

The Road to Decriminalization: Litigating India's Anti-Sodomy Law

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I. INTRODUCTION

Late in the afternoon on an early spring day, the Supreme Court of India began hearing the final arguments that would determine the legal status of the lesbian, gay, bisexual and transgender community in India. Earlier that very week, I told my parents that I was a member of the litigation team – and that I was gay. Without warning, I found arguments from a heated family discussion reverberating in the chambers of a court of law.

These dialogues were inevitable: both the ones in the courtroom and the ones with my parents. In 2009, the Indian LGBT community took its first step towards equal sexual citizenship through the Delhi High Court's judgment in the matter of *Naz Foundation v. NCT of Delhi and Others*.¹ The Bench, comprising then Chief Justice of the High Court Justice A.P. Shah and Justice Muralidhar, crafted a 105-page document that is considered a landmark moment in Indian judicial history. The judgment not only empowered a historically marginalized community, but it also laid the foundation to strengthen other human rights struggles in the country with its expansive reading of constitutional rights. Yet for all the revelry that surrounded the judgment, there was an equally fierce backlash that played out across Indian television screens as advocates for the movement faced off with opponents from religious groups of all faiths and denominations. It was inevitable then, that within two weeks of the decision, an appeal was filed before the Supreme Court of India.

The conversation with my parents too, had been set into motion years before. Maybe it began with that first wave of self-acknowledgment, or the

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1. 160 (2009) DLT 277.

first outing (to a law school classmate, in the middle of a quiz), or even the first piece of writing I did on the issue. I still recall the forced-casual call I received from my father years ago as he inquired about “this academic piece on homosexuals you wrote which I just found online.” I registered his emphasis on the word “academic,” almost a plea – let it just be academic interest. Even more vivid was the look on my mother's face as I informed her in no uncertain terms that I wouldn't ever get married, “for reasons I can't explain right now.” We dealt with it by not dealing with it – until, that is, the day we had to, when the implied became an expressed statement, and the option of reading between the lines disappeared.

“Homosexuality is a disease.” A sentiment expressed by a psychiatrist to whom I was taken. An argument advanced before the Supreme Court of India. “Homosexuality is a part of Indian culture, and has been for millennia.” Two judges grappled with this submission. Two parents struggled to reconcile themselves with this information. Progress was made on both fronts. A Rajasthani folk story was the more unlikely of submissions which seemed to make an impact on the Court. Time, plain and simple time, was what led my family to take their first tentative steps toward understanding.

I write these words at a time of uncertainty. It has been more than a year since the Supreme Court of India finished hearing arguments on the case. In the hands of a two-judge bench, Justice G.S. Singhvi and Justice S.J. Mukopadhyay, lies the question of whether the lesbian, gay, bisexual and transgender community in India will continue to remain outside the specter of criminality – or be dragged back into it. An uneasy anticipation has descended upon the LGBT community as all eyes turn toward the Supreme Court, while tentative action plans are made depending on what way the judgment will go. Uneasiness characterizes the silence between me and my parents too, as we push the now-acknowledged issue of my sexuality to the background of our conversations.

We don't know when the judgment will be out, and we can't really predict which way it will go. What then is this Note hoping to achieve?

I'm attempting to capture a moment of uncertainty in the LGBT struggle in India. Whatever the Supreme Court does, it will mark a significant milestone in the movement, the culmination of a litigation process already more than a decade long. But until it does come out with its judgment, we have the proceedings before the Court, and the context of the movement that led up to them, to illuminate what lies ahead.

Which is all well and good, but why impose upon this a parallel personal narrative simply because it intersected with this judicial moment?

I think the answer to that lies smack in the middle of the questions the Supreme Court judges raised over the course of the arguments. How did the impugned section actually target the LGBT community? What was the impact – the impact of the law, the impact of the *Naz Foundation* judgment, the impact of stigma? At what sites did the alleged blatant misuse of the

law happen? There are some answers to which the formal give-and-take of the adversarial legal system cannot do justice. Sure, we can file affidavits that testify to these experiences and produce media reports that recount the correct stories, but there will always be a level of formalism to the discourse. Academic legal writing, it isn't necessarily less formal, bound as it is by similarly rigid rules of constructing arguments and ruthlessly stripping whatever it perceives redundant. This, then, is an attempt to counter both kinds of rigidity. In the end, the story I tell is a universal one: the story of how we are required to make a case for law's empire as it intersects with different modes of power and shapes our lives. It is my response to the questions of the Court, a response that would be impossible to truly articulate within the realm of the courtroom.

Another reason I make use of this narrative device derives from the Romantics—the idea that if one describes the particular in enough detail, the universal will begin to seep through. The stories I've elected to tell here echo fragments of the larger story of the Indian LGBT movement and the manner in which it has evolved over the past decade. I'll start by talking about how the case finally came before the Supreme Court in the manner it did. I will locate the middle of this essay within the courtroom as the arguments were presented before the judges. Without a final decision to tell us which arguments were effective and which ones ultimately bit the dust, I'm again hoping to convey the mixed sense of anticipation and dread felt by the respondents in the Courtroom as different statements were presented and received by the Court. Finally, I'll end by discussing where the future of the movement might lie.

Early in the Supreme Court proceedings, the judges asked opposing counsel a seemingly throwaway question: "Do you know any person who is homosexual?" The counsel was Additional Solicitor General Mr. P.P. Malhotra, who replied that he was ignorant about "modern society." For many of us in the courtroom, this exchange evoked an important moment from another time and place—indeed, twenty five years before. Then it was the United States Supreme Court that was poised to finally recognize the unconstitutionality of anti-sodomy laws. What resulted however, was the near miss of *Bowers v. Hardwick*²; a 5-4 decision with the crucial swing vote of Justice Powell becoming a mythical point of contention in the movement.³ Years later, there came another moment, and that time, it wasn't a false alarm. With *Lawrence v. Texas*,⁴ the U.S. Supreme Court overruled *Bowers* and effectively decriminalized same-sex sexual activity throughout the country.

2. 478 U.S. 186 (1986).

3. Much ire was directed against Powell's law clerk who refrained from coming out to him, a point made particularly significant when Powell claimed he hadn't met a homosexual. The Note will expand on this story in a later chapter.

4. 539 U.S. 558 (2003).

Will this be our *Bowers* or our *Lawrence*? Or will the Court possibly go down a third path, abstaining from a declaration and asking the Government to decide?

II. GETTING THERE IS HALF THE FUN

"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 offense described."

These words compose Section 377 of the Indian Penal Code, the colonial era legislation that has been used to "persecute, blackmail, arrest and terrorize sexual minorities" in India since the inception of the Code, more than a hundred and fifty years ago.⁵ The *Naz Foundation* judgment's stroke of liberation came from removing consensual sexual intercourse between adults from the ambit of criminality. There are a number of moments one could start with in attempting to trace the story of the case.

In her book *Loving Women*, Maya Sharma locates the struggles of a number of working-class lesbian women, in which the honor of a family or village is often invoked to oppose the demands of two people who want to be with each other. One incident involves a woman who "dares" to elope with another woman being beaten and stripped, having her face blackened, and being paraded around a village with a garland of shoes on her neck.⁶ "Sahayatrika, a lesbian women's collective in Kerala, has documented twenty-four cases of lesbian couple suicides in Kerala during the period between 1996 and 2004."⁷

An important moment that one might use to identify the start of greater public discourse on LGBT issues is in precisely such a story. This was back in 1987 when Urmila Shrivastava and Leela Namdeo, two women from a rural background serving in the Madhya Pradesh constabulary, decided to get married at a temple. Harassed about their relationship by a male superintendent at a police training camp, they took a photograph of themselves

5. As stated in a widely circulated open letter signed by, amongst others, Vikram Seth, and endorsed later by Amartya Sen, available at http://www.nytimes.com/packages/pdf/international/open_letter.pdf/. The signatories included over 100 prominent persons belonging to the fields of law, film, academia, journalism and medicine, with the letter being widely reported across national and international media.

