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#### ABSTRACT

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This paper will consider whether LGBT rights are best seen as drawing from a wider notion of struggle. To make this point, the present paper will first map the role that pioneers of democratic struggle, whether Luis Gama in Brazil, Mahatma Gandhi in India or Nelson Mandela in South Africa, have played in setting in place an understanding of transformative democracy. It will be argued that this foundational struggle has had an imprint upon the constitutional framework in those countries and hence makes it possible for the Constitution to be transformative. This paper then argues that a successful LGBT articulation in each of these countries draws upon these histories of resistance, be they against colonialism in India, racism and military rule in Brazil or apartheid in South Africa.

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#### KEYWORDS

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ARTICLE

# BRAZIL, INDIA, SOUTH AFRICA: TRANSFORMATIVE CONSTITUTIONS AND THEIR ROLE IN LGBT STRUGGLES

Arvind Narrain

*Twelve voices were shouting in anger, and they were all alike. No question, now, what had happened to the faces of the pigs. The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which.*

George Orwell (1945)

## 1 Introduction

The BRICS states (Brazil, Russia, India, China and South Africa) are increasingly viewed as a new power bloc, with the potential to displace the hegemony of the global north. The key question is: If there is a transition, what kind of transition will this be? Will it amount to a substantive change from the past, or will it be merely what Orwell described at the end of *Animal Farm*, when the pigs take over from the humans and exploit the other animals just like the humans before them?

The BRICS have the potential to become the pigs Orwell warned against. They already possess elements of domination based on economic power. The footprint India and China have left across Africa is a testament to the economic power exerted by the BRICS, and their enormous potential for causing widespread harm.<sup>1</sup> While this is the world of real politics, as activists the concern would be whether there is another kind of connection which can be forged between the BRICS' peoples, between social and political struggles by movements in each of these countries.

Activists in each of the BRICS nations have very different challenges based upon the degree of authoritarianism of their respective states. Each country has its own political trajectory—India, South Africa and Brazil are democracies (to varying degrees), while Russia and China suffer from authoritarianism (of

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differing degrees). This paper examines the possibilities and inter-connections opened up through people's struggles in the three democracies (i.e. Brazil, India and South Africa).<sup>2</sup> First I discuss whether the history of democratic struggles in each of these countries provides the foundation for a widening and deepening of democracy. To make this point, I focus on the role that pioneers of democratic struggle—Luis Gama in Brazil, Mahatma Gandhi in India or Nelson Mandela in South Africa—have played as emblems of a collective resistance and mappers of a collective future. I then argue that the constitutional framework adopted in each of these states bears the imprint of these struggles and hence has the potential to be transformative. Finally I make the point that a successful LGBT articulation in each of these countries has depended on its ability to draw upon these histories of resistance, whether against colonialism in India, racism and military rule in Brazil or apartheid in South Africa.

## 2 Fleshing out the idea of freedom: Nelson Mandela, Mahatma Gandhi and Luis Gama

The biographies of three figures—Nelson Mandela in South Africa, Mahatma Gandhi in India and Luis Gama in Brazil—symbolize the struggle against racial and colonial domination. Their lives serve to articulate some of the dimensions of what freedom means and provide something akin to a 'freedom roadmap'.

In his autobiography, *A Long Walk to Freedom*, Mandela details what it meant to live under a regime of daily humiliation. In a country which is overwhelmingly black, the African child discovered that he or she had no place:

*An African child is born in an Africans-only hospital, taken home in an Africans-only bus, lives in an Africans-only area and attends Africans-only schools, if he attends school at all [...]*

*When he grows up he can hold Africans-only jobs, rent a house in Africans-only townships, ride Africans-only trains and be stopped at any time of the day or night and be ordered to produce a pass, without which he can be arrested and thrown in jail. His life is circumscribed by racist laws and regulations that cripple his growth, dim his potential and stunt his life.*

(MANDELA, 1994, p. 109).

