De Lege Ferenda (2021) Vol IV, Issue ii, 66–93

Horizontal Enforcement of Queer Rights in India: A Constitutional Solution

Satyajit Bose* and Rhea Paul**

Abstract

This paper explores a unique constitutional question that arises in the enforcement of queer rights in India. The rights enumerated in Part III of the Constitution of India, which were instrumental in the reading down of Section 377, can generally only be asserted *qua* the State. Therefore, this paper questions whether the Constitution of India provides any protection to queer sexual minorities against private acts of discrimination. It argues that a remedy may be found in Article 17, which prohibits the practice of untouchability by both State and non-State actors. To that end, this paper presents normative and historical arguments in favour of an expansive interpretation of Article 17, which would encompass all forms of group exclusion rooted in the notions of 'purity' and 'pollution'.

Keywords: discrimination, constitutional law, horizontal rights, disgust stigma, queer rights

I. Introduction

In 2012, a small bakery in Colorado emerged at the centre of a national controversy on queer rights.[1] Jack Philips, the owner of the bakery, had refused to bake a wedding cake for a gay couple, citing his religious opposition to same-sex marriage. In his opinion, the Holy Bible only permitted heterosexual marriage,

* Final year student, B.A. LL.B. (Hons.), National Law School of India University, Bengaluru. satyajitbose@nls.ac.in.

** Final year student, B.A. LL.B. (Hons.), National Law School of India University, Bengaluru. rheaelizabethpaul@nls.ac.in.

1 Julie Turkewitz, 'Colorado, Once Called the "Hate State", Grapples with Cake Baker Decision' *New York Times* (Lakewood, 5 June 2018) <https://www.nytimes.com/2018/06/05/us/colorado-masterpiece-cake.html> accessed 18 August 2020.

through which he claimed that his refusal was a form of religious expression protected under the First Amendment to the American Constitution.[2] In response, the couple filed a complaint before the statutory commission under the Colorado Anti-Discrimination Act, alleging discrimination on the basis of sexual orientation.[3] After multiple rounds of litigation, the case eventually reached the US Supreme Court. In a 7-2 verdict, the Court ruled against the couple on the technical ground that the Commission had displayed religious animus against Philips.[4]

At its core, this case brings out a tension which lies at the heart of constitutional law and its intersection with queer rights.[5] In recent years, constitutional courts across the world have declared the rights enjoyed by queer sexual minorities, such as the right to dignity, equality, privacy and sexual expression.[6] The recognition of these rights has been instrumental in striking down colonial-era sodomy laws in various jurisdictions, most notably in the reading down of Section 377 of the Indian Penal Code.[7] However, the question of *who* these rights may be enforced against remains unexplored. Under the Indian Constitution, the rights enumerated in Part III are generally[8] enforced 'vertically' *qua* the State, as defined in Article 12, and not 'horizontally' against other private actors.[9] Therefore, the extent to which fundamental rights can be asserted against private acts of discrimination remains

2 See, for example, The Leviticus 18:22 ("You shall not lie with a male as with a woman; it is an abomination"); see generally Robert A.J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Abingdon Press 2010).

3 Colorado Anti-Discrimination Act 2017, §24-34-601(2)(a) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.").

4 *Masterpiece Cakeshop Ltd. v Colorado Civil Rights Commission* 138 S. Ct. 1719 (2018).

5 The term 'queer' is used as an umbrella term to describe any sexuality or gender identity that does not conform to the heteronormative ideal; see Gautam Bhan and Arvind Narrain (eds.), *Because I Have A Voice: Queer Politics in India* (Yoda Press 2005) 3 ("It embodies within itself a rejection of the primacy of the heterosexual, patriarchal family as the cornerstone of our society […] it captures and validates the identities and desires of gay, lesbian, bisexual and transgender people, but also represents, for many, an understanding of sexuality that goes beyond the categories of 'homosexual' and 'heterosexual'.").

6 See, for example, *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; In the United States of America, see *Lawrence v Texas*, 539 U.S. 558 (2003); *c.f. Ong Ming Johnson v Attorney General* (2020) SGHC 63.

7 ibid. See Robert Wintemute, 'Lesbian, Gay, Bisexual and Transgender Human Rights in India: From Naz Foundation to Navtej Singh Johar and Beyond' (2019) 12 (3-4) NUJS LR.

8 However, Articles 15(2), 17, 23 and 24 are usually regarded as the exceptions to the exclusively vertical reach of Part III.

9 For an overview of the vertical-horizontal dichotomy, see Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India' in C. Raj Kumar & K. Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment* (2nd edn., OUP 2007).

unclear, particularly when the act in question is being justified as an exercise of constitutionally guaranteed religious or economic freedoms.[10] The significance of this issue cannot be understated – it means that while queer sexual minorities might be guaranteed formal equality under the law, they can still be discriminated against by private individuals in various spaces, such as commercial establishments, housing and employment.[11] Without eliminating horizontal discrimination, substantive equality will continue to remain elusive in India.

While this issue has been resolved through civil rights legislation in the United States of America, India has yet to follow suit in enacting a comprehensive anti-discrimination law.[12] In the absence of a statutory framework, we argue that a horizontal remedy may be found in Article 17 of the Indian Constitution, which prohibits the practice of "untouchability in any form."[13] The interpretation of Article 17 was recently considered by the Supreme Court of India in *Indian Young Lawyers Association* v. *State of Kerala*, which pertained to the entry of menstruating women into the Sabarimala temple in Kerala.[14] In his concurring opinion, Chandrachud J held that discrimination suffered by menstruating women was a form of "untouchability", which fell within the purview of Article 17.[15] In furtherance of this radical interpretation, we argue that "untouchability" under Article 17 should be expansively interpreted to include discriminated based on both gender-identity and sexual orientation.

This article begins by providing an overview of the horizontal rights debate within Indian Constitutional Law, focusing on the extent to which different fundamental rights are applicable within the private sphere (I). Through this Section, we endeavour to bring out the uniqueness of Article 17 as a horizontally enforceable provision within a predominantly vertical constitutional framework. Thereafter, we examine the treatment of horizontal discrimination within the three

[10] Ashish Chugh, 'Fundamental Rights - Vertical or Horizontal?' (2005) 7 SCC J 9, 13 ("That voluntary agreements could defeat fundamental rights by simply relying on the primacy of the freedom to contract.").

[11] While it may be possible to argue that such discrimination would violate Article 15(2), this issue has not been judicially determined as of yet.

[12] Recently, efforts have been directed towards enacting such a legislation; *see e.g.* Centre for Law and Policy Research, *The Equality Bill 2019* <https://clpr.org.in/wp-content/uploads/2019/06/Equality-Bill-2019-22nd-July-2019.pdf> accessed 4 August 2020; Tarunabh Khaitan, *Equality Bill 2016* <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnx0YXJ1bmFiaHxneDo1ZGI1MDdiNGVjYzMwZDZl> accessed 4 August 2020.

[13] The Constitution of India 1950, art 17.

[14] *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

[15] ibid [355].

landmark decisions on queer rights, *Naz*,[16] *NALSA*[17] and *Navtej*. (II). This Section provides an insight into how the Supreme Court has navigated the horizontal – vertical dichotomy in the most prominent queer rights cases. Subsequently, we begin our argumentation on Article 17 by exploring the two competing views – the narrow interpretation and the expansive interpretation (III). Finally, we contend that discrimination based on sexual orientation and gender identity is based on notions of 'purity' and 'pollution', and can accordingly be interpreted as a form of "untouchability" under Article 17 (IV).

II. Mapping the Four Corners of Part III: A Review of the State Action Doctrine in India

The horizontal effect of constitutional rights is one of the most fundamental, yet controversial issues within comparative constitutional law.[18] Most liberal democratic constitutions recognise that the exercise of state power poses a threat to individual rights and freedoms, which is why constitutional rights are generally deemed to be enforceable *qua* the State.[19] In contrast, relationships between individuals are strictly within the 'private sphere', and therefore outside the ambit of constitutional law.[20] This position reflects the vertical approach, where constitutional rights bind and impose duties on State actors only. The United States of America is regarded as a classic example of the vertical position. In the *Civil Rights Cases* of 1883, the American Supreme Court famously laid down the 'State Action' doctrine which stipulates "[…] that it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack".[21] Individual actions that were not supported by State authority amounted to mere

16 *Naz Foundation v Government of NCT of Delhi* (2009) SCC OnLine Del 1762.

