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Mediating the Optics of Privacy: LGBTQ Rights, Public Subjecthood and the Law in  
India

A dissertation submitted in partial satisfaction of the requirements  
for the degree Doctor of Philosophy

in

Communication

by

Pawan Deep Singh

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Professor Lisa Cartwright, Chair  
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2015

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Chair

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2015

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Decriminalization of Homosexuality in India” is under review for publication with *Social Text*.



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## **ABSTRACT OF THE DISSERTATION**

Mediating the Optics of Privacy: LGBTQ Rights, Public Subjecthood and the Law in  
India

by

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Doctor of Philosophy in Communication

University of California, San Diego, 2015

Professor Lisa Cartwright, Chair

Section 377 of the Indian Penal Code has criminalized homosexuality in India since 1861 when it was first instituted by the British government as a tool of governing the personal relations among native Indian populations. The law was retained in the Indian Constitution when it was drafted in 1948 after India gained Independence from the British. The law became the subject of reform during the early 1990s when it was seen to hamper HIV/AIDS outreach for vulnerable groups that were engaging in same-sex behavior that was criminalized under the law. The Indian LGBTQ movement emerged partly in response to the public health crisis and also as a challenge to the law's criminalization of various identities such as gay, lesbian and transgender. In 2009, the Delhi High Court amended Section 377 to decriminalize homosexuality by according a right to privacy, equality, dignity and non-discrimination to consenting adults. However, the Supreme Court of India overruled the Delhi High Court decriminalization decision in

2013 with the view that the law only criminalized certain “unnatural” acts, which could be committed by anyone. The Court ruled that the law did not target any identity or group in particular.

This dissertation undertakes a critical examination of the right to privacy as the basis of homosexuality’s provisional decriminalization in India during 2009-2013. Through an analysis of case law, human rights violation reports and film and media representations of privacy violations of LGBTQ subjects in India, the dissertation interrogates the material stakes in making privacy the central basis of homosexuality’s legalization. Using archival analysis, textual interpretation, discourse analysis and interviews with lawyers and LGBTQ activists, the dissertation demonstrates how the exercise of the right to privacy by a violated figure entails greater visibility for the subject. The various forms of mediation of privacy violations produce greater visibility for the subject bringing them empowerment with potential vulnerability in the postcolonial Indian context in which homosexuality continues to be pathologized and criminalized. The dissertation draws upon media studies, queer theory and postcolonial studies in its analysis of the relationship among privacy, visibility and sexuality.

## Introduction

Section 377 was written into the Criminal Code of India as part of the larger colonial project to standardize and codify what were seen by the British as the confusing and personal systems of Hindu and Muslim laws. It was Lord Thomas Babington Macaulay as the Chairman of the Indian Law Commission who drafted the Penal Code of 1837 that was premised on the utilitarian philosophy of the greater good of the greater number. Following the Indian Revolt of 1857 that left the British government in India shaken, the Indian Penal Code was passed in 1860. The revolt reinforced the British view of the Indian native subject as perverse and barbaric, in greater need of the civilizing mission than before. Thus, Section 377 was written into the Indian Penal Code to regulate the vices of the flesh and crimes against the body, which were regarded by the colonial government as crimes against the state itself. Section 377 was worded as follows:

Unnatural offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term, which may extend to 10 years, and shall be liable to fine.

Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.<sup>1</sup>

The law was retained in the Indian Constitution of postcolonial India when it was drafted in 1948 after India gained independence from the British in 1947. In the postcolonial context up until the 1990s, the law had mostly been used to prosecute cases

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<sup>1</sup> Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals," *Economic and Political Weekly* 41 No. 46 (2006): 4815-4823.

of non-consensual sex such as those involving child sexual abuse. However, in the early 1990s, the law came to be seen as an impediment to HIV/AIDS outreach work by criminalizing the sexual behavior of men-who-have-sex-with-men (MSM) who were understood by public health NGOs to be driven underground as a result. Indian activists and lawyers have also argued that the law has been misused by the police to harass gender non-normative bodies in a range of public contexts.<sup>2</sup> I will unpack the historical and the contemporary context of this law's use in the subsequent chapters of the dissertation.

On July 2, 2009, after over a decade of legal challenges by Indian activists, lawyers and public health NGOs, the Delhi High Court read down<sup>3</sup> Section 377 of the Indian Penal Code to exclude consensual same-sex adult conduct in private. This day, celebrated by the self-identified, national LGBTQ communities marked a watershed moment in the Indian cultural politics of homosexuality's pathologization and medicalization. The verdict in the case *Naz Foundation vs. the Government of NCT of Delhi*<sup>4</sup> (the Naz judgment from hereon) was based on the Public Interest Litigation (PIL)<sup>5</sup> filed by the Naz Foundation (an NGO that works in the area of HIV/AIDS outreach to sexually vulnerable population) along with Lawyers Collective, a Delhi-based legal advocacy group. In making privacy the immediate basis of decriminalizing consensual

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<sup>2</sup> Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change, 2004).

<sup>3</sup> The term "reading down" was used by the court to exclude consensual same-sex activity in private from the purview of the law.

<sup>4</sup> WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2nd July, 2009.

<sup>5</sup> Public Interest Litigation (PIL) in the Indian context is a form of legal intervention that enables the advocacy of causes related to the socially and economically marginalized sections of society. It is usually a "not for profit" legal practice.

same-sex adult conduct, the Delhi High Court extended the rights to equality, dignity and liberty to Indian LGBTQ individuals and to “MSM” – the rubric used in public health and other institutional bodies to identify men who have sex with men as a discreet behavioral category. The Naz verdict also conferred recognition on the LGBTQ, a section of Indian society previously understood to be historically invisible, oppressed and persecuted. The judges crafted the verdict from a range of international sources including human rights law, decriminalization judgments from comparative jurisdictions, judgments from the Indian Supreme Court and academic, medical and scientific literatures. A detailed reading of the judgment will be covered in the first chapter of the dissertation.

The breadth of legal sources that informed the Naz judgment also attested to the transnational framework of LGBTQ politics within which Indian activists and advocates have taken up the battle against the law that criminalizes male homosexual conduct. The Naz judgment was received with nation-wide jubilation among LGBTQ communities and human rights groups. It occasioned an extensive media and academic commentary on its merits and implications, some of which is reviewed in later sections of this introduction.

Yet the judgment was also critiqued on various counts and vehemently protested by the right-wing conservative sections of Indian society and religious groups. These entities challenged the judgment in the Indian Supreme Court with the view that homosexual conduct and practices were not in fact a part of the Indian society. In December 2013, the Supreme Court of India reinstated Section 377 with the view that the law only criminalized certain acts and not any identities in particular.

The cultural argument that homosexuality is alien to the traditional Indian society was one of the justifications of the push towards reinstatement. Human rights reports and public health contentions around HIV transmission have made it clear that controversy over the Naz judgment's decriminalization of homosexuality was a cultural, religious and health-centered debate and not just a legal matter – a debate central to the core ideas about what constitutes sexual identity in India.

Naz marks a moment of global, national and legal recognition of not just decriminalized homosexual conduct but also a dignified LGBT identity embodying a sexual orientation protected by the rights to equality, liberty and non-discrimination. This 2009 ruling and its overturning in 2013 is an appropriate juncture to inquire into what was widely celebrated nationally as the teleological point of LGBTQ liberation in India.<sup>6</sup> If we look to the many stories and commentaries that heralded the Naz judgment, we find the judgment elevated to the legal stature of a protean treatise that addresses homosexuality through secular values enshrined in the Indian Constitution. These values are also affirmed in the judgment's appeal to a global human rights discourse.

For instance, in a story titled, “Striving for Magic in the City of Words,” prominent Indian lawyers and legal scholars, Lawrence Liang and Siddharth Narrain, likened the Naz judgment to the historic American verdicts, *Roe v. Wade* (which legalized abortion) and *Brown v. Board of Education* (ending racial segregation in

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<sup>6</sup> A compilation published by the *Alternative Law Forum*, a legal organization that played a key role in the decriminalization of homosexuality in India, describes the Naz judgment as sparking a nation-wide conversation on sexuality, bringing the LGBT people “out of the closet, and literally on to the front pages of all Indian papers and news channels.” See, *The Right that Dares to Speak its Name: Decriminalizing Sexual Orientation and Gender Identity in India*. (Bangalore: Alternative Law Forum, 2009), 4.

American public schools). Their comparison offered an optimistic assessment of the judgment's implications for sexual minorities.<sup>7</sup> Pratap Bhanu Mehta, the president of the Center for Policy Research Delhi, in a story in the national daily, *The Indian Express*, described the judgment as about being “all of us,” as Indians whose values teach the invoked “us” to tolerate difference and defend the values of liberty, equality and dignity.<sup>8</sup> In another of the many news stories about Naz, this one in the newspaper *The Telegraph*, legal scholar and human rights advocate Tarunabh Khaitan, lauded the progressive reinterpretation of the Article 15 of the Indian Constitution to provide a framework of non-discrimination that is good for all minorities.<sup>9</sup>

In its liberal re-interpretive entelechy, the judgment was claimed as an occasion on which gay male sexuality and MSM behavior were finally recognized as matters worthy of a legible identity. Naz conferred the possibilities of these identifications and behaviors as fundamental aspects of personhood that could safely be claimed, opening into a future of radical possibilities for a range of LGBTQ subject positions. Naz viewed as a new protective apparatus converged with what many regarded as a newly visible range of self-affirming LGBTQ subject positions – identities liberated from the shackles of a colonial-era law and popular religious morality. The public abjuring of the legal criminalization of homosexuality in India represented by Naz was thus a significant accomplishment in human rights. The Indian LGBTQ subject was rendered visible not only in the profoundly public celebration around the change of Section 377 but also

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<sup>7</sup> Lawrence Liang & Siddharth Narrain, “Striving for Magic in the City of Words,” *The Himal Magazine*, August 2009.

<sup>8</sup> Pratap Bhanu Mehta, “It’s About All of Us,” *The Indian Express*, July 3, 2009.

<sup>9</sup> Tarunabh Khaitan, “Good for All Minorities,” *The Telegraph*, July 9, 2009.



throughout the late 20<sup>th</sup> and early 21<sup>st</sup> century in gay pride marches and activist intervention, leading up to the watershed moment. With the Naz decision, this subject was seen to finally emerge from its shell of oppression, where it had been forced by the violence of prohibition into invisibility. This moment in Indian history was seen as a collective national un-closeting with historic national and global dimensions.

My narration of this putatively empowering teleology of LGBTQ struggles for freedom from criminalization and stigma in Indian culture is deliberately narrated in hyperbolic terms. In this project, I seek to capture a piquant paradox surrounding the political rhetoric in which the bringing to visibility of the LGBTQ subject is understood to be linked to the liberatory quest for public identities previously spoken about by default, through omission and inference, in the historical period prior to Naz. The registers of secrecy and invisibility through which LGBTQ and MSM identities had been experienced and spoken about in tones of inference and censure were of course no less constituting of subject positions than the rhetorical registers of visibility that closely preceded and followed the Naz decision. But by emphasizing the watershed moment, we lose sight of the constituting impact of the long durée of erasure and criminalization.

This is a project that takes as its task the unearthing of Indian LGBTQ and MSM identities and practices in and through the law and its co-constituting discourses and institutions--including most centrally public health, religion, and media. I turn to the historical period of Section 377 before Naz, the brief and heady period of its negation, and the context after the legal code's reinstatement. My intention is to show in detail the constitution of LGBTQ and MSM subjectivities in India in, through, and against the Code in this long durée of its ebbs and flows—to demonstrate the extent to which identity

is always constituted through and against such laws, and cannot simply be linked to a discourse of rights and watersheds of legal transformation—and that, moreover, it is perhaps dangerous to cling to discourses that suggest narrative teleologies from unfreedom and/as invisibility to freedom and/as appearance under the law.

The year 1860, when the colonial law Section 377 of the Indian Penal Code was drafted, may be regarded as the originary context that produced the conditions of invisibility of queer sexuality. This is a legacy understood by legal scholars such as Alok Gupta, Arvind Narrain and Suparana Bhaskaran among many others as a detrimental residue of colonialism.<sup>10</sup> The writings of this canon have had a discursive effect of positing visibility as an empowering condition and a means of asserting sexual selfhood in public. This position is built upon the assumption that invisibility is in itself disempowering—is a cloistering secrecy. I propose that this discourse, which I will discuss at length below, puts forth a perhaps too simple binary understanding in which invisibility and visibility are in themselves stages in the linear narrative teleology of a sexual identity's emergence. Throughout this project, I propose instead that the entanglement of discourses and practices of sexuality in, through, and against the discourses and practices of law, religion, media, and medicine entail a complex and nonlinear interweaving and co-constitution of forms and degrees of visibility and invisibility. This interrelational formation of identity must be captured in its complexity without reducing it to watershed moments and binaries of freedom and unfreedom.

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<sup>10</sup> Alok Gupta, "This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism," (New York: Human Rights Watch, 2008) ; Suparana Bhaskaran, "The Politics of Penetration: Section 377 of the Indian Penal Code," in *Queering India: Same-Sex Love and Eroticism in Indian and Culture and Society*, ed. Ruth Vanita (London: Routledge, 2002). Also see, Narrain, *Queer*.

The subject of privacy is at the heart of this discussion about sexual identity and visibility in public culture. I situate the discourse on privacy and sexuality in postcolonial India within a historical, legal and cultural framework. The relationship between privacy and homosexuality as it unfolds through my reading of reports of human rights violations, film representations and privacy violation cases during the decriminalization period (2009-2013) informs my interrogation of visibility as a putatively empowering condition for the recognition of the sexual subject.

This argument about privacy has a third component: public health has been a major factor in the maintenance of a law and a moral ethos against LGBTQ sexual identities and male same-sex practices. The decriminalization of homosexuality in 2009 was only provisional. Naz was challenged by moral and religious citizen groups, which brought their appeal to the Supreme Court of India in 2010. These groups, in their support of the reinstatement of Section 377, contended that the law was a necessary tool of HIV/AIDS prevention by acting as a deterrent to same-sex behavior that in their view was against Indian national culture. Groups countering these arguments included the NGO Naz Foundation and concerned citizen groups formed not only by LGBTQ individuals but also advocates and parents of LGBTQ children, academics, mental health professionals and activists who submitted historical, empirical and personal evidence that homosexuality was indeed part of the Indian society with a rich presence in mythology, culture and other social formations. Visibility was constituted through a historical exegesis that showed invisibility to be a critical constituting element of identity.

In 2011, the Supreme Court of India heard arguments from both sides and reserved its judgment in March 2012. The judgment was finally delivered in December 2013 after a long period of anticipation among LGBTQ activists, NGOs and other support groups. The Supreme Court was sympathetic to neither side. Confining its task to deciding the constitutionality of the law, the court ruled that Section 377 did not criminalize any sexual identities such as gay or lesbian. The law's object of criminalization was certain carnal acts, which when performed by anyone regardless of sexual orientation or identity, were liable for prosecution. The court brought all the arguments back to the technical question of the law's constitutionality. In doing so, it summarily dismissed the NGO data and other evidence of misuse, deeming it abstract with the argument that none of the aggrieved parties were present. The court thus separated the question of the law's constitutionality from its misuse by police authorities. That constitutionality was upheld in principle is evident through the decision's neutrality towards identities that might or might not be "behind" certain acts. The judges added that the LGBT in India were a miniscule fraction of the population; it was up to the legislature to take up the question of human rights violations and amend the law. In effect, the court held that no right to privacy could attach to "unnatural carnal acts" regardless of who was committing them. Thus implicitly even heterosexual married couples were invoked as potential perpetrators if they engaged in the said acts.

Decriminalization spanned 2009 to 2013, a period during which the discourse on LGBTQ rights was ascendant in India. This was a momentous time frame. By searching within it, we may understand how and why the right to privacy, in a postcolonial context, legally defines same-sex conduct and relations and how this condition of the law affirms

a broader axiomatic relationship between homosexuality and privacy. In western contexts such as the USA, South Africa and Australia, privacy rights consistently define bodily autonomy of gendered and sexual identities with respect to issues like contraceptives, abortion and homosexuality. Privacy jurisprudence and the legal scholarship on some landmark US decisions such as *Roe v. Wade* (abortion, 1973), *Bowers v. Hardwick* (sodomy, 1986) and *Lawrence v. Texas* (sodomy decriminalization, 2003) are salient points of reference for understanding the Indian case of decriminalization. Judgments from various national contexts including the US informed the Delhi High Court's deliberations and decision. The postcolonial Indian context and specifically the brief period of homosexuality's provisional legal recognition provide an important setting in which to examine privacy's relationship to homosexuality. The linkage between homosexuality and privacy is complicated in many national and international instantiations. This is very much the case in India where the inextricability of the private from the public in various institutional sites such as the law, the clinic, the family or even the crowded public space renders the visibility of sexual conduct and identity fraught with unforeseen danger in the face of a historically patriarchal and heteronormative public culture.

Instead of taking as a given the relationship between privacy and homosexuality – instead of merely asserting that this is simply a matter of obtaining rights as a means to enabling empowerment – this project maps and examines the various coordinates of privacy in the context of homosexuality within media representations, the law and public culture during the 1990s and the 2000s.

*Mediating the Optics of Privacy: LGBTQ Rights, Public Subjecthood and the Law in India* offers a specific focus on the period 2009-2013 when Section 377 of the Indian Penal Code became part of the heated public discourse on homosexuality. The work undertaken here is a genealogical analysis of privacy with respect to the publically debated question of homosexual conduct, as it became understood during the early 1990s in the context of the AIDS epidemic and MSM behavior.<sup>11</sup> Taking the analysis of the landscape of LGBT rights set forth by the 2009 Naz judgment as a point of entry, the chapters in this project go back to the postcolonial period of the law's use in cases of non-consensual conduct (1950-2009), the period of LGBTQ rights and activism in the context of public health (1994-2009) and the contemporary period of intensive legal reform (2009-2013). These broad time frames clearly overlap and do not in any sense represent terminal points of the many lives of Section 377. Rather this project raises questions about same-sex conduct and sexuality during each of these periods, framing these questions in terms of the particular public significance of each instance discussed. The work that follows highlights the recursive nature of legal, social and cultural logics through which privacy and homosexuality have been framed in the various axiomatic

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<sup>11</sup> Academic scholarship and general documentation have constantly invoked Section 377 of the Indian Penal Code in the context of illicit sexual relations further framed within a public health framework of HIV/AIDS outreach. See, Sherry Joseph, "Gay and Lesbian Movement in India," *Economic and Political Weekly* 31 No. 33 (1996), 2228-2233; Arvind Narrain, "The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva," *Sexuality, Human Rights and Health* 7 No. 2 (2004), 142-164; Patralekha Chatterjee, "AIDS in India: Police Powers and Public Health," *The Lancet* 367 No. 9513 (2006), 805-806.

terms of identity, rights and secrecy within a national context that is deeply enmeshed in transnational discourses and frameworks.

This work is driven by an underlying motivation to interrogate the foregone status of privacy in defining homosexuality. Considering privacy as the foundation for homosexuality's decriminalization in India and elsewhere, the study avoids the categorical premise that privacy's fragility in postcolonial culture renders it unable to be studied. The project does not harbor such pessimism about rights, but rather sees rights as, like subjectivity, constituted through the complex play of absence and inaccessibility. Taking privacy as the animating analytic, this project seeks to deconstruct privacy. One of its chief linked concerns is the history of homosexuality as pathology, with privacy as an exclusionary affordance available only to a few. Of further concern is the necessarily public nature of certain conducts and identities that by their very nature are placed directly within the ambit of the public eye. This work sustains detailed engagement with privacy as an affordance and a legal right in the context of LGBTQ empowerment and legal recognition of homosexuality in India. It strives to make an intervention to demonstrate the materiality of privacy as unequivocally urgent to the specific needs of those who identify as LGBTQ and others who are classified as a health risk demographic, and inhabit cultural and social contexts where sexual acts assume greater significance over identity. Although the project relies on public health studies on documentation of the MSM phenomenon in India, as a relatively invisible subjectivity and behavioral category that signifies absence, the MSM is of great importance to the argument around privacy and identification in this project. The MSM constitutes an intersectional demographic structured by class, caste, occupation and marital status and offers by comparison with

legible categories such as LGBTQ, a way to complicate the empowering narrative of sexuality.<sup>12</sup> This comparison takes us to the heart of this project's concern with privacy, identity, and the complex dynamics of public disclosure that surround both the Penal Code and the discourse of Naz and its identity-free aftermath. A host of rights were granted to Indian LGBTQ individuals in the 2009 Naz judgment including the right to life, equality, dignity and non-discrimination. These rights acquire material significance around the issue of privacy of conduct, identity and safety from harm – a notion I introduce here as critical to my concern about visibility and freedom. To what extent, I ask throughout this project, does invisibility paradoxically confer safety, and the visibility of recognition confer risk?

Particularly in the postcolonial Indian context, an analysis of the specific right to privacy supporting the decriminalization of homosexuality in the 21<sup>st</sup> century offers a valuable opportunity to engage with scholarly debates in media and cultural studies, queer theory and postcolonial studies on questions of sexual identity, health, representation, visibility and the conditions of empowerment. These issues remain intimately entangled with privacy as a material affordance as well as a right, and conditions of public presence under which global sexual identities such as LGBTQ and behavioral counterparts of the MSM become visible towards empowerment. Such empowerment is not without potential vulnerability in a culture where homosexuality continues to be pathologized and subject to normative public health and moral codes.

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<sup>12</sup> Shivananda Khan, "Culture, Sexualities, and Identities: Men who have Sex with Men in India," in *Gay and Lesbian Asia: Culture, Identity Community*, ed., Gerard Sullivan & Peter A. Jackson eds (New York: Harrington Park Press, 2011).



By examining the conditions of public violations and violence on non-normative gender and sexuality based identities between 1994 and 2013, the period of LGBTQ activism and legal contestations in India under consideration, the dissertation unpacks the contradictions in which privacy becomes implicated through the Delhi High Court Naz verdict. Such an exercise necessitates an interdisciplinary engagement with how the legal conferral of a right to privacy and decriminalization of sodomy is nationally interpreted by Indian LGBTQ groups and communities to be a moment of liberation. This entails a more complex and nuanced understanding of privacy, regarding it as not just as an affordance that secures non-normative practices and identities but also as a legal process in motion situated within the intersecting frameworks of the global ascendance of LGBT rights and the local conditions of struggle, change and resistance. This is one of the central concerns of this work.

In the pages that follow, I briefly review the broader scholarly landscape within which my arguments are situated and also develop a transnational lens to consider privacy's axiomatic relationship with homosexuality.

### **Sexuality within the Global and the Local**

The scholarship in media and cultural studies about the role of global media in forging a sense of identity and identification in national culture is a useful point of departure in thinking about the relationship of media flows and images to sexuality. Particularly for diasporic and migrant populations, media images and representations play a central role in fostering the marginalized identity's sense of belonging in the national

space. Within the media globalization framework, such processes have advanced an understanding of the interactions between the global and the local.<sup>13</sup> The transnational turn in media and cultural studies since the mid 1990s with the focus on multiculturalism, postcolonialism and identity has been an important intervention to complicate the global-local interaction of media images, identities and representations through an illumination of multiple geographical perspectives.<sup>14</sup>

Arjun Appadurai's work on cultural globalization is one of the most influential accounts of global cultural flows and the emergence of local sites where modernity is experienced through cultural homogenization and heterogenization.<sup>15</sup> The movement of media images, finance, populations and technology across the globe leads to the formation of shifting frameworks such as mediascapes, ideoscapes, technoscapes and ethnocapes that represent the complex points of interplay between the global and the local. Such a formulation of a cultural economy of exchange is useful in understanding the transnational networks within which LGBTQ advocacy and activism have been facilitated by interactions between geographically diverse activist networks and organizations.

The global circuits within which sexuality-based work – ideas, advocacy, representations and rights – takes place comprise various material forms of exchange. Within the transnational framework, these forms of exchange pertain to legal advocacy

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<sup>13</sup> David Morley and Kevin Robins, *Spaces of Identity: Global Media, Electronic Landscapes and Cultural Boundaries* (London & New York: Routledge, 1995).

<sup>14</sup> Ella Shohat and Robert Stam eds., *Multiculturalism, Postcoloniality and Transnational Media* (Rutgers, NJ: Rutgers University Press, 2003). Also see, Ien Ang, *Living Room Wars: Rethinking Media Audiences for a Postmodern World* (London: Routledge, 1996).

<sup>15</sup> Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minnesota: University of Minnesota Press, 1996).

such as UN declarations and the Yogyakarta Principles, sexual categories such as LGBTQ, media representations of same-sex expression and desire with global salience, cultural modes of organizing like gay pride parades and the proliferation of online social and dating services as well as commercial consumer culture. Dennis Altman has written extensively about the internationalization of modern homosexuality through the complex interaction between universal markers of gay and lesbian with regional subjectivities organized around local understandings of gender and sexuality.<sup>16</sup> Altman attends to the different regional traditional sensitivities such as alternative modes of identification that often appropriate or wholly reject the universal labels of gay and lesbian disseminated through media images, consumer culture and often HIV/AIDS advocacy.

In its attention to the various modes in which discourses and debates on same-sex desire and sexuality coalesce around cultural material formations, Altman's observations can be understood as constituting a broader paradigm of visibility where the global markers and flows interact with regional and local desires, subjectivities and cultures. Visibility, whether in consumer culture, political advocacy or media representation has historical importance for the emergence of LGBT and queer identities in the western context where widespread pathologization and persecution as well as the AIDS crisis during the 1980s produced radical modes of public organizing and protest.<sup>17</sup> This history has greatly informed and aided the formation of a mainstream LGBTQ movement in

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<sup>16</sup> Dennis Altman, "Rupture or Continuity? The Internationalization of Gay Identities," *Social Text* (1996), 77-94. Also see, Dennis Altman. "Globalization and the International Gay/Lesbian Movement," in *Handbook of Lesbian and Gay Studies*, eds., Diane Richardson & Steven Seidman (London: Sage, 2002).

<sup>17</sup> Richard Meyer, *Outlaw Representation: Censorship and Homosexuality in Twentieth-Century American Art* (New York: Oxford University Press, 2002).

India where western articulations of sexual identity through gay pride parades and consumer culture co-exist with indigenous identifications that complicate any neat taxonomy of universal markers through inflections of caste, class, gender, region and sexual behavior.<sup>18</sup>

Visibility, particularly media representations of same-sex sexuality and queerness, has been an important analytic in the scholarship on media and cultural studies around questions of social progress and acceptance, stereotyping, class and anxieties around national culture. Larry Gross's work has documented the historical invisibility and stereotyping of gay and lesbian characters in American news, television and film over the course of the late 20<sup>th</sup> century into the 1990s when such characters appeared in the media but not without the attendant politics of closeting and coming out.<sup>19</sup> Kevin Barnhurst frames media visibility of queer lives itself as a paradox implied by the individualistic focus on the process of coming out that renders certain kinds of narratives visible over others that may not be culturally normative.<sup>20</sup> Attention although has shifted from the individualizing media queer stories of coming out to community based organizing through new media and online networks in contexts where public identification as LGBT and queer can provoke adverse responses. Mary Gray's ethnographic study of the role of media in facilitating LGBT identity outreach in rural America illustrates how queer youth

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<sup>18</sup> Lawrence Cohen, "The Kothi Wars: AIDS Cosmopolitanism and the Morality of Classification," in *Sex in Development: Science, Sexuality and Morality in Global Perspective*, eds., Vincanne Adams and Stacy Leigh Pigg (Durham & London: Duke University Press, 2005).

<sup>19</sup> Larry Gross, *Up from Invisibility: Lesbians, Gay Men and the Media in America* (New York: Columbia University Press), 2001.

<sup>20</sup> Kevin G. Barnhurst ed. *Media/Queered: Visibility and its Discontents* (New York: Peter Lang, 2007).

employ media technologies to lobby for their rights with legislators and provide community resources and spaces based on a calculated visibility aligned with normativity and respectability.<sup>21</sup>

Gray focuses on a context that often gets overlooked in the urban bias that informs most accounts of queer visibility. Her account, with its focus off the urban center is helpful in considering media visibility in the postcolonial Indian context where such visibility often provokes backlash and anxieties around moral breakdown. A prominent incident in Indian cultural history that captures the anxiety over the visibility of non-normative sexual desire as moral corruption was the release of Deepa Mehta's 1997 film *Fire*, a story of two sisters-in-law who engage in a sexually intimate relationship. The film caused national outrage among the Hindu Right Wing and women's groups that decried the breakdown of traditional heterosexual marriage. The extent of the outrage was manifest in the incidents of vandalism of theaters in Delhi and Bombay where the film was shown for a brief period of time. Indian economy was liberalized in the early 1990s, a process that brought western media images to the country. As a film directed by the South Asian diasporic director Deepa Mehta, *Fire* recapitulated the postcolonial predicament of national cultural sovereignty informed by sexual purity and modesty.<sup>22</sup> The release of *Fire* and the subsequent events of vandalism and protest in response to its controversial subject matter is an important example of how transnational media flows become contested within the national cultural politics of postcolonial contexts.

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<sup>21</sup> Mary Gray, *Out in the Country: Youth, Media and Queer Visibility in Rural America* (New York: NYU Press, 2009).

<sup>22</sup> Ratna Kapur, "Too Hot to Handle: The Cultural Politics of "Fire"," *Feminist Review* 64 (2000), 53-64.

The specificity of the postcolonial condition with respect to the question of non-normative sexual desire and cultural visibility is crucial to an analysis of privacy and public subjecthood as lesbian, gay or transgender through rights and legal empowerment. A review of foundational analyses of gender and sexuality in the postcolonial Indian context is imperative for this dissertation's examination of the public and private configurations of queer life.

### **Queer Visibility in Postcolonial India**

Sexuality and sexual visibility have been one of the prominent sites of cultural regulation in India, especially in the postcolonial context. Particularly relevant is Partha Chatterjee's distinction between the outer and the inner domains that were central to the project of modern nation building. In the outer domain, the nationalist elite looked to the colonizer's expertise in science, technology and questions of statecraft for the purposes of material modernization. However, by announcing their superiority and autonomy in the inner sphere of spirituality and culture, the elite sought to defend the importance of tradition, which was regarded as essential to the modern Indian nation. Further, the secular nature of the modern liberal state that differentiated between the public and the private for the administration of social life became swamped by the differences of class, caste, race, language and religion that were important to the nationalist ideology.<sup>23</sup> The takeover by these differences in the inner domain of the community of the secular

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<sup>23</sup> Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton NJ: Princeton University Press, 1993).

administration of state's functions represents the reiterative postcolonial predicament that haunts LGBTQ rights in the present context.

Attention to issues of gender and sexuality in postcolonial feminist scholarship further takes up the questions of rights and constitutionalism with regards to the feminist subject. Nivedita Menon holds that the language of rights and citizenship is no longer unproblematically available to an emancipatory politics given the need to assert a range of diverse moral visions that comes up against the universalizing drive of constitutionality and rights. In the context of the postcolonial feminist project, Menon demonstrates how the public-private distinction characteristic of liberal democracies remains fraught by the simultaneous difficulty of creating a private realm of individual autonomy for women at the same time as making gender and sexual oppression in private (i.e. in the family and the home) a matter of state intervention and regulation.<sup>24</sup>

Indian legal theorist Upendra Baxi's distinction between the two systems of legal dispute settlement in India offers an iteration of Chatterjee's inner and outer world classification. The first is the state legal system that operates under the clear demarcation of the public and the private and seeks exactitude and certainty. The second system is where the public-private distinction gets murky with the primacy of tradition and the moral forces of honor, kinship and community values.<sup>25</sup>

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<sup>24</sup> Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Chicago: University of Illinois Press, 2004).

<sup>25</sup> Upendra Baxi, *Towards a Sociology of Indian Law* (New Delhi: Satvahan Publications, 1986).

With and through these arguments, this project's analysis of privacy in relation to homosexuality and Section 377 demonstrates that there is yet another concern at stake in the issue of understanding privacy. Historically, the state's judicial function premised on the public-private distinction is not precisely immune from the judges' own personal perceptions of homosexuality, typically viewed as aberrant and deviant.

In India, the mobilization of the transnational human rights discourse about LGBTQ identity and MSM behavior has been more recent, taking on public force at the beginning of the 21<sup>st</sup> century with its culmination point in the 2009 Delhi High Court judgment of homosexuality's decriminalization. Arvind Narrain's work as a lawyer and legal scholar engaged in this rights-based discourse represents an important approach. Narrain provides historical documentation of institutional and cultural violations of same-sex desiring individuals in various public contexts.<sup>26</sup> The Indian LGBTQ movement's political goals have been organized mainly around the reform of Section 377 of the Indian Penal Code, seen by lawyers and activists as a colonial legacy within a broader heteronormative and patriarchal Indian culture. The movement's response has been to foster a politics of visibility that is particularly charged with the mission of providing public presence to counter-heteronormative sexualities within the contested cultural space through representation in media as well as pride marches.<sup>27</sup> Visibility, however indispensable to political mobilization of LGBTQ rights in India, equally befuddles the public-private configuration of a rights-based liberal order within which the sexual

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<sup>26</sup> Narrain, *Queer*. 2004.

<sup>27</sup> Brinda Bose and Subhabrata Bhattacharyya eds., *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (Calcutta: Seagull, 2007). Also see, Arvind Narrain and Gautam Bhan, *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005).



subject is situated. This project by complicating LGBTQ visibility in the Indian context, exercises an underlying motivation to produce a non-totalizing account of visibility and indicate that visibility can be an ambiguous predicament for sexual subjects to identify as gay, lesbian or transgender. Such an engagement with questions of privacy and visibility proceeds with an acknowledgement of the remarkable accomplishments of the visibility politics staged through legal advocacy and evident in pride marches and demonstrations in India. A legally axiomatic relationship of privacy to homosexuality, I will try to demonstrate in later chapters, is in fact advanced through human rights claims. This paradoxical condition suggests an ambiguous configuration of visibility, one – as this dissertation will strive to demonstrate – that provides empowerment with potential vulnerability.

The enterprise of this dissertation is structured around questions of queer identity, privacy and empowerment in a postcolonial context. This discussion requires an engagement with queer theory, an area of inquiry that has extensively taken up the question of visibility in relation to the homosexual identity and the attendant dynamics of secrecy and disclosure.

### **Visibility and Queer Theory**

Eve Sedgwick's work on the closet provided the foundational ideas in queer theory about the equivocal privacy afforded by the state of closetedness and the provisional visibility that ensues upon coming out in a social context where visibility is

wound up with vulnerability.<sup>28</sup> Sedgwick offered insights on the closet as a mechanism of managing visibility. Despite the progress made by LGBT movement in the United States, her concerns still hold true transnationally, particularly in non-western contexts where activists continue to demand basic privacy for homosexual identities. Judith Halberstam has demonstrated in her reading of the transsexual Brandon Teena's life, the predicament of local or non-metropolitan sexualities that exist far from the affordances of urban mainstream gay and lesbian rights movements. Halberstam's attention to the spatiality of sexuality in rural American life informs my reading of privacy's spatial and geographic dimensions in the postcolonial context.<sup>29</sup>

In stark contrast to privacy as an individual right is Michael Warner's conception of queer publics and counterpublics. Warner aims to realize the radical possibilities of queer sexuality in a visibly public culture of queer world making. His argument considers practices of nonstandard intimacies that remain criminalized and pathologized by the heteronormative culture within which they occur. Warner's vision of the queer world is a necessarily public one that implicitly and unconsciously privileges male homosexuality in its various iterations even as it opposes cultural normativity around gender and sexuality.<sup>30</sup> A critically reflexive position on the investigative dynamics of sexual epistemologies is advanced by Scott Herring in his work on queer underworlds in the US. Herring critiques the scholarly quest for epistemological certainty in the study of sexual subcultures by reading the figure of the down-low (DL) man as a sexual type that defies

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<sup>28</sup> Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley Los Angeles: University of California Press, 1990).

<sup>29</sup> Judith Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York: NYU Press, 2005).

<sup>30</sup> Michael Warner, *Publics and Counterpublics* (New York: Zone Books), 2002.

legibility and classification. The DL man's invisibility implied in his name itself becomes a point of methodological caution for Herring who proposes a retreat from queer projects invested in unearthing sexual knowledge by going slumming.<sup>31</sup>

Within the current rights-based movement of transnational advocacy, another framework has emerged to understand the LGBTQ investments in human rights and the move towards normative visibility and inclusion. David Eng elaborates the particular moment of homosexuality's decriminalization in the history of gay rights in the United States in his critique as a critique of "queer liberalism." Eng offers an important intervention in the politics of sexual normativity that has salience for the postcolonial context. Especially relevant is Eng's discussion of the 2003 American legal case, *Lawrence v. Texas*, a landmark sodomy decriminalization decision. He takes an intersectional approach to uncover the decision's politics of good citizenship and domesticated intimacy between queer couples through an analysis of race and the ensuing period's demand for same-sex marriage rights under a neoliberal capitalist regime. Expanding upon Eng's reading, I propose that the public commodification of queer identity under neoliberalism marks a simultaneous demand for rights to privacy and state recognition of LGBT as juridical categories not only in the US, but also in countries that emulate or modify the human rights model put forth in *Lawrence v. Texas*.<sup>32</sup>

Others have used the term "homonormativity" to critique queer liberalism, which alternatively signals a politics of public visibility and consumerist presence under

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<sup>31</sup> Scott Herring, *Queering the Underworld: Slumming, Literature, and the Undoing of Lesbian and Gay History* (Chicago and London: University of Chicago Press, 2007).

<sup>32</sup> David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham and London: Duke University Press, 2010).

economic conditions with the demand for attendant protections of private rights including the right to marry and national citizenship.<sup>33</sup> Jasbir Puar has extended the meaning of the term homonormativity to coin the term homonationalism, which she defines as a liberal formation in which certain racialized groups such as queer Muslims are excluded in the complicity between mainstream queer groups and American nationalism within the context of 9/11 and the discourse of terrorism.<sup>34</sup> Visibility in the context of queer struggles in America saw a paradigm shift through the public presence of people with AIDS and the media's renditions of pathologized bodies, images which served to shape public recognition of gay individuals that ranged from disgust to sympathy and also to the recognition of an important economic demographic with legal rights to privacy and, much later, the right to same-sex marriage.

These interventions, viewed within national and transnational frames, have resonance for an engagement with the struggle for LGBTQ rights and decriminalization in other contexts including postcolonial India. I now outline the contribution this dissertation makes through its interdisciplinary inquiry informed by communication and media studies, postcolonial studies and queer theory.

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<sup>33</sup> Lisa Duggan, *The Twilight of Equality: Neoliberalism, Cultural Politics and the Attack on Democracy* (Boston: Beacon Press, 2003).

<sup>34</sup> Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007).

## Contributions

*Mediating the Optics of Privacy: LGBTQ Rights, Public Subjecthood and the Law in India* develops a critical lens to understand how the transnational mobilization of national discourses of identity and global human rights discourses taken up in the Indian context contribute to the production of visibility for LGBTQ subjects, bringing potential vulnerability with the putative achievement of empowerment. The dissertation traces the relation of privacy to same-sex conduct within the postcolonial historical framework of the sodomy law's application and the transnational context of rights-based mobilization around the decriminalization of consensual homosexuality to manage HIV/AIDS and afford safety and acceptance to LGBTQ subjects in India. It does so instead of simply critiquing human rights as Euro-centric tools introduced by NGOs to manage homosexuality in India,<sup>35</sup> a context that must be understood to be rich in the diversity of sexual cultures. Taking the 2009 Delhi High Court judgment of homosexuality's decriminalization as yet another iteration of the global consensus on LGBT rights, the dissertation interrogates the legal, cultural and social logics through which the right to privacy empowers violated subjects while also placing them at the threshold of visibility. This mode of empowerment, viewed in the postcolonial context where homosexuality continues to be socially and culturally pathologized, should be understood at the intersection of visibility and vulnerability.

The dissertation is a formative study of LGBTQ rights in India during 1994-2013 when Section 377 of the Indian Penal Code that criminalizes homosexuality became

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<sup>35</sup> Ashley Tellis, "Ethics, Human Rights and the LGBT Discourse in India," in Shashi Motilal ed. *Applied Ethics and Human Rights: Contextual Analysis and Conceptual Applications* (New Delhi: Anthem Press, 2010).

subject to public contestations around the legalization of consensual adult same-sex conduct in private. It contributes to the broader area of postcolonial feminist inquiry with which the Indian LGBTQ movement shares its political vision by offering an analysis of the public-private division as a structuring mechanism of gender- and sexuality-based political visions. It demonstrates privacy's pitfalls through its bourgeois provenance as a classed concept and as a right that brings greater visibility while abrogating further claims to the condition of being private. The dissertation builds on the notion of intersectionality coined by legal scholar and feminist Kimberlè Crenshaw<sup>36</sup> and taken up by the Indian feminist scholar Rajeswari Sunder Rajan in her study of the postcolonial state and woman as the feminist subject.<sup>37</sup> Intersectionality of sexual identity, as understood through Sunder Rajan, enables a view of the Indian LGBTQ subject as necessarily implicated in other social hierarchies of class, caste, gender and religion that may compete for primacy.

Through an examination of media representations, case law and human rights documentation, the dissertation demonstrates how privacy violations produce a subject whose exercise of the legal right to privacy necessarily mandates public identification as gay or lesbian in a social context where homosexuality continues to be framed in terms of mental disorder and pathology. This is a moment when intersectionality becomes both acute in terms of exposure of pathologized sexuality in the postcolonial context and relegated to the shadows of the sexual identity that emerges definitively in the exercise of

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<sup>36</sup> Kimberlè Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and the Violence Against Women of Color," *Stanford Law Review* (1991): 1241-1299.

<sup>37</sup> Rajeswari Sunder Rajan, *Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Durham and London: Duke University Press, 2003).

the right to privacy. Implicit within this process is a critique of queer liberalism in the postcolonial Indian context where legal claims to privacy materialize as a secondary order of mediating intersectional identities as sexual subjecthood towards potential empowerment.

The study also brings specificity to an account of the globalization of sexuality within media and cultural studies that has long been concerned with global flows of images, ideas and cultural practices. As in all regional contexts, such flows become meaningful within local institutional formations of institutions such as health and religion, but they are also always constituted through identity and practices tied to categories of gender and sexuality, and through the negotiation of desire relative to morals, ethics and prohibition. Taking a broader understanding of media, this work prefers the concept of mediation. The dissertation analyzes legal and activist communication as forms of mediation, as well as representations that function as points of exchange, in order to demonstrate that LGBTQ visibility is mediated within multiple configurations and negotiations of the public and the private well beyond the categorical media forms of news, film and social media technologies and practices. Instead of theorizing sexual identity, this work contributes insights into the mediating processes of the law, activism and cultural representations in order to show the complexity of the emergence of sexual identities in the postcolonial Indian context.

Finally, this project offers detailed examination of the historical and contemporary public conditions of pathologization and criminalization of homosexuality from which LGBTQ liberal identity politics emerges in postcolonial India. The study traces social and cultural logics through which the deployment of the term “queer” along

with other terms such as LGBTQ in legal advocacy illuminate political articulation within normative conceptions of Indian culture and society. Building on the insights of the western queer theory that emerged as a radical response to the HIV/AIDS crisis and transgressive sexual visibility against heteronormativity and the tyranny of labels, this work demonstrates the strategic logic of incorporation that enables LGBTQ activists and broader civil society to indigenize homosexuality as part of Indian culture. To reiterate, it is not in any essentialist theory of postcolonial queerness that the dissertation expands upon in its analytical framework. Rather, it is in the broader Foucauldian deployment of sexuality as a history of discourses<sup>38</sup> in the postcolonial account of the social, cultural and legal contestations around homosexuality that the dissertation views as its key site of intervention.

In its critical appraisal of legal modes of empowerment for sexual identities, the dissertation illustrates visibility as potential vulnerability. It is fundamentally an examination of liberal identity politics that presupposes a universal abstract figure that can exercise rights publically to attain justice.<sup>39</sup> Visibility under liberal identity politics has often been celebrated as a modality of political presence, arrival and empowered emergence in western and non-western contexts. This study instead follows the project, articulated by Martin Manalansan and others, to interrogate monolithic prescriptions of

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<sup>38</sup> Michel Foucault, *The History of Sexuality: An Introduction Vol. 1* (New York: Vintage, 1978).

<sup>39</sup> Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton NJ: Princeton University Press, 1995).



politicization.<sup>40</sup> The project deconstructs privacy as the primary legal safeguard for same-sex conduct. In doing so, it is an exercise in complicating visibility as an ambiguous predicament in the postcolonial Indian context.

To argue for a more nuanced and complex account of visibility entails tracing the material figurations of the public and the private that are illuminated in the process. However, it is also to be attuned to an understanding of invisibility as safety, as freedom and ultimately as a form of privacy itself, no matter how fleeting and precarious. Such a position does not mark a categorical endorsement of either total visibility or invisibility. Rather, it seeks to direct attention to alternative modes of being within which sexuality is negotiated intersectionally within the Indian context. The dissertation does not in any measure demonstrate such a possibility. Rather, the contingency of invisibility is a theoretical implication that it articulates as a more complex and formative state of being than previously understood. In this orientation, this dissertation stands among other branches of study, such as afropessimism, that in this historical time attempt to demonstrate the need for a politics of theory that allows for the more nuanced articulation of an identity based in negativity.

## **Methods**

The dissertation is an interdisciplinary study of the legal discourse, media representations and human rights documentation pertaining to the Indian LGBTQ

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<sup>40</sup> Martin Manalansan, "In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma," *GLQ: A Journal of Lesbian and Gay Studies* 2 No. 4 (1995): 425-438.

movement towards the decriminalization of homosexuality in India through the reform of Section 377 of the Indian Penal Code. It builds on a year of fieldwork research conducted at the legal organization, the Alternative Law Forum in Bangalore, India. Data collected from the organization includes a range of legal documents: court orders, affidavits, petitions and other submissions in the Delhi High Court and the Supreme Court of India. Human rights organizations' reports of gender- and sexuality-based violations were accessed online and through mailing lists such as LGBT-India, *movenpick* and Orinam.net.

The project employs genealogical discourse analysis, textual analysis and archival analysis as its main approach. In undertaking a genealogical analysis of privacy in case law and through media representations, I follow Foucault's understanding of genealogy as a method that may activate historical knowledges that share continuities and bear a relation to the contemporary legal discourse of privacy.<sup>41</sup> Through a close reading of legal verdicts, courtroom proceedings, media reports and human rights documents, the study may also be understood as a history of social, cultural, legal and health discourses on homosexuality during the late 1990s and the early 21<sup>st</sup> century.<sup>42</sup>

The final chapter, which is a case study of privacy violations, develops a transnational framework to interrogate the consolidation of categorical sexual epistemologies such as postcolonial homophobia by putting in dialog incidents in seemingly disparate contexts that share political resonances. Finally, the project's use of the terms LGBT, LGBTQ and queer are in line with their mobilization by Indian activists

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<sup>41</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon, 1972).

<sup>42</sup> Foucault, *History*.

in legal communication, protest marches and online mailing lists.<sup>43</sup> LGBT and LGBTQ are used interchangeably, as appropriate to the context of the usage. For instance, when discussing the perspective of the law, courts and international frameworks, LGBT is used to follow their terms of recognition. LGBTQ reflects the terminology of choice among activist and advocacy workers in the everyday practices committed to creating awareness, outreach and social change. Usage of the term “queer” is confined to analysis and arguments that follow theoretical strands informed by scholarship in queer theory and postcolonial studies in which this term appears. Within the transnational framework of sexuality rights and scholarship, these terms have been used interchangeably to describe global circulation of advocacy and consumer cultures except where the question of each term as specific to the identity it bears is under consideration.

### **Chapter Overview**

The chapters in the dissertation map the various aspects of the LGBTQ struggles around the legal reform of Section 377 of the Indian Penal Code through an analysis of case law, film, human rights documentation and case studies of privacy violations. Chapter 1, “LGBTQ Rights in 21<sup>st</sup> Century India: The Delhi High Court Naz Decision,” offers a close reading of the short-lived 2009 Delhi High Court judgment that decriminalized homosexuality in India. The reading mainly attends to the judicial logic through which the various rights of privacy, equality, dignity and non-discrimination

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<sup>43</sup> Narrain and Bhan, *Because I have a Voice*.

were crafted through extensive acts of interpretation and consultation with human rights law within a transnational context.

Chapter 2, “Sodomy, Unnatural Acts and the Courts: Section 377 of the Indian Penal Code in Colonial and Postcolonial India,” traces the continuity in judicial logics through which “unnatural sex,” the uncertainty regarding the object of the law’s criminalization, becomes precisely the occasion to rationalize and ponder over the various meanings attributable to sodomy. From the case law pertaining to non-consensual acts between 1950-2009 to the 2012 Supreme Court proceedings of the Naz case, sodomy emerges as an irresolute protean signifier of criminality that, despite putative clarity of literal meaning, invites a judicial engagement with the legal code’s purposes. Ultimately, the status of sodomy in its multiple criminalized variants does not change with the distinction between consensual and non-consensual sexual acts. The chapter proposes that privacy, as a basis of committing those acts, is rendered tenuous given the specter of criminality attached to the acts.

Chapter 3, “Identity as Injury: The Postcolonial Context of Public Violations,” maps the broader public context within which sexual identity and identity-based outreach work become framed within the terms of pornography and scandal during the period 1994-2009. Drawing upon postcolonial feminism, this chapter offers a postcolonial perspective on human rights violations pertaining to HIV/AIDS work and the public presence of non-normative sexual identities in India. Ultimately, this chapter suggests, there remains an analytical gap between the nature of these violations of rights and the 2009 Naz right to privacy ruling—a gap that represents the absent privacy not afforded to certain bodies predominantly understood in the public context of their presence.

Chapter 4, titled “Privacy and Other Absences: HIV, Queerness and Human Rights in *My Brother...Nikhil*,” traces the story of India’s alleged “first” HIV-positive man made visible to the law by triangulating this account through the legal case about this individual’s experience of being quarantined, a human rights film based on his life story, and the 2009 Naz judgment. This chapter attends to the tension between the public and the private that emerge from reading the film alongside the legal case, situating both the case and the film within the Naz framework of privacy. As a case study of privacy violation, this case pertains to another archaic law mandating public health quarantine of an HIV positive individual. The chapter shows how the film’s portrayal of Nikhil’s life produces representational excess for his real life counterpart, Dominic D’Souza, when his iconicity is read as pathological through the dual registers of public health and sexual identity.

Chapter 5, “Public Absence, Legal Abstention and Cultural Absence: The Limits of the Naz Right to Privacy,” is a case study of two nationally prominent cases of moral policing of queer subjects after homosexuality was decriminalized in 2009. The first is the 2010 case of a professor at a Muslim university who was photographed having sex with his male partner in the bedroom of his on-campus home by media persons hired by colleagues who wished to conduct a sting operation. The second case is a 2011 sting operation conducted by a regional TV news channel seeking to expose a gay dating service, with a view to publicizing an “outbreak” of homosexuality in the city of Hyderabad. These two cases demonstrate how the Naz framework of privacy enabled justice, but they also highlight the spatial logics within which privacy becomes more materially urgent, and conveys risk. The chapter also develops a transnational framework.

This is offered by a reading of the professor's case alongside another incident of sexual privacy violation, an incident occurring in the US at Rutgers University in which an Indian student's actions of webcam spying on his white roommate were seen as an instance of postcolonial homophobia. Through these examples of visibility as risk under conditions of decriminalization, the chapter demonstrates how legal justice for privacy violations in disparate contexts relies on the consolidation of postcolonial homophobia that is at once material and symbolic, not only within India but also in the US and the attendant "global" human rights discourse of gay visibility and/as freedom.