It is this realization spurred by "a steady accumulation of a thousand slights, a thousand indignities and a thousand unremembered moments" which, according to Mandela, fed "an anger, a rebelliousness, a desire to fight the system that imprisoned my people" (MANDELA, 1994). The struggle against the apartheid system waged by the South African people and symbolized by the twenty-seven years Mandela spent in prison could easily have perverted the meaning of democracy. However as early as 1962, in the course of the Rivonia trial, Mandela articulated a broad and encompassing notion of what democracy would mean in post-apartheid South Africa. As he put it,

*I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.*

(MANDELA, 2014).

This experience of indignity and collective humiliation suffered by the black people of South Africa and by Mandela finds a precursor in the struggle of Mahatma Gandhi. The ideas of satyagraha, or non-violent action, actually took shape in Gandhi's head in South Africa (where he lived for twenty-one years). When he arrived in South Africa for the first time to work as a lawyer for an Indian merchant, Gandhi quickly realized that his Indian colleagues survived in South Africa only by "[making] it a principle to pocket insults as they might pocket cash" (GANDHI, 1968, p. 57). And this is precisely what Gandhi refused to do.

The incident at the city of Pietermaritzburg, South Africa in 1893, where Gandhi was thrown off a train due to his insistence that he had a first class ticket and hence as much right to be there as any white person, has justly become famous. On being thrown off the train, Gandhi contemplated his future course of action:

*I began to think of my duty. Should I fight for my rights or go back to India, or should I go on to Pretoria without minding the insults, and return to India after finishing the case? It would be cowardice to run back to India without fulfilling my obligation.*

(GANDHI, 2010, p. 107).

As we know, the train incident hardened Gandhi's will to challenge racist domination.

After the Pietermaritzburg incident, Gandhi attempted to resume his journey by coach; with great difficulty he finally obtained a ticket, but only on the condition that he sit outside, next to the coachman, and not inside the coach where there were only white people. As Gandhi was sitting outside, next to the coachman, the leader of the coach came out from inside the coach and confronted him. Gandhi described the ensuing scene:

*Now the leader desired to sit where I was seated, as he wanted to smoke and possibly to have some fresh air. So he took a piece of dirty sack cloth from the driver, spread it out on the footboard and addressing me said, 'Sami, you sit on this, I want to sit near the driver.' The insult was more than I could bear. In fear and trembling I said to him, 'It was you who seated me here, though I should have been accommodated inside. I put up with the insult. Now that you want to sit outside and smoke, you would have me sit at your feet. I will not do so, but I am prepared to sit inside.'*

*As I was struggling through these sentences, the man came down upon me and began heavily to box my ears. He seized me by the arm and tried to drag me down. I clung to the brass rails of the coachbox and was determined to keep my hold even at the risk of breaking my wristbones. The passengers were witnessing the scene, the man swearing*

*at me, dragging and belabouring me, and I remained still. He was strong and I was weak. Some of the passengers were moved to pity and exclaimed: 'Man, let him alone. Don't beat him. He is not to blame. He is right. If he can't stay there, let him come and sit with us'.*

(GANDHI, 2010, p. 109).

Gandhi further describes another incident: when walking on the street, he was ordered to leave the footpath and was pushed and kicked into the street (GANDHI, 2010, p. 125). On another occasion, upon his return to South Africa from India in 1897, he was pelted with 'stones, brickbats and rotten eggs' (GANDHI, 2010, p. 186).

So if freedom is to mean anything at all, at the least it must mean that this regime of insults and humiliations is overthrown. Formally the struggle of Gandhi, which began in South Africa in the 1890s, culminated in India with independence in 1947. However while external freedom might have been won, the struggle against regimes of humiliation continues for vast sections of the Indian population.