6. MAYA SHARMA, *LOVING WOMEN: BEING LESBIAN IN UNPRIVILEGED INDIA* (2006).

7. National Alliance of Women, India, *INDIA: SECOND NGO SHADOW REPORT ON CEDAW*, 207 (2006), available at <http://www.iwraw-ap.org/resources/pdf/India%20Shadow%20report.pdf> (last viewed Sept. 10, 2011).

enacting their marriage rites. Their subsequent dismissal captured the media's imagination and is one of the significant early "outings" of the LGBT movement in India.⁸ In their own words:

"We were kept in isolation and not given food for 48 hours. They coerced us into signing papers that we had not read. We were . . . deposited at the Bhopal railway station in the dead of night. They warned us against returning to the barracks."

Another point at which one might anchor this narrative is the moment of the first notable gay rights protest in India, organized by the AIDS Bhedbhav Virodhi Andolan (ABVA)⁹ in 1992. The ABVA worked on issues related to human rights of persons living with HIV/AIDS. Its 1991 report "Less than Gay" was one of the first documents to locate the violence faced by sexuality minorities within a larger circle of intolerance.¹⁰ Their public demonstration was primarily aimed at police harassment; in a memorandum submitted to the police, the ABVA asked: "When will the police get rid of its homophobia? Is it a crime for two consenting adults (of the same sex) to meet in a public place, become friendly and have a healthy discussion on sexuality or any other matter - which may or may not end up in sexual activity at a place other than a public place?"¹¹

As Suparna Bhaskaran explores in *Made in India*,¹² the rise of HIV/AIDS is significantly linked to the story of the LGBT movement. Following the discovery of HIV/AIDS amongst the wards of India's largest prison, Tihar Jail of New Delhi, a 1994 survey found that two-thirds of the inmates had participated in homosexual activity. The head of Tihar, Kiran Bedi, opposed the demand for the distribution of condoms amongst the prisoners by arguing that such measures would be tantamount to legalizing homosexuality: "[W]e just need to sort out the gays by giving them medical and psychiatric help."¹³ The ABVA's interventions then hinged on the health and human rights connection, starting from the premise that Section 377 impeded HIV/AIDS prevention efforts. In 1994, they filed a petition challenging the constitutional validity of Section 377 in the Delhi High Court. But by the time the petition finally came up for a hearing in early

8. Arati Rege, *A Decade of Lesbian Hulla Gulla*, in *HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY AND BISEXUAL RIGHTS IN INDIA* 142-46 (Bina Fernandez ed. 1999).

9. Roughly translated, "Movement to Protest AIDS Discrimination."

10. ABVA, *LESS THAN GAY: A CITIZEN'S REPORT ON THE STATUS OF HOMOSEXUALITY IN INDIA* (1991).

11. ABVA Memorandum to the Commissioner of Police, New Delhi (Nov. 8, 1992) (on file with the Alternative Law Forum).

12. Suparna Bhaskaran, *MADE IN INDIA: DECOLONIZATIONS, QUEER SEXUALITIES, TRANS/NATIONAL PROJECTS* 72 (2004).

13. *Id.*

2001, the group had disbanded.¹⁴

Another flagship moment was the extended conflict around the release of the film *Deepa Mehta's Fire* in 1998.¹⁵ Depicting a lesbian relationship, the movie was greeted with a storm of protests and attacks on cinema halls screening the film. Despite the protests—or perhaps because of them—the film ran to packed houses, and inspired counter-protests in its defense as well. In one or way or another, these events contributed to the scant public discourse around LGBT issues in the country, leading up to the moment in 2001 when the *Naz Foundation* petition made its first appearance.

A. The Naz Petition

A brief overview of the constitutional rights scheme vis-à-vis the judiciary might be useful at this juncture. Part III of the Indian Constitution guarantees a set of fundamental rights ranging from Article 14, which provides for the right to equality before the law and equal protection under law, to Article 21, which guarantees the right to life and personal liberty. One of the fundamental rights, Article 32, provides for the right to approach the Supreme Court of India for the enforcement of rights guaranteed under Part III. Subordinate to the Supreme Court are the various State High Courts, which may be approached for constitutional remedies under Article 226.

In July of 2001, a set of raids rocked the city of Lucknow and the LGBT community: first on a public park frequented by the MSM¹⁶ community, and next on the offices of two NGOs working on safe sex issues that led to the arrest of a total of ten people. The operation was conducted on the basis of a complaint filed with a Lucknow police station, wherein it was alleged that a certain Suresh had sodomized the complainant. Notable in the incident was the climate of homophobia stoked by the media, which indulged in sensationalizing headlines,¹⁷ and the Magistrate concerned further refusing bail to the men. In that denial of bail, instead of siding with the relevant law, the Magistrate clearly proceeded on the basis of his perceptions regarding homosexuality: “They...are polluting the entire society by encouraging the young persons and abetting them for committing the offence of sodomy.”¹⁸

It was towards the end of the same year that Naz Foundation, a Delhi-

14. See Arvind Narrain, *QUEER: DESPISED SEXUALITY, LAW AND SOCIAL CHANGE* 73 (2004).

15. See Rajeev Kumaramkandath, *Glimpses of the Fire: Documenting the debates around the film Fire*, CENTRE FOR THE STUDY OF CULTURE AND SOCIETY, cscs.res.in/courses_folder/other-courses/papers.2008-03-17.1729485494 (last visited Apr. 4, 2013).

16. Men Having Sex with Men, *see, e.g.*, *LGBT Section 377*, LAWYERS COLLECTIVE, *available at* <http://www.lawyerscollective.org/vulnerable-communities/lgbt/section-377.html>.

17. *See, e.g.*, *Gay Culture Started In UP In 1998 Itself*, TIMES OF INDIA, July 10, 2001.

18. NARRAIN, *supra* note 14, at 70 n.10 (2004), quoting Crim. Misc. Case No. 2054/2001.

based NGO working on HIV/AIDS issues, filed a petition before the Delhi High Court. The petition asked the Court to read Section 377 of the Indian Penal Code as excluding acts of consensual private sex from its purview.¹⁹ This wording was important, since asking the Court to wholly strike down the law would have had a direct impact on child rights groups that used the law to prosecute child sexual abuse.

2001 was also the year that my family moved back to India after a decade in the Middle East. In the midst of navigating reverse culture shock, I learned the meaning of the word “homosexual” and first encountered the vague anxiety that it could possibly apply to me. There was nothing in the world of popular culture to address that anxiety, though, the books and movies available to me maintained a studied silence on the issue. I made do with reading my fantasies into those stories, dismissing my casual reversal of the protagonists’ respective genders as an insignificant quirk. Also seemingly insignificant was the intense friendship I had fostered with a male classmate, failing to recognize in our back-and-forths the echoes of full-fledged relationships to come.

In 2003, the Government of India responded to the Naz Foundation petition. The response came in the form of an affidavit, with the Ministry of Home Affairs questioning the locus standi of the petitioner, asserting that “Section 377 has been applied to cases of assault where bodily harm is intended and/or caused and deletion of the said section can well open flood gates of delinquent behaviour and be misconstrued as providing unbridled licence for the same.”²⁰ The affidavit noted that there was no evidence for the fact that homosexuality was tolerated in Indian society prior to colonial rule and went on to conclude that “[o]bjectively speaking, there is no such tolerance to practice of homosexuality/lesbianism in the Indian society.”²¹ It further observed that “[w]hile the Government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large.”²²

This first round was unsuccessful: the Delhi High Court dismissed the petition in 2004 on the ground that the petitioner was not affected by Section 377 and hence had no locus standi to challenge the law. In the same year, the Court rejected a review petition challenging this order. On an appeal filed by Naz Foundation, the Supreme Court of India passed an order in 2006 remanding the case back to the Delhi High Court so the matter could be heard on its merits.

2006 was the year I began law school – and the year I finally came out

19. Writ Petition at 7-27, *Naz Foundation v. NCT of Delhi*, 160 DLT 277 (2009), available at <http://www.lawyerscollective.org/files/High%20Court%20Writ%20Petition.pdf>.

20. Counter-Affidavit on behalf of Ministry of Home Affairs, para 9, available at <http://www.lawyerscollective.org/files/MHA%20Affidavit.pdf>.