The conclusion to this project offers a brief analysis of the 2013 Indian Supreme Court decision that overruled the Naz decision of decriminalization. As noted above, the view put forward was that Section 377 criminalized only unnatural sexual acts that could be committed by anyone. No sexual identities, the judges held, were under the purview of the legal code. I also offer a brief analysis of three cases pertaining to Section 377 after the legal code was reinstated in 2013. These cases concern gay or bisexual men in heterosexual marriages whose same-sex encounters were exposed. They were booked under Section 377 under its renewed tenure creating an anxiety over the status of privacy for gay or bisexual men on the one hand and the morality of their extra-marital conduct on the other. Further, this conclusion offers an analysis of the implications of the Supreme Court's dismissal of the Naz panoply of LGBT rights, a decision based on the court's view that there were no aggrieved parties present in the court; mere academic and abstract arguments did not constitute a sound basis for declaring the law unconstitutional. This profound statement echoed and extended the public view of homosexuality as simply not existing in India, a condition of invisibility that I will have argued throughout

is radically constitutive of precisely the negatively valenced state of experience and practice at stake within the Indian LGBTQ community and its diaspora.

## Chapter 1

### **Reading Down of Section 377 of the Indian Penal Code– the Decriminalization of Homosexuality in India**

Section 377 of the Indian Penal Code, as noted in the introduction, was written into the Indian Penal Code as part of the legal codification and standardization of Indian laws by the British government in 1860. The law was retained in the Indian Constitution when the constitution was drafted in 1948 following the Indian Independence from the British. Arvind Narrain has noted that over the postcolonial period from 1947 to the early 1990s, the law had mostly been used in cases of non-consensual sexual acts and sexual abuse of minors. No cases related to consensual conduct were brought to court under the law. Section 377, to reiterate, criminalizes “carnal intercourse against the order of nature” and does not distinguish the conduct on the basis of privacy and consent. The law says:

Unnatural offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term, which may extend to 10 years, and shall be liable to fine.

Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.<sup>44</sup>

Narrain further observes that the law criminalizes any sexual act (such as oral or anal) that does not result in procreation. The law in his view further creates an atmosphere of silencing and invisibility of individuals with same-sex desires who are

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<sup>44</sup> Arvind Narrain, “The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva,” *Health and Human Rights* 7 No. 2, Sexuality, Human Rights and Health (2004): 142-164.



afraid to publicly identify as gay or lesbian out of fear of prosecution or social shame around their sexual desires. During the early 1990s, the law's relationship to the dynamics of secrecy and disclosure was understood to have devastating effects on public health efforts to check HIV/AIDS. Public Health NGOs, the Naz Foundation in Delhi and the Humsafar Trust in Bombay, have documented the challenges in providing healthcare to the men-who-have-sex-with-men (MSM) whose sexual behavior is criminalized under Section 377. As a result of this criminalization, this population that is most vulnerable to HIV/AIDS and other health risks is driven underground, beyond the reach of HIV/AIDS health outreach.

The articulation of human rights related to privacy, health and liberty of LGBTQ identified subjects and the MSM groups during the 1990s has occurred around the repeal of Section 377. This articulation within a predominantly heteronormative and traditional national culture of postcolonial India recapitulates the Foucauldian repressive hypothesis that points to an incitement to the discourse of rights and the recognition of sexuality under the legal regime of Section 377 that reflects Victorian morality.<sup>45</sup> Public health efforts to manage the rising rates of HIV/AIDS through a rights-based framework has been central to the reform of Section 377 in order to bring the MSM populations within the ambit of visibility in order for them to avail of the necessary healthcare.

The national concerns with the rising rates of HIV/AIDS in India and the invisibility of the MSM as well as other vulnerable populations like LGBTQ have led the Indian LGBTQ movement and advocates to organize around the repeal of Section 377 to

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<sup>45</sup> Michel Foucault, *The History of Sexuality Vol. 1* (New York: Vintage, 1978).

legalize homosexuality in India.<sup>46</sup> In India, sexual visibility is mediated by the convergence of conditions including the global circulation of universal identity categories in non-western and postcolonial contexts,<sup>47</sup> national and international legal advocacy and activism, and a shared understanding among advocates in India and globally that sexuality rights are human rights. Sexual visibility has been mediated in India, particularly for a range of non-normative sexual subjects, through the proliferation of same-sex representations in public media and cultural spaces since the early 1990s when the Indian economy was liberalized to allow the inflow of western media.<sup>48</sup> The scholarly canon on this public circulation includes the writings of Dennis Altman and Jon Binnie.

Altman, a preeminent author who has been publishing books since the 1970s on gay oppression and liberation from the intellectual context of Australia, insisted in his book of 2001 that we take note of the Americanization of the proliferating homogenous image of gay “global sex,” and note the extent to which sexual identities are in fact subject to uneven conditions. Altman further sees globalization of sexual identities as a form of homogenization based in consumer culture leading to the inequality along class lines. Binnie, writing in 2004, proposes that “the globalization of sexuality” and the discourse of rights in particular<sup>49</sup> are formations that deserve to be complicated. Binnie

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<sup>46</sup> I contextualize this vulnerability of the MSM and LGBTQ groups in Chapter 3 on the contemporary history of sexual identity as a form of injury.

<sup>47</sup> Inderpal Grewal, “Global Identities: Theorizing Transnational Studies of Sexuality,” *GLQ: A Journal of Lesbian and Gay Studies* Vol. 7 No. 4 (2001). Elizabeth A. Povinelli & George Chauncey, “Thinking Sexuality Transnationally,” *GLQ* Vol. 5 No. 4 (1999).

<sup>48</sup> Ratna Kapur, “Out of the Colonial Closet but Still Thinking ‘Inside the Box’: Regulating ‘Perversion and the Role of Tolerance in De-Radicalizing the Rights Claims of Sexual Subalterns,” *NUJS Law Review* Vol. 2 No. 381 (2009).

<sup>49</sup> Jon Binnie, *The Globalization of Sexuality* (Sage, 2004). Also see, Dennis Altman. *Global Sex* (Chicago: University of Chicago Press, 2002).

further theorizes the relationship between the national, the global, and queer sexuality, and critiques Altman's model of the application of postcolonial theory to queer globalism, in particular challenging the universality of notions such as "queers of color" and the term queer itself. The emergence of an Indian national queer politics and LGBTQ movement, with the objective of decriminalizing homosexual identities and sexual practices, demonstrates the crucial purchase of "global gay" despite critiques such as these.

The understanding of sexual categories included in the spectrum LGBTQ as universal and globally homogeneous continues to circulate globally, shaping advocacy and activism in contexts such as India where the legal right to practice gay sex has been at stake.<sup>50</sup> Yet attention to the specific context makes it clear that different modes of public visibility are at play. We see gay sexual identity enacted through symbolic displays such as queer pride parades and through institutional forms such as courtroom litigation around legal reform, in the legal challenge to the sodomy law Section 377 of the Indian Penal Code. We also see a mix and range of forms of gay and sexual expression in media images, most obviously in the globally popular form of Bollywood films. The presence of this range of modes of public visibility in which queer sex appears warrants an inquiry into the critical episteme of "queer visibility" in India. Because even as this episteme inaugurates the universal narrative of progress, aligned with global human rights, it inevitably creates outcomes that hearken not necessarily to a repressive regime of gender and sexual relations but to a more complex formation of visibility within which

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<sup>50</sup> Gautam Bhan & Arvind Narrain, *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005).

sexual identification can itself constitute a form of vulnerability, or sexual visibility as violence.<sup>51</sup>

On July 2, 2009, the Delhi High Court amended Section 377 of the Indian Penal Code to exclude consensual same-sex acts in private from the criminal purview of the law. In decriminalizing homosexuality, the Court in a 105-page long verdict in the case *Naz Foundation v. Govt. of NCT of Delhi*<sup>52</sup>, legally recognized LGBTQ rights as guaranteed in the Indian Constitution. Through an expansive re-interpretation of the various articles of the Constitution and the use of international human rights law, legal cases from comparative jurisdictions like the US, Fiji, Nepal, South Africa and Australia, the Court affirmed the rights to equality, liberty, dignity and non-discrimination for the Indian LGBTQ subjects. The Naz verdict, as it came to be known among national LGBTQ communities and activists, took into account the main contention of the petitioner Naz Foundation, a public health NGO that works with MSM groups. The NGO argued that Section 377, by criminalizing same-sex behavior, drove the MSM groups underground and hampered their access to HIV/AIDS healthcare in the times of rising rates of the epidemic. Other evidence of police misuse of Section 377 to harass non-normative bodies like transgender and other local sexual identities like *hijras* and *kothis* (an effeminate man who identifies as a receptive partner) was also submitted in the form of human rights reports, legal affidavits and other submissions by civil society groups to demonstrate the extent of human rights violations.

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<sup>51</sup> Joseph Massad, “Re-Orienting Desire: The Gay International and the Arab World,” *Public Culture* Vol. 14 No. 2 (2002).

<sup>52</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

This chapter offers a close reading of the Naz verdict in order to offer an understanding of the rights granted to the LGBTQ groups and the implications of these rights. My reading of the Naz text also shows the judicial logics employed by the courts to formulate key concepts like “privacy,” “identity” and “sexual orientation” for these rights to be meaningful. In demonstrating the judgment’s construction of a modern homosexual identity in terms of privacy and other rights, I draw upon queer theory as well as the numerous critiques of the judgment articulated by Indian legal and feminist scholars working at the intersection of public health scholarship and postcolonial theory. Here I am concerned with the exclusions and slippages enacted in the Naz verdict through the construction of the Indian homosexual identity in terms of privacy.

### **The LGBTQ Human Rights in the Naz Verdict**

Among the various rights accorded to the Indian LGBTQ subjects and ostensibly the MSM<sup>53</sup> such as the rights to equality, dignity and non-discrimination, the right to privacy emerged as the primary basis of homosexuality’s decriminalization in the Naz verdict. The Delhi High Court declared that the state had no business in the private bedrooms of LGBTQ individuals. With a global resonance as well as local and regional significance, privacy in the Naz judgment figured not merely as the right to be left alone but as a right to decisional autonomy. An expansive reinterpretation of the Articles 14 (Equality), Article 15 (Non-Discrimination) and Article 21 (Life and Liberty) of the

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<sup>53</sup> I say ostensibly here because the MSM by its very definition is an invisible figure. This issue came up in the Supreme Court hearings of the Naz verdict when the court noted that those affected by HIV/AIDS due to lack of healthcare were absent in the courtroom.

Indian Constitution along with insights taken from Indian case law and from comparative jurisdictions informed the breadth of the right to privacy. At the same time, such breadth is based upon the shifting locus of privacy and an understanding of the right that is contingent upon precedents in the case law.

The legal construction of privacy is at the core of sexual personhood in the Naz judgment. The 105-page long Naz verdict points to privacy's lack of textual fixity in the Indian constitution. Yet privacy in social life remains an important material need of both the MSM groups and the self identified Indian LGBTQ individuals. Paradoxically, the verdict and the law to which it responds are built on a constructivist foundation that affirms the essentialist fixity of sexual identities. In their legal legibility, sexual identities emerge from a positivism of sorts, a verifiable oppressed human subject that is shown to have been harmed by the operations of the antisodomy law, Section 377. The Naz verdict constructed a rights-based legal scaffolding for the protection of LGBTQ subjects that featured the safeguard of privacy. As I will show, the judgment moved through a narration of the violence inflicted upon non-normative bodies and behaviors in public by the police use of Section 377. This narrative shows that these violations of privacy were in each case public. Publicness appears to have been a necessary condition of these narratives of violence. I suggest that it is perhaps also the case that publicness is the basis of the right to privacy as a safeguard. Sex in public is a concept that has been taken up in queer theory as a radical form of queer public cultures in the western contexts.<sup>54</sup> My point here is that what constitutes "public sex" is complicated in a (pre-Naz) context where sex with men is in some contexts outright denied as an existing aspect of Indian life, and

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<sup>54</sup> Michael Warner, *Publics and Counterpublics* (Cambridge MA: Zone Books, 2002).

exists only in secret, as pathological and criminal behavior. What becomes public is thus a matter of the private unveiled. In the pages that follow, I take up what has until now been a lost opportunity to interrogate the boundary between the public and the private as it pertains to sexual practice, and by extension to sexual identity and human rights. The text of the law and its temporary undoing in Naz is a rich resource for understanding the state's own interpretation of what constitutes the human subject who has been constituted through public erasures, and who now appears, in the reading down of this law, as an absence. This is an unstated and unrepresented subject that is now represented and dramatized in terms drawn from the underside of legal discourses, the violations under Section 377 that are brought to light in the bold, clinical, florid, and erotic terms of the historic cases.

The Naz judgment begins with a summary of the challenge to Section 377 by the petitioner Naz Foundation along with National AIDS Control Society (NACO) and the Union of India represented by the Central Health Ministry. In their submissions, the petitioners claimed the following:

1. Section 377 has been misused to abuse and harass men-who-have-sex-with-men (MSM) and transgender individuals who are the most susceptible to HIV/AIDS. Thus the law hampers HIV/AIDS outreach functions performed by the Naz Foundation.
2. Section 377 is based on Judeo-Christian moral and ethical standards and creates a class of vulnerable people and disproportionately targets them based on their sexual behavior.

3. Section 377 impinges on the right to privacy and dignity of homosexuals. This right implicit in the right to life and liberty under the Article 21 of the Indian Constitution encompasses the private intimate sphere of homosexual lives that stand criminalized under the law.
4. Section 377 unreasonably distinguishes between procreative and non-procreative sexual acts, which violates the Article 14 (Equality) of the Constitution. Further, under Article 15 (Non-discrimination on grounds of sex), the concept of gender includes sexual orientation. The law also violates Article 19 that pertains to the freedom of movement and speech concerning one's sexual identity.

In their summary of the petitioners' position, the judges "for the sake of convenience" employed the terms "homosexual", "gay" and the "gay community" to refer to the behavioral category MSM. The latter is claimed to be most susceptible to HIV/AIDS due to the operations of the law, a statement that reinforces the understanding that these categories and by extension the LGBTQ spectrum are being understood through the historical public health lens of HIV/AIDS in which nondisclosure has been the norm in India.<sup>55</sup> The casual conflation of behavior with identity levels the difference between identity and community and subsumes the complex realities within which each rubric is shaped. MSM, a category pertaining to men who have sex with men, is rendered interchangeable with "homosexual" and "gay," terms that may variously signify behavior, or, as a noun, men only, or women and men, who identify as such; and these terms that are rendered interchangeable with the group form of identity, erasing distinctions between men and women, about whom Section 377 has an irrelevance also

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<sup>55</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 2009: 6.



constitute a queer erasure. Moreover, by introducing “community” into the mix, we find synecdochal slippage in which the part is taken for the whole, and the whole is misrendered as a unified type. Most significantly, MSM, a category into which many in India must default due to the very law in question, becomes a curious tacit erasure, insofar as members of this group would be unlikely to identify as gay. The blurring of these categories and the use of catch-all terms marks the courtroom as what feminist postcolonial scholar Ratna Kapur has described as a kind of “constrained, unreflective space” that is often constituted by the generic use of “queer.”<sup>56</sup> In her critique of the Naz judgment, Kapur notes how the elasticity of the term “queer” as taken up in the west, its association with disruptive and transformative thought and actions get appropriated in non-western contexts. Queer becomes a prescriptive label, signifying a global identity that seeks to secure legitimacy for same-sex relations and desire. Indian sociologist Zaid Al Baset bemoans the historical evacuation of specificity in the Naz court’s usage of the terms “homosexual” and “gay” noting that these terms functioned in this specific context as universal signifiers of unnatural desire foreshadowing other terms such as “lesbian,” “*kothi*” (a regional term for a visibly effeminate man who identifies as a receptive partner in anal sex) and “*hijra*” (transgender/eunuch).<sup>57</sup> Al Baset, also writing about the Naz decision, reminds us of the well-known western and European provenance of the term “homosexual,” locating its usages within the pages of medical and psychiatric journals, retracing the history of the term “gay” through the writings on sexology of the late 19<sup>th</sup>

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<sup>56</sup> Ratna Kapur, “Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in the Law,” *Jindal Global Law Review* Vol. 4 Issue 1, (2012).

<sup>57</sup> Zaid Al Baset, “Section 377 and the Myth of Heterosexuality,” *Jindal Global Law Review* Vol. 4 Issue 1 (2012).

and 20<sup>th</sup> centuries and in the history of Stonewall Riots, the gay liberation movement in the US and the AIDS crisis. This history is well known through the classic works of Ronald Bayer, Michel Foucault, David Halperin and Jennifer Terry<sup>58</sup>, and others, but here, crucially, is recalled in the postcolonial context in which the recollection of meanings and their discursive entanglements take on crucial political import.

Both Kapur and Al Baset target the Naz judgment's usage of identity-based terms as instrumental deployments that either compromises the potential of queer politics as radical and transformative or evacuates that potential of its western historical specificity. The term "queer" has been used interchangeably with "LGBT" by Indian activists and advocates<sup>59</sup> since the advent of public organizing around sexuality rights. But the term's usage remains confined to academic theorization or political mobilization. "Queer" has not carried the same political charge in everyday modes of sexual identification in India, where "gay," "homo" and other words that are also simultaneously summoned as epithets, such as like *kothi* and *hijra*, have much greater valence.

The term "queer" has been mobilized by some theorists and activists in the temporal register of futurity.<sup>60</sup> In its radical and transformative potential, "queer" is situated in the future of becoming. The usage of "queer" in the context of Section 377 and the Naz judgment has strong relevance, because this is clearly a context of marked

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<sup>58</sup> See Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (Princeton: Princeton University Press, 1987); Michel Foucault, *History*; David Halperin, *How to do the History of Homosexuality* (Chicago: University of Chicago Press, 2002). Jennifer Terry, *An American Obsession: Science, Medicine and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).

<sup>59</sup> Arvind Narrain & Alok Gupta, eds., *Law like Love: Queer Perspectives on Law* (New Delhi: Yoda Press, 2011)

<sup>60</sup> José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York: NYU Press, 2009).

transformation. It must be asked, in this and every other context in which this term is used, what happens when that transformation (the acquisition of rights) is secured? Does the queer impulse then not disappear into the normativity afforded by the transformation, testifying to its own transience in the struggle for rights? The “radical” recourse away from the normative gestures of the law towards the promises of the term “queer” does mark a productive contest over the future applicability of terms of identity and their discursive hazards. If rights are rendered normative to the queer subject, does the identity cease to exist in its constitutive conditions? By privileging modes of signification pregnant with disruptive content, we may also be tacitly practicing a fundamental deference to a contest over signs. If queer is to be kept alive in political consciousness towards organizing around questions of sexuality, especially in the postcolonial Indian context, its deployment can only be a provisional one and must attend to the materiality of questions around sexuality.

But “queer” appears neither in Section 377 nor the Naz jury’s discourse of decriminalization. The jury, as noted, conflated behaviorally oriented categories such as MSM with categories featuring modes of identity (gay, homosexual) and community (gay community). This practice was in tension with the position of the Union of India represented by the Ministry of Home Affairs, This body, which represented the interests of moral and religious groups that supported Section 377, described homosexuality narrowly in terms of sexual acts. The Home Affairs Ministry took the route of public morality, disapproving of homosexuality in India and challenging the Naz decision. The Ministry cited the most inflammatory cases taken up under Section 377, such as those involving child abuse and bodily harm. The Ministry warned that the law’s deletion

would open “floodgates of delinquent behavior and can possibly be misconstrued as providing unfettered license for homosexuality.”<sup>61</sup> The Health Ministry, representing the same government, took yet another position on the categories at play in Section 377 and the broader social context of the present to be impacted by its dismantling. The Health Ministry, the arguments of which supported the Naz’s petition, put forward an understanding informed by public health discourses about sex and identity forged through decades of HIV/AIDS local and global mobilizations, tying Section 377 directly to national health and mortality. This ministry described empirical evidence showing a positive correlation between risky MSM behavior and rates of HIV infection, and identified the source of this problem in the legal criminalization of such behavior. The ministry’s focus on Section 377 as a causal factor in negative national health and mortality outcomes rendered its understanding of the law’s human rights subject as one constituted through behavior, not identity. MSM practices were coded as risky at the level of acts and behaviors by both the Health Ministry and National AIDS Control Organization’s (NACO) submissions during the Naz hearings. But their respective recommendations, outside that legal conversation, to control rates of infection among the invisible and mobile MSM remained rooted within the very cultural norms that stigmatize homosexuality. For instance, the NACO includes monogamy among its recommendations for the MSM, a figure whose behavior often goes unreported. The NACO’s strategy is thus to align itself with the most traditional Indian moral values of abstinence and fidelity. NACO offers a host of other educational and informational measures and recommendations for MSM and other groups, but this moral kernel remained intact, and

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<sup>61</sup> *Naz Foundation*, 11.

was targeted most strategically at this most invisible sector, MSM—a group that by its very definition refuses identity-based social visibility, taking cover in the anonymity afforded by a category of sexual practice that is understood to confer provisional privacy.

The NACO recommendations, with their featuring of abstinence and their focus on behavior not identity, cast homosexuality as an urgent matter of risky behavior, lived at the level of acts, a subjectivity performed in unsafe, ambiguously private-public spaces, and an enacted identity resulting in devastating health outcomes for an invisible minority group. One of the many effects of this strategy was to pose a challenge to the radical image of sexual and social non-normativity that had been dominant in the queer politics shaped by postcolonial writing on sexuality in India.<sup>62</sup> Both sides, those against Naz (represented here by the Ministry of Home Affairs) and those in support (the Health Ministry), employed an understanding of the law as a barometer of harm management around public culture and public health. Yet in both cases the sexual subject's redress through rights was configured through pathology, understood as the management of public risk, as risk of social and moral if not medical pathology.

Neil Cobb reviews the global deployment of the public health rationale in the repeal of sodomy laws by drawing upon the Foucauldian idea of biopower. Cobb critiques such rationales of moral and health risk as they are linked, in both arguments, to the securing of rights. Cobb acknowledges the success of public health strategies in advancing queer rights in non-western contexts, but observes that such an approach reinforces the idea that queer subjects harbor risk of contagion to heteronormative

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<sup>62</sup> Bhan and Narrain eds., *Because I have a Voice*. Also see, Brinda Bose & Subhabrata Bhattacharya eds., *The Phobic and the Erotic*.

populations. Both arguments produce the queer subject as an anti-citizen, even as the latter argument (the Health Ministry's) seeks to free the homosexual identity itself from the stigma of contagion by tying stigma "only" to the behavior of men having sex with men.<sup>63</sup>

This very entanglement of identity and acts also became a focus of the Naz hearing through the testimony of Respondent no. 8, Voices Against 377. "Voices" was a coalition of civil society groups that supported the decriminalization of homosexuality on grounds that the law creates a criminal association between same-sex desiring individuals and their sexual acts. Their response was given by advocate Mr. Shyam Divan. Based on a range of evidence, which included police reports, human rights violations reports and affidavits of police torture and brutality, Divan, as Respondent no. 8, demonstrated the magnitude of the law's misuse in the hands of the police who routinely oppressed visibly gender non-normative bodies in public contexts. "Voices" emphasized the public visibility of individuals with gender- and sexuality based non-normative identities who suffer both symbolic and material harm. That harm, it was proposed, itself undermines the core of their identity; to appear in one's identity in public is to risk censure and punishment, hence there is the lesson that it is safer not to appear. The "Voices" response made references to acts (behavioral categories of MSM) and identities (both global as LGBT and local as *hijras*), showing them both to be subsumed together under the law in a confounding manner, as deviant as well as rights-deserving. Divan further showed how the distinctions between behavior and identity are collapsed and flattened under Section

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<sup>63</sup> Neil Cobb, "Contagion Politics: Queer Rights Claims, Biopower and the "Public Health" Rationale for the Repeal of Sodomy Laws," *Jindal Global Law Review* Vol. 4 Issue 1 (2012).

377, pushing towards a narration of a positivistic homosexual figure visible as injured and oppressed at the same time that its behavior is understood as a matter of inner essence, as an unchanging core. Despite the definitive move to decriminalize same-sex conduct in private, it is the modern *public* LGBTQ identity that gets celebrated as a liberated entity. The court's mobilization of global human rights based frameworks that serve as universal safeguards for legible gender and sexuality based identities patently overlooks the complex realities of the public and private contexts within which same-sex desiring individuals negotiate their lives in India.<sup>64</sup>

The judges hearing this response did not address the tension between sexual acts and identities. Instead, they proceeded to assess the "Voices" response in the context of a second argument put forth by the Naz counsel Mr. Anand Grover, who suggested that Section 377 was in violation of Article 14, 19 and 21 of the Indian Constitution insofar as it created an unreasonable classification, in effect predominantly targeting the gay or homosexual community. Grover further concluded that the law infringes upon the zonal and decisional right to privacy of such persons and treats them less than other people in the country. The constitutionality of public morality as the grounds for Section 377 was raised, with Grover arguing that public morality was an invalid basis for the disapproval of homosexuality.

On the defendant side, the Additional Solicitor General (ASG) rehashed the cultural argument around homosexuality as alien and abhorrent in Indian society. He further contended that the right to privacy cannot be absolute and can be restricted for compelling state interest. Divesting the law of any identities, he made the claim that the

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<sup>64</sup> *Naz Foundation*, 17-20.

law is gender neutral and targets anyone who commits the act. He further linked those acts to the spread of HIV/AIDS, inverting the petitioner's argument by suggesting that Section 377 actually curbs risky sexual activity, keeping in check the spread of HIV.<sup>65</sup>

The remainder of the judgment demonstrated the court's construction and derivation of rights from sources ranging from national case law, comparative jurisdictions and international human rights law. In what reads like an extensively well-informed treatise on human rights, heralding a new period of recognition of sexual personhood in India, the court performed the ultimate abstraction of such personhood by casting the rights-bearing figure as possessing all the static components of an empowered existence. However, as this analysis demonstrates, the Naz verdict represents a legal imbrication of incongruent realities—for example the court's conflation of the MSM and LGBTQ proceeds without addressing the tensions between acts and identities or public and private. In the Naz decision, these incongruent realities are contained within the protective yet permeable shell of human rights that foregrounds sexual identities. This containment of sexual identity within the protective shell of human rights is done, throughout this hearing and throughout the liberatory discourse around it, without a gesture to the categories of class, caste, gender or religion that inform and are informed by sexual identity.<sup>66</sup> The shell that protects rights can be likened to a black box, a container that makes an operation smooth and efficient but which conceals the messy operations of difference, discordancy, and exclusion. The black box as camera is also an instrument for making visible, which contains within itself a core of invisibility with

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<sup>65</sup> *Naz Foundation*, 22-24.

<sup>66</sup> Ashley Tellis, "Disrupting the Dinner Table: Re-thinking the 'Queer Movement' in Contemporary India," *Jindal Global Law Review* Vol. 4 Issue 1 (2012).



respect to its own mechanisms. This paradox holds for the legal shell of human rights, which confers visibility to its subject while containing the very mechanisms of construction, conformation, and erasure of differences through which the putative human rights subject is made.<sup>67</sup>

### **The Naz Sexuality Rights – Abstractions and Absences**

The judgment begins with Article 21 of the Indian Constitution that lays out the scope of the Right to Life and Liberty. Acknowledging that the idea of dignity is a difficult concept, the judgment defined it as recognizing a “person as a free being who develops his or her body and mind as he or she deems fit.”<sup>68</sup> The judgment further noted that human dignity rests on the physical and spiritual integrity of the human being, his or her humanity, irrespective of the utility the person can provide to others. On this issue, it referred to national case law and a judgment from the Canadian Supreme Court, *Law v. Canada (Ministry of Employment and Immigration)*. From these sources, the court rehearsed a definition of dignity, which is described in terms of self-worth, fulfillment of basic needs of life and fair treatment of difference.

On the issue of privacy in the judgment, the judges acknowledged privacy as being absent as a specific right in the Indian Constitution. They referred to the Article 12 of the Universal Declaration of Human Rights (1948) that defines privacy as protection against arbitrary interference. A similar caveat was cited from the Article 17 of the International Covenant of Civil and Political Rights. This source makes references to

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Naz Foundation*, 26.

privacy with respect to family, home, correspondence and reputation. Another iteration of privacy was taken from the European Convention of Human Rights. Using this source, the court added an exception to the right to privacy in cases involving national security, public safety or the economic wellbeing of the country, implicitly evoking John Stuart Mill's harm principle.<sup>69</sup> Further citations were drawn from Article 19 (1) (a) of the Indian Constitution, a source that addresses freedom of speech and expression, and Article 19 (1) (d), a passage that addresses the right to freedom of movement.

Through these sources, the court turned to an extensive rehearsal of privacy jurisprudence in American case law. This set of concerns had been referenced previously in the Indian Supreme Court. But in the Naz decision, this foreign comparison or precedent becomes part of a long, rehearsed narrative through which the course of thinking on privacy rights for the putative gay or homosexual subject of the decision is interpreted through this western, American historical trajectory. In other words, the Indian gay subject, at the moment of its emergence into the conditions of rights and visibility, finds justification of its origins in a European history of privacy law. This history is articulated, in this 21<sup>st</sup> century moment, in global terms through a course of logic that must pass first through the US legal narrative in which both privacy and the homosexual subject come into being as a right and a subject of that right respectively.

The judges also cited other US sources. Justice Brandeis' dissenting position in *Olmstead v. United States* (1928) was invoked. This was a case of electronic surveillance, concerning the right to privacy in the Fourth Amendment that implies a right to be left

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<sup>69</sup> John Stuart Mill, *On Liberty* (Mineola, NY: Dover Publications, 2002).

alone in order to create conditions favorable to the “pursuit of happiness.”<sup>70</sup> The court also referred to *Griswold v. Connecticut* (1965) on the autonomy to make decisions regarding contraception or sexual conduct within the private space of a marriage and *Eisenstadt v. Baird* (1972) that extended such privacy to unmarried persons. Other important decisions regarding bodily privacy and autonomy cited by the court include *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern PA v. Casey* (1992). These were cases in which the American courts observed the absence of an explicit right to privacy in the American Constitution but recognized zones of privacy in the First, Fourth and Fifth Amendments, in the penumbras of the Bill of Rights in the Ninth Amendment and in the concept of liberty in the Fourteenth Amendment.

This judicial rehearsal of privacy’s evolution as a right through the American jurisprudence makes privacy dually derivative through a series of translations. No doubt, the American judgments cited have been historically prominent for advancing the discourse on bodily privacy in the west. But their invocation in the Naz account of privacy, as noted above, did not adequately capture the specificity of postcolonial context in terms of acts/identities and public/private. It is as if privacy as a right could cut across a range of similar yet specifically distinct issues like abortion, contraception and homosexuality. Privacy as a right is certainly needed to protect non-normative subjects and experiences. But the sheer diversity of these experiences mandates an attention to the peculiar specificities of the context within which the subjects of privacy become visible as being in need of that right.

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<sup>70</sup> *Naz Foundation*, 29.

Following this detailed history of privacy's development in the American case law, the court turned to developments in the Indian case law. The court referred to a number of domestic judgments all but one of which explicitly concerns privacy as bodily/sexual autonomy.<sup>71</sup>

Of these six cases referenced, only one concerned bodily privacy. This was the last, in which the courts granted the appeal of a man to demand that his wife undergo a medical examination for mental illness in order to facilitate his case for divorce. The other five pertain to privileged communications, intrusion into home, and unauthorized searches and freedom of speech. From the aforementioned cases, the court also reiterated two important caveats about privacy. The first concerned an absence of privacy's textual status as an explicit right, a form of protection that is rendered intelligible through constant judicial reinterpretation. In the second caveat, the judges noted that privacy would have to be legislated, and would develop as a concept, on a case-by-case basis,

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<sup>71</sup> 1. *Kharak Singh v. the State of U.P.* (1964) on the surveillance by domiciliary visits by the police 2. *Gobind v. State of M.P.* (1975) about surveillance by domiciliary visits of habitual criminals. 3. *R. Rajagopal v. State of Tamil Nadu* (1994) concerning the balance between the right to privacy of a person and the right to criticize and comment on acts and conduct of public officials. 4. *District Registrar and Collector, Hyderabad and Another v. Canara Bank and Another* (2005) concerning a state act that authorized the collector to delegate "any person" to enter any premises to search for and impound improperly stamped documents. 5. *People's Union for Civil Liberties v. Union of India* about wiretapping of a telephone conversation that was found to be a violation of the freedom of speech under Article 19. 6. *Sharda v. Dharmpal* (2003) in which the court granted a man's request to compel his wife to undergo medical examination for mental illness in order for him to get a divorce.

given that judicial reliance on too broad a definition of privacy could raise questions due to the concept's derivative nature.<sup>72</sup>

In the Naz judgment, the sole case concerning bodily privacy was mentioned only in passing while the other five offered the judges a way to construct privacy in terms of home (zonal) and communication (free speech). However, with respect to the case number 4, the court also held that privacy related to persons and not places, an idea that assumes decisional autonomy of individuals as free, liberal agents who can direct their own lives. The rudimentary derivation of privacy was drawn from various decisions pertaining to bodily privacy (mostly US case law) and legal notions of zonal and communicative privacy. The judges went on to contextualize privacy and dignity in the context of Section 377 and its infringement of the privacy of homosexuals. In doing so, the judges referred to the matter of homosexual identity as an unchanging core, an aspect of personhood that cannot be left behind at home. Such a characterization once again had the effect of casting the LGBTQ identity as an essentialist subjectivity that is immutable alongside its situational counterpart, the MSM – a behavioral category that is socially constructed. This paradox juxtaposes two entirely different accounts of sexual identities that are treated just the same through the rhetoric of rights in the judicial reckoning.<sup>73</sup>

The US was not the only national legal context summoned to support arguments about sexuality and privacy. A case granted importance among the range of decisions

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<sup>72</sup> Prashant Iyengar, "Limits to Privacy," Center for Internet and Society, Bangalore India (2011). Accessed online at <http://cis-india.org/internet-governance/publications/limits-privacy.pdf> on December 31, 2014.

<sup>73</sup> Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism," in *Social Perspectives in Lesbian and Gay Studies: A Reader* eds., Peter M. Nardi & Beth E. Schneider (London, New York: Routledge, 1998), 134-159.

from which the judges cited passages was the 1998 South African decision of homosexuality's decriminalization in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*. This case bolstered the discourse of privacy rights with a language of intimacy, liberty and nurturing human relationships. The language of intimacy and privacy used in the South African case was in fact borrowed from US law, specifically from Justice Blackmun's dissent in *Bowers v. Hardwick*, the 1986 decision that upheld the US state of Georgia's sodomy laws. This case was referenced in the Naz text as additional reinforcement of privacy's importance. The Naz judges also cited the UN human rights treaties and the European Convention on Human Rights, from which they borrowed a positivistic language of sexual orientation and gender identity in order to bolster the framework of privacy and non-discrimination. The Yogyakarta Principles, 2007, a set of principles formulated by a group of human rights expert on matters of sexual orientation<sup>74</sup>, were also cited by the Naz judges to define sexual orientation and gender identity:

Sexual Orientation is understood to refer to each person's capacity for profound emotional, affectional (sic.) and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.<sup>75</sup>

Another definition cited in the Naz text came from Prof. Edwin Cameron, a Justice of South Africa's highest court who has written widely on HIV/AIDS, and who straightforwardly uses the colloquial terms of sexual orientation as a matter of erotic

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<sup>74</sup> Michael O' Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles," *Human Rights Law Review* 8 No. 2 (2008): 207-248.

<sup>75</sup> *Naz Foundation*, 36-37.

attraction.<sup>76</sup> The judgment relied on a mix of legal, positivist and colloquial definitions of sexual orientation and how it works. However, all of these definitions were cast in terms that emphasized the individual interiority of sexual identity. The judges made personal, private interiority an immutable characteristic of sexuality, something present within the person at all times. The judges employed a range of precise definitions, but each was made to resonate with sexuality as inner essence that was unalterable. This approach supported the notion of privacy as a protective apparatus for the safeguard of spatial presence, of personal autonomy, and of speech. In inscribing homosexuality into the legal apparatus of sexual orientation, the judgment eventually foreclosed any possibility of dwelling on a social constructionist understanding of sexuality.<sup>77</sup> This was so despite the recurrence of MSM in the text, a category whose social constructedness never got addressed.

Having circumscribed homosexuality within the ambit of privacy, a sexual orientation experienced as an immutable and interior bodily essence, the judges then cited academic literature and empirical studies on various kinds of discrimination and harm that homosexuals suffer on account of their sexuality. Paradoxically, it was only by adducing the public aspects of homosexuality as a legible identity prone to social and cultural persecution that the judges could advocate for a right to privacy. This right should be conferred in order to respect that condition of sexual subjectivity, which, in the judgment's view, constituted a fixed essence. Privacy would be the legal shell conferred

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<sup>76</sup> Edwin Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights," *South African Law Journal*, 110 (1993): 110-450.

<sup>77</sup> Steven Seidman, *The Social Construction of Sexuality* (New York & London: W.W. Norton & Company, 2003).

to protect that essence of the putative homosexual subject of Section 377 in all of its varieties of definition. In the Naz narrative of how homosexuals are treated in society at large, the public and private aspects of a homosexual identity remained irreconcilable. The logic at work goes this way: If sexuality is necessarily of interior essence, and a private matter, then that which becomes vulnerable to harm is the non-normative matter of the body. This model of the subject can be compared to what Judith Butler has called the “regulatory ideal” of sex, a model that functions to constitute the body’s normativity.<sup>78</sup> By implication, sexual orientation is also rendered a regulatory ideal, shaped according to the judicial logic in which it becomes visible. This is a logic that necessarily constructs the subject through the lens of injury and discrimination, a narrative passage that confers visibility and also deems the subject as paradoxically in need of the shell of protection.

It isn’t quite the fixed sexual orientation, the private core that becomes vulnerable by becoming subject to harassment by police through the misuse of Section 377. Rather, as we saw earlier in this chapter, the evidence of public violations of transgender bodies and other visibly effeminate gay men adduced to construct a narrative of harm under the misapplication of Section 377 told a story of identity-based violence in public. If it was the sexual identity, as gay or lesbian, that was vulnerable under the law in public contexts, its expression would clearly be a reading of non-normative gender behavior. Because sexual orientation as the inner, unseen and unchanging core of a human cannot be visually accessed, the police persecution of non-normative bodies was then based on

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<sup>78</sup> Judith Butler, *Bodies that Matter: On the Discursive Limits of “Sex”* (London: Routledge, 1993), 3.



their gender non-conformity.

The judgment, in relying on the evidence of public violation, then had the effect of positioning gender as public and sexual orientation as private. However, another mechanism through which sexual orientation was itself read into the Indian Constitution was the Article 15. This article prohibits discrimination on grounds of an individual's sex, or gender among other things. The Naz judgment treated sex as analogous to sexual orientation as grounds for non-discrimination under Article 15 of the Indian constitution. Hence the text ended up conflating the two categories in a prolific narrative of harm and stigma. But given that such harm in this narrative is mostly inflicted on the public visibility of certain bodies, it is gender non-normativity (a citational and iterative act, in Butler's terms) as a public "expression" of sexual orientation, which to reiterate is private/interior, that comes to collapse the difference between sex and orientation. Put another way, what is protectable is identity as privacy (inner core) through an understanding of gender non-normativity as prone to injury (public visibility). If this is so, then technically either the judicial logic must demand the same private identity to be legible publically or the logic must cast it as a separate category of protection unto its own without necessarily having to retreat into the more inscrutable and inaccessible realm of sexual orientation.

This conflation of gender non-normativity and sexual orientation advanced towards a potentialization of rights becomes another irreconcilable layer in the leveling of difference enacted before in the case of LGBTQ and MSM as well as public and private. The sexual act is not in and of itself an identity but its marker, its cipher. As an immutable expression of the sexual identity that it brings into being, the act seeks

protection on the basis of consent and privacy through the discourse of identity. This poses two significant issues: 1. Section 377 criminalizes sexual acts that are considered against the order of nature, and not identities. 2. The tension between sexual acts and identities as constantly destabilizing homosexuality manifests as the tension between the public and the private in terms of human rights violations. To summarize this incongruity in the Naz logic of conferring rights upon sexual identities such as LGBTQ and by extension, also the MSM, the gender non-normativity, which is publically visible, poses risk to the body. Sexual orientation, regarded as an inner core, is invisible and inaccessible. But gender non-normativity signifies sexual orientation for the latter to be protected by privacy. This is not a mere contest over terminology but at stake in this formulation is the very specificity of each category that is interlinked to the other.

Take for instance, the persistently enthusiastic judicial empiricism in the Naz text on the vulnerability of homosexuals in the reference to legal scholar Ryan Goodman's 2001 essay on the social panoptic effects of sodomy laws. The paragraph quoted reinforces the judges' own activist impulse:

He categorizes how sodomy laws reinforce public abhorrence of lesbians and gays resulting in an erosion of self-esteem and self-worth in numerous ways, including (a) self-reflection, (b) reflection of self through family, (c) verbal assessment and disputes, (d) residential zones and migrations, (e) restricted public places, (f) restricted movement and gestures, (g) "safe places" and (h) conflicts with law enforcement agencies.<sup>79</sup>

Goodman's essay, which is concerned with demonstrating the symbolic harm of

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<sup>79</sup> *Naz Foundation*, 2009, 40-41. Also see, Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics," *California Law Review* 89 No. 3 (2001): 643-740.

sodomy laws even when they remain unenforced, advocates empirical research, especially field research, on the lives of gays and lesbians to assess the actual harm suffered by them. In adopting a socio-legal research agenda that follows the social norms scholarship to analyze both the law's constitutive and instrumental effects, Goodman's conclusions are drawn from open-ended interviews conducted with South African gay men and women in 1995 and 1999. There is no doubt that Goodman assembles persuasive evidence to make the case for the repeal of sodomy laws.

This evidence finds resonance in the Naz judgment when it is used directly by the judges to bolster the case for the repeal of Indian sodomy laws. We might laud the recourse to legal scholarship on the judges' part. However, we might also interrogate the common assumption and implication of necessarily open and public identification that undergirds both the Goodman text and the Naz Court's argument through it. The empiricism espoused by both is reliant upon a concept of sexual identity as fixed, observable and vulnerable in the shell of protection. A clear but unstated ground supporting both arguments is the necessity of narrating identity through the potential for injury as understood through law. Whether the injury is symbolic or physical, the injured must come out of the closet and speak from the position of a visible homosexual in order to avail him or herself of the right to the protective shell of privacy. This subject thus rhetorically abrogates its own conditions of essential privacy—conditions central to the Naz understanding of homosexuality as innately private—in the act of coming out.

I now turn to violence in this configuration. The Naz judges proposed that Section 377 enacted violence on the homosexual by the very existence of the antisodomy law. Their empirical argument relies on visibility and sexual identification of the homosexual

subject in order to proceed to its conclusion that violence is committed even by unenforced sodomy laws. The concern here is of course symbolic violence, the immaterial harm that precedes any public recognition of a gay or lesbian identity. How, then, does the socio-legal empiricism exercised by the judges circumvent the issue of privacy? How is this done when in order to demonstrate its own conclusions, the legal standpoint must not just expect but also assume that the loss of privacy must be subsumed in the gain of valuable, socially beneficial research on the lives of those in the interstices of visibility and violence?

Such a conundrum is more an interrogation of legal empiricism in the service of rights-based empowerment of identities that continue to struggle with visibility of the self as an issue fundamental to existence. Less so, it is an indictment of the conclusions about the perils of unenforced sodomy laws that without a doubt operate in ways that cannot be wholly foreseen. My analysis follows legal scholar Kendall Thomas's position that the function of legal scholarship should not separate the legal doctrine from its rhetoric or discourse. Instead of serving as a mere means to convey judicial principles, any legal text is a complex combination of rules and rhetoric, which cannot be understood without rigorous attention to its social dimensions.<sup>80</sup>

In their assessment of the various misapplications and abuses of Section 377 in the hands of the police, the judges also juxtaposed both the unenforced and the enforced effects of the law's misuse. For instance, take the invoking of the oxymoronic figure of the "unapprehended felon" by the judges. The figure that was claimed by the civil society

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<sup>80</sup> Kendall Thomas, "Corpus Juris (Hetero) Sexualis: Doctrine, Discourse and Desire in *Bowers v. Hardwick*," *GLQ: A Journal of Gay and Lesbian Studies* Vol. 1 No. 1 (1993): 33-51.

group *Voices Against 377* to live as a second-class citizen in society as an embodiment of symbolic criminality shares the same space of detriment with the homosexuals, the MSM, lesbians and gays, all of whom are denied full “moral citizenship” under the law’s protean capacity to criminalize and discipline non-normative bodies.<sup>81</sup> Referring to the empirical narrative of symbolic and material harm, the judges also invoked the Criminal Tribes Act of 1871, another colonial piece of legislation enacted to criminalize certain vagrant populations like *hijras* and eunuchs who were seen as criminal by birth and engaged in public singing and dancing as their livelihood.<sup>82</sup> The judges thus trace the sodomy law’s magnitude of harm back to its British colonial context. In doing so, however, the judges’ reference to the “criminal” tribes once again neither distinguishes between the public context of their itinerant circulation in colonial India nor to their gender non-normativity that once again becomes intelligibly criminal under an archaic law within a field of visibility, far from the reaches of privacy. The Naz text thus offers a concept of privacy as a material affordance that appears to be within the grasp, and aligned with the interests of the “unapprehended felons.” This figure can evoke the discourse of full moral citizenship and legal recognition more resourcefully within the global-speak of human rights and sexual identity. In the Indian context, such a subjectivity translates into a class-based identity that can afford spatial privacy and also

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<sup>81</sup> *Naz Foundation*, 41-43. The Delhi High Court borrowed the phrase “moral citizenship” from the 1998 South African decision of decriminalization in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*.

<sup>82</sup> For a discussion of the nexus of the Criminal Tribes Act, 1871 and Section 377, see Anjali Arondekar’s discussion of the 1884 case *Queen Empress v. Khairati*, a case in which, a man called Khairati was apprehended by the police while he was singing and dancing in women’s clothes. Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Durham & London: Duke University Press, 2009).

exercise personal autonomy. Indeed, the decriminalization of homosexuality in India has been framed in terms of the elitist and classist orientation of the Indian LGBT movement, a critique I consider here briefly.<sup>83</sup>

Writing in the context of decriminalization, Jason Keith Fernandes, an Indian LGBT activist, contends that the harassment of subaltern men and sex-workers soliciting MSM at the hands of the police will continue despite the provisional reading down of Section 377 and the right to privacy, primarily due to the public nature of their presence. Sex in public is clearly precluded under the right to privacy despite the recognition of privacy in broader terms of decisional autonomy, transcending the supposedly narrower scope of the zonal or the spatial aspects.<sup>84</sup> By contrast, Saptarshi Mandal, a legal scholar has reviewed privacy and consent in the context of heterosexual marriage in a manner that offers a comparison with the rights granted under the Naz verdict. Mandal argues that where public sex remains subject to prosecution under the sodomy law as well as public obscenity laws, the legitimacy of sex in private, is configured by heterosexual marital norms that precludes sex workers and other public identities like *hijras*, often subsumed within the Indian LGBTQ movement. Sex work is criminalized under the Immoral Traffic (Prevention) Act, 1956, while hijras, who earn a living by performing at

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<sup>83</sup> Ashley Tellis, "Disrupting the Dinner Table: Re-thinking the 'Queer Movement' in Contemporary India," *Jindal Global Law Review*, Special Issue: *Law, Culture and Queer Politics in Neoliberal Times* Vol. 4 Issue 1 (2012).

<sup>84</sup> Jason Keith Fernandes. "The Dilemma after the Decision: Strays Thoughts after Gay Liberation," *Tehelka Magazine*, 14 Aug 2009. Accessed online at: [http://archive.tehelka.com/story\\_main42.asp?filename=Ws220809The\\_Dilemma.asp](http://archive.tehelka.com/story_main42.asp?filename=Ws220809The_Dilemma.asp) on January 4, 2015.

public ceremonies and begging are routinely arrested and harassed by police.<sup>85</sup>

Legal scholar Pritam Baruah, in tracing the logical inconsistencies in the Naz judgment, holds that the notions of privacy, personhood and autonomy conferred by the court on sexual minorities have little specific content given their constructivist foundations in the Indian Constitution. They serve as placeholders instead, depending on the concept of dignity, which again remains vague in the court's reasoning. Despite the fact that privacy in the Naz framework of rights was interpreted as the decisional autonomy of a person, and not merely spatial or zonal in nature, it is essentially reduced to the right to be left alone.<sup>86</sup> Although Baruah does not push the question of personhood to describe the concept with greater specificity, he does consider its conspicuous absence in the Indian Constitution and regards it as the source of the principle's tenuousness. But the Indian context may also be instructive in contesting personhood's boundaries through what Kimberle Crenshaw has termed "intersectionality" of the self in the context of identity politics. Crenshaw observes that the problem with identity politics isn't that it fails to transcend difference; rather that it conflates or ignores intra-group differences.<sup>87</sup> A cursory reading of the Naz judgment would reveal a similar failure of imagining the differences between MSM, self-identified LGBT, *hijras*, sex workers and other sexual minorities conflated under Section 377 as criminals. The idea of personhood as a superior and liberal basis of privacy presupposes individuals as free agents without any social and

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<sup>85</sup> Saptarishi Mandal, "Right to Privacy in Naz Foundation: A Counter-Heteronormative Critique," *NUJS Law Review* 2 (2009): 525.

<sup>86</sup> Pritam Baruah. "Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity," *NUJS Law Review* 2 (2009): 50

<sup>87</sup> Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and the Violence Against Women of Color," *Stanford Law Review* Vol. 43 No.6 (199): 1241-1299.

cultural obligations.

Neither personhood nor privacy attends to the intersectionality of class, caste, gender (instead under Article 15 sexual orientation is read to be contained under the category of sex while lesbians are hardly mentioned in the judgment), religion, region or occupation. Instead, even as they appear in the judgment interchangeably, the figures of the MSM and *hijras* function as undistinguished alibis for the law's misapplications without a real presence in the courtroom while they become represented by self-identified LGBT groups. As further distanced from any specificity of sexual subjectivity in the judgment, they are coded as what Geeta Patel calls "risky subjects" to be managed through humanitarian appeals of risk and care. Concerned with the privatization of care within the framework of insurance and finance in India, Patel ponders the Naz foundation's coupling of MSM, HIV and risk with rights to health and life: What happens when the care of the self, the right to health, and the right to life are detoured through risk?<sup>88</sup>

The Naz verdict's language of risk relies on the submissions of the National AIDS Control Organization (NACO). It is in this assessment of the vulnerability of MSM to HIV/AIDS that the court's language of risk slips between the registers of acts and identities inattentive to, and productive of the tension between the public and the private. On the law as an impediment to risk management, the court declared:

The situation is aggravated by the strong tendencies created within the community who deny MSM behavior itself. Since many MSM are married or have sex with women, their female partners are consequently also at

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<sup>88</sup> Geeta Patel. "Risky Subjects: Insurance, Sexuality and Capital," *Social Text* 89 Vol. 24 No. 4 (2006).



risk for HIV infection. The NACO views it imperative that the MSM and *gay community* have the ability to be safely visible through which HIV/AIDS prevention may be successfully conducted. Clearly, the main impediment is that the sexual practices of the MSM and *gay community* are hidden because they are subject to criminal sanction.<sup>89</sup>

The judicial demonstration of the law's far-reaching impact relied on conveniently switching between acts and identities, a distinction that produces the slippage between the public and the private. Ultimately this can also be understood as a gap between the international frameworks of human rights employed by the court and the social reality of gender non-normative identities that are violated on a routine basis in their everyday lived contexts. While the court's observations about the law's misapplications remain tenable, its failure to contrast the public nature of those misapplications with the right to privacy's (spatial or personal autonomy) protective apparatus of personhood, consent and dignity exacerbates the tensions between the public and the private that ultimately maps on to the divergence between the global and the local. Drawing upon sources like International Covenant on Economic, Social and Cultural Rights, the UN Declaration on Commitment on HIV/AIDS, 2001, National Conference on HIV/AIDS in Delhi, 2000, and the Delhi Declaration of Collaboration, 2006, the Naz verdict offers a global survey of the consensus on the vulnerability of MSM, drug users and sex workers to HIV/AIDS, necessitating the articulation of health rights. Despite the court's attempt to envisage a broader human rights framework purported towards identity-based justice, it is the figure of the MSM, the behavioral counterpart to the self-identifying gay identity who recurs throughout the verdict's

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<sup>89</sup> *Naz Foundation*, 51.

distillation of a right to privacy. Yet, ironically, the MSM is defined empirically by publically risky behavior precisely because privacy as a material affordance is elusive to lower classes that often take up laterally mobile jobs. Despite its frequent recurrence, the MSM are never spoken of in terms of a sexual orientation.