The importance of narrating in great detail the humiliations faced by Gandhi is to underscore the idea that if freedom is to mean that one is liberated from a regime of humiliations, such a freedom is not yet the reality for a section of Indian people including LGBT persons and the minority Dalit community.<sup>3</sup> At the same time, it's important to note that the struggle against untouchability as well as the struggle for LGBT rights could draw inspiration from one who in his own life questioned the humiliations which still are heaped upon both Dalits and LGBT persons.<sup>4</sup>

While Gandhi and Mandela are iconic figures whose fame has travelled far beyond their shores, the Brazilian anti-slavery activist, poet, lawyer and journalist Luis Gama is a relatively lesser-known figure outside Brazil. Gama's life was even more eventful than that of Gandhi and Mandela.

Gama was born on June 21, 1830 to a Brazilian father and African mother. He was sold into slavery by his father at the age of 10 and spent eight years in bondage as a houseboy. During his time as a houseboy, he formed a friendship with Antonio Rodrigues do Prado, a law student who was staying with his owner and who taught him how to read and write.

In 1848, using his newly acquired knowledge, Gama then escaped from his owner along with certain legal documents and used those documents to make an argument before the court that he was not a slave and his detention was illegal.<sup>5</sup> The argument was accepted and Gama became free and went on to gain an education and become a lawyer. As a litigator, he was an unwavering fighter for the emancipation of Brazil's slaves, waging his struggle through the law courts as well as the media. His remarkable work ensured that many Negro slaves were freed. As James H. Kennedy notes,

*Unlike other talented Brazilians of colour who, once achieving fame and consequential social ascension, ignored the situation of their less fortunate brothers, Luiz Gama, after having won acclaim as a poet, dedicated the rest of his life exclusively to a personal struggle to abolish the institution of slavery in Brazil. He began his campaign by*

*defending in court blacks who had been illegally enslaved and by purchasing the freedom of the individual slaves with funds obtained from private sources. Very often he received financial contributions for his cause as a result of his anti-slavery lectures.*

(KENNEDY, 1974).

His aim was to achieve the ideal that “the land of the Southern Cross [Brazil] [be] without a king and without slaves” (KENNEDY, 1974). Gama’s story points us to a history of Brazil wherein the resistance to oppression based on colour is key. To treat human beings as slaves, to deny them their dignity, equality and autonomy, is anathema to the Brazilian history of struggle for equality. Gama’s often lonely fight for equality, emancipation and dignity through the creative use of the courts is a pivotal aspect of Brazilian history and an inspiration for subsequent progressive social movements.

The stories of these three figures form part of the history of the global struggle against domination; considered together, these three figures draw attention to another possible history for the BRICS. Humiliation and second-class citizenship were anathema to these great figures, who symbolize in their own persons a collective history of struggle against imperialism and racism. Looking forward, the question is how to connect these struggles to more contemporary contexts.

### 3 National liberation and LGBT activism: Some connections?

The links between the anti-apartheid struggle and the struggle for the rights of LGBT people are best illustrated through the iconic story of Simon Nkoli, an activist against both apartheid and institutionalised homophobia. Simon’s story is well known in South Africa, but must become more widely known in the global LGBT community. His struggle exemplifies a new and inspirational model for activism, neither sectarian nor singular, but embodying the widest notion of a suffering humanity.

Tseko Simon Nkoli’s anti-apartheid activism began with his arrest in the student rebellions of 1976. In 1979 he joined the Congress of South African Students (COSAS); this student activism led him to join the African National Congress and the United Democratic Front (UDF). In 1984 he helped establish the Vaal Civic Association, charged with organising tenants in the township of Delmas, east of Johannesburg.

Nkoli and 21 others from the UDF were arrested after a march protesting government-imposed rent hikes. They were charged with ‘subversion, conspiracy and treason’, crimes subject to the death penalty. The ‘Delmas Trial’ lasted four years.<sup>6</sup>

While in the Pretoria Central Prison, Nkoli came out to his comrades when a love letter written by his fellow prisoner to a convict was discovered by the warden; the warden informed the other inmates of this. In a meeting among the accused to discuss this letter, Nkoli discovered general outrage and strong sentiments prevailing against homosexuals.