17 *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

18 Charles Black, Jr., 'Foreword: "State Action," Equal Protection, and California's Proposition' (1967) 81 Harvard LR 69, 95, wherein he famously characterised this issue as a "conceptual disaster area"; *c.f.* Laurence Tribe, 'Refocusing the "State Action " Inquiry: Separating State Acts from State Actors' in *Constitutional Choices* (HUP 1985) 248 ("In my view, considerably more consistent and less muddled than many have long supposed."); see generally Richard Kay, 'The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law' (1993) 10 Constitutional Comments 329, 346.

19 Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 Int'l J. Consti. L. 79 ("Put crudely this strand leads constitutionalists to pay primary attention to the threats to human rights that government poses.").

20 For an account and critique of the public/private divide, see Susan B. Boyd, 'Challenging the Public-Private Divide: An Overview' in Susan B. Boyd (ed.), *Challenging the Public-Private Divide: Feminism, Law and Public Policy* (University of Toronto Press 1997).

21 Civil Rights Cases, 109 U.S. 3 (1883); *c.f.* Harold Horowitz, 'The Misleading Search for "State Action"' Under the Fourteenth Amendment' (1957) 30 S. Cal. LR 208, 210.

private wrongs that were actionable under the Common Law, against which constitutional rights cannot be asserted. The sole exception to the state action doctrine is the Thirteenth Amendment, which mandates complete abolition of slavery and involuntary servitude.[22]

Over the years, this model of constitutionalism has been heavily criticised for ignoring inequalities of power within the private sphere.[23] It is often argued that individual rights can also be imperilled by extremely powerful private actors, both within economic and social spaces.[24] For example, as seen in the Temple Entry Movement, powerful religious actors can excommunicate and declare a 'social boycott' on marginalised communities, thereby denying them the constitutional right to freely practice and propagate their religion.[25] In recognition of this inequality, several constitutional systems have extended the protections of individual rights to private relationships, albeit to varying degrees. For example, the Irish Constitution provides for complete horizontal enforcement of rights through its jurisprudence of "constitutional torts".[26] The Irish Constitution is unique in this sense, for it "confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials".[27]

In this section, we seek to explore the nuances of the horizontal-vertical dichotomy within Indian Constitutional Law. It is not our endeavour to provide a comprehensive theory on the nature of rights within the Indian Constitution, which is far beyond the scope of this paper. Rather, we advance the limited claim that the rights enumerated in Part III are not uniform in their scope of application within the private sphere. In doing so, we aim to emphasise on the significance of Article 17 as a directly horizontal provision within a predominantly vertical constitutional scheme. Accordingly, this section deconstructs Part III rights into

[22] Constitution of the United States, Amendment XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[23] Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan LR 387, 395. See, generally, Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 NWU LR. 503, 537 ("In fact under the State Action doctrine, the rights of the private violator are always favoured over the rights of the victim.").

[24] Tushnet (n 19) 79.

[25] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (OUP 2019) 159 ("The effect of excommunication was not simply 'religious', but extended to barring the individual from exercising his civil rights; and furthermore, by forbidding social or economic contact, effectively turned him into a 'pariah'.").

[26] Gardbaum (n 23) 396; see *Meskell v Coras Iompair Eireann* I.R. 121, 133 (1973).

[27] *Hosford v John Murphy & Sons* I.R. 621, 626 (1987).

three categories – vertical (A), directly horizontal (B) and indirectly horizontal (C), and examines each of them in turn.

A. Vertical rights

As a general rule, the rights enumerated in Part III of the Constitution have traditionally been regarded as 'vertical' in nature.[28] They regulate the relationship between the individual and the state, without directly binding non-state entities. This approach is justified by the textual provisions, as well as the drafting history of the Constitution.

To begin with, Article 13(2) reads: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void".[29] As D.D. Basu observes, Article 13(2) requires a specific form of threshold "State action" before violation of a fundamental right can be asserted.[30] There are two aspects of Article 13(2) that support this interpretation: *first*, the '*State*' is expressly identified as the sole duty-bearer, who is obligated to refrain from violating any of the rights enumerated in Part III;[31] *second*, it stipulates that '*any law*' that contravenes the rights conferred in Part III shall be deemed to be void. Article 13(3) defines 'law' as "[…] laws passed or made by Legislature or other competent authority in the territory of India", in which exercise of private power find no mention.[32] Furthermore, this interpretation is supported by numerous Articles that identify the 'State' as the duty-bearer of the corresponding right.[33] This understanding was also echoed by various parliamentarians during the Constituent Assembly Debates, where Dr.

[28] *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632, 659 ("The Fundamental Rights in Part III of the Constitution are normally enforced against State action or action by other authorities who may come within the provision of Article 12 of the Constitution."). For analysis of this case, *see* Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2019) 11 Asian J. of Comp. Law 1.

[29] The Constitution of India 1950, art 13(2).

[30] D.D. Basu, *Commentary on the Constitution of India* (9th Ed., LexisNexis 2014) 22 ("It applies if the following conditions are satisfied, *viz* (a)The law is made by an authority which comes within the definition of "State" under Article 12); H.M. Seervai, *The Constitutional Law of India* (4th edn., Universal Law Publishing 1991) 374; *Menaka Gandhi v Union of India* (1978) 1 SCC 248 ("What the court must consider is the "direct" or "inevitable" consequence of State action"); *R.C. Cooper v Union of India* (1970) 1 SCC 248, 284 ("Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action.").

[31] Stephen Gardbaum, 'The Indian Constitution and Horizontal Effect' in Sujit Choudhry et al (eds.), *Oxford Handbook of Indian Constitution* (OUP 2016) 577.

[32] The Constitution of India 1950, art 13(3); D.D. Basu (n 30) 22 ("The Law falls within the definition given in Article 13(3)(a)").

[33] Gardbaum (n 23).

B.R. Ambedkar noted that the scope of Part III was to bind every authority that "*has got the power to make laws*".[34] For present purposes, Articles 14, 15(1) and 19, all of which were essential in the decriminalisation of homosexuality, expressly place restrictions on the "State".

This interpretation of Part III rights can also be historically rationalised. Part III, as a charter of rights and freedoms, was born out of the "legacy of injustice" that had been perpetrated by the British within the Indian subcontinent.[35] The Constitution, as a radically transformative project[36], aimed at redefining the legal relationship between the individual citizen and the post-colonial State.[37] Under British rule, the individual had been treated as a mere subject of colonial administration, often having to bear the brunt of governmental excesses and injustices. The Constitution sought to remedy this by granting rights to the individual, with the government having limited power to curtail these rights.[38] Therefore, the vertical approach envisages a Constitution that primarily places limitations on State Power within the public domain, with the private domain being free of constitutional regulation.

B. Direct horizontal rights

There are four exceptions to the vertical interpretation of Part III. Articles 15(2), 17, 23 and 24 are directly horizontal in nature, in that they are "plainly

[34] Constituent Assembly Debates, November 25, 1948, speech by Dr. B.R. Ambedkar <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25>.

[35] Bhatia (n 25) 6, citing Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 Yale LJ 2009, 2057.

[36] *See* Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African J. on Human Rights 146, 150 ("By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."). See also Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in Upendra Baxi et al (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (University of Pretoria Press 2013).

[37] See Moiz Tundawala, 'On India's Postcolonial Engagement with the Rule of Law' (2013) 6 NUJS LR 11 ("Contrasting the 'equality of status and of opportunity' promised in the Preamble with the British sense of superiority over the natives would have made the people of the country wonder in excitement about the limitless possibilities which lay ahead as the project of modernity with its agenda of progress, constrained by a racial hierarchy in colonialism, could now reach its logical completion.").