21. *Id.*

22. *Id.*

to myself. "Silence," says Cass Sunstein, quoting Kanan Maikya, "is a way of talking, of writing; above all, it is a way of thinking that obfuscates and covers up for the cruelty that should be a central preoccupation of those who make talking, writing, and thinking their business."²³ In most university campuses across the country, it was exactly this silence that pervaded the institution. Mario D'Penha and Tarun take note of this fact as they explore the emergence of queer university campus movements in the anthology *Because I Have a Voice*.²⁴ While reasserting how most university campuses have reflected the social reality of homophobia by being far from safe spaces for the assertion of students' identities, they look at the encouraging narratives from two Indian universities that have engaged in creating spaces for sexuality activism. Law schools in particular become a significant site for such activism, seeing as how official academic narratives are grounded in rights language and constitutionalism. From that abstract recognition of individual rights, it becomes difficult to then deny LGBT rights without contradicting the core belief of universality.

An important milestone for the National Law School in Bangalore was the declaration in the University's official prospectus that it did not discriminate on the basis of, amongst other things, sexual orientation. The Law School's official recommendations to the National Commission for the Review of the Constitution also suggested the inclusion of a non-discrimination clause in the Indian Constitution on the ground of sexual orientation. But while the National Law School also had a Gender Study Circle that embraced queer issues within its folds, it was Jawaharlal Nehru University in New Delhi that had the first queer students collective in India, called Anjuman. Anjuman took on board the alliance-building project of attempting to redefine the contours of the term "queer," to encompass any person who consciously questioned gender and sexual norms.

In the context of these tentative movements towards queer campus activism and the slowly emerging pop-cultural visibility of homosexuality, it was possible at least to have academic conversations about homosexuality in my law school. They weren't necessarily all positive ones, but I took the fact that my peers were willing to have these discussions at all as encouragement. The first real sign that tolerance had spread further than I had realized was when a classmate of mine did a paper on same-sex marriage, concluding forcefully that such values absolutely could not be imported to India. The vast majority of students greeted her with an uproar of opposition - they may not have engaged in much discourse on homosexuality, but they were law students in the end, and the homophobia in her arguments sat uneasily with their conceptions of justice.

23. CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

24. See Mario D'Penha and Tarun, *Queering the Campus: Lessons from Indian Universities*, in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* 205 (Arvind Narrain & Gautam Bhan eds., 2005).

So when I finally found my voice, there were empathetic ears to listen. The first two times I came out to a friend, I was saved the difficulty of having to complete my sentence - they did it for me. Encouraged, but still wary, I began to explore my sexuality through the academic realm. An internship with a sexuality rights NGO in Mumbai was my first exposure to writing on queer theory and feminist liberation. I was enthralled. The next time I came out to a friend, I managed to articulate my sexuality aloud. "I'm gay," I said. Two syllables, and two years to work up to expressing them.

Back in the Delhi High Court, the Health Ministry joined the fray in the year 2006, but in support of Naz Foundation: an affidavit was filed by the National Aids Control Organization that the enforcement of Section 377 was a hindrance to HIV prevention efforts. Corroborating similar contentions made by Naz Foundation, the affidavit stated that by driving high-risk activities underground, Section 377 made it extremely difficult to get needed information and services to those most at risk of contracting HIV. By the time the case came up for final arguments before the Court, the Delhi-based group Voices Against 377 had also joined Naz with its own petition, while the respondents list was supplemented by B.P. Singhal, a conservative activist, and Joint Action Committee, Kannur, an activist group which was primarily opposed to HIV/AIDS organizing.²⁵ The Alternative Law Forum, where I now work, came on board at this time as counsel for Voices Against 377.

The LGBT community followed the arguments in the Delhi High Court chambers with great interest—as did many human rights activists. Transcripts of the proceedings were widely circulated,²⁶ and in November of 2008 the arguments came to a close, the case reserved for judgment. The next few months involved a terse waiting period for the LGBT community and its supporters. At the same time, gay pride celebrations were becoming more popular in India, with the summer of 2009 finding major pride gatherings in Delhi, Chennai, Bangalore, and Kolkata. Then, as if to celebrate the spirit of pride itself, the Delhi High Court gave its judgment just a week after the pride marches.

B. The Judgment

I felt the first buzz of a new message on my phone at 10:45 am on July 2, 2009. Sitting in my fourth year law class on intellectual property rights, I knew instantly what the message would be about. The judgment had been scheduled to be delivered that morning, and I sat charged with the thrill of

25. Documents relating to the Naz Foundation case, available at www.lawyerscollective.org/vulnerable-communities/lgbt/section-377.html#more-168 (last visited Apr. 13, 2012).

26. *Id.*

anticipation. I'd found it hard to sleep the night before, the hours stretching endlessly as I waited to hear about the verdict. And yet, when the message came, when the actual answer stood facing me, I froze. This was it; this was the moment, and if I looked now, reality would come down on one side of the coin. Until the moment I looked, there was still the glorious uncertainty. But the phone buzzed again and again until I'd counted six messages. I excused myself from the classroom, ran out, and flipped open the phone. Five minutes later I was back in the room, the half-crazed smile on my face telling my friends all they needed to know, and in a flurry of whispers the news was relayed all around. Spontaneous applause broke out even as my phone began to ring, presaging the first of many gushingly happy conversations I was to have over the course of the day.

A 105-page document, *Naz Foundation v. Government of NCT of Delhi and ors.*²⁷ did not merely grant equal sexual citizenship to a historically marginalized community. It pushed towards a new discourse, away from the medicalized idea of the homosexual subject and towards a vocabulary of inclusiveness and tolerance. Deeply empathetic of the queer experience, the judgment grounded itself in the right to privacy,²⁸ equality,²⁹ non-discrimination,³⁰ dignity,³¹ and health.³²

To truly appreciate the judgment, it's important to place it in the narrative of prior case law and the history of the Section. Until *Naz Foundation*, the reported judicial decisions relating to Section 377 were mostly prosecutions of non-consensual sex between men and children, women or other adult men.³³ Section 377 itself can trace its origins to a 16th century law passed by Henry VIII and the British Parliament, which made "the detestable and abominable crime of buggery committed with mankind or beast" a felony.³⁴ Towards the end of the 18th century, Jurist Edward Coke's systematization of the English Penal Code defined buggery as "a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator and order of nature by mankind with mankind, or with brute beast, or by womankind with brute beast."³⁵ In 1828 the British Parliament recriminalized sodomy to make it a capital offense, applicable to British India and other places of

27. 160 (2009) DLT 277.

28. *Id.* para 47.

29. *Id.* para 94.

30. *Id.* para 104.

31. *Id.* para 26.

32. *Id.* para 72.

33. Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, ECON. AND POL. WKLY., Nov. 18, 2006, at 4819.

34. An Acte for the Punysshement of the Vice of Buggerie [sic], 1533-4 (Eng.)

35. SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES ch. 10 (1817).

trading in the East Indies.³⁶

The first draft of an Indian anti-sodomy law came in 1837, as part of the Draft Penal Code prepared by the first Indian Law Commission constituted in 1834. Clause 361 and 362 of the Code dealt with Unnatural Offences,³⁷ defining the offenses as touching any person or animal for the purpose of gratifying unnatural lust. With Thomas Babington Macaulay heading the Commission, the final language of the Section replaced this idea of unnatural touch with the equally vague "carnal intercourse against the order of nature." It is this definition that has survived in the Penal Code to date.