Shivananda Khan, founder of the Naz Foundation, has extensively documented the lives of the men-who-have-sex-with-men (MSM) in the context of HIV/AIDS outreach and prevention among the lower-class vulnerable groups. Ranging from being in professions like auto-rickshaw driver, sex-worker, truck-drivers and other low-paying temporary jobs, these men, notes Khan, often don't subscribe to a western gay identity that remains more prevalent among English-speaking western educated affluent men in India. These men, who are often married and have children, mostly think of their desire in terms of sexual behavior pertaining to the social context of cruising in parks, public toilets and other similar spaces. They also often keep these sexual hook-ups a secret. Their desires are predominantly shaped by the widespread sexual repression and gender segregation in traditional South Asian societies, in the absence of domestic privacy where a small home is shared by four or five siblings in an average lower middle-class Indian family. To the MSM, more than identity labels of gay or bisexual, behavior-oriented terms like "active" and "passive" are more important as is sex within marriage, which is often seen as a duty. Sex with men in public spaces or in the context of their occupational mobility i.e. if they are truck drivers, becomes a matter finding encounters during the course of driving.<sup>90</sup>

The necessarily public situatedness of the MSM escaped the court's attention

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<sup>90</sup> Khan, *Culture, Sexualities and Identities*, 2011.

even as the judges rebutted the Additional Solicitor General's contention that Section 377 had never been enforced to prosecute homosexual conduct in private and mostly applied in cases of child sexual abuse. Based on the petitioner Naz's submissions on the widespread misuse of Section 377, the judges observed that if Section 377 had not been enforced to prosecute homosexual conduct in private then the provision was not necessary for public or moral health of society and the law should fail the "reasonableness test."<sup>91</sup> This conclusion immediately followed a mention of the vulnerability of the MSM under the law, a section of society whose existence is rendered intelligible as public health risk in their unsafe sexual behavior conducted under ambiguously public conditions, in the petitioner's reasoning.

The judgment offered other grounds for the reading down of Section 377 as well. On the issue of public morality and the moral disapproval of homosexuality, the judges held that the invasion of the privacy of homosexuals did not serve any compelling state interest except in cases of non-consensual conduct and child abuse. Here the court drew upon Justice Kennedy and Justice O'Connor's majority opinion in *Lawrence v. Texas* to discredit moral disapproval as grounds for criminalizing private homosexual behavior. To reinforce the idea that such laws that criminalize same-sex conduct in private serve no pressing social need, the judges also referred to *Dudgeon v. United Kingdom* and *Norris v. Republic of Ireland* to advance the notion of constitutional morality that supersedes public morality. As opposed to popular/public morality based on subjective notions of right and wrong, the judges defined constitutional morality as proposed by B.R. Ambedkar, one of the drafters of the Indian Constitution. Holding it to be an

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<sup>91</sup> *Naz Foundation*, 60.

indispensable condition of a free and peaceable government, Ambedkar's definition was based on the tyranny of any one powerful minority that might subvert the values of the constitution. Thus, constitutional morality, in his estimation wasn't a natural sentiment but had to be cultivated for any society to be truly democratic. The judges developed the notion of constitutional morality further by citing the South African decriminalization verdict in *The National Coalition of Gay and Lesbian Equality v. The Minister of Justice* (1998) in which it was held that the constitution as a document that respects difference must inform the enforcing of any morality and also its limits. Also referenced was the 1957 Wolfenden Committee Report that was the basis of homosexuality's decriminalization in the U.K. In rejecting the cultural arguments appealing to ancient history and civilizational values as the basis of homosexuality's decriminalization, the report upheld that there was no evidence supporting the view that homosexual practices in private deteriorated the moral fabric of the society.

More supporting rationales for the deletion of Section 377 were cited. The judges referred to the Law Commission of India's review of sexual offences laws in India. In a bid to strengthen the framework of Section 375 of the Indian Penal Code that deals with cases of rape and sexual assault, the commission's aim was to streamline all non-consensual sexual offences under the existing rape laws. Further, the definition of sexual assault, or penetration was broadened to define it in relation to any bodily part that was violated against a person's wishes except in cases of medical procedures carried out hygienically. Importantly, the commission also recommended making the laws gender neutral instead of gender-specific with a view to recognize cases of assault on male

victims.<sup>92</sup>

The judges continued to repudiate the ASG's submission that the deletion of Section 377 would open the floodgates to delinquent behavior and erode the moral fiber of Indian society. Dismissing moral indignation and revulsion about homosexuality as an invalid basis to support the law, the judges recognized the need to follow global trends on such sexual offences. However, in considering the absence of a compelling state interest in regulating private homosexual activity, the judges observed one exception. The promotion of public health interventions targeted at the Indian MSM through the deletion of the law constituted in their view, a compelling state interest. Thus, the right to privacy as a tool of empowerment was not reconciled with the necessarily public nature of the MSM behavior repeatedly coded as a public health concern and as a matter of compelling state interest.

Another test considered by the judges was the "reasonable classification" test under Article 14 that prescribes the fulfillment of two conditions to be tenable: 1. The classification must be founded on intelligible differentia, 2. The differentia must have a rational relation to the objective sought to be achieved by the statute in question. Observing that the application of Section 377 made no distinction between public and private conduct or consensual and non-consensual or even a lack of consideration of the harm caused, the court concluded that the law targeted the homosexual community as a class. They further instructed that public disgust or animus was not a valid ground for

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<sup>92</sup> For a critique of the recommendation to make rape laws gender neutral, see Flavia Agnes, "Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law," *Economic and Political Weekly* Vol. 37 No. 9 (2002). Agnes argues that gender neutrality in rape laws would do little to protect the weaker sections of the society and further disempower women who are already marginalized.

classification under Article 14 that prescribes the equality of Indian citizens. As the judges went further in elucidating how criminalizing private consensual conduct did not serve to protect women and children – one of the stated rationales of enforcing Section 377 – their reasoning slipped along the collapsed distinction between public and private in making a case for decriminalizing private consensual conduct.

The judges held that the law hampers HIV/AIDS efforts by driving risky sexual practices underground while also invading the privacy of citizens and damaging their dignity. In making this case, the judges relied on a construction of harm inflicted by the law that did not fully account for sexual practices in public, precisely for the lack of privacy that MSM populations remain defined by. As noted above, MSM are often classified as such because they provide descriptions of ambiguously public sexual encounters, often without adequate protection. The social risk and stigma associated with such activity prevents their practices from being self-reported or reported in the literature outside public health or medical record. This complex mix of public and private is cause for significant concern among health NGO and public health workers involved in HIV/AIDS outreach.

In juxtaposing risky HIV/AIDS prone sexual practices and the dignified, consensual conduct in private that causes no harm to anyone, the judicial rationale to grant a right to privacy implicitly privileged the latter, resulting in the figure of the homosexual as harboring the private core of sexual identity. There remained no judicial reflection on what made the MSM conduct risky. This is a striking absence in the extensively well-informed Naz text.

Yet the right to equality under Article 14 and the Declaration of Principles of

Equality, 2008 was conveniently pronounced as an overarching framework within which the human rights of Indian LGBT subjects were now enshrined. Disgust or animus on the part of others, the judges held, was not a compelling state reason to invade the privacy of a person whose conduct does not harm anyone.<sup>93</sup> We are reminded again of the colloquial definition of homosexuality as one form of erotic attraction, offered by the judges on the basis of the South African HIV/AIDS advocate and Justice Edwin Cameron. The public nature of the MSM, unmentioned, hung implicitly as a loose thread in the reasoning. And with MSM, homosexuality dangled in public airing of this renegotiation of constitutional law, ultimately also to be bound back in place through the securing assignment of the right to privacy.

The conclusion of the judgment devoted the last 25 pages to various international legal sources and Indian case law to concretize sexual orientation as a target of the law and in so doing, the move towards resolving the fundamental tension between acts and identities was staged.

### **Deriving Sexual Orientation in the Indian Constitution**

David Halperin has proposed an analytical framework to document with rigor and complexity the history of male homosexuality. Halperin suggests a genealogical approach based on transhistorical continuities and discontinuities across sexual practices and

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<sup>93</sup> Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010).

associations.<sup>94</sup> Seeking to circumvent the contest between essentialist and social constructionist practices, Halperin's approach is aligned with the logic of tracing a history of discourses and their effects of reorganizing modern sexuality within a binary system of homosexual and heterosexual. Similarly, a legal history of homosexuality, whether transhistorical or intercontinental, at least, in the modern context of rights would rest on another binary, of public and private, that has been mobilized fairly consistently in the law. The public and the private necessarily crop up in gender and sexuality based litigation with the result that homosexuality has predominantly been encapsulated within a privacy framework – a model that suggests negativity and derivation as well as ambiguous visibility. Despite the Delhi High Court's coupling of privacy with decisional autonomy – an assumption of abstract agency – rather than zonal protection that was considered by LGBTQ activists to be a narrower conception, all the evidence of legal abuse of the law points to spatiality as a more accessible realm within the evidentiary structure. No claim could be advanced on account of decisional autonomy if the court indeed reasoned correctly because the MSM are mere visible targets, not merely subject to the law but also to the health outreach. They never spoke for themselves in the Naz hearings. What does the right to privacy mean for those who figure as a health risk demographic and are constantly defined by their invisibility and inaccessibility?

The extensive evidence on which the court relied to construct a transcendent notion of privacy as decisional autonomy pointed unequivocally towards public space where decisional autonomy of the violated subjects did not mitigate the violence suffered.

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<sup>94</sup> David M. Halperin, "How to do the History of Male Homosexuality," *GLQ: A Journal of Gay and Lesbian Studies* Vol. 6 No. 1 (2000): 87-123.



Such a public context for certain identities, whether they are self-identified or behavioral categories, remains fraught with the specter of criminality that often exceeds even the purview of the law. Beyond mere legal criminality, as the remaining chapters in the dissertation will demonstrate, is the broader postcolonial realm of society, traditions and customs within which homosexuality or sexual non-normativity is often subject to patriarchal discipline.

The relationship between the body, privacy and sexuality has been a historical preoccupation in the American legal jurisprudence that has informed the judicial decision-making in Indian courts.<sup>95</sup> As important and urgent as privacy is, it remains a rather tenuous principle to underpin the decriminalization and recognition of the rights of a range of sexual subjectivities in the Indian context. Without privacy, other rights such as the right to life, liberty, equality and dignity remain grand abstractions without a spatial or physical locus and a sense of materiality that only privacy can bring. Yet privacy's own foundations shift constantly making its conception subject to a permanent state of becoming. The central concern here is the matter of decriminalization of homosexuality and the derivation of another similarly tentative conception, that is of "sexual orientation" that also gets posited as an essentialist category by the judges.

Drawing upon the South African decriminalization decision in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, the judges observed how despite the law in its criminalization of sexual acts did end up unfairly targeting homosexuals as a class of people. Justice O'Connor's decision in *Lawrence v. Texas* further informed the judges' view that it was identity associated with the act that ended

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<sup>95</sup> Alan Hyde, *Bodies of Law* (Princeton, NJ: Princeton University Press, 1997).

up being persecuted. From other notable decisions such as *Romer v. Evans* in Colorado about discrimination of gays and lesbians in the field of employment and the Canadian decision *Vriend v. Alberta* on the psychological effects of discrimination leading to the concealment of true identity, the judges concluded that the discrimination caused to MSM and the gay community in the Indian context was in breach of Article 14 of the Constitution (Equality).

The judges derived sexual orientation as grounds analogous to sex under the anti-discrimination framework of the Article 15. The Article 2 of the International Covenant on Civil and Political Rights (ICCPR) and the Australian decision in *Toonen v. Australia* also aided the judiciary in this formulation. They went on to enumerate a number of legal decisions in which sexual orientation as analogous to sex and other unspecified grounds were held as valid in developing an anti-discrimination framework. These included Canadian decisions like *Vriend v. Alberta* (discrimination on grounds of sexual orientation), *Corbiere v. Canada* (analogous grounds for discrimination) and South African decisions such as *Prinseloo v. Van Der Linde* and *Harksen v. Lane* both of which dealt with discrimination on unspecified grounds that had the potential to impair a person's dignity. The judges highlighted the fact that some of these unspecified grounds may constitute personal attributes that may be immutable biological grounds or religious beliefs. They further noted the horizontal application of rights under Article 15 (2) that prohibits discrimination against one citizen by another.

Two other principles featured in the court's construction of anti-discrimination protection based on sexual orientation. The judges borrowed the notion of "strict scrutiny" from American jurisprudence and "proportionality review" from jurisprudence

in Europe and Canada.<sup>96</sup> These principles prescribe that the limits of state interference of someone's freedom under a given statute should be proportionate to legitimate aims sought to be accomplished. Further, the application of strict scrutiny implies that in addition to considering the goals to be accomplished by the interference, the implications and effects must also be weighed. These principles, the judges observed, were especially pertinent in the case of culturally oppressive laws that targeted particular minorities and deprived them of personal autonomy and freedoms. Such personal autonomy was seen by the court to be implicit in the unspecified grounds of sexual orientation that was derived from the category of sex under Article 15 of the Indian Constitution.

In their conclusion, the judges addressed the contention of the ASG that under the constitution, the courts did not enjoy the powers of judicial review of any legislation. The judges could only act as interpreters of the law without having the power to declare it invalid. To the question of deference to the Parliament for the amendment of a law, the judges declared that they were the ultimate interpreters of the constitution with the power to determine the limits of the exercise of the power of each branch of the government. Finally, the judges considered the doctrine of severability that allows the deletion of a part of the law that is deemed to be unconstitutional. Severability, according to the judges worked in two distinct fashions. In the first case, a law may contain two sub-sections, one of which may be valid and the other void, in which case, the void sub-section may be severed. In the second kind, the one that the judges applied to Section 377, the severability in application or enforcement may offer recourse if the word of the law embraces distinct categories of subject matter, which the legislature has no power to

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<sup>96</sup> *Naz Foundation*, 88.

legislate or such matter is otherwise subject to a constitutional limit. In the case of Section 377, the judges severed the part that affected consensual same-sex conduct in private. They declared that insofar as the law criminalizes consensual sexual acts, it was in violation of Articles 21 (Right to Life and Liberty), 14 (Equality) and 15 (Non-discrimination) of the Indian Constitution. Further, the law will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex concerning minors (under the age of 18). Finally, such a declaration will not result in the re-opening of criminal cases under Section 377 that have already attained finality.<sup>97</sup>

### **Through the Optics of Privacy: Public Mediation, Visibility and Rights**

The judicial construction of the right to privacy in Naz based primarily on the courtroom mediation of publically committed state violations whether on MSM bodies or visibly non-normative sexual minorities attaches such privacy to sexual acts seen as pathology and deviance in Indian culture. Such a move also constitutes what Eve Kosofsky Sedwick has called the universalizing gesture of sexual acts. The global emergence of the right to privacy, as I have shown in my reading of the Naz verdict, is at the core of safeguards for LGBTQ identities. This safeguarding in various contexts also signifies a minoritizing gesture that is putatively offered to protect sexual identities.<sup>98</sup> In my reading of the Naz text, I have shown that there is considerable overlap between the legal space of protection and the public health space of risk control. In this unstable space

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<sup>97</sup> *Naz Foundation*, 105.

<sup>98</sup> Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley LA: University of California Press, 1990).

of overlap we find the derivation of identities from acts and the constitution of the private through the public. It is in this contradictory space that we find structured the visibility afforded to LGBTQ individuals. Visibility is conferred not merely as a political practice, through litigation and activism. It also is a strategic practice of behavior or identity management by those who perceive themselves to be at risk of violent exposure.

Visibility profoundly refigures privacy itself. Privacy becomes a modality tasked with protecting everyday visibility of a same-sex desiring individuals. Privacy is newly recast in terms of visibility, entailing (especially in the Indian context) not simply a public removal of the homosexual body but also a leaving to permanent exposure, the gender non-normative bodies and MSM groups that cannot have privacy. These subjects must continue to engage in risk as an everyday practice of living for privacy. Privacy as conceived by the Naz verdict in terms of decisional autonomy, has never been their recourse historically.

To reiterate, the Naz version of privacy, as conceived by the Delhi High Court judges, defined privacy as personal/decisional autonomy, transcending what the LGBTQ activists and lawyers believed to be the narrower confines of zonal/spatial privacy linked ultimately to the bedroom. Because bedroom privacy, even though a classed notion, implies a form of invisibility of the queer subject, its status is seen to be of a lesser order than that of personal/decisional autonomy that, at the outset, suggests empowerment through public identification as gay or lesbian with a right to privacy. However, such a distinction assumes a free subject unencumbered by social obligations and fully in control of their destiny. Spatial/zonal privacy, as the subsequent chapters will demonstrate, not only provides material specificity of sexual experience but can also imply safety, security

and protection from public exposure and harm. Neither spatial privacy nor decisional autonomy is a fully secure form of protection in the postcolonial Indian context. The spatial formulation of privacy is clearly classed and gendered given the issue of access to both private space within the home and the family and the public space dominated by masculinist ideals.

But we should look beyond the sophisticated legal technicalities used by the Naz court to alter the conceptual course of privacy towards a expansive, humanistic interpretation. The Naz understanding of the quality of being private in social and cultural terms implicitly privileges the spatial as its primarily ordained order. Section 377 of the Indian Penal Code was reinstated as law in 2013. If this law is to continue to apply to non-private or public conduct, then those upon whose violated backs – i.e. the MSM, *hijras* and other lower-class transgender identities – Naz elevated privacy to personhood will continue to remain vulnerable in their public existence. These subjects have no claim on personhood *ipso facto* within the postcolonial predicament of multiple social obligations of marriage, religion and caste. Still, even if we are to grant that privacy confers its protective powers on a minority that values its legal course, we end up recapitulating the Sedgwickian closet, the “defining structure of gay oppression,” in the 21<sup>st</sup> century.<sup>99</sup> This dissertation proceeds on a conviction that there is a fundamental relationship between privacy and visibility, and that interrogation of this relationship is analytically productive. The project interrogates this contemporary predicament, which it understands to have been produced by the making legitimate of global sexuality rights in contexts such as the one described in this chapter, the case of the Naz reading down of

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<sup>99</sup> Sedgwick, *Epistemology*, 71.

Section 377 and its harmful logics. By interpreting this case, I have tried to cover a rent between imperatives to empower sexual minorities and the persistence of Victorian moralities cloaked and rehashed in Indian national cultural ideologies against global human rights discourses.<sup>100</sup> Within this tear, homosexuality in India is multiple: a western import, a product of Victorian British colonial thought, and a national religious, moral, and political figuration unique to India itself.

In the next chapter, I review the prosecutions of non-consensual acts under Section 377 during 1950-2009 to demonstrate how the distinction between consensual and non-consensual configures the discourse of injury. The notion of injury has been central in identity politics geared towards the attainment of human rights. But a reading of these prosecutions along side the Supreme Court verdict that overturned the Naz decriminalization of homosexuality in India reveals the continuity in judicial logics that rely on a complex understanding of injury to justify the application of Section 377. Injury, as the next chapter will show, is both physical and symbolic in nature, a fact that ultimately emerges as a distinction between the two forms and renders the idea of consent as a correlate of privacy tenuous.

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<sup>100</sup> Paola Bacchetta, "When the (Hindu) Nation Exiles its Queers," *Social Text* No. 61 (1999): 141-166. Also see, Brinda Bose, *The Phobic and The Erotic*, 2007.

## Chapter 2

### **Sodomy, Unnatural Acts and the Courts: Section 377 of the Indian Penal Code in Colonial and Postcolonial India**

Among the many profound responses to British colonialism in India, a regime that continued from the 18<sup>th</sup> to the 20<sup>th</sup> century, Indian nationalism as a political and cultural counter-force has been understood by scholars of postcolonial theory as a fundamental project of nation-building and development. Unlike the nationalist thinking and feeling explicated by Benedict Anderson in his seminal notion of “imagined communities” embodying national membership fostered by print capitalism<sup>101</sup>, Indian nationalism, explains Partha Chatterjee, was fashioned through a division of the world of social institutions and practices during the colonial times into two domains – the material and the spiritual. The material or the outer domain was the sphere of statecraft, lawmaking, development and bureaucratization where the Western powers had proved their superiority. Over time, this domain became extensive and took on the form of the postcolonial state. On the other hand, Indian nationalists maintained their sovereignty in the spiritual or the inner domain, launching their most powerful nationalist project of forging a modern “national culture” that was nevertheless not Western.<sup>102</sup>

Consequently, the emergent postcolonial state in the outer domain embodied the ideology of the modern-liberal democratic state with secular institutions relying upon a

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<sup>101</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London, New York, 1983).

<sup>102</sup> Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 6.



distinction between the public and the private. The public state was required to protect the inviolability of the private by adopting an attitude of indifference to the multiplicity of the concrete differences constituting the privates selves. This is where, Chatterjee continues, resides the incongruence between the nation-state imagined through the nationalist project reliant upon the split between outer and inner domains and the public-private distinction necessary to the secular functioning of a modern liberal state order. The question of cultural difference that was essential to the nationalist project in the inner/spiritual domain was neither coeval nor coincidental with the public/private distinction constituting what Chaterjee calls “our postcolonial misery:”

...not in our ability to think out new forms of the modern community but in our surrender to the old forms of the modern state. If the nation is an imagined community and if nations must also take the form of states, then our theoretical language must allow us to think about community and state at the same time. I do not think our present theoretical language allows us to do this.<sup>103</sup>

Chatterjee’s elucidation of the lack of correspondence between the traditional yet modern genesis of the nationalist project and the project’s secular edifices resting on a distinction between the public and the private is instructive in thinking about the colonial legacy of laws pertaining to intimate bodily conduct and gender normativity in postcolonial India. If the Indian postcolonial state modeled its political modernity by adopting the colonial institutions of the law, bureaucracy and statecraft and its non-western cultural modernity by privileging its own history of customs, beliefs and practices, then how do we account for an accommodation of non-normative identities of

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<sup>103</sup> *Ibid.* 11.

gender and sexuality within the interstitial space of these two modernities that in Chatterjee's view remain divergent?

Within the postcolonial context, the question of such identities and practices, specifically homosexuality, has remained a vexed one in various social, cultural, legal and political discourses on gender and sexuality. Postcolonial scholars such as Paola Bacchetta have demonstrated the repression of dissident genders and sexualities within the Hindu nationalist project manifesting as an extreme version of the inner/spiritual domain described by Chatterjee. The Hindu nationalists' adoption of a militant and masculine identity and its conflation with, and elevation to the Indian national identity precludes sexuality as an experiential category itself.<sup>104</sup> Professing an aesthetic and ethic of asexuality, the Hindu nationalist imaginary is one among the many forms of the repression of homosexual desire and identity, a figuration that most commonly circulates as "LGBT" or "queer" in the contemporary cultural politics of the postcolonial Indian context.

Within this context, the period between 1994 and 2013 is particularly salient for the ascendance of a discourse on LGBTQ rights in India mainly in relation to the 1861 colonial era anti-sodomy law, Section 377 of the Indian Penal Code. This chapter offers a brief history of the colonial context of Section 377 and the drafting of the Indian Penal Code. Following this brief history, the chapter undertakes an analysis of the available legal judgments in the case law under Section 377 pertaining to incidents of non-consensual sodomy in post-colonial India from 1947 onwards. Through the analysis of

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<sup>104</sup> Paola Bacchetta, "When the (Hindu) Nation Exiles its Queers," *Social Text* No. 61 (1999): 141-166.

the case law, the chapter builds an argument around the right to privacy provisionally granted to the Indian LGBTQ subjects by the Delhi High Court in 2009 by amending Section 377 to exclude consensual same-sex adults acts in private from the criminal purview of the law. This chapter's argument around the right to privacy that underpinned the legal sexual subjecthood for Indian LGBTQ subjects is twofold: 1. As the central right defining the decriminalization of Indian LGBTQ subjects through the verdict in *Naz Foundation v. Govt. of NCT of Delhi*<sup>105</sup> (the Naz judgment hereon) the legal recognition of Indian LGBTQ subjects as *consenting* adults engaged in same-sex acts in private is framed by a distinction from non-consensual criminalized acts under Section 377 as evidenced in the material precedence in Indian case law. In this framing, the distinction between consensual and non-consensual acts becomes key in the conferral of rights upon LGBTQ as an identity engaged in same-sex behavior by the Delhi High Court. Yet in 2013, the Indian Supreme Court in its decision in *Suresh Kumar Koushal & Another v. Naz Foundation and Others*<sup>106</sup> ruled on the constitutionality of Section 377 of the Indian Penal Code and observed that the law did not criminalize particular identities based on gender and sexuality such as gay or lesbian. Rather the law identified certain acts as criminal, which if committed by anyone would be considered an offense. The first argument of the chapter is that the derivation of LGBTQ rights on the basis of consent and privacy as distinguished from the history of criminal prosecutions of non-consensual conduct under the same law renders both privacy and consent tenuous insofar as the

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<sup>105</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

<sup>106</sup> *Suresh Kumar Koushal and Another v. Naz Foundation and Others*, CIVIL APPEAL 10972 OF 2013.

distinction pertains to the same kind of sexual conduct and acts under the purview of the law. This is in line with the Indian Supreme Court's view that only certain sexual acts committed by anyone are the target of the law. Whether the sexual acts are consensual or non-consensual, homosexual or heterosexual, the legal discourse surrounding Section 377 is structured by a fundamental tension between the (sexual) act and the (homosexual) identity that remains unresolved. Consequently, privacy and consent are rendered tenuous through this very tension in which the sexual act is framed within terms of criminality and pathology.

2. It is here that the second argument complements the first with regards to the sexual conduct criminalized by Section 377. As will be illustrated through the analysis of the case law, there appears to be a profound lack of conceptual and analytical clarity that plagues the meanings of the words "sodomy" and "carnal intercourse against the order of nature" that inhere in the text of Section 377 when it was first written into the books in 1861 by a British lawmaker by the name of Thomas Babington Macaulay. The vagueness in the language of the law then occasions a productive legal discourse around the meanings of the order of the nature and carnal acts that are understood to violate such an order. At the same time, such vagueness, originating in the law's inception in its colonial context and continuing across the permutations of cases of non-consensual carnal acts in postcolonial Indian courts, remains a persistent preoccupation even for the Supreme Court judges as well. Ruling in favor of the constitutionality of the law in 2013 with the caveat that the law concerned itself with sexual acts (which were not clearly defined) and not identities, the judges remain preoccupied with the question of what constituted "carnal intercourse against the order of nature." Sodomy's status as an un-definable

object yet one that can be made meaning of through the unique mechanics of each act under question is key in consolidating the “order of nature.” This consolidation through sexual acts, as I will show in my analysis, cuts across the taxonomy of identities both heterosexual and homosexual. It also confines consent to the ambit of heterosexual marriage defined specifically by peno-vaginal intercourse.

That despite the vagueness, lack of clarity and the prosecutorial history of non-consensual acts under Section 377, how and why does this law become the central mechanism towards the attainment of LGBTQ rights in India and the delineation of the resultant rights-bearing LGBTQ identity in the 2009 Delhi High Court verdict? Through what discursive confluences and slippages does the modern homosexual individual appear as a public rights-bearing subject in the Naz judgment that decriminalized homosexuality in India? To answer these questions, the next section provides a brief summary of the rationales employed by the Delhi High Court to decriminalize homosexuality in India. Following this summary, the chapter provides the historical context of the law’s inception in colonial India before turning to the case law for the application of Section 377 in cases of non-consensual sex in postcolonial India. Among the eight cases discussed in this chapter, the judgments are only available for five of them, accessed online in the Indian legal database of court verdicts, *indiankanoon.org*. The conclusion of the chapter employs an analysis of the proceedings of the Naz case in the Indian Supreme Court in 2012 when the Delhi High Court ruling of homosexuality’s decriminalization was challenged by various religious and cultural entities.

In connecting the piecemeal moments of the anti-sodomy law’s application through the cases of non-consensual sex as well as the Supreme Court proceedings of the

Naz judgment, the chapter's framework draws upon Michel Foucault's work on the history of sexuality that specifically describes the discursive mechanisms through which the homosexual identity came into existence in the 18<sup>th</sup> century Europe in relation to the law, medicine, psychiatry and other social and political ideas.<sup>107</sup> Within the Foucauldian framework of incitement to discourse – the myriad ways in which we speak about sexuality through discourses of control, observation and a productive channeling of sexual desire – the chapter further turns to the scholarship on law and popular culture, particularly questions of affect and feeling, to critically complicate the understanding of the law as a body of scientific and rational knowledge. I draw upon the works of legal scholars Alan Hyde and Lawrence Liang to consider how the law as a productive discourse constructs various kinds of bodies and also remains subject to the affects, feelings and sensations that those bodies experience.<sup>108</sup> Insofar as the law is summoned to issue conclusions on the nature of sex and sexuality, the ostensibly disinterested body of the law as comprised by judges (often predominantly male) remains implicated in the affective circuit of sexual desire itself. Their specific interest in defining sodomy and unnatural acts, an epistemology that masks itself as legal word, produces variegated narratives bordering on a prurient interest in non-normative sexual acts. In delivering these speech acts with their judicial prerogative, the judges become experts of sorts in defining those acts that constantly exceed the boundaries of the normative. Here again, Foucault's discussion of the seventeenth century Christian pastoral society's imperative

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<sup>107</sup> Michel Foucault, *The History of Sexuality Vol. 1*. (New York: Vintage, 1978).

<sup>108</sup> Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997). Also see, Lawrence Liang, "Media's Law: From Representation to Affect," *Bioscope: South Asian Screen Studies* 2: 23 (2011).

to speak of sex through moral discourses is prescient in capturing the legal rationalizations of sodomy in postcolonial courts. Citing from the French aristocrat and thinker Donatien-Alphonse de Sade, Foucault writes:

Your narrations must be decorated with the most numerous and searching details; the precise way and extent to which we may judge how the passions you describe relates to human manners and man's character is determined by your willingness to disguise no circumstance; and what is more, the least circumstance is apt to have an immense influence upon the procuring of that kind of sensory irritation we expect from your stories.<sup>109</sup>

As my analysis of the non-consensual cases will demonstrate, the judges engage in a form of legal discourse in the form of narratives of sexual acts whose specificity is illuminated and made to conform in precise details to constitute the definitions of unnaturalness and hence criminality under Section 377. This chapter arrives at this assessment of the law through an analysis of the diffuse moments in the legal tenure of Section 377 of the Indian Penal Code and the nebulous constellation of sexual acts that cluster under its uncertain purview. At the same time, the chapter furthers the critique of the derivation of LGBTQ rights (consensual intercourse and privacy) from this law and its peculiar history of vagueness in the interpretation of unnatural acts.

### **Section 377 of the Indian Penal Code – 1861-2009-2013**

Section 377 of the Indian Penal Code, a law codified in 1861 in British-ruled colonial India was instituted with the purpose of punishing carnal offenses against the “order of nature,” such as sodomy, buggery and bestiality. The section reads:

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<sup>109</sup> Foucault, *History of Sexuality*. 21.

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 offence described in this section.

**Comment.** The section is intended to punish the offense of sodomy, buggery and bestiality. The offense consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.<sup>110</sup>

In the late 19<sup>th</sup> century, this law reflected the prevailing Victorian morality and colonial anxieties around the preservation of the English race and masculinity owing to the fears of intimate contact with the colonized natives. In its contemporary context, however, the legal contestations around Section 377 by the Indian LGBT activists, lawyers and civil society organizations have been based on the framing of the law as an impediment to HIV/AIDS outreach in India, particularly where the legal code targets lower-class mobile populations, known as men-who-have-sex-with-men (MSM) in the public health discourse.<sup>111</sup>

The organizing around the law's harmful nexus with the public health crisis of HIV/AIDS in India during the 1990s and early 2000s culminated in the 2009 Delhi High Court judgment in *Naz Foundation v. Union of India* that went beyond the demand for decriminalization of homosexuality to confer the human rights of equality, dignity,

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<sup>110</sup> Suparana Bhaskaran, "The Politics of Penetration: Section 377 of the Indian Penal Code," in *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society*, ed. Ruth Vanita (New Delhi: Routledge, 2002), 15.

<sup>111</sup> Gregory Pappas et al., "Males who have Sex with Males (MSM) and HIV/AIDS in India: The Hidden Epidemic," *Public Policy Journal* 16 (1). (2001): 4-17. Also see, Shivananda Khan, "MSM and HIV/AIDS in India," *Naz Foundation International* (2004).



privacy and non-discrimination on the Indian LGBT subjects. The Naz judgment achieved this through an expansive interpretation of various articles in the Indian constitution.<sup>112</sup> The Delhi High Court's reading down<sup>113</sup> of Section 377 of the Indian Penal Code to exclude adult consensual same-sex conduct in private was based on an extensive range of judicial sources such as decriminalization decisions from other national contexts, international human rights law and agreements as well as affidavits and submissions about human rights violations of sexually non-normative bodies filed by national citizen communities. The decriminalization of homosexuality was bolstered by the rights-based framework that introduced the principle of non-discrimination on the grounds of sexual orientation in the Indian Constitution. As a legal victory for the Indian LGBT community, the decision was declared "India's Stonewall," widely regarded as the un-closeting of a collective queer nation.<sup>114</sup> The euphoric response did not fully drown out dissident voices such as religious groups and conservative sections of Indian society who voiced their opposition and disapproval of the judgment. As a result, the judgment was challenged in the Supreme Court of India in 2010 with different stakeholders mobilizing another set of affidavits, legal submissions and appeals that laid out arguments for and against the change of the law.

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<sup>112</sup> These include Article 14 (Right to Equality), Article 15 (Non-discrimination on grounds of sex re-interpreted to also include sexual orientation), and Article 21 (Dignity and Privacy located within the Right to Life and Liberty). See Chapter 1.

<sup>113</sup> The term "reading down" was used by the Delhi High Court judges to mark the exclusion of Section 377 to consensual sexual acts among same-sex adults while the prosecution of non-consensual acts was still considered constitutional.

<sup>114</sup> Arvind Narrain, *The Right that Dare Speak its Name: Decriminalizing Sexual Orientation and Gender Identity in India* (Bangalore: Alternative Law Forum, 2009).

On December 11, 2013, in a rather unexpected reversal of the Delhi High Court's human rights approach, the Supreme Court of India overruled the Naz judgment observing that Section 377 did not suffer from any constitutional infirmity since it only criminalized certain acts, and not a class of people. In its concluding observations, the court further noted that the LGBT constituted only a miniscule fraction of the Indian population and that in the last 150 years, less than 200 persons had been prosecuted under the law. The discursive production of the modern LGBT identity in the Naz judgment that inaugurated the Indian rights-bearing sexual subject came undone in the Supreme Court's technical rationalization concerning the constitutionality of the law, which the judges ruled was about the criminalization of sexual acts and not identities. A detailed analysis of the Supreme Court judgment will be conducted in the conclusion of the dissertation.

Contemporary mobilizations of sexual identity based claims under Section 377 began around the mid 1990s owing to public health exigencies brought about by HIV/AIDS in India. One of the major incidents that brought the focus on the rising rates of HIV/AIDS in conjunction with male homosexual behavior was the public health controversy in India's biggest prison called the *Tihar* Jail in New Delhi. The head of Police at the time, Kiran Bedi, refused to distribute condoms to the prisoners on dual accounts of homosexuality being against Indian culture as well as its criminalization under Section 377.<sup>115</sup> Prior to this period of heralding a national level debate about homosexuality's place in Indian culture, the law's sporadic application historically suggests a discontinuous, diffuse trajectory of apprehending sexual deviance primarily

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<sup>115</sup> Bhasakaran, *Politics of Penetration*.

manifest in the non-normative embodiment of certain figures and their sexual behavior as well as cases of non-consensual sex. A review of this diffuse history is instructive in understanding how the legal code's malleable textuality allows for an interminable interpretation of carnal acts "against the order of nature," a legal hermeneutics that in turn rationalizes the law's constitutionality as apropos of the Indian constitution. This uncertainty and contingency around the meanings of sexual acts persists across the periods of the legal code's routine application in postcolonial India as well as its focalization during the decade of LGBTQ activism. The series of public interventions by the Indian LGBTQ activists culminated in the judicial occasion of the Supreme Court judges pondering precisely the same question: What were the unnatural carnal acts that violate the order of nature ordained in the text of Section 377? Despite the global recognition of the Naz judgment as the apotheosis of a human rights era in Indian cultural politics, the eventual fate of Section 377 as a legal albatross culminated in a profound reductionism of LGBTQ identities to sexual acts whose meanings were never apparent to begin with when it was first laid down as a tool of colonial governance in mid-19<sup>th</sup> century British India.

Drawing upon postcolonial studies that takes up the role of sexuality in the expansion of colonial rule, the next section offers an overview of the particular exigencies of the colonial context that brought Section 377 of the Indian Penal Code to streamline the processes of governance of the colonized natives in India.

### Section 377- The Colonial Context

The Indian Penal Code came into existence within the historical context of the European wave of Enlightenment thinking represented by intellectuals like Jeremy Bentham whose disdain for ideas of natural laws and natural rights led him to devise the codification of legal systems in England. Bentham's thinking was in line with utilitarian principles embodied in the maxims of the greatest happiness for all and the minimization of pain.<sup>116</sup> At the same time, Thomas Babington Macaulay, a Bentham epigone, was the British official responsible for the drafting of the Indian Penal Code, which he began working on in 1834 when he left for India to head the Law Commission that was to modernize India's legal systems. David Skuy argues that the drive to modernize what was perceived by the British to be India's primitive legal system – a mix of Hindu, Muslim and British laws – was not in fact part of the colonial civilizing mission. It was rather a motivation to modernize Britain's own primitive legal system that contained capital punishments for the most minor of offenses.<sup>117</sup> On the one hand were Macaulay's criticisms of Indian customs, traditions and judicial discretions of the native judges coupled with his belief in the inherent superiority of British legal thinking that in his view reflected a higher morality. On the other, Skuy argues, were the roles of the East India Company, the British Parliament and English intellectuals in constructing India's colonial legal systems. The East India Company was hardly interested in native affairs. The Hindu and Muslim laws continued to regulate native affairs often without direct British

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<sup>116</sup> Sanford H. Kadish, "The Model Penal Code's Historical Antecedents," 19 *Rutgers Law Journal* 521 (1987).

<sup>117</sup> David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies* 32 No. 3 (1998).

participation or permission. The process of codification as envisioned by Bentham and James Mill was intended for the overhaul of English law that was plagued by the profit-oriented nature of the legal profession to which the rights of the common man were beholden. Macaulay's implementation of the utilitarian principles for the Indian Penal Code reflected the needs and ideas appropriate to the English criminal justice system, which was also in need of reform.<sup>118</sup>

Elizabeth Kolsky views the codification of the Indian legal system as related to certain local and political factors in the colony that served as a laboratory for metropolitan legislative experiments. She attributes the rationale for codification to the presence of non-official Europeans whose criminal activities in India were a cause of concern for the British government and its civilizing authority. While also citing the capricious and haphazard administration of legal justice in India, informed by the multiple sources of the law, Kolsky points to an internal contradiction in the British approach to administering justice. This approach relied on separate laws for Indian subjects who were tried under local courts and exempted the growing non-official European presence from the jurisdiction of local courts.<sup>119</sup> Macaulay's attempt at the Indian Penal Code drafted in 1834 took over twenty years to be passed in India in 1862.

While this brief historical overview of the issues surrounding the Indian Penal Code suggest that the modernizing process of India's legal system was essentially a fraught one, the main catalyst for the passage of the Code is believed by historians to be the 1857 Indian mutiny against the British. There was widespread discontent in India

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<sup>118</sup> *Ibid.* 538.

<sup>119</sup> Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23 No. 3 (2005).

owing to the perception that the British government was planning to end all distinctions based on caste and religion and instead impose Christianity in India in the mid-nineteenth century. Particularly, the belief that the East India Company was lubricating the cartridges for the new Enfield rifle with pig and cow fat that if bitten by Indian sepoys before use would violate their religious beliefs was a major source of the growing distrust of the Company's administration. Subsequently, in a series of mutinies, violence broke out in what constituted a coup by Indian sepoys against the British resulting in the murder of many European men, women and children.<sup>120</sup> The events of the 1857 Mutiny rendered urgent the need for the colonial authorities to maintain proper distance from the natives who could no longer be trusted.

Suparana Bhaskaran further explicates the colonial context of the law's codification that followed the 1857 revolt by the Indian soldiers leading to a consequent shift in the British attitudes towards native populations from integrationist policies to largely isolationist and indifferent imperial governance. Fear of miscegenation and inter-racial conjugality among the British and Indians as well as the rise in venereal diseases led to the establishment of state-regulated brothels in the mid-1850s to preserve racial and sexual purity among the Imperial army that was perceived as susceptible to "special Oriental vices" such as homosexuality.<sup>121</sup> However, in the second half of the 19<sup>th</sup> century, Christian and feminist "purity campaigns" in Britain imported gender propriety and norms of masculinity and femininity into the colony leading to the suspension of the brothels in 1888. Lord Macaulay presided over the Indian Law Commission to head the

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<sup>120</sup> Lawrence James, *Raj: The Making and Unmaking of British India* (New York: St. Martin's Press, 1997).

<sup>121</sup> Bhaskaran, *Politics of Penetration*, 17.

codification of a uniform criminal and civil law for the whole of India, ostensibly in consultation with scriptural experts like Brahmin pundits and Muslim priests. However, following the Mutiny, Queen Victoria took direct control of India and declared herself the empress, resulting in the dual role of the crown in overseeing economic interests and state functions. The Indian Penal Code finalized in 1860 was drafted by drawing upon the English Law, Hindu law, Muslim law, Livingston's Louisiana Code and the Code of Napoleon and the Code of Criminal Procedure and was passed in 1862. Even as it drew on multiple sources, ironically, the motivation behind the overhaul, as noted earlier, was the need to modernize and standardize what was seen as India's chaotic and primitive legal system.<sup>122</sup>

Given that the Indian Penal Code serves as a historical mark putatively separating a previous legal regime from what was now understood to be a modern one following the passage of the Code, hastened by the 1857 revolt, how do we situate the question of sexuality in relation to the interests of the Empire? How did the idea of a reigning Victorian morality inform the framing of native practices as being in need of regulation, of which the Section 377 was an explicit prohibitive expression? How do we situate concepts like "oriental vices" and "native perversity" that rationalized what Partha Chatterjee calls the "rule of colonial difference?"<sup>123</sup> In elucidating the link between

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<sup>122</sup> *Ibid.*

<sup>123</sup> Chatterjee, *Fragments*. The rule of colonial difference suggests the ideology that validates the British presence in India in order for the colony to be modernized on the basis of the racial difference between the superior Europeans and the primitive natives. As an ideology of colonial rule, this difference had to be maintained to continue the project of colonialism as a civilizing, benevolent mission.

Empire and sexuality, Ronald Hyam has argued, “one of the worst results of the expansion of Britain was the introduction of its guilty inhibitions about sex into societies previously much better sexually adjusted than perhaps any in the West.”<sup>124</sup> Similarly, Lawrence James has described the context of nineteenth century British India as a land of sexual opportunity and availability of native women for the British travelers at a time when forces of Victorian repression were just taking shape through purity campaigns, Evangelical churchmen, public school headmasters and other self-appointed champions of public morality in England. Further, James notes that homosexuals in India were free to satisfy their fancies as long as they were careful in stark opposition to homosexuals in Britain where homosexuality was despised and buggery was a capital crime until 1861.<sup>125</sup>

The sexual life of the Empire, popularly known as the Raj, has been a subject of prolific discussion among postcolonial historians. Far from being a history of repression and prohibition, sexuality under the colonial regime was a contested field of negotiating the distance and proximity between the European bourgeois society and the Indian natives. Colonial elites marketed the colonies to European men as a domain to indulge their sexual fantasies while at the same time prevented the proliferation of a mixed-race population as a result of sexual liaisons between the colonizer and the colonized.<sup>126</sup> This sexual history of the Empire is also populated with certain colonial figures who maintained intimate relations with their mistresses, indigenously known as *bibis*, as

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<sup>124</sup> Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester and New York: Manchester University Press, 1990), 3.

<sup>125</sup> James, *Raj*.

<sup>126</sup> Ann Laura Stoler and Frederick Cooper, “Between Metropole and Colony: Rethinking a Research Agenda,” in *Tensions of Empire: Colonial Cultures in a Bourgeois World*, eds. Frederick Cooper & Ann Laura Stoler (Berkeley, Los Angeles, London: University of California Press, 1997).



demonstrated in the works of scholars like Ronald Hyam and Durba Ghosh.<sup>127</sup>

Particularly in relation to homosexuality in colonial India, Robert Aldrich has documented the sexual relations between British travelers like E.M. Forster and Indian *maharajas* (kings), a practice that was frowned upon by the colonial elites. For instance, Aldrich describes the anxieties around homosexuality as a form of deviation in this passage:

Colonial rulers also reacted against homosexuality among the Indian elite. Lord Curzon drew up a list of princes with homosexual tastes, which he blamed on early marriage: 'A boy gets tired of his wife, or of women, at an early age, and wants the stimulus of some more novel or exciting sensation.' Curzon sent one homosexual prince to the Cadet Corps to learn self-discipline, but then fretted that his influence might corrupt other young men.<sup>128</sup>

I rehearse this brief history as a metonymic instance of a much larger narrative of intimate relations between the colonizing elites and the colonized natives that constituted the heterogeneous sexual economy of colonialism. Section 377 of the Indian Penal Code then can be seen to fit into this history as an instrument of regulation and prevention of sexual contact that could interfere with the rule of colonial difference.<sup>129</sup> The rule of colonial difference as explained by Chatterjee pertains to the ideology of the perceived difference between the modern European elite whose mission in the colonies was to civilize the primitive natives and their barbaric savage practices. As such, it legitimated the colonial rule in India, a project that was to remain incomplete because if indeed the

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<sup>127</sup> Hyam, *Empire*. Also see, Durba Ghosh, *Sex and the Family in Colonial India: The Making of Empire* (Cambridge: Cambridge University Press, 2006).

<sup>128</sup> Robert Aldrich, *Colonialism and Homosexuality* (London & New York: Routledge, 2003), 276.

<sup>129</sup> Chatterjee, *Fragments*.

modernization of the natives was fully accomplished, such a teleological moment would erase all justifications for the colonial rule. The sexual politics of the Empire was far more complex involving intimate relations across lines of gender, class, race and sexuality however, homosexuality was seen by colonial authorities as a special “oriental vice” even though they were aware of the existence of such practices in England.<sup>130</sup>

Macaulay introduced his project of Bentham-style codification by classifying offences under four broad categories: offences against the public, offences against the person (the human body), offences against property, and offences against condition and reputation. Additionally, attention in the Indian Penal Code was paid to the mental circumstances involved in a crime, for instance, in the offences related to the body.<sup>131</sup> Despite this rationalization of the Indian legal system into uniformity and standardization, the question of what constituted offences against the body, especially if such offences pertained to sexuality, defies the rational impulse. The legal framing of sexuality in terms of a punishable offense also begs the question of how does the law as a body of knowledge itself seeks to contain sexual knowledge as a matter of regulation. The edification of the “order of nature” in Section 377 of the Indian Penal Code sets the backdrop against which an array of sexual acts considered “perverse” concerned the judiciary in colonial and postcolonial India.

Before Section 377 became codified in 1861, Macaulay’s acute disgust at the acts triggered by “unnatural lust” was rationalized through two predecessor clauses:

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<sup>130</sup> Kenneth Ballhatchet, *Race, Sex and Class under the Raj: Imperial Attitudes and Policies and their Critics, 1793-1905* (London: Weidenfeld and Nicolson, 1980), 120.

<sup>131</sup> Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959).

Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said [...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 that 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.<sup>132</sup>

Alok Gupta traces the pre-history of sodomy laws to the medieval times in a Christian Europe where the meaning of sodomy was not necessarily confined to sexual acts between men but also extended to those among interracial groups such as the Turks and the Jews. The criminalization of sodomy in the Middle Ages owed to anxieties in Christian theology around sexual pleasure that was only tolerable for the purposes of reproduction. So detestable and abominable was considered the sin of buggery, Gupta notes, that defining it with any precision would have amounted to flirting with contamination.<sup>133</sup> On the issue of defining and naming with precision, Gupta aptly captures an irony in the project of codification:

Describing sodomy precisely was risky, to be avoided. In an 1842 British court case that involved a man accused of committing “nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices” in the vicinity of Kensington Gardens, the defense objected that the adjectives gave no indication of what the crime actually was. The vagueness became more an issue as, in the nineteenth century, reformers set about codifying and imposing order on the chaos of British common law and statute law.<sup>134</sup>

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<sup>132</sup> Alok Gupta, “This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism,” *Human Rights Watch*, 2008.

<sup>133</sup> *Ibid.* 14.

<sup>134</sup> *Ibid.* 15.

In the final text of Section 377 drafted by Macaulay, there was no provision for a standard of harm based on the use of force thus abrogating the issue of consent in the act criminalized under the law's purview. Macaulay was unwilling to debate or discuss the "heinous crime," a response that Alok Gupta suggests transforms the penal code into a matter of personal discretion. The vagueness of language in Clause 361 and 362 albeit mitigated in the revised version, Section 377, was still "shrouded in euphemisms." Although the section criminalizes the offense of sodomy, the act itself stands unclearly defined without a distinction between homosexual and heterosexual acts. However, Gupta notes that over the years since its codification, the law came to mark certain bodies in a way so as to create an association between the sexual act and a corresponding non-normative body.<sup>135</sup>

The creation of Section 377 served to concretize the colonial contempt at what was perceived to be native perversity or the special oriental vices. Yet the law's articulation as a legal code seemed so vague as if words themselves had a tactile import enabling the access to that which was sought to be prohibited.

To reiterate, this chapter goes on to trace and argue through a close reading of a few of the available judgments from the late 20<sup>th</sup> century (accessed on the Indian legal database *indiankanoon.org*), the vagueness of language in the legal code regarding its object of prohibition. This textual vagueness offers precisely the opportunity and occasion to a faction of male judges to speculate, conjecture, deliberate and funnel the meanings of a confounding mess of sexual acts, modes and behaviors through the legal

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<sup>135</sup> Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals," *Economic and Political Weekly* 41 No. 46 (2006): 4816.

code's capacity for taxonomical proliferation. This judicial enterprise must dwell on the prohibited – carnal intercourse against the order of nature – in such detail so as to flesh out the colonial skeleton in the closet of an inherited Victorian morality. This morality manifests as uniquely Indian in the disclaimed western origins of homosexuality in post-colonial India. The judicial institution's engagement with Section 377 that codifies the prohibited act only to decode its "perverse" permutations in the registered cases unfolds as the Foucauldian incitement to discourse through the deployment of sexuality to produce its variegated truth.<sup>136</sup>

In writing a history of sexuality as a history of multiple discourses, Michel Foucault's debunking of the repressive hypothesis – the notion that the discourse of sex and sexuality came to be negated and prohibited in the Western society since the 17<sup>th</sup> century onwards – may perhaps only partially account for Lord Macaulay's unwillingness and disgust at the spectrum of unnatural acts. If the purposeful vagueness of Section 377 of the Indian Penal Code in Macaulay's view was intended to shield the moral fabric of English and colonial society from the language of perverse sexuality, then the Indian judges presiding over sodomy law trials are implicated in the operations of power by virtue of the "speaker's benefit."<sup>137</sup> In dealing with the handful of sodomy law cases, the Indian courts' exercise of judicial power then led to a proliferation of discourses about sex. As Foucault aptly notes:

...But more important was the multiplication of discourses concerning sex in the field of exercise of power itself: an institutional incitement to speak about it, and to do so more and more; a determination on the part of the

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<sup>136</sup> Foucault, *History*.