[38] Constituent Assembly Debates, November 4, 1948, speech by Dr. B.R. Ambedkar <constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04> ("I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit").

and indubitably enforceable against everyone".[39] This is clearly reflected in the text of these Articles, which do not identify specific duty bearers – rather, they call for the complete abolition of certain practices. For example, Article 17 reads "untouchability is abolished and its practice in any form is prohibited".[40] While the Constitution sought to place limits on the State Action in the public domain, the Drafters also acknowledged the unique characteristics of Indian society, wherein power was not consolidated in the hands of the State. Rather, it was distributed between social groups, communities and other private actors, creating a system of complex social hierarchies that Kaviraj describes as "two-layered sovereignty".[41] As Ambedkar observed, discrimination was conducted through community sanction on the basis of a system of "graded inequality".[42] Backed by the forces of tradition and religion, individual rights and freedoms were rendered meaningless by powerful social and economic actors. Therefore, the nationalist movement was not exclusively targeted at "colonial configurations of power", but also sought to unfetter the individual from "local configurations of power".[43] This meant that the constitutional project not only aimed at liberating India from the vice grip of a Colonial power, but also sought to bring about a "social revolution"[44] by breaking down a fundamentally unequal social order.

C. Indirect horizontal rights

In recent years, constitutional courts across the world have moved towards a 'hybrid approach' between vertical and horizontal application of rights.[45] Popularly referred to as 'indirect horizontality', this approach retains the basic premise of the vertical position that constitutional rights are applicable against the State only. However, it allows for enforcement of constitutional rights against private

[39] *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

[40] The Constitution of India 1950, Article 17.

[41] Sudipta Kaviraj, *Trajectories of the Indian State: Politics and Ideas* (Permanent Black 2010) 12 ("The 'sovereignty' of the state was two-layered […]. Often, there existed a distant, formally all-encompassing, empire, but actual political suffering was caused on an everyday basis by neighbourhood tyrants. There were also considerable powers of self-regulation by these communities.").

[42] Constituent Assembly Debates, November 25, 1949, speech by Dr. B.R. Ambedkar <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25> ("we have in India, a society based on the principle of graded inequality with elevation for some and degradation for others").

[43] Gopal Guru, 'Constitutional Justice: Positional and Cultural' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (OUP 2008) 235.

[44] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966) ("The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'."); *c.f.* Sudipta Kaviraj, 'A Critique of the Passive Revolution' (1988) 23 (45/47) Economic and Political Weekly 2429.

[45] Gardbaum (n 23) 398.

actors if state action can be indirectly linked to the act. This can take various forms. For example, in the *Dolphin Case*, the Canadian Supreme Court held that "constitutional values" can indirectly regulate private relationships, by evolving the Common Law in consonance with values contained in the Canadian Charter of Freedom.[46] The German Constitutional Court also upheld the "constitutional values" doctrine in the famous *Luth* case, where it held that "every provision of private law must be compatible with [the Basic Law's] system of values".[47] However, the German Constitution also indirectly regulates private action one step further – law authorising private action is also directly subjected to constitutional rights, and is invalid to the extent of contravention.[48]

The Indian Supreme Court has also embraced the shift towards indirect horizontality. Although the state action requirement in Article 13(2) still precludes direct horizontal application, the Court has creatively interpreted fundamental rights to indirectly subject private actors to constitutional review. This jurisprudence has evolved in two distinct forms: *first*, the imposition of "protective duties" on the State to prevent private violation of fundamental rights; *second*, by challenging the law that empowers the private violation of fundamental rights.

(i) Protective duties

The imposition of 'protective duties' identifies the State as a duty-bearer in a dual sense. As mentioned earlier, the State is primarily obligated to not directly act in a way that infringes the rights enumerated in Part III. Beyond this, the 'protective duties' approach places a positive obligation on the State to prevent non-State entities from violating fundamental rights.[49] This means that the failure to protect fundamental rights from private violation constitutes a form of "state action", which gives rise to a remedy against the State. A manifestation of this approach is seen in the celebrated case of *Vishaka* v. *State of Rajasthan*.[50] In this case, Bhanwari Devi, a social worker was gangraped by a group of men while protesting against the marriage of an infant in Rajasthan. In exercise of its powers under

[46] *Retail, Wholesale & Dep't Store Union v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573.

[47] Liith, BVerfGE 7, 198 (1958); *see generally* Greg Taylor, 'The Horizontal Effect of Human Rights, the German Model and its Applicability to Common Law Jurisdictions' (2002) 13 King's Coll LJ 187.

[48] See Peter E. Quint, 'Free Speech and Private Law in German Constitutional Theory' (1989) 48 MD LR 247, 264; Basil S. Markesinis & Hannes Unberath, *The German Law of Torts* (Hart Publishing, 4th edn., 2002) 406 ("A public law action between an individual and the state, a constitutional right will directly override an otherwise applicable rule of public law. The constitutional right will also override a statutory provision of private law if it contravenes a constitutional right.").

[49] Gardbaum (n 23) 579; Other examples of this approach can be seen in *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42 ("The State, be it Union or State government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman.").

[50] *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

Article 32, the Supreme Court formulated a set of guidelines to protect women from sexual harassment, which was a violation of Articles 14, 19 and 21.[51] One of the guidelines placed an affirmative duty on the Union and State Governments to enact "suitable measures including legislation to ensure that the guidelines laid down by this order *are also observed by the employers in Private Sector*".[52] In other words, the Court placed a positive obligation on the State to take appropriate action to prevent violation of fundamental rights in the workplace.

(ii) Laws that enable restriction of fundamental rights

Similar to protective duties, this approach does not directly subject private actions to the anvil of fundamental rights. Rather, it challenges the law that authorises the non-state entity to act in a manner that violates a fundamental right.[53] While this approach has found limited application in India, one of the landmark cases on this position is *R. Rajagopal* v. *State of Tamil Nadu*.[54] In *Rajagopal*, a magazine wanted to publish the autobiography of a prisoner who had been sentenced to death. The warden and other public officials attempted to prevent publication by filing defamation suits against the editors of the magazine. In response, the magazine argued that defamation law was being used to stifle the expression of freedom of speech under Article 19(1)(a). Eventually, the Court modified the legal standard for defamation to ensure that it cannot be used to prohibit *bona fide* exercise of the freedom of speech under Article 19(1)(a).[55]

In summary, the rights enumerated in Part III are generally enforceable against the State. In this context, the abolition of "untouchability" in Article 17 assumes enormous significance. When compared to the American Constitution, Article 17 can be seen as the "functional equivalent of the thirteenth amendment"[56]

[51] ibid [3] – [14]

[52] ibid [17]

[53] See Larry Alexander, 'The Public/Private Distinction and Constitutional Limits on Private Power' (1993) 10 Constitutional Comments 361, 362-3 ("If we couple this fact about private actions - that they occur against a background of various legal duties and immunities, which background gives them their legal status - with another fact - that these various background legal duties and immunities are paradigmatic "state action" -we come to the conclusion that all private action implicates state action.").

[54] *R. Rajagopal v State of Tamil Nadu* AIR 1995 SC 264

[55] ibid [21] ("[…] but what is called for today is a proper balancing of the freedom of the press and said laws consistent with the democratic law ordained by the Constitution.").

[56] Gardbaum (n 23) 678.

– it occupies a unique space as a directly horizontal provision within our constitutional scheme.

III. Horizontal Discrimination: Examining *Naz*, *NALSA* and *Navtej*

In recent years, the Indian Supreme Court has delivered three landmark decisions on queer rights under the Constitution of India. The first of these was *Naz*, where the Delhi High Court declared that Section 377 was unconstitutional to the extent it criminalised same-sex intercourse.[57] This was followed by *NALSA*, where the Court extended legal recognition to transgenders as constituting the "third gender".[58] Finally, in *Navtej*, the Court affirmed the holding in *Naz*, and accordingly read down Section 377 of the Indian Penal Code. Admittedly, all three cases were litigated by individual citizens/groups against the State, without directly implicating private actors for constitutional violations. However, we argue that all three decisions displayed elements of indirect horizontality in various avatars – they acknowledged the impact of private actions on fundamental rights and sought to hold the State accountable for them. In the process, we aim to shed some light on how the Supreme Court has tackled the problem of horizontal discrimination in queer rights thus far.

