clapping as a means of economic empowerment, the practice is apparently too crass for upper middle-class gay activists in Kolkata. Dutta, *supra* note 16, at 129–30. This irony certainly merits some introspection by the queer justice movements in India.

332. Dutta, *supra* note 16, at 131. Of course, this assumes that the entry costs for some of GayBombay's more expensive events is obtainable for lower-caste, lower-class queers.

333. Bérubé describes the assimilationist techniques used by mainstream gay activists in the United States as "mirroring the whiteness of men who run powerful institutions as a strategy for winning credibility, acceptance, and integration; excluding people of color from gay institutions; selling gay as white to raise money, make a profit, and gain economic power; and daily wearing the pale protective coloring that camouflages the unquestioned assumptions and unearned privileges of gay whiteness." Bérubé, *supra* note 196, at 235.

334. Dutta, *supra* note 16, at 112–13, 130; Khan, *supra* note 170, at 111.

335. Narrain, *We Dissent*, *supra* note 94, at 3–4.

336. *Id.*

337. Dutta, *supra* note 16, at 125.

an LGBT experience without highlighting the huge disparities in how different queers experience oppression is incomplete, and overlooks the intersectional nature of queer experiences in India. It is for this reason that considering queer antisubordination critiques of decriminalization advocates is particularly important.

2. Queer Antisubordination Critiques of *Naz v. NCT Delhi* and *Koushal*

The previous part outlined the tension between Western identity-based constructions of homosexuality and Indian MSM understandings of homosexual behavior as an activity. This part will build on the previous part by discussing queer antisubordination critiques of *Naz v. NCT Delhi*, in which the Delhi High Court read down Section 377 to decriminalize sex between consenting adults in private. When decriminalization advocates appealed *Naz v. NCT Delhi* to the Supreme Court in *Koushal*, their arguments were largely similar. Thus, while many of the antisubordination critiques were written in response to *Naz v. NCT Delhi*, they are just as applicable to the legal strategies used by decriminalization advocates in *Koushal*.

Scholar Ashley Tellis, who identifies as gay and *Dalit*,³³⁸ has criticized the High Court's decision in *Naz v. NCT Delhi* for relying heavily on international precedent to address issues of sexual behavior in India.³³⁹ Tellis's rejection of international precedents might seem strange because he is a foreign-trained, Indian-based academic who draws on non-Indian theorists.³⁴⁰ However, on closer examination, Tellis's critique of the High Court is not a complete rejection of foreign socio-legal theory and precedent. Rather, he calls for a more nuanced examination of how subordination actually operates in India, especially for those sexual minorities who experience oppression along multiple axes, including caste, class, gender, tribal status, and rural status.³⁴¹

Like Khan, Tellis considers the way homosexuality is constructed as an identity in *Naz v. NCT Delhi* to be problematic because such constructions are more consonant with global governance and foreign-funded urban HIV/AIDS

338. See *supra* note 124 and accompanying text. For reference to Tellis's self-identification as gay and *Dalit*, see Ashley Tellis, *On Being a Gay Activist in India*, CAFÉ DISSENSUS (June 25, 2013), <http://cafedisensus.com/2013/06/25/on-being-a-gay-activist-in-india-ashley-tellis/>.

339. Tellis, *Re-thinking Queer*, *supra* note 169, at 145 (citing Ashley Tellis, Remarks at the Council for Social Development and India International Centre National Seminar on Society and the State in Contemporary India: Intersectional Approach to Class Analysis, LGBT Politics in India: Problems and Possibilities 10 (Aug. 20–21, 2009) (unpublished) (on file with author) [hereinafter Tellis, *LGBT Politics*]).

340. E.g., Tellis, *Human Rights*, *supra* note 20, at 165 (drawing on French critical theorist Michel Foucault and British feminist philosopher Denise Riley).

341. Tellis, *Re-thinking Queer*, *supra* note 169, at 156. Tellis suggests that just as there are outsider queer critiques of mainstream LGBT rights movements in the United States and Europe, there is a need for critiques of Indian LGBT rights movements to make them more inclusive and representative of those who are most marginalized. See *id.*

NGOs than with indigenous expressions of homosexual behavior.³⁴² He argues that no matter how many times the words *Hijra* or *Kothi* are used in decriminalization arguments, decriminalizing consensual sex among adults in private does little for queer subalterns.³⁴³

For example, queer subalterns who live in slums will benefit little from reading down Section 377 to decriminalize sex in private. The government of India has estimated that nearly 100 million people in India live in slums.³⁴⁴ People in slums (usually lower-caste, lower-class persons) often do not have private space in which to engage in sexual activity.³⁴⁵ As a result, a judgment that decriminalizes sex in private does little for those have no choice but to have sex in public spaces.³⁴⁶

When analyzed through an intersectional lens, attempts to achieve decriminalization through the expansion of privacy rights fail to address the concerns of some of the most marginalized people in Indian society. Like Tellis, scholar Darshan Datar critiques decriminalization advocates' privacy-based remedy.³⁴⁷ He suggests that the Supreme Court's decision to overturn *Naz v. NCT Delhi*, and recriminalize non-procreative sex in *Koushal* was not a huge setback for LGBT rights.³⁴⁸

Datar argues that *Naz v. NCT Delhi*'s focus on privacy restricted homosexuality to the "matrimonial bedroom" and failed to promote broader social acceptance of homosexuality.³⁴⁹ For instance, there was an incident that occurred after the High Court's decriminalization of homosexuality but before the Supreme Court's recriminalization in which police targeted a group of homosexuals under Section 377.³⁵⁰ Datar argues that this incident highlighted how the High Court's decision did little to make society accept homosexuals.³⁵¹ At most, the High Court's decision protected against prosecution.³⁵² Similarly, Tellis notes that reading down Section 377 did little for *Dalit* or *Adivasi* women,

342. *Id.* at 145; Tellis, *LGBT Politics*, *supra* note 339, at 10.

343. *See* Tellis, *Re-thinking Queer*, *supra* note 169, at 14. Tellis finds the piecemeal reading down of Section 377 to remove private consensual sex from its purview to be classist and casteist. *Id.*; *see also* Tellis, *LGBT Politics*, *supra* note 339, at 6; Tellis, *Party*, *supra* note 171.

344. In 2011 it was estimated that there would be 100,786,594 people living in slums in 2015. *See* GOV'T OF INDIA, MINISTRY OF HOUS. & URBAN POVERTY ALLEVATION, *SLUMS IN INDIA: A STATISTICAL COMPENDIUM 6* (2011). The government also acknowledged that its numbers may be underestimated. *Id.* at 2. Slums may be defined as "residential areas that are physically and socially deteriorated and in which satisfactory family life is impossible." *Id.* at 6. They tend to be in "bad repair" and have inadequate heating, ventilation, and sanitation. *Id.* Slums also do not allow "for family privacy." *Id.* Since slums tend to be overcrowded, they are also "subject to fire hazard" and leave "no space for recreational use." *Id.*

345. *Id.*; *see also* Khan, *supra* note 170, 110–11.