<sup>137</sup> *Ibid.* 6.

agencies of power to hear it spoken about, and to cause it to speak through explicit articulation and endlessly accumulated detail.<sup>138</sup>

Following Foucault further with the observation that towards the end of the 18<sup>th</sup> century there emerged a political, economic and technical incitement to speak about sex through analysis, stocktaking, classification and specification, the sodomy law trials demonstrate the administration and regulation of sex “through useful and public discourses.”<sup>139</sup> Further, marital relations became the focus of constraints in the 18<sup>th</sup> century with regards to which homosexuality was deemed abominable, contrary to nature and against the law. The phrase “order of nature” ordained within Section 377 as per Macaulay’s moral sentiments shares continuities with beliefs in Christian theology in medieval Europe. However, the meaning of the phrase, as demonstrated in the analysis of the Section 377 cases in postcolonial India and more recently in the 2012 Supreme Court proceedings of the Naz verdict, while continuing to prove elusive simultaneously emerges as a protean enterprise. The more the meaning is speculated over in the courts, the greater is the uncertainty as to its applicability and form and yet the phrase’s meanings accrete. The “order of nature” when framed in Foucauldian terms is an order of “perversion,” detailed by the legal imperative to adjudicate certain acts according to the vagaries of language in Section 377.

Yet the available cases under Section 377, only a handful in number, do not necessarily cohere in an ongoing, sustained investment in re-orienting the order of nature as a matter of harm management for a larger social body. Rather, as this chapter argues,

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<sup>138</sup> *Ibid.* 18.

<sup>139</sup> *Ibid.* 25.

their promise inheres in the moments in the judgment that illuminate the recursive logic through which sodomy is seen to repeat itself, masking as other penetrative simulations inviting the judiciary for a reprisal of the order of nature. The Supreme Court of India elucidated the most recent iteration of this recursive logic of interpreting the meaning of sodomy or unnatural acts when the 2009 Naz judgment delivered by the Delhi High Court was challenged in the higher court in 2010. Over four weeks of public hearings, the judges, in a categorical departure from the decidedly human rights perspective of the Delhi High Court, proceeded steadfastly on the technical question of what constituted the order of nature and unnatural penetration and why the legal code criminalizing such acts was unconstitutional. Reading the 2012 account of the Supreme Court proceedings of the Naz case as if continuous with the concerns of the postcolonial judges in interpreting the meanings of sodomy in the 377 case law from the late 20<sup>th</sup> century then at least partly suggests the extant pathologization of homosexuality in India that foreshadows the specific LGBT rights of privacy and non-discrimination granted in 2009 by the Delhi High Court.

This chapter's arguments advance a postcolonial version of the Foucauldian idea of the "incitement to discourse" – speaking infinitely about what was considered so abominable by the 17<sup>th</sup> century European Christians and English lawmakers like Macaulay that it could not even be defined. Such prohibition of sexual acts against the order of nature under Section 377 of the Indian Penal Code takes on a decisively political mantle in the contemporary demand for the decriminalization of homosexuality emerging at the turn of the 20<sup>th</sup> century culminating in the 2009 Naz verdict of the Delhi High Court. However, it is with the Supreme Court of India's 2013 decision that the

recognition granted to the Indian LGBT community through a right to privacy and the identification of Section 377 as a law about homosexuality, is realigned with the nebula of “carnal intercourse against the order of nature,” or sexual acts that comprise the legal code’s target, not any particularly vulnerable class under the law. The Supreme Court, to borrow from Foucault again, reverses the sexual discourse by evacuating the specificity of the rights-deserving homosexual to deliver the sodomite again and attribute that figure to all sexualities.

So far I have reviewed the colonial context of Section 377 and the broader codification of the Indian legal systems in British India. I now turn to a reading of the available verdicts under Section 377 both in colonial and postcolonial India. My analysis of the cases draws upon postcolonial scholarship on the prosecutions under Section 377 and the case law wherever the verdicts are available in original. In analyzing these cases, I will pay particular attention to slippages of interpretation in the verdicts where the judicial uncertainty surrounding the meaning of penetration, sodomy and the order of nature becomes the precise moment of multiplying the forms that unnatural sex could take.

### **Applications - Section 377 over the Colonial and the Postcolonial Period in India**

One of the earliest convictions under Section 377 dates back to 1884 pertaining to the case of a man by the name of Khairati who was charged with the crime of sodomy. Anjali Arondekar’s reading of the 1884 case, *Queen Empress v. Khairati* (Khairati from hereon) demonstrates that the terms of the native criminality were not necessarily driven by the force of evidence; rather such a subject came to be suspended between “the



epistemological imperatives of legal codification and colonial anthropology” seen as ontologically criminal and perverse.<sup>140</sup>

I consider Arondekar’s analysis of *Khairati* at length because the annals of legal history, such as John Mayne’s *The Criminal Law of India* (1901) list the case as a precedent and an illustration of Section 377. *Khairati* is noted as a cautionary tale for authorities given the absence of key facts as evidence (the when, where and with whom of sodomy) and the initial conviction on grounds of cross-dressing and physical signs of habitual sodomy. A range of other legal sources such as D. Sutherland’s *The Digest of Indian Law Reports* (1890), Joseph Vere Woodman’s *A Digest of Indian Law Cases* (1894) and J.B. Worgan’s *Consecutive Tables, Criminal Cases Being an Annotation of the Criminal Cases in the Indian Law Reports from their Commencement to the End of 1897* (1898) contain the case as a bibliographic reference and an “exemplary instantiation of the scarcity of solid evidence, as well as the ubiquity of native perversity.”<sup>141</sup>

Arondekar’s analysis of *Khairati* ponders questions of archival recovery as a means of obtaining the “truth” of sexual difference in the colony. *Khairati* was convicted of the crime of sodomy under Section 377 in 1883 in the district of Moradabad by the sessions judge Denniston. A legal case of unusual complexity, *Khairati* summons the colonial judicial reasoning to speculate the disparate and tenuous pieces of evidence into a rationalized account of the innate criminality of the native. Arondekar unravels the larger incongruences in the colonial rule instrumentalized by the rationalizing technologies of the law that departed from its own avowed civilizing mission when it

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<sup>140</sup> Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Durham & London: Duke University Press, 2009), 69.

<sup>141</sup> *Ibid.* 74

came up against a perplexing maze of native practices and customs. The details and proceedings of the case enable not the sanguine recovery of a coherent narrative but a story that comes together piecemeal.

Khairati was convicted by the sessions judge of Moradabad, Mr. J.L. Denniston for the crime of sodomy in 1883. The charge pertained not to an exact date or time of the crime but to an arrest made on the basis of the accused found singing in women's clothes among the women of a certain family following which he was subjected to a physical examination by the civil surgeon. The results reported the "characteristic mark of a habitual catamite – the distortion of the orifice of the anus into a shape of a trumpet" with signs of syphilis in the same region. Khairati's explanation that he had a serious case of dysentery was dismissed by the judge who concluded that despite the inadequacy of circumstantial evidence, Khairati's singing in women's clothing, the presence of syphilis and a subtended anus together offered proof that the crime of sodomy indeed had been committed.<sup>142</sup>

Later in the Allahabad High Court in 1884, Judge Straight dismissed Khairati's earlier conviction on grounds of the inadequacy of the particulars of *when, with whom* and *where* of the crime. Observing that the accused was clearly a habitual sodomite and that despite the desire of authorities to check these disgusting practices, the judge declared that the law and procedure could not be set aside to obtain a laudable object.

In Arondekar's account of the case, a number of analytical strings pull at the heart of the legal encounter with sexuality in colonial India. The encounter seems to fold the colonial moral disgust at sexual crimes like sodomy into a legal offense while at the same

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<sup>142</sup> *Ibid.* 68.

time locating such criminality as an indigenous phenomenon rampant among the native populations of India. Here, Khairati's determinate status as a "habitual sodomite" in the estimation of the judges stands only partially subsumed in his description as "not a eunuch in the literal sense."<sup>143</sup> Further, the perceived colonial status of sodomy as a common oriental vice among the eunuchs also implicates Khairati in the socially itinerant network of eunuchs and tribes who were deemed sexually non-conformist.

In the context of social deviance, Arvind Narrain describes The Criminal Tribes Act of 1871 as an "extraordinary legislation" that in departing from the principles of the Indian Penal Code, sought to criminalize entire communities of itinerant performers such as acrobats, singers, dancers, tightrope walkers and fortune-tellers. Criminality among these communities linked to their sexual non-conformity was seen as being passed along generations and rooted in an already entrenched caste system that placed these communities at the bottom. The criminal tribes were subject to a range of punitive measures such as mandatory registration (even of children and women), restrictions on mobility and imprisonment up to three years for lurking and loitering in certain areas.<sup>144</sup>

What *Khairati* captures in Arondekar's view are the specific anxieties and preoccupations around the potential criminality of the native body that produce a crisis of legal codification around the crime of sodomy without an eyewitness, victim or

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<sup>143</sup> *Ibid.* 69.

<sup>144</sup> Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change 2004), 59. An 1897 amendment to the act titled "An Act for the Registration of Criminal Tribes and Eunuchs" further specified the category "eunuch" to include all members of the male sex who medically tested to be impotent. Apart from mandatory registration of names and addresses with the government under suspicions of kidnapping and castrating of children, the eunuchs were also subject to punishment and imprisonment without warrant if found singing and dancing in women's clothes in public.

chronology but comprehended as a matter of habit and perversion. Even as systems of colonial administration were transformed and overhauled in 1948 in order for postcolonial India to take charge of its own populace as an independent republic, non-normative forms of sexual and gender practices remained pathologized and criminalized by state administrative policies. The mid 1990s form a context in which the activist and civil society challenge to the law's criminalization of homosexual conduct produces the Indian LGBT as public subjects through a narration of bodily and psychological violence. However, the retention of Section 377 of the Indian Penal Code in the Indian Constitution after Independence and the law's history of sporadic application in cases of sexual abuse in post-Independence India suggests an unremarkable tenure of convictions. Yet the legal application of the Code has much to offer by the way of blurring the key distinctions between forms of sexual acts that ultimately became the basis of provisional decriminalization in 2009. This chapter also argues that there is a fundamental link between the cases of non-consensual acts regarded as unnatural under the law and the demand for the decriminalization of such acts when they are consensual. It instantiates this link by posing the following question: How and why does the understanding of sodomy in the cases of non-consensual sex, as a patently physical act get disinvested from the affective circuit of pain and pleasure and reinvested through the abstractions and approximations of the law that continues to produce the legal truth of sexual criminality and illegitimacy? Behind this putatively rationalization of the law's legal application, perhaps, lurks a subconscious force of what Narrain and Gupta have called public morality, the assumption of the larger societal disapproval of sodomy and same-sex relations as unequivocally foreign influences. Disproving this assumption then tasked the

contemporary LGBT politics in India whose rights-based advocacy and the 2009 Naz verdict of homosexuality's decriminalization in the Delhi High Court cast same-sex relations as governed by a constitutional morality. The constitutional morality pertains to a secular principle of governance of all Indian citizens, in part also legitimated by the historical presence and approval of same-sex practices in Indian society and culture before the imposition of Victorian morality.<sup>145</sup>

A review of the list of the cases filed under Section 377 discussed in secondary literature as well as original judgments, wherever available, suggest that the vagueness in language in fact becomes a productive force to refine the law and tailor its amorphous text to specify the offense on a case-by-case basis. The law's textual obfuscation becomes an occasion for a host of judges to make the law a protean enterprise in deliberating foundational issues like consent, difficulty of proof and the nature of the act. The chapter does not exactly follow a chronological order in the discussion of the cases.

For instance, a communal dispute involving a sodomy case of an accused Muslim called Mirro and a lower-caste Hindu called Ram Dayal was brought to a lower court in *Mirro v. Emperor* (1946). The initial sentence of seven years based on the semen stains found on Mirro's *dhoti* (loin cloth) was overturned by the Allahabad High Court on grounds of the lack of evidence.<sup>146</sup> Arondekar's account of the case offers the story based on the judgment text. Ram Dayal, a young *chamar* (lower-caste) boy was accosted by a

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<sup>145</sup> Narrain, *The Right that Dare*. Arvind Narrain distinguishes constitutional morality from its obverse, public morality, as based on liberal democratic ideals that underlie the Indian Constitution, which are not informed by religion or tradition. In terms of LGBT rights, it translates into a principle of non-interference on the government's part if no compelling state interest is served.

<sup>146</sup> Bhaskaran, *The Politics of Penetration*.

Muslim man named Mirro at a blacksmith's shop and whisked away to Mirro's brother-in-law's house in the North Indian city of Agra. The offense being committed at peak public hours between 4:30 and 5 pm drew attention and resulted in Ram Dayal's supporters gathering outside the house who proceeded to catch Mirro and beat him with *lathis* (batons).<sup>147</sup>

It is on the issue of proof that the case flounders, just like *Khairati* did, faltering on key facts of the time, place and victim in determining the crime that is displaced on to an ontological history of habitual sodomy. In the Mirro case, the medical evidence – medical jurisprudence and legal medicine themselves emerging as powerful forms of knowledge mediating the colonial understanding of native ontologies – was found to be inconclusive without forensic traces of the crime such as a subtended anus or semen stains. Even the eyewitness accounts offered conflicting testimony but ultimately Mirro was acquitted even as in the judge's estimation he was deemed an undesirable person who had made many enemies.<sup>148</sup>

Medical jurisprudence as a truth technology of the colonial legal system played a pivotal role in consolidating ethnographic knowledge into medical knowledge in the face of witness unreliability, codification and controversial evidence. The doctor's status as an expert legal witness elevated his authority in combining ethnographic knowledge and

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<sup>147</sup> Anjali Arodekar, "Time's Corpus: On Sexuality, Historiography and the Indian Penal Code," in *Comparatively Queer: Interrogating Identities and Cultures Across Time* ed. Jarrod Hayes et al. (New York: Palgrave Macmillan, 2010).

<sup>148</sup> *Ibid.*

medical jurisprudence as well as his ability to offer facts and opinions, a prerogative not assigned to non-expert witnesses who could only offer what they saw and perceived.<sup>149</sup>

But medical jurisprudence and medical evidence continued to inform postcolonial courts as well aiding the judges in making swift and confident determinations of sodomy's marks on the victim's body. The chapter draws upon only a few of the available prosecutions under Section 377 where the judicial reliance on medical evidence to describe sexual assault related physical injuries allows the narration of sexual perversion that subsumes a range of non-consensual acts, and by their implication under the provisions of the penal code, also consensual acts. Consensual homosexuality's absence in any of these cases may be better understood as a muted presence sharing the indictment of physical injuries with the non-consensual cases of sexual assault.

Often the result of contradictory testimonies of the victim and the accused, the judges' recourse to medical reports then mediates the determination of the most plausible account proximate to truth. A sodomy case as recent as 2002 brought to the Delhi High Court in 2009 illustrates the use of medico-legal certificates (MLC)<sup>150</sup> in adjudicating the conflicting accounts put forth by the appellant and the victim of the crime. The *Ram Bhagat Ram v. State* (2009) was heard in the Delhi High Court in February 2009 with an appeal directed against a previous order dated February 12, 2002 sentencing the appellant to four years of rigorous imprisonment and a fine of Rs. 1000 (approx. \$ 22).<sup>151</sup> The

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<sup>149</sup> *Ibid.* Also see, Arondekar, *For the Record*.

<sup>150</sup> A term used by the High Court judges in *Ram Bhagat Ram v. State* 2009 to refer to the medical reports of the victim and the accused.

victim's version of the story recalls an incident on the morning of October 7, 1995 when he was going to ease himself in the fields in front of the factory where he worked. Two men known to the victim intercepted him and demanded Rs. 100 (\$2.5) for liquor. Upon the victim's refusal, one of the men, Rajpal closed the victim's mouth with his hand while the other, Ram Bhagat, inserted his penis in the victim's anus for about 5-7 minutes. Somehow the victim managed to escape and reported the incident to his father. Subsequently, they filed a report with the police and the victim was sent to the D.D.U hospital where he was medically examined along with his underwear, which were seized by the doctor. The underwear was presented in the court for the victim to identify.

Giving credence to the victim's version of the story, Judge Muralidhar observed that a non-consenting victim of sodomy is unlikely to forget the bitter experience as it constitutes a violation of his right to privacy and dignity. The distinction between consensual and non-consensual proved key only a few months later in July 2009 when the same judge authored the Naz verdict in which the Delhi High Court decriminalized same-sex consensual conduct in private. That a case registered in 2002 was heard in the court in 2009 and marked the key distinction between consent and its lack thereof is remarkable in understanding the prolonged temporality of legal processes, in effect, undermining the meanings of liberal principles of privacy and consent.

Even as the Delhi High Court's human rights tenor – right to privacy and dignity of the victim, a conception remiss in other sodomy trials in India before the 1990s –

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<sup>151</sup> *Ram Bhagat Ram v. State*, Law Commission Report (2009), Delhi. Accessed on March 18, 2014 at <http://www.indiankanoon.org/docfragment/1664960/?formInput=Ram%20Bhagat%20Ram%20vs.%20State%20Delhi%20High%20Court>



marks the court's departure from questions of sexual perversion, Judge Muralidhar remains reliant upon the medical-legal certificate (MLC) issued by the examining doctor, *Modi's Medical Jurisprudence and Toxicology*<sup>152</sup> as well as the 1946 case *Mirro v. Emperor* discussed earlier in this chapter.

The victim's MLC begins with the victim being described as a catamite, later defined as a young boy who is a passive agent in sodomy. The judge then takes note of the abrasions on both arms of the victim, left side of the face, lower eyelid and the left knee in addition to an absence of injury on the anal area. The judge also summarizes the appellant Ram Bhagat's MLC. The salient points mentioned about the appellant include: married male with three children, nocturnal intrimesence (or possibly intumescence), admission of having committed sodomy, bruise on upper right leg, male organs well developed, secondary sexual characters well developed and smegma absent.<sup>153</sup> The absence of smegma on the appellant's penis and presence of semen on both the victim's and the appellant's clothes in the court's view constitutes further corroborative evidence of sodomy having occurred.

After casting the victim as a human rights subject, the court proceeds to respond to the defense's claim that the absence of injury in the victim's anal area disproves the victim's version of sodomy. With the disclaimer that the court's reliance on *Modi's Medical Jurisprudence* is only as a guidance to assess the medical and forensic evidence of sodomy, the court cites relevant passages from the text to survey the signs of sodomy

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<sup>152</sup> B V Subrahmanyam ed., *Modi's Textbook of Medical Jurisprudence and Toxicology*, 22<sup>nd</sup> Edition (New Delhi: Butterworth, 1999).

<sup>153</sup> *Ibid.*

accounting for a range of factors. Citing Modi, the court describes the possible parties to the act:

A grown-up passive agent may persuade a young boy to act as an active agent to practice the vice on him but such instances are very rare indeed. Modi had seen only one case in which a passive agent of forty-five to fifty years of age was prosecuted for having persuaded a sixteen year-old boy to having an unnatural connection with him.<sup>154</sup>

Adding further from the text that skin abrasions on the anus are accompanied by pain in walking and defecation in the case of a passive agent not accustomed to sodomy, the court unwittingly recapitulates the category of the “habitual sodomite” that characterized the crime in the *Khairati* case (discussed above). But the next passage cited by the court offers an ostensibly deeper insight, an embodied specificity so precise that it begs the question of the author’s forensic gaze at the generalizable sodomized body:

Owing to the strong contraction of the sphincter ani, the penis rarely penetrates beyond an inch, and consequently, the laceration produced on the mucous membrane within the anus with more or less effusion of blood is usually triangular in nature, having its base at the anus and the sides extending vertically inwards into the rectum. Modi had found lacerations internal to the sphincter ani in several cases, but a typical triangular wound only in a few cases. These signs may not be present in cases where the active agent has used lubricants or/and has introduced his penis slowly and carefully without using force into the anus of the passive.<sup>155</sup>

A similar description capturing the extent of penetration and the triangular nature of the wound is cited in Anjali Arondekar’s analysis of the use of medical jurisprudence in colonial India to examine cases of native sodomy and its ethnological variations. The text Arondekar refers to was called Wilson Johnstone’s *Physical Evidences of Sodomy*

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<sup>154</sup> *Ram Bhagat v. State*, 2009.

<sup>155</sup> *Ibid.*

written in 1886 on the Punjabees of India.<sup>156</sup> Such concerns with native sexual criminality in the colony share continuities not just across the Empire and the colony but also across the postcolonial world as evident from Modi's medical jurisprudence employed by the Delhi High Court.

The mobilization of medical jurisprudence by the Delhi High Court in response to a legal narration of the injuries on the victim's body in the Ram Bhagat case then raises a question about the legal constructions of the body. Alan Hyde's version of this question captures the specificity of the bodily privacy in the case at stake: How does legal discourse constitute the body as a holder of legally relevant evidence?<sup>157</sup> Hyde goes on to demonstrate the balancing test of body's privacy interest as pitted against its public uses by the state to obtain evidence. The law assumes power over the body's construction by first abstracting its privacy as a public interest, and then reifying that interest as relevant to its legal needs for evidence. Hyde observes that the law is free to construct multiple bodies and that the "choice for the body as privacy interest is necessarily a choice for a body that is quite substantially open at the boundaries and available to others."<sup>158</sup> The Delhi High Court performs precisely this function through its evaluation of the victim's injuries by (dis) placing it within the larger framework of Modi's text. By first assessing the victim's body in terms of injuries, physical marks, stains and then citing the variations in the mechanics of sodomy, whether forceful penetration or lubricated entry, the court abstracts the victim's bodily privacy in the interest of resurrecting him as a public human rights subject who must be defended. Also, the court's observation about a grown-up

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<sup>156</sup> Arondekar, *For the Record*.

<sup>157</sup> Hyde, *Bodies*, 153.

<sup>158</sup> *Ibid.* 159.

passive agent of forty-five having “unnatural connection” with a younger active sixteen-year-old agent slides along semantic clarity obfuscating the object that is deemed unnatural. Is it the age difference between the two that renders the connection unnatural or is it the very act of sodomy that in the court’s view figures as unnatural and hence culpable under Section 377? Once again, the language of the law, specifically the law that criminalizes certain sexual acts, allows expansive interpretation through its openness and vagueness.

A widely cited text in Indian courts, *Modi’s medical jurisprudence* has been critiqued by Indian feminist legal scholar Flavia Agnes, a figure whose work in many aspects of women’s rights includes involvement in anti-rape law and activism in India. Agnes observes that the case law referred to in the book is either archaic English case law or colonial-era Indian case law.<sup>159</sup> Similarly, writing about the infamous two-finger test used in rape trials in India to determine the sexual history of the victim (mostly as a way to discredit the victim’s version of the assault), Pratiksha Baxi traces Modi’s jurisprudence back to the work of the French medical jurist, Léon-Henri Thoinot who published his “Medico-legal Aspects of Moral Offenses” in 1898. Modi’s jurisprudence, Baxi notes, quotes passages on the two-finger test verbatim from the 1911 English translation of Thoinot’s book that makes a distinction between true and false virgins. The French medical jurist further believed that women with intact hymens could also be habituated to sex given the elasticity of some hymens. To truly uncover the truth of sexual assault, he advised his medical students to insert a pipette, a cone or two fingers

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<sup>159</sup> Flavia Agnes, “To Whom do Experts Testify? Ideological Challenges of Feminist Jurisprudence,” *Economic and Political Weekly* 40 No. 18 (2005).

into the vagina, which he believed simulated an erect penis.<sup>160</sup>

Forging a plagiaristic relation to Thoinot's continental foray, Modi's text also belongs in a broader genre of concern about unnatural offenses and control of deviant sexuality emergent during the colonial period in India as already demonstrated by Arondekar. This genre is especially evident in Britain where sodomy and repressed sexuality came to be identified with a Victorian morality. Anxious to disavow the presence of such vices in the British culture, the development of medical jurisprudence facilitated judicial decision-making in sodomy trials in arriving at the legal proof of same-sex activity among men, a "vice" whose rampancy in Britain mobilized a range of authorities to tackle the "nameless offence."<sup>161</sup> This mobilization is better understood as a history of imbrication of various discourses – legal, cultural, medical, popular – within which sodomy came to be medicalized through the professionalization of medicine, especially forensics, venereology and sex psychology in 19<sup>th</sup> century Britain.<sup>162</sup> Spurred by the silence of most physicians and surgeons on sexual topics, the specialization of forensic science wrested the exclusive authority of the law to comment on such matters and made an appearance in the courts with clues to decode the physical ciphers of sodomy. As Ivan Dalley Crozier demonstrates through his analysis of the 1871 Boulton and Park case that summoned the expertise of seven medical practitioners to determine if sodomy had been committed, the determination of the sexual crime became contingent on

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<sup>160</sup> Pratiksha Baxi, "Ban the Two-Finger Test in Rape Cases," Blog Post, January 4, 2013. Accessed March 22, 2014 <http://lawandotherthings.blogspot.com/2013/01/ban-two-finger-test-in-rape-trials.html>

<sup>161</sup> Harry G. Cocks, *Nameless Offences: Homosexual Desire in the 19<sup>th</sup> Century* (IB Tauris, 2003).

<sup>162</sup> Ivan Dalley Crozier, "The Medical Construction of Homosexuality and its Relation to the Law in Nineteenth-Century England," *Medical history* 45 (2001).

the physical manifestation of its traces on the body.<sup>163</sup>

Informed by the work of the noted practitioner of jurisprudential medicine and expert witness Alfred Taylor who authored the “Manual of Medical Jurisprudence” in 1846, the *R v. Boulton and Park* was the most famous “homosexual” trial in England.<sup>164</sup> Boulton and Park were arrested in 1870 when on their way to the theater. Dressed in women’s clothing, they were accused of conspiring to commit and actually committing unnatural acts. The reliance on the seven medical practitioners in the court uncovered a range of physical signs on the bodies of the accused. For instance, the divisional surgeon to the Eastern Division of the Metropolitan Police James Thomas Paul found “an extreme dilation of the anus” in Boulton and that the anal passage opened readily. On examining Park’s body, the surgeon observed a greater relaxation of the muscles along with discoloring of the skin.<sup>165</sup>

While the surgeon’s cross-examination by Mr. Seymour proved his observations inadequate given he had not used a speculum on the accused and had never examined a person with a dilated anus before, the other six surgeons’ examination provided descriptions such as warts, abrasions on the posterior part of the anal opening extending from the interior backward, a small vein on the back of the anus, and also contradictory reports of a usually marked anus. The inconclusiveness of the evidence offered relief to the judicial authorities for in their view, the vice had not yet “tainted the habits of the men of this country – for that thank Heaven.”<sup>166</sup>

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.* 67.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.* 72.

The exclusive reliance on bodily evidence, suitably medicalized to locate a moral malady, in addition to validating the properly embodied expertise of the attorney, the judge, the police and the surgeon also assuaged Victorian anxieties about cultural and moral breakdown in the late 19<sup>th</sup> century England when the crime's committal could not be proved. How, then, do we explain the judicial mobilization of a similar text, *Modi's Medical Jurisprudence and Toxicology*, that begins with an assumption that sodomy is an unnatural perversion, in the year 2009, that also marked the decriminalization of consensual same-sex relations in private by the Delhi High Court? The Delhi High Court's position in the *Ram Bhagat Ram* case framed the non-consensual crime in terms of a violation of the victim's human rights to dignity and privacy. Yet by continuing to rely on a text like *Modi*, the judge S. Muralidhar unwittingly kept sodomy in the cage of unnatural perversion, which when performed consensually went on to constitute the liberal sexual subject in India with rights to privacy, dignity, equality and non-discrimination.

In its conclusion of the *Ram Bhagat Ram* case, the court also refers to the *Mirro* case to consider the absence of injuries on the victim's body, which the appellant claimed to be an index of the absence of sodomy having been committed. Stating the inconclusive and contradictory nature of the evidence in the *Mirro* case in which the victim was a boy who was quite "grown up," the court dismisses the appellant's appeal of overturning the previous conviction. However, the court's recourse to *Modi's* medical jurisprudence is not categorical, punctuated as it is with disclaimers about a variety of factors in the determination of sodomy some of which may or may not be present.

The medical report as a documentation of the signs of sodomy facilitates the

judge's conclusion in the 2003 case, *Kailash alias Kala v. State of Haryana*<sup>167</sup> as well when the appellant Kailash appeals his conviction under Section 377 in the sessions court. Specifically, upholding the findings of the medico-legal report (MLR), the judge echoes the doctor who finds the anus opening of the victim loose aside from other familiar abrasions indexing sodomy. Further evidence of sodomy includes stains of blood and semen on the victim's underwear. The medical examination of the accused, however, reveals a rather vague description implying that the doctor did not find anything to suggest that the accused was not capable of doing sexual intercourse.

The last argument advanced by the counsel for the accused requests a lenient treatment of the sexual act, which in the counsel's submission was not considered a criminal offense in European countries. In response to the argument, the judge considers the decriminalization of homosexuality in England in 1957 following the recommendations made by the Wolfenden Committee and Lord Patrick Devlin in his 1978 book *Enforcement of Morals*. Disagreeing with Lord Devlin's endorsement of John Stuart Mill's idea of liberty, the judge instead aligns his views with Professor M.L.A. Hart's 1963 book *Law, Liberty and Morality* and argues that the adoption of English laws is not conducive to the running of the Indian society, which must rely on its own laws and customs for its smooth functioning. As Alok Gupta notes, the judge speaks with a deep sense of amnesia given that the anti-sodomy laws were conceived, legislated and enforced by the British in colonial India.<sup>168</sup>

Owing to other complications in the case including hostile witnesses and the

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<sup>167</sup> 2004 CriLJ 310.

<sup>168</sup> Gupta, Dignity.



absence of the counsel for the accused, the latter's bail stood canceled postponing the 1988 conviction for over a decade well into 2003 when the case was taken up in the Punjab/Haryana High Court. Aside from the diffuse aftermath of sodomy reconstructed through the temporal signs rendered visible in the court through medical evaluation – the loose anus, semen and blood stains and other insinuations of sexual prowess – the case also ventures into a cultural evaluation of sodomy indicting even consensual acts framed in broader strokes of Indian culture and societal disapproval. The judge's logic of the distinction between European and Indian cultural values as warranting separate laws is precisely the one whose inversion in the Naz petition filed in the Delhi High Court in 2001 enables the claim about sodomy's indigeneity and presence in Indian history with a view to decriminalize homosexuality towards the facilitation of HIV/AIDS outreach by the NGO Naz Foundation. Even as the Delhi High Court dismissed the Naz petition in 2004 on grounds of the absence of an injured party, the underlying figurations of the victim and the injury under Section 377 demonstrates a slippage between the consensual parties engaging in sodomy and sodomy as a mode of injury inflicted between two parties that ultimately reifies sodomy as injury.

Arondekar summarizes the Delhi High court's view on the 2001 Naz Public Interest Litigation (PIL) dismissed in September 2004:

There can be no petition, the court's judgment stated, if there are no alleged victims. Any public interest litigation, the court added, must be filed on the behalf of persons. Hypothetical and academic archival inquiries into the potential violation of constitutional rights enabled by a continued enforcement of Section 377 were not sufficient grounds for a repeal of Section 377. Without victims, without literal bodies seeking redress, the petition had no legal standing – it was merely an academic exercise, seeking redress for an imagined community of victims it had, as

yet, not managed to produce.<sup>169</sup>

In the court's opinion then the injury of victims must be substantiated only through the victims of the said injury in order for the law to be repealed. Where in the non-consensual legal cases the physical injury and signs metonymically assign sodomy to the body, it follows that in the consensual cases, hypothetical as they are in the court's assessment of the Naz petition, sodomy as a potential route to pathology further assigns injury to the body that Section 377 prevents from being addressed and presented. Or stated in terms of consent as an informing principle of the act, sodomy *is* the (physical) injury when consent is absent under the law but sodomy must be *produced* as injury (as pathology, as HIV/AIDS or as symbolic) even when the act is consensual for the purposes of legal justice under Section 377. Such a reification of sodomy as injury then seems to pre-figure any legal rights discourse that seeks to flesh out sexual acts into political identities, or injuries into potential victims. At stake here are a range of concerns related to sexual acts as founding identities, injury as founding victims and human rights as founding private subjects that warrant interrogation as the primordial articulations of the political.

The burden of proof in the aftermath of the criminal offense of sodomy also ails the conclusion in the 1934 case *Nowshirwan Irani v. Emperor* where the charge of sodomy brought by an 18-year old boy against the appellant was dropped on grounds of inconclusive evidence. The judge ruled that the 18-year-old victim's medical report showed a history of anal intercourse and that further, the absence of signs of injury on the

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<sup>169</sup> Arondekar, *Time's Corpus*, 119.

body of the victim meant that there had been no resistance to the overtures of the appellant. Additionally, the seminal discharge experienced by the appellant through friction with the victim's body did not constitute penetration as strictly defined under Section 377.<sup>170</sup>

A similar conclusion was reached in the 1996 *Biren Lal v. State of Bihar* case where the victim's claim that the appellant tried to sodomize him in a road culvert by pulling down his clothes was dismissed as not constituting penetration under the legal code. Thus far, through my discussion of the original verdicts in the Ram Bhagat and the Kailash cases, I have demonstrated how the Indian judges read the committing of sodomy on a non-consenting body that was rendered legible through the technologies of medical jurisprudence. The medico-legal report (MLR) as a documentation of sodomy breaks down the act into metonymic signs, each of which corroborates the conjectured truth of the crime having been committed. To reiterate, the notion of sodomy as physical injury in cases of non-consensual sex as a criminal act under Section 377 prefigures the possibility of consensual sex as a basis of decriminalization and further, a right to privacy. In the case of consensual sex, the status of sodomy as physical injury shifts to both pathology (the argument about Section 377 impeding HIV/AIDS outreach to Indian men-who-have-sex-with-men or MSM) as well as causing symbolic harm to self-identified gay and lesbian subjects. Insofar as the physical act of sodomy remains the common denominator for the identification of both kinds of acts – the decriminalized consensual act as well as the criminalized non-consensual act – a fundamental unresolved tension between the

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<sup>170</sup> Narrain, *Queer*.

homosexual identity as signaled by consent and homosexual act as cautioned by the lack of consent implicitly structures the gay rights discourse in India.

If the judges looked for the evidence of sodomy in the body of the violated, the nature of the act performed also displaced their normative view of sodomy as a bodily site-specific crime to a more action-oriented one as inhering in the act of penetration. I now turn to the cases where the uncertainty regarding the mechanics of the sexual act becomes the precise occasion for the law to offer interpretations of sodomy in order to continue justifying the criminalization of such “unnatural” acts under Section 377. The constantly expanding interpretation of sodomy to fit the unnaturalness of the penetrative act and suit the application of the law is key in substantiating how Section 377 straddles a fundamental vagueness and a protean discourse of sexual acts simultaneously.

### **Interpreting Penetration to Define Sodomy**

Although in an 1884 case, *Government v. Bapoji Bhatt*, the court did not extend the definition of “carnal intercourse against the order of nature” to include oral sex, the widely cited 1925 case, *Khanu v. Emperor*, moved the court in the direction of specific criteria for the constitution of sodomy. The court offered the following as included in carnal intercourse involving penetration:

- a. Existence of penetrative intercourse with an orifice.
- b. Impossibility of conception thus against the order of nature.

The court went on further to define penetration as “a temporary visitation to one organism by another” whose primary object was to “obtain euphoria by means of detent of the nerves consequent on the sexual crisis...”<sup>171</sup>

Only a few years later in 1933, another case, *Khandu v. Emperor* redrew the boundaries of the unnatural offense when a jail convict Khandu was caught inserting his penis up the nostril of a bullock tied to a tree. Describing his crime as being of a “highly depraved nature,” one that “set a degrading example of sexual immorality,” the judge denied the appeal to reduce the sentence of the accused. As a side commentary to the case, judge Dr. Hari Singh Gour broadens the purview of the law by adding women as possible convicts in case they use inanimate objects to penetrate animals.<sup>172</sup>

What’s striking is not just the longevity of the word of law over a century but also the persistence of legal reasoning as inflected by the personal morality of the judges as evidenced in two post-independence cases dated 1968 (*Lohana, Vasanthlal, Devchand v. The State*<sup>173</sup>) and 1992 (*Brother John Anthony v. the Madras High Court*<sup>174</sup>), both involving sexual abuse. The Lohana case precedes *Brother John Anthony* and is cited in the latter’s judgment. In staking out the technical terrain of unnatural perversion, the judge, as Suparana Bhaskaran astutely points to in her brief analysis of the Lohana case, becomes complicit with Havelock Ellis’s social Darwinist views on the savage races’ propensity for primitive and degenerate sexuality when he regards oral sex as coterminous with sodomy through an imitative route under Section 377. The

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<sup>171</sup> Gupta, *Dignity*, 4817.

<sup>172</sup> Bhaskaran, *The Politics of Penetration*, 23.

<sup>173</sup> 1968 CriLJ 1277.

<sup>174</sup> 1992 CriLJ 1352.

preoccupation throughout the text of the judgment with how to confine oral sex within the parameters of the criminal code, to arrive at its quintessential mechanism of penetration through deductive logic, and to expand the purview of the law by employing analogous and imitative principles, then speaks as much to a fundamental bewilderment about the nature of the act as it does to the distressed source of that bewilderment. Alok Gupta also points out that both in *Lohana* and *Brother Anthony*, the judges prioritize the definition of sexual perversion over the issue of consent as determinant of the nature of the crime. Possibly because, the word “voluntarily” in the text of Section 377 renders consent irrelevant, the judges appear more invested in an epistemology of sexual perversion. Noteworthy here though is also the fact that the already collapsed distinction between consent and force also contains another collapsed distinction between homosexual conduct and non-procreative heterosexual conduct under the purview of the law. However, Bhaskaran’s and Gupta’s accounts also show how the absence of the distinction between consent and force in cases involving only men becomes a defining presence in sodomy cases involving heterosexual conduct within the ambit of marriage.<sup>175</sup> This is further demonstrated through my analysis of a 1981 case of heterosexual sodomy *Grace Jayamani vs. E.P. Peter*<sup>176</sup> after I offer a reading of *Lohana* and *Brother Anthony*.

My interpretation of these cases extends Bhaskaran’s and Gupta’s analyses to address the sexual calculus through which the judge arrives at the unnaturalness of the offensive act, vague and interpretable under the law at the same time. In doing so, the

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<sup>175</sup> Bhaskaran, Politics of Penetration; Gupta, Dignity.

<sup>176</sup> AIR 1982 Kant 46, ILR 1982 KAR 196.

legal discourse within which the judge himself stands implicated blurs the boundaries of the law as an arena of rationalization and the law as an affective, sensuous realm of interpretation. Additionally, my reading of the Jayamani case will show how the case remains wound up in a profound contradiction. As a case of heterosexual sodomy within the ambit of marriage, it is not a case registered under Section 377. Yet it offers the judges another legal opportunity to interpret sodomy as unnatural within heterosexual marriage in India despite the fact that marital rape, or non-consensual peno-vaginal intercourse remains legal. I will draw upon the work of Indian feminist scholars including Flavia Agnes and Nivedita Menon whose critiques of heterosexism and patriarchy are valuable to this project's engagement with privacy and consent in relation to sexuality. I will particularly elucidate how the issue of consent refigures both homosexual and heterosexual acts but with profoundly different outcomes.

The Lohana case brought to the Gujarat High Court concerned three men, Lohana, Vasanthlal and Devchand who were convicted under Section 377 for unnatural intercourse with the victim, a 23-year-old boy Babulal Vithaldas. The appellants sought to overturn the conviction with the contention that the testimony of the victim regarding the offense committed was uncorroborated. In the revision petition filed in the Gujarat High Court in 1968, the judge pondered the "important and interesting" question of the second petitioner "putting his male organ" in the mouth of the victim and whether that was voluntary and constituted an offense under Section 377. After stating the caveat of penetration as sufficient to constitute the order of nature, the judge observes that the act of penetration into the orifice of the mouth that is not built meant naturally for such

carnal intercourse is still an offense under Section 377 even though there was no seminal discharge.

To demonstrate the liability of oral sex under the provisions of Section 377, the judge embarks on a circuitous route to establishing the act as an imitative form of sexual intercourse against the order of nature. First up for consideration is the appellant's advocate's reference to the renowned British physician Havelock Ellis's work, *Studies in the Psychology of Sex, Twelfth Impression, 1948 London*, particularly a passage on sexual stimulation to intercourse:

While the kiss may be regarded as the typical and normal erogenic method of contraction for the end of attaining tumescence, there are others only less important. Any orificial contact 'between persons of opposite sex' is sometimes almost equally as effective as the kiss in stimulating tumescence; all such contacts, indeed, belong to the group of which the kiss is the type, Cunnilinctus (often incorrectly termed cunnilingus) and fellatio cannot be regarded as unnatural for they have their prototypic forms among animals, and they are found among various savage races. As forms of contraction and aides to tumescence they are thus natural and are sometimes regarded by both sexes as quintessential forms of sexual pleasure though they may not be considered aesthetic. They become deviations, however, and this liable to be termed "perversions", when they replace the desire of coitus.<sup>177</sup>

Clarifying the act of oral sex in the instance under consideration wasn't a prelude to carnal intercourse – in that it replaced the desire of coitus, consequently ruling out the question of exciting passions for sexual intercourse – the judge explains how the act replaced actual sexual intercourse per anus. The explanation hinges on a fine detail of the circumstances under which the boy voluntarily took the organ of the accused in his mouth, that is, he began to get a lot of pain from anal intercourse with the other two. The

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<sup>177</sup> *Lohana...v. State*, 1968.



seminal discharge of the accused in the boy's mouth who vomited it out, then, in the judge's view firms up his position that such an act indeed replaced actual coitus.

In belaboring the imitative aspect of oral sex as akin to penetrative sodomy, the judge continues to highlight the appeasement of the appellant's sexual appetite as well as the unnatural function of the orifice of the mouth for sexual purposes, thereby constituting an offense under Section 377. Further, the judge sets aside the objection that sexual intercourse only meant for the purposes of conception is an outmoded theory and reinforces his own view that oral sex is an unnatural offense. Other legal material placed before the judge allows him to refine his theory of intercourse:

By metaphor the word 'intercourse' like the word 'commerce' is applied to the relations of the sexes. Here also 'there is the temporary visitation of one organism by a member of other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is 'to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis.'<sup>178</sup>

The judge goes on to note further that the visiting member should at least be partially enveloped by the visited organism given the connotation of reciprocity in intercourse, a principle that leads him to conclude that the sin of Gomorrah is no less carnal than the sin of sodomy. Towards the conclusion of the judgment, the judge continues to draw upon different sources like the *Khandu* case involving the penetration of a bullock's nostril, Ratanlal's *Law of Crimes, 21<sup>st</sup> Edition* and *Webster's New 20<sup>th</sup> Century Dictionary, unabridged, 2<sup>nd</sup> edition* to define oral sex as constituting penetration under Section 377, and after sufficient consultation and citation of the sources, dismisses

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<sup>178</sup> *Ibid.*

the review petition. On the one hand, we may read the judge's narrative as straightforward legal observations informed by various scientific sources on classification of sexual acts. On the other, the details in the narrative beyond being a simple matter of the judicial rehearsal of the process to arrive at a just decision also mask a subconsciously erotic interest in the "perversion." This perversion is defined only through the ostensible process of constructing it carefully, a task in which the judge sets himself up to be more than just a disinterested authority. Let's look at another case where instead of simply declaring non-consensual sex as a crime, the judge constructs a detailed narrative to rationalize the use of Section 377.

In fixing the taxonomical assignation of oral sex as indeed covered under Section 377, *Lohana* marks a precedent for other cases of non-consensual unnatural sexual offenses and sets in motion the deductive and enumerative enterprise of what counts as an offense and what does not. The 1992 case, *Brother John Anthony v. the State* was brought to the Madras High Court when the sub-warden of the boarding home attached to the St. Mary's Higher Secondary School in Tuticorin was accused by the brother of one of the school inmates of sexually assaulting the inmates in 1987. Subsequently, a case was booked under Section 377 of the Indian Penal Code and the petitioner John Anthony's counsel argued that no offense under the purview of the legal code had been committed.

After listing the facts of the case, the judge begins by stating the dearth of case law on such matters from the superior courts. As a response to the defense's claim that no act under Section 377 had been committed, the judge enumerates and defines a list of sexual perversions with their definitions namely, sodomy, bestiality, tribadism, sadism, masochism, fetichism (sic.), and exhibitionism. Following this neatly recited list, the

judge proceeds to break down the constitutive elements of Section 377 and rehearses their meanings drawing upon a range of sources such as *Butterworth's Medical Dictionary, Second Edition* for the meanings of the terms, “intercourse”, “carnal knowledge” and “coitus”. The meanings of the words “penetrate” and “penetration” are detailed with examples, drawing from the *Shorter Oxford English Dictionary, Volume IX, Third Edition* and described in the various instances of their usage such as *penetrated with grief, mutual permeation of two fluids, power of an optical instrument and the depth to which a bullet penetrates a material* among several others.

To further elucidate his point, the judge refers to the *Lohana* case (discussed above) in which oral sex as simulative of penetration becomes the defining condition of unnatural intercourse under Section 377. After citing the *Lohana* scenario, the judge decides to “delve deep to decide the question as to whether the various acts attributed to the petitioner would fall within the ambit of Section 377, IPC requiring the petitioner to undergo the ordeal of trial.”<sup>179</sup> In the process, the judge offers two categories:

(1) insertion of the penis of the petitioner into the mouth of the victim boy and doing the act of carnal intercourse up to the point of ejaculation of semen into the mouth; and (2) manipulation and movement of the penis of the petitioner whilst being held by the victim boys in such a way as to create an orifice like thing for making the manipulated movements of insertion and withdrawal up to the point of ejaculation of semen.<sup>180</sup>

Continuing his evaluative tone, the judge observes that the first act of oral sex is certainly an offense under Section 377, the second however, the judge decides, needs to

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<sup>179</sup> *Brother John Anthony v. State*, 1992, CriLJ 1352.

<sup>180</sup> *Ibid.*

be considered with regards to the petitioner's contention that it does not fall under the legal code.

Another case from the Kerala High Court, *State of Kerala v. K Govindan* (discussed next), facilitates the judge's reasoning here as he maps the likeness of mechanics involved in acts imitative of penetration. Since in the *K. Govindan case*, the act was committed by the insertion of the male organ between the thighs of the victim that were kept "together and tight", it was tantamount to penetration under Section 377 insofar as to penetrate means "to find access into or through" or to "pass through." Armed with this definition of penetration, the judge makes his final observation before dismissing the petition:

As already referred to, in the case on hand, the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal. In the process of such manipulation, the visiting male organ is enveloped at least partially by the organism visited, namely, the hands which held tight the penis. The sexual appetite was thus quenched by the ejaculation of semen into the hands of the victims, as prima facie revealed by the statements of various victim boys.<sup>181</sup>

In capturing the precise embodied sleight through which the imitative act becomes meaningfully unnatural, the judge effects an affective transference from the *K. Govindan* case where the contingency of penetration hinges on the tightness of the orifice thus simulated in order for various perversions to emerge. The judge's description both belies and affirms what Alan Hyde (1997) has called the "law's cold metaphors."<sup>182</sup> Following Hyde's characterization of the law's language as cold, clinical and self-

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<sup>181</sup> *Ibid.*

<sup>182</sup> Hyde, *Bodies*, 4.

consciously metaphorical, the judge's description of the unnatural act in *Brother Anthony* spills over with affective undertones connoting tactility (held tight the penis...ejaculation of semen into the hands), relief (quenched by ejaculation...) and feeling. The more the legal enterprise strives to contain within textual parameters, the erotics of sexual perversion, the more it ends up proliferating its forms, its myriad simulations. At the same time, the question of this disinterested yet eroticized rehearsal of why Section 377 should be applied cannot be wholly overlooked. The constructed narrative of the crime begets not simply an elaboration of what happened but more importantly, a crafty elocution of details that reveal more than plain judicial expertise. It unmask the judicial cover of authority and power based on proper distance from the accused to render visible the authoritative body of the judge as equally susceptible to the narrative of "perverse" sexual acts, a narrative he co-authors expertly with an "extra-legal" interest.

Lawrence Liang's call to consider questions of affect and feelings in the body of legal texts and judgments is pertinent here as well in understanding how legal procedures of control and restraint may exceed their own tasks in the enactment of media censorship cases. Liang's discussion of a 1996 case in the Indian State of Andhra Pradesh involving the illegal screening of pornographic films in a theater, inserted in the censor certified feature, frames the legal encounter with pornography. He asks the reader to imagine the scene preceding the moment of the judgment. This inaccessible scene, Liang argues, must be speculated, in order to understand how the law "produces fantasies of order and control which allow us to observe the workings of power and sovereignty as erotic

adventure.”<sup>183</sup> The scene imagined by Liang is essentially a sensual one in his own words – the officers of the law sitting huddled together in a dark room with a pen and pad watching a bizarre montage of images – that captures the affective and libidinal dimensions of the censorship process when the officer or the judge as an embodiment of the law themselves possibly become susceptible to what they seek to prohibit from public view. This scene also exposes and displaces, in Liang’s view, the law’s abnegation of sight, the inability to see – as a cipher of neutrality and objectivity – on to a moment of confrontation with the prohibited image when the law’s blindfold comes off and brings out “the affectivity of judgment” that is seldom analyzed.<sup>184</sup>

Liang’s critique of legal reasoning where the movement from the particular to the abstract, generalizable principle, or to what has been called the triumph of algorithmic justice that entails “the erasure of the particular and the incommensurable”<sup>185</sup> while specific to an ocular-centric relation in the law, does have some relevance to comprehend the legal erotics at work in sodomy law trials discussed above. For instance, even in the movement from the particular act deemed unnatural and perverse to a more abstract framework of sodomy under 377, the act’s mechanics retain their unique force inviting newer forms of nomenclature. They also summon the affective capacities of the jury to describe sensations, to ascertain degrees, and to conjure the bodily modes through which such acts enter a state of unnaturalness. The rationalizing inquisitions of the judiciary remain fraught with the particularities of each sexual act whose adjudication must proceed through a centripetal logic under Section 377 yet at the same time as the act

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<sup>183</sup> Liang, *Media’s Law*, 28.

<sup>184</sup> *Ibid.* 36.

<sup>185</sup> *Ibid.* 34.

asserts its own centrifugal force.

For example, the 1969 *State of Kerala v. K. Govindan* case brought to the Kerala High Court offered another opportunity to the court to demonstrate yet another variant through which unnatural penetration under Section 377 may be defined. The case involved a lower-class minor girl of age 14 who was raped by two men named Kannan Nair and K. Govindan. The accused were acquitted in the sessions court where the judge found discrepancies in the victim's evidence and also claimed that the penetration was an "afterthought"<sup>186</sup> following which the public prosecutor filed an appeal in the high court.

The judge in the Kerala High Court dismisses the assistant sessions court judge's conclusion and cites the girl's medical report to assert that penetration had indeed occurred. Pointing out the graphic details such as lacerated hymen, abrasions on the vaginal walls, ulcerated walls, discharge and a roomy vagina that "admitted two fingers easily," the judge asks what was meant by penetration being an afterthought in the sessions court judge's version? Did it mean that there was no penetration but it was made to appear so as to get the medical certificate?

Further, in response to the sessions court judge's claim that full penetration wasn't clear, as it was only between the girl's thighs, the high court judge invokes the scope of Section 377 to define how this particular form of penetration would fall in the legal code's ambit. Then, he rehearses the fundamental basis of penetration i.e. a temporary visitation must be partially enveloped by the visited organism to obtain euphoria through sexual crisis. Finally the judge lays out the simple mechanics of "thigh sex":

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<sup>186</sup> 1969 CriLJ 818.

In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight... Then about penetration. The word 'penetrate' means in the concise Oxford Dictionary 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust.' Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.<sup>187</sup>

The accused are then convicted in the Kerala High Court as their acquittal from the lower court is set aside by the judge. Instead of ruling it to be an unequivocal case of child sexual abuse, the judges felt compelled to literally invent a new category of unnatural sex under the ambit of Section 377. That “thigh sex” emerges through judicial interpretation as a legal rationale independent of and above the issue of coercion on a minor or lack of consent then testifies to the judge’s unfathomable faith in the word of the law. In barely acknowledging the lack of consent in all three cases – *Lohana, Brother Anthony* and *K. Govindan*, the judiciary remains guided by the protean powers of Section 377 whose vagueness serves precisely to grant the law the certitude of unnaturalness and the legitimacy of its application.