As Nkoli tells it, Terror, a cellmate, announced: “Comrades, I’ve got this

love letter. It's disgusting [...]" Hearing this range of negative opinions expressed about homosexuals, and witnessing the physical violence visited upon the letter's author, Nkoli found himself overcome by rage. As he says, "The next thing I heard was my own voice, interrupting, 'What about me?' Terror was dumbstruck: he had only ever had political discussions with me" (GEVISSER; CAMERON, 1994, p. 254). As Nkoli continues, "But then others started interjecting. One guy said, 'We should have our own trial. I'm not going to stand accused with a homosexual man'. I stood up and said, 'I think I should leave this meeting now. This is including me as well. Here you are not talking about the person who committed this act. You're actually talking about homosexual men and I am one'" (GEVISSER; CAMERON, 1994, p. 254).

What followed was an intense period of discussion on whether Nkoli should stand trial with the other Delmas accused. Finally the intervention of the progressive lawyers defending the accused decided the matter—the lawyers were unequivocal in stating that they would pull out if there were more than one trial. As Nkoli puts it, these intense debates and discussions, combined with the strong support that he received from the anti-apartheid movements in Britain and Europe, resulted in a change in attitudes.

This action, and the debates it inspired, prompted UDF leaders (such as co-defendants Popo Molefe and Patrick Lekota) to recognize homophobia as a form of oppression. Terror Lekota, now national chair of the ANC and fellow Delmas defendant, said that, despite initial hostility,

*All of us acknowledge that Simon's coming out was an important learning experience [...] How could we say that men and women like Simon, who had put their shoulders to the wheel to end apartheid, should now be discriminated against?*

(DAVIS, 1999).

In Simon Nkoli's own words,

*I'm sure that my continued involvement with the African National Congress after my acquittal has helped to gain credibility for gay rights within the liberation movement, and it has also helped many other gay and lesbian people within the liberation movement in their coming out. It's difficult for me to tell exactly what the relationship is between my anti-apartheid activism and my gay activism, but there are two things I know for sure. The first is that my baptism in the struggles of the township helped me understand the need for a militant gay rights movement. The second is that this country will never protect the rights of its gay and lesbian citizens unless we stand up and fight—even when it makes us unpopular with our own comrades.*

(GEVISSER; CAMERON, 1994, p. 256).

In India, there is no inspirational presence like Simon Nkoli, who straddles the worlds of anti-imperialism and the freedom to define one's sexual identity. However, there is another iconic figure who, much like Simon Nkoli, not only struggled against external (imperialist) domination but equally against internal

(caste) domination. The figure I want to recall is Dr. B.R. Ambedkar – the first untouchable leader of modern times and a politician, lawyer and statesman who ceaselessly fought against the discriminatory attitudes of upper caste India towards the Dalit community.<sup>7</sup>

Much like Luis Gama in Brazil and Gandhi in South Africa, Dr. Ambedkar struggled throughout his life to overthrow the regime of daily humiliations he experienced as a Dalit person. The majoritarian ethic prevailing in India imposed apartheid-like restrictions on Dalits: where they could live, what kind of work they could do, whom they could marry and what they could eat. Any disobedience of these series of prohibitions, enforced by the sanction of the caste system, was treated with severe consequences, even murder.

Though there is no direct connection between the struggle of the Dalit community and the struggles of the LGBT community, there is one in terms of principle. Dr. Ambedkar's struggle was fundamentally one against the majoritarian ethic, as with the struggle of LGBT people. In Dr. Ambedkar's thinking, morality could never be the basis for depriving a minority of their rights. The fact that the majority considered it immoral to dine with Dalits, or to live in the same quarters as Dalits, did not mean that the majority opinion should prevail. Dr. Ambedkar's life exemplified the struggle against a morality which sanctified the customs and thoughts of the majority as the law of the day. It is precisely this struggle against a majoritarian ethic which embodies the struggle of the LGBT community in India today.

