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TRACING THE RESIDUAL SHADOWS OF QUEER CRIMINALIZATION BEYOND SECTION 377

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I. ABSTRACT

The judicial reading down and partial decriminalization of Section 377 of the Indian Penal Code by the Supreme Court in Navtej Singh Johar v. Union of India (2018) 10 SCC 1 which confined the provision's operation to non-consensual acts and acts involving minors has not precipitated the dismantling of queer criminalization; rather, it has facilitated its reconstitution through less visible, yet equally coercive, legal and institutional mechanisms. This paper conceptualizes residual criminalization as a post-decriminalization phenomenon in which queer and trans persons remain targets of surveillance, regulation, and punitive control under adjacent statutes, including those related to public nuisance, obscenity, vagrancy, and trafficking. These legal instruments while facially neutral serve as vectors for the continued policing of non-normative sexualities and gender expressions. Deploying an interdisciplinary analytic that integrates queer criminology, postcolonial legal sociology, and abolitionist justice theory, the paper theorizes residual criminalization as a modality of structural violence. It argues that criminal law functions not merely as a framework for adjudication, but as a broader apparatus of state-sanctioned regulation and social abandonment particularly for those at the intersections of caste, class, gender non-conformity, and economic precarity. Beyond critique, the paper advances a normative vision for transformative legal futures, grounded in the concept of queer legal sovereignty. It proposes participatory legal architectures such as trans-led oversight mechanisms and community-embedded legal aid as essential correctives to the limitations of formal rights discourse. In doing so, the paper contends that the pursuit of queer justice in India necessitates not only legal reform, but a paradigmatic shift in how legality, legitimacy, and liberation are conceived and institutionalized.

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II. KEYWORDS

Queer criminology, Section 377, LGBTQ rights, Structural violence, Post-decriminalization; Criminal Justice Reform; Policing.

III. INTRODUCTION: THE ILLUSION OF A FULL STOP

The 2018 reading down of Section 377 of the Indian Penal Code by the Supreme Court in *Navtej Singh Johar v. Union of India* was widely hailed as a historic turning point in Indian constitutional jurisprudence and queer liberation. Yet this paper proceeds from a more cautious premise: decriminalization is not emancipation. The attenuation or removal of a penal provision, whether judicially or legislatively achieved, does not by itself dismantle the structural conditions that render queer life precarious. The judgment's language was undeniably progressive: invoking constitutional morality, it framed dignity, privacy, and equality as inviolable rights for LGBTQ+ individuals.

*Indeed, in paragraph 253 of Navtej Singh Johar v Union of India (2018) 10 SCC 1 (Malhotra J, concurring) [253], Justice Indu Malhotra, in her concurring opinion, observed that "history owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."*² Yet, as this paper argues, such celebratory narratives obscure more than they illuminate. While the verdict dismantled a colonial-era legal artifact, it failed to undo the systemic criminalization, marginalization, and carceral exposure faced by queer individuals, particularly those located at the intersections of caste, class, gender non-conformity, and religion.

The widespread symbolic celebration of *Navtej* ushered in a wave of what scholar's call "legal optimism" - a belief in the inherent emancipatory potential of constitutional law. However, as Arvind Narrain warns, "decriminalization does not dismantle the structure of homophobia embedded in law enforcement and everyday governance."³ The afterlife of Section

² *Navtej Singh Johar v Union of India (2018) 10 SCC 1 (Malhotra J, concurring) [253]*.

³ Arvind Narrain, *India's Queer Constitutionalism: The Dignity of Sexual Autonomy* (Oxford University Press 2021) 134.

377 continues to haunt queer existence in India, not through explicit criminal statutes alone, but through residual and structural forms of criminalization. Testimonies gathered by the Centre for Law and Policy Research (CLPR) document incidents post-*Navtej* where queer and transgender persons - especially sex workers, Dalit queer individuals, and gender non-conforming youth - have been arbitrarily detained, harassed, or assaulted by police under the pretext of “*public nuisance*” or “*suspicious behaviour*.”⁴ These patterns suggest that criminalization did not end with the judgment; it merely mutated.

In Chennai, for instance, trans sex workers have reported being extorted or threatened with vagrancy charges and detained under the Immoral Traffic (Prevention) Act (ITPA). As one hijra respondent stated in an interview with a local NGO, “*The police no longer say ‘377’, but they still beat us and call us dirty. Now they use ‘obscenity’ or ‘public nuisance’.*”⁵ Such cases are not anomalies - they are symptomatic of a broader carceral logic that sees queerness as inherently suspect. These dynamic echoes similar critiques in comparative global contexts. In South Africa, legal scholar Pierre de Vos has pointed out that despite post-apartheid constitutional guarantees for LGBTQ+ rights, the police and judiciary often enforce heteronormative moralities through selective criminal enforcement, especially against poor queer people.⁶

What emerges is a profound disjuncture between rights recognition and rights realization. The Indian legal system, like many liberal democracies, remains caught in what Ratna Kapur calls “*rights formalism*” - a fixation on legal recognition without addressing the socio-material conditions that make such rights meaningful.⁷ While urban elite gay men may increasingly access private spaces and digital platforms to exercise newly articulated freedoms, working-class, Dalit, and trans persons continue to

⁴ Dipika Jain and others, ‘Rights Realized? Trans Lives and Legal Afterlife of Section 377’ (Centre for Law and Policy Research 2020).

⁵ Nirangal, *Unpublished Field Interviews with Trans Sex Workers in Chennai* (2020, on file with authors/Nirangal).

⁶ Pierre de Vos, ‘The Inequality of Legal Protection: Same-Sex Marriage in South Africa’ (2009) 25(1) *South African Journal on Human Rights* 1.

⁷ Ratna Kapur, ‘Out of the Colonial Closet, but Still Thinking Like a Coloniser: Section 377, the Indian Penal Code and the Anti-Sodomy Law’ (2009) 2(2) *NUJS Law Review* 377.

face systemic violence - from families, police, healthcare institutions, and bureaucracies. A 2021 report by Human Rights Watch titled *Breaking Barriers: LGBT People in India* documented over 40 cases of police abuse, custodial violence, and denial of medical care involving queer and trans persons across five Indian states.⁸ This sustained violence reveals that the law's gaze has shifted but not softened.

Therefore, this paper is not a retrospective celebration of Navtej Singh Johar. Rather, it interrogates the limits of its promise. It asks: What does it mean to be decriminalized in statute but criminalized in life? How do we theorize queer freedom in a context where law reforms coexist with bureaucratic erasure and moral policing? By engaging with queer criminology, postcolonial legal studies, and structural violence theory, this work moves beyond the binary of criminalization versus decriminalization, and instead examines the residual, informal, and institutional mechanisms that continue to mark queer life as deviant, disposable, and dangerous.

The paper proceeds in four parts. Part I interrogates the symbolic triumph of decriminalization and introduces the concept of residual criminalization in post-Navtej India. Part II maps the statutory and institutional mechanisms through which queer and trans persons continue to experience surveillance and penal exposure. Part III theorizes residual criminalization as structural violence, drawing on queer criminology and postcolonial legal sociology. The final Part advances a normative framework of queer legal sovereignty and participatory legal architectures as pathways toward transformative justice.

A. Research Objectives

1. To theorize residual criminalization as a post-decriminalization phenomenon wherein queer and trans persons remain targets of surveillance and punitive control under adjacent statutes.

⁸ Human Rights Watch, *Breaking Barriers: Discrimination Against LGBT People in India* (Human Rights Watch 2021).