346. Khan, *supra* note 170, 110–11.

347. Datar, *supra* note 166.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

who “run away from their homes, marry each other and often commit suicide across the country.”³⁵³ Their love would have remained stigmatized, even if *Koushal* had upheld *Naz v. NCT Delhi*, because privacy-based arguments do not, on their own, create societal acceptance of homosexuality.

Further, Naz Foundation’s most pro-subaltern argument in favor of reading down Section 377 was out of touch with the reality of queer subalterns. Naz Foundation argued that Section 377 is subject to arbitrary enforcement. It argued that the police often used Section 377 in cruising³⁵⁴ areas to “intimidate and harass subaltern men,” including “sex workers soliciting MSM clients.”³⁵⁵ These arguments suggest that decriminalization advocates believe that once private consensual homosexual sex is legalized, police will not target lower-class/caste subjects who cruise in public. However, LGBT rights activist and scholar Jason Fernandes points out that the argument fails because reading down Section 377 does not decriminalize public sex or sex solicitation.³⁵⁶ Public nuisance provisions can still be invoked to target queer subalterns who engage in public cruising, public sex, and sex solicitation.³⁵⁷ Reading down Section 377 does little to protect queer subalterns who do not have private spaces in which to have sex and continues to leave them vulnerable to police intimidation and harassment.³⁵⁸

Unfortunately, the arbitrary enforcement and police brutality arguments that decriminalization advocates put forward in *Naz v. NCT Delhi* and *Koushal* did not accurately represent how Section 377 affected *Hijras*. For example, The Parents of LGBT Children, a pro-decriminalization intervenor in *Koushal*, provided evidence of an incident that, they argued, demonstrated the abuse of LGBT persons under Section 377.³⁵⁹ The intervenor described how, during that incident, Kokila, a *Hijra*, was sexually abused and tortured by the police.³⁶⁰ However, the written submissions of Voices Against 377, another pro-decriminalization intervenor, reveal that Kokila was not charged with violating

353. Tellis, *LGBT Politics*, *supra* note 339, at 10.

354. Cruising means searching for a sexual partner in a public space. It is a term that is often used by gay men.

355. Fernandes, *supra* note 172.

356. *Id.*

357. *Id.*

358. *Id.*

359. Submissions on Behalf of “Voices Against 377,” *supra* note 160, at 18.

360. *Id.* During the incident, Kokila “was stripped naked, and handcuffed to the window.” *Id.* at 16. The Police “began to hit her with [police batons] and kick her with their boots.” *Id.* They referred to her using a Hindi slur for transgender persons (“*khoja*”) and a slur for men who are anally penetrated (“*gaandu*”). *Id.* The use of the derogatory hate speech indicated that Kokila “was being tortured merely because of her sexual identity.” *Id.* Kokila “suffered severe injuries on her hands, palms, buttocks, shoulder and legs” and burns on her nipples and “*chapdi* (vaginal portion of *Hijras*).” *Id.* There was also extended psychological torture: “One Sub-Inspector positioned a rifle on her *chapdi* and threatened to shoot her.” *Id.* The Sub-inspector also went further and “pushed the rifle butt into the *chapdi*, saying ‘do you have a vagina, can this go inside.’” *Id.* This part of the assault was intended to insult Kokila “because she is a transgendered woman and not a ‘real’ woman.” *Id.*

Section 377.³⁶¹ Instead, the police forced her “to confess to a crime foisted upon her.”³⁶² It appears that *Hijras* like Kokila are not being targeted only because of Section 377, but also because they are vulnerable and have less power in the hierarchy of Indian society.

Thus, decriminalization arguments suggesting that reading down Section 377 would help lower-class, lower-caste queers significantly overstated the benefits of such a remedy. Instead, these arguments were put forth to support a remedy that would primarily benefit upper/middle-class gay men who have access to private space and who want to use decriminalization as a stepping stone to homonormative marriage equality.³⁶³ Even if Section 377 had been read down, *Hijras* and other lower-caste, lower-class, gender nonconforming queers would continue to remain vulnerable to police brutality.³⁶⁴ Thus, since reading down Section 377 will have very little benefit for those queers who are the most marginalized in Indian society, decriminalization arguments can be understood as a co-optation of lower-caste, lower-class, gender nonconforming experiences to support the goals of urban privileged homosexuals.³⁶⁵

Unfortunately, as Professor Kapur argues, the High Court’s decision in *Naz v. NCT Delhi* focused on decriminalizing a specific sexual act rather than creating any kind of meaningful liberation for subordinated queers.³⁶⁶ The judgment did not question marriage and monogamy, patriarchy and gender binaries, or any of the other ways in which power operates to oppress subordinate subjects in India.³⁶⁷ Further, because the judgment only prevented prosecution for private acts, it did little to promote acceptance of public acts of resistance and revolution.³⁶⁸ As a result, Kapur argues that decriminalization advocates missed an opportunity to attack broader systems of subordination that

361. *Id.* at 16.

362. *Id.*

363. Fernandes, *supra* note 172; *see also supra* note 188 and accompanying text.

364. Fernandes, *supra* note 172.

365. *Id.*; *see also* Tellis, *Re-thinking Queer*, *supra* note 169, at 147–48. Tellis critiques NGOs like Naz Foundation for being run by upper-class people. *Id.* He writes that upper-class LGBT agendas are at the foreground of such organizations since “upper class people run these NGOs and there is free interplay (if not a set of networks that render them indistinguishable) between NGOs” and mainstream queer activism in India. *Id.* Unfortunately, more marginalized queers tend to be “ignored altogether” as a result. *Id.* at 148. When upper-class LGBT activists do take into account the experiences of marginalized queers, they merely appropriate their stories and label marginalized groups, such as *Hijras*, “‘high risk populations’ or similar epidemiological categories” that need to be educated and modernized, instead of recognizing them as people with unique needs and priorities. *Id.* In fact, Tellis suggests that upper-class activists only consider more marginalized persons to secure funding to advance their own upper-class LGBT agenda. *See id.*

366. *See* Kapur, *Multitasking Queer*, *supra* note 12, at 54 (arguing that “[i]t is [the] opposition to binary thought that needs to be foregrounded rather than the focus on sexual acts and identities which is what the *Naz* decision does as it concerns the criminalisation of a specific sexual act—sodomy.”).

367. *Id.*

368. *Id.* at 58.

operate along multiple axes, such as caste, class, gender, and sexuality.³⁶⁹

While the perspectives discussed in this subsection are critical of decriminalization advocates and their arguments, it is important to note that the critiques come from progressive scholars who also support queer justice. These perspectives are helpful in considering opportunities for improvement in Indian queer justice movements. Interestingly, some of these critiques were released after *Naz v. NCT Delhi* and before *Koushal*. However, advocates made the same arguments for decriminalization in *Koushal* as they had in *Naz v. NCT Delhi*; the arguments put forth in *Koushal* were thus similarly underinclusive.