There is however one exception to the rule of the irrelevance of consent. The 1982 case, *Grace Jayamani v. EP Peter* in the Karnataka High Court concerned the petitioner Grace Jayamani’s appeal for the dissolution of her marriage with EP Peter, who the petitioner claimed had been inflicting sexual cruelty and committing sodomy on her against her consent. To examine the soundness of the district court’s judgment that affirms the dissolution of marriage under the Indian Divorce Act, 1869, the Karnataka

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<sup>187</sup> *State of Kerala v. K Govindan*, 1969.



High Court judge raises the question whether the definition of sodomy can be extended from an unnatural act between two men to the same offense between a man and a woman.

The judge rationalizes his belaboring definition of sodomy:

The early legislators, in keeping with the delicacy of the early writers on the English Common Law were reluctant to set out in detail the elements of sodomy because of its loathsome nature. They simply provided for the punishment of any person who committed "sodomy or the crime against nature." Definition of the term is not included in the present Act obviously for the same reason as the Act was drafted and enacted as early as in the year 1869. That being so we have to necessarily look into the Dictionary meaning of the term 'Sodomy'.<sup>188</sup>

The judge meanders through a range of contemporary and historical sources like *Shorter Oxford English Dictionary*, *Webster's Third New International Dictionary*, *Halsbury's Law's of England, III Edition Volume 10*, *Jowitt's Dictionary of English Law*, and *American Jurisprudence, II Edition, Volume 70*, all of which define sodomy variously as between man and man, man and woman, man and animal as well as derived from the practices indulged in by the inhabitants of the cities of Sodom and Gomorrah as understood from the Hebraic Law. The judge finally defers to the authority of the *Court for Divorce and Matrimonial Cases in England* as well *Taylor's Principles and Practice of Medical Jurisprudence, XII Edition, Volume II* to settle on the definition of sodomy.

The judge finds the testimonies of Grace Jayamani and her father who provide details of sexual cruelty such as biting of the breasts, sexual intercourse during menstrual period, and anal and oral sex fully convincing. Particularly salient is the judge's acceptance of this testimony on grounds of Grace Jayamani's lack of consent to sodomy,

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<sup>188</sup> *Grace Jayamani v. EP Peter*, 1982.

a principle that Bhaskaran and Gupta note<sup>189</sup>, does not apply to cases of sodomy involving men who remain criminalized under Section 377. Importantly, however, the judgment does not refer to Section 377 or invoke it remotely to pursue the question of sodomy even though sodomy, whether heterosexual or homosexual, consensual or non-consensual, remains a criminal offence under the law. The marriage is dissolved under the Indian Divorce Act, 1869.

The judge's dissolution of Grace Jayamani's marriage to EP Peter on grounds of non-consensual sodomy committed by the latter on his wife then remains mired in contradiction. In addition to Bhaskaran's observation that consent is generally disregarded in cases of sodomy involving men, within heterosexual marriage in fact, consent as illustrated by the Grace Jayamani case, remains a selectively invoked principle of autonomy. Indian feminist scholar Flavia Agnes has long argued for the recognition of the wife's consent to sexual intercourse in a heterosexual marriage in order for statutory rape to be a cognizable offense. Consent as one of the liberatory principles in the decriminalization of homosexuality by the Delhi High Court in 2009 remains an attenuated form of liberty in heterosexual marriages in India owing to the exclusion of marital rape from criminal prosecution. Agnes has argued that the wife's consent remains beholden to the sanctified union of marriage in which the law does not want to interfere excessively.<sup>190</sup> Thus marital rape's legality has been one of the most contentious issues in the legal reform of rape legislation. Consequently, in addition to a legal recognition of heterosexual (male) autonomy and authority and by extension privacy, consent is also

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<sup>189</sup> Bhaskaran, *The Politics of Penetration*; Gupta, *Dignity*.

<sup>190</sup> Flavia Agnes, "Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law," *Economic and Political Weekly* 37 No. 9 (2002).

refigured as the organizing principle of naturalizing (procreative, peno-vaginal) and penalizing (sodomy, oral sex) sexual acts conducted among gendered actors with specific outcomes i.e. male-on-male consensual sodomy is criminal however non-consensual heterosexual sodomy violates heterosexual marital sanctity that non-consensual peno-vaginal intercourse does not. Nivedita Menon observes that “marital rape” does not exist in the Indian law unless it is a case of sodomy. Under Section 375 of the Indian Penal Code (IPC) that deals with cases of rape, sexual intercourse by man with his wife regardless of consent features as an exception to the definition of rape. However, even if sodomy committed by heterosexual married couples is consensual, both husband and wife are held guilty and the lack of wife’s consent makes only the husband liable.<sup>191</sup>

This is precisely what the *Jayamani* judgment demonstrates. Even without the invocation of Section 377, the judge in the case undertakes a textual investigation of sodomy as a sexual act, as that inscrutable perversion whose meaning must be constantly searched for in legal and medical jurisprudence from different national contexts. Ironically, because Section 377 is not invoked but sodomy is still defined, the lack of *Jayamani*’s consent for sodomy becomes the primary basis for the dissolution of marriage. Although consent as a principle is present-ed, what is rendered conspicuous by absence is the medical evidence of physical injuries that resides at the heart of the evidentiary structure in other non-consensual Section 377 cases involving conduct between men.

The judge’s prompt acceptance of Grace *Jayamani*’s testimony when he declares,

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<sup>191</sup> Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Urbana and Chicago: University of Illinois Press, 2004).

“There is no cross-examination on the asseverations made by the lady in the box. By the very nature of things, it is not possible to expect corroboration to testimony before the court. Even so, she has reported the matter soon after to her father,” is profound in dispensing with the need for further evidence that is often required to substantiate sodomy physically in other cases. Perhaps, because no charge is brought under Section 377 in the case, the judge’s faith in “the very nature of things” or the facts of sexual violence obviates any recourse to medical jurisprudence for sodomy’s signature on the body.

As a non-377 case, the *Jayamani* judgment ultimately gets implicated in the sodomy law’s web of legality discursively under three conditions a). Consent becomes a key constituent of sexual relationality edifying heterosexual marriage while male homosexuality even when consensual remains criminalized. b) The legality of marital rape in heterosexual marriages naturalizes the peno-vaginal non-consensual sex, or the order of nature under Section 377, c). Sodomy continues to occupy its abject status as the sexual perversion capable of undermining a heterosexual marriage but also remains an open-ended act that must be interpreted continuously by the court without any success of precision or certitude.

The adjudication of sodomy as a sexual act under Section 377 of the Indian Penal Code, whether it is consensual or non-consensual, heterosexual or homosexual, or even textual or forensic has historically operated in the courts of law towards its pathologization as a sexual perversion and the proliferation of its various forms. As I have shown so far, sodomy as crime has been an occasion for the reinforcement of various authoritative forms of knowledge – judicial, philosophical, medical and forensic.

Through legal ventriloquism, these forms of knowledge unmask sodomy's manifold forms and outcomes.

In the next section, I turn to the nexus of judicial power and sexual knowledge that continues to ponder the question of “carnal intercourse against the order of nature” and what is implied by the term, “penetration” under the legal code. I offer a close interpretation of the proceedings of the Naz case in the Supreme Court of India in 2010 when the decriminalization verdict was challenged by various private individuals and religious groups. Reading the Supreme Court proceedings of the Naz case that begin with the very question of the definition of Section 377 and its constituent parts, what emerges is the recursive logic manifest in the continuing preoccupation with unnatural acts defined through their operative form of penetration. This recursive logic marks not just a mere return to law's interest in prosecuting sexual perversion, rather it also continues to advance the law's enterprise under an epistemological banner of elaborating the meanings of unnatural sexual acts within the purview of Section 377. It further enacts a de-linking of sexual acts as the basis of sexual identity read in to Section 377 by the activists, lawyers and civil society actors through a reverse Foucauldian maneuver in which the sodomite is not necessarily a homosexual but any sexually perverse figure inhering in the legal code's textual vagueness (whoever voluntarily...).

### **The Sodomite isn't Necessarily a Homosexual – The Indian Supreme Court and Naz**

The originary openness and vagueness of Section 377 to prohibit perversion in society through the mere paternoster, “carnal intercourse against the order of nature,” transforms into a judicial undertaking to elaborate and flesh out the forms of that

perversion. It essentially enacts the Foucauldian incitement to discourse.<sup>192</sup> But one must also venture beyond the familiar schema of prohibition and incitement to ponder the reliability of judicial expertise in matters of sexual perversion when pitted against the embodied experience of its practitioners who must certainly know it more “naturally” if not habitually. The transference of knowledge from the embodied experience of the practicing offender to the judicial authority as an embodiment of knowledge then demonstrates another Foucauldian dictum that power and knowledge co-constitute each other.

The juridical order of knowledge through which sex and sexuality were administered under Section 377 then illustrate Foucault’s insight:

The essential point is that sex was not only a matter of sensation and pleasure, of law and taboo, but also of truth and falsehood, that the truth of sex became something fundamental, useful, or dangerous, precious or formidable: in short, that sex was constituted as a problem of truth.<sup>193</sup>

As a problem of truth is precisely how the order of nature under Section 377, and the carnal intercourse it was set against, did the Supreme Court in 2012 take up the Delhi High Court’s decision of decriminalizing homosexuality. Various private individuals and religious groups opposed to decriminalization filed special leave petitions (SLP) to appeal the Delhi High Court judgment in the Supreme Court. What followed over four weeks from February to March 2012 was a legal theater in which the homosexual became the temporary aberration, a mistaken presence under Section 377 that in the jury’s view had always been about the sodomite, standing in for the object of carnal intercourse

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<sup>192</sup> Foucault, *History*.

<sup>193</sup> *Ibid.* 56.

against the order of nature. The Supreme Court judges G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya focused mainly on three sets of concerns pertaining to Section 377 and its interpretation in the Delhi High Court:

1. What are the carnal acts against the order of nature covered under Section 377?  
What is the order of nature as defined by the law?
2. How is the law related to the transmission or prevention of HIV/AIDS?
3. Does the law create an unreasonable classification to target a class of people i.e. homosexuals? Or does it apply to anyone who engages in carnal acts against the order of nature?

In raising these three elementary questions about the legal functions of Section 377, the Supreme Court justices patently undermined the human rights agenda of the LGBTQ rights activists and lawyers as well as the Delhi High Court's humanist tenor.

I will first turn to the arguments started on February 13, 2012 by Mr. Praveen Agrawal, the lawyer of petitioner Suresh Kumar Koushal's (an astrologer), which are the opening arguments in the challenge to the Naz verdict detailing the undesirable outcomes of decriminalizing homosexuality in Indian society. This account allows me to raise the point about the law's duality in its capacity for harm management as related to the public health context of HIV/AIDS. The petitioners who filed their arguments against the Naz decriminalization defended Section 377 as an effective law that prevented homosexuality and as a result, the transmission of HIV/AIDS in India. This argument not only inverts the Naz position of Section 377 as an impediment to HIV/AIDS outreach but also patently produces homosexuality as pathological, as a vector of HIV/AIDS.

Faulting the Delhi High Court's decision to grant the right to privacy to same-sex consenting adults, Mr. Agrawal claimed that legalizing such behavior would lead to a rise in HIV/AIDS. Justice Mukhopadhaya responded with the question, "What is Section 377? Does it take care of homosexuality? What are the subjects therein?" and asked Mr. Agrawal to formulate his arguments properly.

The next lawyer, Mr. Amarendra Sharan, representing Delhi Commission for the Protection of Child Rights, raised the point that the order of nature excluded sex between men and men, women and women and with animals. Asking why animals were covered under the section, the judges insisted on knowing the legal definition of the term "carnal" and "unnatural". Focalizing the discussion on the contents of Section 377, the judges declared that they would analyze the constitutionality of the legal code and the scope of the order of nature that in their view should apply both to minors and adults.

Right at the beginning of the hearings then, the discussion's focus on the classification and meanings of acts might as well have recapitulated the originary moment in the late 19<sup>th</sup> century when the law was codified. Placing the use of the words "order of nature" alongside modern phenomena such as test tube babies and surrogate mothers, the judges noted how the category "natural" itself was in flux.

Further, in response to Mr. Sharan's definition of carnal intercourse (enveloping of the visiting member by the recipient organization) and his argument that such acts led to unmanliness and the indoctrination of young men in society, the judges asked the difference between "unnatural sex" and "abnormal sex." Mr. Sharan's citation of the *Khandu* case (penetration of a bullock's nostril) and the *Lohana* case (oral sex with a minor) as cases of sexual penetration led one of the judges to remind him that the word



“sexual” wasn’t part of the language in Section 377. As Mr. Sharan went on defining the term “penetration” as to “thrust” and “gain access by force,” Judge Mukhopadhaya raised a more fundamental question about penetration:

Do you find anything with respect to the word “against the order of nature?” There are various examples apart from old temple scriptures. If a gynecologist inserts a hand inside to find out if the baby is all right, is it against the “order of nature?”<sup>194</sup>

What ensued this statement was a disagreement over the meanings of the terms “carnal” and “sexual,” with the judge’s insistence that the gynecologist’s insertion of the hand would qualify as carnal. The question neatly aligned with the judicial interest in the Section 377 cases concerning the implications of imitative and simulative acts as discussed in the preceding sections. Upon further discussion, the judge asked if anyone could have a fundamental right to carnal intercourse against the order of nature. The two judges further remarked that Section 377 was not applicable to a class of persons but to anyone who commits an act against the order of nature. The justices continued to de-link the nature of acts from sexual identities proposing that even married heterosexuals would also be subjects under Section 377 contrary to Mr. Sharan’s insistence that only homosexuality was criminal under the law. Continuing to voice their confusion with what was deemed carnal and unnatural the judges asked:

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<sup>194</sup> *Suresh Kumar Koushal and another v. NAZ Foundation and others*, Civil Appeal No.10972 of 2013, India: Supreme Court, 11 December 2013, available at: <http://www.refworld.org/docid/535626384.html> (accessed 22 June 2015).

What if a boy inserts his tongue into another's mouth? What if a father inserts his tongue while kissing a child?<sup>195</sup>

The judges' preoccupation with such hypothetical acts and the lack of clarity specifically about the carnal acts against the order of nature led the jury to declare their inability to examine the constitutionality of the legal code, however, the arguments continued the next day on February 22, 2012.

The petitioners' arguments based on their opposition to the reading down of Section 377 appeared motivated by a framing of homosexuality based on public morality in India, or what Martha Nussbaum calls a politics of disgust that often plays a role in the justification for upholding sodomy laws and their presumed civilizing function. Noting that disgust concerns the borders of the body, Nussbaum argues that the idea of a male homosexual as anally penetrable, as a social contaminant that can penetrate through his gaze and all the attendant associations of fluid exchange, and finally as a sexual predator typically mobilizes homophobic responses to homosexuality.<sup>196</sup>

Perhaps, upon a close reading of the petitioners' arguments, a politics of disgust may be located within the broader terrain of cultural and moral disapproval even though such "disgust" is not articulated beyond the familiar terms of unnaturalness, specters of social breakdown and transmission of HIV contingent upon decriminalization. However, the concept of disgust does not quite aptly characterize the judges' disinterested response that insisted upon a disaggregation of the legal rights conferred by the Delhi High Court

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<sup>195</sup> *Ibid.*

<sup>196</sup> Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton: Princeton University Press, 2009).

as well the right-holders, who as this analysis goes on to show, were not present parties in the court's view.

On the continuation of Mr. Sharan's arguments about homosexuals constituting a high-risk group, the judges asked if there was a scoping study that showed the links between Section 377 and whether there were an accused and complainant in the case. Further, if a third party witnessed the act, would it still be considered "private?" Continuing their line of inquiry, the judges asked if Section 377 used the word "sex," and observed that sexual orientation in itself was not an offense. Pondering once again, the nature of offenses under the law, the judges raised the issue of obscenity:

In other countries, there is a practice in football and cricket matches of people going nude. Can youngsters in our country say that it is their basic right to remain naked?...or their natural right?<sup>197</sup>

And then further, de-linking rights to acts rather than identities:

Does a person have a fundamental right to act against the order of nature? Does Article 21 empower someone to act against the order of nature? E.g. with animals. No one can say this. Which act is against the order of nature is also individual.<sup>198</sup>

Questioning the applicability of the different articles of the Indian Constitution – Article 14 (Right to Equality), Article 15 (Non-Discrimination on Grounds of Sex) and Article 21 (Right to Life and Liberty) – to Section 377, the judges reiterated that the law did not target anyone in particular, that it was blind to sex, class, creed and religion.

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<sup>197</sup> *Suresh Kumar Koushal v. Naz Foundation*, 2013.

<sup>198</sup> *Ibid.*

The next day, February 23<sup>rd</sup>, Mr. Sharan continued his argument about the absence of a homosexual community that could be given rights as the Delhi High Court did. He further objected to the reinterpretation of Article 15 to equate sex with sexual orientation, which in his view implied a rewriting of the Indian Constitution by the Delhi High Court. The Additional Solicitor General, Mr. P.P. Malhotra resumed this argument when he claimed that the Delhi High Court had relied on the South African Judgment to read the clause of sexual orientation into the Indian Constitution. In response to Mr. Malhotra's definition of the order of nature as strictly peno-vaginal and procreative as opposed to anal penetration understood as a route of disease transmission, the judges asked about animals, as if embarking on a technical circularity that seemed inescapable.

When Mr. Malhotra cited the statistics for HIV positive MSM groups at 6 percent, the judges asked for the latest data and inquired why transgender groups weren't included given that they engaged in the same acts and further, that why the human trafficking of women and children wasn't reflected in the HIV figures. As Mr. Malhotra went on to point out the flaws in the Naz judgment, the judges asked about the nexus between the disease and law's unconstitutionality. Insisting that their task wasn't to decide how HIV/AIDS spreads, the judges continued to ask for specific information such as HIV related statistics compiled by government institutions in the Indian context.

On February 28, the judges started the hearings by declaring that the only issue before them was the constitutionality of Section 377, whether it was ultra vires or intra vires of the Indian Constitution. This position sealed the fate of the next set of arguments as well, by Mr. Sushil Kumar Jain who rehashed the same claims about MSM as a high-risk group for HIV transmission. However, the next person to speak Mr. H.P. Sharma, the

counsel for the petitioner Mr. B.P.Singhal, shifted the focus back to unnatural acts with the argument that the right to privacy was not absolute if the act was illegal, for instance, in the case of adultery and gambling.

Even the next counsel was met with the same question by the judges. This was Praveen Agrawal's defense of Section 377 as deterring homosexuality, a social evil that leads to AIDS. Does the legal code target a particular gender or class of persons? What is against the order of nature? Mr. Radhakrishnan, the counsel for an evangelical group called Trust God Ministries, recited the order of nature as designated through the biologically assigned functions of organs in the human body, proposing a rehabilitation program for homosexuals who in his view remained hard to identify. Criticizing Naz Foundation and the National AIDS Control Organization (NACO) for their HIV outreach that sanctioned homosexual practices, the counsel likened homosexuality to malaria and cholera whose transmission must be checked.

Other arguments presented by the subsequent counsels continued their attack on the High Court judgment and observed that the latter was at fault in assuming the immutability of sexual orientation. Section 377 criminalized the sexual acts against the order of nature, independent of sexual orientation, a point that led the judges to ask again, can the order of nature change with time?

The hearings on March 1, 2012 began with some confusion with the statistics on HIV positive persons and the discrepancies in the data across different years causing the judges to ask for the number of homosexuals who were HIV positive. One counsel representative in particular, disclaiming the Section 377-HIV/AIDS nexus, described the NACO data as fraudulent and manufactured, proposing it was introduced to pump

billions of dollars into the NGO business. Unwittingly, the counsel mobilized Arturo Escobar's Foucauldian argument about the deployment of Western development models in the third world as a way to maintain domination over the latter. In Escobar's view, the professionalization and institutionalization of development in third world countries to tackle problems of underdevelopment such as poverty, health, literacy and infrastructure enables a proliferation of Western discourses through NGO funding towards a broader management of life in western modes.<sup>199</sup> Specifically in the Indian context, Subir Kole regards the rise of queer activism in India alongside the spread of HIV/AIDS during the 1990s as linked to the entry of multi-national NGOs that funded sexual health awareness programs through global discourses of sexuality. In this formation, India was seen as sexually repressed or under-developed hence more susceptible to the spread of HIV/AIDS without an open public discourse around sexuality and health.<sup>200</sup>

As the counsel continued his conspiracy theory about the exploitation of homosexuality as high-risk by the NGOs and the limitation of the urban bias in the NACO studies, the judge asked again: Is there any data on homosexuals? Displeased with the inadequacy of claims and data presented by the petitioners, the judges insisted on reports and studies that were reliable and could verify the claims made by the petitioners about the sodomy law's role in the prevention of HIV. Unconvinced by the reports of HIV/AIDS rates, statistics on the Indian MSM and other reliable data, the judges in their refusal to entertain the petitioners' arguments were in fact insisting on the courtroom

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<sup>199</sup> Arturo Escobar, "Discourses and Power in Development: Michel Foucault and the Relevance of his Work to the Third World," *Alternatives: Global, Local, Political* 10: 377 (1984).

<sup>200</sup> Subir Kole, "Globalizing Queer?: AIDS, Homophobia and the Politics of Sexual Identity in India," *Globalization and Health* 3: 8 (2007).

presence of publically open homosexual bodies that had been affected by the law's operations.

The disaggregation of the legal code through arguments around the links or lack thereof between the law and pathology, sexual act and sexual orientation, law and sexual identities, and further fundamental rights linked to dignity, equality and non-discrimination then shape the most profound right that remains key in decriminalization. The right to privacy of sexual conduct is caught in a dual bind. According to one court – the Delhi High Court – the right pivots homosexuality towards decriminalization and sexual subjecthood. For another court – the Supreme Court of India – the homosexual must appear publicly (abnegation of privacy) whether in its aggrieved incarnation or as statistically significant in order for the Supreme Court to cede that right as inhering in the unconstitutional operation of Section 377.

The right to privacy is then at the subconscious center of concern for the Supreme Court in their demand for the evidence of how Section 377 targets a class of people, or homosexuals, and further they must appear as aggrieved parties before the law for any right to be claimed. Notwithstanding the conflation of the behavioral category of MSM and the self-identified LGBT subjects by Naz Foundation and other appellants in their demands for fundamental rights in the Delhi High Court, the homosexual's existence in whichever legally adjudicable form must be substantiated first under the operations of Section 377, and then publically presented in the court for a right of privacy to even emerge. Such a demand clearly complicates privacy through the insistence on the public visibility of homosexuals who must abnegate privacy in order to gain rights.

As a contested field of textuality, Section 377 of the Indian Penal Code from its historical origins in colonial Victorian morality through its postcolonial applications in cases of non-consensual sexual offenses has staged a multifaceted discourse around sexual acts, the order of nature, pathology, human rights and sexual identity. So far, my analysis has shown how the vague provisions of the law accommodate variations of sexual acts coded as criminal sodomy through judicial reasoning and imaginative interpretation. In its contemporary context, from the mid 1990s up into 2012, Section 377 underwent two significant changes. Its reading down in 2009 became a purveyor of the rights to privacy and consent for homosexual conduct in the Delhi High Court Naz verdict through a distinction from the criminal form of non-consensual conduct. It also invented the modern Indian homosexual subject, a figure whose primacy for rights was reduced by the Supreme Court of India in 2012 when the judges argued that the law was merely about sexual acts and did not target any identities. If it indeed targeted such identities, the court demanded they appear publically to make their case, to narrate their grievances and then only could they be the appropriate claimants of rights under the law. I now turn to the final and concluding section of this chapter where the Supreme Court of India places precisely this demand on the litigating parties for the aggrieved bodies to appear before the legal body. This demand then has implications for the right to privacy and consent, which was precisely the basis of homosexuality's decriminalization in India. In the concluding section, I begin with the seminal critique of the right to privacy as advanced by the legal theorist Jed Rubenfeld.



### **Where are the Homosexuals in the Court of Law?**

The proceedings of the Naz case in the Supreme Court of India raise a question even more fundamental than the modern notion of identity-based human rights. What defines a homosexual under Section 377? Is it the sexual act of sodomy that more appropriately defines the behavioral category of men-who-have-sex-with-men (MSM) whose sexual subjectivity remains tied to pathology or HIV/AIDS? Is it the modern notions of the right to privacy and consent that must be distinguished from an absence of consent in the postcolonial cases under Section 377? At the beginning of this chapter, I argued that privacy and consent as the bases of decriminalization and the consequent emergence of an LGBTQ identity remain tenuous insofar as they pertain to the same kind of sexual conduct that is also criminalized when non-consensual. The aforementioned questions at the beginning of this section clarify the stakes of this project in its interrogation of the status of privacy as a right for LGBTQ subjects in India. Privacy as a condition to support homosexuality's decriminalization and empower LGBTQ individuals in India remains intricately entangled with the generation of greater visibility for the violated subject who comes into an iconic public presence. In its abstract formulation, privacy assumes a subject who can be empowered only through public presence and visibility, as clearly seen in the Supreme Court's demand for where the MSM or other wronged homosexuals were in the court.

I now draw upon Jed Rubenfeld's essay to show the peculiar problems that a right to privacy opens up for modern sexual identities. The scholarship on law, privacy and sexual identity is vast and is engaged more exhaustively throughout the dissertation.

Jed Rubenfeld's analysis of constitutional the right of privacy in the American context captures the dilemma with the right when he states that at the heart of the right, there remains a conceptual vacuum. Particularly noteworthy and pertinent is Rubenfeld's critique of the personhood principle, or the right to privacy as a right to self-definition, or a principle of self-identity that translates in to sexual orientation in the sodomy law case as defined by the very sexual act that the law prohibits. Offering an extensive critique of sexuality's relationship to privacy through various political modes, Rubenfeld's engagement with Michel Foucault's work on sexuality and the right to privacy of sexual identity serves the analysis in this chapter most productively. Following Foucault's notion of the repressive hypothesis that demonstrates a discursive proliferation of sex and sexuality, Rubenfeld challenges the idea of sexuality's liberation from repression or social prohibition, or in the Indian case, criminalization of sexual acts under Section 377. Specifically in terms of considering the act of homosexual sex as determinant of homosexual identity (i.e. without the sex there is no identity), Rubenfeld argues that the point of differentiation of homosexual identity from a heterosexual one based on a form of sex has a history of stigmatization attached to it. Further the idea of homosexual rights does not overturn the social hierarchy of sexuality and leads to a further rigidification of sexual identities whose operative premise is the very classification into "normal" and "abnormal." This implies then:

Thus, personhood, at the instant it proclaims a freedom of self-definition, reproduces the very constraints on identity that it purports to resist.<sup>201</sup>

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<sup>201</sup> Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102 No. 4 (1989): 781.

This, in Rubinfeld's view, becomes a problem for the right to privacy when the fundamentality of the prohibited conduct defines a corresponding identity keeping the invidious use of state powers unchallenged. In terms of the Delhi High Court Naz decision, the demand was precisely framed in terms of extending the fundamental rights of liberty, equality, dignity and non-discrimination through privacy and consent to homosexual conduct whose legal decriminalization would liberate the homosexual identity from the shackles of Section 377. This liberation was to then equip them with a life of dignity albeit privately and access to HIV/AIDS-related healthcare, with the inadvertent consequence of being recast as pathologized subjects who engaged in legal sexual acts while being caught in the public-private millstones.<sup>202</sup>

Following Rubinfeld's distillation of the problems with the right to privacy, I turn to an analysis of the right's negotiation in the Supreme Court of India proceedings through an examination of the arguments advanced by the defendants of the Naz verdict.

The argument of the defense started with Mr. Fali Nariman who represented the parents of LGBT children in the court. Pointing to the specific place of Section 377 as appearing under "offenses affecting the human body" under the Indian Penal Code as opposed to "moral offenses," Mr. Nariman argued that it concerns private conduct of individuals to which no public moral judgment can be attached. This he contended was distinct from the laws on obscenity where such an objection may be raised due to the public nature of the act. Emphasizing the individuality of conduct, he further stated that theoretically it could affect heterosexuals too, however, the judges remained unconvinced

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<sup>202</sup> For a detailed analysis of the Delhi High Court verdict in *Naz Foundation v. Union of India* (2009) and the landscape of LGBT rights, see Chapter 1 of the dissertation.

when they declared that there has to be a complainant who can claim that the act conducted is not criminal, that it violates their fundamental right under the law. The debate then once again returned to the lack of clarity on which acts were sought to be decriminalized since no party present in the court had claimed victimhood thus far.

At one point, the counsel and judges seemed to agree on the task before them, which was to interpret whether Section 377 violates the Articles 14, 15 and 21 of the Indian Constitution, especially in the light of the modern circumstances of the contestations around the law in relation to HIV/AIDS and human rights. To show these violations, Mr. Nariman cited the cases of harassment – documented through individual affidavits under – owing to the misuse of Section 377 by police authorities. However, the judges came back to the same point about the presence of a complainant under the law i.e. a person who is not a victim and an actual victim whose rights have been violated by the application of the law. The distinction between the defendant or the complainant and the victim under the law then emerged as another structural tension in the legal proceedings along the same lines of the corresponding distinctions between act and identity, consent and force and heterosexual and homosexual.

Mr. Anand Grover who represented the Naz Foundation argued next. Beginning with how the legal criminalization of certain carnal acts violated the dignity of a section of the society and that HIV was a small part of the petition, he argued that the MSM constituted a hidden population who couldn't access healthcare due to the fear of prosecution under Section 377. The judges argued that anal sex was only one among the many other acts covered under Section 377 and it had nothing specifically to do with the MSM. Mr. Grover continued the argument about certain acts as fundamentally linked to

the identities of homosexuals falling into the deductive trap of personhood as observed by Rubinfeld. The judges, however, maintained that the law concerned itself only with acts and not identities. Mr. Grover mobilized all possible human rights references including reports by the group *Human Rights Watch*, international law, American jurisprudence and other human rights protection instruments to show how at stake was the concept of a zone of privacy under Article 21 (Right to Life) of the Indian Constitution to drive home the point that the MSM cannot come out to access services. But the judges continued to ask for the numbers of MSM and how HIV was linked to Section 377. Further evidence of the law's consequences led the discussion back to the meaning of penetration under Section 377 as particularly about non-procreative acts at which point the judges asked if breastfeeding constituted a penetrative act since it involved a sexual organ. The recursion to the meaning of penetration seemed central once again in this higher judicial reasoning.

But the point at which the privacy argument came under serious attack from the judges was when Mr. Grover discussed the impact of the law on the dignity of homosexuals. The judges asked if the homosexuals could be identified. When Mr. Grover responded in negative, the judges asked how it was possible for dignity to be affected if there was no identity to begin with. Mr. Grover then posited a hypothetical case of a troubled teenager who could identify his desires at puberty but could not come out given the norm of heterosexuality. His attribution of a fully developed identity to the initial stirrings of desire then led the judges to ask if someone could claim a similar attraction to animals. The judges simply declared that there was no question of compromising dignity if the identity was not known.

Another technical circularity ensued that continued with the next counsel Mr. Shyam Divan who represented *Voices Against 377*, a group of concerned citizens against the sodomy law. Mr. Divan's arguments about dignity and identity cited three filed affidavits representing a remarkably diverse range of experiences as produced by the operation of the law: of a hijra (eunuch) who underwent custodial rape, of a gay man harassed by the police and of Gautam Bhan, a self-identified gay man who felt like a second hand citizen because of the law. Further invoking arguments about nature and medical opinion on homosexuality, Mr. Divan emphasized sexuality at the core of an individual's identity based again on a survey of documentation in academic, medical, legal and international literature. The judges also took issue with the characterization of the LGBT community as a sexual minority on the basis of their difference from heterosexuals under Section 377 that in their view only concerned unnatural acts that may vary from person to person without being specific to a community. The constant refrain by Mr. Divan that the law targeted the LGBT community in particular did not change the judges' point of view. On the contrary, the judges retorted with an argument about class claiming that law in general targeted the powerless. The judges asked:

Are they a minority in terms of the Constitution? Constitution recognizes linguistic and religious minorities only. Section 377 makes no mention of a group, it does not classify, it applies to a generic "whoever."<sup>203</sup>

While this merely reinforced the judges' position that Section 377 was facially neutral, the next counsel, Mr. Ashok Desai's argument about the harassment of men having sex in railway stations then brought the discussion back to privacy when the

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<sup>203</sup> *Suresh Kumar Koushal v. Naz Foundation*, 2013.

judges asked if there had been any reported cases of prosecution of consenting adults in private. They asked, who was the accused and who was the victim if it was in private? With the arguments of the subsequent counsels, the judges posed the same question about where the target group was, if indeed such a group had been targeted. They wanted to see the aggrieved party, a victim, a class of people who had been unfairly targeted by the law.

The arguments went on in a circular tug-of-war with each side claiming real and rhetorical grievances, fundamental rights, violations and the limits on them, however, the judges through their legal recursive logic returned to the nature of acts, the order of nature and the proof of victimhood and the presence of their bodies in the court. Divesting sexual identities from the law, they questioned whose rights were violated, where the violated persons were and why HIV was relevant to the operations of the law. Ultimately, the vagueness of language in Section 377 allowed them to disaggregate all claims of harm, violation and injury documented through legal affidavits, human rights reports and parallels with international law, all of which was set aside to ponder the question: What were the unnatural acts under Section 377 and why was it sought to be declared ultra vires of the constitution? In the privileging of strict legal interpretation, the homosexual thus produced from the sodomite in the Delhi High Court judgment was rendered a discursive effect at the intersection of medical opinion, personal narrative and pathological threats recapitulating Foucault's history of sexuality. His observation in relation to medical and psychiatric discourses of the 19<sup>th</sup> century captures this predicament:

Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny,

a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.<sup>204</sup>

The human rights approach of the Delhi High Court in the Naz verdict came undone in the Supreme Court of India. The approach was based on the sodomy law's adverse impact on the MSM groups that in Naz Foundation's view were the aggrieved under the law. The Supreme Court demanded to see the real bodies to which the rights had been attached. The right to privacy and dignity thus accorded by the Delhi High Court, ironically in part to a group that engaged in sexual conduct primarily in public, could not be legitimated in the Supreme Court's view if there were no publically present victims. The victims had to come out, appear as public subjects, and be physically present in order for any rights violation to be intelligible under Section 377. Such an absent subject is also an important figure described by Jacques Rancière as the embodiment of a "wrong" in the claiming of human rights. Rancière observes that politics, such as human rights claims, happens only in certain moments of a wrong committed on a body that emerges as the rightful subject of that right to engage in politics.<sup>205</sup> I will engage with Rancière's work in the next chapter to discuss how sexual identity becomes a form of injury in public contexts in India.

Thus, making privacy meaningful only through its violation, tangible only through the presence of the violated bodies, the Supreme Court of India, in a reverse Foucauldian logic, delinked homosexuality from sodomy and declared the applicability of Section 377 to sexual acts and not identities. In according the ability to commit such

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<sup>204</sup> Foucault, *History*, 43.

<sup>205</sup> Jacques Rancière, *Dissensus: On Politics and Aesthetics* (London & New York: Continuum, 2010).



acts to anyone, heterosexual, homosexual or transgender, the Supreme Court reinforced the idea of Section 377 as constituting a protean legal discourse generating multiple interpretations of sodomy and their actors.

I have shown that the Supreme Court of India, in effect, deconstructed the normalizing intervention of self-identified LGBT activists, lawyers, civil society and the NGOs that mobilized a transnational avalanche comprised of extensive documentation, affidavits, legal jurisprudence from other contexts and academic literature. In doing so, the Court also unwittingly participated in what Steven Seidman would call the social constructionist troubling of an essentialist notion of identity. Seidman wrote in the early 1990s during the emergence of a queer theory that took to task the mainstream gay and lesbian politics in America. This body of work noted the critical promise of the sign “queer” in challenging the fixed and universalizing premise of LGBT identity politics.<sup>206</sup>

The Indian context of this era was one in which LGBT politics emerged in response to a publicly perceived health crisis around HIV/AIDS that gradually became organized around the archaic sodomy law, Section 377 of the Indian Penal Code. In this context, the term “queer” only rhetorically served to mediate a more inclusive approach to sexual identity by speaking in terms of both a range of identities – gay, lesbian, transgender, bisexual, hijras and other local registers – as well as the multiplicity of desires.<sup>207</sup> Multiple differences of class, caste, gender and religion structure various local

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<sup>206</sup> Steven Seidman, “Identity and Politics in a “Postmodern” gay culture: Some Historical and Conceptual Notes,” in *Fear of a Queer Planet: Queer Politics and Social Theory* ed. Michael Warner (Minneapolis: University of Minnesota Press, 1993).

<sup>207</sup> Gautam Bhan and Arvind Narrain eds., *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005).

forms of organizing and advocating around gender and sexuality politics in India.<sup>208</sup> A discussion of these differences while important is beyond the scope of this chapter.

Finally, the judges in the Supreme Court of India rejected the public interest intervention of Naz Foundation along with other petitioners and overruled the Delhi High Court verdict of homosexuality's decriminalization. By constantly engaging the question of unnatural acts and the meaning of penetration under Section 377, the judiciary in the Supreme Court unconsciously aligned their reasoning with the previous judges of postcolonial courts who adjudicated Section 377 cases of sodomy at the level of physical non-consensual acts. Such acts were interpreted both as physical injury through marks and signs on the victim's body and their multiple imitative proliferations that could be simulated differently in those judges' view. The Supreme Court's keen interest in investigating the order of nature and the meaning of penetration under Section 377 marks a recursive logic that aligns itself with the reasoning of the other postcolonial judges. By questioning in hypothetical terms the nature of certain intimate and non-intimate acts like breastfeeding, a father kissing his child or the work of an ultrasound technician as possible iterations of unnatural penetration, the Supreme Court's reasoning reinforced the vagueness of the law while at the same time augmenting its protean discourse. Such forms of technical reasoning direct the legal gaze at the nature of the sexual act itself without any substantive engagement with issues of consent, privacy or rights. Consequently, taken together, the judicial fixation on defining sodomy as a sexual act

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<sup>208</sup> For instance, see, Naisargi Dave, *Queer Activism in India: A Story in the Anthropology of Ethics* (Durham and London: Duke University Press, 2012). Also see, Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (New Delhi: Yoda Press, 2006).

under the law is also implicitly seen as a pathologized practice. This practice also informs the fundamental content of the modern Indian homosexual legal identity through a right to privacy and consent to engage in the aforementioned pathologized practice.

Yet, as my arguments in this chapter have illustrated through an extensive reading of case law, postcolonial scholarship and legal court proceedings, the right to privacy is rendered tenuous ultimately by the history of adjudication under Section 377 that precedes and foreshadows the right. The Supreme Court of India explicitly evacuated the right to privacy in demanding the presence of those who had been harmed by the law. It refused to place its faith in the reports of the harm and detriment inflicted by the law in terms of HIV/AIDS outreach and the affected bodies. In the court's insistence, the bodies had to be made present before they could claim any subjecthood with respect to an adverse impact of Section 377. That such a right to privacy does not *precede* but *follow* the body when privacy is violated to legitimately produce such a body as the subject of the right is the overall conclusion of this chapter. This exercise also proves useful to interrogate the axiomatic relationship between privacy and visibility that ultimately negates the state of being private, safe and unexposed.

In the next chapter, I consider the importance of injury to sexual identity in India through the lens of public violations of gender non-normative bodies and HIV/AIDS outreach work in the contemporary context of the law's misapplications leading up to the 2009 Naz decision. The chapter demonstrates the incongruity between the magnitude of violence inflicted on these bodies in the public context and the scope of the Naz right to privacy defined in the context of liberal personhood and decisional autonomy. This formulation, to reiterate, was viewed by lawyers and Indian LGBTQ activists as more

expansive and far superior than privacy as merely zonal or spatial. I draw upon postcolonial studies and political theory to understand the foundational importance of this subject's absence in the Supreme Court of India to the arguments of the petitioner Naz whose claims around HIV/AIDS remained unsubstantiated in the judges' view.

### Chapter 3

#### Identity as Injury: The Postcolonial Context of Public Violations

In April 1994, the AIDS Bhedhav Virodhi Andolan (ABVA, or the AIDS Discrimination Prevention Group), an AIDS and sexuality relation human rights group, filed a petition in the Delhi High Court challenging the validity of Section 377 of the Indian Penal Code. The organization's main contention was the rising rates of HIV among inmates in India's biggest prison, Tihar Jail, where the authorities had refused to distribute condoms. Owing to the peremptory letter of Section 377 that criminalized homosexuality as a form of conduct deemed against the natural order and the ideological position of same-sex conduct as not a part of national culture, the refusal resulted in the death of an inmate from exposure to HIV that same year.<sup>209</sup> In July 2001, the police raided a park frequented by men-who-have-sex-with-men in the North Indian city of Lucknow upon a complaint of sexual assault filed by a man. The raid further led to the arrest of ten safe-sex outreach workers who were employees of two registered HIV/AIDS NGOs, the Naz Foundation International (NFI) and the Bharosa Trust. In denying their bail, the chief judicial magistrate ruled that the men were polluting the entire society by encouraging young persons to commit the crime of sodomy.<sup>210</sup>

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<sup>209</sup> Vimal Balasubrahmanyam, "Gay Rights in India," *Economic and Political Weekly* 31 (1996) 257-258.

<sup>210</sup> "Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India," A Human Rights Watch Report, Vol. 14 No. 5 (C). Accessed Online February 25, 2015 at <http://www.hrw.org/reports/2002/india2/india0602-05.htm> .

In the same year, the Nation Human Rights Commission (NHRC) of India denied the plea of a homosexual man who had been subjected to aversion and shock therapy, a medical experience that left him devastated.<sup>211</sup> Similarly, a woman named Geeta underwent similar psychiatric abuse that affected her cognitive abilities.<sup>212</sup> In November 1998, the lesbian themed film *Fire* (dir. Deepa Mehta 1998) opened to curious audiences and subsequently public attacks by Right-wing Hindu activists and women's groups and vandalism of theaters screening the film in Bombay and Delhi in a violent display of gendered nationalism.<sup>213</sup> On numerous other occasions, in several other places, semi-public and public, the visible presence of non-normative sexuality has incited moral backlash and institutional crackdown in India through the 1990s and the first decade of the 21<sup>st</sup> century.

These disparate yet recurrent responses to a range of incidents concerning homosexuality constitute the contemporary history of rights violations of LGBTQ subjects in postcolonial India. Pertaining to public health urgencies of HIV/AIDS outreach, unethical and uninformed clinical treatments of sexual "deviation" or cinematic portrayals of same-sex desire, these incidents also become the basis for advancing rights-based claims and political mobilization. Particularly, the 2009 Naz right to privacy and its conclusion of queer liberation and empowerment become attenuated when situated in

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<sup>211</sup> "NHRC, the Law and the Police," *Law and Other Things: A Blog about India's Laws and Legal Systems, its Courts and its Constitution*. July 24, 2009. Accessed online February 27, 2015 at <http://lawandotherthings.blogspot.com/2009/07/naz-foundation-and-nhrc.html>

<sup>212</sup> Voices Against 377, "Rights for All: Ending Discrimination against Queer Desire under Section 377," 2004.

<sup>213</sup> For an in-depth examination of the Indian lesbian identity and LGBT activism in India, see Naisargi Dave, *Queer Activism in India: A Story in the Anthropology of Ethics* (Durham & London: Duke University Press, 2012).

relation to the long and recursive modes of public violations that remain the fundamental basis of queer identity-based mobilization.

In this chapter, I offer a brief history of these violations in order to highlight the necessarily public nature of their occurrence. Drawing upon postcolonial theory, particularly the Subaltern Studies School and the works of postcolonial feminist scholars like Rajeswari Sunder Rajan and Anjali Arondekar, my analysis aims to show how the right to privacy formulated as linked to personhood/decisional autonomy in the 2009 Naz verdict assumes an unmarked liberal individual who can exercise that right as a free agent. My analysis pays particular attention to the fundamentally public, and in a number of cases, the spatial aspects of these violations that pertain to sexuality and sexuality-based NGO work in India during the period 1994-2009.

The spectrum of non-normativity comprises a range of public signifiers such as ambiguously covert sexual acts, clinical therapy and NGO health outreach work, all of which, as part of the broader evidentiary narrative of the misuse of Section 377, coalesce into what I call the “public signifiers of homosexuality” in India. Within this formation, the specter of the “unnatural” sexual act as the object of criminalization prefigures the broader cultural meanings of public sexuality-based work within pornographic and scandalous terms. Despite the institutional legitimacy and urgency of this work spurred by the HIV/AIDS crisis and clinical pathologization of homosexuality, the public context of this work becomes an incitement to the nexus of cultural norms and law enforcement that seek to police this work with a view to restore the moral public order. The contemporary history of the public visibility of such work as well as non-normative gender identities is instructive in resituating the 2009 Naz right to privacy that

decriminalized homosexuality in India.<sup>214</sup> To briefly reiterate, the Naz right to privacy was based precisely on these public exigencies of sexuality and health, coded in this chapter as injury, as a result of the misapplications of Section 377 to control medically unsafe sexual behavior as an abetment to HIV/AIDS. It is also worth remembering that the formulation of privacy in Naz defined privacy through personal and decisional autonomy as the basis of sexual personhood. This conception of privacy was seen to transcend the putatively narrower confines of spatial and zonal privacy by Indian lawyers and LGBTQ activists. However, as this chapter's analysis of the public exigencies framed by the spectral criminality under Section 377 will demonstrate, the distinction between the public and the private that gets blurred in the violations suffered by non-normative bodies also collapses the distinctions between regulation/discipline and violence. As long as the object of protection within the Naz privacy framework remains the principle of sexual personhood, the enforcement of such a framework would always be contingent upon the public identification and visibility of the liberal individual as the embodiment of such privacy. Such an appearance, this chapter argues, signals an endangered emergence, subject to the same forces of moral policing and pathologization in postcolonial India. This is even more so under the reinforced tenure of Section 377 of the Indian Penal Code that was reinstated by the Supreme Court of India in December 2013 to re-criminalize homosexuality. The subsequent return of the Hindu Right Wing government to power in 2014 further compounds the ideological denial of homosexuality in Indian culture and its framing as a western import.

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<sup>214</sup> See Chapter 1 of this dissertation, "Reading Down of Section 377 of the Indian Penal Code."



The chapter begins with a brief account of the liberal LGBTQ identity politics in India that shows the disjuncture between transnational modes of human rights advocacy and the postcolonial predicament of sexual identities at the intersection of class, caste, gender, religion and region. The specificity of the postcolonial context within which the public and the private constitute the structuring mechanisms for the visibility of queer politics is key in understanding this disjuncture. This context does not allow for private sexual personhood to be extricated and liberated from the public specter of non-normative sexuality's presence within pornographic and pathological registers that have historically framed their appearance although not exclusively.

### **Queer Liberalism in India**

During the late 20<sup>th</sup> and early 21<sup>st</sup> century, the global circulation of human rights acquired a commonsense resonance signaling the infinite potential of emancipation from various forms of oppressions on account of race, gender, sexuality, nationality and ethnicity. Advocates of human rights while admitting their limitations do profess their universal relevance and favor anthropological and ethnographic accounts of cultural and political regimes in order to understand their transnational mobilization.<sup>215</sup> In particular, sexuality rights instruments have emerged within the international human rights framework to mark the universal consensus on sexual orientation as a legible category of protection, especially in countries where homosexuality remains a criminal offense. In particular, declarations such as the Yogyakarta Principles and the Universal Declaration

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<sup>215</sup> Mark Goodale & Sally Engle Merry eds., *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

of Human Rights, UN 1948 have become subject to critique for their reliance on empirical and fixed understandings of gender identity and sexual orientation.<sup>216</sup>

Sexuality rights acquire particular salience in postcolonial contexts where they appear to be in contest with dominant ideological conditions under which various forms of injustices are perpetuated. Rights-based humanitarian interventions in late modernity operate on a liberal model of the individual conceived as inviolable to the extent that their actions do not cause any kind of harm to others.<sup>217</sup> Wendy Brown's critique of injury as the basis of identity politics, as structuring its set of demands for redress of pain, aptly points to the contradictions within which identity gets mired in its quest for freedom. Drawing upon Marx's work on political emancipation, specifically on the Jewish question and Foucault's work on power and discipline, Brown advocates a post-individualist concept of freedom that does not render modern democracy, a system of distributing human rights as goods. Rather, given their investment in the vision of democratizing power, Brown sees identity politics as a reactionary form of organizing to address the perceived social injury by imagining a world where the conditions of domination have been all but abolished.<sup>218</sup>

At the center of Brown's analysis is the illusion of the free subject that, through rights-based mediations, remains subject to the disciplinary power of the state, further stratified in the law on account of her injury. In effect, the individuation and false

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<sup>216</sup> Matthew Waits, "Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles," *Contemporary Politics* 15: 1 (2009): 137-156.

<sup>217</sup> John Stuart Mill, *On Liberty* (Broadview Press, 1999).

<sup>218</sup> Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton NJ: Princeton University Press, 1995).

autonomy of the liberal subject also marks her vulnerability. According to Brown, rights-based redress individuates the subject, disciplines her and further entails the subject's entrenchment in the law. In doing so, rights focus away from the transformation of the structures of dominance towards individual legal recognition of injury that further naturalizes the identity-injury link.

Lisa Duggan has advanced a similar critique of identity-based social movements in the American context in the transition from rights-based liberal regime to a neoliberal era of free market rationality and the increasing privatization of the public sphere. Duggan coins the term "homonormativity" to describe the neoliberal sexual politics that does not contest the heteronormative institutions and culture but upholds them through the vision of a privatized and depoliticized gay culture based in domesticity and consumption. For Duggan, the demand for domestic privacy and same-sex marriage rights marks a deradicalization of the vision of the gay politics of the seventies and the eighties that insisted on confrontational tactics of visibility in the time of AIDS.<sup>219</sup>

David Eng's critique of "queer liberalism" in the context of liberal inclusion of queer subjects through a right to privacy accorded in the 2003 *Lawrence v. Texas* decision is also useful in understanding privacy as a kind of politics of normativity. Eng observes that the majority opinion in the Lawrence decision granted legal recognition to gay and lesbian subjects by defining privacy in terms of the freedom to intimacy, domesticity and couple-dom. Queer liberalism thus becomes linked to a politics of good citizenship as well as a heteronormative ideal for particular gay and lesbian subjects.

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<sup>219</sup> Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics and the Attack on Democracy* (Boston: Beacon Press, 2003).

Eng's analysis also deals with historical issues of race and sexuality in the American context. I refer to Eng and Duggan's work to indicate in my own analysis the emergence of a similar kind of queer liberal politics in India. This politics demands the legal decriminalization of homosexuality through a right to privacy formulated in terms of abstract personhood and more implicitly, spatial protection. However, the history of public violations on which the judgment was partly based clearly suggests the complex nature of the public within which a simple right to privacy to consensually engage in sexual conduct remains a limited form of intervention. This provisional moment of queer liberation in India marked the abstraction and the depoliticization of the LGBTQ subject, who, to borrow from Brown again, was now formally equal in their right to privacy but also became subject to the disciplinary and regulatory effects of rights-based interventions. Further, to stay with Brown in her critique of class and bourgeois norms of class power and legal acceptance, the right to privacy for the LGBTQ in India inaugurated a similar conception of bourgeois privacy given to a liberal individual subject who could exercise such privacy by identifying as LGBTQ into a legally ensured and secured public visibility.

I now turn to the postcolonial predicament of sexual identity that emerges under a similar liberal rights regime (global sexuality rights, local contestations for queer liberation and recognition in India) from a variegated history of public modes of injury in the form of moral policing, criminalization of same-sex desire and clinical pathologization of homosexuality. Every appearance of sexuality in this formation becomes subject to apprehension in the form of criminalization, pathologization,

ensorship and often a mere reluctance to address homosexuality's nexus with the burgeoning public health crisis of HIV/AIDS.