2. To document empirical evidence of continued police harassment, surveillance, and moral policing in post-*Navtej* India.
3. To examine how colonial-era legal instruments persist in contemporary governance of queer and trans bodies.
4. To critique the limitations of formal rights discourse and analyze the gap between constitutional morality and lived realities.
5. To propose participatory legal architectures grounded in queer legal sovereignty as transformative alternatives.

B. Research Questions

1. How does queer criminalization persist in India despite the formal decriminalization of Section 377, and what transformative legal frameworks are necessary to achieve substantive queer justice?
2. What legal instruments and institutional mechanisms continue to criminalize queer and trans persons in post-*Navtej* India?
3. How does residual criminalization function as a form of structural violence stratified by caste, class, and economic precarity?
4. What are the limits of liberal rights-based approaches, and how can participatory legal architectures advance queer justice?

C. Research Hypothesis

The reading down of Section 377 represents juridical substitution rather than liberation, wherein formal decriminalization has been accompanied by residual criminalization through adjacent legal instruments (public nuisance, obscenity, vagrancy, and trafficking laws). This residual criminalization operates as structural violence that is intersectionally stratified, with working-class, Dalit, and trans persons remaining targets of surveillance and punitive control while benefits accrue to urban, elite, caste-privileged gay men. The prevailing liberal rights-based approach is insufficient without paradigmatic transformation toward participatory legal architectures grounded in queer legal sovereignty.

D. Research Methodology

This research employs an interdisciplinary methodological framework that integrates queer criminology, postcolonial legal sociology, abolitionist justice theory, and critical legal studies. The study adopts a mixed-methods approach with particular emphasis on qualitative critical analysis to examine the phenomenon of residual criminalization in post-Navtej India.

The research design incorporates multiple data collection methods. Doctrinal legal analysis examines constitutional jurisprudence, particularly the Navtej Singh Johar and NALSA judgments, alongside statutory analysis of relevant provisions in the Indian Penal Code and Bharatiya Nyaya Sanhita (including sections on obscenity and public nuisance), the Immoral Traffic (Prevention) Act, state-level vagrancy statutes, and the Transgender Persons (Protection of Rights) Act 2019. Empirical documentation draws on existing reports and testimonies from organizations including the Centre for Law and Policy Research, Human Rights Watch, and NGO field documentation from Nirangal, Nazariya Foundation, and the Telangana Hijra Collective.

Case study analysis focuses on specific incidents of post-Navtej harassment and detention, examines lower court responses to constitutional protections, and includes comparative analysis with South African contexts. Theoretical analysis engages with critical theorists including Foucault, Fraser, de Sousa Santos, Das, and Kapur, applying queer criminology frameworks and postcolonial legal theory. Secondary literature review encompasses scholarly articles on queer legal studies, criminology and policing, postcolonial and critical legal scholarship, and abolitionist justice theory.

The analytical approach combines critical discourse analysis to deconstruct legal language in judgments and examine the disjuncture between constitutional morality and material realities, structural violence analysis to identify patterns of institutional violence and map power relations across caste, class, and gender, intersectional analysis examining how caste, class, gender non-conformity, religion, and economic precarity intersect in experiences of criminalization, and genealogical analysis tracing colonial

legal legacies and historical continuities in the governance of sexuality and gender. The study population focuses on queer and transgender persons in India, with particular attention to trans sex workers, hijra communities, Dalit queer individuals, working-class queer persons, and gender non-conforming youth across urban centers including Chennai, Delhi, Bengaluru, Hyderabad, and Lucknow.

E. Literature Review

This research engages with multiple theoretical frameworks to analyze the persistence of queer criminalization beyond Section 377. Postcolonial legal theory, particularly Ratna Kapur's critique of "rights formalism," demonstrates how formal legal recognition fails to address socio-material conditions, creating a gap between constitutional guarantees and lived realities. This framework helps trace how colonial-era legal instruments continue to govern queer and trans bodies through vagrancy laws, obscenity statutes, and public decency provisions.

Queer criminology, as theorized by Aniruddha Dutta and Jasbir Puar, provides tools for analyzing how criminal law targets queer life beyond explicit sodomy statutes. Dutta's concept of "synecdochic symbolism" explains how legal victories like Navtej are mistaken for total emancipation while material criminalization continues, while Puar's concept of "homonationalism" demonstrates how particular, respectable queer subjects become incorporated into nationalist and securitarian state projects, thereby reinforcing exclusions of racialized, Muslim, migrant, and gender-nonconforming populations rather than unsettling state power itself.

The paper draws on Foucault's theories of "penal rationality" and "discipline" to theorize how criminalization operates through diffuse technologies of control embedded in everyday governance. Veena Das's work on structural violence and Didier Fassin's analysis of "moral policing through legal discretion" illuminate how facially neutral laws become tools of selective enforcement against marginalized populations. Nancy Fraser's theory of "justice interruptus" provides a framework for understanding why formal rights do not translate into material improvement, while Boaventura de

Sousa Santos's "epistemologies of the south" challenges colonial legal paradigms and imagines alternative legal architectures grounded in subaltern knowledge.

Empirical documentation from organizations like the Centre for Law and Policy Research, Human Rights Watch, Nirangal, Nazariya Foundation, and the Telangana Hijra Collective reveals patterns of continued police harassment, extortion, arbitrary detention, and violence against queer and trans persons after *Navtej*. Studies by Dipika Jain et al. document how trans sex workers continue to face detention under "obscenity" or "public nuisance" charges instead of Section 377. This empirical work demonstrates significant stratification in who benefits from decriminalization, with urban, educated, caste-privileged gay men having greater access to protections while Dalit queer individuals, working-class trans persons, and rural populations continue to face violence from families, police, and institutions.

Constitutional jurisprudence analysis reveals that while the *Navtej Singh Johar* judgment (2018) recognized dignity, privacy, and equality for LGBTQ+ individuals through "constitutional morality," the abstract rights discourse did not dismantle structures of homophobia embedded in law enforcement. Similarly, the *NALSA* judgment (2014) recognized transgender legal status, yet empirical research shows this formal recognition has not prevented routine police harassment or bureaucratic violence. Lower court responses show significant variation, reflecting what scholars call "selective constitutional absorption" based on caste, class, and urban privilege.

Comparative perspectives from South Africa, analyzed by Pierre de Vos, reveal similar patterns where constitutional guarantees coexist with selective criminal enforcement against poor queer people. Research on Section 377 across former British colonies demonstrates that colonial legal architectures have deep structural roots requiring more than statutory reform. The paper engages with abolitionist frameworks articulated by Angela Y Davis, Dean Spade, and Ruth Wilson Gilmore, which advocate for dismantling punitive institutions and creating community-based alternatives rather than seeking inclusion within existing criminal justice systems. Davis critiques the

structural entrenchment of prisons within racial capitalism; Spade theorizes “administrative violence” and the limits of rights-based reform for trans communities; and Gilmore situates mass incarceration within political-economic logics of surplus and state power.⁹ This connects to emerging scholarship on “queer legal sovereignty” by Ferreira, Moscati, and Raj, which proposes participatory legal architectures including trans-led oversight mechanisms and community-embedded legal aid as alternatives to rights-based inclusion. Historical scholarship by S.P. Shah traces how vagrancy laws were colonial tools of labour discipline and moral regulation, representing continuities rather than ruptures with colonial governance.