In this Section, we will focus on two examples of private violations that the Court sought to indirectly regulate: *first*, blackmail of queer individuals, wherein we analyse the judicial treatment of this phenomenon from *Naz* to *Navtej* (A); *second*, discrimination suffered by transgenders in public and commercial spaces, where we analyse the imposition of affirmative duties on the State in *NALSA* (B).

A. Section 377 and blackmail

In *Navtej*, the Petitioners impugned Section 377 of the Indian Penal Code, which criminalised "carnal intercourse against the order of nature".[59] In a strictly vertical sense, this provision was declared unconstitutional – it amounted to legislative action in violation of Articles 14, 15, 19 and 21.[60] However, this provision

[57] See, generally, Vikram Raghavan, 'Navigating the Noteworthy and the Nebulous in Naz Foundation' (2009) 2 NUJS LR 3.

[58] See, generally, Aniruddha Datta, 'Contradictory Tendencies: The Supreme Court's NALSA Judgement on Transgender Recognition and Rights' (2013-14) 5 JILS 225.

[59] Indian Penal Code 1860, §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 a term which may extend to ten years or with a death penalty, and shall also be liable to fine").

[60] For an analysis of Article 14 jurisprudence developed through these cases, see Gauri Pillai, 'Naz to Navtej: Navigating Notions of Equality' (2019) 12(3-4) NUJS LR.

had rarely been invoked by the State to criminally prosecute queer individuals, with a mere 131 cases being registered during its entire 140-year existence.[61] Therefore, the real impact of Section 377 was not felt in the courtroom, but rather in everyday society.[62] One of the many consequences of Section 377 was its widespread abuse to blackmail and extort queer individuals, so much so that it resembled a "blackmailer's charter".[63] As the Delhi High Court remarked in *Naz*, the real effect of Section 377 was that:

> "Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as 'unapprehended felons' thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination".[64]

The significance of this analysis lies in the recognition that Section 377 effectively stigmatised homosexuals as criminals, which meant that they were vulnerable to exploitation in the form of blackmail and extortion. For the blackmailer, Section 377 provided both moral and legal legitimacy for criminal activity. It provided legal immunity as the victim was unlikely to report the blackmail and risk both criminal prosecution and social sanction. It also provided moral justification. As Gupta observes, Section 377 constructed a "parallel order of sexual morality" that was weaponised to police non-conforming sexual expression.[65] This emboldened the blackmailer to extort and blackmail with impunity, all under the garb of enforcing and protecting social morality.

Four years later, the Supreme Court of India overturned the Delhi High Court's decision in *Suresh Kumar Koushal* v. *Naz Foundation*.[66] In stark contrast, the Supreme Court held that the "[…] section is misused by police authorities and

[61] See Alok Gupta, 'The History and Trends in the Application of the Anti-Sodomy Law in the Indian Courts' (2001) 16 The Lawyers Collective 7, 9.

[62] The significance of the decision is by no means restricted to the impact on blackmail and extortion. However, for the purposes of this claim, we will be focusing on the role of Section 377 in facilitating blackmail.

[63] Arvind Narrain & Alok Gupta, 'Introduction' in Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011).

[64] *Naz Foundation* (n 16) [50].

[65] Alok Gupta, 'The Moral Order of Blackmail' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011) 502 ("The blackmailer is a non-institutional avatar of the Morality Sena, albeit without any overt political backing. But like the Sena, he justifies his criminal actions by falling back on cultural homophobia as well as legal proscriptions against homosexuals"); On violence perpetrated on account of Section 377, *see also* Akshay Khanna, 'The Social Lives of 377: Constitution of the Law by the Queer Movement' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011)

[66] (2014) 1 SCC 1.

others is not a reflection of the vires of the section".[67] Finally, in *Navtej*, the Supreme Court overruled *Koushal*, and read down Section 377. On the issue of blackmail, the Court noted that, "Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence".[68]

At its core, the judges in *Koushal* differed from their counterparts in *Naz* and *Navtej* on whether state action is required to violate a fundamental right. In *Koushal*, the judges conceptualise fundamental rights as exclusively vertical - abuse of Section 377 by non-state entities, even if it deprives an individual of the right to a dignified existence under Article 21, does not meet the threshold requirement of state action. Accordingly, the only issue is whether Section 377, a direct form of State Action, is in contravention of the fundamental rights. In comparison, the judges in *Naz* and *Navtej* move beyond the strictly vertical approach. Accordingly, in *Navtej*, the Court explores the extent to which Section 377 has been exploited by private individuals to deny the homosexual's dignity, which is held to be an integral facet of the right to life and liberty under Article 21. In doing so, the Court has adopted the second form of indirect horizontality, where all private violations are deemed to take place in the backdrop of laws i.e., Section 377, thereby satisfying the requirements of the State Action rule.

There are two caveats that are necessary here. *First*, admittedly, the threat of blackmail is not completed eliminated by the reading down of Section 377. It is still possible to blackmail individuals who are not openly homosexual, and threaten to '*out*' them to society. However, the impact of *Navtej* is that it holds the State responsible to the extent to which it has enabled private blackmail. The existence of Section 377 precluded individuals from seeking any legal remedy while being blackmailed, which exacerbated the problem. *Second*, the abuse of Section 377 alone cannot be an independent ground to declare it unconstitutional. It is only when State Action is routinely exploited to deny a fundamental right, such as the right to a dignified existence, that the State is responsible to that extent. Therefore, the *Navtej* judgement is indirectly horizontal as it holds the State accountable to the

[67] ibid [76]

[68] *Navtej Singh Johar* (n 6) [377].

extent to which it has facilitated private blackmail, which led to denial of the right to dignity.

B. Protective duties in *Nalsa*

In *NALSA*, the Petitioners did not challenge a specific legislative or executive action. On the contrary, they sought legal recognition of transgender identity, arguing that the State's failure to do so violated their fundamental rights under Articles 14 ,19 and 21.[69] The Petitioners further claimed that non-recognition of their gender identity had resulted in denial of their legal and constitutional rights – this had manifested in social discrimination, lack of access to medical facilities, physical harassment and sexual violence in public and private spaces, to name a few consequences.

These claims point to the scale of discrimination suffered by transgenders at the hands of non-state entities. In 2019, the International Commission of Jurists published a report on discrimination based on sexual orientation and gender identity in India ('ICJ Report').[70] The ICJ Report notes, inter alia, that transgenders face widespread discrimination within public spaces, housing and employment. This can take various forms. The Report details accounts of humiliating and discriminatory commercial practices that transgenders face, such as denial of entry into commercial establishments.[71] In the realm of housing, transgenders are often segregated into low-income neighbourhoods, without access to drinking water, sanitation and basic amenities.[72] Even within the families, transgenders and queer individuals face abuse and oppression. The recent death of a 21-year old bisexual woman from Kerala, who was forced to undergo conversion therapy further illustrates this point.[73]

This argument was viewed favourably by the Court, which held that the absence of legal recognition of transgenders had "left them vulnerable to

[69] *National Legal Services Authority* (n 17) [2].

[70] International Commission of Jurists, *Living with Dignity - Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India* (2019) <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf> accessed 18 August 2020.

[71] ibid 128 ("Transwomen who work on streets all day or who have been seen on streets as sex workers or beggars will never be allowed into malls. They think we will create nuisance inside the malls, or solicit or beg, so they don't allow us. If they do allow us, a security guard will follow us inside to each and every shop or food court where we go").

[72] ibid 28.