### **Public Visibility of Non-Normative Sexuality and the Incitement to Policing**

The 1994 Tihar Jail story of the rising rates of HIV in India's largest prison and the police administration's refusal to distribute condoms among the inmates marked the concurrent makings of a public health crisis and the legal battle to decriminalize male same-sex relations in India. The administrative refusal to provide preventive care by distributing condoms in order to curb infection rates was rationalized by invoking legal and cultural arguments. Where Section 377 prohibited same-sex acts among prisoners in the jail, homosexuality as not a part of Indian culture also became the refrain of the authorities. The retention of the British era law Section 377 of the Indian Penal Code in the postcolonial Indian Constitution in its explicit criminalization of carnal intercourse "against the order of nature" also then set up an implicit framework within which not just non-normative sexual conduct but also its associated signifiers like the public health crisis around HIV became linked with the abetment to criminality. The legal framing of same-sex conduct as criminal also bolstered the cultural argument about homosexuality as a western import, as not a part of Indian culture despite extensive evidence provided by literary scholars to the contrary.<sup>220</sup>

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<sup>220</sup> Ruth Vanita, ed., *Queering India: Same-sex Love and Eroticism in Indian Culture and Society* (London & New York: Routledge, 2002). Also see, Suparna Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/National Projects* (New York: Palgrave Macmillan, 2004).

The jail represented an ambiguously public context for the same-sex desiring inmates to engage in homosexual conduct and as undifferentiated bodies figured as a source of contagion and an object of biopolitical management of life in prisons.<sup>221</sup> Consequent to the police administration's refusal to distribute condoms among the inmates mainly on account of the fact that such provisions would be tantamount to an abetment to homosexual behavior, AIDS Bhedbhav Virodhi Andolan (ABVA, AIDS Discrimination Opposition Organization) challenged the constitutionality of Section 377 in the Delhi High Court. ABVA claimed that the law violated Article 14-15 (protection against discrimination), Article 19 (freedom of speech and expression) and Article 21 (life and liberty encompassing the right to privacy) of the Indian Constitution by depriving the prison populations of healthcare as well as coercive separation of inmates with a homosexual orientation, especially those suffering from HIV.

However, as ABVA subsequently became defunct, the petition never came up for hearing. The NGO Naz Foundation, working in the area of HIV/AIDS outreach for particularly vulnerable populations such as the MSM revived the petition in 2001 with a similar rationale about the law's obstruction of health outreach efforts to vulnerable groups. The petition was summarily dismissed by the court on the grounds that Naz was not affected by Section 377 and hence had no *locus standi* in the matter.

Behind the repudiation of public health concerns was clearly an implicit indifference to both, a law that raised the specter of homosexuality as well as the denial of same-sex relations in Indian culture. Along with the petition's dismissal in 2001 came

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<sup>221</sup> Graham Burchell et al. eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991).

another blow to public health efforts around HIV and their apprehension within the moralizing framework of criminality and prurience. In 2001, the healthcare staff and employees of an NGO in the North Indian city of Lucknow were arrested for allegations around unnatural sex and involvement in running a gay club under the cover of NGO work. The Lucknow incident unfolded as a series of raids and arrests causing sensationalist media commentary in overtones of moral panic and the breakdown of the heteronormative moral order of the city. This case attests to the fraught boundaries between the public and the private and consequently, the social and the sexual, especially within postcolonial India where these mappings of queer visibility remain incongruous in relation to the broader heteronormative, patriarchal national culture that pre-empts and abrogates all claims to privacy.

### **The Lucknow Incident**

On July 7, 2001, acting on the complaint of a man who was allegedly sodomized, the Lucknow police raided a park frequented by a number of MSM. Among those arrested included an activist from Bharosa Trust, an NGO working with the MSM for safer sex education and HIV outreach. Subsequently, the offices of Bharosa and Naz Foundation International were raided and the police seized safe sex advocacy material.<sup>222</sup> The seizure of the material added further force to the police framing of the raids as the busting of a “gay club” and an “international sex racket.” The arrested employees were charged with indulging and propagating “unnatural sex” under the broad purview of

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<sup>222</sup> Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change, 2004).

Section 377 that included: Section 292 (sale of obscene books), Section 120b (criminal conspiracy), Section 109 (abetment to unnatural sexual activity) of the Indian Penal Code. The array of educational materials seized included condoms, lubricants videocassettes, photographs and a dildo for the purposes of demonstrating condom use. This ensemble of items was reported in the media in pornographic terms despite NGO documents and papers evidencing their use for education and advocacy.<sup>223</sup>

As the NGO offices were sealed, neither National AIDS Control Organization nor the Uttar Pradesh Government came forward to support the NGOs that had been officially recognized by the government for doing HIV outreach work with the MSM group. According to a report by the Human Rights Watch, Lucknow's Naz Foundation Director Arif Jafar was detained without bail along with one other employee. The detainees were subjected to inhumane treatment for the first ten days. Deprived of clean drinking water and proper access to sanitation in the jail, they were forced to drink water from the drain and deprived of bathing privileges. They were accused of running a gay den and profiting from it. Arif Jafar's Muslim background in particular was linked to Pakistan's Inter-Services Intelligence (ISI) and Kashmiri militants with the allegation that he was trying to promote homosexuality in India.<sup>224</sup> Characterizing homosexuality as a specifically Muslim vice, the administration claimed that such practices were not prevalent among the Hindus in India. Thus the argument around homosexuality as foreign was reframed in terms of terrorist infiltration. This was done in a bid to bolster Indian national culture that defines Indianness as neither Muslim nor homosexual. Both

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<sup>223</sup> Subir K. Kole, "Globalizing Queer? AIDS, Homophobia and the Politics of Sexual Identity in India," *Globalization and Health* 3:8 (2007).

<sup>224</sup> Epidemic, Human Rights Watch.



homosexuality and muslim-ness have historically been framed in India within a discourse of contamination and infiltration from the west (considering Pakistan is west of India). Lucknow, a predominantly Islamic city, is also the electoral base of Hindu political groups. Hence, the attribution of homosexuality and Islam only served to play up the narrative of moral corruption in the Lucknow incident.

Arvind Narrain notes the dual role of the law and the media in framing the incident in homophobic terms. The magistrate who denied the bail of the detainees did so, not on the basis of the provisions of the Criminal Procedure Code, without due process but on the basis of the nature of the NGO activities that in his view could not be extricated from the specter of homosexuality as illegal, criminal and explicitly pornographic.<sup>225</sup> The local print media sensationalism evident in the prolific publicity of the incident as a “sex club” “gay racket” and other epithets of illegality pre-figure a gesture to the public visibility of homosexuality within frames of scandal and moral panics.

The Lucknow incident essentially represents a scene of public encounter between the global modes of health and rights advocacy and the local interception of such an emergence within an insular national culture of prioritizing public morality, heteronormativity and patriarchal public norms of gender and sexual embodiment. Of course, the necessary apparatus of the health NGOs—condoms, lubricant, dildo for pedagogic demonstration and safe-sex literature—is in place in Lucknow as elsewhere. This apparatus, which circulates within every local/regional context of HIV transmission, is always already implicated in a potential scene of national cultural crisis, staging the

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<sup>225</sup> Narrain, *Queer*.

postcolonial contest between tradition and modernity. Tradition would here be the “traditional” medical instrumentation as the under-developed apparatus of state medicine replaced by the medical arsenal of modernity, which includes medical implements that also introduce a western culture of sex with its condoms and dildos, reminding us of Escobar’s thesis that development is always culturally loaded. The universalist discourse of development to usher in modernity also reaches its limit in contexts that are produced in discourse and through regimes of representation, as being in need of development.<sup>226</sup>

Theorists of media and cultural globalization have analyzed the global-local dynamic in the process of cultural identity reconfiguration in ways that are equivocal and ambiguous, fraught with a range of political, economic and social conditions.<sup>227</sup> Sexuality as an analytic within these theories has been productive of insights into the processes by which the global markers of LGBT and queer interact with more local subjectivities and health-based categories.<sup>228</sup> While in India, queer politics has had a similar trajectory of interconnecting networks through online media<sup>229</sup> and has been organized around both Western markers of sexual identification as well as more local idioms<sup>230</sup>, the

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<sup>226</sup> Arturo Escobar, *Encountering Development: The Making and the Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995).

<sup>227</sup> David Morley & Kevin Robins, *Spaces of Identity: Global Media, Electronic Landscapes and Cultural Boundaries* (London, Routledge, 1995). Also see, Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis, London: University of Minnesota Press, 1996).

<sup>228</sup> Dennis Altman, *Global Sex* (Chicago: University of Chicago Press, 2001).

<sup>229</sup> Sandip Roy, “From Khush List to Gay Bombay: Virtual Webs of Real People,” in *Mobile Cultures: New Media in Queer Asia* eds. Chris Berry et al. (Durham & London: Duke University Press, 2003).

<sup>230</sup> Gautam Bhan & Arvind Narrain eds., *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005).

globalization of sexuality within a human rights and health advocacy framework is further compounded by issues of class, gender and region.

Ashley Tellis's critique of sexuality NGOs and the internationalization of global LGBT categories hones in on the framework of development within which the politics of global funding agencies is tied to their outreach work in the Global South. Tellis contends that sexuality-based NGOs take recourse to the language of health and human rights for legitimacy and often conduct advocacy without attention to how the local communities organize their own knowledge of the issues of concern. Moreover, their urban metropolitan location and perspective do not take into account the everyday life complexities of those in semi-urban and rural areas on whose behalf these NGOs speak. Further, in Tellis's indictment, the dominant modes of sexual identification of LGBT often represent the subjects of NGO advocacy as undifferentiated group who can be identified and represented within these universal markers.<sup>231</sup>

The distinction between safe sex rights-based advocacy and abetment to sex, seen in the Lucknow case as a form of global excess stands collapsed as an instance of Tellis's argument about the gap between urban, cosmopolitan modes of sexuality advocacy and sexuality as a fraught arena of politics and representation within local contexts like Lucknow. The police and the legal authorities double up as moral arbiters of public morality in the city. Their actions show the historical primacy of the social structured by religion, tradition and heteronormativity over the secular reach of the legal. This primacy of the social in its particular configuration is specific to the Indian context in which we

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<sup>231</sup> Ashley Tellis, "Ethics, Human Rights and the LGBT Discourse in India," in *Applied Ethics and Human Rights: Conceptual Analysis and Contextual Applications* ed. Shashi Motilal (Anthem Press, India, 2010).

find a specific regard and interpretation of public presence of sexuality in law and more broadly. The overtaking of the legal by the social in matters of sex and sexuality remains at the root of what Partha Chatterjee has referred to as the source of “our postcolonial misery (discussed in previous chapters).”<sup>232</sup> Chatterjee characterizes the postcolonial project of nation-building as constructing a unique modernity based on a division between the outer world of western style development of secular institutions and the inner world of culture where religion, traditions and spiritual beliefs had sovereignty. The secular logics of liberal-democratic government were based on a distinction between the public and the private. Nonetheless the true community of the nationalists within the inner domain found it hard to reconcile the various differences of language, caste, creed and religion with that former distinction. The constant recapitulation to old forms of the modern state informed by communitarian logics structures any articulations of sexual identity that falls outside the normative forms of kinship and family. It is to the analysis of the postcolonial specificity of the social’s primacy that supersedes the sexual that I now turn.

### **Sexuality and its Postcolonial Discontents**

Postcolonial historians and feminist scholars like Ranajit Guha, Nivedita Menon and Rajeswari Sunder Rajan have analyzed the ways in which the sexual and gender minorities become visible as subjects of justice within multiple configurations of the public domain of the Indian constitutional law. These authors analyze the ways in which

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<sup>232</sup> Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 11.

the law guarantees equality and freedom to all citizens and their private world shorn by various differences of class, caste, religion, language and community. I also consider writings from the Indian queer movement by advocates such as Arvind Narrain and Vinay Chandran who follow a rights-based approach to the recognition of LGBTQ issues. The queer movement has adopted various tenets of the Indian feminist movement to publically challenge the masculinism and the patriarchal nature of the state and the law on issues including sexual violence, abortion, domestic violence and caste and communal conflict.

The Malayali writer and professor of political theory Nivedita Menon, in an important text of 2007, takes up the general concept of woman used in human rights discourse. Menon deconstructs the category “woman” as the putative subject of feminist politics in India. The mobilization of the category “woman” in legal and rights discourses remains subject to multiple claims to the category in relation to the various axes of caste, class, sexuality and religion. It remains troubled in its uses, by moral implication, especially when articulated by identities like the *hijra* (eunuchs), sex workers and lower-class women. Citing a Delhi High Court judgment that set aside the election of two hijras from posts reserved for women, Menon denaturalizes the figure of the “woman” as necessarily biological in arguing for a more materially located experiential realm of identity to be represented by the mobilization of the category.<sup>233</sup> Her proposal introduces a critique of heteronormativity, suggesting it as the source of modern identity. This critique is particularly relevant to any discussion about contestation around claims to citizenship on non-normative grounds, and the ways in which they remain beholden to

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<sup>233</sup> Nivedita Menon, *Sexualities* (New Delhi: Kali for Women, 2007).

patriarchal and heteronormative understandings of the subjects. Particularly relevant to this project is Menon's discussion of a 2005 Supreme Court ruling in which *upper-caste* judges deemed illegal the election of the daughter of an upper-caste man to a position reserved for a candidate belonging to a Scheduled Tribe.<sup>234</sup> The official-elect appealed the denial on grounds of the fact that she was not truly upper caste; Because her parents were never legally married, she belonged to the caste of her mother who belonged to a Scheduled Tribe. The judges ruled that it was only the father's caste (upper caste in this case) that defined her caste status, despite the marital status of her parents. They further expressed dismay at her attempt to gain political office by openly branding her five siblings illegitimate and her mother a concubine, an 'outing' that was in fact incidental and not expressed in such pejorative terms by the official-elect.

Menon observes that the judges' upper-caste background enables them to define legitimacy within familial and patriarchal terms while limiting for the defendant the potential advantages of affirmative action. Thereby, they naturalize not only patriarchy but also caste categories at the same time.<sup>235</sup> This is one among the many similar cases where claims to legal legitimacy of one's social identity become intersectionally disaggregated by the other sub-identities on the one hand and by the dominant social identities of the judges as the "neutral" arbiters of justice on the other. Disaggregated as well are kinds of claims to legal legitimacy. This parallels the Lucknow case where the

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<sup>234</sup> Scheduled Castes, Scheduled Tribes and Other Backward Classes (OBC) are equivalent constitutional categories for the purposes of affirmative action or reservations in the Indian context.

<sup>235</sup> Menon, *Sexualities*, 28-29.

district magistrate's own prejudices against homosexuality informed his denial of the bail to the accused staff of the NGOs.

The discourse of familial legitimacy and legality has been pervasive. It has remained a steadfast source of recourse for the adjudication of familial matters involving gender and sexuality in India. Ranajit Guha's subaltern history of a case in the Bengal province of India dating back to 1849 is a foundational illustration of the attention to the "small drama and fine detail of social existence, especially at its lower depths."<sup>236</sup> I introduce his account at length here in order to give a brief summary of an episode of the legislation of sex in India during the decades leading up to the institution of the antisodomy law in 1860. A full account of the regulation of sex during the prehistory of the Code is outside the scope of this work. The 1849 case provides a brief glimpse into the ways in which sexuality is legislated at the level of the village through kinds of institutionalizing of moral codes by the community—that is, through the *samaj*, the Hindi word for community or society. This term collapses the institutional aspects of society and its moral and political attributes, rendering visible the intricate roots of the social injuries it adjudicates. This particular formation applied in an individual case of sexual legislation helps us to better understand the complex rooting of the act of sodomy in Indian moral, religious and sociopolitical frameworks across a range of religious, political, and regional cultures.

Guha recounts an incident in a village in Bengal where an unmarried pregnant out of wedlock girl, Chandra, was administered a drug to terminate the pregnancy. As a result

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<sup>236</sup> Ranajit Guha, "Chandra's Death," in *A Subaltern Studies Reader 1986-1995* ed. Ranajit Guha (Minneapolis: University of Minnesota Press, 1997), 36.

of the aborting treatment the girl died of poisoning. His analysis is based on a range of depositions regarding Chandra's death recorded in the legal archives in Calcutta. He demonstrates how the reporting of the incident in the law constructs a linear narrative of the crime of murder that abstracts contextual anxieties and real historical experience. In this framework, Guha expresses criticism of the state's appropriation of the subaltern voices of the mother, sister, neighbor and Chandra herself. Guha remarks:

The consequence of this appropriation has been to clip those perspectives that situated this incident within the life of a community where a multitude of anxieties and interventions endowed it with its real historical content. Some of those perspectives could perhaps be restored if the stratagem of assimilating these statements to the processes of the law were opposed by a reading that acknowledged them as the record of a Bagdi family's effort to cope collectively, if unsuccessfully, with a crisis.<sup>237</sup>

Guha's reading opposes the law's discursive operation, which he argues, produces a linear and abstracted narrative of these subaltern confessions. His reading moves through the complex and intersectional maze of social forces to address questions of class, caste, gender and sexuality within the broader colonial landscape of rural Bengal. For instance, the Bagdi family's lower class and caste status in the village places these community members, particularly women, in a vulnerable position of economic and sexual availability to the feudal upper class that also imposes its patriarchal morality on these subjects. This circumstance is more pronounced for women; the landed elite assumed an easy sexual availability of lower caste women. This regard and treatment of women by the elite, Guha notes, was based in the perception of such classes as morally loose and corrupt. However, this perception, he continues, does not mitigate the

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<sup>237</sup> *Ibid.* 40.



imposition of patriarchal morality in the community. This is a predicament that in Guha's view, results in Chandra's death. Or the very act of abortion that was meant to save her from living death by communal disgrace in a ghetto of social rejects.

Guha also grounds the news of Chandra's pregnancy within a broader kinship network of villages that collectively felt threatened by the possibility of an illicit birth. He invokes the specter of the Indian *samaj*, the Hindi word for community, a term that collapses the institutional aspects of society and its moral and political attributes, to render visible the intricate roots of the social injury. This injury is also of course also physical: Recall that Chandra suffered to death upon the administration of the abortive drug. The intersecting stakes of crime and injury in this episode are bound up with the interpretation and adjudication of its events by the *samaj*, an entire sociopolitical and moral structure constituted by multiple networks of caste, subcastes and villages. That is, the *samaj* as a loose concept constituted by multiple networks of caste, subcastes and villages becomes the primary adjudicator of the sexual morality and bodily transgressions before the law delivers its rarefying justice. This moral primacy of the *samaj* raises the stakes for understanding the far-reaching ramifications of the injury and violation.

The prestige of the caste, Guha further elaborates, depended on gendered notions of women as sexually pure, a trait edified in the figures of the virgin maiden, a chaste widow and a faithful wife. Any violation of these norms could lead to the pollution of the family and excommunication from the caste group. Further, it is women in the drama of Chandra's death who generate the most movement in the narrative, from traveling to another village to procuring and administering the medicine. Guha regards this autonomy

as evidence of a degree of women's control over their own bodies despite the underlying motivations of their actions as conforming to patriarchal morality.

Guha's account suggests that this episode was enacted in a context structured by feudal and patriarchal moral imperatives. Rural Bengal was a context structured by a set of implicit and explicit rules concerning sexuality. This was broadly typical throughout rural India where social rules were condensed into and represented through the authoritative presence of an adjudicatory *samaj*. The case as Guha represents it has strong relevance to consider the predicament of the public presence of queer sexuality in postcolonial India. As evidenced in the Lucknow episode, the patriarchal authority enacted out of moral imperatives around sexuality and the body, are very much impelled in the actions of the police, the magistrate who denies bail as the judicial authority, and the news media. These interveners are not located outside of the implicit moral boundaries of the modern *samaj*, or the local society of small town Lucknow that is sexually conservative.

Despite their colonial origins, the intersectional intricacies of identity and social injury, described by Guha, owing to the transgressions of gender and sexuality shares continuities with a similar regulation of homosexuality in postcolonial India. To return to the Lucknow incident of the crackdown on NGO activities: This case is shaped through a similar ideological apparatus of patriarchy and heteronormativity that seeks to police and criminalize sexuality, in this case homosexuality. In the Lucknow case it becomes difficult to distinguish between the workings of the modern yet conservative society (*samaj*) as the constellation of societal norms from the functioning of the law as the neutral, objective authority. The law's unconscious manifest in the judge's denial of bail

to the accused is in fact structured by the same logic of the publically conscious removal of MSM and HIV/AIDS work from sight, which also informs the signifying conditions of homosexuality as an alien, corrupting and contagious influence on local morality. As noted in the introduction and the earlier chapters, the category MSM takes on a threatening significance despite its status as a behavioral marker in public health discourse. The city of Lucknow represents an ambiguously modern context where MSM, gay, homosexual and other terms coalesce around the specter of public sexuality considered deviant and morally corrupt by the city's conservative society of which the judges and the police are a part. Instead of being seen in distinctive terms with sexual specificity, MSM, NGO outreach work around same-sex behavior, public health workers who impart sex education to MSM and the self-identified gay or bisexual, all become implicated in the scandalous drama of sexual eruption in Lucknow's public space.

Particularly important to this dissertation is the work of Indian feminist scholar Rajeswari Sunder Rajan who writes about the postcolonial Indian state and its relationship to the category "woman" as the subject of feminist politics. Rajan, in her book *Scandal of the State*, analyzes the relationship between the Indian state and the gendering of citizenship and the regulation of sexuality, by engaging with a range of western feminist critiques of the state (specifically the works of Catherine MacKinnon, Carole Pateman, Wendy Brown and Jacqueline Steven).

Rajan's scholarship is strongly relevant to any understanding of the intersectionality of the claims that constitute challenges to citizenship and subject recognition, including the liberal queer challenge to the Indian state – a challenge that has interpreted the Indian Constitution to guarantee the universal equality of all its subjects.

Rajan makes an important point concerning the universality and the singularity of the term “woman” in relation to its lived heterogeneity in the Indian context:

The problem of religious and community differences among women is, for instance, at the center of the conflict over introducing a uniform civil code in India. The existing personal law system gives primary recognition to the religious community identity of the Indian people, even at the cost of supporting differential laws and discrimination against women; but neither is the politics of minority identity something to be easily dismissed in the present Indian context.<sup>238</sup>

In the passage above, Rajan is attentive not only to the primacy of the competing regimes of identity’s regulation and recognition but also to the politics articulated by minority identities as more than structured by their social injury. When those who claim minority identities turn to the constitutional law for a verification of the universality of their rights, their political claims for justice often stage political scenes. French philosopher Jacques Rancière has called this staging the scene of dissensus. Rancière defines dissensus as the moment of politics when the subject of a violation or an injury comes into being to challenge the normative order of equality. By appearing as a subject of a violation, such a figure produces a political moment by creating a division in the given social order.<sup>239</sup>

The course of justice does tend to flatten the complexity of identity into the singular figure of the litigant, the aggrieved or the injured. However, such a claim made on the constitutional body of the law emerges from an intricate a social location. The

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<sup>238</sup> Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Durham & London: Duke University Press, 2003), 16.

<sup>239</sup> Jacques Rancière, *Dis-agreement: Politics and Philosophy* trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999).

language of justice under liberalism therefore is essentially inadequate to the task of carefully parsing out identity's intersectional condition. However, in the face of no other viable alternative, the terms of political transformation can only be negotiated and valued within the moments of politics as Rancière defines it. For Rancière, politics happens only in moments that produce the verification of equality under the existing social order through the exercise of abstract rights that are made meaningful in the process.

I now turn to the modes of injury inflicted on non-normative bodies in public upon whose battered backs, the Delhi High Court built its transcendent notion of privacy in terms of decisional autonomy, a principle that was revealed to be operative only through identification as LGBT or queer, and not through the category of MSM. This identification in the Indian context of being publically visible as gay, lesbian or transgender has often become a form of public subjection and violence by the police authorities. The contradiction between unequivocally public instances of sexual violation and the right to privacy as a corrective cannot simply be resolved through legal sublimation of privacy by abstracting it from its spatial context – a concept that affords greater materiality – and attaching it instead to the virtually amorphous ability of the sexual identity's decisional autonomy. In theory, such a reordering of privacy may be more expansive but in practice it demands sexual identification to allow decisional autonomy to proceed from its intersectional grounding. Such a movement into the visible is precisely what can prove to be the specter of those whose public emergence signals an endangered appearance.

### **Interrogating Privacy as Decisional Autonomy: An Archive of Public Violations**

The liberal conception of privacy in terms of decisional autonomy that was accomplished in the 2009 Naz judgment of homosexuality decriminalization by the Delhi High Court was based on the extensive evidence of cases of violation in which privacy as decisional autonomy turns out to be a mere illusion. This is particularly so in the postcolonial context in which the public visibility of the non-normative sexual self remains subject to a range of disciplinary and regulatory institutional violence. A reading of the archive of individual injuries suffered in different kinds of public contexts, some bound more by normative privacy while others routinely public yet implicitly heteronormative.

The clinic has been a particularly fraught realm where the homosexual has been rendered as a visible human subject through medical and public health discourses and practices. A long history of conversion and aversion reparative therapies in India, as elsewhere in the world (including in the west), attests to this pathologization and medicalization of homosexual subjects even after the World Health Organization's widely recognized ICD (International Statistical Classification of Diseases and Related Health Problems) changed its classification of homosexuality as a mental illness, which appeared in the 1977 ninth edition.<sup>240</sup> The tenth edition offered a modified description of homosexuality, offering instead an interpretation of homosexuality as an ego-dystonic disorder, not a mental illness. In Indian medical archives, clinical cases of psychiatric

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<sup>240</sup> Ronald Bayer, *Homosexuality and the American Psychiatry: The Politics of Diagnosis* (Princeton, NJ: Princeton University Press, 1987).

intervention are not well documented, in part due to confidentiality. However, in the medical literature there is extensive anecdotal evidence of the ongoing use of reparative approaches that have remained largely unsuccessful.

Prominent Indian lawyer Arvind Narrain and Vinay Chandran, counselor and executive director of a Bangalore-based NGO working with sexual minorities have documented stories of the use of various kinds of clinical treatments and psychiatric therapies on gay men in the city of Bangalore.<sup>241</sup> They begin their paper with an epigraph from a story taken from a local paper published in 1998. The account concerns a self-identified gay man who was told by his doctor that homosexuality was a kind of schizophrenia, a form expressed in delusions and hallucinations. The man was prescribed, the drugs Orap and Serenace, strong neuroleptics that over fifteen years led him to attempt suicide by what was determined to be an overdose of Orap. The man survived, but was further made to undergo shock therapy, which also failed to “cure” him of his putative homosexual schizophrenia. Eventually, the doctor advised this man to get married, and further prescribed anti-epileptic medication, stating it would enhance sexual performance.

Narrain and Chandran note that homosexuality was never truly a medical category, but was nonetheless often subject to alternative systems of therapy such as Ayurveda and homeopathy. Importantly, the authors describe the position of the Indian medical establishment that had adopted the revised ICD-10 definition of homosexuality.

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<sup>241</sup> Arvind Narrain and Vinay Chandran, “It’s Not my Job to Tell You It’s Okay to be Gay: Medicalization of Homosexuality, A Queer Critique,” *Alternative Law Forum*. Accessed Online March 16, 2015 <http://www.scribd.com/doc/192268531/It-s-Not-My-Job-To-Tell-You-It-s-Okay-To-Be-Gay> .

This classification distinguishes between ego-syntonic and ego-dystonic homosexuality, a distinction adopted by Indian medicine. In the ego-syntonic category, the gender identity and sexual object choice of the individual are not in conflict. In ego-dystonic, the individual wishes to have a body matched to a different gender identity in relation to sexual object choice. This, in the view of the WHO and the Indian medical establishment, warrants treatment through behavioral therapy.

Narrain and Chandran contend that the existence of ego-dystonic homosexuality has, over the years, become the truth of homosexual identity in the Indian clinical realm. The use of ICD-10 sub-classification of homosexuality by doctors warrants treatment. In their interviews with a number of mental health practitioners in Bangalore, Narrain and Chandran found a range of concordant views, all of which reinforced the sense that homosexuality was a source of distress, rooted not so much in scientific research but in the fear of the lack of social acceptance. Rather than homosexual behavior, it is the social consequences of homosexuality that remain at stake in the patient's understanding of his or her own sexual condition. This interpretation suggests that homosexuality exists in a medicalized context despite the removal of the "mental illness" classification in 1990. Whereas the diagnosis of mental illness in the first case is very much in force despite the ICD-10, Narrain and Chandran also found medical interpretations drawn from the softer subcategories of ego-syntonic and ego-dystonic offered in the ICD-10.

In all, etiological approaches remain the preoccupation of the doctors who cite reasons such as club and youth culture, media exposure, poor parenting, lack of sexual outlet in the gender-segregated Indian society and other situational factors for homosexuality. These views share continuities with the heterosexist and patriarchal



institutional and public culture. However, a cultural understanding of the homosexual as someone who engages in multiple sexual partners without the ability to sustain a long-term relationship further informs their construction as an ego-syntonic and ego-dystonic “pervert.” Ironically, Narrain and Chandran note that queer activism itself was seen by the doctors as a means of promoting homosexuality detracting from people’s desire and ability to want to convert to the “superior” option of heterosexuality.

Shock therapy in India has prevailed as the long-standing clinical procedure that combines a host of treatments including aversion therapy, positive reconditioning and orgasm reconditioning and therapy to facilitate conversion to the unchallenged heterosexual norm. In treatments, stimuli such as images of women are introduced with descriptions of how a vagina feels along with orgasmic reconditioning. The patient is aroused and made to masturbate to the images of same-sex activity that are gradually replaced with those of the opposite-sex closer to the point of climax. Shock therapy employs the opposite method by the synchronized administering of an electric shock as the patient orgasms. The association between orgasm caused by homosexual stimulus and the electric shock is intended to decrease interest in being homosexual.<sup>242</sup>

Narrain and Chandran focus on the deep-rooted heterosexism and paternalism in the mental practitioners’ positions. Their critique can be extended further to consider issues of decisional autonomy, gender, religion and the law and medicine as mutually reinforcing regimes within which the homosexual experience has been shaped in the Indian clinic. Both the law and medicine make behavioral distinctions – the carnal act against the order of the nature and ego-syntonic/dystonic. As long as the clinical

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<sup>242</sup> *Ibid.*

objective is towards re-orientation to heterosexuality, the law does not interfere to challenge unethical psychiatric abuse to which these patients are subjected. The legal silence on the realm of clinical malpractice on the issue of homosexuality implicitly sanctions the psychiatric abuse of those who present themselves as homosexual, in need of medical intervention within the ambit of clinical privacy. The predominance of male patients attests to the gendered nature of homosexuality in the public realm, where men who have greater personal autonomy are forced by their families and broader society to undergo treatment in order for them to become more disposed to the idea of marriage and to be better reconciled with its practices. Women, on the other hand, have less autonomy. A trend that has been on the rise in parts of Southern India is suicide among lesbians, suggesting that women are compelled to take extreme steps to escape.<sup>243</sup> The reasons for suicide often include a lack of acceptance for same-sex lesbian relationships, especially for low-income migrant women. These women from semi-urban contexts take up work in more urban areas and find themselves pathologized and policed for their sexual choices in a predominantly heteronormative, patriarchal culture.<sup>244</sup>

Individual decisional autonomy as the basis of bodily privacy within the clinical, the legal and the social has historically been beholden to patriarchal heteronormativity that is pervasive across the law, the clinic and the family in India. This is evident in a case of another gay man in the late 1990s who was unsuccessfully subjected to behavioral

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<sup>243</sup> See, Naisargi Dave, *Queer Activism in India: A Story in the Anthropology of Ethics* (Durham & London: Duke University Press 2012).

<sup>244</sup> See Darshana Sreedhar's unpublished paper on lesbian suicides and NGO work on queer sexuality in Kerala. Darshana Sreedhar, "Sahayatrika in its Making: Queer Visibilization in Kerala," Unpublished manuscript. Accessed online May 3, 2015. [https://www.academia.edu/3552893/Sahayatrika\\_in\\_its\\_making\\_Queer\\_Visibilization\\_in\\_Kerala](https://www.academia.edu/3552893/Sahayatrika_in_its_making_Queer_Visibilization_in_Kerala)

therapy and shock treatments at the All India Institute for Medical Sciences (AIIMS) in New Delhi for four years. He then was brought before the National Human Rights Commission (NHRC) of India. The treatment consisted of counseling therapy and un-prescribed loose drugs from the doctor's stock that left the patient devastated causing deep psychological trauma.<sup>245</sup> The patient himself believed that men who were confused about their sexuality should be given the option to convert to heterosexuality. He had been led to believe that he had to be "cured" despite the fact that he felt no such confusion. It is unclear as to why he sought treatment. But one might conjecture that he faced the social pressure to convert to heterosexuality, especially when clinical therapy was presented as a "viable" solution for his perceived disorder of homosexuality.

The complaint based on this case, number 3920 filed by the Naz International with the chairman of the NHRC, focused on a claim of psychiatric abuse of the gay man and the lack of formal standards in psychiatric care. It was dismissed. The grounds of dismissal employed a circular logic bringing the organization's inability to intervene back to Section 377 of the Indian Penal Code as the primary institutional roadblock. Unless the law was repealed, the organization reasoned, the NHRC's intervention would itself be tantamount to an offense under the law. It further noted that the entire campaign for sexual rights of the minorities was run and funded by international NGOs and foreign organizations that enjoyed no grassroots support in India.<sup>246</sup>

It would appear that the 2009 Naz version of privacy as decisional autonomy of the individual would become exercisable precisely under such circumstances where the

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<sup>245</sup> Narrain, *Queer*.

<sup>246</sup> *Ibid.* Annexure 1, "Letter to the NHRC Regarding the Dismissal of Complaint 3920 on Medical Treatment of Homosexuality," September 4, 2001 at 120.

individual is enabled to put up resistance to an invitation to institutional abuse. Even though this case pre-dates the Naz verdict by almost a decade, it informs the Naz verdict as part of the evidence of institutional abuse of sexual minorities. However, decisional autonomy cannot function in isolation of the broader heteronormative culture and patriarchal mandates that underlie the imperative to heterosexual marriage leading homosexual men to believe that medical treatment could be successful in changing the sexual orientation. We may consider this in spatial terms though. If Section 377 did not apply to consenting adults in private at the time of this case, then the spatial private of the clinic could possibly have had some measure of accountability under the law for subjecting an individual to a range of scientifically unsubstantiated clinical treatments. Again, reparative and reconditioning therapies continue to have sway in India given their purchase within a broader heteronormative culture that prioritizes heterosexual marriage as a communal requirement and a gendered social fulfillment. The sodomy law exempts the clinical from being liable for inflicting prolonged psychiatric abuse. Before and throughout this process, the family and the community function, and are invoked as regulatory and disciplining institutions, providing impetus for such unscientific and unethical clinical practices to prevail. As we saw with the *samaj*, the appeal the family and the community have deep historical roots in the administration of law prior to the law of the state.

Seen from the lens of the clinical, medical injury becomes the primary mode of experiencing one's sexual identity. Even before it can be the basis of any kind of articulation towards appeals for justice, it is physically seared into the body and the

psyche living interminably as psychological trauma for those who are compelled to undergo reparative therapy in India.

In the conclusion of this chapter, I further consider the spatial, the public and the social as realms of experience that apprehend any notion of privacy as linked to the individual's autonomy and foreground the precarious predicament of public visibility of sexual identity that becomes an incitement to institutional violence and violation. In citing these examples, I do not aim to introduce a totalizing caution about any public visibility of homosexuality and non-normative gender embodiment as always potentially endangered. For that would overlook the very routine and organized safety and security afforded to gay pride parades and parties in various metropolitan centers in India. Such a contradiction further highlights the Indian LGBTQ movement's elite orientation comprising of self-identifying upper-middle and middle class citizens who can indeed afford privacy. My main goal in using these examples as illustrations of bodily violations is to elucidate the specificity and the intricacies of the postcolonial context within which same-sex desire, identity, expression and representation remain steadfast objects of policing and pathologization, often framed as threats to a moral public culture within the registers of the pornographic and the sexually corrupt. The admission of these into the law through their status as the evidence of misuse of Section 377 in the Delhi High Court then makes visible the stakes in demanding a right to privacy and the complex and unforeseeable nature of the public that diminishes privacy's corrective powers.

### **The Public, the Social and the Spatial: Everyday Visibility as Vulnerability**

*I identify as a gay man and work in a restaurant in Gurgaon. I am also an outreach volunteer for an HIV/AIDS organization called Mitr Trust....On 19<sup>th</sup> September 2006, I was standing at Dhaulakua bus stand waiting to take a bus to Mahipalpur at 10 pm. I was picked up by two policemen. They accused me of being a homosexual...they started assaulting me with lathis targeting my groin and buttocks. I was made to bend over and one of the policemen held my head between his thighs while the other continuously hit me with the lathi.*

- Affidavit of a gay man filed in the Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi & Others.*

*That on 18<sup>th</sup> June, 2004 (Friday), around 8 p.m. while I was dressed in women's clothing and waiting on the road, I was raped by 10 goondas (all male) who forcefully took me to the grounds next to Old Madras Road. They threatened to kill me if I wouldn't have sex with them. I was forced to have oral and anal sex with them. While I was being sexually assaulted two policemen arrived. On the arrival of the police most of the goondas ran away from the scene the police caught two of them...instead of registering a case against the goondas and sending me for medical examination, they harassed me with offensive language and took me along with the two captured goondas to the police station...the police took me to a room inside the police station, stripped me naked and handcuffed my hands to a window. Six policemen, all of whom seemed drunk, hit me with lathis and their hands and kicked me with boots...the police also burned my nipples and chapdi (vaginal portion of hijras) with a burning coir rope.*

- Affidavit of Kokila, a self-identified hijra, filed in the Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi & Others*.

The above statements are only excerpts from a more explicit, gruesome narrative of police violence inflicted upon people with publically visible non-normative bodies within the very institutional space that is the space of protection. Ironically, the crime that these bodies signify, of unnatural desires under the law, through the mere presence in their everyday public contexts, becomes precisely the mode of torture inflicted upon them by the police within the space of public administration turned into one for private use. The gang rape by multiple police officers combined with physical brutality defies all analytical logic. How and where should the analysis of such unrelenting violence begin? What motivations, beyond the regulatory and disciplinary functions of the law, incite this violence that is without boundaries, strikes as it does at the intimate parts of the denuded non-normative body stripped of dignity, confounding all senses of the private and the public? How do we distinguish here between the crime of the non-normative body as defined under the sodomy law and the crime of the police, exactly identical in its mechanics, but committed with a desire to punish, to teach a lesson and to create a private spectacle in a public space?

In raising these questions, my purpose is neither to suggest that such violence is any way new, a rupture of the ordinary, nor to assign violence an exceptional heuristic status beyond description and analysis. Such violence against sexually and gender non-normative bodies continues to brutalize individuals in a global context and is spoken of,

opposed and decried. While very much within the ambit of their everyday lives, this violence as an event redraws the boundaries between the ordinary and the eventful in terms of the failure of the grammar of the ordinary.<sup>247</sup> The anthropologist Veena Das, in her ethnography of communal violence in India, describes the everyday life context of the riot survivors for whom the memory of the violence witnessed and suffered became absorbed in the texture of the everyday, experienced as eventful. Although Das writes of two world-changing events in Indian history – the Indian Partition of 1947 and the Sikh riots of 1984 – her words capture the contingency experienced by marginalized and socially vulnerable Indian minorities even outside those heightened moments of transition, a contingency that shapes the experience of living in the fear of violence, whether it is individual or communal. I cite her observations not to build a comparison of world-annihilating violence suffered at differing scales – for that would dangerously verge on a gesture to offering up a rationale to explain why the violence occurred. Rather I cite her work to understand why violence becomes the response to certain minority experiences in a particular time and place.

Das, drawing upon the philosopher Wittgenstein, proposes that the subject does not belong to the world but rather it is the limit of the world. It is the experience of violence that the subject witnesses before their eyes or feels on their body that is of interest to my analysis. This passage from Das's ethnography evokes the world-extinguishing sense of violation that is at the heart of my concern with the sexually and gender non-normative subjects in India and their public visibility:

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<sup>247</sup> Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (Berkeley: University of California Press, 2007).



It is not only violence experienced on one's body in these cases but also the sense that one's access to context is lost that constitutes a sense of being violated. The fragility of the social becomes embedded in a temporality of anticipation since one ceases to trust that context is in place. The affect produced on the registers of the virtual and the potential, of fear that is real but not necessarily actualized in events, comes to constitute the ecology of fear in everyday life.<sup>248</sup>

No claims to comprehension can be made by someone writing about the unbridled violence without boundaries in all senses of the word. The narratives in the affidavits produced before the law offer precise details of the body parts tortured and sexually violated multiple times over in a space meant for the public protection of the citizens. However, in the institutional theater of punitive criminality, the boundary between the public administration space and a private spectacle of sexual violence stands collapsed as does the distinction between regulatory discipline of the body signifying sexual transgression and personal yet popular morality to assume that body's naked availability for limitless torture. This is a scene that recurs in a space outside the law's perspective yet within the law's premises. Whether it is the same-sex desiring male inmates in Uganda or India who become HIV positive in the face of institutional neglect and ideological refusal to provide healthcare protections or the sexual torture of the inmates in Abu Ghraib by American military, the racial and the sexual non-normativity of certain bodies within a nationalistic and heteronormative culture becomes a mark of vulnerability, or the loss of context to their own reality, as Das puts it.

The affidavits also speak of living with the trauma of suffering violence and torture, an experience that is clearly unforgettable and recapitulates injury as one's

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<sup>248</sup> *Ibid.* 9.

embodied identity. In Rancièrian terms, these are the subjects of the wrong that build up a case for the verification of equality and more specifically in this case, the verification of privacy as protection and safety whether conceived of in spatial terms or attached to one's decisional autonomy.

The public-private distinction for the modern sexual identity or the legal LGBT subject in India is essentially a blurred one as evidenced in the lived experience of a range of non-normative bodies in public. Whether they are in a space of incarceration or a publically authorized space of outreach work, the clinic or even ordinary public space, the collapse of the boundary between the public and the private for these subjects and bodies entails the collapsing of other distinctions between regulatory discipline and violent punishment, same-sex behavior and gay identity and ultimately the foundational injury and the identity.

The social, American Studies scholar Saidiya Hartman observes in her discussion of the slavery in the United States, was beyond the reach of the state and exempt from state intervention. Implicated within the social was the private as a realm of sentiment and affinity in which the law had no place governing. Yet it was precisely the displacement of the public character of racism on to the private prerogatives of individuals that allowed the state to disavow its role in the private, deemed to be a realm of (white) autonomy. Despite their contextual specificity in a different age and place, Hartman's insight on the crisis in the distinction between public and private is relevant to the postcolonial context of queer visibility, especially in the 21<sup>st</sup> century when a right to privacy comes to define queer liberation:

Rather than accept the bifurcated construction of social existence drawn by liberalism, in which the private signifies individual autonomy and the public infringement of this putative autonomy, it is important to keep in mind that these terms are contingent and partisan constructions of social life rather than disinterested explanatory terms. Instead, the public and the private need to be considered provisional designations within an ensemble of shifting, interconnected and overlapping social relations and institutions, which cannot be distilled into discrete and independent components without the risk of reductionism or obfuscation: neither free will nor inconvenience adequately depicts the social organization of space, bodies and power.<sup>249</sup>

In the postcolonial context of a nascent history of legible injury on queer bodies – the non-normative gender and sexuality – the private and the public are similarly contingent upon the fragility of the social and the spatial as well as the insularity of the institutional within which these bodies are shaped by abuse and violence. The private isn't a protective sphere of individual autonomy as evidenced by the cases discussed above. The psychiatric abuse of the gay man in the clinic bound provisionally by medical confidentiality and institutional privacy eventually became a public matter that remained constrained by the sodomy law's criminalizing ambit. The charge of sexual perversion attributed to the healthcare NGOs in Lucknow sanctioned the police raid of private NGO offices in the name of public morality. The torture of the gay man and the *hijra* at the hands of the police unfolded in a public space cordoned off by the private interests of the officers who ironically committed the exact same crime under Section 377 for which they purportedly inflicted the violence.

The public visibility of non-normative sexuality whether it manifests as sexual behavior, identity or outreach in the postcolonial context produces a painful history in

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<sup>249</sup> *Ibid.* 201-202.

which the signification of the sexual as deviant and pornographic, as nakedly available for violation confounds the boundary between the public and the private. Whether such privacy is spatial or pertains to individual autonomy, the overarching rationale of public morality makes no distinctions between privacy and exposure, regulation and violation and ultimately identity and injury. Such a history of quintessentially public violations of the non-normative subjects of gender and sexuality in India preemptively frames the discourse of queer liberation that cannot always guarantee privacy as a necessarily empowering safeguard.

The next chapter takes up the case of a man identified under the law as India's first case of an HIV positive individual. This man was quarantined under a ruling based on a public health legal mandate. This public-health legislation has been considered as archaic as the sodomy law, another legacy of colonialism in India. I consider the legal case regarding the quarantining and human rights violations of the man in relation to a film made on his life and the Delhi High Court Naz judgment to consider its role as another instance of sexual colonialism's legacy in the times of Naz.

## Chapter 4

### **Privacy and Other Absences: HIV, Queerness and Human Rights in *My Brother...Nikhil***

The 21<sup>st</sup> century transnational paradigm of sexuality rights advocacy has been mobilized in India, as elsewhere, in part through the circulation of a broad mediascape comprising work by humanitarian groups, online activist networks and sites of popular culture that traffic in images, ideas and idioms of the local and the global.<sup>250</sup> The mediascape paradigm suggests a sense of immediacy impelled by the urgency of the flow of media stories, images, and films addressing the demand for sexuality rights by exposing violations and repressive legal regimes. But much of the material in this mediascape also re-interprets past injustices within the future-oriented rights framework. Sexuality rights within various national contexts such as the USA, India, South Africa and Nepal have predominantly relied on an interpretation of the right to privacy as a pivotal one that renders meaningful other legal rights such as dignity, equality and non-discrimination.

Specifically, in the Indian context, LGBT rights advocacy is the most legible form of global sexuality rights. This area of advocacy has emerged as a public forum of humanitarian appeal in part through the ongoing public health and community concerns about HIV/AIDS. The broad-based advocacy and activist effort committed to an advancement of modern, democratic rights-based agenda in India has proceeded through

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<sup>250</sup> Christopher Pullen, ed. *LGBT Transnational Identity and the Media* (Basingstoke: Palgrave Macmillan, 2012).

a feminist and queer indictment of more than one antiquated colonial law. Section 377 was the target of much activist and legal energy during the early 21<sup>st</sup> century. The project of LGBTQ emancipation in India was also, however, envisaged through rendering visible the damaging nexus of the colonial law pertaining to the public health crisis of HIV/AIDS. Efforts along both fronts have in part been mobilized through a transnational mediascape of rights advocacy.<sup>251</sup>

The movement has deployed a notion of individual sexual privacy as an antidote to the archaic sodomy law that symbolically and materially criminalize LGBTQ subjects. But these rights become operable and claimable only through a profound public mediation of the subject at the intersection of privacy violation and rights-based visibility. Within the context of the transnational mediascape of rights advocacy, the right to privacy has held a pre-eminence. The right to privacy, understood as constituting the inviolability of the sexual subject is always already mediated by a gesture to the same public context in which the same subject must also be held up as a highly visible human rights icon, as the injured, unrecognized subject who must be granted rights. An insistence on the right to privacy at the core of sexual subjecthood warrants an examination of the public as an enabling condition of such subjecthood, and the subject as an icon at the center of the humanitarian appeal for justice made to the Indian state, in tandem with other similar appeals in other national contexts. In each campaign, this subject is made visible to audiences transnationally. Situated against the larger public backdrop of rights-based intervention, how do we understand privacy as bringing into our

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251 Gautam Bhan and Arvind Narrain, *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005).

view a visible human rights subject and yet functioning as a safeguard of sexual privacy for the sexual subject in the law? The public mediation of the right to privacy, this chapter argues, necessarily produces contradictory outcomes for the sexual subject for whom a claim to privacy instantiates a profoundly public mode of representational visibility in the transnational mediascape.

Taking this public mediation of subjects of privacy as its point of departure, this chapter considers sexuality, privacy rights and its attendant public subjecthood in the Indian context through an analysis of the film *My Brother... Nikhil*, the debut of film director Onir released in 2005. This was a year of heightened advocacy and activism in India around Section 377 and LGBTQ rights. The film is based in Goa and chronicles the experience between 1986 and 1992 of Dominic D'Souza, a wildlife photographer from Goa, who was quarantined in 1985 for being HIV positive under the public health law, Goa, Daman and Diu Public Health Act. The film narrates D'Souza's experience of living as an HIV-positive man in the context of a gay relationship within the ambit of the Indian family.

This chapter turns to this film to make a case that it is enabled by the discourse of absence and invisibility that is common to the circumstance of LGBT life under Section 377. The film's broader extra-textual politics of representation, circulation, and reception, including its production and global circulation in film festival circuits, are central to this chapter's argument which is framed by the multivalent textuality of three intersecting genres of public appeal: 1. As an AIDS advocacy film, *My Brother...Nikhil* tells D'Souza's story within a local context devoid of HIV/AIDS/gay activism that for instance serves as the predominant backdrop for American HIV/AIDS films of the 1980s

and 1990s. 2. The film's global and transnational circulation as queer cinema and its reception as a bold yet sensitive portrayal of same-sex relations highlights not only the departure from Bollywood's dominant mode of gay men and women as funny stereotypes for which the film was lauded, but also the absence of public outrage and opposition to homosexuality in India that, for instance, beset the 1996 release of lesbian-themed film *Fire* (Deepa Mehta, 1996). 3. Finally, though the film renders publically urgent D'Souza's privacy rights violation in 1989, the film's producers and directors disavow all references to the story. It disavows its own documentary roots as a "compromise"<sup>252</sup> in a climate of escalating human rights discourses that would render its subject matter sensitive and controversial not for outing D'Souza, but for reflecting poorly on the Goan authorities' treatment of him. This disavowal of D'Souza's experience and his legacy of HIV activism in Goa that informs the film's subject matter was intended to grant the Goan authorities a measure of dignity at a moment when their culpability in wrongs retrospectively was acknowledged. But this disavowal turns into a critical absence when after the film's release, D'Souza is referenced through the dual register of illness and sexuality, as an HIV positive *homosexual*, in popular and academic discourse. By hinging its narrative conflict on the conjunction between HIV and homosexuality while also driving home the message that the etiology of transmission is irrelevant, the film's fictionalized story ends up reinforcing and naturalizing the popular view of homosexual behavior as causing HIV. At the same time, the question of D'Souza's sexuality and the cause of HIV are also made relevant in much of the writing on HIV/AIDS in the Indian

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<sup>252</sup>. "Gay Bollywood Director Onir Says 'I won't be Invisible,'" Deccan Chronicle, February 16, 2014. <http://www.deccanchronicle.com/140215/entertainment-bollywood/article/gay-bollywood-director-onir-says-i-wont-be-invisible>



context. These questions were never raised in the 1989 legal case, *Smt. Lucy D'Souza vs. State of Goa and Others*, the legal case regarding D'Souza's quarantining.<sup>253</sup> Despite figuring as an absence in the original legal case that informs the film's narrative, D'Souza's sexuality is extrapolated from his cinematic counterpart Nikhil whose queerness furthers D'Souza's privacy as an absence. This is effected as D'Souza is referred to as a gay subject in popular and academic discourse. The film was foregrounded by LGBT audiences and activist as sensitive queer cinema, as a celebrated marker of cinematic maturity and progress within Bollywood's putative canvas of gay stereotypes.<sup>254</sup> Such a framing of the film by LGBT groups and liberal media in terms of cinematic progress also reinforces a linear, teleological trajectory for Bollywood, understood to have emerged from total queer invisibility to a more explicit register of queer representation. Cinema studies scholars including Shohini Ghosh and Thomas Waugh have astutely demonstrated that in fact the queer canvas of Hindi cinema is far more complex and protean.<sup>255</sup>

Dominic D'Souza who died in 1992 appears as a public icon after the release of the film in 2005 stands for three key absences: in public consciousness, as the face of a

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<sup>253</sup> AIR 1990 Bom 355 Author: V.A.Mohta. In *Smt. Lucy D'Souza vs. State of Goa and Others*, the Bombay High Court upheld the provisions under the Goa, Daman & Diu Public Health Act, 1985 that mandates the isolation of persons with an infectious disease like HIV/AIDS in 1989.

<sup>254</sup> Sohini Chakravorty, "Gay Fun or Cause?," *The New Indian Express*. February 27, 2010.