In Brazil, the iconic struggle against the military dictatorship of 1964-1985 serves in many respects as the founding narrative for social movements. As Glenda Mezarobba puts it,

*Among the most frequently adopted penalties were exile, suspension of political rights, loss of political mandate or removal from public office, dismissal or loss of union mandate, expulsion from public or private schools and imprisonment. Just as arbitrary detention was commonplace, so was the use of torture, kidnapping, rape and murder [...] To eliminate its opponents, the government instead carried out summary executions or killed its victims during torture sessions, always behind closed doors.*

(MEZAROBBA, 2010).

The struggle to end the myriad practices of cruelty which constituted the dictatorship forms the heart of the Brazilian impulse toward democratization. It is this same impulse LGBT activists in Brazil draw upon in their struggle.

#### 4 Transformative Constitutions

These struggles—whether in South Africa against apartheid, in India against colonial domination and caste domination, or in Brazil against military domination—have profoundly influenced the nature of the states that arose in their wake. The constitutions of India, South Africa and Brazil, adopted and shaped in light of their painful pasts, are what Professor Upendra Baxi calls 'transformative constitutions'. In his words,

*The BISA (Brazil, India, South Africa) project constitutes a momentary, and even perhaps, momentous, pursuit of the politics of human hope. It postulates the idea that constitutions are necessary and desirable and further that they may, in some contexts of history, carry a transformative burden, character, or potential.*

(BAXI, 2013, p. 30).

The transformative aspect of a constitution may come not from its official interpretation, but rather from ‘the voices of human and social suffering of the rightless’ or ‘communities of resistance’ (BAXI, 2013, p. 27), once they become interpreters of the constitution. It is in this context that a remembrance of the many histories of struggle that resulted in the constitution become deeply relevant. The narratives of Gandhi, Gama, Ambedkar and Mandela—among many others—would be vital in bringing to bear an understanding of the constitution as a document not of the past, but with deep meaning for a future based on respect for the inherent dignity of all persons.

*The idea of a transformative constitution is also addressed by (former) Chief Justice Mahmood of the South African Constitutional Court in a 1995 case where the death penalty was declared unconstitutional: It [The South African Constitution] retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.*

(SOUTH AFRICA, *S v Makwanyane and Another*, 1995, para. 262).

What marks Brazil, India and South Africa is that the constitutions of these three countries set in place a normative framework of rights which had the ability to speak to the future. The constitution did not lock in place dead and fossilised institutional arrangements but, on the contrary, opened the door to the future.

The constitutions of Brazil, India and South Africa, in the hand of imaginative judges, have the potential to speak to the situation of the oppressed. Justice Vivian Bose, one of India’s finest judges, best expressed this sentiment when he said that the words of the constitution are not “just dull lifeless words static and hidebound as in some mummified manuscript”, but rather a “living flame intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present” (INDIA, *State of West Bengal v. Anwar Ali Sarkar*, 1952, para. 84-85).

The reason it is possible to think of a constitution in these terms is because these constitutions have behind them a rich history of struggle. The challenge is how this rich history of struggle transmutes the constitution from ‘dull lifeless words’ to ‘tongues of dynamic fire potent to mould the future’.

## 5 Transforming norms of gender and sexuality: The Constitutional experience of Brazil, India and South Africa

LGBT activism must address the question of how this notion of a transformative constitution can be extended and advanced in order to address the humiliations suffered by the LGBT community.

In South Africa, the struggle against racism encompassed within its fold a conceptualization of the struggle against discrimination on the grounds of sexual orientation. As a result, the Constitution itself expressly recognized sexual orientation as a prohibited basis of discrimination in the new South African state:

### 9. Equality [...]

*(3)The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

(SOUTH AFRICA, 1996, p. 1247).