[73] Cris, 'Kerala student dies in Goa, death puts focus on inhuman 'conversion therapy' on queer people' (*News Minute*, 16 May 2020) <https://www.thenewsminute.com/article/kerala-student-dies-goa-death-puts-focus-inhuman-conversion-therapy-queer-people-124683> accessed 18 August 2020.

harassment, in public spaces, at home and in jail".[74] In *NALSA*, the Court held the State accountable for failing to protect the fundamental rights enjoyed by the transgender community. In direct contrast to *Naz* and *Navtej*, the state action requirement is met by demonstrating 'State inaction' to protect fundamental rights. In other words, it relies on the "protective duties" approach by placing a positive obligation on the State to act in a manner that prevents fundamental rights from being violated. Much like *Vishaka*, the judgement concludes by issuing directives to the State to frame and implement laws that protect the fundamental rights enjoyed by transgenders.[75]

Through our analysis of *Naz*, *NALSA* and *Navtej*, there are two useful conclusions that can be drawn. First, in the realm of queer rights, all three judgements display elements of indirect horizontality. This is born out of the recognition that queer sexual minorities suffer widespread harassment and exploitation within the private sphere, which necessitates moving beyond a strictly vertical approach. Second, somewhat paradoxically, all three cases continue to uphold the state action requirement – primarily because these cases were litigated against the State. This means that while combating private discrimination, an individual is still required to show that discriminatory conduct can be attributed to the State in some form, either directly or indirectly.

There are numerous examples of private discrimination that do not meet this requirement. Take the example of a private employer that refuses to employ homosexuals by exercising the freedom of trade under Article 19(1)(g). The State cannot be held indirectly responsible when an individual exercises a constitutionally guaranteed economic freedom. Why is this a problem? As Khaitan argues, one of the goals of discrimination law is to ensure that members of marginalised groups get adequate opportunities.[76] While cases such as *NALSA* and *Navtej* ensure formal equality under the law, they do little to address the substantive group disadvantage accruing to various queer communities. In light of this, we suggest the solution to combat horizontal discrimination lies in Article 17, which is directly enforceable against private entities.

IV. Sabarimala and the Radical Interpretation of Article 17

Located in the Western Ghats of Kerala, the Sabarimala temple houses the deity of Lord Ayyapan. It is popularly believed that the deity took up a vow of eternal celibacy – or 'Naishtik Brahmachari' – due to which devotees who

[74] *National Legal Services Authority* (n 17) [62].

[75] ibid [135] ("The Central and State Governments should take proper measures to provide medical care to TGs in the hospital and also provide them separate public toilets and other facilities.").

[76] See Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015).

undertake a pilgrimage to this temple are required to observe 41 days of strict penance, or 'vratham'. This includes complete abstinence from drinking alcohol or consuming meat, engaging in sexual relations with your spouse, or even interacting with women at all.[77] To ensure that the deity's celibacy was not affected in any way, it was a custom for women of menstruating age to not enter the temple. In 1955, the Travancore Devaswom Board noted that the requirements of 'vratham' were not being observed sincerely by the devotees. At the same time, mature women were also found to be breaching the custom by entering the temple premises. Hence, in 1955, the Board issued a notification that barred menstruating women between the age of 10 and 55 from entering the temple premises, to uphold "the sanctity and dignity of this great temple and keep up the past traditions".[78] In 1965, the State Government of Kerala followed this up by enacting the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, of which Section 4 empowered the State Executive to frame rules to preserve public order and decorum, as well as ensure the due performance of rights and ceremonies.[79] Pursuant to Section 4, the Kerala State Government further issued a set of regulations titled the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules. Rule 3(b) of the Regulations prohibited women from entering places of public worship when "they are not by custom and usage allowed to enter".[80] This provision was subsequently challenged before the Supreme Court in *Sabarimala*.

There are numerous issues that were raised by the Petitioners. *Prima facie*, the crux of this issue pertains to the relationship between Articles 25 and 26 of the Constitution, as well as the application of the 'essential practices test' to this case.[81] On this point, by a 4-1 majority, the Court declared that the exclusion of menstruating women from a public temple was unconstitutional.[82] Beyond this, the *amicus curiae* also advanced an argument under Article 17 – that the practice

[77] *Indian Young Lawyers Association* (n 14) [231].

[78] ibid [233]

[79] Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965, §4.

[80] Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965, Rule 3(b) ("The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship: […] (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.").

[81] See generally Mary K. Dominic, 'Essential Religious Practices as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Finding' (2020) 16 Socio-Legal Review 46.

[82] For analysis of this decision, *see* Suhrith Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgement in Sabarimala' (2020) 3 Ox. Human Rights Hub J. 123; Deepa Das Acevedo, 'Pause for Thought: Supreme Court's Verdict on Sabarimala' (2018) 53(43) Economic and Political Weekly 12.

of excluding women of menstruating age was a form of "untouchability" that was expressly barred by the Constitution of India. In adjudicating this argument, a clear split emerged within the bench. Malhotra J opined that the prohibition on untouchability was a specific reference to historical caste-based discrimination, which was not analogous to the treatment of women.[83] In direct contrast, Chandrachud J held that Article 17 was not restricted to caste-based untouchability, but included all forms of hierarchical social exclusion along the axis of 'purity' and 'pollution'.[84]

This interpretative clash is by no means new. It arose during the Constituent Assembly Debates, when members repeatedly pointed to the vagueness of Article 17. It reared its head in 1962, when the Supreme Court considered a challenge to temple entry legislation. The divergence between the Malhotra J and Chandrachud J represents the two poles on Article 17 – the traditional interpretation (A) and the radical thesis (B). Thereafter, we normatively justify this expansive interpretation of untouchability by situating it within Nussbaum's theory of disgust (C).

A. The traditional interpretation

Article 17 abolishes "untouchability" and prohibits its practice "in any form". Within the text of this Article, two questions immediately arise: first, *who is an untouchable?* second, *what are the various forms in which it may be practiced?* Proponents of the traditional view point out that the term "untouchability" has been placed within inverted commas – this indicates that it has a concrete, historically contextualised meaning, which is located in systemic caste-based oppression and exclusion which is widely prevalent in Hindu society.[85] In other words, the Drafters of the Constitution used the term "untouchability" as a technical term referring exclusively to caste untouchability, which cannot be interpreted to include all forms of group exclusion. This understanding was echoed by numerous members during the Constituent Assembly Debates. For example, Professor KT Shah highlighted the absence of a definition of untouchability, without which Article

[83] *Indian Young Lawyers Association* (n 14) [523].

[84] ibid [357].

[85] Constituent Assembly Debates, November 29, 1947, speech by K.M. Munshi <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-29> ("The word 'untouchability' is put purposely within inverted commas in order to indicate that the Union legislature when it defines 'untouchability' will be able to deal with it in the sense in which it is normally understood."); *Devarajiah v B. Padmanna* 1957 SCCOnline Kar 16.

17 could potentially include other forms of group exclusion.[86] This could range from treatment of menstruating women as impure to exclusion on sanitary and hygiene grounds, such as those who are suffering from diseases such as leprosy. In furtherance of this claim, Naziruddin Ahmed moved an amendment that proposed to define untouchability in terms of caste and religion, to give "better shape" to the scope of Article 17.[87] Similarly, other members such as Manohar Das almost exclusively referred to the treatment of Harijans while discussing the radical significance of Article 17.[88]

This interpretation has also been upheld by numerous Courts. In *Devarajiah* v. *B. Padmanna*, the Mysore High Court observed that "comprehensive as the word 'untouchables' in the Act is intended to be, it can only refer to those regarded as untouchables in the course of historical development".[89] Similarly, in *State of Karnataka* v. *Appu Balu Ingale*, the Court held that "Article 17 of the Constitution strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic".[90] However, the most significant exposition of this view was delivered by a five-judge bench of the Supreme Court in *Sri Venkataramana Devaru* v. *State of Mysore*.[91] This case pertained to a temple in Karnataka, which was only open to a specific sect of Hindus known as Gowda Brahmins. On being challenged, the Supreme Court upheld the right of religious groups to exclude the general population under Article 25(2)(b). In doing so, Dasgupta CJ held that the only restriction on religious administration under Article 26 was stipulated in Article 17, which prohibited practice of caste-based untouchability. In defining the scope of this restriction, the Court reasoned that Article 17 was a culmination of attempts to outlaw "a custom which denied to large sections of Hindus the right to use

[86] Constituent Assembly Debates, November 29, 1948, speech by K.T. Shah <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> ("[...] I would like to point out that the term 'untouchability' is nowhere defined… What about those diseases, and people who suffer from, which are communicable, and so necessarily to be excluded and made untouchables while they suffer?").