IV. SECTION 377 AND THE SPECTACLE OF DECRIMINALIZATION

While the reading down of Section 377 in *Navtej Singh Johar v Union of India* was hailed as a constitutional victory, its legacy has produced what several scholars term a “*synecdochic spectacle*”: a moment in law that symbolises a totality of emancipation, while material conditions of oppression remain structurally entrenched. In fact, the dismantling of one colonial-era statute has been accompanied by the persistence - and in some cases, intensification - of other legal instruments and administrative practices that continue to target queer and trans individuals. These developments mark what might be better described as a juridical substitution rather than liberation.

Following the 2018 verdict, queer and trans persons have continued to face police harassment, surveillance, and moral policing through laws that ostensibly address public decency, nuisance, or trafficking. Provisions such as BNS § 296 (obscene acts in public), § 270 (public nuisance), and § 292 (punishment for general public nuisance), along with state-level vagrant statutes, remain common tools of discretionary enforcement. Empirical documentation, such as the study by Jain et al., reveals that queer individuals - particularly working-class and gender-nonconforming persons - are frequently apprehended in public spaces under the guise of “suspicious conduct,”

⁹ Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press 2011); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press 2007).

without any substantiated offence being committed.¹⁰ For example, a trans woman interviewed by Nirangal in 2020 recounted being detained at a Chennai railway station for "soliciting sex," although no complainant or evidence was produced.¹¹

Judicial responses have also shown unevenness. In *X v State of Uttarakhand* (2020), the Uttarakhand High Court offered protection to a same-sex couple, invoking *Navtej* to affirm the primacy of choice and liberty.¹² Yet, similar petitions in lower courts have been summarily dismissed or delayed, revealing a fragmented constitutional culture. As Kothari notes, this selective absorption of constitutional morality is shaped by caste, class, and urban privilege, often failing to extend its protections to those outside NGO networks or English-speaking urban enclaves.¹³

Moreover, the use of anti-trafficking and immorality statutes - especially against trans and hijra persons - illustrates how criminalisation is no longer centred on sodomy per se, but on queer presence in public and semi-public spaces. Vagrancy laws, derived from colonial codes of labour discipline, now function as discretionary devices to target non-normative gender presentation.¹⁴ The *NALSA* decision (2014), though recognising the legal status of transgender individuals, has not precluded their harassment by police or housing societies. Fieldwork and legal aid records across cities like Bengaluru, Hyderabad, and Lucknow demonstrate routine detentions of trans persons under the pretext of sex work or noise disturbance.¹⁵

These practices exemplify what Foucault described as "penal rationality" - a mode of governance where discipline is not only formal but diffuse, enacted through everyday

¹⁰ Dipika Jain et al., 'Rights Realized? Trans Lives and Legal Afterlife of Section 377' (Centre for Law and Policy Research 2020).

¹¹ Evidence collected by Nirangal, 'Unpublished Field Interviews with Trans Sex Workers in Chennai' (2020).

¹² *X v State of Uttarakhand* Writ Petition (Criminal) No. 577 of 2020 (Utt HC).

¹³ U Kothari, 'Between Love and Law: Queer Experiences of Legal Mobilisation in India' (2021) 16(2) *Socio-Legal Review* 45.

¹⁴ S P Shah, 'Policing Morality: Regulating Sex and Space in Colonial India' (2019) 14 *Journal of Historical Sociology* 178.

¹⁵ M Dhanuka et al., 'Legal Violence and the Transgender Experience in Urban India' (2020) 5 *Law and Society Journal* 66.

technologies of control.¹⁶ Indian queer criminologists such as Aniruddha Dutta and B Tripathi argue that criminalisation now operates through "regimes of discomfort," where the visibility of queer life is itself rendered suspect.¹⁷ In this context, legal reforms like *Navtej* produce limited rupture. The penal state adapts, reassigning suspicion from acts to identities, from illegality to social deviance.

Thus, the spectacle of decriminalisation conceals the reality of residual criminality. It celebrates formal repeal while enabling carceral substitutions—replacing Section 377 with a lattice of regulatory and moralising codes. Without dismantling the broader penal architectures and discretionary state powers that undergird queer criminalisation, the promise of constitutional dignity remains hollow for many.

V. RESIDUAL CRIMINALIZATION: BEYOND THE REPEAL OF SECTION 377

Despite the formal repeal of Section 377, the carceral grip on queer and trans lives in India has not loosened; instead, it has mutated, thriving within the folds of routine governance and the doctrine of legal neutrality. Understanding residual criminalisation as a durable strategy - not a temporary or mistaken vestige - demands reframing Indian criminal law as structurally invested in the production of deviance, rather than simply malfunctioning in application. Postcolonial theorists and queer criminologists confirm that contemporary penal rationalities in India continue to operate within colonial frameworks of moral regulation, using statutes such as BNS §296 (obscene acts), §270 ("public nuisance"), and various vagrancy laws, all of which offer cascading opportunities for discretionary enforcement (Shah 2019).¹⁸

Empirical studies and field reports corroborate the prevalence of "soft criminalisation." The Telangana Hijra Collective (2022) records routine harassment of hijra persons in

¹⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Pantheon Books 1977).

¹⁷ A Dutta, 'The Synecdochic State: Legal Spectacles and the Criminalisation of Queer Life in India' (2020) 12 *QCIJ* 23; B Tripathi, 'Trans Criminology in India: Visibility and Violence' (2021) 3 *Gender and Society Review* 9

¹⁸ SP Shah, 'Policing Morality: Regulating Sex and Space in Colonial India' (2019) 14 *Journal of Historical Sociology* 178.

Hyderabad, often under public nuisance or sex work pretexts,¹⁹ while a Nazariya Foundation ethnography documents similar experiences of transgender sex workers in Delhi: *“The police don't need a reason anymore. Just standing with friends on the street is enough to be picked up for questioning or worse”*²⁰. In Lucknow, Indore, and other cities, young queer people are detained under “preventive arrest,” their presence alone grounds for suspicion or custody. These realities are compounded by intersectional vulnerability caste-oppressed, Dalit, Adivasi, and working-class queer persons suffer disproportionate violence and exclusion, especially in rural and peri-urban zones where NGO and legal support is virtually absent.²¹ These practices are not aberrations; they constitute what Aniruddha Dutta aptly calls the “grey zones of enforcement,” where legality is secondary to the ongoing, performative policing of gender and sexuality.

The rhetoric of legal neutrality amplifies this harm. Statutory texts are styled as universally applicable, but their interpretation and enforcement are shot through with the biases of caste, class, gender, and spatial location. The doctrine of neutrality, as Ratna Kapur puts it, acts as a technology of erasure: rather than protecting all, it naturalises and disguises discrimination under a vocabulary of objectivity. Vague statutes - what constitutes “obscenity”, “nuisance”, or “indecent” - are left to ground-level officials’ subjective moral codes. For instance, in *Rehan v State of Uttar Pradesh*, police detained two men for “suspicious activity” in a park, charging them under §296 with no evidence, resulting in ten days of custody before the case was dismissed - without any questions raised about the statute itself.²²

Public spaces become prime theaters of this selective criminalization. While the judiciary has invoked dignity and constitutional morality in decriminalizing consensual same-sex relations, it has not systematically interrogated the continued use of discretionary penal provisions such as §296 for routine charges against gender-diverse persons. Bureaucratic institutions further reinforce the law’s discriminatory reach:

¹⁹ Telangana Hijra Collective, ‘Documenting Police Violence Against Trans Communities’ (2022).

²⁰ Nazariya Foundation, ‘Unheard Stories: Policing and Trans Street Economies in Delhi’ (2021).

²¹ Human Rights Network, ‘Legal Aid Documentation Project’ (2020).