IV. PARALLELS BETWEEN THE CONCERNS OF THE COURT IN *KOUSHAL* AND CRITIQUES BY QUEER ANTISUBORDINATION SCHOLARS AND ACTIVISTS

The decriminalization arguments put forth in *Koushal* had significant gaps. Decriminalization advocates inadvertently tried to impose Western solutions on Indian queers³⁷⁰ and ignored the contextual nature of oppression in India. Even though advocates presented evidence of the oppression of lower-caste, lower-class queers, the legal arguments put forward in support of decriminalization were not grounded in the subjective realities of many queer Indian subalterns.³⁷¹ Further, decriminalization advocates' desired remedy—the reading down of Section 377 to exclude sex in private between consenting adults—would not actually benefit many of the queer subalterns for whom advocates purportedly sought decriminalization.³⁷²

This section of the Article demonstrates different ways in which the Supreme Court, on its own, highlighted these gaps, which had been identified in queer antisubordination critiques of *Naz v. NCT Delhi*. At no point did the Supreme Court ever cite any of the queer antisubordination scholars, nor did the judges explicitly engage with queer theory. Nevertheless, the Supreme Court judges' comments, both in their written opinions in *Koushal* and in the hearing transcripts,³⁷³ parallel critiques by queer antisubordination scholars. That is, some of the concerns raised by the *Koushal* bench regarding decriminalization arguments were also raised by queer antisubordination scholars in the aftermath of *Naz v. NCT Delhi*, including the overreliance on Western precedent and

369. *Id.*

370. Tellis, *LGBT Politics*, *supra* note 339.

371. Fernandes, *supra* note 172.

372. *Id.*

373. The Indian Supreme Court does not provide official transcripts, and the quality of the transcripts used here may be subject to criticism. While a significant portion of the transcript includes direct quotes from the hearing, the transcript often contains only general summaries of what actually occurred in the court. It is not an official transcript; rather, it is from Orinam.net, which lists itself as a resource for “the LGBT community and allies in Chennai and for those with roots in Chennai/Tamil Nadu” and provides many legal documents. *About Orinam*, ORINAM, <http://orinam.net/about/orinam-net/> (last visited Jan. 24, 2016).

privacy-based remedies.³⁷⁴ Had decriminalization advocates addressed queer antisubordination critiques of *Naz v. NCT Delhi* in framing their arguments in *Koushal*, they might have found greater success. Interestingly, some of the gaps in the decriminalization arguments were not repeated in *NLSA v. UOI*, a case in which the Supreme Court recognized the rights of transgender persons. Thus, while the Supreme Court's decision in *Koushal* invites critique, the Court's reluctance to read down Section 377 might also suggest deficiencies in the decriminalization arguments.

The next three subsections address parallels between the Supreme Court's criticism of decriminalization in *Koushal* and the antisubordination critiques of advocates' decriminalization arguments. First, both queer antisubordination scholars and the *Koushal* bench critiqued the High Court's overreliance on Western precedent to decriminalize homosexuality in India. Second, both questioned whether privacy-based arguments truly legalized homosexuality. Third, both expressed skepticism regarding whether reading down Section 377 to exclude private consensual sex between adults would alleviate police brutality towards lower-caste, lower-class queers. The last subsection discusses how the legal strategy used by advocates in *NLSA v. UOI* may have contributed to the more progressive outcome in that case.

A. Overreliance on Western Precedent

Both the Supreme Court and queer antisubordination critics separately critiqued the Delhi High Court's overreliance on Western precedent.

In *Koushal*, the Supreme Court reprimanded the High Court for extensively relying on foreign precedent without considering whether it applied to the Indian context:

In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.³⁷⁵

Unfortunately, the Supreme Court did not provide any other explanation

374. Tellis, *Party*, *supra* note 171; Fernandes, *supra* note 172.

375. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 78 (India). Raghavan has argued that Section 377 was not enacted by the Indian legislature, as the Supreme Court writes in the paragraph, but rather enacted by the Legislative Council, a group of twelve Englishmen who were the Governor General's colonial advisors. Raghavan, *Part II*, *supra* note 95. However, the Supreme Court emphasized the fact that since the Indian Parliament had amended the Indian Penal Code multiple times, and the law continued to remain on the books, it was in force by the will of the Indian legislature. *See id.*

for why it rejected foreign human rights precedents.³⁷⁶ Professor Thiruvengadam suggests that the *Koushal* bench was unprincipled and hypocritical.³⁷⁷ He questions the Court's "strong aversion to foreign law,"³⁷⁸ noting that Justice Singhvi "has frequently cited foreign cases as authority including for points of law on which sufficient precedents existed within Indian law."³⁷⁹ In addition, the Supreme Court has relied on foreign jurisprudence in other cases, including *NLSA v. UOI*, where it recognized the rights of indigenous Indian transgender identities such as *Hijras*, *Aravanis*, *Kothis*, *Jogtas/Jogappas*, and *Shiv-shakthis*.³⁸⁰

However, a close reading of the quoted paragraph indicates that the Supreme Court is not opposed to using foreign law. The Court's use of the term "blind-folded" suggests that the judges were simply unconvinced that the foreign law had been appropriately applied in the Indian context.³⁸¹ This hypothesis is supported by *NLSA v. UOI*, where the Supreme Court did consider foreign jurisprudence, but only after specifically discussing the "Indian Scenario," including the specific transgender identities of people in India and their experiences of oppression and othering.³⁸² Based on this discussion, the Court in *NLSA v. UOI* was able to justify its reliance on international precedent.³⁸³

Like the Supreme Court in *Koushal*, many queer antisubordination critics have argued that the decriminalization legal arguments put forth in *Naz v. NCT Delhi* and *Koushal* were rooted in Western conceptions of sexuality/homosexuality that did not reflect the lived experiences of queer subalterns in India.³⁸⁴ For example, activist and scholar Ashley Tellis criticizes the use of foreign precedent in *Naz v. NCT Delhi*:

[M]ost of the [*Naz v. NCT Delhi* judgment] is full of legal precedents from the West (the United States, the United Kingdom and white-dominated countries like Australia and South Africa) to justify the need for the law to go in India and it leans heavily on international humanrightsspeak [*sic*] to

376. *E.g.*, Boyce, *supra* note 94; Thiruvengadam, *supra* note 94.

377. Thiruvengadam, *supra* note 94, at 602–03.

378. *Id.* at 608.

379. *Id.* at 606.