[87] Constituent Assembly Debates, November 29, 1948, speech by Naziruddin Ahmed <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> The amendment that was introduced read as "No one shall on account of his religion or caste be treated or regarded as an 'untouchable'; and its observance in any form may be made punishable by law".

[88] Constituent Assembly Debates, November 29, 1948, speech by Manohar Das <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29>

[89] *Devarajiah* (n 85) [18].

[90] (1995) Supp (4) SCC 469.

[91] AIR 1958 SC 255.

public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth".[92]

In *Sabarimala*, Malhotra J held that not all forms of exclusion amount to untouchability under the Constitution. Rather, Article 17 only "pertains to untouchability based on caste prejudice […]. The right asserted by the Petitioners is different from the right asserted by Dalits in the temple entry movement".[93] On these grounds, she held that Article 17 was inapplicable to the case of menstruating women.

B. The radical thesis

The radical thesis does not challenge the basic premise of the traditional approach – Article 17 undoubtedly sought to prohibit caste-based untouchability, which had led to some of the worst atrocities and structural oppression in Indian history. However, this view argues that Article 17 is not restricted to caste-based untouchability, but also prohibits various other forms of group exclusion. At its core, Article 17 embodies a larger principle of the transformative constitution – the anti-exclusion principle.[94] As Bhatia observes, the anti-exclusion principle seeks to limit "the power of groups and communities to exclude their constituents in a manner that would interfere with their freedom to participate in normal economic, social and cultural life".[95] Therefore, Article 17 does not only prohibit untouchability against the lower castes, but seeks to emancipate all groups "who have been victims of discrimination, prejudice and social exclusion".[96]

This interpretation can be justified as a matter of a textual construction, constitutional history and judicial precedent. The text of Article 17 prohibits untouchability "in any form" – a deliberately broad phrase that was added to the initial draft prepared by the Fundamental Rights Sub-Committee.[97] This seems to suggest "untouchability" can manifest in various avatars, such as prejudice against menstruating women, all of which would be outlawed under the Constitution. However, what is of greater significance is that the Drafters of the Constitution refrained from defining "untouchability". This is in direct contrast to the Government of India Act 1935, which was laid down a specific list of

92 ibid [23].

93 *Indian Young Lawyers Association* (n 14) [523].

94 Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom Under the Indian Constitution' (2016) 5 Global Constitutionalism 351, 373.

95 ibid.

96 *Indian Young Lawyers Association v State of Kerala* (n 14) [341].

97 B. Shiva Rao, *The Framing of India's Constitution: A Study* (Universal Law Publishing 1968) 202 (The first draft of the provision read "Untouchability is abolished and the practice thereof is punishable by the Law of the Union").

communities that were treated as "untouchables".[98] Moreover, Dr. B.R. Ambedkar expressly rejected the Amendment propounded by Nazaruddin Ahmed, which was ultimately rejected by the Assembly as well. Despite repeated objections that Article 17 was vague, and could potentially include exclusion of multiple other forms of group exclusion, the Constituent Assembly voted against narrowing down this definition.[99]

While most cases have predominantly favoured the traditional interpretation, the exception to this can be found in Sinha CJ's dissenting judgement in *Sardar Sayedna Taher Saifuddin* v. *The State of Bombay*.[100] This case involved a challenge to the Bombay Prohibition of Excommunication Act, 1949, which prohibited the practice of excommunication by the leaders of religious administrations. This legislation was challenged by the Head Priest of the Dawoodi Borah community. By a 4-1 majority, the Supreme Court struck down this Act as unconstitutional as it deprived the Head Priest of the right to manage its own religious affairs. The lone dissenter, Sinha CJ, linked religious excommunication with the prohibition on untouchability under Article 17. He argued that the social practice of excommunication had the effect such that "*the position of an excommunicated person becomes that of an untouchable in his community*".[101] Accordingly, Article 17 was not merely a direct proscription against caste-untouchability, but also encompassed groups that were 'effectively' being treated as untouchables.

On reviewing the text and constitutional history, it is plausible to argue in favour of a broad interpretation of Article 17. However, one question remains: how do different forms of social untouchability interact with another? It is here that Chandrachud J's holding in *Sabarimala* is truly transformative. He argues that caste untouchability is not an independent structure of social exclusion - it is rather one of many manifestations of a "hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste".[102] This order may manifest in various other forms. In the realm of sexuality and gender, it manifests in the exclusionary treatment of menstruating women. In the realm of religion, it manifests in the practice of excommunicating certain groups. However, all of these practices emanate from a discriminatory social hierarchy

[98] For an analysis of this argument, see Bhatia (n 94) 368.

[99] Constituent Assembly Debates, November 29, 1948 https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29.

[100] AIR 1962 SC 853.

[101] ibid [24].

[102] *Indian Young Lawyers Association* (n 14) [343].

that is rooted in ideas of purity and pollution.[103] Rather than targeting one specific form of untouchability, Article 17 sought to break down the institution from which it emanates.

C. Deconstructing purity and pollution

The radical view identifies '*purity*' and '*pollution*' as the defining feature of social untouchability under Article 17. Irrespective of the interpretative issues surrounding the Constituent Assembly Debates, can this approach be normatively justified within a broader theoretical framework of discrimination law? We argue that the construction of '*purity*' and '*pollution*' are manifestations of disgust stigma, which posits that discrimination against certain marginalised groups is based on stigmatising them as '*dirty*' or '*impure*'.

The theory of disgust was propounded by the legal philosopher Martha Nussbaum, who argued that prejudice and social exclusion against certain marginalised groups is based on disgust.[104] According to this theory, human beings often harbour disgust towards certain substances, such as their own bodily fluids and excreta. Some scholars, such as Rozin, argue that the reason behind this disgust is because it forces human beings to confront their own animality.[105] Irrespective, Nussbaum labels this phenomenon as "primary disgust", which she considers an inherent aspect of human existence. However, she further argues that human beings have a tendency to distance themselves from their animality by projecting this disgust onto others - this cognitive response manifests in the attribution of quasi-animal characteristics to a subaltern group, such as homosexuals, Jews or African Americans. These groups are then stigmatised in various ways, such as being identified as hyper-sexual, smelly, less intelligent and so on.[106] On a fundamental level, "projectile disgust" challenges the humanity of the minority group, who are portrayed as uncivilised or barbaric. Nussbaum identifies

[103] See Gautam Bhatia, 'I send my soul through time and space/ to greet you. You will understand […]: On Sabarimala and the Civil Rights Cases' (*Indian Constitutional Law and Philosophy*, October 29, 2018) <https://indconlawphil.wordpress.com/2018/10/29/i-send-my-soul-through-time-and-space-to-greet-you-you-will-understand-on-sabarimala-and-the-civil-rights-cases/> accessed 8 August 2020 ("In other words, like slavery was the most horrific and most tangible manifestation of racial hierarchy, untouchability was the most horrific and most tangible manifestation of an exclusionary social order that was grounded in ideas of purity and pollution. There were, however, other manifestations of that order as well.").

[104] Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (OUP 2010).

[105] Paul Rozin, 'Disgust' in M. Lewis and J. M. Haviland-Jones (eds.), *Handbook of Emotions* (Guilford Press 2000) 637-53.

[106] Martha Nussbaum, 'Disgust or Equality? Sexual Orientation and Indian Law' (2010) 6 JILS 1, 5 ("The so-called thinking seems to be: if those quasi-animal humans stand between us and our own animal stench and decay, we are that much further from being animal and mortal ourselves").

various groups that have been treated in this manner – homosexuals, Jews, African-Americans and menstruating women. That is not to discount a variety of other factors that may lead to prejudice, such as religious beliefs and other psychological causes. However, it cannot be denied that disgust stigma is one of the central pillars of discrimination against different marginalised groups, which eventually gives rise to various tropes and stigmas.[107] In conceptualising queer discrimination, disgust stigma cannot be ignored.