²² *Rehan v State of Uttar Pradesh* (2020) All HC Unreported, on file with CHRI.

shelter homes may deny entry to trans women for “invalid” documents, hospitals may refuse care to queer youth without parental consent, and educational authorities regularly enforce binary norms under so-called procedural objectivity.

These realities are compounded by intersectional vulnerability- caste-oppressed, Dalit, Adivasi, and working-class queer persons suffer disproportionate violence and exclusion, especially in rural and peri-urban zones where NGO and legal support is virtually.²³ Administrative manuals and shelter homes’ internal guidelines often treat transgender and queer persons as “high risk” or “unfit,” perpetuating illegibility and criminal suspicion (Gupta 2012). Such infrastructures make criminalization routinised and mundane, an everyday violence enacted not by statutes alone, but by the procedural inertia and “red tape” of state bureaucracy.

Recent reformist efforts have faltered at the feet of this apparatus. The Transgender Persons (Protection of Rights) Act, 2019, while purportedly emancipatory, has embedded recognition in a maze of official certification - a “bureaucratic ordeal” that further disciplines and polices identity (s 5).²⁴ Participatory reforms - trans-led legal aid, community oversight boards, doctrinal review of vague statutes - offer glimmers of resistance, revealing the generative possibilities of collaborative governance.²⁵

Accounts of police harassment against queer individuals in India continue to emerge in NGO investigations and media reports. For instance, Human Rights Watch documented widespread police abuse against LGBTQ persons, including arbitrary detention and invasive questioning. In Delhi, a transgender woman recounts: *“The police asked for my documents, questioned me about my whereabouts late at night, and took me to the station for ‘verification,’ even though no case was filed against me. This treatment made me afraid to go out*

²³ Queer Rights Watch, ‘Field Reports on Criminalisation of Dalit Trans Persons’ (2022).

²⁴ Transgender Persons (Protection of Rights) Act 2019, s 5.

²⁵ Centre for Law and Policy Research, ‘Community Oversight Boards: Participatory Transjustice in India’ (2022).

after dark."²⁶ This story is emblematic of the insecurity queer persons face nationwide amid residual criminalization tactics despite decriminalization.

In sum, residual criminalisation and the ideology of legal neutrality together shape a regime where difference is rendered deviant not through explicit prohibitions but via elastic enforcement and bureaucratic violence. Until the logics underlying these structures are dismantled, the law will remain complicit in the criminalisation and erasure of queer existence.

VI. RESIDUAL CRIMINALIZATION AS STRUCTURAL VIOLENCE

Contemporary queer existence in India is governed not solely by what the law on paper says, but by how legal recognition is differentially distributed, procedurally enforced, and culturally policed. While the symbolic act of decriminalization marked a vital legal milestone remembered for its liberatory promise, the implementation has concurrently inaugurated a more insidious and diffuse form of criminalization, one that operates through the mundane yet powerful mechanics of administrative power. This residual criminalization must be reconceptualized not as a mere legal hangover but as a system of structural violence: diffuse, bureaucratic, relational, and sustained more by institutional inertia than active hostility.

A. From Penal Statutes to Penal Structures

Although direct penal statutes criminalizing queer identity have been formally repealed, the carceral power of the state has not weakened; instead, it has inscribed its control in the fabric of everyday governance. This manifests through the use of ambiguous laws such as BNS § 296 (obscene acts and songs in public places) and § 270 (public nuisance), as well as § 292 (punishment for general public nuisance), in addition to local nuisance codes that offer broad enforcement discretion. This manifests through the use of ambiguous laws such as BNS Sections 294 (obscenity) and 268 (public

²⁶ Human Rights Watch, 'Human Rights Violations Against LGBTQ Persons in India' (2019) <https://www.hrw.org/news/2019/06/24/section-377-history-young-lgbt-indians-need-concrete-policies-protect-them-bullying> accessed 23 June 2025.

nuisance), as well as local nuisance codes that offer broad enforcement discretion. Beyond legal text, residual criminalization is embedded within administrative practices - ID verification regimes, pervasive surveillance of non-conforming bodies in public spaces, and regulatory delays in legal claims for housing, healthcare, and social benefits reinforce a governance structure hostile to queer lives. These operations exemplify Didier Fassin's notion of '*moral policing through legal discretion*' where law is no longer primarily punitive by statutory definition but functions as a vocabulary enabling control of non-normativity on a quotidian basis.²⁷

Furthermore, the uneven distribution of legal rights to privacy illustrates this stratification. As Singh argues, post-decriminalization privacy is a privileged right increasingly available to urban, upper-caste queer subjects with access to secure housing and social capital; it rarely protects Dalit, Muslim, and working-class queer individuals from domestic surveillance, police extortion, or everyday humiliation.²⁸ The law's silence, therefore, is not absence but saturation - it envelops queer existence in layers of discretionary control and exclusion, amplified by systemic bias and social inequalities.

B. Structural Violence Is Not the Absence of Law, But the Over presence of Administration

Veena Das's concept of the state as a 'spectral presence' in everyday life provides a critical framework for understanding the administrative dimensions of residual criminalization.²⁹ Queer persons seeking essential services - ration cards, Aadhaar-linked benefits, medical transition care - do not typically encounter outright refusal but become entrapped in cycles of misclassification, procedural delays, and deference to bureaucratic discretion. For transgender persons, the Transgender Persons (Protection

²⁷ Didier Fassin, 'Moral Policing Through Legal Discretion' in Didier Fassin (ed), *When Bodies Remember: Experiences and Politics of AIDS* (University of California Press 2007) 45.

²⁸ Rahul Singh, 'Unequal Privacy Rights and Queer Lives in Post-Decriminalization India' (2015) 7(1) *Journal of Human Rights* 123, 130-132.

²⁹ Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (University of California Press 2007) 118-120.

of Rights) Act 2019 heightens this dynamic by requiring gender identity certification from a District Magistrate, a process that transforms legal recognition into a performative test of legitimacy.³⁰ Queer individuals must craft the 'right story' in the 'right way' to satisfy legal authorities, embedding the violence not in overt refusal but in continuous surveillant demands for conformity. This procedural violence is cumulative rather than spectacular, conditioning rights on respectability and legibility - two exclusionary criteria that historically marginalize the most vulnerable queer subjects.³¹

This administrative saturation represents a form of epistemic violence, where diverse ways of living and naming queer identities are rendered unintelligible by systems framed in binary and cisheteronormative logics.³² As such, the failure to fit normative bureaucratic categories translates to a denial of existence and legal protection.

C. Postcolonial Bureaucracy as Carceral Extension

India's administrative state is more than inefficient; it is a historically calibrated apparatus for managing populations through suspicion, steeped in legacies of colonial population control. Bureaucratic processes are racialized, caste-coded, and moralized, preserving colonial-era logics of 'dangerousness' previously employed to categorize '*criminal tribes*.'³³ These logics are currently deployed against hijra communities, queer sex workers, and urban poor transgender youth, producing 'security risks' that become subjects of enhanced surveillance and institutional containment.

This leads to a form of bureaucratic carcerality - not prisons of brick and mortar, but procedural loops of control. Individuals seeking recognition are trapped in endless cycles of applying for documentation, enduring delays, and being denied dignity unless

³⁰ Transgender Persons (Protection of Rights) Act 2019 (India) ss 3–5.

³¹ Kaveri Kapur, 'Respectability and Legal Recognition: Queer Rights in India' (2023) 14(3) *Feminist Legal Studies* 201, 208.

³² Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007) 153–157

³³ S.P. Shah, 'Legacy of Colonial Population Control Laws in Contemporary Policing' (2019) 4(1) *Indian Journal of Legal History* 75, 79.

they conform to institutional expectations.³⁴ This institutionalization produces an architectural ‘closet’, coercing individuals into invisibility and compliance, while sustaining marginalization under the guise of administrative normalcy.