380. In *NLSA v. UOI*, the Supreme Court acknowledged that "International Conventions and norms are significant for the purpose of interpretation of gender equality." Nat'l Legal Servs. Auth. v. Union of India (*NLSA v. UOI*), (2014) 5 SCC 438, 484 (India). Where "Indian law is not in conflict with" international covenants, especially human rights agreements, to which India is a party, "the domestic court can apply those principles in the Indian conditions." *Id.* at 485. The Court went on to hold that the international agreements and principles on the rights of sexual orientation minorities and transgender people, such as *Yogyakarta principles*, were "not inconsistent with the various fundamental rights guaranteed under the Indian Constitution" and thus "must be recognized and followed." *Id.* at 486.

381. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 78 (India).

382. *NLSA v. UOI*, (2014) 5 SCC at 480–86.

383. *Id.*

384. Tellis, *Party*, *supra* note 171.

make its case for sexuality as identity, among other things.³⁸⁵

As discussed in the previous section, Tellis's discomfort with the use of Western precedent comes in part from what he views as the neocolonial application of international human rights discourse to queer subalterns.³⁸⁶ Queer subalterns in India who engage in homosexual behavior do not equate their behavior with having a homosexual identity.³⁸⁷ As a result, Tellis is uncomfortable with labeling all homosexual behavior in India as LGBT.³⁸⁸ Further, equating homosexual behavior in India with a global LGBT identity risks erasing and suppressing the unique experiences of queer subalterns.³⁸⁹

In *Koushal*, the Supreme Court did not engage in a progressive intersectional analysis when it rejected decriminalization advocates' use of foreign precedent. However, similar to Khan, the Supreme Court rejected the equation of homosexual sex with an LGBT identity.³⁹⁰ The *Koushal* bench indicated that it would have been more willing to declare that homosexual behavior was natural than to recognize homosexuality as an identity construct.³⁹¹

While considering scientific evidence that homosexual behavior is natural, the *Koushal* bench suggested that if homosexual behavior were natural, it would not be captured under Section 377, as the provision only criminalizes "unnatural" sex.³⁹² Justice Singhvi even asked why the High Court did not make a specific finding of fact that homosexual behavior is natural.³⁹³ This suggests that the Court in *Koushal* may have been more comfortable with constructions of homosexuality as behavior rather than as identity.

Further, the Court seemed unwilling to equate sexual behavior with sexual identity. For example, the Court remarked that "a miniscule fraction of the country's population constitute lesbian, gays, bisexuals or transgenders [*sic*]."³⁹⁴ However, the size of a minority group is irrelevant to whether a minority group should be constitutionally protected.³⁹⁵ The Court's statement on the size of the LGBT community is perplexing, in particular because the Court made the statement in the context of distinguishing between homosexual identity and

385. *Id.*

386. Tellis, *Human Rights*, *supra* note 20, at 160–64.

387. Khan, *supra* note 170, at 110–11.

388. Tellis, *Party*, *supra* note 171.

389. Dutta, *supra* note 16, at 11. Dutta examines how the mainstream LGBT rights movement in India "tends to exclude or discipline" more marginalized queers "at the intersections of gender/sexual and class/caste marginality." *Id.*

390. Khan, *supra* note 170, at 110; Tellis, *Party*, *supra* note 171.

391. NOTES OF PROCEEDINGS IN *KOUSHAL* 2012, *infra* note 414, at 85–87. Unfortunately, the judges do not speak to this in the judgment.

392. *Id.* at 87 ("Natural expression of sexual orientation has, according to you, been shown in science. . . . Consenting adults are not covered in 377.").

393. *Id.* at 85–86 ("One more thing, Mr. Divan, the language of the reports you cite are about the person—attraction between the person. It is quite natural—for some, if not for all. Where is this discussion in the Delhi High Court's declaration?").

394. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 69 (India).

395. Narrain, *We Dissent*, *supra* note 94, at 2.

behavior. By referencing the triviality of the number of LGBT folk, the Court questioned the relevance of LGBT identities to a legal analysis regarding penetrative acts covered under Section 377.

Finally, the Court's reluctance to accept that Section 377 criminalizes LGBT folk is evocative of Kapur's call to conceive of queerness beyond particular sexual acts.³⁹⁶ In *Koushal*, the Court stated, "Section 377 IPC does not criminalize a particular people or identity or orientation," as the prohibition under Section 377 applies "regardless of gender identity and sexual orientation."³⁹⁷ Of course, for those whose identity is in fact synonymous with the sexual act, the distinction between homosexual identity and homosexual behavior can be problematic. At the same time, as Kapur has pointed out, limiting homosexual dissidence to the homosexual penetrative act leaves much to be desired from a progressive queer intersectional perspective. Like Kapur, the Court (albeit through its regressive judgment) also challenged readers to think of homosexual dissidence beyond homosexual identity and homosexual penetration.

This juxtaposition of queer antsubordination critiques of *Naz v. NCT Delhi* and the Supreme Court's reasoning in *Koushal* and *NLSA v. UOI* suggests that decriminalization advocates should consider whether the international precedent they relied on, and the way it was applied in the Indian context, truly represented the experiences of Indian queer subalterns. It is possible that rather than rejecting foreign law, the Supreme Court in *Koushal* was merely pointing out that international law does not always apply in the Indian context, or was not applied correctly by decriminalization advocates in that case.³⁹⁸ Had decriminalization advocates developed arguments for *Koushal* that addressed queer antsubordination concerns regarding reliance on Western precedent and Western constructions of sexuality, the Court may have reached a different outcome.

B. Privacy-Based Arguments and the Legality of Homosexuality

In both the Delhi High Court and the Supreme Court, decriminalization advocates put forward privacy arguments in support of reading down Section 377 to exclude private consensual sex between adults. Although these arguments emphasized the importance of queers' dignity and liberty interests, they failed to acknowledge that the vast majority of queers in India do not have access to private space.³⁹⁹ Both the Supreme Court in *Koushal* and queer antsubordination scholars and activists questioned whether and how privacy-based arguments are relevant to decriminalizing homosexuality.

Immediately following the High Court's decision to read down Section 377, *Tellis* questioned why decriminalization advocates had focused on reading

396. Kapur, *Multitasking Queer*, *supra* note 12, at 58.

397. *Koushal*, (2014) 1 SCC at 66.

398. *Id.* at 78.

399. Fernandes, *supra* note 172.

down Section 377 to only decriminalize private sex.⁴⁰⁰ Tellis's preference would have been to do away with the notion that particular sexual acts are somehow unnatural, whether they are done in public or private.⁴⁰¹ Tellis indicated that the original goal of queer justice activists was to have Section 377 struck down in its entirety.⁴⁰² However, this objective was soon abandoned, and activists advocated for an interpretation of Section 377 that would exclude private sexual acts between consenting adults.⁴⁰³ Unfortunately, decriminalizing private sexual acts did not legalize all homosexual penetration or promote broad-based acceptance for homosexual behavior.⁴⁰⁴ Non-private sexual acts remained criminal even after *Naz v. NCT Delhi*.⁴⁰⁵ In fact, a key antistatist critique of the *Naz v. NCT Delhi* is that it did nothing to protect lower-caste, lower-class queers who do not have access to private spaces in which to engage in consensual same-sex intercourse.