The judiciary has read the equality provisions along with the provisions guaranteeing dignity<sup>8</sup> to effect a progressive jurisprudence on LGBT issues: these provisions have served to invalidate anti-sodomy laws (SOUTH AFRICA, *National Coalition for Gay and Lesbian Equality v. Ministry for Justice*, 1998) and have allowed the Constitutional Court to powerfully assert that only the legal recognition of marriage on par with heterosexuals would stand the test of equality and dignity (SOUTH AFRICA, *Minister of Home Affairs v. M.A. Fourie*, 2005).

*In Minister of Home Affairs v. M.A. Fourie, where the Court held same sex marriage to be on par with heterosexual marriage, the Constitutional Court declared as follows: The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage.... Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect.*

(SOUTH AFRICA, *Minister of Home Affairs v. M.A. Fourie*, 2005, para. 60).

The judges expressly drew from the history of the struggle against apartheid as they fashioned a new series of rights. In the judges' conceptualization, the struggle for equality for LGBT persons flowed from the struggle against racism.

While South Africa's Constitution includes the recognition of sexual orientation, by comparison in India the only legal recognition of LGBT people is the Indian Penal Code of 1860, which criminalizes what it calls 'carnal intercourse against the order of nature'.<sup>9</sup> This provision has stood for over one hundred and forty years uninterrupted and functioned as a tool to harass the LGBT community.

Most recently on December 11, 2013, the Supreme Court of India ruled that the law which criminalized homosexual acts was constitutionally valid, signalling a failure to apply the norms of equality, privacy and dignity to LGBT persons (INDIA, *Suresh Kumar Koushal v. Naz Foundation*, 2014). This decision constituted a huge failure of the Court, not only to recognize that LGBT persons have rights, but more importantly that the Indian Constitution might be transformative. This becomes even more marked when one views the decision which the Supreme Court overruled, namely that of the Delhi High Court in *Naz Foundation v. NCR Delhi* (INDIA, *Naz Foundation v. NCR Delhi*, 2009).

When the history of the LGBT movement in India is written, the Delhi High Court's decision, which took four years, will represent a landmark moment of great transformation. This was because in 2008, after fifty-eight years of constitutional silence (The Indian Constitution came into force in 1950), the Delhi High Court struck down the provision of the Indian Penal Code (IPC) in light of the constitutional promise of equality, privacy and dignity. The judgement itself drew from both the experience of the LGBT community and from deep constitutional wellsprings. The creativity of the judgement lay in its use of a philosophical approach to the Indian Constitution as a document of 'inclusivity' in order to redress the history of violence and humiliation suffered by the LGBT community.

The Delhi High Court in *Naz Foundation v NCR Delhi* struck down Section 377 of the IPC, thereby effectively decriminalizing the lives of LGBT persons. What is remarkable is that the judges, in arriving at their conclusion that Section 377 was in violation of the right to equality, privacy and dignity, chose to place this case within a transformative constitutional tradition.

They cited Dr. Ambedkar's notion of constitutional morality to clarify and emphasise that the vision of a democracy in India was not merely majoritarian in nature. Even if the majority of Indians disapproved of LGBT persons, or even if Parliament, with three strokes of the legislative pen, chose to deprive LGBT persons of all rights, the judges would not stand idle. Constitutional morality imposes a responsibility to protect those who could be at the receiving end of a majoritarian public morality.

While affirming that India is, at its core, a democracy that guarantees rights to all (especially the minority), the Delhi High Court also observed that inclusivity serves as a wellspring of Indian democracy. In support of this conclusion, the Delhi High Court drew upon Jawaharlal Nehru's moving speech on the Objectives Resolution in the Constituent Assembly on December 13, 1946, in which Nehru declared that the House should consider the Resolution not in a spirit of narrow legal wording, but rather in terms of its underlying spirit. In Nehru's words,

*Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion [...] [The Resolution] seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.*

(INDIA, *Naz Foundation v. NCR Delhi*, 2009, para. 129).