<sup>255</sup> Shohini Ghosh, "Queer Pleasures for Queer People: Film, Television, and Queer Sexuality in India," in *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society*, ed. Ruth Vanita (New York and London: Routledge, 2002), 207-221. Also see, Thomas Waugh. "Queer Bollywood or 'I'm the Player, You are the Naïve One': Patterns of Sexual Subversion in Recent Indian Popular Cinema," in *Keyframes: Popular Cinema and Cultural Studies*, eds. Matthew Tinkcom & Amy Villarejo (London & New York: Routledge, 2001).

violated subject of illness, as an icon of queer sexuality and finally through the explicit public address of the film, as the face of privacy rights. The reading of the film offered by this chapter acknowledges the film's contribution to the nascent genre of Indian queer cinema. However, it also aims to direct attention to the discursive processes through which transnational mediations of rights-based advocacy situate human rights subjects directly within multiple configurations of the public and the private. It also critically interrogates the affective and political investments of Indian queer cinema and its global circulation in a necessarily public queer subject – a subject posited as being in need of humanitarian redress. This subject is rendered especially vivid through icons like Nikhil in the first decade of the 21<sup>st</sup> century during which LGBTQ activism and sexuality rights in India are legally recognized through privacy.<sup>256</sup>

The essay works through a triangulation of the 1989 Lucy D'Souza case in the Bombay High Court, the context of film's release in 2005 and its circulation in the years after. This was a moment of ascendant LGBTQ activism in India that culminated in the 2009 Delhi High Court Naz verdict that decriminalized Indian homosexual subjects by granting them a right to privacy against state intrusion. Significantly, through the film's portrayal of HIV and same-sex relations, the legal case that appealed the Goan state authorities' mandatory quarantine decision in the Bombay High Court acquires resonance as an HIV/AIDS *LGBT* issue, as part of the national regime of injustices on sexual minorities, through the film's portrayal of HIV and same-sex relations. By mapping the three absences and tracing the D'Souza story through the film's narrative about Nikhil's

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<sup>256</sup> See, the introduction and Chapter 1 on the Naz Foundation case of 2009 that decriminalized homosexuality in India.

fictional experience, this chapter offers a critique of the privacy discourse as the basis of legal empowerment that is often enabled by modes of public representation that place violated subjects permanently at the threshold of the public.

### **My Brother...Nikhil – HIV/AIDS advocacy**

Released in 2005 almost a decade after the national protests against Deepa Mehta's *Fire* (1996), *My Brother...Nikhil* received critical acclaim from South Asian audiences broadly for its sensitive portrayal of a gay relationship and for showing the trials and tribulations of a young HIV-positive man who is ostracized by his family and the larger society.<sup>257</sup> The story revolves around Nikhil (Sanjay Suri), a state swimming champion in Goa, who is quarantined in a TB sanatorium under a public health law when he tests positive after a routine blood test. The film is narrated in docudrama style, told mostly in flashbacks performed by Nikhil's family members and his lover, Nigel. Nikhil Kapoor, (Sanjay Suri), is the star son of the family, a state swimming champion, while his sister Anamika or Anu, (Juhi Chawla) remains in the shadows of the family's aspirations which exclusively privileges their son's progress. The story unfolds through the narration of the main characters as they address the audience about their relationship and concern for the film's protagonist Nikhil, who is at first abandoned by his family upon the discovery of his HIV infection, but gradually gains their acceptance over the course of the film.

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<sup>257</sup> Somini Sengupta. "Gay-Themed Film Tests Sensibilities in India," *The New York Times*, April 6, 2005. [http://www.nytimes.com/2005/04/06/movies/06bomb.html?\\_r=1&](http://www.nytimes.com/2005/04/06/movies/06bomb.html?_r=1&)

As an HIV/AIDS advocacy film, the narrative of *My Brother...Nikhil* dramatizes Dominic D'Souza's story with a few fictionalized details. Set in 1980s Goa, a western state in India that was under Portuguese control until the early 1960s, the HIV/AIDS narrative trajectory of the film advances a local experience of illness and the concomitant social ostracism shaped through the trials and tribulations of a middle-class family, with the conspicuous absence of gay community organizing and activism. In films like *And the Band Played On...* (Roger Spottiswood, 1993), *Philadelphia* (Jonathan Demme, 1993) and *It's My Party* (Randy Kleiser, 1996), HIV/AIDS experiences of gay men were portrayed as inextricable from gay life within a community context during the initial years of the epidemic in the 1980s in the west. Unlike these film, *Nikhil* foregrounds HIV/AIDS by addressing questions of etiology, social injustice and public health through the issue of transmission.

Throughout the film, Nikhil is the center of concern, first as a swimming champion and then as a vulnerable HIV figure who, once abandoned by his parents, remains in the care of his sister Anu and lover Nigel who advocate for Nikhil's cause legally and socially. Nikhil first learns of his condition when he receives a phone call from his family doctor. The meeting with the doctor establishes the possible etiological context for his HIV infection through a series of questions posed to Nikhil. After ruling out blood transfusion and intravenous drug use, it is on the question of unsafe sexual practices that Nikhil hesitates, and after being assured of confidentiality, hesitantly admits to having engaged in sexual relations with girls. Nikhil's struggles as an HIV-positive person drive the narrative, which moves through a series of institutional

responses to his condition as well as including scenes featuring the social awareness campaign launched by his sister and lover who are presented as championing his cause.

The meeting with the doctor serves as an ominous prelude to the remainder of the scenes in which institutional authorities such as the police and medical staff are reduced to caricatures of cruelty. For instance, in a scene in which Nikhil is asked to report to the police station, the police inspector accuses Nikhil of using his public status as a state swimming champion for sexual liaisons with girls. He demands a list of all the girls he has been with and orders his dispatch to the hospital for a medical check-up. While traveling in police custody to the sanatorium, the police constables jeer at Nikhil and speculate about his sexual practices with men and women both.

At the hospital as he is escorted by four constables, the nurses and doctors look askance at him and also comment on his questionable sexual practices. The doctor warns the nurses to wear gloves before touching Nikhil. Another doctor offers that Nikhil should be sent to Bombay immediately to mitigate the risk of transmission to the staff and other patients. A nurse concurs with an after-remark, "This illness wasn't in Goa ever before," following which Nikhil is ordered to be locked in the sanatorium, an uninhabitable place in total disarray littered with broken furniture and bottles and infested with rats. The only water supply is shown to come from an unclean tap that makes Nikhil sick as soon as he drinks from it.

The nurse's pithy remark about the newness of HIV in Goa subsumes a complex politics of location in relation to HIV transmission and its attendant geography of contagion. The 1980s provincial Goa serves as an ideal backdrop for anxieties of HIV transmission as well as the various social, cultural and institutional responses to Nikhil's

positive status that play out through different spaces in the film. Goa's coastal location has made the state a popular tourist destination for beach vacations. The remark's medico-moralist undertones coincidentally carry the resonances of the legal-rationalist anxieties of the Bombay High Court judges who defended the Goa, Daman & Diu Public Health Act, 1985, in their verdict in the Lucy D'Souza case that challenged D'Souza's quarantining. In the judges' reasoning, Goa's tourism rendered it vulnerable to the influx of HIV-ridden western bodies, revealing its particularly delicate geographical susceptibility. Indeed, such reasoning not only rehashes the commonplace Indian myth of HIV/AIDS as a western disease, as an analog to homosexual practice but also maps the viral transmission spatially, setting up the analogy of HIV's entry into the body on to the HIV positive bodies entering the tourist space.

Within the narrative, Goa's physical spatiality operates on a local scale in two important scenes that establish the threat of contagion. A scene in which an HIV-positive Nikhil enters the swimming pool, causing all other swimmers to hastily clear out is particularly important. The scene makes evident the general public ignorance and lack of informed discourse about HIV/AIDS at the time in Goa. The space of the TB sanatorium where Nikhil is isolated – rodent-infested, unsanitary and without proper drinking water – further reinforces the discursive vacuum within which Nikhil is transformed into a medico-legal subject at the same time.

This regional politics of location, signifying both remote ignorance and also its vulnerability to western perversions, remains immanent, and places the film in vast distinction to the geographical narrative of HIV/AIDS films like *And the Band Played On...* (Roger Spottiswood, 1993). This film's narrative stages a mapping exercise to trace

the transmission of HIV, taking the form of a medico-cultural geography that entails tracking the movements of specific infected individuals. The film also sets up a dichotomy between America and Africa, with America figured as the developed world and the unwitting victim of invading foreign bodies that bring in HIV, and Africa, the place where the virus is believed to have originated, and to which, the former country plays the part of a savior through the development of a vaccine. This narrative recalls the highly publicized and dramatized case of Gaetan Dugas, a Canadian flight attendant, who was globally cast as the Patient Zero, who infects others (in some accounts on purpose). Yet Dugas's own HIV infection is only explained through his itinerancy and promiscuous behavior.<sup>258</sup>

*My Brother...Nikhil's* politics of location also functions through accounts of societal and cultural responses to Nikhil's condition, reinforcing the film's portrayal Goa as a provincial locale. Nikhil's parents are ostracized in the local club, a nighttime anonymous attack is made on sister's Anu's house and homophobic graffiti is plastered on his lover Nigel's house. These scenes complement the geography of contagion, unleashed through the institutional responses of apprehension, prevention and isolation that fill the plotlines. The discursive vacuum within which Nikhil emerges as a medico-legal subject produces the critical juncture in the narrative, at which the film suddenly launches into its HIV/AIDS advocacy mode, revealing its apparent mission, in an explicit public service announcement style (PSA) address to the audience.

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<sup>258</sup> Gabriele Griffin, *Representations of HIV/AIDS: Visibility Blue/s* (Manchester: Manchester University Press, 2012), 101.

A scene of Nigel and Anu's visit to the sanatorium where Nikhil is isolated is particularly salient in its setting up of the necessary medical aspect of testing and care. Nigel, as Nikhil's lover is urged to get tested. This is a key moment when HIV/AIDS advocacy draws upon a PSA style address. Nigel informs the film audience of his negative results in a clarifying tone: *People think it's a homosexual disease. I was all clear. Our relationship had nothing to do with the disease. I was not HIV positive.*

The emphasis on multiple etiologies of HIV transmission in the film's narrative becomes part of "Free Nikhil," a public campaign designed to demystify HIV transmission. The PSA style narration to drive the HIV/AIDS advocacy mission moves the film beyond the narrower focus on Nikhil as the individual subject of inhuman treatment, rendering him iconic of a greater cause. It also encapsulates an educational information campaign about the sources of HIV transmission and the need for a compassionate approach towards anyone affected by the condition inside a narrative about an individual character who is figured as without contact with a larger gay and/or HIV community, movement or context. The advocacy mission proceeds with affective overtones of moral interpellation of the audience in constructing a universal humanitarian message without figuring a collective of human subjects for whom that message would be pertinent.<sup>259</sup>

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<sup>259</sup> The concepts of moral spectatorship and empathy within psychoanalytic theories of film, affect studies and phenomenology would be relevant here. However, they are beyond the scope of this chapter. See, Lisa Cartwright. *Moral Spectatorship: Technologies of Voice and Affect in Postwar Representations of the Child* (Durham & London: Duke University Press, 2008).; Jane Stadler . "Cinema's Compassionate Gaze: Empathy, Affect, and Aesthetics in *The Diving Bell and the Butterfly*," In Jinhee Choy & Mattias Frey eds. *Cine-Ethics: Ethical Dimensions of Film Theory, Practice and Spectatorship* (New York: Routledge, 2013).



The PSA mode of address accomplishes the HIV/AIDS advocacy mission not just within the film's textuality but also in its extra-textual framework. As a Bollywood film produced and distributed by the film industry's biggest commercial production house, Yash Raj Films, *My Brother...Nikhil* faced significant funding constraints. It was initially without any producers willing to take on the risk of its controversial subject matter. In a marketing ploy to promote the film and its release, several Bollywood film actors, directors and celebrities came together in a PSA with a view to bind its potential audiences in the role of morally responsive spectators. The PSA they produced, which aired on Indian television prior to the film's release in 2005 posed a simple question to its viewers: *I care about my brother Nikhil...Do you?* The direct address to viewers interpellates them individually into the role of empathetic spectators through a public appeal towards an ethics of care.

This direct address also positions audiences as what Leshu Torchin calls "witnessing publics," audiences that enable individual spectators recognize themselves as subjects who must take responsibility and action for the suffering of others. In her book *Creating the Witness: Documenting Genocide on Film, Video and the Internet*, Torchin explores a range of audio-visual media that render visible human rights violations and injustice in incidents of genocide to assess how effectively these media interpellate viewing audiences. *My Brother...Nikhil's* documentary style storytelling then instantiates Torchin's observation about documentary and docudrama, forms that in such instances

serve a witness function by staging a narrative of suffering to summon a politically, socially and morally engaged public.<sup>260</sup>

Finally, the film's politics of location must also be considered through its global circulation and screenings in theaters, universities and film festivals in different national contexts, towards its function of summoning transnational witnessing publics. In an online story, Sandip Roy, a San Francisco-based social commentator, offers the testimony of an HIV-positive Mexican man who went up to the film's director Onir and thanked him for making a film about family, at the film's screening in the Castro Theater in San Francisco. Roy also describes his own reaction of weeping by the end of the film with raw and red eyes, further drawing upon his personal experience of coming out in the late 1980s India, describing it as lonely.<sup>261</sup> These affective responses must be seen as forming a much larger constellation of a transnational spectatorship of diasporic queer Indians, families struggling with their children's sexuality and HIV positive individuals in various contexts who are moved into forging a personal bond with the film's portrayal of an HIV-positive gay man's trials and tribulations. The practices of becoming a viewing witness within the spaces of the theater, the university or the film festival, then produces scenes of media appreciation that operate within a moralizing economy of transnational humanitarianism where a critical spectatorial media engagement necessarily summons affective, political and personal reactions and ideas.

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<sup>260</sup> Leshu Torchin, *Creating the Witness: Documenting Genocide on Film, Video, and the Internet* (Minneapolis: University of Minnesota Press, 2012), 3.

<sup>261</sup> Sandip Roy, "Bringing It Home: Indian Film Tackles HIV, Gay Life with Family Tale," News America Media, June 24, 2005.  
[http://news.newamericamedia.org/news/view\\_article.html?article\\_id=fa0101b29f8103276d765f83fc524aa0](http://news.newamericamedia.org/news/view_article.html?article_id=fa0101b29f8103276d765f83fc524aa0)

Despite its protagonist's homosexuality, the film, in its AIDS advocacy mode, stages different iterations of the same question about HIV transmission posed by medical authorities, the police and even Nikhil to himself in moments of introspection: Where did it come from? The film's discursive labor to mitigate the etiological link between pathology and sexuality remains a self-conscious preoccupation, one that is partially displaced onto its concern with dispelling the popular mythology of HIV/AIDS transmission. Yet the film bears a relationship to the human rights discourse of the Delhi High Court Naz verdict of 2009, in which one of the primary rationales for decriminalizing same-sex conduct in private was the susceptibility of the Indian men-who-have-sex-with-men (MSM) to HIV. This film is one instance within a range of texts in the mediascape of the period that publically marked the emergence of the pathologized subject of sexuality in need of state intervention.<sup>262</sup>

Nikhil's queerness isn't centrally addressed in his encounter with the medical authorities and the police. However, he is certainly derided by them for having engaged in illicit sexual conduct with men or women as a possible reason for his infection. That sexual practice, whether homosexual or heterosexual, implicates Nikhil as a legal subject under the state's repressive power then transforms him into a medical subject as well. This condition then gestures towards the need for a care-centric approach to dealing with individuals made vulnerable at the intersection of HIV and homosexuality. The film emphasizes the exteriority of Nikhil's condition – HIV, physical decline, quarantine, but only minimally addresses his queer interiority and psychological health.

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<sup>262</sup> Kaustav Bakshi & Parjanya Sen, "India's Queer Expressions On-Screen: The Aftermath of the Reading Down of the Section 377 of the Indian Penal Code," *New Cinemas: Journal of Contemporary Film*, 10 No. 2 & 3 (2012): 167.

In its bid to foreground HIV as its primary object of moral interpellation and its advocacy mission to represent homosexuality as mostly incidental to its protagonist's condition, the film, only partially succeeds in distancing itself from its subconscious politics of identification within the Foucauldian repressive hypothesis. The moments of unresolved suspicion on Nikhil's part as to how he became infected as well his boyfriend Nigel's constant refrain that AIDS is not a homosexual disease, not only deny access to Nikhil's queer interiority but also constitute the incitement to discourse on the question of sexuality that is not entirely displaced.<sup>263</sup>

As a queer film that carefully crafts a gay relationship without an explicit portrayal of physical intimacy between the two gay men – no kiss or bedroom scene – mainly to cater to the sensibility of Indian audiences<sup>264</sup>, it is the HIV/AIDS narrative that functions as an alibi for the management of distance or proximity between the lovers. The film, in other words, becomes intelligible as an AIDS film predominantly in the context of the gay relationship that it stages as a site of care, alternative to the family that is reconsolidated in the aftermath of the tragedy in the film's climax. As a queer film recognized and appreciated for its sensitive portrayal of same-sex relations in Bollywood, the film's reception is structured by yet another absence – of stereotypical portrayal of gay sexuality in Indian cinema as well as the public outrage and protests against homosexuality as not part of the Indian culture – that aligns unequivocally with the cultural logic of the legal affidavits filed by the parents of LGBT children in the Indian Supreme Court with a view to defend the 2009 Delhi High Court judgment of

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<sup>263</sup> Michel Foucault, *The History of Sexuality Vol. 1* (New York: Vintage, 1978).

<sup>264</sup> Sengupta, *Gay-Themed Film*, 2005.

homosexuality's decriminalization. The negotiation of homosexuality and HIV within the familial in the film then instantiates a particularly Indian cinematic habitus, one that has been predominant in narratives of heterosexual romances and family relationships. It is to the second order of absence signaled by the film's reception as a sensitive queer text that this chapter turns.

### **My Brother...Nikhil – Negotiating queerness within the Indian family**

As the story of an HIV-positive only son in a middle-class Indian family in Goa, *My Brother...Nikhil* portrays the classic conundrum of a male-centric Indian society whose hopes and aspirations hinge on the son's wellbeing and progress. In its departure from the norm of the queered themes of heterosexual male-bonding integral to romance in Hindi cinema,<sup>265</sup> as well as through a negotiation of the phobic and the erotic elements in the queer subplots of the Bollywood films in the 21<sup>st</sup> century,<sup>266</sup> *My Brother...Nikhil* was celebrated for its sensitive portrayal of the negotiation of family and same-sex relationships in the face of tragedy.<sup>267</sup> The film's title prioritizes the familial over same-sex romantic relations. But nonetheless it opens up questions around not just gay sexuality but also conventional masculinity, social normativity and universal morality.<sup>268</sup>

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<sup>265</sup> Ghosh, *Queer Pleasures*, 2002.

<sup>266</sup> Shohini Ghosh, "False Appearances and Mistaken Identities: The Phobic and the Erotic in Bombay Cinema's Queer Vision," in *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*, eds. Brinda Bose & Subhabrata Bhattacharya (Calcutta: Seagull, 2007), 417-436.

<sup>267</sup> Roy, *Bringing it Home*, 2005.

<sup>268</sup> Ghosh, *False Appearances*, 2007.

Shohini Ghosh observes that the film's documentary style storytelling in which characters directly address the audience before entering a flashback allows the narrative to build a "stylistic affinity to an entire tradition of subaltern narratives." As a form marginal to mainstream cinema, this documentary style itself "locates the marginal protagonist of Bombay cinema – the homosexual man – at the center of the narrative."<sup>269</sup> John Tagg's historical insight into the documentary mode of representation in photography also captures the film's humanistic appeal that transforms "the flat rhetoric of evidence into an emotionalized drama of experience that works to effect an imaginary identification of viewer and image, reader and representation..." and speaks to those with relative power – the audience – about those positioned as lacking, as the 'feminized' other.<sup>270</sup>

Despite the criticism from gay activists that the film toned down its gay content by desexualizing the relationship between Nikhil and Nigel to make it mass-market friendly,<sup>271</sup> the portrayal of their relationship opens up the space for the on-screen negotiation of conventional masculinities, social pressure to pass as heterosexual as well as homophobia within its queer plot. Despite the subsuming of homosexuality in heterosexual family relationships, HIV/AIDS advocacy and the human rights tenor, the film remains a salient queer text on a spectrum of queer visibility in a Bollywood whose previous queer, gender non-normative characters have been cast as ambiguous side characters or stereotypical caricatures.

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<sup>269</sup> *Ibid.* 432.

<sup>270</sup> John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (Amherst: University of Massachusetts Press, 1988).

<sup>271</sup> Roy, *Bringing it Home*. 2005.

The opening sequence of Nikhil's sister Anu (Juhi Chawla) and the mother Anita Rosario Kapoor (Lilette Dubey) reminiscing about Nikhil sets the tone of its story as first and foremost a family tragedy. It also establishes the conventional middle-class context of Nikhil's sexuality, masculinity and parental expectations that stand belied later on in the narrative. In the opening sequence, the mother emotionally gazes at a painting Nikhil made at age 8 and calls him "my little boy," adding that her husband never liked her calling their son "a little boy." This sentiment is again evident when the father Navin Kapoor (Victor Banerjee) accuses the mother of making Nikhil a sissy when she sympathized with her son for losing in a swimming competition. Navin's reminiscing about his son's promise as a sportsman in relation to his illness and sexuality remains regretful, verging on partial denial of the past.

Throughout the narrative in various instances, Nikhil is prioritized over his sister as his successes as a sportsman are celebrated and his failures given more attention – until the point of HIV infection. The onus of his father's expectations becomes the burden under which he crumbles. Nikhil turns to painting and teaching music during the years of his health's decline with the onset of AIDS. In the film's climax, Nikhil's mother expresses regret at not previously recognizing his artistic side. This belated recognition tacitly functions as an indirect acceptance of her son's sexuality.

Shohini Ghosh also observes that Nikhil's "sporty muscularity" allows him to pass as heterosexual, an impression that enables the audience to reassess their criteria for classifying men as gay or straight.<sup>272</sup> The film opens up the space for the negotiation of

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<sup>272</sup> Ghosh, *False Appearances*, 432.

conventional masculinity assertively represented by Navin with his assumptions of Nikhil's compulsory heterosexuality.<sup>273</sup> Nikhil's struggles with accepting his feelings are most evident, almost to the point of coming out, in the scenes with his sister Anu with whom he shares his frustrations about parental pressures.

The pressure on Nikhil becomes more pronounced when it is revealed that Navin had fixed Nikhil's marriage with his friend's daughter Leena (Dipanita Sharma). An awkward kiss initiated by Leena on a resisting Nikhil leads to a scene of confrontation with Nigel, a point in the narrative where their same-sex relationship is made evident.

Within the scheme of sequences in the film, the imperative of marriage for Nikhil gets resolved through the onset of HIV, following which he is thrown out of the house and left with no choice but to move in with Nigel both before and after his isolation in the TB sanatorium. As the film displaces the biological family as the primary site of care, it does not radically refigure the space of care in the alternative family formed by his sister and boyfriend's support. The conflict in the narrative suggests a generational rift both in the acceptance and concern for HIV and homosexuality. The parents' departure from Goa in the face of social ostracization as opposed to the sister's adamant perseverance to ensure legal and social justice for her brother as well as the boyfriend Nigel's unconditional commitment to Nikhil demonstrates the contested nature of the family rooted in biological notions of blood and lineage. It also marks the emergence of what Kath Weston has identified as gay kinship that is not unlike the biological family unit but enjoys no legitimacy outside the predominant biological order of nature and the law in

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<sup>273</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).



mainstream society.<sup>274</sup> Absent from this alternative reconfiguration of the biological family is also the broader LGBT community space of response to HIV/AIDS that plays a more prominent role in the western media and activist discourses.

Nikhil and Nigel's relationship is made more pertinent with the discovery of Nikhil's HIV status that results in their cohabitation. Their physical intimacy is only subtly referenced through dialog. In the sanatorium, upon being urged to get tested, Nigel snaps and suggests that it would make no difference because it's already too late.

However, it is in the second half of the narrative that the film makes the queer relationship more conspicuous through Nigel's flashbacks that demonstrate the negotiation of the closet as well as Nikhil's decline with the onset of AIDS and death in the climax. The only other queer space aside from Nigel's home where he becomes Nikhil's primary caregiver is the bar where the two meet, as told by Nigel in a flashback, when he first noticed him surrounded by women and felt that he wasn't really interested in them. As a queer text, the film cautiously treads the territory of labels in its bid to realistically capture the ignorance and phobia surrounding homosexuality in Goa. The word "gay" is uttered only once, as is the term "homosexual" with a few other references to the order of nature. However, it is in its use of the term "faggot" sprayed on Nigel's house wall after he returns home one evening after campaigning for Nikhil that the film resorts to a global vocabulary associated with sexual identities within the predominantly provincial Goa of the late 1980s/early 1990s.<sup>275</sup> The film's hitherto circumspect approach

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<sup>274</sup> Kath Weston, *Families We Choose: Lesbians, Gay, Kinship* (New York: Columbia University Press, 1991).

<sup>275</sup> R. Benedito Ferrão, "Gay Globalization Via Goa in *My Brother...Nikhil*," *Journal of Creative Communications*, 6 no. 1-2 (2011): 141.

to portraying homosexuality then haphazardly renders visible a seemingly misplaced expression of homophobia in a narrative that patently circumvents the politics of naming and labeling. In other words, as a queer text that strives to subsume homosexual intimacy within an ethos and pathos of care in relation to HIV and its AIDS advocacy aimed at invalidating an etiological link to sexuality, the film's representational agenda remains punctuated with discursive slippages that do not effectively allow sexuality to be extricated from pathology. The choice of the term "faggot", while a minor instance of social homophobia in the narrative, serves to vocalize a more global articulation of sexuality rights purported to end homophobia and discrimination.

Set against the film's overt advocacy mission of dis-identifying AIDS as a gay/homosexual disease are Nikhil's unresolved suspicions about how he became infected. Nikhil's confusion about the cause of his condition persists right from his meeting with the doctor where he uncomfortably confesses to physical relations with girls but appears tentative up until his disagreements with Nigel over the question of marriage. In a scene where Nigel badgers him about his double standards and the importance of taking a stand in life, Nikhil overreacts and lashes out at him. When he calms down, he asks Nigel if he had been with anyone else (physically). Nigel is taken aback and Nikhil apologizes and says he just wondered.

Nikhil and Nigel both represent a departure from the conventional patriarchal masculinity embodied by Nikhil's father, Navin, and as Ghosh observes, the two are able to pass as heterosexual.<sup>276</sup> However, the narrative situates them on two opposite ends of

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<sup>276</sup> Ghosh, *False Appearances*, 433.

the spectrum of self-identification, as embodiments of queer interiority and exteriority. Nikhil's dependence on his family and his inability to come out until the discovery of HIV infection casts his queerness in interior terms. The viewers never get full access to his confusion about how he became infected despite his constant preoccupation with the question. Nigel, on the other hand, upon his return home to Goa from the diasporic west, arrives as the "transnational messenger of gay rights" who constantly exhorts Nikhil to come out and accept his sexuality, especially to his parents.<sup>277</sup> Nigel's negotiation of his sexuality is exteriorized, aligned with visible self-identification when he pressures Nikhil to come out, with bodily health in relation to his HIV negative status and his HIV/AIDS rights-based advocacy.

The denial of access to Nikhil's queer interiority remains a narrative priority throughout the film. In an intimate moment following his sister Anu's wedding, Nikhil's and Nigel's banter leads Nikhil to ask his lover, *You never asked me how I got this disease?* Nigel's responds, *Doesn't matter...I won't be able to leave you.* The following scene immediately shifts to human rights advocacy when Nigel addresses the audience to emphasize the irrelevance of the etiology of infection. What matters in Nigel's appeal to the audience is the inhumane treatment meted out to Nikhil. In a bid to prioritize HIV-based discrimination over the etiology of infection in this final moment of addressing the irrelevance of the mode of transmission, the film contextualizes the denial of Nikhil's queer interiority through its subsumption within the family. Even as HIV undermines the biological family and casts the queer family as a site of care, the two families are united

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<sup>277</sup> Ferrão, *Gay Globalization*, 143.

in a poignant moment in the film's climax when after Nikhil's death, a resigned Navin accepts Nigel as his own son.

In prioritizing discrimination over etiology, family over sexual identity and exteriority over interiority, the film aligns with a particular logic of cultural visibility and naturalization of homosexuality within the familial in the Indian context. Especially relevant is the emergence of the family as a stakeholder within the legal narratives pertaining to the Section 377 Naz case (2009) that was reviewed in the Supreme Court of India in 2012. The parents of LGBT children who filed petitions to defend the Naz decision in the Supreme Court elaborated in their documents, the process of negotiation with their children's homosexuality, in the Indian context. In making the social and the cultural coextensive with the natural, the parents describe their initial shock and dismay at the knowledge of their children's sexuality mainly due to the fear of social and legal persecution. Introducing their children as highly qualified and educated individuals who contribute to society and are well versed in Indian culture with their knowledge of classical music, dance, languages and literature, the parents indict the law for criminalizing their sexual orientation and creating an atmosphere of social and cultural alienation for them.

Similarly, the film's indictment of the public health law under which Nikhil is quarantined and criminalized, the Goa Public Health Act, 1985, showcases an Indian family's trials and tribulations in coming to terms with their son's sexual identity and HIV status, unveiling a cultural logic of negotiated acceptance within the familial space, not dissimilar to the Naz verdict.

As a queer text that functions as an extension of the legal representation of the Dominic D'Souza case and HIV-based discrimination in Goa, the film's multivalent textuality is constituted by a third genre of public appeal that pertains to the global human rights context of its release in 2005, just four years before the Delhi High Court judgment that decriminalized homosexuality in 2009. The next section in this chapter analyzes the film's discursive work of representation through its circulation as a human rights text based on the real life story of the late Dominic D'Souza whose life and activist legacy are nowhere acknowledged in the film.<sup>278</sup>

### **Right to Privacy and Public Subjecthood: Human Rights in the Times of Naz**

In one of the flashbacks in *My Brother...Nikhil*, the father Navin directs a question at the audience that interrogates the mandate of the politics of naming and identification that the film strives to ropewalk – a question that also perhaps reveals the film's unconscious politics of disavowing the late Dominic D'Souza's story. Navin asks: *Now that Nikhil is gone, why do they want to label him gay? He had many girlfriends and was supposed to get married...he was a normal boy.* Beyond the normal paternal anxiety about his son's alleged homosexuality, Navin's question, especially in the context of the Naz judgment's right to privacy of intimate sexual same-sex conduct, is essentially a question about the privacy of those who become public subjects precisely through a violation of privacy. Put another way, what does the right to privacy mean for a public subject who comes into visibility precisely through a violation of the very privacy to

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<sup>278</sup> *Ibid.*

which the human rights attach in order to ensure justice? Once public through any form of representation, the subject never returns to a fully sanctified privacy. In this formation, privacy remains an absence, beholden to its violation to be concretely meaningful, and reinforced in its absence once within the ambit of publicly contested human rights.

As a human rights text, the film is structured by the most critical absence in its disavowal of the D'Souza story that lends the film's human rights subject matter credence. The disavowal transforms into a more profound absence (of privacy) when the film's fictionalization of D'Souza's story produces representational excess – that is, when he is referenced as an HIV positive *homosexual* man in the academic and popular literature surrounding the film. Nowhere in the original legal record of the 1989 Bombay High Court case, *Smt. Lucy D'Souza v. State of Goa and others* is the matter of D'Souza's sexuality addressed by the court, either independently or as linked to HIV. The public health law, by quarantining Dominic D'Souza in 1989, for the putative purpose of ensuring safety of broader public, physically removed the man to an unsafe, unsanitary and uninhabitable institutional place where his right to privacy and bodily integrity were revoked, therein constituting the first order of absence.

Even as the film's narrative is decontextualized of D'Souza's story, the post-production promotional textuality of the film accounts for its disavowal when actor Sanjay Suri who plays Nikhil, in an interview, clarifies that the film had to pass the censor board, which did not want any controversy owing to the use of D'Souza's story.<sup>279</sup> The funding constraints surrounding the film's production further mandated the

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<sup>279</sup> Thessa Mooij, "The New Bollywood: No Heroines, No Villains," *Cineaste*, 31 no. 3 (2006): 30.

mitigation of commercial risk by emphasizing the family rather than Nikhil and his lover in the film's promotional materials.

In striking a human rights chord in the narrative, the film represents three key moments from D'Souza's life pertaining to his illness and his experience as a legal subject of HIV. While D'Souza was fired from his job at the World Wild Fund for Nature (WWF) in Goa after being released from the sanatorium, a circumstance echoed when Nikhil finds himself in a similar predicament when he is expelled from the swim team and informed by the manager that no one in the team wants to work with him.

The second moment in the film that corresponds with D'Souza's life is based on a promise that he extracted from his lawyer, Mr. Anand Grover, the attorney who took up several HIV-related discrimination cases in the 1990s, and who would later represent the Naz Foundation's case about Section 377 in the Delhi High Court. In a letter to Dominic D'Souza published in a conference report by the National Human Rights Commission, India, Mr. Grover recounts D'Souza's promise that the lawyer would continue his work in the field of HIV litigation to ensure the rights of HIV positive persons, and in order to make the battle against the HIV pandemic easier.<sup>280</sup> The film translates this promise into a moment that foregrounds law's remedial powers to guarantee constitutional rights when Nikhil asks for a similar pledge from his lawyer Anjali to take his case on behalf of all those who are HIV positive, who have the right to lead a happy life. He further adds: *It's a constitutional right.*

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<sup>280</sup> "Report of the National Conference on Human Rights and HIV/AIDS," (New Delhi, November 24-25 2000).

Through its rights-based empowerment narrative, the film sets up an opposition between archaic laws such as the Goa Public Health Act of 1986 and the human rights based approach to litigation that has characterized the LGBT movements' challenge to sodomy laws across the globe. In juxtaposing the repressive and the empowering aspects of the law, the cinematic representations of the legal remain diffuse in the absence of any courtroom scenes. On the one hand, the law's power acts through different networks of authority invested in the medical staff and the police, while on the other, it is also embodied in the lawyer who represents a reinvestment of that power through a human rights approach to empower individual subjects or a class of legal subjects.

The third instance of the film's mimetic relationship to D'Souza's life pertains to the material legacy of his activist work that still continues in Goa through the organization he founded, called Positive People.<sup>281</sup> Nikhil and Nigel founded a similar organization in the film, called "People Positive," on behalf of the rights of people living with HIV.

Through the depiction of three salient factual details of D'Souza's life, the film seeks to fulfill its moral promise of human rights advocacy, however, its representational politics of the omission of D'Souza's name within the story – no reference within its text – does not entirely erase the real. Instead, the real is reconstituted through the cinematic representation when D'Souza, as a legal subject of HIV, is recast as an "HIV positive homosexual" in the extra-cinematic discourses that ensue from the film, always with the film as its source text. The film's discursive framing of HIV/AIDS through

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<sup>281</sup> <http://www.positivepeople.in/>



homosexuality in effect was projected as a queering of D'Souza, the fiction paradoxically constituting a public sexual status that he himself probably avoided claiming throughout his life.

We see this in the scholarly writing on the film, for instance, Subir Kole in an essay on queer globalization in relation HIV/AIDS and the Indian government's funding of HIV/AIDS outreach, discusses the repressive public health measures taken to control HIV/AIDS in India upon the reports of first few cases of the infection:

Considering it immediately as a "foreign disease," the government adopted a repressive AIDS Control Policy (1989) through which it outlined "contact tracing," testing of sex workers, injecting drug users, and other highrisk groups and adoption of a quarantine approach if found HIV-positive to protect larger population at risk. Consequently, sex workers, drug users and MSMs were forcibly tested and jailed for several months in Chennai, Mumbai and Goa. For example, in 1989, Dominic de Souza, a World Wildlife Fund employee and *a gay* on whose life Bollywood film *My Brother Nikhil* (2005) was produced, was kept in a solitary confinement for over a month by Goa government (*italics mine*).<sup>282</sup>

Kole illustrates D'Souza's case as an example, not just of the government's repressive public health measures, but also of the most HIV-susceptible groups such as the sex workers, drug users and MSM, referring to D'Souza as a "gay" man.

Similarly, in her analysis of three AIDS-themed movies, Louise Bourgault states that *My Brother...Nikhil* (2005) is based on a real incident that happened to an HIV positive homosexual, Dominic D'Souza in Goa<sup>283</sup> completely missing the point that the

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<sup>282</sup> Subir Kole, "Globalizing Queer? AIDS, Homophobia and the Politics of Sexual Identity in India," *Globalization and Health*, 3 no. 8 (2007): 1.

<sup>283</sup> Louise M. Bourgault, "AIDS messages in three AIDS-themed Indian movies: eroding AIDS-related stigma in India and beyond," *Critical Arts: South-North Cultural and Media Studies*, 23 no. 2 (2009): 171.

film was a fictionalized text.

Other references to D'Souza's story outside of the film's discussion include Benjamin Law's book that charts a cartographic survey of the queer cultures in various Asian countries including Indonesia, Thailand, China, Japan, Myanmar, Malaysia and India. As an ethnically Asian, Australian citizen, the author, in his self-proclaimed gonzo anthropological style, narrates his touristic return to Queer Asia as his homeland through the lens of a diasporic queer subject, who he suggests, is able to traverse seven different Asian countries and produce insights about their queer cultures.<sup>284</sup>

In his discussion about India's gay culture, Law describes a meeting with Mr. Anand Grover, D'Souza's lawyer and also the attorney representing the Naz Foundation's Section 377 case in the Delhi High Court. In summing up Mr. Grover's HIV and sexuality rights based litigation and advocacy work, Law references the Dominic D'Souza case as the starting point of the lawyer's foray into human rights representation. Law makes sure to clarify that Anand Grover isn't gay, however he refers to Dominic D'Souza as "a gay man who was fired after being diagnosed as HIV-positive."<sup>285</sup> Perhaps from the author's own gaze as a liberated Western queer subject,<sup>286</sup>

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<sup>284</sup> Benjamin Law, *Gaysia: Adventures in the Queer East*. (Victoria, Australia: Black Inc., 2012).

<sup>285</sup> *Ibid.* 248.

<sup>286</sup> The author's description on the back-page of his book reads: "Benjamin Law considers himself pretty lucky to live in Australia: he can hold his boyfriend's hand in public and lobby his politicians to recognise same - sex marriage. But as the child of migrants, he's also curious about how different life might have been had he grown up in Asia. So he sets off to meet his fellow Gaysians. Law takes his investigative duties seriously, going nude where required in Balinese sex resorts, sitting backstage for hours with Thai ladyboy beauty contestants and trying Indian yoga classes designed to cure his homosexuality. The characters he meets - from Tokyo's celebrity drag queens to HIV - positive Burmese sex workers, from Malaysian ex - gay Christian fundamentalists to

a gaze directed at rendering transparent the complex realities of “Gay Asia,” this epistemological quest situates HIV, sexuality and the law on the same scale of human rights violation without discerning the specificity of the individual experience of the specific violation.

However, it is also worth noting that most other references to Dominic D’Souza, outside of the film’s decontextualizing of his story (its constitution of him as an absence), are mostly concerned with the history of HIV/AIDS related work in non-western contexts – but not without a gesture to the register of gay sexuality. For instance, Dennis Altman, the Australian scholar and gay rights activist, who has written extensively about the globalization of LGBT movements, sexuality and HIV/AIDS, in his book of 2013 reflects on how the AIDS epidemic became his pathway into “gay Asia,” specifically through his involvement in the founding networks of HIV/AIDS and sexuality based mobilization in South-East Asia. In the context of narrating his journey into “gay Asia,” Altman recounts Dominic D’Souza’s story of incarceration in a TB sanatorium, relating how, following his release, D’Souza founded India’s first People Living with AIDS (PLWA) group despite enormous prejudice and discrimination from all levels of the government. Even as Altman steers clear of referencing D’Souza’s sexuality, he situates his activist legacy within the same context as his entry into “gay Asia.”<sup>287</sup>

Also noteworthy is a public discussion on a Yahoo! online forum, *HIV & AIDS analysis India eJournal*, on Dominic D’Souza and *My Brother...Nikhil*. A message titled,

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Chinese gays and lesbians who marry each other to please their parents - all teach him something new about being queer in Asia.”

<sup>287</sup> Dennis Altman, *The End of the Homosexual?* (Queensland: University of Queensland Press, 2013), 121.

“Dominic D’Souza was not a homosexual” posted by the user AIDS-India reads:

While the film ‘My Brother Nikhil’ has won wide acclaim for its portrayal of the trauma and tribulations of an HIV positive and later an AIDS-infected swimming champion, it still has ended up causing extreme hurt and agony to his close friends to Positive People, the organization he founded. Though no protests have been heard, there is dismay that Nikhil has been portrayed as a homosexual when Dominic D’Souza was far from being one.<sup>288</sup>

Another online column titled, “Stories from a Crisis” on infochangeindia.org by Goa-based noted columnist Jerry Pinto cites a *Newstrack* video magazine story featuring an interview with Dominic D’Souza’s mother in 1992, the year of Dominic’s death. In the story titled “A Positive Life, a Moving Death,” his mother’s candid response about his HIV infection when she says, “He had sex with some woman in Germany,” is rebutted by Dominic’s own views on the etiology of infection. He had previously contended that the cause of HIV, whether through blood transfusion, an infected needle or sex, wasn’t important.<sup>289</sup>

Even as these contested facts about Dominic’s life mingle with the fictional uses of his story in the film, the veracity of D’Souza’s sexuality remains a moot point. However, the film’s mediation of his life elucidates the discursive mechanisms through which human rights based claims and assertions come to occupy their publically available and malleable subjects. The argument thus far has, with an analytical eye on the privacy

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<sup>288</sup> “Dominic D’Souza was not a Homosexual,” *HIV & AIDS Analysis India eJournal*, Online Yahoo Group. (April 23, 2005). <https://groups.yahoo.com/neo/groups/AIDS-INDIA/conversations/topics/4501>.

<sup>289</sup> Jerry Pinto, “Stories from a Crisis,” *Infochangeindia.org*. <http://infochangeindia.org/hiv-aids/media/stories-from-a-crisis.html> . Accessed May 3, 2015.

discourse in relation to sexuality in India, attempted to trace the text of the film within the context of the real story it mediates to demonstrate the subtle slippages in human rights advocacy whose violated subject is produced through representational excess.

The Bombay High Court legal case documents the rationale for the violation of D'Souza's rights by the State of Goa owing to his criminal HIV positive status under the public health law, present-ing him in the legal archive as a subject of state power that disciplines his body through solitary confinement and isolation from public contact.<sup>290</sup> The film, *My Brother...Nikhil*, re-presents D'Souza's story by absent-ing him from the narrative that is still credentialed by D'souza's human rights experience and activist legacy. It portrays HIV within the context of sexuality, with the effect of reconstituting D'Souza as a human rights subject through a gesture of empowerment towards both pathology and sexuality. D'Souza's legal subjecthood and cinematic absence translates into the presence of his sexuality without an archival trace or its affirmation in D'Souza's own voice or words.

The conclusion of this essay addresses the tension between the real and the representation through D'Souza's story as an index of the right to privacy that mediates the absence and the presence of a violated subject who, upon stepping into public visibility for justice, cannot erase the traces of their public presence.

## **Conclusion**

The concept of representation has a long history of feminist, queer and political

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<sup>290</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977).

critique.<sup>291</sup> As a modality of presence tasked with rendering the real, or the truth visible, reckonable and palpable, it guarantees nothing and produces its own excess and set of meanings embedded in discursive paradigms that produce truth-effects. The materiality of representation abounds in idioms of visual access such as exposure, presence and identification while also performing their obverse through absence, invisibility and as Roland Barthes has noted about photographs, death.<sup>292</sup> The representation's ostensible promise of making presence materially reckonable enables the human rights commitment to justice with the common objective of empowerment. Human rights politics then becomes a form of visibility politics that equates being publicly visible with being empowered towards the attainment of justice and parity.

The paradox suggests itself: The right to privacy remains at the core of modern sexual subjecthood, which the public human rights representation mediates through various forms of scrutiny at every level of justice-making from activist to judicial to political. The Dominic D'Souza story directs our attention to the ways in which public representations of injustice and discrimination subsume the narrative of privacy in rendering visible the subject as a human rights exemplar. The film's fictionalization of D'Souza's story through its AIDS narrative scripts his violation within formulaic human rights terms – HIV/AIDS and homosexuality – that exceeds the narrative of his presence within the legal record of the Lucy D'Souza case in which, to reiterate, the only relevant

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<sup>291</sup> See, Tagg, *The Burden of Representation*, 1988.; Liesbet Van Zoonen, Ed. *Feminist Media Studies* (London: Sage Publications, 1994).; Michael Warner. *Publics and Counterpublics* (New York: Zone Books, 2002). ; Judith Halberstam. *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York: New York University Press, 2005).

<sup>292</sup> Roland Barthes, *Camera Lucida: Reflections on Photography* (Hill and Wang, 1979).

question pertains to HIV and public health. Despite the film's disavowal of the story, it circulates through D'Souza's archival ghost whose lived experience authenticates the film's recognition and reception as moving the audiences towards responding as empathetic witnesses to humanitarian concerns. As D'Souza's story makes the film a credible, urgent representation of state violence, the film, in turn, re-makes the late D'Souza, subjecting him to its own politics of identification, by marking him visible within the historical paradigm of the conflation of HIV/AIDS and homosexuality.

The representational excess thus produced then reinforces the fraught nature of any form of representation itself. Peggy Phelan takes this form of ocular-centric politics to task when she observes that representation always conveys more than it intends and is never totalizing. Despite the excess, representation produces gaps and ruptures, failing to reproduce the real exactly. She further draws upon Judith Butler to explicate why the confusion between the real and the representational occurs:

The real is positioned both before and after its representation; and representation becomes a moment of the reproduction and consolidation of the real.<sup>293</sup>

This excess in the case of *My Brother...Nikhil* concerns not just the question of conflating sexuality and pathology in relation to the film's archival inspiration but also of privacy in relation to human rights subjects made public. The privacy argument, however, is somewhat oblique in this case. To reiterate, it isn't the veracity of D'Souza's sexual identity that is at stake in understanding the violation of his rights through the

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<sup>293</sup> Peggy Phelan, *Unmarked: The Politics of Performance* (London, New York: Routledge, 1993), 2.

film's mediation. It is the assumption about his homosexuality that the film discursively produces and validates, making queerness naturally co-extensive with HIV/AIDS while also mediating in part, D'Souza's circulation as an HIV positive homosexual in contemporary academic and popular accounts.

As a discursive truth-effect of the film's politics of identification, this assumption is wound up with the 21<sup>st</sup> century human rights discourses around non-normative sexualities and their legal criminalization in the Indian Constitution. The human rights discourses then constitute the broader context for the film's reception and certify its humanitarian advocacy mission and appeal for justice. As stated earlier, in the 2009 legal case for the amendment of Section 377 of the Indian Penal Code, one of the grounds for the petition to decriminalize homosexuality was the sodomy law's obstruction of Naz Foundation's HIV outreach work for men-who-have-sex-with-men (MSM), a medical category based on sexual behavior. Naz Foundation argued that the Indian MSM population was being driven underground given the criminality of their sexual behavior under Section 377. As a result, the organization claimed that it could not provide them with HIV-related healthcare, making them more vulnerable to contracting HIV.

The film's critique of the public health law that quarantined Dominic D'Souza for being HIV-positive in 1989 through his portrayal as a gay man in *My Brother...Nikhil* in 2005 is then also a gesture towards the indictment of the sodomy law, Section 377 of the Indian Penal Code. Despite decriminalization, homosexuality's continued pathologization in Indian society then resituates the Naz's right to privacy in relation to an ethical dilemma of privacy that the film, as a text wound up in multiple forms of appeals for public justice, itself poses and conflates. Through its politics of identification, the film



discursively performs an outing of Dominic D'Souza whose sexuality remains an absence in the legal archive never affirmed of his own volition.

Larry Gross's work on the historical course of outing as a political tactic employed by the gay liberationist groups in the US in order to claim public figures in Hollywood and American politics as gay or lesbian during the 1960s up to the years of HIV/AIDS outbreak in the 1980s and 1990s is relevant here. Gross's consideration of a range of questions pertaining to the outing of eminent and influential figures with respect to the right to privacy is especially instructive in parsing out the complicated intertwining of media ethics with the urgent context of AIDS and the gay liberation movement in the American context. In his meticulously detailed analysis of media news reports, scandals and celebrity gossip, he raises a fundamental question pertaining to the politics of outing by drawing up an imaginary continuum of privacy stretching from eminent politicians who pursue an anti-gay agenda to ordinary men and women who wish to lead private lives. In recognizing outing as a strategy that has led to the visibility of the gay and lesbian community, Gross offers a nuanced view:

...the real issue is not to decide *whether* outing is, by one view, always a violation of journalistic and human ethics or, by the opposing view, a necessary political weapon of an oppressed minority whose pervasive invisibility fuels their oppression...the real question...is *where* in the middle one draws the line, and *who* has the right to decide on which side of the line any particular instance falls.<sup>294</sup>

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<sup>294</sup> Larry Gross, *Contested Closets: The Politics and Ethics of Outing* (Minneapolis: University of Minnesota Press, 1993), 3.

Gross's argument and discussion are specific to the American context.

Nonetheless the emergence of a global consensus on LGBT rights and freedoms in non-western contexts has, in large part, been due to an ocular-centric politics of visible subjecthood and liberation from the repressive closet, forged by LGBT activism and advocacy. This is particularly true of India, where homosexuality even when provisionally decriminalized by the Delhi High Court in 2009 remains socially and culturally pathologized with the persecution of sexual minorities still extant. What does the legal right to privacy then mean in a context where despite its legal recognition, a gay or lesbian person still runs the risk of being exposed and open to discrimination, slander and persecution in society? Does privacy count as a right for a human rights subject who is dead and can no longer speak on his or her own behalf? The Dominic D'Souza case remains instructive for a cultural understanding of privacy as an absence made present through *My Brother...Nikhil*, a film that appropriates his story towards its own agenda of pursuing a politics of identification, consequently framing D'Souza as a queer subject.

The film's mediation of D'Souza's legacy as an HIV activist without any acknowledgement within its narrative complicates an understanding of privacy as a pre-existing right. It does so in relation to the story's broader politics of identification that equates pathology and sexuality despite its own effort to the contrary. Privacy violations as exemplified in Gross's work (for instance through the outing of eminent figures) are invoked as a violation and publically reconstituted as a right to privacy of personhood. However, in both frameworks of intervention, the outing as the violation and the invocation of the right to privacy as reparation, the violated subject is rendered progressively visible, without being reconstituted as an uncompromised privacy interest

again. In the vein of visibility politics and queer liberation, D'Souza as a human rights figure, through his cinematic representation, perhaps represents a prototype of violation, an archival presence affirming violence committed on a non-normative body. But as a privacy interest produced by the same discourse of human rights advocacy, he stands over-represented, extended from embodying pathology to inhabiting queerness, a modality of public circulation that can never be affirmed in D'Souza's permanent absence.

The next chapter continues this dissertations focus on privacy violations of non-normative sexual subjects constituted as publically legible queer subjects in the post-Naz period from 2009 to 2013. It tracks the applications of the Naz framework of rights before the Indian Supreme Court set aside the Delhi High Court decriminalization judgment with the view that Section 377 only criminalized unnatural sexual acts and not any sexual identities in particular.

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## Chapter 5

### **Public Absence, Legal Abstraction and Cultural Abstention: The Limits of the Right to Privacy for Indian LGBTQ Subjects Post-Decriminalization of Homosexuality in India**

The immediate national atmosphere after the 2009 decriminalization of homosexuality in India was one of jubilation among various LGBTQ groups in India and a feeling of safe public visibility as well as a perception of social acceptance of homosexuality.<sup>295</sup> This confidence and sense of security among these groups was attributable to the Naz right to privacy ruling that was the basis of decriminalization. I briefly revisit an understanding of the rights afforded by Naz here before this chapter's examination of the two nationally prominent cases of privacy violations that followed the provisional decriminalization of homosexuality.