In his essay on *Section 377 and the Dignity of Indian Homosexuals*, Alok Gupta notes that out of over 50 reported judgments under the section, more than 30 percent deal with cases of sexual assault or abuse of minors, while the rest deal with non-consensual sexual activities between men and with women.³⁸ There are only two cases from the early decades of the twentieth century that specifically address consensual sexual acts between adults. Whenever the question of homosexuality arose, it was linked to a narrative of perversity—a view that remained remarkably consistent over the decades. A Sind Court in 1933 noted that "sodomy is one of those offences for which there can be hardly any extenuating circumstances; and even if so it cannot justify an over lenient sentence of four months rigorous imprisonment[.]"³⁹ seventy years later the Supreme Court noted that "[s]exual offences, however, constitute an altogether different kind of crime, which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape."⁴⁰ The unnatural carnal intercourse was at different points referred to as being an act of men of "depraved morality,"⁴¹ and one that was "abhorred by civilized society."⁴² The few cases that dealt with consensual homosexual sex only reaffirm this: in *Noshirwan v. Emperor*,⁴³ two men were caught attempting to commit sodomy in a house and reported to the police. Though they were not convicted because the act of sodomy was never completed, the judge reprimanded the accused as a "despicable" specimen of humanity for being addicted to the "vice of a catamite[.]"⁴⁴

36. An Act for Improving the Administration of Criminal Justice in the East-Indies, 1828, c.74 (Eng.).

37. Draft Penal Code of 1837 by Lord Macaulay - A Penal Code, Prepared by The Indian Law Commissioners, And Published by Command of The Governor General of India in Council, The Law Book Exchange Limited, Union, New Jersey, 2002. *Draft Penal Code of 1837 by Lord Macaulay* (Vol II, p 42).

38. Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, ECON. AND POL. WKLY., Nov. 18, 2006.

39. *Emperor v. Mohamed Yousif* AIR 1933 Sind 87, at 4819.

40. *T.K. Gopal v. State Karnataka* AIR 2000 SC 1669.

41. *Mirro v. Emperor* AIR 1947 Allahabad 97.

42. *Mihir v. State* 1992 CriLJ 488, 2.

43. *Noshirwan v. Emperor* AIR 1934 Sind 206.

44. *Id.* at 208.

Naz Foundation's most important achievement then was the manner in which it inaugurated a new discourse on queerness, one that moved away from the clinical, detached view of the homosexual to instead embrace the LGBT community within a language of dignity and inclusiveness. "If there is one constitutional tenet," says the judgment, "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."⁴⁵

The Court took this ethos to heart, starting by elaborating on the concept of dignity within the Constitutional framework. "[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society."⁴⁶ The judgment simultaneously elaborated on the right to privacy, expanding the concept from the zonal understanding under which prior Indian case law placed it, to also include a decisional notion: privacy that "deals with persons and not places."⁴⁷ Noting that the right to life and personal liberty under Article 21 of the Indian Constitution encompassed the rights to dignity and privacy, the Court held that Section 377 was unconstitutional in so far as it denied a person's dignity and criminalized their "core identity" solely on the basis of their sexuality, and that it further denied the right to "full personhood."⁴⁸

A particularly radical move was the Court's re-interpretation of Article 15 of the Indian Constitution. Article 15 is a specific application of the general doctrine of equality guaranteed by Article 14 – where the latter guarantees equality under the law and equal protection before it, the former lists prohibited grounds of discrimination, namely religion, race, caste, sex, and place of birth. The Court expanded the dimensions of Article 15 through its finding that "sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15."⁴⁹ Just as significantly, the Court noted that grounds which were not expressly highlighted in Article 15, but were analogous to those listed, might qualify for protection, since "personal autonomy is inherent in the grounds mentioned in Article 15."⁵⁰

Also significant was the court's discussion on constitutional morality. In responding to arguments about whether popular morality could stand as a justification for restriction of fundamental rights, the Court answered in the negative. It noted that popular morality was merely based on shifting notions of right and wrong, whereas constitutional morality, derived from constitutional values, was a more solid standard. It quoted the chairman of

45. 160 (2009) DLT 277, para 130.

46. *Id.* at para 26.

47. *Id.* at para 47.

48. *Id.* at para 48.

49. *Id.* at para 104.

50. *Id.* at para 112.

the Constituent Assembly, B.R. Ambedkar, in this regard: "The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable Constitutional morality is not a natural sentiment. It has to be cultivated."⁵¹ Arvind Narrain articulates the importance of this paradigm shift in terms of how the protection of LGBT persons speaks not only to guaranteeing constitutional rights to a minority, but also to the vision of the kind of nation "we all want to live in and what it means for the majority."⁵²

C. Post Naz

Encouraged by the class's reaction to *Naz*, and finally comfortable in my skin, I began to think of ways in which we could take the movement forward within the campus and bring together people interested in the issue. It began with Foucault: "*Do not ask me who I am and do not ask me to remain the same. . . . [L]eave it to our bureaucrats and our police to see that our papers are in order.*"⁵³ This was a good way, we felt, to headline the invitational notice of a forum whose primary aims include questioning the identities we had painstakingly constructed for ourselves in the first place.

We started small. Three of us, huddled around the less rickety of the two tables at our friendly neighborhood coffee shop, threw around ideas about scope, structure, organization, readings, and most importantly, the group name. Unable to come up with something sufficiently quirky, we stuck with the staid but respectable "Gender and Sexuality Forum." The minutes of the meeting were stored as text messages on our mobile phones. The *modus operandi* was simple: discussion and debate, accompanied by the occasional film screening.

With 60 active participants and about 10 curious onlookers, this was a much higher than expected turnout. We started by playing to our strengths: What better way to kick start a group conceived by a couple of queer students than to weave in a discussion on the *Naz Foundation* judgment? We were looking in particular at a critique of the judgment by the current Vice-Chancellor of another of India's premier legal institutions. While the critique itself starts with a disclaimer against making any kinds of value judgments, the statement "*Naz Foundation . . . has picked up and placed in the central stage an issue that I doubt deserves so much prominence . . .*"⁵⁴ was hardly encouraging. The group reached a degree of consensus on this point, and

51. *Id.* at para 79 (citation omitted).

52. Arvind Narrain, *A New Language of Morality*, in LAW LIKE LOVE 253, 275 (Alok Gupta & Arvind Narrain eds., 2011).

53. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 172 (Routledge Classics 2002).

54. Mahendra P. Singh, *Decriminalisation of Homosexuality and the Constitution*, 2 NUJS L. REV. 361 (2009).

discussed how those in positions of power or privilege could easily afford to create a hierarchy of oppressions, placing whatever did not serve their interests at positions lower in the hierarchy. An hour later, we had finished the meeting, flushed with the adrenaline of a good discussion.

Meanwhile, a vast number of petitioners had lined up in opposition to the Delhi High Court decision, appealing the judgment before the Supreme Court of India. The first of these was Suresh Kumar Koushal, an astrologer, followed in quick succession by religious organizations ranging from the Apostolic Churches Alliance to the All India Muslim Personal Law Board. The Delhi Commission for Protection of Child Rights joined a crowded fray which also included all the parties in the lower court judgment, with one surprise switchover to come later in the proceedings.

These surging numbers were met by an increase in supporters on the other side. In addition to the Naz Foundation, Voices Against 377, and NACO, a diverse set of voices filed a series of interventions before the court. Parents of LGBT persons from across the country came together for an intervention, as did mental health petitioners, teachers, law academics, and Shyam Benegal, a member of Parliament.

Even as the opposing groups geared up for the Supreme Court battle, the impact of the Naz judgment continued to make itself felt, with the story of Professor Shrinivas Ramchandra Siras standing out in particular. Professor Siras was a 64-year old faculty member of the Aligarh Muslim University (AMU). In February 2010, he was filmed having consensual sex with another adult male within the confines of his house. AMU suspended him shortly after the video was made public, citing immoral sexual activity.⁵⁵ Siras's suspension was met with nationwide outrage. Objections were leveled against the implications of the suspension on two grounds: the perception of homosexuality as immoral despite the judgment of the Delhi High Court, and the disturbing nature of the filming of Dr. Siras in the privacy of his home.⁵⁶

On April 1 of the same year, the Allahabad High Court ordered AMU to reinstate Siras, holding that his right to privacy had been violated, stating that "the right of privacy is a fundamental right [and] needs to be protected and that unless the conduct of a person, even if he is a teacher is going to affect and has substantial nexus with his employment, it may not be treated as misconduct."⁵⁷ Shortly thereafter, the Uttar Pradesh police arrested two of the accused who had broken into Siras' house to film him, while a num-

55. Manjari Mishra, *Aligarh Muslim University Professor Suspended for Being Gay*, TIMES INDIA, Feb. 18, 2010, available at http://articles.timesofindia.indiatimes.com/2010-02-18/india/28118769_1_shrinivas-ramchandra-siras-rickshaw-puller-amu-campus.

