Guest Post: Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are

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(This is a guest post by **Tarunabh Khaitan**, who is an Associate Professor of Law at the Universities of Oxford and Melbourne.)

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The guarantee of non-discrimination under Article 15 of the Constitution is **not** an essential weapon to fight the criminalisation of victimless consensual sexual acts between adults under section 377 of the Indian Penal Code. The ridiculousness of such criminalisation is so patent that even a deferential quest for reasonableness under Article 14 of the Constitution will find the criminal provision wanting. Nor is the provision likely to pass muster with the guarantee of personal liberty and privacy under Article 21. Indeed, there is even a view that no constitutional provision needs to be invoked—that s. 377 can be defanged through a mere statutory reinterpretation in light of changes social facts.

Judicial minimalism (and, the related notion of constitutional avoidance)—the idea that if a case can be decided on narrower grounds, courts should avoid bringing the big guns out—is usually wise counsel. The case before the Supreme Court, however, is unusual. This is an instance where the Court has a constitutional obligation to unrelentingly apply the full moral force of the antidiscrimination principle embedded in Article 15 against s 377, in addition to the arguments mentioned above. There are at least two reasons why judicial minimalism will be unwarranted in this case.

The first reason is institutional. The Court needs to atone for its own institutional sin in recriminalising homosexual conduct by overruling the constitutionally sound judgment of the Delhi High Court. This is an opportunity for the Court to apologise to the Constitution, for its abject failure to defend its values. The Court also owes an apology to millions of innocent Indians who it rebranded as criminals in 2013. It much acknowledge, loudly and clearly, the violence its judgment visited on so many lives. It needs to recognise that it acted as an organ of a colonial state when it criminalised people based simply on who the were, and mocked their quest for justice as a claim for ‘so-called rights’. The Court inflicted a material injury and an expressive wrong on the LGBTQ people of India. The correction must go beyond the material too, and include an expressive remedy. The Court must make sure that its apology is full-throated, and not muted. One way to do so is to un-condemn and celebrate the difference of those it hurt and insulted under the pluralistic ambit of Article 15.

The second reason for an expansive reasoning is provided by the current political context. In most cases, the primary judicial objective is to reach a just outcome under law. But some cases come to acquire an expressive significance far beyond the remedy the court orders. The litigation over s 377 has shaped our political discourse over the last two decades in ways that would have been unimaginable for activists who first challenged the provision at the start of the century. Within fifteen years, the country moved from not talking publicly about homosexuality to a general election where major political parties promised decriminalisation in their election manifestos. What the Court says in this judgment is going to matter as much as what it does through its order.

But the expressive salience of a case on discrimination against a politically disempowered minority, based purely on the prejudices of a majority, goes beyond the issue of LGBTQ rights. Indian constitutional democracy today is at a crossroads. Its constitutional commitment to an inclusive, composite, secular ethos has never been challenged more seriously than it is today. At a time when sectarianism and majoritarian nationalism are seeking to exclude all sorts of minorities from public life and equal citizenship, the Court has a duty to emphasise the inclusive and pluralist rather than majoritarian character of our democracy. Inclusiveness and pluralism lie at the heart of Article 15, which can be the surest vehicle for the Court to lend its institutional authority to the salience of these ideas in our constitutional identity.

A robust development of the Article 15 jurisprudence, along the path showed by the Delhi High Court in 2008, is more urgent than ever. The Court owes a promise to Rohith Vemula that the judiciary would rigorously examine exclusionary and discriminatory practices. It has a duty to all those who have been lynched, harassed or persecuted for being different that Article 15's promise of defending their personal autonomy and dignity is not empty rhetoric. It is true that the Court alone cannot deal with rampant discrimination. But its strong endorsement of the antidiscrimination principle could provide a boost for political efforts to enact a comprehensive antidiscrimination law, at least in some states to begin with.

It is true that judicial minimalism and constitutional avoidance are not typical features of the jurisprudence of the Indian Supreme Court. The Court has often been jurisprudentially expansive, while being remedially minimalist. But, in politically sensitive cases, it has found judicial minimalism to be strategically useful (its judgment in the triple talaq case, eschewing all mention of Article 15, is a case in point). Such strategic minimalism can often be important for preserving a court's legitimacy. In the 377 case, however, it is not just judicial legitimacy that is at stake, but the very nature of our constitutional identity.

In his excellent book on constitutional identity, Gary Jacobsohn identifies the phenomenon of *disharmony* in constitutional identity (p 87): "Sometimes [disharmony] exists in the form of contradictions and imbalances internal to the constitution itself, and sometimes in the lack of agreement evident in the sharp continuities that frame the constitution's relationship to the surrounding society." An inclusive pluralism has, largely, been the dominant narrative in

India’s constitutional identity. But seeds of disharmony have always existed—internally, in the form of the cow slaughter directive of the Constitution, and externally in the deeply inegalitarian and sectarian social structure the Constitution has tried to transform. As Jacobsohn argues, constitutional disharmony carries within it the seeds of constitutional change.

Make no mistake: the dominance of inclusive pluralism as the defining feature of our constitutional identity itself is at stake. Majoritarian nationalism is waging a spirited battle, not just for continued political relevance but for the very soul of our polity. It doesn’t just seek to win the game, it is trying to change the rules of the game. Which side the Court comes down on, and how robustly, may not determine, but will surely affect the outcome of this battle over defining who We, the people of India, *really* are.