Further, as activist and scholar Shivananda Khan identified in his ethnography of MSMs and gay-identified men in India, one of the main differences between gay men and MSMs is that Western notions of "personal choice and privacy" have little meaning for queer subaltern men in India who have sex with other men.⁴⁰⁶ Many in India live in severe economic poverty and struggle with homelessness or inadequate housing.⁴⁰⁷ Those individuals frequently lack access to private space. One of Khan's MSM subjects asked: "Privacy? What privacy?"⁴⁰⁸ He lamented the lack of private space in India, describing how he lived in close quarters with members of his immediate and extended family.⁴⁰⁹ He went on to discuss his tight living situation and complete absence of privacy:

I share a room with my three older brothers The other room is where my parents and grandparents sleep. There is no lock on the door. In the hallway, my uncle and aunt sleep. It's like this everywhere in India.⁴¹⁰

In addition to a lack of access to private space, there is no social, psychological, or cultural space in which to develop an identity based on desire.⁴¹¹ Many deal with familial obligations to get married, social practices

400. Tellis, *Party*, *supra* note 171.

401. *Id.*

402. *Id.*

403. *Id.*

404. Datar, *supra* note 166.

405. Fernandes, *supra* note 172.

406. Khan, *supra* note 170, at 110.

407. *See supra* notes 285 (regarding poverty) and 344 (regarding slums and inadequate housing).

408. Khan, *supra* note 170, at 110.

409. *Id.*

410. *Id.*

411. *Id.* at 111. Khan writes, "There is no social, psychological, or cultural space to resist a closeted and schizophrenic state of being for men who have sex with men, and whose sense of desire and self articulates a yearning for a 'life-style' or some sort of safe 'identity' that expresses 'gayness.'" *Id.*

such as child marriage, and a lack of economic privilege. This makes privacy-focused, identity-based arguments around homosexuality irrelevant for queer subalterns, who lack both the physical and emotional space to construct their identities around sexual acts.⁴¹²

Like queer antisubordination scholars who criticized the High Court's decision in *Naz v. NCT Delhi*, the *Koushal* bench struggled with the relevance of privacy-based arguments in favor of decriminalization. For example, during the hearing,⁴¹³ one judge inquired if there were any examples of an adult being arrested under Section 377 for engaging in homosexual sex with another consenting adult in private.⁴¹⁴ The judge reasoned that if a sexual act was done in private between consenting adults and there was no complainant, the police would never know it happened.⁴¹⁵ According to this reasoning, individuals who engaged in private, consensual sex would never be subject to criminal liability, even if Section 377 remained in effect.⁴¹⁶

Thus, like queer antisubordination scholars and activists, the Supreme Court questioned whether decriminalizing private homosexual sex would result in any real change for those individuals subject to liability under Section 377. However, in contrast to *Tellis*, who called for Section 377 to be struck down entirely, the Supreme Court was content with keeping a provision prohibiting “unnatural” sex on the books. The Supreme Court's skepticism of the privacy arguments supporting decriminalization in *Koushal* nevertheless indicates that advocates could have made more compelling arguments supporting decriminalization. If advocates had tackled head-on the challenges of adopting a privacy-based argument in the Indian context, the Court, at the very least, would have had to grapple with the issue of a more public homosexual dissidence.

C. Queer Subalterns and Police Brutality

In *Koushal*, the Supreme Court tried to separate operational police abuse and brutality from the plain meaning of Section 377. Similarly, pro-subaltern scholars and activists, like Jason Fernandes, attempted to distinguish police

412. *Id.* at 106. Khan explains that “same-sex sexual behavior may play a relatively insignificant role in the construction of an identity” for MSMs and other queers in India. *Id.* Rather, “[b]eing a husband, father or a wife or mother often carries greater weight.” *Id.*

413. Unfortunately, in the *Koushal* judgment, the Court only addresses the privacy arguments in two paragraphs, in which there are no statements of law or conclusion on the privacy arguments put forward by decriminalization advocates. See *Koushal v. Naz Found.*, (2014) 1 SCC 1, 72–73 (India). The paragraphs merely introduce two block quotes and do not apply them to the facts. See *id.* So, the only place to look for the judges' thoughts on the law is the transcripts.

414. ORINAM, NOTES OF PROCEEDINGS IN *SURESH KUMAR KAUSHAL V. NAZ FOUNDATION* FEBRUARY 23 TO MARCH 27, 2012, SUPREME COURT OF INDIA 96, http://orinam.net/377/wp-content/uploads/2013/12/SC_Transcripts_Hearings.pdf (last accessed Jan. 24, 2016) [hereinafter NOTES OF PROCEEDINGS IN *KOUSHAL* 2012] (note: *Koushal* is alternately spelled in the title of this work).

415. *Id.* at 29, 96.

416. *Id.*

abuse and brutality against queer subalterns from the operation of Section 377.⁴¹⁷ However, while Fernandes sought to determine what else could be done to address the plight of queer subalterns, the Court left the issue to Parliament.⁴¹⁸ Importantly, both questioned whether Section 377 caused police brutality and targeting, or whether there were other factors at play. Both the *Koushal* court and Fernandes highlighted that the issue of police brutality is an intersectional social subordination issue, not just an issue of sexual orientation.

Fernandes and the Supreme Court made the same point: reading down Section 377 would not actually reduce police brutality against marginalized queer people.⁴¹⁹ Fernandes indicated that the only benefit of the judgment would be that queer people would be able to have sex in private spaces without harassment.⁴²⁰ However, effeminate men would still be subjected to police harassment based on other provisions in the criminal code, including provisions banning solicitation.⁴²¹ For those who do not have access to private space, “hurried sex in public spaces [would] still be [the] norm,” even after the decision.⁴²² Further, even if the *Koushal* bench had upheld *Naz v. NCT Delhi*, “[s]ame-sex couples showing affection in public [would] still be treated to verbal and physical assault that hetero-sexual couples are often shown,” since “sex [of any kind] in public spaces is still not condoned” in India.⁴²³

Similarly, in *Koushal*, the Court tried to decouple the constitutionality of Section 377 from its use in the harassment of LGBT people.⁴²⁴ The Court suggested that Section 377 neither mandated nor condoned police brutality or intimidation.⁴²⁵ Though the Court did not discuss the issue in great depth, the transcripts suggest that it considered the targeting of LGBT people to be an issue of systemic social stigma rather than a function of the legal operation of Section 377.⁴²⁶ In a conversation about social targeting and police brutality during the oral hearings, counsel for Voices Against 377, a pro-decriminalization intervenor, asserted that there was a wealth of literature discussing the physical violence and mental oppression of the LGBT community.⁴²⁷ Justice Singhvi questioned whether only *Kothis*, who are visibly gender nonconforming, need to be protected, or whether people who can assimilate and “pass” as straight also

417. Fernandes, *supra* note 172.

418. *See id.*; *Koushal*, (2014) 1 SCC at 81.