56. Arvind Narrain, et al., *Policing Morality at AMU: An Independent Fact-Finding Report*, FRIDAE, Mar. 10, 2010, available at <http://www.fridae.com/newsfeatures/2010/03/10/9724.policing-morality-at-amu-an-independent-fact-finding-report?n=sea&nm=amu>.

57. *Dr. Shrinivas Ramchandra Siras & Ors v. The Aligarh Muslim University & Ors*, Civil Misc. Writ Petition No.17549 Allahabad H.C. (2010).

ber of university officials were also charged with criminal offences. As Vinay Sitapati notes, none of this could have happened in a context where gay sex was illegal. In that context, it would have been Siras who was the criminal, and the additional wrongs done simply irrelevant: "[T]his is not how the story was supposed to pan out. Those who broke into Siras' house and AMU (and there are allegations that they are one and the same) assumed that Siras's transgressions were so repellent, that their own would be forgiven." The judicial narrative—of a victimised Siras, a callous administration and criminal house-breakers—owes much to the Delhi High Court's view that Siras' sexual choice was legitimate.⁵⁸

And yet this very incident also served to showcase the limitations of the law. A press release by the AMU authorities demonstrated a continuing disrespect for privacy: "[T]he University respects the privacy of a teacher living in its premises but it also expects everyone to behave in a respectful manner giving due regard to its valued cultural ethos and the campus sensitivity including their neighbours' concerns and to the great moral credentials that AMU has been nurturing since its inception."⁵⁹

Less than a week after the Allahabad High Court's judgment vindicated him, Professor Siras was found dead in his room. The police ruled it as suicide.⁶⁰

III. THE SUPREME COURT HEARINGS

For the first few days at the Supreme Court, it was a waiting game. The Court hours were from 10 am to about 3:30 pm. The *Naz* appeal would make its appearance around the lunch hour and continue until the end of the day—about an hour and a half of arguments. But in the second week, the Court decided to clear its roster to focus on the arguments three days of the week. There were, after all, 15 parties on the side of the petitioners and seven on the side of the respondents.

Another kind of waiting game played out with my parents in our mutual refusal to break the silence that had descended since our "outing" conversation on the phone. Where my mother's occasional calls skirted around the issue but explicitly underlined it with her broken voice, my father chose the path of silence. We were ultimately able to agree on me flying home during a week-long break that we would get in the middle of the Supreme Court hearings.

To take a purely chronological account of the Supreme Court hearings

58. Vinay Sitapati, *The Spectre of Naz*, THE INDIAN EXPRESS (Apr. 22, 2010), <http://www.indianexpress.com/news/the-spectre-of-naz/609695/0>.

59. Narrain, *supra* note 52, at 16.

60. Deepu S. Edmond, *AMU Prof Death: Police Say Poison Traces Found in Body*, THE INDIAN EXPRESS (Apr. 9, 2010), <http://www.indianexpress.com/news/amu-prof-death-police-say-poison-traces-found-in-body/602147/>.

would invite incoherence: arguments were often repeated, and digressions were frequent. What I have attempted here is to glean out the major themes around which the arguments revolved and present what appeared to us as the crucial points in the litigation. It may well be the case that the points we thought important have no bearing on the judgment, and it also might be that this account misses some vital points. As I remarked at the outset, we don't yet have the judgment to give us the clarity of hindsight; in this proverbial groping in the dark, then, these were the highlights of the proceedings for me.

The first major theme around which the hearings revolved were the question of how Section 377 could be interpreted—did it even really target the LGBT community in the first place? If it didn't target a particular identity, then the question of what particular acts may be covered under the Section formed the core of the next part of the debate. Another point of contention was the position of the government in the matter—this last one taking a surprising, and welcome turn. Finally, I'll discuss the fate of the argument relating to the mental health professionals' intervention.

A. Interpretation

I will begin by highlighting a crucial point around which the question of interpretation hinges: the words of Section 377 don't make explicit reference to a particular act or sexual identity. This is a reflection of Lord Macaulay's reluctance to actually discuss the subject:

[We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.⁶¹

This “not naming” is a characteristic that Section 377 shares with many anti-sodomy legislations—the Georgia Statute in *Bowers*⁶² is a notable example. Section 377's enforcement too followed that of its mirror legislations, in that heterosexual sodomy would escape the ambit of criminality, leaving homosexual sex to be proscribed. This was an assertion the Delhi High

61. Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp. 3990-91, cited in Gupta, A., *Section 377 and the Dignity of Indian Homosexuals*, ECON. AND POL. WKLY., Nov. 18, 2006, at 4815 n.5.

62. GA. CODE ANN. § 16-6-2 (West 1984): “(a) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”

Court accepted without ado. It was also a point that remained largely unchallenged by the respondents in the case. Even before the Supreme Court, the respondents—now petitioners—did not focus on this point. It came, instead, from the Bench.

The first named petitioner, Suresh Kumar Koushal, was represented by Praveen Agarwal. The Bench asked Mr. Agarwal a number of questions on the statute, such as what Section 377 explicitly spelled out and whether it concerned homosexuality as such at all. What, the Bench was interested in knowing, were the subjects it focused on?

As it were, it would be this set of questions that would become the mainstay of the hearings, the point on which both sides would continually be questioned. The wording of the questions would change and the implications for the parties would vary, but the fundamental question of interpretation was always highlighted.

In a way this was a hurdle for both sides. Whether it was the petitioners or the respondents, both broadly focused on arguing that, yes, Section 377 did in fact concern homosexuality, and that carnal intercourse against the order of nature was in fact same-sex sexual intercourse. The petitioners' primary argument then remained one of public morality vis-à-vis the law reflecting the social opprobrium of homosexuality; the respondents, on the other hand, focused on the array of fundamental rights arguments.

To take the example of the lawyer who spoke after Mr. Agarwal, representing the Delhi Child Welfare Committee, when asked what constituted "carnal intercourse against the order of nature[.]" he answered emphatically that nature recognized only carnal intercourse between man and woman, and that homosexuality would be the unnatural behavior implied within these words. Similar responses echoed through the other petitioners' arguments. Yet the Bench continued to pose this question, seemingly dissatisfied with their answers.

When it came to the respondents' arguments, one tactic involved attempting to turn the question of interpretation on its head. No, argued our opening lawyer Fali Nariman, the words "carnal intercourse against the order of nature" did not refer to homosexual intercourse—at least not any more. The term "order of nature" has evolved in meaning; as Mr. Nariman pointed out, the only Court judgment to interpret this phrase was a 1925 decision that defined the natural object of carnal intercourse as "the possibility of procreation."⁶³ The Indian Constitution had since then made provisions for family planning, clearly indicating that the definition of the order of nature had evolved past sex-for-procreation. Hadn't we then evolved past considering homosexuality against the order of nature?

63. *Khanu v. Emperor*, AIR 1925 Sind 286 ("it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be possibility of conception of human beings, which in the case of coitus per os is impossible").

If that wasn't enough, said Mr. Nariman, there was also the odd case of its placement within the Indian Penal Code. The Penal Code is divided into 23 chapters mostly based on broad categorizations of offenses: so while the offense of sedition finds itself in the Chapter on Offences Against the State, theft is in the Chapter on Offences Against Property of Theft. Chapter XIV relates to Offences affecting the Public Health, Safety, Convenience, Decency and Morals—this would have been the logical place to position Section 377. And yet, it finds itself in Chapter XVI, as part of a group of Offences affecting the Human Body. Mr. Nariman argued that this implied the Section could only be interpreted to constitute a bodily harm—for instance when the carnal intercourse was non-consensual. In the case of consensual sexual intercourse between adults of the same sex though, no discernible harm could be gleaned. The placement of this Section, if construed to encompass consensual sex, was then absurd. This point didn't seem to garner much muster with the Court; the Bench's response noted that the Section did deal with offences affecting the body, since spreading of diseases, which was possible here, would come under the umbrella term. Mr. Nariman didn't go too much further on this point.

B. What Goes Where? Sexual Acts and Lost Identities

The issue before the judges was clear: the Delhi High Court had refrained from entering a discussion on exactly what acts constituted carnal intercourse against the order of nature. It had taken as granted the impact of the section on a particular community, and thus issued a declaration stating that Section 377 would be unconstitutional insofar as it criminalized consensual sexual intercourse between adults in private. The Supreme Court judges continued to express their dissatisfaction with this point in subsequent questioning.