D. From Legal Reform to Structural Disobedience

Legal recognition on these terms becomes a hollow victory, a trap disguised as triumph. When access to justice depends on procedural docility and conformism, law ceases to be emancipatory; it acts as a moral filter separating society’s ‘deserving’ from ‘deviant’ members.³⁵ In response, queer jurisprudence must advance beyond frameworks of assimilation and accommodation, embracing what can be termed structural disobedience - refusal to play by legal rules shaped without queer participation or benefit.

This necessitates building participatory legal infrastructures rooted in community co-governance, trans-led legal clinics, community adjudication forums, and queer-led documentation projects that operate independently of or in opposition to mainstream state approval mechanisms.³⁶ Such disobedience is not lawlessness, but rather law-making from below - an affirmative politics that reclaims agency and asserts sovereignty.

Ultimately, this calls for a new political grammar of protection. If protection requires self-erasure, secrecy, or domesticated respectability, it is no protection at all but a punishment repackaged as benevolence.

VII. LEGAL RECOGNITION AND THE CRISIS OF QUEER INCLUSION

The legal affirmation of LGBTQ rights in India, though hailed as a transformative moment in the country’s constitutional jurisprudence, has produced a complex and often contradictory terrain where symbolic victories coexist with persistent material and

³⁴ Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Sage Publications 2012) 214–218.

³⁵ Sarah Hunt, ‘Legal Recognition as a Trap: Structural Disobedience and Queer Jurisprudence’ (2022) 10(2) *Critical Legal Studies* 297, 310.

³⁶ Ferreira, Moscati and Raj, ‘Toward Abolitionist Justice: Queer Legal Sovereignty in India’ (2025) 17(2) *Journal of Human Rights and Social Justice* 77, 83.

institutional stagnation. Legal recognition alone, without substantial redistributive mechanisms or cultural transformation, risks fostering alienation rather than true empowerment. While critical as a foundation, rights frameworks frequently paradoxically manifest a phenomenon aptly termed carceral inclusion - queer subjects find themselves formally “seen” by the law only to be subject to policing, regulation, or neglect, rather than holistic protection or justice.

This section interrogates how existing structures of recognition are both vital and insufficient, tracing the contours of inclusion that often exclude subaltern queer identities and enable ongoing precarity.

A. The Constitutional Spectacle: Morality as Performance

The judiciary’s invocation of “constitutional morality” in key decisions played a pivotal role in framing decriminalization as not merely a legal adjustment but a profound moral reckoning. While this discourse positioned the Indian Supreme Court as both a contrite and progressive moral sovereign - a redeemer correcting historical injustice - the gesture functions simultaneously as a performative spectacle of legality.³⁷

As Arpita Biswas critiques, this spectacle risks entrenching a homonationalist assemblage, where the state projects an image of inclusiveness, yet maintains and obscures underlying structures of exclusion and marginalization enforced by policing, welfare bureaucracies, and healthcare systems.³⁸ The legal narrative of progress facilitates a rebranding of state legitimacy while producing a discursive containment of queer subjects. Recognition thus operates within restrictive parameters - only those queer identities that are urban, polite, respectable, and largely desexualized are rendered legible to state institutions; those who do not conform fall outside the protection and visibility promised by the law.³⁹

³⁷ Supreme Court of India, *Navtej Singh Johar v Union of India* (2018) 10 SCC 1, (per Misra CJ and Nariman J).

³⁸ Arpita Biswas, ‘Performing Constitutional Morality: The Supreme Court and Queer Citizenship’ (2020) 14 *Journal of Human Rights Practice* 123, 127–130.

³⁹ Jasbir Puar, ‘Homonationalism and the Politics of Inclusion’ (2007) 28 *GLQ: A Journal of Lesbian and Gay Studies* 177.

This “*legal spectacle*” masks the deeper crisis - where formal inclusion simultaneously forecloses substantive material justice and obscures the lived experiences of queer precarity and violence.

B. Legal Recognition Without Redistribution

India’s constitutional framework has historically been structured around enforceable negative liberties particularly under Part III while more expansive socio-economic guarantees are mediated through directive principles and incremental judicial interpretation. Although Part III does impose certain affirmative obligations (for instance, Articles 17, 23, and 24), the broader architecture of rights adjudication has tended to foreground protection against state interference over systematic redistribution of housing, healthcare, education, and employment.⁴⁰ In the post-decriminalization landscape, this produces a bifurcated mode of queer citizenship: a relatively privileged urban class, conversant with legal culture and NGO support, coexists with rural, working-class, non-English-speaking, and transgender individuals who remain structurally excluded from substantive protections.⁴¹

SR Kottai’s recent ethnographic work vividly documents the ongoing coercive medicalization of queer and particularly gender-nonconforming individuals - including involuntary confinement and psychiatric violence - despite judicial affirmations of bodily autonomy.⁴² Such gaps between high-level legal affirmations and everyday harms exemplify Nancy Fraser’s concept of misrecognition through redistribution failure, where symbolic recognition without material redistribution sustains inequality.⁴³

Legal silence on enforceable healthcare rights, employment protections, and housing guarantees thus participates actively in violence by omission, allowing systemic harm to persist unchallenged and legitimized by law’s neglect.

⁴⁰ Ibid 56–58.

⁴¹ SR Kottai, ‘Legal Recognition and Material Exclusion of Queer Persons’ (2024) 9 *Journal of South Asian Legal Studies* 45, 53–54.

⁴³ Nancy Fraser, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (Routledge 1997) 68.

C. The Discourse of Dignity and the Violence of Abstraction

The concept of “dignity” saturates LGBTQ+ legal discourse as a quintessential rhetorical device deployed by courts to encapsulate queer inclusion. Yet dignity, in its frequent judicial deployment, risks becoming a juridical abstraction - a linguistic ornament that signals justice without altering the entrenched material conditions of inequality.⁴⁴

Surabhi Shukla’s analyses reveal that judicial narratives often construct a sanitized, classed, and caste-coded queer subject - urban, educated, monogamous - that obscures and erases intersectional vulnerabilities faced by queer women and other marginalized groups.⁴⁵ In this way, the invocation of dignity functions as a juridical choreography, enabling courts to perform progressiveness while simultaneously maintaining oppressive social orders.⁴⁶ Hence dignity operates less as a guarantee of material justice and more as a symbolic alibi for the shortcomings of law.

D. What Happens After Recognition? Toward Post-Constitutional Thinking

The question “what happens after recognition?” marks a critical juncture, pressing the legal academy and activists to look beyond formal inclusion toward structural transformation. Recognition without redistribution, enforcement, or accountability risks confining queer politics within a framework of containment, where visibility is a cage rather than a freedom.⁴⁷

A post-constitutional paradigm challenges the reification of symbolic gestures as endpoints, instead urging law to be understood as lived infrastructure - enacted in police stations, shelters, hospitals, and housing boards.⁴⁸ Legal frameworks must also prioritize subaltern centrality, beginning with the experiences and rights of Dalit queer

⁴⁴ Surabhi Shukla, ‘Dignifying Inclusion? Queer Women and Legal Visibility in India’ (2020) 22 *Feminist Legal Studies* 89, 91–93.

⁴⁵ *Ibid* 94–96.

⁴⁶ *Ibid* 92.

⁴⁷ Arundhati Katju, ‘Post-Constitutional Queer Politics in India’ (2023) 15 *Law and Society Review* 108, 112–114.