419. Fernandes, *supra* note 172.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 76–78 (India). The Court writes that Section 377 neither mandated nor condoned “harassment, blackmail and torture” of the LGBT community. *Id.* The Court goes on to say that “the mere fact that the section is misused by police authorities and others is not a reflection of the *vires* [and the constitutionality] of the section.” *Id.*

425. *Id.*

426. NOTES OF PROCEEDINGS IN *KOUSHAL* 2012, *supra* note 414, at 91–92.

427. *Id.* at 91.

need to be protected.⁴²⁸ Counsel for Voices Against 377 responded that everyone needed to be protected.⁴²⁹ Justice Singhvi, likely drawing on his own experience with issues of police brutality,⁴³⁰ replied that “[i]n India, targeting happens to people who don’t have power—otherwise, it doesn’t. This is the harsh reality of our times.”⁴³¹ Justice Singhvi’s statement suggests that he considered the targeting of those who are oppressed a function of social forces rather than the ordinary operation of Section 377. Justice Singhvi then went on to equate discrimination and targeting based on sexual orientation with caste-based discrimination.⁴³² He suggested that the best way to counter social stigma is through education.⁴³³ Like Fernandes, the *Koushal* court recognized that police harassment and police brutality are issues that reach far beyond Section 377.⁴³⁴ Further, by equating sexual orientation with caste, the Court demonstrated awareness of police brutality, targeting, and discrimination along other axes of oppression.⁴³⁵

Fernandes and the Supreme Court both rejected legal arguments suggesting that reading down Section 377 would mitigate police brutality against queer subalterns. Fernandes wrote: “The reading down of 377 will not therefore result in an immediate or automatic liberation for the supposed beneficiaries of the decision.”⁴³⁶ Still, LGBT advocates deployed arguments that painted marginalized queers as the primary beneficiaries of a remedy, which, in actuality, would primarily help propertied, urban, middle-class men and do little to alleviate the burden of police violence on queer subalterns. For this reason, Fernandes recommended that decriminalization advocates instead develop legal strategies tailored to the needs of queer subalterns.⁴³⁷ In fact, such a strategy was

428. *See id.* Justice Mukhopadhyaya stated, “*Kothi* has a feministic way of talking—not invisible, seen. Also being targeted. So do we only need to protect people who are visible?” *See id.*

429. *Id.* At this point, the transcript appears to be missing part of the conversation between the bench and counsel; unfortunately, no official transcripts are available. *Id.*

430. Indeed, Justice Singhvi may actually have unique insight into the issues of police brutality, since he monitored the government’s implementation of police reforms ordered by the Supreme Court in a police reform PIL. *See* Satya Prakash, *SC Directions on Police Reforms Hang Fire*, HINDUSTAN TIMES, <http://www.hindustantimes.com/india/sc-directions-on-police-reforms-hang-fire/story-sbly2Hfrc8abLi4jC8abJ.html> (last updated Nov. 2, 2013). Satya Prakash discusses how, in a particular PIL case, *Prakash Singh v. Union of India*, (2006) 8 SCC 1 (India), the Court directed both the legislative and executive branches to enact and implement specific police reforms; the Court then monitored their progress. *See id.*

431. NOTES OF PROCEEDINGS IN *KOUSHAL* 2012, *supra* note 414, at 92.

432. *Id.* Justice Singhvi remarks, “When you are educated, a lawyer, you don’t want to know the caste of your friend, [or] his sexual orientation. It is a personal matter. Social stigma lessens with education.” *Id.*

433. *Id.*

434. *Id.*; Fernandes, *supra* note 172.

435. NOTES OF PROCEEDINGS IN *KOUSHAL* 2012, *supra* note 414, at 92.

436. Fernandes, *supra* note 172.

437. As an example, Fernandes recommends that decriminalization advocates tackle provisions criminalizing solicitation of sex first. *Id.* He suggests that lower-class, effeminate men will continue to be harassed by the police “since soliciting for sex continues to be a crime.” *Id.* He argues that “if the liberation of the subaltern was a primary task, a challenge to the criminalization of soliciting for sex would have been the primary target.” *Id.* As an added

adopted in *NLSA v. UOI*.

D. *NLSA v. UOI*: A Decision that Served the Needs of Its Stated Beneficiaries

In *NLSA v. UOI*, in which the Supreme Court recognized rights of *Hijras* and other transgender people in India, transgender rights activists sought solutions that directly served the needs of those for whom they were seeking remedies. In *NLSA v. UOI*, the Supreme Court was more open to the humanity of *Hijras* in India.⁴³⁸ In fact, the Court acknowledged the “trauma, agony and pain” of transgender persons and the marginalization of those with alternative gender identities in the very first paragraph of the judgment.⁴³⁹ One of the remedies sought and won in *NLSA v. UOI* was the recognition of *Hijras* as a “distinct socio-religious and cultural group,” which must be considered as a separate “‘third gender,’ apart from male and female.”⁴⁴⁰ Additionally, the Court ordered the government to adopt and develop strategies, such as affirmative action, to uplift such persons socially, economically and politically.⁴⁴¹ In contrast, when advocates utilized stories of *Hijras*’ oppression to read down Section 377 in *Koushal*, the Supreme Court seemed to turn a deaf ear.⁴⁴²

Comparing the two cases in the context of Fernandes’s critiques of *Naz v. NCT Delhi*⁴⁴³ suggests that where the Court is able to identify a specific citizen who needs protection and is convinced that the remedy sought will actually help that citizen, the Court will be more willing to step in. But where arguments appropriate the stories of lower-class *Hijras* to seek remedies that primarily help upper-class urban queers,⁴⁴⁴ the Supreme Court will be less sympathetic. The outcomes in *Koushal* and *NLSA v. UOI* therefore suggest that arguments which are authentically grounded in the reality of queer subalterns will be more successful.

In summary, this section has sought to identify areas of overlap between

benefit, such an approach might have also “mobilized a larger community and have had larger implications for gender liberation.” *Id.*

438. Nat’l Legal Servs. Auth. v. Union of India (*NLSA v. UOI*), (2014) 5 SCC 438, 459 (India). The Court acknowledged that Indian society rarely “realizes or cares to realize the trauma, agony and pain which the members of [the] Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex.” *Id.* The Court also acknowledged the broad-based and explicit discrimination transgender people experience “in public places like railway stations, bus stands, schools, workplaces, malls, theatres, [and] hospitals.” *Id.* Further, “they are sidelined and treated as untouchables.” *Id.* The Court even suggested that “the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions” and indicated that such a mindset had to change. *Id.*

439. *Id.*

440. *Id.* at 491.