Following Mr. Nariman came Mr. Anand Grover, representing Naz Foundation. He too was faced with a volley of questions cataloguing what sexual acts were being discussed in the first place. Why, the Court asked, was Mr. Grover saying that the law targeted all homosexuals when it seemed to affect a very broad “whoever”? He responded that the basic act targeted was anal sex, an act which he argued was much more central as a sexual expression for gay men. By prohibiting anal sex, the only form of “carnal intercourse” available to gay men, the law robbed them of their constitutional rights. He further raised the Right to Health argument, stating that Section 377 impeded efforts related to HIV/AIDS prevention since it drove men-having-sex-with-men populations underground and made it more dangerous for them to access information on safe sex practices. The Court persisted in questioning Mr. Grover on the acts targeted under the section, dissatisfied with the link with identity that he proposed.

Next up was Mr. Shyam Diwan, representing Voices Against 377. Mr. Diwan's strategy was to take the case away from the minutiae of sexual act semantics and frame it as a broader rights issue. He argued that the case was centrally about the moral citizenship of a section of the population—the lesbian, gay, bisexual and transgender community. He submitted that the case wasn't merely about sexual acts, and that it was essentially about a community which couldn't attain full expression of its sexuality because of the law and social norms. The petition at hand couldn't by itself transform social norms, but it could seek a declaration from the Court that at least took the community outside the shadow of criminality.

In continuing with this attempt at humanizing the legal rhetoric, he directed the Court's attention to a prior moment in the arguments, when they asked government counsel if he knew anybody who was gay or lesbian. Mr. Diwan said that he would like to answer that question—yes, he did know LGBT people; he knew people from the community as part of his family, his friends, and his colleagues. If this was an otherwise silent group, it was because of the social stigma it faced as a result of its criminalization.

This personalization of the queer narrative evokes a story about the *Bowers v. Hardwick* case that has become one of the biggest “what-ifs” of the American LGBT movement. *Bowers* was a 5-4 decision in favor of holding that the constitutional right to privacy did not protect homosexuals from prosecution for sexual conduct within a private space. Justice Powell, who cast the deciding vote, was on the fence right till the end. Years later, Powell admitted he felt he'd made a mistake: “When I had the opportunity to reread the opinions a few months later I thought the dissent had the better of the arguments.”⁶⁴ As documented by his biographer, Powell also once stated that he believed he'd never met a homosexual.⁶⁵ The irony is that this particular discussion took place with his law clerk, Cabell Chinnis, who happened to be gay. Chinnis chose not to come out to Powell, while this story crystallized into an odd little cautionary tale for, amongst other people, closeted law clerks across the world. The question lingers on many minds: would Justice Powell have reconsidered his opinion if he realized he actually knew a gay man?

Mr. Diwan thus sought to put a face on the story, if in an indirect manner. He went on to read out a series of affidavits that ranged in subject matter from the brutal rape and torture of a *hijra*⁶⁶ to an account of a gay man's struggles with coming out and acceptance. The affidavits recounted instances where persons who belonged to a particular sexual orientation had been subject to different kinds of violence. Mr. Diwan was advancing the

64. Linda Greenhouse, *The Legacy of Lewis F. Powell Jr.*, N.Y. TIMES, Dec. 4, 2002, available at <http://www.nytimes.com/2002/12/04/politics/04SCOT.html>.

65. *Id.*

66. A group identity in which a transgender person who is biologically male takes on the gender role of a female.

argument that the LGBT community was being specifically and disproportionately targeted under the ambit of Section 377. And yet, the Court seemed unconvinced about the idea that an LGBT "community" was being targeted. Section 377 seemed to start and end with the list of sexual acts it covered; the fact that certain groups of people engaged in those acts more than others did not seem to be a relevant consideration for them.

Consequently, even when Mr. Diwan's arguments focused on how the law violated the constitutional right to equality and non-discrimination, the Bench's questions continued to focus on acts. They wanted a list of acts upon which we could base our arguments. Even when the question of homosexuals as a minority group came up, the Court said that it was concerned with sexual acts, which weren't as such in the majority or minority.

This made it particularly difficult to advance the fundamental equality claim that had been so successful before the Delhi High Court. To satisfy the requirements of Article 14 of the Constitution, which deals with the right to equality, the petitioners had to show that a classification had been made in the first place. On the opposing side, Mr. Sharan argued that there was no class targeted by Section 377, that no classification had been made, and that the High Court's finding that the law violated Article 14 was without any basis. There was no empirical data, he said, to show that there was a homosexual "community," and there was nothing to prove that they constituted a class. The Bench seemed to follow a similar line of thought, asking why we were talking of community when there was no commune, and commenting that the community to which we were referring was an indistinctive part of society.

One of the judges expressed his difficulty in acknowledging sexual preference as a basis for class distinction through a specific example - an incident in Punjab where an inspector got hold of three ladies who were frequent pickpockets, and then he had tattoos engraved on their foreheads to identify them as such. Wouldn't this also constitute a class, no matter how small?

It was becoming clearer that the arguments would have to take the issue to a further level of abstraction, that LGBT rights language had to give way to a broader human rights rhetoric. Instead of arguing that carnal intercourse against the order of nature constituted same-sex sexual intercourse, the argument would have to be modified to posit that such carnal intercourse included certain sexual acts that were common across sexual identities.

Thus, Mr. Ashok Desai, who followed Mr. Diwan, spoke at length on the right to privacy and how Section 377 affected the rights of everyone, be they homosexual or heterosexual, to have certain kinds of sexual intercourse. Mr. Desai argued that the section was cast in the widest possible terms with the word "whoever," and included both homosexuals and heterosexuals. The words "carnal intercourse" included all physical relation-

ships; the phrase "against the order of nature" would include contraception as well as oral and anal sex within the marital relationship. He spoke at length about the evolution of the right to privacy in Indian and international case law, locating it within the constitutionally enumerated right to personal liberty. He made sure to express that his arguments were wide enough to encompass heterosexuals and homosexuals. In essence what he was stating was that the law must stop at bedroom doors, irrespective of which sexual acts consenting adults did behind them.

C. The Government and the Colonial Narrative

Where did the State figure in all of this?

Recall that the Delhi High Court proceedings had featured a divergent stance from the Union of India: the Ministry of Home Affairs had opposed Naz Foundation's petition, while the Health Ministry had been in favor of decriminalization. Initially it seemed like the status quo would remain unchanged. As he had before the High Court, Additional Solicitor General P.P. Malhotra represented the Home Ministry. He argued that homosexuality was immoral, and even that homosexual intercourse led to a higher chance of disease; that the Delhi High Court's judgment was flawed in its over-reliance on "foreign judgments;" and finally that the law's obstruction to HIV/AIDS prevention efforts could not be a valid consideration, as hardship was no ground to invalidate a law and the law could not please everybody.

This was all fine, except that as Mr. Malhotra finished his submissions, another Additional Solicitor General, Mr. Mohan Jain, stood before the Court and stated that the arguments presented so far did not actually represent the government's current stance. He pointed out that the Union of India had not filed an appeal. As much as this indiscretion on the government's behalf angered the court, which promptly chastised the government, it represented an intriguing development. What would this new stance be, we wondered?

It first came to light with a government affidavit the following week, stating that a group of ministers had decided in 2009 that the High Court judgment did not suffer from "any error of law" and should not be appealed, a decision the Cabinet accepted later in the year. The Attorney General of India, Mr. Goolam Vahanvati (A.G.) was then summoned by the Court to clarify the government's position. Again, it turned out to be a largely positive one, with the A.G. even going so far as to place the law in its socio-historical background. Reading from Lawrence James' historical account of British India, the A.G. pointed out the contrast between the treatment of homosexuals in India and Britain in 1861. Where Britain had a deeply repressive regime, even punishing buggery as a capital crime till

1861, India was much more liberal. Many sought to escape Victorian sexual repression and came to India, which in turn prompted "sexual imperialism" as the British imposed their sexual mores on India. He concluded that Indian society clearly had a much greater tolerance for homosexuality than its British counterpart, and that the introduction of Section 377 in India was not a reflection of existing Indian values and traditions. Rather, it was imposed upon Indian society due to the moral views of colonizers.