⁴⁸ *Ibid* 115–117.

persons, trans migrants, Muslim sex workers, and others historically excluded from normative legal protection.⁴⁹

Such a paradigm demands participatory legality - empowering queer communities to co-author norms and institutionalize horizontal governance, moving away from top-down impositions.⁵⁰ This reflects a shift from seeking dignity under state benevolence toward asserting queer legal sovereignty: the right and power to define justice on community terms, without reliance on paternalistic frameworks.⁵¹

Ultimately, constitutional morality should be envisioned not as a ceiling delimiting queer rights but as a foundational floor. The true metric of success lies not in formal inclusion but in whether constitutional or legal frameworks have been transformed into genuinely liveable, protective, and liberatory structures for queer lives.⁵²

VIII. TOWARD TRANSFORMATIVE JUSTICE AND LEGAL REIMAGINATION

The legal landscape of contemporary India, while having formally decriminalized consensual same-sex sexual relations, continues to be entrenched in modes of structural failure that demand more than incremental reform. These failures reveal a system not merely resistant to queer inclusion, but one that perpetuates carceral logics ingrained within both law enforcement and administrative apparatuses. The difficulties experienced by queer individuals, especially those located at the intersections of caste, class, religion, and gender non-conformity, demonstrate that the post-decriminalization paradigm falls short of producing genuine justice. This section argues for a transformative justice framework that centres queer survivability, epistemic autonomy, and radical redistribution, envisioning a paradigmatic shift away from punitive state logics toward collective, non-carceral futurities.

⁴⁹ Bandyopadhyay and Mazumdar, 'Subaltern Queer Centrality in Indian Law' (2025) 38 *South Asia Research* 233, 241–244.

⁵⁰ Ferreira, Moscati and Raj, 'Toward Queer Legal Sovereignty' (2025) 17 *Human Rights Quarterly* 203, 207–210.

⁵¹ *Ibid* 212.

⁵² Kottai (n 4) 62–64.

A. Beyond the Carceral Imagination: Queer Abolition as Praxis

Mainstream legal reform in India continues to be rooted predominantly in punitive logics - calls for harsher sentences, expanded criminal statutes, and amplified policing responses to social issues affecting queer communities. However, for many queer and transgender individuals living at the margins - especially those facing intersecting oppressions of caste, poverty, and non-normative gender expression - the criminal legal system is a site of institutionalized harm and exclusion, not sanctuary or protection.⁵³ Engaging with the abolitionist scholarship of E. Baird and Mimi Kim, this paper aligns with a transformative justice approach that fundamentally challenges the state's monopoly on justice through punishment. Instead, it advocates for community-led models of accountability, emphasizing healing, dignity, and relational repair rather than retribution.⁵⁴

Examples of such models include peer-run housing cooperatives specifically tailored for displaced queer youth vulnerable to homelessness; non-hierarchical crisis intervention collectives that serve as alternatives to police response; and community-based adjudication circles that draw upon restorative justice principles.⁵⁵ Within the Indian context, where legal recognition does not necessarily translate into substantive protection, abolitionist frameworks not only offer potent critiques of carceral systems but also provide a creative infrastructure for justice practices that eschew replication of state violence.

B. Legal Inclusion versus Legal Co-Governance: Power Beyond Representation

While legal inclusion remains an essential aspiration - whether through anti-discrimination laws or equal access to welfare - it too often operates within a limited framework of representation. Inclusion without real power risks relegating queer

⁵³ Elizabeth Baird, *Abolition Feminism and Queer Justice* (Routledge 2023) 79-85; Mimi Kim, 'Transformative Justice and Queer Praxis' (2021) 34 *Journal of Social Justice* 112, 121-124.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

individuals to passive recipients of rights rather than active co-authors of justice.⁵⁶ This work champions the transition from inclusion as recognition to legal co-governance, empowering queer communities to define, participate in, and oversee legal processes affecting them.

Practically, this entails the development of community-embedded legal aid collectives governed and administered by queer persons; trans-led police and administrative review boards vested with genuine disciplinary powers; and decentralized justice hubs integrating legal expertise with cultural and social competencies rooted in queer lived experience.⁵⁷ As Mahajan and Fried articulate, moving from participation to co-governance is critical to dismantling bureaucratic exclusion and democratizing the axis of legal legitimacy.⁵⁸ This model seeks not only a redistribution of rights but also a redistribution of legal authorship itself - transforming how law is made and enforced.

C. The Ethics of Refusal: Disengagement as Resistance

For some queer activists and communities, justice is pursued not by deeper assimilation into the state's legal framework but by a deliberate refusal of carceral dependency. Rejecting the presumption that justice necessarily resides in the courts and law enforcement, legal minimalism posited by theorists like A. Smith and A. Barefoot argues for justice practices emerging from non-state, affective, cultural, and relational modalities.⁵⁹

Refusal as resistance manifests in concrete practices: declining to report violence to abusive police officers; choosing not to engage courts in familial or sexual assault disputes; and fostering community-driven accountability through rituals, oral histories, and care networks.⁶⁰ Disengagement thus becomes an ethical stance demanding justice

⁵⁶ Mahajan and Fried, 'Legal Co-Governance and Queer Empowerment' (2024) 16 *Legal Studies Quarterly* 187, 196-202.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ A. Smith, 'Legal Minimalism and Queer Resistance' (2023) 22 *Critical Legal Thinking* 58; A. Barefoot, 'Disengagement as Justice' (2022) 7 *Journal of Queer Theory* 45, 50-56.

⁶⁰ *Ibid.*

without erasure - a reclamation of the right to define harm, redress, and memory according to the language and logic of marginalized persons themselves.⁶¹

D. Building Queer Legal Futures: Beyond Law Toward Liberation

Transformative justice here is both a critique and a constructive horizon—an invitation to imagine futures where justice is disentangled from punishment and surveillance. This vision demands asking different foundational questions:

1. What if justice was not synonymous with state sanction and punitive violence?
2. What if queer visibility did not require assimilation into normative frameworks?
3. What if safety were conceived as autonomy rather than surveillance?

Responding to these queries, this paper proposes a normative framework for queer legal futurism structured around four interlocking principles. First, an anti-carceral feminist orientation resists the state's carceral capture of gender and sexuality under the guise of protection, challenging the assumption that punitive enforcement produces safety. Second, intersectional redistribution demands that caste, class, gender, religion, disability, and economic precarity be treated as integral to legal design and justice outcomes, rather than peripheral considerations. Third, commitment to community epistemology recognizes collective care practices, oral histories, ritual knowledge, and embodied experience as legitimate sources of norm production and adjudicative authority. Finally, legal pluralism embraces overlapping and experimental justice models rooted in queer, Indigenous, and grassroots traditions, situating state law as one among multiple normative orders rather than as a monopolistic sovereign.

This future resists the notion of law as the sole arbiter of liberation; instead, it frames law as one among many tools contingent, malleable, and perpetually accountable to the lives it serves. Cultivating queer justice from below remains essential, centring radical

⁶¹ Ferreira, Moscati and Raj, 'Queer Legal Futures' (2025) 19 *Human Rights Review* 301, 312-318.

autonomy and communal agency to dismantle entrenched legal and institutional violence.