441. *Id.* at 508.

442. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 76-78 (India).

443. Fernandes, *supra* note 172.

444. *Id.*

the Supreme Court's analysis in *Koushal* and queer antisubordination scholars' criticisms of the decriminalization arguments advanced in both *Koushal* and *Naz v. NCT Delhi*. *Koushal* demonstrated that legal arguments that simply co-opt lower-caste, lower-class queer experiences such as those of *Hijras* and *Kothis*, and use stories of their oppression to push forward a homo-assimilationist agenda that will not actually help them, may not persuade the Supreme Court. Thus, if decriminalization advocates had heeded queer antisubordination scholars' critiques of the legal strategies employed in *Naz v. NCT Delhi*, they might have had more success in *Koushal*. Moving forward, decriminalization activists should reevaluate whether their heightened focus on decriminalization, and their approach to achieving it, is the most effective way to promote queer justice in India.

V. INTROSPECTION, INCLUSION, AND INTERSECTIONAL STRATEGIES

Queer antisubordination scholars and activists have highlighted the limitations of a single-issue, single-axis, LGBT-identity-focused politics by critiquing marriage equality arguments in the West and decriminalization arguments in India. Further, intersectional feminist theorist Professor Marilyn Frye's metaphor of a bird in a cage demonstrates that a single-axis perspective does not fully or accurately conceptualize what it means to be marginalized along multiple axes of difference.⁴⁴⁵ This metaphor exposes the fundamental flaw in decriminalization advocates' single-axis, identity-based arguments supporting the reading down of Section 377.⁴⁴⁶ Like the trapped bird, Indian queer subalterns are not marginalized solely based on their sexual orientation; rather, they face multiple, overlapping sources of oppression.⁴⁴⁷ Thus, reading down Section 377 to decriminalize private consensual sex will still leave many queer subalterns trapped inside the bars of systemic oppression.⁴⁴⁸ In contrast, many urban, middle class, educated, gay men in India, who experience oppression primarily on the basis of their sexual orientation, will benefit more directly.⁴⁴⁹

The previous section of this Article highlighted the parallels between queer antisubordination perspectives and the Supreme Court's response to decriminalization arguments. This section discusses ways in which the LGBT rights movement can learn from these perspectives and create more inclusive queer justice movements going forward. Perhaps the most important tool the movement can adopt is ally building with groups and individuals who experience discrimination along multiple, intersecting axes of oppression. In addition to promoting greater inclusivity in the LGBT rights movement, an ally-building

445. FRYE, *supra* note 225.

446. *Id.*

447. *Id.*

448. *Id.*

449. Fernandes, *supra* note 172.

strategy has many practical benefits. Through collaboration with these groups, LGBT rights activists will be better equipped to authentically represent the unique experiences of queer subalterns in India and develop effective legal and legislative solutions.

For instance, had decriminalization advocates collaborated with other groups to combat police brutality, they might have had more success at the Supreme Court addressing police violence against queers. Following the decision in *Naz v. NCT Delhi*, Fernandes suggested that if liberating queer subalterns had been a primary goal of decriminalization advocates, they would have built alliances with other groups facing similar struggles against unfair police practices, including those targeted under public nuisance provisions.⁴⁵⁰ This ally building would have resulted in a more “pro-subaltern” approach to liberation.⁴⁵¹ By collaborating with religious minorities and lower-caste persons who also experience police targeting and brutality, decriminalization advocates will be better equipped to develop comprehensive legal arguments addressing police brutality against queer subalterns. This type of collaboration may also help to mitigate opposition from religious conservatives.

A. Intersectional Litigation Strategies

Perhaps the strongest argument in favor of building allies and supportive coalitions to present intersectional perspectives at the Court is the very nature of the Public Interest Litigation process in India. As Professor Fredman argued, PIL works best when the court implements policies “which have already achieved broad consensus.”⁴⁵² Unfortunately, religious groups, and organizations like the Delhi Commission for Protection of Child Rights, fiercely resisted the arguments that advocates presented to the Supreme Court in favor of reading down Section 377.⁴⁵³ This resistance suggests that the idea of reading down Section 377 has not yet achieved the type of broad consensus in India that is necessary for reform.⁴⁵⁴ Of course, the Supreme Court may still intervene when there is a “conspicuous gap in policy making,” especially relating to matters of fundamental human rights.⁴⁵⁵ However, Fredman suggests that such judicial policy-making must necessarily be based on a deliberative process.⁴⁵⁶ Such deliberation will be enhanced through broader participation from affected groups who experience subordination along multiple, intersecting axes. By aligning themselves and contributing their different perspectives on intersecting social issues, progressive groups will develop more comprehensive and persuasive

450. *Id.*

451. *Id.*

452. Fredman, *supra* note 42, at 141.

453. *See id.* For a summary of the parties at the Supreme Court, see *Koushal v. Naz Found.*, (2014) 1 SCC 1, 24–28 (India).

454. Fredman, *supra* note 42, at 141.

455. *Id.*

456. *Id.* at 149.

policy solutions in future queer justice PILs.

One impediment to ally building is the perception that intersectional perspectives do not always lead to the most efficient legal arguments. As Professor Ratna Kapur acknowledged, there may be a need for “strategic essentialism” in the courtroom.⁴⁵⁷ Indeed, the fact that decriminalization advocates in *Naz v. NCT Delhi* and *Koushal* avoided a more inclusive, complex definition of “queer” in their courtroom constructions of homosexuality suggests that they were concerned about efficiency.⁴⁵⁸ However, their arguments did not ultimately persuade the Supreme Court. Kapur emphasized that a better strategy for decriminalization advocates going forward may be to pursue more “creativity in legal argument.”⁴⁵⁹ Only by working with allies will queer justice activists be able to develop more innovative arguments that “will resonate with the judges.”⁴⁶⁰

Such arguments must necessarily embody a more intersectional approach, which connects “different kinds of disenfranchisements” to better reflect queer Indians’ experiences of subordination.⁴⁶¹ It may be possible to develop legal arguments based on homosexuality as a behavior or act, rather than as an identity; as noted previously, this approach seemed to resonate with the Supreme Court in *Koushal*.⁴⁶² Further, rather than ignoring the reality that lower-class, lower-caste queers lack access to private space in which to have sex, that issue should be placed at the forefront of the decriminalization argument. Although developing such an argument in detail is beyond the scope of this Article, below are some ideas for how to begin.