I believe the importance of this particular line of argument is clear once we look back to the Bench's reaction to a similar submission from Ashok Desai. In that instance, Mr. Desai had handed the book *Same Sex Love in India: A Literary History*⁶⁷ to the Court. The book demonstrates that same-sex desire has been prevalent throughout the history of Indian literature, tracing descriptions of same-sex desire from the ancient epics to modern writers and artists. The book seemed to leave an impression on the Court, as a judge observed aloud that a variety of writers depicted same-sex attraction as a natural part of Indian society. Presently, though, it was viewed as a perversion, a notion that had been thrust upon India by the British. This colonial narrative then was a strategically useful frame to place the issue of homosexuality in.

This argument didn't work nearly as well with my parents. A lament of "what will people say? This isn't tolerated by our society!" is not best answered in a domestic setting with the reassurance, "Ancient Indian society was fine with it: look at those old temple carvings." My parents simply responded, "Well, they also walked around naked back then. That wouldn't be encouraged today would it?"

At least my parents were not Supreme Court judges.

D. Mental Health

One of the final interventions to be heard in the Supreme Court from our side was filed on behalf of mental health professionals. The intervention combined thirteen affidavits of psychiatrists and doctors from across the country testifying that homosexuality was not a mental disorder, that it was natural and normal, and that efforts at conversion therapy would prove damaging and futile. Perhaps it was the fact that this petition came up for hearing after five weeks of arguments over the matter, or perhaps it was because Mr. Shyam Diwan had already covered some of its points in his own submissions—either way, Mr. Dayan Krishnan, representing the mental health professionals, was barely given five minutes to argue by the Court.

As he stood up to submit the medical consensus on homosexuality not

67. SAME-SEX LOVE IN INDIA: A LITERARY HISTORY (Ruth Vanita & Saleem Kidwai eds., 2008).

being a disease, the Bench responded that they didn't want to know whether or not it was a disease, and asked whether there were sexologists among the doctors. When he attempted to continue with his submission by describing the American Psychiatric Association's position on homosexuality, the Bench said that Section 377 was not about homosexuals – that to argue so was to misunderstand the issue. Once again, we were back to that question.

If there was ever a moment during the proceedings where I'd felt the urge to stand up and implore the Court to acknowledge a point, it was this. A few days before the mental health intervention came up for hearing, the Court had closed for a weeklong holiday, during which I'd decided to fly home and face it out with my parents. An hour after landing in my hometown, my parents took me to the friendly neighborhood psychiatrist.

Partly because I've forgotten his name, and partly because I'd prefer to block it out anyway, I'll go with the moniker Dr. Doctor. As I was ushered into the doctor's room, I took a second to take in the array of medals and certificates plastered across the walls. My parents positioned themselves on either side of me. Dr. Doctor surveyed me wordlessly for a few seconds, tilted his head sideways, and leaned forward –

"Do you know why you're here?"

Of course I did, but I wasn't going to give him that. I stared at him blankly.

"You're here ... because you're homosexual."

Spotted.

"How do you feel about being homosexual?"

I broke my silence – "Oh, I'm actually quite happy about being gay."

He flinched visibly. "So you're saying you're fine with being gay."

As the fact sunk into his head, he looked right at my mother, then back at me, and asked, "So basically if your mother commits suicide because of you, that's all right with you?"

Now it was my turn to flinch. I turned to look at my mother, then back at him. "Well, by that logic, how is the reverse acceptable? What if I commit suicide because she's unable to accept me for who I am?"

I sensed a mildly convulsive movement from beside me, but I couldn't take my gaze off the doctor. He got down to brass tacks. "So there are three ways in which we can approach this condition. One, homosexuality might be caused by hormonal imbalances. Two, it could be a result of some tumor in the brain. And third, it could be caused by some other mental disorder."

And just like that, I'd had enough. This wasn't the time for gentle reasoning; it was time for theatrics. I took out my phone, placed it on the table, and told him – "Just so you know, I've recorded this entire conversation. And you look confused, so let me tell you why I've done that. I'm going to

use this as evidence for the FIR⁶⁸ I file against you as soon as I walk out of this office."

For the first time since we walked into his room, his smug smile wavered. "What would you do that for?"

"Well, for starters, I'm going to have you booked for medical malpractice and causing emotional distress. You have all these big certificates and medals around your office, and yet you don't seem to know that the American Psychiatric Association declassified homosexuality from its list of mental disorders back in 1973. And, oh, that the World Health Organization had it removed from its International Classification of Diseases in 1990. Yet here you are, trying to pass this off as a disease that I should be trying to cure."

In panic now, he looked at my parents, but they were unable to look him in the eye. One final attempt – "He – he could be suffering from paranoid schizophrenia, that's why he's talking like this!" Unable to take it anymore, I got up and stormed out of the room. He didn't call back for me.

In 2001, the National Human Rights Commission admitted a complaint from a patient at the All Indian Institute of Medical Sciences, alleging psychiatric abuse at the hands of the consulting doctor. The patient had been put on a four-year course of drugs and told he had to be "cured" of his homosexuality. The NHRC finally chose to reject the complaint; informal conversations with its chairman showed his belief that until Section 377 was read down, nothing could be done.⁶⁹

Medicine in India continues to be obsessed with curing homosexuality, with health professionals in many places still offering behavioral therapy that includes electric shock treatment as well as therapy that includes psychiatric drugs and hormones to "cure" patients of homosexual desire.⁷⁰ Interviews with psychiatrists in Bangalore have highlighted their belief in the possibility of discovering which gene determines sexual preference and scientifically suppressing it.⁷¹

Of course, quacks exist across the spectrum, and medical malpractice is barely limited to giving disastrous advice and/or treatment to persons "afflicted" with homosexuality. To understand how the debate moves beyond merely unqualified doctors, we have to factor in the medical category of ego-dystonic homosexuality, which the World Health Organization (WHO) has endorsed.⁷² Here, the gender identity or sexual preference of the indi-

68. First Information Report – a complaint filed with the police by the victim of a cognizable offense.

69. Arvind Narrain and Tarunabh Khaitan, *Medicalisation of Homosexuality: A Human Rights Approach*, in HUMJINSI: A RESOURCE BOOK ON LESBIAN, GAY AND BISEXUAL RIGHTS IN INDIA 29, 34 (Bina Fernandez, ed., rev. ed. 2002).

70. Vinay Chandran, Executive Director, Suabhava Trust, Ain't No Cure for Love, India Together, Apr. 6, 2006, <http://www.indiatogether.org/2006/apr/hrt-nocure.htm>.

71. *Id.*

72. See World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* F66.1 (1993), available at <http://www.who.int/>

vidual is not in doubt, but the individual wishes it were different and seeks treatment.⁷³ The way a number of psychiatrists engage with this category is summed up by the statement "it's not my job to tell him that it's okay to be gay." Instead, it seems that the psychiatrist's job is to attempt to "cure" the oft-acknowledged incurable.

The fundamental factor not taken into account by this diagnosis is that it is very often the environment that surrounds the expression of homosexual identity that the patient is concerned about, as opposed to merely the idea of being LGBT. The relationship between patient and doctor is a fiduciary one, premised on absolute trust. In consulting a doctor, the patient entrusts fundamental decisionmaking powers to the practitioner. The medical professional is often unable to comprehend the question of choice. This, in turn, results in effectively infringing the patient's autonomy: the component of attaining fulfillment, the growth in self-esteem that the Delhi High Court elaborated on is robbed in the process of stifling sexuality, even when it is something the patient specifically requests the doctor for.

IV. AND NOW, WE WAIT

A national civil society meeting was held in Bangalore a few months following the hearings. Called to discuss the trajectory of the LGBT movement as it would proceed after the Supreme Court's judgment, the meeting reflected the two major pathways the decision would lead us down. The first half of the meeting focused on the possibility of the Supreme Court overturning the High Court's verdict and re-criminalizing homosexuality in India; the second half focused on a positive verdict. Of course, it was acknowledged, it wouldn't necessarily be as clear cut as that. Beyond these scenarios, there was also the possibility of the Supreme Court upholding the lower court's judgment in essence, but striking down some of its important jurisprudential innovations. Alternately, the Court might refer the matter to a larger bench of judges within the Supreme Court, or even to the Parliament, in which case our initial post-decision effort would be to prevent a stay on the Delhi High Court's judgment.