Drawing from Nehru, the judges from the Delhi High Court concluded that,

*If there is one constitutional tenet that can be said to be the underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.*

(INDIA, *Naz Foundation v. NCR Delhi*, 2009, para. 130).

The judges in *Naz Foundation* drew upon the spirit of the Constitution, in justifying the principles of inclusiveness and against majoritarianism, thereby linking the current travails of the LGBT community to the values embodied in the Indian struggle for independence.

Similarly, Brazil has applied its transformative Constitution, borne of its history and the ashes of military rule, to the indignities suffered by LGBT persons. In 1985 Brazil emerged from a regime of military dictatorship, slowly transitioning towards democracy. This process resulted in a new constitution, Brazil's eighth since its independence. This new constitution, dubbed the 'Generous Constitution', was drafted in reaction against Brazil's long history of social injustice, rampant inequality and the arbitrary exercise of state power, recognizing and protecting individual and social rights (FRIEDMAN; AMPARO, 2013).

In a case regarding the constitutional validity of permanent same sex unions, the Supreme Federal Court of Brazil (STF, in its original language) unanimously ruled in 2011 that, according to the Federal Constitution of Brazil, same-sex unions are equal to opposite-sex unions and should be extended the same rights and duties. The Court recognized that same-sex public and lasting unions, like opposite-sex unions, are also the nuclei of families and should be correspondingly protected (FRIEDMAN; AMPARO, 2013).

In ruling thusly, the Court confronted the obstacle of Article 226 of the Constitution:

*Article 226. The family, which is the foundation of society, shall enjoy special protection from the State.*

*Paragraph 3—For purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.*

(BRASIL, 1988, p. 37).

The Court concluded that 'The Constitution's words cannot be used against its intention', thereby drawing upon the ideal of a 'transformative constitution'. According to the Court:

*[P]eople's sex and sexuality are not valid grounds of discrimination. If used for that purpose, those grounds would collide with Brazil's constitutional objective of 'promoting the well-being of all' (article 3, IV), eroding the principles of socio-political-cultural pluralism and material democracy with the respectful co-existence of differences.*

(FRIEDMAN; AMPARO, 2013, p. 275).

In the substantive reasoning, Britto J's ruling concluded:

*[Britto J] said that the right to sexual freedom is an elementary part of one's human dignity and autonomy, in their personal pursuit of a meaningful life. It is also based on the rights to freedom, privacy and intimacy, resulting, in fact, in an individual right to personality, which is both immediately applicable (article 5, § 1) and irrevocable (article 60, § 4, IV). That considered, there are no licit grounds for unequal treatment of homoaffective and heteroaffective people.*

(FRIEDMAN; AMPARO, 2013, p. 275).<sup>10</sup>

The Superior Court of Justice (STJ in its original language), the highest court of appeal in matters of federal law in Brazil, built upon the STF decision in a judgement later in 2011, recognising the right of a same-sex couple in stable union to get married, like that of a heterosexual couple.<sup>11</sup>

## 6 Towards a conclusion

From this account of the history of struggle for LGBT rights in Brazil, India and South Africa, the following conclusions may be drawn:

*Firstly*, there is a connection between LGBT rights and wider struggles for dignity, equality and human rights. Campaigns for LGBT rights in all three nations have built upon each nation's history of struggle against previous forms of oppression. The concepts of dignity and equality are central to the histories of Brazil, South Africa and India; these principles form a part of the normative architecture of each constitution. It is this striving to achieve equality, and to be treated with dignity, which is at the foundation of the political demands of the LGBT community. The advances made by the notions of equality and universal dignity in all three societies have been fundamental to achieving the demands of the LGBT community.