In India, the construction of "purity" and "pollution" is the most prominent manifestation of disgust stigma. Within the caste system, Dalits have historically been forced to work as manual scavengers, which has strengthened the stigma of the lower castes being "unhygienic", and "polluting".[108] However, the purity-pollution dichotomy is not restricted to the lower castes. Various subaltern groups in India are stigmatised on the basis of disgust, such as Muslims, Dalits, menstruating women, aged people, and, as argued in greater detail later, homosexuals and transgenders.[109] In the case of Muslims, the role of disgust stigma during the 2002 Gujarat riots is well documented, where Muslims were often portrayed as "hyper-fertile" and "animalistic".[110]

Therefore, the radical thesis advances our understanding of discrimination in India in two ways. First, it may be argued that this interpretation dilutes the significance of caste discrimination in India. On the contrary, the radical thesis recognises the intersections between gender, sexuality and caste in India, which sheds light on how different groups are stigmatised in the name of purity.[111] That does not mean that all groups are stigmatised equally – rather, it shows how notions of purity are a common element in discrimination against various social groups. Second, it provides constitutional protection to minority groups who remain stigmatised in contemporary society, which may pave the way for substantive equality in the future.

V. Impurity as Disgust: Reading Queerness into Article 17

This brings us back to the central question that this article poses: how do we protect queer sexual minorities from private discrimination under the Constitution

[107] Zoya Hasan *et al*, 'Introduction' in Zoya Hasan et al. (eds.) *The Empire of Disgust: Prejudice, Discrimination and Policy in India and the US* (OUP 2019).

[108] See Marc Galanter, 'Untouchability and the Law' (1969) 4 Economic and Political Weekly 131, 137 ("In its broadest sense 'untouchability' might include all instances in which one person treated another as ritually unclean and as a source of pollution.").

[109] ibid.

[110] See Martha Nussbaum, *The Clash Within: Democracy, Religious Violence and India's Future* (HUP 2007).

[111] On the intersection between caste and gender, see B.R. Ambedkar, 'Castes in India: Their Mechanism, Genesis and Development' in Dr. Babasaheb Ambedkar (ed.), *Writings and Speeches* (Dr. Ambedkar Foundation 1979).

of India? We argue the answer lies in Article 17 of the Constitution, which is horizontally applicable against all private actors.[112] Needless to say, this argument is firmly grounded in the radical tradition, which interprets Article 17 as an expansive prohibition on all forms of group untouchability.

During the hearings in *Naz*, the Delhi High Court briefly observed that there may be an analogy between untouchability and sexual orientation.[113] Unfortunately, the Court did not elaborate on this argument, which finds no mention in the final judgement.[114] We develop this claim further by arguing that discrimination suffered by queer individuals is a structural form of "untouchability". To prove this, we begin by demonstrating the role of "purity" in discrimination against non-hetero sexuality (A). In particular, we deconstruct the discourse surrounding public health, HIV and queerness in India. Thereafter, we analyse the continuities between caste hierarchies and sexual orientation. Through this, we show that the impurity of the lower castes is historically intertwined with the stigmatisation of sexual minorities in India (B). Therefore, we conclude that queer prejudice and discrimination is rooted in disgust, which is a manifestation of the purity-pollution hierarchy that is intrinsic to the caste system. Accordingly, it is a form of "untouchability", which brings it within the purview of Article 17.

A. Purity and pollution in queer prejudice

The role of disgust stigma in discrimination against queer sexualities is well documented. In many ways, it can be said to be the core tension behind the struggle to strike down sodomy laws across the world. It was a central feature of the famous debate between Lord Devlin and HLA Hart, with the former arguing that collective social disgust towards homosexuals was sufficient to criminalise same-sex intercourse.[115] In *Evans* v. *Romer*, a case before the US Supreme Court, a witness claimed that homosexuals routinely ate each other's faces, consumed raw blood and

[112] Madhav Khosla, *The Indian Constitution* (OUP 2012) 89.

[113] Edited Transcript of the Final Arguments Before the Delhi High Court, in Arvind Narrain and Marcus Eldridge (eds.), *The Right that Dares to Speak its Name: Naz Foundation v. Union of India and Others* (Alternative Law Forum 2009) 48.

[114] A brief explanation is provided in Sujit Chaudhary, 'Living Originalism in India? "Our Law" and Comparative Constitutional Law' (2013) 25 Yale J. of Law and the Humanities 1, 15 ("But what is the link between sexual orientation and untouchability? The treatment which homosexuals experience today is similar in kind to that which "untouchables" experienced and which prompted the adoption of Article 17, in that the treatment of homosexuals likewise flows from their social status.").

[115] Patrick Devlin, *The Enforcement of Morals* (OUP 1965); *c.f.* H.L.A. Hart, *Law, Liberty and Morals* (OUP 1963). See, generally, Peter Cane, 'Taking Law Seriously: Starting Points of the Hart-Devlin Debate' (2006) 12 J. of Ethics 21 (2006).

brought back diseases from their travels in foreign countries.[116] In particular, these descriptions were aimed at eliciting revulsion towards sexual practices that are not peno-vaginal, referencing purportedly "filthy" acts, such as anal sex. In the case of transgenders, disgust is often motivated by revulsion towards the trans body, which challenges heterosexual norms by rejecting the sex assigned at birth. As Miller *et al* point out, disgust towards trans bodies is particularly strong in response to a change of sex through hormone therapy or surgery.[117]

The role of disgust in perpetuating social prejudice against sexual minorities can be seen in various avatars in India during the struggle for decriminalisation. This can be seen in Lord Macaulay's refusal to even explicitly mention same-sex intercourse while drafting Section 377, out of the fear that it "could give rise to public discussion on this revolting subject".[118] Similarly, in *Mihir* v. *State of Orissa*, Pasayat J observed that "carnal intercourse is abhorred by civilised society", and offences under Section 377 implied "sexual perversity" in some form.[119] Lastly, in *Koushal*, the Supreme Court rebuked the Delhi High Court for relying on foreign precedents "in its anxiety to protect the *so-called* rights of LGBT persons".[120] The implication of using the phrase 'so-called' is fairly clear – the rights of homosexuals are somehow inferior to those held by the heterosexual majority.

One of the primary arguments used to defend Section 377 was that decriminalisation would lead to a spike in HIV-AIDS cases and public health risks.[121] In the United States of America, HIV-AIDS was popularly referred to

[116] *Evans v Romer* 517 U.S. 620 (1996).

[117] P.R. Miller et al., 'Transgender politics as body politics: Effects of disgust sensitivity and authoritarianism on transgender rights attitudes' (2017) 5 Politics, Groups and Identities 4, 5 ("Individuals with stronger disgust dispositions may have more adverse reactions to transgender people who challenge body norms by displaying gender on their bodies – dress, makeup, or hair, for example – in ways that do not match their sex assigned at birth. Likewise, those strongly oriented toward disgust may react negatively to perceived body norm challenges from those who alter their bodies via hormone therapy or surgery. And given the literature on disgust and outgroup attitudes, disgust may be especially potent in this context given that transgender people are a relatively stigmatized minority group.").

[118] Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (2006) 41(46) Economic and Political Weekly 4815.

[119] *Mihir Alias Bhikari Charan Sahu v State* 1991 SCCOnline Ori 438, [7]; *Chitranjan Dass v State of UP* (1974) 4 SCC 454 ("a highly educated and cultured individual, was suffering from mental aberration when he committed the offence of sodomy").

[120] *Suresh Kumar Koushal* [n 66].