The Supreme Court's decision can either further crystallize or instead discard some of the remarkable principles of jurisprudence that the Delhi High Court developed. As mentioned earlier, there is the Court's remarkable discussion of constitutional morality. Using constitutional morality to test the bounds of a compelling state interest would imply a moral code that is based on the liberal democratic ideals that underlie the Indian Constitution, not any particular religious or cultural traditions.⁷⁴ This kind of

classifications/icd/en/GRNBOOK.pdf.

73. *Id.*

74. *Naz Foundation v. NCT of Delhi and Others*, 160 (2009) DLT 277 para 79.

test would serve as an important check on attempts to restrict various kinds of expression - be it political, artistic or even romantic - in Indian society, with public morality used as the barometer. As Arvind Narrain notes, constitutional morality "requires the court to play the role of a counter majoritarian institution which takes upon itself the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe."⁷⁵

Also significant is the manner in which the Supreme Court construes the Article 15 argument. *Naz Foundation's* expansion of the grounds for discrimination under this article represented an important strategic move, opening a door to constitutional protections for groups marginalized on unlisted grounds, such as disability or HIV positive status.⁷⁶ Upholding this interpretation would allow the judgment to stand as an important advocacy tool for other such marginalized groups in their future struggles as well.⁷⁷

If the judgment does land in our favor, and if homosexuality is once and for all decriminalized, we'll only then have seen the Indian LGBT community's first concrete step towards emancipation. Decriminalization is only the first goal in a journey towards full moral citizenship: a journey that transitions from the right to be let alone to the right to be recognized by the State. This new paradigm raises a range of issues relating to positive political claims.

The first issue revolves around the legal recognition of same-sex relationships in India. A system of legal pluralism dominates Indian family law, with religious groups governed by separate codes, all of which clearly restrict marriage to mixed-sex couples within religious boundaries. The first redefinition of marriage and sexual union in India happened with the passage of the Special Marriage Act of 1954, which permitted secular marriage across caste and communities, though still framed within the bounds of heterosexual unions. The exclusion of same-sex couples from this institution denies them a range of basic entitlements available to heterosexual couples. The first question to explore would hinge on the feasibility of advocating for same-sex marriage rights, or instead arguing for civil unions. If we pursue both options simultaneously - and I believe this might be the best path - the secondary set of issues would revolve around how we conceive of and advocate for these new legal frameworks. Arguments for same-sex marriage would almost certainly have to focus on amending the secular marriage law as opposed to religious laws. On the question of civil

75. Arvind Narrain, *A New Language of Morality*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON THE LAW* 253, 274 (Arvind Narrain & Alok Gupta eds., 2011).

76. See Tarunabh Khaitan, *Reading Swaraj into Article 15 - A New Deal for Minorities*, in *LAW LIKE LOVE: QUEER PERSPECTIVES ON THE LAW*, 278, 282-83 (Arvind Narrain & Alok Gupta eds., 2011).

77. *Id.*

unions, it would be worth considering whether we should imagine the institution as one available to heterosexual couples as well.

The second major issue is that of anti-discrimination provisions for LGBT people at the institutional level. Indian anti-discrimination laws have been largely focused on reservation, with other aspects such as equal opportunity and diversity promotion for all vulnerable groups having only gained importance recently. The new interpretation of Article 15, if it stands, will play an important role in making positive legal claims with respect to creating safe institutional spaces for LGBT people.

The arguments for relationship recognition and non-discrimination represent a new challenge to the rights movement, in that they shift from a paradigm of tolerance to that of staking a positive political claim. The third issue I'd like to highlight moves between the two claims: the status of the transgender community in India. Unlike the gay, lesbian, and bisexual community, the transgender community's status of criminalization hasn't been completely erased since the Delhi High Court's judgment.

Even as the LGBT community as a whole awaits the Supreme Court's final verdict on decriminalization, the Indian transgender community – represented to a large extent by the *hijras* – remain cast under a shadow of criminality through other avenues. The 2011 Police Act enacted by the State of Karnataka resurrects the spirit of the draconian Criminal Tribes Act of 1871, which reversed the principle of presumption of innocence, mandating local governments to keep registers of the names and residences of *hijras* as automatic suspects for crimes. The *hijra* community is also targeted through the rampant misuse of the Immoral Trafficking Prevention Act. While the Act's objective is to criminalize institutional structures that result in human trafficking, it ends up primarily targeting the visible figure of the sex worker and enables the police to arrest and intimidate the transgender sex-worker population.

If the *hijra* community is hyper-visible in the domain of criminal law, it encounters complete invisibility when it comes to civil law. Identity documents ranging from driver's licenses to ration cards don't allow for a transgender option, thus depriving the community of a range of state entitlements. Beyond identity documents, Sexual Reassignment Surgery (SRS), an essential aspect of realizing transgender identity, remains prohibitively expensive. Those seeking the surgery often rely on unqualified medical practitioners, which in turn exposes them to post-operative complications. And when it comes to the legal recognition of transgender relationships, the law again falls short. India's secular marriage legislation and its individual religious legal codes clearly restrict marriage to male-female couples, thus disallowing the transgender community access to this institution.

Even as the *Naz* litigation approaches its possible end, another major suit is set to begin. The National Legal Services Authority of India recently filed a petition before the Supreme Court of India asking for the recognition

of a range of rights for the transgender community in India. Amongst the various measures that the petition asks for are directives to the government ensuring access to basic necessities like shelter, food, clothes, medical facilities, education, and identity documents, as well as a realization of the transgender community's right to marriage and adoption.

These aren't the only conversations afoot, of course. Voices of change within the courtrooms speak in tandem with whispers of change outside. Where popular culture once refused to engage with LGBT issues, an increasing number of Indian films feature queer themes and characters. We may not have a *Brokeback Mountain* yet, but we did have a wonderfully empathetic portrayal of a supporting gay character in the recent acclaimed release *English Vinglish*.⁷⁸ Even notoriously heterosexist Indian television got a major shot in its queer arm with the soap *Maryada -Lekin Kab Tak?*.⁷⁹ The show begins as the story of four women in a family in the North Indian state of Haryana, leading to a storyline where a married son turns out to be in love with another man.⁸⁰ Our Pride marches continue to grow and expand to smaller cities with every passing year. Queer literature continues to find larger takers – and writers – in the country, with this year featuring the release of the first queer anthology of stories since the Delhi High Court's judgment. I'll end using my own words from my contribution in that anthology:

In the heart of Bangalore, in the middle of Cubbon park, is the bandstand. Huddled under this deceptively unwieldy structure, 50 odd queer folk narrate stories of love, loss and everything in between as we celebrate another year without 377. There are many ways of being proud, many ways of celebrating pride. Those colourful marches are the ones we've let the world become the most familiar with, but what I see happening today feels equally important. I feel every different, disparate narration today knitting us into this one tapestry of consciousness.

Where do we go from here?

I think we need to tell more stories. I think that's important. I think we need to have more conversations. If the Supreme Court Appeal is overturned, and if we find ourselves once more in the margins of the law – well, we'll need to fight. But if the Appeal is upheld, if we continue to remain legal citizens – well, we need to fight just as hard. We need to make sure this darn homosexuality business is talked about to death in the university, in the workplace, on television – to make people as tired of seeing a constant queer presence as they possibly can be. We need to be unabashedly loud and unapologetically obnoxious and while we're at it – remember to dress fashionably.

But really, most importantly, more than anything else – we need to keep tell-

78. ENGLISH VINGLISH (Eros International 2012).

79. *Maryada-Lekin Kab Tak?* (STAR Plus television broadcast Oct. 18, 2010).

80. *Id.*

*ing those stories.*⁸¹

81. Danish Sheikh, *Days of 377 Past*, in OUT! STORIES FROM THE NEW QUEER INDIA (Minal Hajratwala ed., 2012).