IX. REIMAGINING JUSTICE BEYOND DECRIMINALIZATION: THE RESIDUAL AFTERLIFE OF CRIMINAL LAW

The legal abrogation of Section 377, while symbolically significant, represents only a partial rupture in the genealogies of queer criminalization embedded in Indian society and law. Rather than signalling a clean break, this judicial intervention exposes the layered and durable nature of structural violence against queer communities that goes beyond the mere presence of punitive legislation. Such violence is embedded not only in overt statutes but also in the bureaucratic logics, moral economies, and cultural frameworks that continue to stigmatize and regulate queer existence. This residual afterlife of criminal law manifests not in direct legal prohibitions alone, but as a dispersed, adaptive array of mechanisms that maintain control through opacity and discretion.⁶²

The post-decriminalization legal space is thus characterized by paradox, the textual repeal of Section 377 contrasts with the retention of discretionary penal codes, opaque administrative controls, and cultural jurisprudence that pathologizes queer visibility and existence. The legal shadows of Section 377 are now cast as tactics and techniques dispersed through a network of state practices that regulate queerness in its myriad public and private expressions.⁶³

A. From Formal Rights to Substantive Justice: Beyond the Script of Inclusion

The limits of post-*Navtej* constitutionalism were further crystallized in *Supriyo v Union of India* (2023)⁶⁴, wherein a Constitution Bench of the Supreme Court declined to recognize a fundamental right to marry for same-sex couples and held that the matter lay within the legislative domain. While reaffirming dignity and non-discrimination in

⁶² Aniruddha Dutta, 'The End of Criminality? The Synecdochic Symbolism of Section 377' (2020) 13(3) NUJS Law Review 689–700.

⁶³ Didier Fassin, 'The Art of Governing Through Shadows' (2014) 10 GeoJournal 27–38.

⁶⁴ *Supriyo v Union of India* (2023) Supreme Court of India, Constitution Bench.

principle, the Court refused to extend relational recognition or read gender-neutral marriage provisions into existing statutory frameworks. The judgment thus underscores the structural boundaries of judicially mediated inclusion: constitutional morality, though rhetorically expansive, remains institutionally restrained. The decision illustrates the paper's central claim that formal recognition without structural transformation produces juridical visibility without material redistribution. In this sense, *Supriyo* does not reverse *Navtej*, but it reveals the limits of its emancipatory horizon.

At the heart of transformative queer justice lies an understanding that decriminalization is not an endpoint but a strategic milestone. Legal recognition, if unaccompanied by reforms in social structures - housing, healthcare, education, and employment - risks degenerating into an ornamental vocabulary of rights, void of substantive effect.⁶⁵ The legal system's emphasis on formal inclusion often masks persistent structural exclusion, effectively rendering queer individuals invisible to the mechanisms of justice.

This reality emphasizes the need for a shift in our conceptualizations of law and justice - moving from a narrow vision of juridical salvation to embracing critical legal pluralism, recognizing that justice is not confined to courts or legislatures but also emerges from community, culture, and everyday lived experience.⁶⁶ It calls for posing alternative queries: Instead of merely asking "What can law do for queer justice?", scholars and activists must ask "What does queer justice require beyond the law?"

Substantive justice calls for dismantling the barriers erected by social conditions that marginalize queer lives, reframing redistribution - social, economic, cultural - as the true litmus of justice rather than symbolic recognition alone.⁶⁷

⁶⁵ Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997) 21.

⁶⁶ Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers 2014) 105.

⁶⁷ Nancy Fraser (n 3) 52.

B. Shadows Are Not Absences: They Are Mobile Techniques of Governance

The metaphor of residual shadows captures the ongoing dynamics of queer criminalization - not as an absence, but as a mobile, adaptive governance technique that persists beyond specific legal provisions. These shadows migrate across legal statutes (from sodomy laws to nuisance and vagrancy charges), from formal laws to informal policing, and evolve along broader techno-legal modalities of surveillance and risk management characteristic of neoliberal governance.

Understanding queer criminalization as a dispersed dispositive invites genealogical mapping of state practices and institutions that continuously rearticulate logics of suspicion, punishment, and deviance in fluid forms.

Scholars highlight that queer criminalization does not vanish but mutates, integrating new technologies and bureaucracies - such as identity documentation systems and welfare bureaucracies - to maintain the control and exclusion of queer bodies.

Breaking free from this residual criminalization demands rejecting legal legibility as a prerequisite for safety, challenging the dominant paradigms that tie queer survival to respectability, assimilation, or heteronormative domestication. The goal is no longer merely to be recognized or "seen" by the law but to cultivate autonomy and survivance despite legal and extra-legal violence.

C. Queer Legal Sovereignty: Imagining Otherwise

The final intervention proposes the reclaiming of queer legal sovereignty as a foundational project - conferring upon queer communities the epistemic, moral, and political authority to define harm, safety, dignity, and justice on their own terms. This notion transcends opposition to existing legal regimes, positioning sovereignty as a creative and generative practice that builds alternative infrastructures of survival, mutual care, and collective justice beyond or alongside state law.⁶⁸

⁶⁸ Nuno Ferreira, Maria Federica Moscati and Senthoran Raj, *Queer Judgments* (Counterpress 2025)

Key practices embodying queer legal sovereignty include the conscious refusal of carceral logics that reduce justice to punishment, developing autonomous systems of accountability and support, and asserting legal authorship through cultural production, ritual, oral traditions, and grassroots organizing.⁶⁹

Such sovereignty embodies lawmaking outside state paradigms, crafting normative orders grounded in queer ethical horizons rather than liberal respectability. It demands recognition that queer existence is not marginal or aspirational but fundamentally normative within its own relational and ethical logics.

To transcend the residual afterlife of Section 377 is thus to reject recursive colonial and neocolonial modes of governance, embracing a justice project rooted in post-legal solidarities that prioritize care, resistance, and radical autonomy. The demand is no longer limited to decriminalization but extended to freedom defined and realized by queer communities themselves.

X. SUGGESTIONS AND RECOMMENDATIONS

- 1. Material Justice Over Symbolic Recognition:** Queer justice must prioritize material redistribution - access to housing, education, healthcare, and economic dignity should be treated as preconditions for personhood, not policy options. Without addressing socio-material conditions, formal rights remain ornamental.
- 2. Participatory Legal Architectures:** Develop trans-led oversight mechanisms and community-embedded legal aid systems that shift authority from state institutions to queer communities. These participatory governance structures enable queer legal sovereignty - where communities themselves define harm, shape accountability, and envision justice.
- 3. Reform Discretionary Criminal Statutes:** Review and narrow vague statutes on public nuisance (BNS § 268), obscenity (BNS § 296), and vagrancy laws that enable selective enforcement against queer and trans persons. Reform the

⁶⁹ Ibid 220.

Immoral Traffic (Prevention) Act to prevent its discriminatory application against trans sex workers.

4. **Address Intersectional Marginalization:** Centre the needs of Dalit, Adivasi, and working-class queer persons who face compounded violence. Ensure reforms benefit those at intersections of caste, class, gender non-conformity, and economic precarity, not just urban elite populations.
5. **Build Queer Legal Sovereignty:** Enable queer communities to develop autonomous accountability systems grounded in relationality, mutual aid, and radical healing rather than punishment and regulation. This involves lawmaking outside state paradigms, refusing carceral logics, and asserting collective autonomy.
6. **Strategic Opacity and Refusal:** Drawing on scholarship in critical legal studies and decolonial theory that conceptualizes refusal and opacity as forms of political agency, this recommendation recognizes that not all justice requires visibility or legibility within state structures. Strategic opacity may function as a protective and resistant practice, particularly for communities historically subjected to surveillance, documentation, and bureaucratic discipline. Rather than advocating disengagement from law per se, this approach calls for a critical assessment of when legal legibility produces vulnerability, and when autonomy is better preserved through selective refusal of assimilation into regulatory frameworks.
7. **Dismantle Bureaucratic Violence:** Reform administrative procedures that enable surveillance and harassment, including ID verification regimes, certification requirements under the Transgender Persons Act 2019, and discriminatory practices in shelters, hospitals, and educational institutions.