[121] AIDS Bhedbav Virodhi Andolan, *less Than Gay*: *A Citizens Report on the status of Homosexuality in India* (1991) <https://s3.amazonaws.com/s3.documentcloud.org/documents/1585664/less-than-gay-a-citizens-report-on-the-status-of.pdf> accessed 24 August 2020.

as the "gay plague" on being associated with same-sex intercourse.[122] This is a unique manifestation of the theory of disgust – it attributes the spread of HIV-AIDS to the alleged "promiscuity" of the gay man, who is portrayed as engaging in unsafe and unsanitary sexual practices. A review of the transcripts in both *Naz* and *Koushal* shows that the State considered same-sex intercourse as a public safety risk.[123] Accordingly, the State argued that Section 377 was a deterrent measure against unsafe sexual practices that resulted in greater HIV-AIDS infection. This was despite an affidavit from the National AIDS Control Organisation which effectively said that Section 377 impeded the fight against HIV-AIDS. Historically, the weaponization of HIV-AIDS discourse to regulate marginalised communities is not a new phenomenon. For example, in the United States of America, HIV-AIDS has been used as a pretext to persecute communities on the fringes of civilised society, such as poor African-American intravenous drug users.[124]

This argument should not be taken to mean that untouchability in caste and sexual orientation are identical. While the caste system constructs purity on the basis of birth, queer untouchability operates through the medium of disgust – it associates the queer with promiscuity, unsafe sexual practices and disease to justify social exclusion and prejudice. However, there are many similarities in the way both groups are stigmatised as impure. For example, both communities are perceived to be "unsanitary" and associated with faecal matter. While the lower castes are perceived as "unsanitary" due to the practice of manual scavenging, queer groups are treated the same way due to non-hetero sexual practices. The practice of untouchability and prejudice towards both groups is heavily linked with disgust stigma.

B. Caste and sexual orientation

In the previous section, we established that queer discrimination takes place along the axis of "purity" and "pollution", much like caste discrimination. In this Section, we take this claim one step further – we argue that queer discrimination is not only similar to caste discrimination in its *modus operandi*, but is historically linked with the development of the caste system. Much like gender and caste intersect in

[122] John Paul Brammer, 'Three decades later, men who survived the 'gay plague' speak out' (*NBC News*, 2 December, 2017) <https://www.nbcnews.com/feature/nbc-out/three-decades-later-men-who-survived-gay-plague-speak-out-n825621> accessed 24 August 2020.

[123] Notes of Proceedings in *Suresh Kumar Kaushal v. Naz Foundation* 32 <http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf> ("[...] read out figures for various States in India of HIV prevalence among MSM community. He said that unprotected anal sex was the most important risk factor for the spread of HIV.").

[124] ABVA Report (n 121) 3.

the treatment of menstruating women, sexual orientation and caste intersect in the exclusion and prejudice towards queer sexualities in India.

Throughout the prolonged struggle against Section 377, we repeatedly see references being made to "Indian values and morals", both within the courtroom as well as in broader public discourse. Defenders of Section 377 argued that Indian culture represents a puritanical regime of sexual morality, where only heterosexual intercourse within the realms of marriage was permitted.[125] However, this argument ignores the influence of colonialism on the development of sexual morality in India. As Menon argues, the culture and tradition that led to the enactment of Section 377 was not "Indian", but rather "a concoction of patriarchal British prudery and minority Indian practices".[126]

In the context of India, the rise of disgust towards queer sexualities roughly corresponds to the advent of colonial rule. Prior to the arrival of the British, sexuality was widely celebrated in Hindu culture. This can be seen through various texts, most prominently in the sexually explicit kama-sutra. As Menon shows, Indian history is rife with examples of sexual freedom and desire that extend far beyond the heteronormative ideal.[127] To name a few, Hijras were treated as auspicious and not stigmatised, the rulers of Awadh dressed as women during feast days and women had multiple sexual partners. This is not to say that this description is without exception – for example, the Manusmriti promotes the notion of sexual purity in many ways. However, the evidence overwhelmingly indicates that Indian culture recognised a wide and permissive range of sexual practices prior to the arrival of the British.

However, the advent of British colonialism brought with it a gradual decline of sexual freedom in India. The British were shocked by Hindu sexual practices, which they regarded as "dirty" and "filthy".[128] Accordingly, they sought to legislate and regulate the exercise of desire in India. It was during this time that the infamous Criminal Tribes Act, 1861 was enacted, in which hijras were treated as a

[125] Aniruddha Dutta, 'Retroactive Consolidation of 'Homophobia' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011) 163 ("The Hindu right and more conservative factions of the government have set the fray in proclamations of homosexuality as 'western', corruptive or inhospitable to 'Indian' values and society).

[126] Madhavi Menon, *Infinite Variety: A History of Desire in India* (Speaking Tiger Publishing 2018) 7.

[127] ibid; see generally Giti Thadani, *Sakhiyani: Lesbian Desire in Ancient and Modern India* (Bloomsbury 2016).

[128] Nussbaum (n 110) 8.

"criminal caste".[129] Similarly, Section 377 of the Indian Penal Code was a version of a similar provision of the British Penal Code, which declared that buggery was an offence against the Creator.[130] Over time, this critique of Indian sexuality was internalised by upper-caste Hindus, who sought to mimic the practices and morals of Victorian England.[131] Therefore, the caste-order that crystallised during the later years of colonialism attributed hyper-sexuality and sexual perversity to the lower castes, while the upper castes prided themselves on sexual purity.[132] This took various forms. For example, the purity of the upper castes was ensured by preventing upper caste women from engaging in sexual intercourse with men from the lower castes.

Historically, this shows that the oppression of queer sexuality was an integral element of the caste hierarchy that emerged during colonial India. The emergence of disgust towards non-hetero sexual practices was heavily associated with the impurity of the lower castes. Prejudice towards queer sexualities is a form of the purity-pollution hierarchy identified by Chandrachud J in *Sabarimala*, akin to the treatment of menstruating women. Therefore, we conclude that queer discrimination and prejudice is a form of social untouchability, which falls within the purview of Article 17. Accordingly, this provides an independent basis through which private actions can be subjected to the anvil of constitutional review.

VI. Conclusion: Civic Equality Beyond Decriminalisation

The decriminalisation of same-sex intercourse has been hailed as a ground-breaking moment in Indian history for various reasons. After all, it was a victory that was achieved after three decades of litigation and activism. For some, it marked the end of treating homosexuals as criminals and "unapprehended felons". For others, it represented an unequivocal rejection of Victorian morality

[129] *See* Dilip D'Souza, *Branded by Law: India's Denotified Tribes* (Penguin 2001) 57 (quoting Jawaharlal Nehru as saying "I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty […]. An attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle is out of consonance with all civilized principles of criminal justice and treatment of offenders.").

[130] British Penal Code 1797, §377 ("Buggery is a detestable and abominable sin among Christians not to be named, committed by carnal knowledge against the ordinance of the creator and order of nature by mankind with mankind, or with brute beast, or by womankind with beast.").

[131] Nussbaum (n 110) 9.

[132] Uma Chakravarthi, 'Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State' (1993) 28(14) Economic and Political Weekly 579, 579 ("The need for effective sexual control over such women to maintain not only patrilineal succession [a requirement of all patriarchal societies] but also caste purity, the institution unique to Hindu society. The purity of women has a centrality in Brahmanical patriarchy, as we shall see, because the purity of caste is contingent upon it.").

in a democratic society. Nonetheless, it is clear decriminalisation is only the first step in a longer journey towards achieving substantive political and social equality in India. There are many directions that the queer rights movement can go from this point onwards. This includes petitioning for the right to marry, civil unions, full property and inheritance rights.[1]

While the significance of decriminalisation cannot be understated, equally the continued existence of private discrimination and oppression cannot be ignored. In a rigidly hierarchical society, the persecution of queer minorities continues despite the reading down of Section 377. As the ICJ Report highlighted, it takes place in a variety of different forms, across public and private spaces. In other words, more is required to substantively give effect to constitutional guarantees of equality and human dignity. This may take the form of anti-discrimination legislation, as has been enacted in the United States. Our argument suggests that this conundrum can be unanswered by unlocking the radical potential within the Constitution of India, through an interpretation of Article 17.

[1] See Satchit Bhogle, 'The Momentum of History – Realising Marriage Equality in India' (2019) 12(3-4) NUJS LR. 1-22.