First, advocates should acknowledge that people all over India engage in homosexual behavior. This would include an ethnography of those who engage in homosexual penetration and a detailed discussion of homosexual behavior by those who do not identify as gay.⁴⁶³ Advocates could also tie this behavior to the homosocial and homoaffectionalist culture in India.⁴⁶⁴ An ethnographic representation may help to normalize homosexual behavior for judges and the broader public. Additionally, such an ethnography might also convince the judges that homosexual behavior is “natural” and thus not covered by Section 377’s prohibition of “unnatural” sex.⁴⁶⁵ A focus on same-sex behavior rather than identity might also counter the Supreme Court’s reasoning that only a miniscule fraction of the population is homosexual.⁴⁶⁶ While few people may

457. Kapur, *Multitasking Queer*, *supra* note 12, at 53.

458. *Id.*

459. *Id.*

460. *Id.*

461. Tellis, *LGBT Politics*, *supra* note 339, at 10.

462. NOTES OF PROCEEDINGS IN *KOUSHAL* 2012, *supra* note 414, at 85–87.

463. *See* Khan, *supra* note 170.

464. *See id.* at 110.

465. NOTES OF PROCEEDINGS IN *KOUSHAL* 2012, *supra* note 414, at 87.

466. *Koushal v. Naz Found.*, (2014) 1 SCC 1, 69 (India).

identify as homosexual, far more people engage in homosexual behavior.⁴⁶⁷

Second, decriminalization advocates should further highlight how Section 377 disproportionately impacts lower-caste, lower-class men who have sex with men and lack access to private space, as compared with urban propertied gay men who are far less vulnerable to police brutality.⁴⁶⁸ Perhaps the lack of private space available to lower-caste, lower-class men can be countered by pursuing political solutions for more affordable housing or legal solutions like a right to housing. Regardless, more work will need to be done to show how removing or reading down Section 377 will help those who do not have access to private space.⁴⁶⁹ These arguments require further investigation and development. However, the first step for decriminalization advocates will be to introspect, to acknowledge possibility for improvement, and then to work collaboratively with others in queer justice movements to develop more innovative, intersectional, and inclusive solutions.

B. Intersectional Political/Legislative Strategies

In addition to promoting more effective legal strategies, ally building and solidarity would help LGBT people gain greater leverage in the legislative process, including the development of broad consensus around the need for legal/legislative reform. LGBT advocates should consider working with other groups to develop legislative solutions. Postcolonial scholar and activist Fernandes suggests that decriminalization should have been achieved legislatively by building broad consensus on the issue.⁴⁷⁰ He notes that decriminalization advocates may have to temporarily put aside their decriminalization advocacy and focus on the more pressing liberation demands of marginalized queer subalterns.⁴⁷¹ However, building the consensus required for legislation might produce more long-lasting and comprehensive liberation solutions.⁴⁷² Some scholars have argued that the Indian Parliament is dysfunctional, and that legislative solutions are therefore not realistic for achieving justice.⁴⁷³ However, Fernandes's position is that ignoring the legislative process is a form of elitism that decriminalization advocates should avoid.⁴⁷⁴

Additionally, Tellis recommends that decriminalization advocates develop arguments based on “analogous reasoning with various other minorities like

467. Khan, *supra* note 170, at 110–11.

468. See Fernandes, *supra* note 172.

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

473. For a discussion of legislative paralysis in India, see generally Tarunabh Khaitan, *The Real Price of Parliamentary Obstruction*, in UNIVERSITY OF OXFORD LEGAL RESEARCH PAPER SERIES 37 (2013).

474. Fernandes, *supra* note 172.

Dalits, Adivasis, and religious minorities” and examine successful, progressive legislation from these groups.⁴⁷⁵ In his view, analogies between marginalized groups “would have strengthened the case for constitutional arguments.”⁴⁷⁶ Through his reference to “legislation,” Tellis seems to suggest that activists should promote the rights of sexual minorities through legislative action, in the same way that *Dalits, Adivasis, and religious minorities* secured their rights through legislative mechanisms and constitutional amendments.⁴⁷⁷ For example, Tellis suggests that LGBT rights activists could collaborate with others to set up an effective Equal Opportunity Commission, which would address diversity issues at a national level.⁴⁷⁸

Regardless of the specific legal or legislative strategies LGBT advocates choose to adopt, the way forward must reflect the complexity and intersectionality of the human experience. An effective approach must better represent and account for the lived experiences of Indian queers coping with subordination along multiple axes of oppression. It is only through recognition of the intersectional nature of oppression, and collaboration with progressive allies, that LGBT advocates will be able to achieve social, legal, and political successes for queer justice and antisubordination.

VI. CONCLUSION

Much of the literature after *Koushal* has criticized the Court for its refusal to read down Section 377 to exclude consensual sex between consenting adults in private. This Article acknowledges the importance of critiquing the Supreme Court’s opinion while also considering what decriminalization advocates can learn from the outcome of *Koushal*.

Through a comparison of the Supreme Court’s decision in *Koushal* with antisubordination critiques of decriminalization arguments put forth in *Naz v. NCT Delhi* and *Koushal*, this Article has examined the shortcomings in decriminalization advocates’ legal strategies. Both the Supreme Court and antisubordination scholars have noted ways in which decriminalization arguments did not authentically represent the experiences of queer subalterns. As decriminalization advocates and others within Indian queer justice movements determine how to move forward, they would benefit from introspecting and adopting intersectional, inclusive strategies that come from queer subalterns. Such a process may generate creative solutions and foster opportunities for more meaningful ally building, which will result in greater legal, social, and political reform.

This Article does not suggest that decriminalization advocates acted in bad faith. Rather, decriminalization advocates were limited in part by their own

475. Tellis, *LGBT Politics*, *supra* note 339, at 10.

476. *Id.*

477. *Id.*

478. Tellis, *Party*, *supra* note 171.

privilege, as well as the historical and contemporary systemic silencing of subaltern voices. Postcolonial theorist Professor Gayatri Spivak has argued that it is privilege that prevents the privileged from gaining certain kinds of knowledge.⁴⁷⁹ Those who are more privileged within queer justice movements have to learn “to speak to historically (and indeed structurally) ‘silent’ others” to “systematically unlearn [their] own privileges.”⁴⁸⁰ Only then can one meaningfully engage in true queer postcolonial liberation.

As postcolonial subjects, Indians have much work to do and a long way to go to overcome historical and current forms of subordination. Ultimately, we can overcome intersecting axes of subordination more effectively if we work together on radical, empathetic, and collaborative antisubordination projects. A collaborative process may better achieve shared values of liberation for all.⁴⁸¹ But we can only work together effectively if we learn to respect our differences, rather than ignore them.

479. Spivak, *supra* note 276.

480. Ravecca & Upadhyay, *supra* note 276, at 360 (citing Spivak, *supra* note 276).

481. For an example of a collaborative process in which queer subalterns speak back to more economically privileged, urban middle-class men and influence queer justice movements, see Dutta, *supra* note 16, at 135–41.