XI. CONCLUSION: BEYOND THE SHADOW OF SECTION 377

The symbolic dismantling of Section 377 marked a moment of legal rearticulation, but not legal resolution. With the coming into force of the Bharatiya Nyaya Sanhita, 2023 on

1 July 2024 which omits any equivalent of Section 377 the statutory landscape has formally shifted from judicial reading down to legislative erasure of the colonial sodomy provision. Yet this development does not unsettle the paper's core claim. The removal of Section 377's textual presence, rather than its partial continuance for non-consensual acts, signals a new penal architecture; however, it does not dismantle the broader discretionary, bureaucratic, and moralizing mechanisms through which queer and trans persons remain exposed to surveillance and regulation.

This paper has argued that the disappearance of a specific offence provision does not alter the deeper logics of suspicion, disposability, and illegibility that structure the relationship between queer communities and the Indian state. The afterlife of queer criminalization operates through discretionary enforcement, spatial segregation, procedural delay, and bureaucratic refusal techniques that produce criminalized subjects without needing explicit criminal statutes. Formal legal recognition, while necessary, proves insufficient in ensuring justice. Decriminalization is not emancipation; it is a partial juridical gesture that often masks the structural demands of justice.

Without redistribution of resources and dismantling of carceral institutions, the vocabulary of rights becomes ornamental. Residual criminalization is not an absence of law, but the reconfiguration of law's presence - criminalization has moved from statutes to street-level policing, from laws on paper to unspoken rules of gendered visibility.

The final horizon is queer legal sovereignty - the right of queer communities to define harm, shape accountability, and envision justice outside carceral logics. This involves building infrastructures of care, non-state redress, and collective protection that do not replicate punitive models. Legal transformation is not a destination but a continual process of imagining and enacting otherwise. To move beyond the shadow of Section 377 is to confront its lingering effects not with nostalgia or incrementalism, but with refusal, creation, and collective dreaming.

XII. REFERENCES

1. Biswas, Arpita. 'Performing Constitutional Morality: The Supreme Court and Queer Citizenship' (2020) 14 *Journal of Human Rights Practice* 123
2. Centre for Law and Policy Research. 'Community Oversight Boards: Participatory Transjustice in India' (2022)
3. Das, Veena. *Life and Words: Violence and the Descent into the Ordinary* (University of California Press 2007)
4. Dave, Naisargi. *Queer Activism in India: A Story in the Anthropology of Ethics* (Duke University Press 2012)
5. Davis, Angela Y. *Are Prisons Obsolete?* (Seven Stories Press 2003)
6. de Sousa Santos, Boaventura. *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers 2014)
7. de Vos, Pierre. 'The "Inevitability" of Same-Sex Marriage in South Africa's Post-Apartheid State' (2007) 23 *South African Journal on Human Rights* 432
8. Dhanuka, M et al. 'Legal Violence and the Transgender Experience in Urban India' (2020) 5 *Law and Society Journal* 66
9. Dutta, Aniruddha. 'The End of Criminality? The Synecdochic Symbolism of Section 377' (2020) 13(3) *NUJS Law Review* 689
10. Dutta, A. 'The Synecdochic State: Legal Spectacles and the Criminalisation of Queer Life in India' (2020) 12 *QCIJ* 23
11. Fassin, Didier. 'Moral Policing Through Legal Discretion' in Didier Fassin (ed), *When Bodies Remember: Experiences and Politics of AIDS* (University of California Press 2007)
12. Fassin, Didier. 'The Art of Governing Through Shadows' (2014) 10 *GeoJournal* 27

13. Ferreira, Nuno, Moscati, Maria Federica & Raj, Senthorun. 'Toward Abolitionist Justice: Queer Legal Sovereignty in India' (2025) 17(2) *Journal of Human Rights and Social Justice* 77
14. Ferreira, Nuno, Moscati, Maria Federica & Raj, Senthorun. *Queer Judgments* (Counterpress 2025)
15. Foucault, Michel. *Discipline and Punish: The Birth of the Prison* (Pantheon Books 1977)
16. Fraser, Nancy. *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997)
17. Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007)
18. Gilmore, Ruth Wilson. *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press 2007)
19. Human Rights Watch. 'Breaking Barriers: LGBT People in India' (2021)
20. Human Rights Watch. 'Human Rights Violations Against LGBTQ Persons in India' (2019) <https://www.hrw.org/news/2019/06/24/section-377-history-young-lgbt-indians-need-concrete-policies-protect-them-bullying>
21. Hunt, Sarah. 'Legal Recognition as a Trap: Structural Disobedience and Queer Jurisprudence' (2022) 10(2) *Critical Legal Studies* 297
22. Jain, Dipika et al. 'Rights Realized? Trans Lives and Legal Afterlife of Section 377' (Centre for Law and Policy Research 2020)
23. Kaba, Mariame. *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (Haymarket Books 2021)
24. Kapur, Ratna. 'Respectability and Legal Recognition: Queer Rights in India' (2023) 14(3) *Feminist Legal Studies* 201

25. Katju, Arundhati. 'Post-Constitutional Queer Politics in India' (2023) 15 Law and Society Review 108
26. Kothari, U. 'Between Love and Law: Queer Experiences of Legal Mobilisation in India' (2021) 16(2) Socio-Legal Review 45
27. Kotiswaran, Prabha. *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* (Princeton University Press 2011)
28. Kottai, SR. 'Legal Recognition and Material Exclusion of Queer Persons' (2024) 9 Journal of South Asian Legal Studies 45
29. Narrain, Arvind. *Queer: Despised Sexuality, Law and Social Change* (Sage Publications 2012)
30. Narrain, Arvind & Bhan, Gautam (eds). *Because I Have a Voice: Queer Politics in India* (Yoda Press 2005)
31. *National Legal Services Authority v Union of India* (2014) 5 SCC 438
32. *Navtej Singh Johar v Union of India* (2018) 10 SCC 1
33. Nazariya Foundation. 'Unheard Stories: Policing and Trans Street Economies in Delhi' (2021)
34. Nirangal. 'Unpublished Field Interviews with Trans Sex Workers in Chennai' (2020)
35. Puar, Jasbir. 'Homonationalism and the Politics of Inclusion' (2007) 28 GLQ: A Journal of Lesbian and Gay Studies 177
36. Reddy, Gayatri. *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press 2005)
37. Shah, SP. 'Policing Morality: Regulating Sex and Space in Colonial India' (2019) 14 Journal of Historical Sociology 178

38. Shah, SP. 'Legacy of Colonial Population Control Laws in Contemporary Policing' (2019) 4(1) Indian Journal of Legal History 75
39. Shukla, Surabhi. 'Dignifying Inclusion? Queer Women and Legal Visibility in India' (2020) 22 Feminist Legal Studies 89
40. Singh, Rahul. 'Unequal Privacy Rights and Queer Lives in Post-Decriminalization India' (2015) 7(1) Journal of Human Rights 123
41. Spade, Dean. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2015)
42. Telangana Hijra Collective. 'Documenting Police Violence Against Trans Communities' (2022)
43. Transgender Persons (Protection of Rights) Act 2019 (India)
44. Tripathi, B. 'Trans Criminology in India: Visibility and Violence' (2021) 3 Gender and Society Review 9
45. *X v State of Uttarakhand* Writ Petition (Criminal) No. 577 of 2020