*Secondly*, while it is true that the LGBT struggle for rights depends for its normative sustenance on the constitutional wellsprings of equality and dignity, it does not therefore follow that these principles will be observed in relation to the rights of LGBT persons. Unlike the struggle against imperialism (which frequently bore an external face), the enemy, in the case of the LGBT struggle, is very often in social attitudes and institutional arrangements which form an unquestioned part of the national culture. The struggle against this opposition, which frequently appropriates the symbolism and rhetoric of 'nationalism', often leads LGBT persons to be depicted as 'anti-national' or 'traitorous'. These attempts to corral and isolate LGBT persons must be defeated; LGBT activists must draw

upon the national heritage of the right to be treated with equality and dignity and claim this proud history, along with a broader cosmopolitan vision, in the name of their own struggles. The struggle for LGBT rights, while drawing from individual national roots, cannot be limited to the struggles of individual national LGBT communities; it is essential that creative and sensitive international solidarity networks be established and strengthened in order to widen the support base of the LGBT community.

*Thirdly*, judicial decisions can, at key points, become initiators of national conversations. They can serve as important turning points in the struggle for rights. The constitutional tradition continues to play a strong role in each of these countries in relation to LGBT rights. One of the shortcomings of any democratic government is that the majority view may prevail without any regard for the legitimate rights of the minority; however, in each of these three countries, the Courts have, at points in time, served as defenders of the rights of unpopular minorities, refusing to surrender their essential role in protecting the rights of all citizens from the majoritarian will (as expressed through parliamentary process).

*Finally*, the task still at hand is to provide an account of activism in both China and Russia as well, so that the idea of the BRICS from the point of view of people's struggles can be further developed. It is only a notion of BRICS nourished by the voices of 'people in struggle and communities in resistance' which can develop a new imagination.

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## NOTES

1. See <<http://china.aiddata.org>>; see also Sundaram (2013).

2. For BRICS to mean anything at all to the struggle for a democratic future, the work of building a connection with activism in Russia and China is vital.

3. For both communities everyday humiliation and violence is the order of the day. See Human Rights Watch (1991). This report puts together a searing account of the everyday humiliations faced by the Dalits until today; see also PUCL-K (2003).

4. One should also note that there has been a rich debate between Gandhi and Ambedkar on how to deal with the problem of caste. Ambedkar was the leader of the Dalit community and he felt that Gandhi's method of dealing with caste was unsatisfactory. However there are other accounts which have sought to reconcile the perspectives of Gandhi and Ambedkar. For a discussion of the debate between Gandhi and Ambedkar, see B.R. Ambedkar (2014). For an attempt to reconcile Gandhi and Ambedkar see D.R. Nagaraj (1993).

5. The legal argument which Gama successfully advanced was that the transaction by which he had been sold into slavery by his father was doubly unjust: as Gama was born of a free woman, and as he had no legally recognised father, his biological father held no title to ownership of the child. Further, the slave trade had been prohibited by Brazilian law since 1831. Cf. Kennedy (1974, p. 255-267 at 260).

6. See <<http://www.csa.za.org/blog/item/94-simon->

[nkoli](#)>. Last accessed on: 1 August 2014.

7. See generally Gail Omvedt (2004). The word Dalit, which means 'oppressed', is a self description of what were called the 'untouchable' communities.

8. Section 10 of the South African Constitution: "Human dignity: Everyone has inherent dignity and the right to have their dignity respected and protected."

9. Section 377 of the Indian Penal Code: "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 and shall also be liable to fine. Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section."

10. "Maria Berenice Dias, jurist and former Rio Grande de Sul High Court Judge, is known for her academic research and litigation for gay rights in Brazil. She started to use the term homoaffective instead of homosexual to stress that homosexuality is not only about sex or eroticism, but also—and perhaps mainly—about love and affection. The word gained mainstream use and has even been included in dictionaries" (FRIEDMAN; AMPARO, 2013, p. 274).

11. See <<http://stj.jusbrasil.com.br/jurisprudencia/21285514/recurso-especial-resp-1183378-rs-2010-0036663-8-stj>>. Last accessed on: 1 August 2014.