The Naz right to privacy ruling inaugurated the notion of sexual personhood in the Indian Constitution by developing it in the context of an individual's personal autonomy as the basis of the limits of privacy. By unhinging privacy from a supposedly narrower understanding in terms of spatial parameters, the Naz right to privacy then became legally operative through an individual's exercise of her autonomy irrespective of social or cultural context. The right to privacy has also been at the heart of a long history of judicial decision-making in the American context, particularly legal decisions related

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<sup>295</sup> Dipika Jain, "The Impact of the Naz Foundation Judgment on the Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation," Center for Health, Law, Ethics and Technology, *Jindal Global Law School*. March 2010. Accessed online at: [http://orinam.net/377/wp-content/uploads/2013/12/Report\\_ImpactoftheNazFoundationJudgment.pdf](http://orinam.net/377/wp-content/uploads/2013/12/Report_ImpactoftheNazFoundationJudgment.pdf) on April 10, 2015.

to intimate bodily conduct such as contraception, abortion and homosexuality.<sup>296</sup> The American context has much salience for a discussion of privacy rights in the Indian context for a number of reasons. Most importantly, the 2003 American sodomy law repeal decision, *Lawrence v. Texas*, critically informed and aided the Delhi High Court judges in crafting the rationale for reading down Section 377 of the Indian Penal Code to legalize consensual same sex conduct in private. Moreover, privacy as a constitutional principle does not have textual foundations either in the American or in the Indian constitution. It remains a penumbral derivative, a constantly shifting basis of defining intimate bodily conduct and personhood contingent upon analogical or axiological arguments that seek to either re-interpret constitutional amendments or rely on a presumptive moral argument concerning privacy.<sup>297</sup> Finally, the explicit deployment of a western political vocabulary of identity-based registers in the Indian context offer the undergirding of a comparative framework within which a transnational understanding of privacy may be deconstructed. These registers include LGBTQ as well as the mobilization of other legible markers of oppression such as homophobia and discrimination.

This chapter takes up a critique of the Naz right to privacy in order to consider its operability in relation to both a spatial notion of privacy and its relation to decisional autonomy and personhood. The critique derives its substantive force from an examination

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<sup>296</sup> Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* (1989): 737.

<sup>297</sup> Kendall Thomas. "Beyond the Privacy Principle," *Columbia Law Review* 9 No. 6 (1992), 1431. Thomas critiques the right to privacy through a discussion of the background facts surrounding the 1986 case *Bowers v. Hardwick* in which the Georgia Supreme Court upheld the state's sodomy laws.

of two nationally prominent cases of privacy violations concerning LGBTQ subjects in India and another in the United States that serves as an alibi for postcolonial homophobia. Written in the wake of the 2009 Naz judgment that was understood to be the teleological moment of LGBTQ liberation in India, the critique below offers that the sublimation of the constitutional right to privacy in India abstracts that very privacy from its material bases. Instead of defining privacy within zonal confines or spatial parameters, this abstraction operates precisely through the underlying presumptive empowerment of the legal sexual subject by casting privacy through an abstract notion of decisional autonomy. Such a formulation takes privacy as a pre-existing condition residing in a fully liberated sexual subject, an identity that is assumed to stand at no intersections of class, caste, gender, religion and sexuality, and possesses at its disposal uninterrupted legal decision-making autonomy. These are the putative conditions from which the subject's privacy must proceed. The deprioritizing of the zonal and the spatial as a lesser order of privacy by the Delhi High Court in the 2009 Naz decision patently overlooks the contested and fraught boundaries between the public and the private in the Indian context within which the Indian LGBTQ individual lives as a real, material counterpart of the legally empowered yet abstracted subject with decisional autonomy. Privacy as a material affordance, especially for the LGBTQ as well as other sexual minorities in their real-life contexts, emerges as a significant and meaningful right only when shaped by a violation more concretely than its presumptive boundaries drawn by higher yet immanent legal reasoning.

The critique that follows aims to address the discontinuity between the 2009 Naz decision's forwarding of privacy as a right and the decision's implicit assumption of

privacy as a pre-existing material affordance without a gesture to the intersection of class, gender, religion, caste and, of course, sexuality in the Indian context. Within the global framework of LGBTQ rights advocacy and visibility politics, this disjuncture manifests the divergence between universal mandates of the right to privacy at the core set of rights and protections for LGBTQ subjects and their lived experience in a particular cultural context that remains fraught with historical conditions of moral policing, discrimination and persecution of such subjects. Acknowledging the complexity of the multiple, intersecting processes at the global and the local scales in the circulation of human rights frameworks, this critique attends to the particularly piquant conundrum posed by privacy as a safeguard for the interests of LGBTQ subjects in the Indian context and their coming into being as public subjects of privacy when the right becomes exercisable upon violation. Scholars of human rights have demonstrated the relevance and relative success of global human rights in varied cultural contexts, often coded as the “local” in debates on transnationalism, through mediating processes such as localization, indigenization and vernacularization of such rights.<sup>298</sup> This chapter, however, is more aligned with the specificity of LGBTQ rights in India within the multiple intervening discourses of the postcolonial law and the post-discriminization optimism of LGBTQ visibility.<sup>299</sup>

Drawing upon media and communication studies, postcolonial studies and critical legal studies, this chapter offers a materialist critique of the right to privacy as it legally

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<sup>298</sup> Sally Engel Merry, “Transnational Human Rights and Local Activism: Mapping the Middle,” *American Anthropologist* 108 No. 1 (2006): 38.

<sup>299</sup> Arvind Narrain. *The Right that Dare Speak its Name: Decriminalizing Sexual Orientation and Gender Identity in India* (Bangalore: Alternative Law Forum, 2009).

defined the Indian LGBTQ persons through the provisional decriminalization of homosexuality in 2009 and the exercise of the right in the moment of privacy violation to render visible permanently public subjects. The chapter specifically considers critiques of privacy with respect to its legal interpretation in privacy jurisprudence, particularly as a putatively empowering right for LGBTQ subjects in India and elsewhere, the right's materiality in geographical and spatial terms that make its violation even more urgent and finally, the right's contextualization within the postcolonial and transnational frameworks within which the right's meaning is mediated with a gesture to the public.

Below I show how the two nationally prominent cases of privacy violations of LGBTQ subjects in India in the wake of homosexuality's decriminalization in 2009 demonstrate both the remedial powers of the law, specifically the Naz right to privacy, as well as the right's limits in negotiating the boundary between the public and the private for the violated subjects. The first case in question is that of Dr. Shrinivas Ramchander Siras, professor at Aligarh Muslim University (AMU) in North India who in 2010 was exposed in the local media, supported by allegations from his colleagues for engaging in homosexual conduct in the privacy of his bedroom in his on-campus home. The Siras case recapitulates privacy as zonal and spatial, rendering it immediately visible in its materiality through the media staging of the alleged transgression in the bedroom space. This intrusion into the bedroom space within the privacy of a home located on the university premises must be understood in the context of Aligarh Muslim University's historical foundations. As an Islamic institution that was founded in 1877, AMU was set up first as the Anglo-Oriental College, modeled along Oxford and Cambridge in order to



impart education through a hybrid of tradition and modernity.<sup>300</sup> Despite a gesture to the modern and the Western, the university's history is implicitly rooted in a blend of Victorian and Islamic ideas and values, an ideological apparatus that historically sought to regulate and silence discourses of sex and sexuality deemed to be immoral.

The Islamic university as a historically moral and public space was also partly a domestic space within which the professor's on-campus home was located. This condition of ownership and context superseded all possible claims to privacy at the time of the professor's suspension. The possibility of such privacy as a right was dismissed by the university authorities as neither a zonal protection nor an assertion of the decisional autonomy from which the Naz right to privacy derived its legal sophistication.

Only a few months later in September 2010, Tyler Clementi, a freshman at Rutgers University in New Jersey was also exposed for his homosexual encounter in his dorm room through the use of webcam surveillance and social media distribution of the footage captured by his roommate Dharun Ravi. This incident was widely understood to have created the social conditions under which Clementi committed suicide. A much broader conversation on LGBTQ bullying and homophobia than that which surrounded the outing of Professor Siras in India was concurrent with Ravi's legal trial in the US. This public conversation framed the privacy rights violations in this case in relatively more universally resonant registers of objection to identity-based violence inflicted upon certain vulnerable bodies.

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<sup>300</sup> See the history of the Aligarh Muslim University, <http://www.amu.ac.in/amuhistory.jsp>

The Clementi-Ravi incident of privacy violation serves as a comparative case study for the Indian context with respect to not merely the mechanics of the encounter in a university space but also, and importantly, the subsequent discourse of remediation of violated bodies that render subjects of privacy progressively more visible and, I propose, therefore more vulnerable. It also serves as a postcolonial critique of the reliance upon fixed and non-negotiable identity based registers of homosexuality and homophobia that are discursively aligned with privacy and publicity respectively under the regime of global LGBTQ rights empowerment.

The second Indian case that I will be considering below concerns a sting operation conducted in 2011 by TV9, a regional news channel in Hyderabad on the users of the gay dating service planetromeo.com. The channel claimed to have conducted the sting with a view to exposing the “outbreak of homosexual lifestyles,” which the station clearly posited as a contaminating subculture in the predominantly traditional culture of the city. The TV9 sting is illustrative of yet another iteration of privacy as a zonal/spatial demarcation. Though exercised on an online space, the TV9 sting raised questions about “privacy in public,” or about the structure of privacy enabled by the user’s decisional autonomy within the accessibility of the public realm of the Internet. The news channel’s breach of media broadcasting standards set by the National Broadcasting Association (NBA) of India through the privacy violation of the gay dating service users rendered users interpretable and apprehensible within the Naz framework of privacy. The recourse to a rights-based approach towards punitive action became intelligible in relation to privacy within online spaces – but not as it pertained to the decisional autonomy of the

violated users. Those subjects in fact never came forward demanding justice, abstaining from public visibility to mitigate further exposure.

The notion of privacy as zonal and spatial, this chapter argues, has greater significance for Indian LGBTQ subjects whose material lived contexts are shaped by various intersecting and overlapping identities of class, caste, gender, religion and sexuality within multiple configurations of the public and the private. By encapsulating the right to privacy in legal terms of dignity and equality, the Naz privacy framework assumed the leveling of difference. Yet it is the very difference that structures states of visibility and vulnerability for the LGBTQ bodies in intersectional terms as aptly demonstrated by Kimberlè Crenshaw's oft-quoted formulation about race and gender-based identity politics in the United States of America.<sup>301</sup> By accounting for the omission of black women's experience of violence and their marginalization within anti-sexist and anti-racist frameworks that implicitly privilege white women and black men, Crenshaw provides material evidence to show how the intersections of race and gender situate black women's bodies at a significant disadvantage towards the pursuit of justice and the legibility of injury. The notion of intersectionality has crucial purchase for the Indian LGBTQ individuals who despite legal recognition of their right to privacy, between 2009-2013 become privacy's legible subjects only upon being violated. Accounting for the intersections of various sub-identities that compete with the sexual identity, the Indian LGBTQ individual as a bearer of legal sexual personhood cannot be entirely abstracted as an empowered entity upon the conferral of rights of recognition and equality.

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<sup>301</sup> Kimberlè Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43 No. 6 (1991), 1241.

**Between Morality and Legality: Homosexuality in the Aligarh Muslim University**

On February 8, 2010, eight months after the legalization of homosexuality in India in July 2009 and the attendant triumphant optimism around LGBTQ liberation, Dr. Shrinivas Ramchander Siras, a professor of Modern Indian Languages at the Aligarh Muslim University in Northern India, was filmed in the privacy of his bedroom without his consent by his university colleagues with the assistance of local media persons. The camera caught Siras in a compromising position with his male partner. The following day, the illegally obtained video footage and images were circulated in the local newspaper and sent to the university administration, following which the professor was suspended by the authorities on the grounds of his “immoral conduct” in his on-campus home. The incident caused national outrage among the various LGBTQ activist groups and teacher communities who demanded strict action against a university that, in their view, had breached the privacy of an employee in his own home. With the help of LGBT lawyers and activists, the professor sued the university and won the case. However, shortly before his reinstatement in the university as ordered by the Allahabad High Court, he was found dead in a mysterious situation in his apartment in April 2010. His death, occurring a short two months after his reinstatement, was inconclusively ruled to be a suicide.

Prior to Siras’s death, a team of lawyers and civil rights activists conducted a fact-finding mission called “Policing Morality at AMU.” The documented report informs the

examination of the incident in this section.<sup>302</sup> The fact-finding report documents the legal team's interactions with various stakeholders involved in the incident. The interviewees included the members of the university administration, students, Dr. Siras himself and local media persons who played an instrumental role in the sting operation. The fact-finding report reveals that the extra-legal actions of the Aligarh Muslim University (AMU) were rationalized by the orthodox Islamic institution's own local constitution. Under this code, the professor's sexual conduct appeared apprehensible, comprising the grounds of his suspension. This was despite the broader recognition among the various parties interviewed that the privacy invasion was unconstitutional. A close reading of the fact-finding report directs attention to the ways in which privacy as a legal principle and a socio-cultural affordance remains intricately entangled with notions of traditional beliefs, religious morality and vernacular media practices that reinforce the spatial or zonal logic of the private as more immediately urgent.

The fact-finding report compiled by lawyers and civil rights activists represents a profoundly public intervention that, though imperative, places its subject in need of redress. The subject is, moreover, placed at an irrevocably public altar of visibility and appears as an exemplar of vulnerability. The various stakeholders that voice their views on the incident as discussed in the report demonstrate the contested legal and cultural terrain within which privacy in relation to homosexuality remains irremediably rooted. These voices compete for narrative legitimacy in their accounting of privacy as a spatial,

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<sup>302</sup> Arvind Narrain et al. "Policing Morality at AMU: An Independent Fact-Finding Report," 10 March 2010. Accessed online at <http://www.fridae.asia/gay-news/2010/03/10/9724.policing-morality-at-amu-an-independent-fact-finding-report>

individual and a religious principle that to reiterate, can be meaningfully grasped only in the moment of its violation.

The report begins with Dr. Siras's version of the events between February 8 to 10, 2010 leading up to his suspension from the university as well as his forced eviction from the university housing, a space rendered immoral in the university's view by Dr. Siras's homosexual conduct abrogating his right of access to his own home. During the intrusion by local media persons into Dr. Siras's bedroom while he was with his male partner, the professor was photographed coercively in a compromising position and threatened with public exposure for his homosexual conduct. The following morning, not only were the photographs circulated to and published in the local newspaper but also the professor was served with a suspension notice by the university. Under Section 40 (3) (C) of the Aligarh Muslim University Act, Siras was cited for having indulged in "gross misconduct and immoral sexual activity" in contravention of the basic moral ethics in university housing. As a publically visible moral offender, he was stripped by the university of his freedom of movement through an order to vacate his university home and not leave Aligarh without permission from the Vice-Chancellor of AMU.

Imposing its own religious morality informed by a historical interpretation of Islam, the University acted with utter disregard for the 2009 Naz decision of homosexuality's decriminalization in India. Under Naz, the right to privacy was defined in individual terms as linked to decisional autonomy and sexual personhood broadening privacy from its zonal/spatial configuration. As becomes evident from the divergent views of the various interviewed parties in the fact-finding report, it is the transgression into the professor's bedroom that constitutes the first order of privacy's integrity in the

sting operation. The professor's decisional autonomy upon undue public exposure for his "immoral" conduct remains tied to his private actions within the confines of his home located on the University premises. The decisional autonomy can be effectively invoked only if the subject identifies openly as gay or lesbian, claiming legal sexual personhood as the basis of her privacy. Such identification in the professor's case clearly follows, and not *precedes* the spatial privacy invasion.

Privacy as spatial security and freedom became even more acute in the sequence of events following Siras's suspension. The professor was notified to vacate the campus housing with immediate effect. In order to expedite his evacuation, the University ordered the disconnection of his home's electric supply depriving him of light and power, perhaps one of the most fundamental liberties of a middle-class private existence. Siras was thus forced out of his home, and by extension, literally out of his material zone of privacy, into the visibility of public subjecthood. This status preceded his search for another home; the publicity functioned as a pre-determining damper on his ability to secure housing anywhere in the city.

Thus it becomes clear that this aspect of the case has several implications for an understanding of privacy as a state of potential vulnerability within the postcolonial context. It demonstrates the tenuousness of privacy as a legal principle in the service of LGBTQ empowerment in India. It renders the material geography of private existence as more urgent. Finally, the case makes plain the juncture of postcolonial morality and

global humanitarianism at which non-normative bodies come into being as global human rights subjects precisely when they are rendered vulnerable.<sup>303</sup>

I now map the legal foundations of the right to privacy within a comparative framework with reference to the privacy jurisprudence in the United States and India. This framework offers the undergirding of the Naz right to privacy in 2009.

### **Legal Critiques of Privacy**

The right to privacy has a long and tenacious history in legal jurisprudence both in the Indian and in the United States context. The right has enjoyed particular salience in American legal matters related to intimate bodily conduct such as abortion, contraception and homosexuality.<sup>304</sup> Legal studies scholars have advanced numerous critiques of privacy as a legal right and conception, a few of which are pertinent to an understanding of the legal right in the Indian context as far as it undergirds the decriminalization of homosexuality and further resides at the core of principles of dignity, equality and non-discrimination for LGBTQ subjects.

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<sup>303</sup> The term “Global Humanitarianism” has emerged in recent times to signal the universal consensus on humanitarian rights shared by a common community of human beings. It pertains to the various spheres of life and living contexts that relate to ethical issues in the suffering of humanity for instance, movements related to environmentalism, gender and sexuality rights, genocide and experimental research. See, Robert De Chaine. *Global Humanitarianism: NGOs and the Crafting of Community* (Lanham MD: Lexington Books, 2005). Also see, Ilana Feldman and Miriam Ticktin, Eds., *In the Name of Humanity: The Government of Threat and Care* (Durham and London: Duke University Press, 2010).

<sup>304</sup> Rubinfeld, Privacy.



Among the most insightful of critiques is Jed Rubenfeld's 1989 essay "The Right of Privacy." In this essay, Rubenfeld observes, "At the heart of the right to privacy, there has always been a conceptual vacuum."<sup>305</sup> Rubenfeld specifically critiques the personhood principle that in his view has "invaded" the privacy doctrine since the 1970s in the American case law. He holds that personhood, or the right to sexual self-definition, a right that suggests an inviolability of one's personality, remains ill defined. He stakes out an elaborate critique of the personhood principle as an invigoration of the privacy doctrine through three main traditions within which the notion of personhood stands on shaky grounds.

Under the analytic tradition, it is the limitations of personhood, on the question of what acts may be considered absolutely essential to self-definition that Rubenfeld launches his objections to personhood. Rehearsing a range of scenarios involving sexual acts such as rape, incest and adultery that may also come under the ambit of the personhood principle, he finally cites the harm principle as developed by John Stuart Mill. If the act under question is self-regarding and does not cause any direct or indirect harm to society, then it may pass the personhood test. Rubenfeld holds, however that such acts are never clearly defined and it is to a good balancing test that personhood must turn to, in understanding privacy as a legal protection. The balancing test is to ascertain the importance of certain proscribed conduct to an individual as opposed to the importance of the state's interests served by the proscribing law. In the republican critique, it is the tension between an individual's self-identification and the society's

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<sup>305</sup> *Ibid.* 739.

collective identity that manifests as a fundamental rift between a homosexual identity and a heterosexual one within a community that abides by certain moral normativity of conduct.

In the third tradition, which relies on Michel Foucault's work on the history of sexuality, Rubinfeld employs the social constructionist view of sexual identity in his critique of personhood. He observes that it was the medical discourse on same-sex acts that produced the category of the homosexual, or it is the act of *homosexual* sex that becomes the basis of sexual personhood and an attendant right to privacy. Rubinfeld writes presciently about the processes through which a homosexual identity as self-definitive can only rigidify sexual hierarchies between what has historically been the "normal" heterosexual identity and the "abnormal" homosexual one. By casting legal rights as homosexual rights, such a classification also arrests the fluidity of sexual identity and practices that only a few years after Rubinfeld's essay, in the early 1990s, came to be articulated under the rubric "queer."<sup>306</sup>

In his conclusion, Rubinfeld seeks to rescue privacy as a principle from the contradictions that personhood poses in its quest for a right to privacy. His legal discussion of privacy and personhood is instructive towards a further delineation of what exactly it is that privacy does and constitutes. As the arguments in this chapter demonstrate subsequently, an insistence on privacy must heed its constitutional construction as a right, transnational circulation as a human value and its geographical materialization as a violation in order for a relatively greater degree of specificity of its

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<sup>306</sup> Judith Butler, "Critically Queer," *GLQ* 1 (1993).

meaning. Instead of aiming for a totalizing critique of privacy, the chapter is more invested in privacy's discursive work in cases of privacy violations as it pertains to Indian LGBTQ subjects.

Andrew Koppelman, writing in 2002, just a year before the landmark *Lawrence v. Texas* sodomy law decision in the United States, point to the weak constitutional basis of privacy that remains derived from various amendments in the American Constitution.<sup>307</sup> As such there is no textual basis for a right to privacy in constitutional terms. While, as Koppelman points out, the Ninth Amendment offers the scope of un-enumerated rights such as privacy, its textual derivativeness is perhaps the least of concerns in understanding its material location in a broader cultural context where privacy concretely takes shape.

Rubinfeld's contention was that a right to privacy for sexual subjecthood casts the individual in narrower terms of sexuality as deemed fundamental to self-definition for an LGBTQ identity. But it can be argued, from a more intersectional perspective that, the right to privacy follows and *does not precede* the subject it brings into being under its purview. Dr. Siras's case clearly illustrates this contradiction. The case sets up the derivative framework within which privacy's existence as a right can be legally evoked, a logic that further reinforces the basis of its derivation.<sup>308</sup>

In its derivativeness from the various articles of the Indian Constitution as well as in its evolution on a case-by-case basis, privacy then remains subject to constant revision

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<sup>307</sup> Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (Chicago: University of Chicago Press, 2002).

<sup>308</sup> See Chapter 1 of the dissertation for how the Naz right to privacy was constructed.

and modification, reliant not just on past cases but also on future ones that would become legal precedents. Kendall Thomas's essay on privacy within a broader public context is also pertinent to a discussion of the Indian context in relation to privacy's redrawn boundaries that broaden it from merely spatial/zonal to constitute the more abstract sphere of individual decisional autonomy.

Writing in 1992, over a decade prior to the *Lawrence* ruling on the decriminalization of homosexuality in the USA in 2003, Kendall Thomas bases his critique of privacy on the 1986 *Bowers v. Hardwick* case that upheld Georgia's sodomy laws.<sup>309</sup> Bearing a close resemblance to Dr. Siras's case of bedroom invasion of his on-campus home, *Hardwick* involves a similar invasion by the Georgia police into Michael Hardwick's bedroom when he was engaged in intimate sexual conduct with his partner. Thomas argues that Hardwick's arrest by the police officer who invaded his sexual privacy was not *merely* based on the moment of the discovery of his illicit sexual conduct with another man under the law. Rather such an invasion was the culmination of a series of events in which Hardwick's sexuality became publicly known to the officer. Hardwick's job at a gay bar established his homosexual identity long before the incriminating act of same-sex conduct was intercepted by the police. Thomas directs attention to the temporal situatedness of Hardwick's arrest within the broader public sphere of the knowledge about his homosexuality that led the police to keep an eye on him. Thus, the state's claim to the legitimacy of the police actions in the *Hardwick* case is complicated by the prior knowledge of Hardwick's identity as a homosexual that

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<sup>309</sup> Kendall Thomas, "Beyond the Privacy Principle," *Columbia Law Review* 92 No. 6 (1992), 1431.

definitively informs his apprehension later on. Writing about how privacy as a legal principle is shaped by the broader public milieu within which the apprehended homosexual body exists, Thomas observes:

Hardwick is not just a story about private homoerotic acts and their interdiction; it is also an account of the harassment, the humiliation and the violence that await the mere assertion or imputation of homosexual identities and existences in the public sphere.<sup>310</sup>

The 2010 Siras case, especially within a legally enforceable Naz framework of privacy isn't a mere local reiteration of *Hardwick* in terms of the mechanics of privacy interception and the moral disapproval of certain sexual conducts. Rather than being viewed in a linear invasion-violation-right to privacy redress trajectory, both cases highlight the profoundly public conditions under which a homosexual individual comes to be known as such, a state of social existence whose knowledge serves as a prelude to a potential violation of the individual's privacy, whether by state or non-state actors. Thomas's recounting of Hardwick's public biography prior to his arrest in the privacy of his home is instructive in speculating a similarly prior knowledge of Dr. Siras's homosexuality – an identity that emerges more pathologically yet definitively in the aftermath of his privacy violation and the course of legal actions against the university.

However, there is another implicit issue that warrants consideration. Dr. Siras's coming into public subjecthood was not simply a result of his privacy violation but was also due in some measure to a preceding knowledge of his homosexuality in which he *consensually* engaged in the presumably safe privacy of his bedroom. Consensual same-

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<sup>310</sup> *Ibid.* 1442.

sex conduct in private in 2010 was protected by the Naz ruling at the time. However, consent as a correlate of privacy ceased to matter not just with respect to the privacy violation but also with regards to the public intervention through which justice in some measure could be ensured. For a public human rights subject who is rendered visible and vulnerable at the same time, the threshold of legal intervention is prompted by the same knowledge of his identity as an exposed homosexual, now affirmed in the aftermath of violation. The public knowledge of homosexuality that precedes the moralizing violation of spatial privacy delivers the violated homosexual body to another form of public knowledge, of the committed wrong, that facilitates further modes of redress and reparation. One must of course consider the possibility of negotiation of the aftermath on the part of Dr. Siras, who upon being exposed was perhaps faced with certain tactical choices to pursue justice. However, what must those choices look like? What courses of action become feasible in the moment of a wrong to an individual who is prompted to seek justice at any cost?

The tentative answer is evident. Consent to the pursuit of legal justice was made urgent and imperative in the context of the victorious albeit provisional recognition of LGBTQ rights in India, a teleological liberatory moment for hitherto invisible subjects. However, insofar as it concerns the sexual privacy of an individual, or the public knowledge of an individual's homosexuality, the right to privacy as a form of redress remains incommensurate with the iconic public status of the human rights subject thus produced at the intersection of undue exposure and legitimate recognition as deserving of justice. Privacy as a result recedes into an absence without reforming an individual as a fully private interest. In demonstrating an understanding of privacy as an absence and

consent as urgently folded into legal intervention, the argument does not necessarily go against the legitimacy of such intervention or the pursuit of justice through an exercise of the right to privacy. Rather, my analysis aims to drive home the point that in pursuing justice on the grounds of a right to privacy, the violated subject becomes progressively public, not merely through their presence in the courtroom and the legal archive, but also through activist news media and other forms of public appeals.

Thomas's attention to the public aspects of the *Hardwick* case in which Michael Hardwick's homosexual identity becomes legible through his presence at his workplace, a gay bar, suggests a similar trajectory for Dr. Siras whose privacy violation must be situated in a broader *public* sphere of diffuse surveillance within the "moral" space of the university. It is most likely that he did not identify as homosexual or gay publicly among his colleagues at the Aligarh Muslim University (AMU), a material context structured by the pathologization of homosexuality in the service of heteronormative national culture in postcolonial India.<sup>311</sup>

Finally, Katherine Franke critiques the right to privacy as a geographical right linked to the liberty of an individual in the 2003 *Lawrence v. Texas* decision that overturned the *Hardwick* judgment, by characterizing Justice Kennedy's version of territorial privacy as "domesticated."<sup>312</sup> Because Justice Kennedy linked the sexual acts of same-sex individuals to a notion of dignity and liberty within the private confines of their home, Franke considers this a narrower version of privatized liberty. If we extend

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<sup>311</sup> Ratna Kapur, *Erotic Justice: Law and New Politics of Postcolonialism*. (London: Glasshouse Press, 2005).

<sup>312</sup> Katherine Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 No. 5 (2004), 1399.

this by analogy to the Naz case, we might say the Delhi High Court judges transcended the spatial narrowness the Naz verdict. Certainly, in legal terms, the right to liberty and privacy as defined by individual autonomy is a far more desirable liberal conception of the right to privacy, however, the Siras case at AMU points in the definitive direction of spatiality, of the bedroom, the on-campus home and the university as a moral geography. The invasion of privacy invoked in the case is framed, first and foremost, in the spatial sense. Siras's individual autonomy that Naz would tie to his identity as a homosexual subject is only constituted in the moment of the shattering of spatial privacy. If not for the spatial transgression, we wouldn't have a homosexual subject of privacy and a consequent notion of individual autonomy available towards an exercise of rights. In other words, individual autonomy as the basis of privacy must first assume a self-identified homosexual subject who can assert such a right, if such privacy is to attach to persons and not places, as the Naz verdict declares.

Legal abstractions of privacy as attaching to unmarked individuals are problematic insofar as they assume individual identities as self-autonomous vessels of the liberal values of privacy, dignity and equality. These abstractions implicitly require those individuals to identify themselves in order to be able to exercise those values as rights. Specifically in the case of Indian LGBTQ subjects, or more appropriately same-sex desiring individuals located on a spectrum of identification and visibility, sexuality may not necessarily be the fundamental aspect of their personhood, as Rubinfeld would argue. However, sexual identification in the moment of violation may be the only route to claiming a right to privacy and its other nebulous correlates of dignity and equality. The Siras case illustrates precisely this conundrum of public sexual identification following



the invasion of spatial privacy towards a staking of rights and justice. In no way does this seek to indict the processes of law that are necessary in modern societies to secure justice.

Teemu Ruskola astutely notes in his critique of the politics of sexual respectability in the *Lawrence* decision that the exercise of rights comes at the price of the disciplinary regime of political modernity.<sup>313</sup> Ruskola's reference to the disciplinary regime of political modernity refers to the legal affordances of dignity and respect as the basis of privacy for the American homosexuals in the eyes of the US Supreme Court. My argument extends this formulation through Foucault's notion of discipline in modern societies linked to the productive harnessing of the body through the operations of power.<sup>314</sup> The activist intervention in the *Siras* case though, by all means indispensable, performs the function of a "disciplinary regime" to mobilize legal and rights-based interventions that make the violated body a productive one towards the public pursuit of justice. Especially in cases of privacy violation, the individual's public appearance first as a violated body and then as a public subject of human rights positions the individual at the permanent threshold of legal, social and cultural visibility.

This cursory but pointed legal critique of privacy necessitates a geographical account of privacy and its material location in culture and society, especially in the postcolonial context where most same-sex desiring individuals, whether self-identified as lesbian, gay or trans or not, always remain in the interstices of private and public worlds. They inhabit a lived experience that remains fraught with the risks of persecution, moral

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<sup>313</sup> Teemu Ruskola. "Gay Rights versus Queer Theory: What is Left of Sodomy after *Lawrence v. Texas*," *Social Text* 23 No. 3-4 (2005): 84-85.

<sup>314</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books 1995).

policing and violence. Such an account is necessarily a geographical one where privacy in the Indian context pertains to class, gender and gender normativity as well as spatial mobility. The next section offer a discussion of privacy as a spatial and geographical construct inherently linked to a politics of visibility and vulnerability.

### **Sexuality in Space: The Materiality of Privacy**

One of the primary rationales employed by the Delhi High Court to rule on the applicability of Section 377 to the conduct of same-sex consenting adults was the public health implication of the sodomy law for HIV/AIDS susceptible men-who-have-sex-with-men (MSM) as demonstrated by the Naz Foundation, the main petitioner in the case. Neil Cobb argues that the public health logic of HIV/AIDS risk management and contagion politics as a particular manifestation of Foucauldian biopower – the state management of health and welfare of populations – produces the queer subject as an anti-citizen, as a risk of contagion to be managed.<sup>315</sup> While making a persuasive argument about the problematic tying up of queer rights with the sodomy laws-HIV/AIDS nexus in postcolonial contexts, Cobb does not consider the public and private aspects that shape the material lives of self-identified queer men and women as LGBT and the behavioral public health categories of men-who-have-sex-with-men (MSM) and MtF transgender groups. The constellation of rights under the Naz verdict – namely equality, liberty, dignity and privacy – is in great measure instrumentalized by emphasis on the urgency of

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<sup>315</sup> Neil Cobbs, “Contagion Politics: Queer Rights Claims, Biopower and the “Public Health” Rationale for the Repeal of Sodomy Laws,” *Jindal Global Law Review* 4 Issue 1, (2012).

a public health crisis. This constellation stands in stark contrast to the quasi-public and public nature of same-sex encounters in parks, public toilets and other unsafe spaces under conditions of partial visibility and potential exposure to institutional and moral policing.<sup>316</sup> Insofar as the deployment of the public health rationale towards the repeal of sodomy laws becomes an alibi for the right to privacy of same-sex desiring individuals, it also reveals the fragility of privacy as a contingent refuge shaped within unsafe public conditions under which same-sex desire is framed as a public health risk, a source of contagion and a site of biopolitical management.

Privacy as a spatial, material affordance clearly raises the stakes for a spectrum of same-sex desiring individuals at least in the Indian context where such an affordance remains inextricable from class, gender, occupation and mobility orienting them towards varying states of inhabitation. I consider here a spatial understanding of privacy through the Siras case, a cognizable subject of privacy under the Naz construction of homosexual personhood, a principle not precisely applicable to the Indian MSM, who instead are figured as risky populations under the purview of the Section 377 of the Indian Penal Code. Such a distinction between a subject deserving of rights-based personhood and another in need of public healthcare renders privacy a more contested legal right whose material meaning can be traced more concretely through its spatiality. Implicit within this formulation is also then a politics of identification as same-sex desiring, gay or queer that must enable the right to claim its rightfully violated subject, an accommodation never extended to the public behavioral counterpart, the MSM, who is only subject to a public

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<sup>316</sup> Patralekha Chatterjee, "AIDS in India: Police Powers and Public Health," *The Lancet* 367 Issue 9513 (2006).

health intervention. I raise this point to develop a more material understanding of the right to privacy as a reparative right, more geographical and spatial in its specificity, addressing the predicament of the identifiable queer subject as well as the behavioral figure whose lack of privacy for sexual conduct is tied to rushed, risky encounters in dangerous public places. Thus, privacy as personhood emerges as less expansive and inclusive, abstracting its subject through legal personhood compared to privacy as spatial/zonal that confers a greater specificity on both sexual identity and acts and offers the possibility of fulfilling social and sexual desires.

The salient facts of the *Siras* case redirect attention to privacy's rendering of a material space safe and habitable. The case is an instance where privacy is tied primarily to an invasion into the bedroom space of the home and subsequently to legal personhood. In their essay on lesbian identities in predominantly heterosexual families in the UK and New Zealand, Lynda Johnston and Gill Valentine elucidate the contingency of privacy within the material space of home. They argue "the privacy of a place is not...necessarily the same as having privacy in a place."<sup>317</sup> Mapping a range of diverse lesbian narratives in which the privacy of desires, identities and practices remains subject to the public, homophobic surveillance of family members, Johnston and Valentine trace such experiences through an idea of privacy deeply rooted in the spatiality of the home. Despite the difference in social and cultural context, the *Siras* case does instantiate a similar logic of the home as a space moralized by its location in the broader religious

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<sup>317</sup> Lynda Johnston and Gill Valentine, "Wherever I Lay my Girlfriend, That's My Home: The Performance and Surveillance of Lesbian Identities in Domestic Environments," in *Mapping Desire: Geographies of Sexualities* eds. David Bell & Gill Valentine (London & New York: Routledge, 1995), 88.

geography of AMU. The stance of the AMU authorities that homosexuality even in the privacy of the home is immoral establishes the privacy of sexual conduct as essentially an absence. Citing the 133-year-old history of the institution, the authorities emphasize the values and culture of the university through propriety of student conduct and modest dress codes in classroom and on campus, essentially abrogating any right to personal autonomy or privacy. The fact-finding report further points to the possible role of a Local Intelligence Unit (LIU) under the direction of the proctor towards the maintenance of moral law and order and the silencing of dissent on the campus premises.<sup>318</sup> It is within these regulatory notions of culture and surveillance that privacy finds its spatiality both compromised and deprived.

Throughout the fact-finding report, references to the culture, values, morality and student conduct within the space of the campus then function as an ideological denial and prevention of how sexuality structures space as demonstrated by various scholars working within the cultural geography tradition.<sup>319</sup> For instance, we might look to Larry Knoppe's attention to queer spatial ontologies in relation to the processes of placement, placelessness and movement that situate queer bodies at the intersection of visibility and vulnerability. His account is instructive in suggesting a scalar analysis of urban and rural geographies that could offer greater specificity in understanding the material contexts of queer lives. Such visibility of queer lives within the transnational context of right-based

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<sup>318</sup> Narrain, *Policing Morality*.

<sup>319</sup> Kath Browne, Jason Lim and Gavin Brown eds., *Geographies of Sexualities: Theory, Practices and Politics* (Aldershot: Ashgate, 2005).

advocacy also speaks to media cultures and practices that must be considered within the cultural context of their production and circulation.

Part of the publicity apparatus in the Siras case was the instrumental role of the local media journalists, who I have left unnamed until now. Syed Adil Murtaza of *TV 100* and Ashu Misam of the *Voice of Nation TV* were the figures, who in collaboration with some of AMU's employees, produced an illegal film of Dr. Siras in a compromised situation with his male partner. Upon being contacted by the fact-finding activist team investigating the Siras case, Murtaza, the journalist from *TV100* reluctantly disclosed that he participated in the sting operation under the belief that the university would approve of his actions. His further aggressive stance towards the activist team suggests a lack of accountability and an absence of adherence to any form of media and broadcasting ethics, in line with AMU's extra-legal exposé. The roles of the local media publicity apparatus and the Islamic university in the traditional small-town of Aligarh become mutually reinforcing as moral police. These agents together set the larger public backdrop for the apprehension of the right to privacy of non-normative same-sex desiring individuals.

Inasmuch as the university's actions fit within its long cultural history of upholding traditional norms of gender and sexuality as clarified by the university's public relations officer, the local media's role should be understood as co-constituting a local and vernacular regime of knowledge<sup>320</sup> of homosexuality as well as a sex scandal for public consumption in the local newspaper.<sup>321</sup> Vernacular media cultures play a key role

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<sup>320</sup> Michel Foucault, *The History of Sexuality Vol. 1: An Introduction* (New York: Vintage, 1978).

<sup>321</sup> William Cohen's discussion of sex scandals of homosexuality in Victorian Britain through legal cases of men who had sex with other men is instructive in considering the

in subverting such visibility through scandal, sensationalism and the pathologization of homosexuality as excessive to the local cultural context. These media cultures stand in opposition to the vast repertoire of queer recognition that has emerged through the circulation of transnational mediascapes within a global cultural economy of different and disjunctural flows<sup>322</sup> as well as among the online networks of LGBTQ communities engaged in activist and advocacy exchange.<sup>323</sup> Such a divide between urban discourses of LGBTQ rights and semi-urban and rural conditions of vulnerability constitute the public context under which a range of non-normative sexual identities and behaviors are shaped. This divide becomes even more pronounced through local media reporting of gender and sexuality based violence. In an online story published by the *Guardian*, New York based Indian documentary filmmaker and writer Parvez Sharma describes this predicament by citing a Hindi newspaper story in a small town called Saharanpur in North India, close to Aligarh, which he characterizes as far removed from the urban realities of gay pride. The news story titled, “Gay Party has been Exposed,” and published in the Hindi daily *Amar Ujala* included photographs of twenty frightened-looking men sitting on the floor trying to hide their faces. The story also identified their first names along with the identity of the party organizer in addition to salacious details of “used condoms” and guests in a

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broader public contexts within which exposés of homosexuality constitute an order of private knowledge made public. Such a public context through a range of legal, medical and popular news media discourses depends on a violation of the privacy of the subjects of the scandal. See, William Cohen, *Sex Scandal: The Private Parts of Victorian Fiction* (London & Durham: Duke University Press, 1996).

<sup>322</sup> Arjun Appadurai, “Disjuncture and Difference in the Global Cultural Economy,” *Theory, Culture and Society* 7 (1990): 295.

<sup>323</sup> Sandip Roy, “From Khush List to Gay Bombay: Virtual Webs of Real People,” in *Mobile Cultures: New Media in Queer Asia*, ed. Chris Berry et al. (Durham & London: Duke University Press, 2003), 133.

“compromising position.”<sup>324</sup> Many such similar stories have been reported on Indian online mailing lists, where are recounted events such as police crackdowns on secretly organized gay parties that are transformed into a public theater of shame through the privacy violation of those who choose to become relatively more visible as gay or lesbian in any public context.

Particularly in postcolonial contexts, LGBTQ visibility and representation constitute an ambiguous predicament of symbolic empowerment and recognition. This discourse is articulated through legal rights and pride parade marches on the one hand, and privacy invasions that produce violated individuals as human rights subjects regardless of identification within the political markers of the LGBTQ on the other. Through a hegemonic discourse of gay liberation, such subjects are situated at the threshold of undesirable visibility and an imperatively desirable LGBTQ empowerment through which they become more visible as subjects proper.

In the final section of this chapter, I consider a postcolonial critique of the right to privacy and the discursive mechanisms through which both homosexual identity and homophobia become reified categories in the service of a gay liberationist and empowerment agenda. Within an increasingly transnational and globalizing world of media, activist and legal interventionist discourses, the term postcolonial itself appears to be a fraught marker of the conflicts between attempts to safeguard a “traditional” notion of culture and morality and the introduction of “modern” secular discourses of rights and

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<sup>324</sup> Parvez Sharma, “Gay Pride only goes so far in India,” *theguardian*, 30 December, 2010 (Last visited 19 September, 2014 at: <http://www.theguardian.com/commentisfree/2010/dec/30/gay-pride-india-queer-delhi-western>).



citizenship. As such, it represents a residual discourse that recapitulates the inner domain of cultural sovereignty in opposition to the outer domain of modernization and rational development that was instrumental in forging the nationalist project in India.<sup>325</sup> The charge of homophobia mobilized as a public epistemology in the consolidation of national culture within which homosexuality represents a western import, a source of contagion and a lifestyle of excess, becomes discursively attributable to a residual condition of postcoloniality through two other transnationally prominent cases that caused outrage among LGBTQ communities within the nation and the diaspora. My analysis of the 2010 Rutgers University case of webcam spying and the 2011 TV9 sting operation on an online gay dating service on the users of Hyderabad in South India interrogates the ongoing investment of LGBTQ remedial cultures in privacy as the basis of sexual identity and the sexual subject as a model figure embodying at once the contradictory states of violation and empowerment, visibility and vulnerability and privacy interest and public iconicity.

### **Homosexuality as Private, Homophobia as Public: A Postcolonial Critique**

In September 2010, Tyler Clementi, a Rutgers University undergraduate student jumped off the George Washington Bridge following an invasion of his sexual privacy by his Indian roommate, Dharun Ravi, also an undergraduate student at Rutgers. Clementi

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<sup>325</sup> Partha Chatterjee, "Colonialism, Nationalism and Colonized Women: The Contest in India," *American Ethnologist* 6 No. 4 (1989), 622. Also see, Kama Maureemootoo, "The Nation as Mimicry: The (Mis) Reading of Colonial Masculinities in India," in *Masculinity and its Challenges in India: Essay on Changing Perceptions* eds. R.K. Dasgupta & K.M. Gokulsing (Jefferson, NC: McFarland & Company, 2014).

was viewed on camera in an intimate and compromised position with his male partner in his dorm room in a couple of episodes of footage procured through webcam spying by Ravi and another student, Molly Wei. Following Ravi's attempts to broadcast the video and further publicity through his Twitter account with updates exposing Clementi's sexual rendezvous, the latter complained to the resident assistant for a room change. Within a couple of days of the incident, Clementi committed suicide on September 22 by jumping off the George Washington Bridge. He left behind a brief suicide note on Facebook, "sorry jumping off the GW bridge."

Subsequently, the story became public as national news media reported the suicide, framing it as another one in a series of gay teen suicides owing to bullying and homophobia, an experience reported to be highly common among American gay teenagers struggling to come to terms with their sexuality.<sup>326</sup> Clementi's suicide and Ravi's homophobia became interpretable within larger interventionist reparative frameworks of legal and social justice, public mediation of pain and a debate on the endemic homophobia among South Asian immigrant communities of which Ravi was a member. Several aspects of this complex case have been addressed at length by media commentators on a range of issues such as gay vulnerability, racialized identities, social media and technology use and legal frameworks made urgent and imperative to apprehend and eliminate homophobia towards the creation of a safe, inclusive world for sexual minorities. My critique hones in on issues of privacy invasion and the broader

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<sup>326</sup> Lucia Graves, "Gay Teen Suicides Pervasive, A 'Hidden Problem': Expert," *The Huffington Post*, Oct 22, 2010. Accessed online April 10, 2015 at: [http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem\\_n\\_772707.html](http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem_n_772707.html).

public remedial interception that sets the stage for the reification of homosexuality as necessarily private and its observe, homophobia as a condition to be publically investigated, exposed and regulated.

The Clementi-Ravi case parallels the Siras case in crucial ways beyond the mechanics of bedroom privacy invasion within university spaces in drastically different contexts. As cases of egregious privacy invasion publicized through the use of local and social media and then re-entered into the transnational economy of LGBTQ media advocacy and appeals for justice, their subjects – of lost privacy – acquire a permanent public presence without any further prospects of a private existence. Yet homosexual identities continue to be defined through privacy, mostly sexual privacy that when violated produces its identifiable subject both as an exposed homosexual and an imminently empowered one.

Putting in dialog these two parallel cases pertaining to differently oriented contexts of LGBTQ visibility and empowerment, the Siras sting operation and the Clementi-Ravi webcam spying episode also converge in their deployment of the epistemologies, not just of the closet in an insistence on privacy as defining homosexual conduct, but also of (postcolonial) homophobia. The latter occurs in making public the violence on non-normative subjects.<sup>327</sup> It is the moment of privacy invasion that splits into the respective epistemologies by positioning the subject of privacy as a permanently public figure in invoking the human right to privacy and the public mediation of violence, and the homophobic other as a shadow subject of privacy, a figure to be publicized, to be

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<sup>327</sup> Eve K. Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

rendered transparent in thoroughly explicating homophobia and redressing it. The Clementi-Ravi case is instructive in tracing these epistemologies towards interrogating the fixed, non-negotiable categories of sexuality that are affectively invested in the enabling of the swift mobilization of public modes of redress.

Clementi's death and Ravi's legal trial occasioned an extensive cultural commentary on the phenomenon of gay teen bullying, an issue that acquired public urgency in the late 2000s in the United States. Clementi's struggles with his sexuality were evidenced in his mother's rejection of her son when he came out to her, prompted by religious shame.<sup>328</sup> That struggle abruptly hastened by his death found a posthumous voice in a much bigger public legacy built around his experience. Particularly salient is the setting up of the *Tyler Clementi Foundation* to create a safe and accepting environment for LGBT youth and foster parental acceptance by the Clementi family who also travel to schools giving seminars about overcoming the struggles of LGBTQ youth.<sup>329</sup> The emergence of this normativizing public culture to mediate privacy as safety represents an enfolding of vulnerable queer life into a seamless national culture of empowered visibility and the public iconicity of what Jasbir Puar calls a queer agential subject. This subject as part of the visibility and LGBTQ empowerment agenda functions as a regulatory ideal that insists on "freedom from norms" through access to an implicit

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<sup>328</sup> Kate Zernike. "After Gay Son's Suicide, Mother finds Blame in Herself and her Church," *The New York Times*, 24 August, 2012 (Last visited 20 September, 2014 at: <http://www.nytimes.com/2012/08/25/nyregion/after-tyler-clementis-suicide-his-parents-make-painful-changes-in-the-search-for-why.html?pagewanted=all&r=0>).

<sup>329</sup> James Clementi. "Looking for Tyler: How My Baby Brother's Legacy is Helping Build a Better Culture for Vulnerable Youth," *HuffPost Gay Voices, The Huffington Post*, 22 September, 2013 (Last visited 20 September 2014 at: [http://www.huffingtonpost.com/james-clementi/tyler-clementi\\_b\\_3957463.html](http://www.huffingtonpost.com/james-clementi/tyler-clementi_b_3957463.html)).

understanding of queerness as cosmopolitan and elite, premised on various regimes of mobility.<sup>330</sup>

When considered in the context of its primary object of mediation i.e. privacy invasion and the attendant right to privacy as a purveyor of dignity, safety and autonomy of same-sex conduct, such a normative culture cannot but rely on fixed and non-negotiable markers of sexuality towards facilitating the LGBTQ empowerment of vulnerable permanently visible subjects. Consequently, both Clementi and Siras are the permanently public subjects of violated privacy, an irreversible predicament in which the right to privacy may yield justice but can never return its subject to a fully sanctified private life. However, there is another subject of privacy in the Clementi episode, a shadow figure, whose privacy is rendered irrelevant in the light of his allegedly homophobic actions. Dharun Ravi, who was convicted by the Middlesex County New Jersey Superior Court on counts of privacy invasion and bias intimidation with a further possibility of deportation to India, is the shadow subject of privacy, culturally held accountable for the death of his roommate Tyler Clementi.

The question of Ravi's homophobia, first socially and culturally brought up through his actions of invading the privacy of a gay roommate and then legally presented in the possibility of his deportation to native India became framed in broader terms of a homophobic, heterosexist South Asian immigrant culture, or a postcolonial residue of tradition within a sexually permissive liberated American context. Sonia Katyal, professor of law at Fordham University, observes that Ravi's actions of bullying and

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<sup>330</sup> Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007), 22.

homophobia must be understood in the context of a culture where no one talks about gay issues. Other members of the South Asian community such as Amit Bagga, a gay Indian-American former Congressional aide attributes Ravi's actions to a homophobic South Asian culture in which homosexuality is an alien concept.<sup>331</sup> Others such as Shawn Jain, former board member of South Asian Lesbian and Gay Association (SALGA), New York and Soniya Munshi, an LGBT activist view Ravi's actions as more complicated, emanating from deep cultural problems in the South Asian Community that privileges heterosexual, male figures.<sup>332</sup>

The framing of homophobia in broad cultural terms, as peculiar to oppressive South Asian immigrant cultures in the United States (a postcolonial diasporic formation) along with the legal possibility of Ravi's deportation then attests to the sexual exceptionalism of the American nation-state project as a liberal, progressive space of LGBTQ acceptance. In his critique of the American asylum law that grants permanent residence to legally and socially persecuted lesbian and gay subjects from other national contexts, Chandan Reddy argues that the juridical appearance of such figures must be situated within the context of the neoliberal structuring of the state power. Within the neoliberal mandates of capital, the demand for immigrant labor to take up low-income jobs is met through legal frameworks like the Immigration Act of 1990 that recruits unskilled, low-wage workers to enter the United States. At the same time, the language of family immigration, which under the rubric of family reunification allows the family

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<sup>331</sup> Sonia Katyal, "Criminal or Cultural: South Asian Gay Community Weighs in on Dharun Ravi," School of Law Newsroom, Fordham University. March 14, 2012 (Last visited 20 September, 2014 at: <http://law.fordham.edu/25660.htm>).

<sup>332</sup> *Ibid.*

members of migrant workers entry into the US, enables the state to project itself as a benevolent actor that reunites broken families. Without fulfilling its redistributive function to meet the welfare needs of migrant families, the burden of such needs is placed on the families themselves. The language of neoliberal responsibility generates the expansion of non-citizen life towards instituting heteronormative community structures for the provision of basic welfare functions. The queer members of such families experience a dual exclusion not just from their immediate family members but also within the racially hierarchical queer cultures in America. The production of the immigrant family as culturally homophobic in its inability to accept queer sexuality is set against the enabling role of the US nation-state as a simultaneous guarantor of freedoms to lesbian and gay subjects and the creator of heteronormative immigrant family structures through neoliberal mandates of capital.<sup>333</sup>

This understanding of the American immigration law's intersecting, contradictory modes of recruitment and disenfranchisement is necessary in order to understand why Clementi's suicide for which Ravi was indirectly held responsible yoked itself for explication to the discourse of homophobia among South Asian migrant communities of which Ravi was a part, as a green card holder. Acknowledging Ravi's upper middle-class background and upbringing still does not mitigate the charge of homophobia understood to be prevalent among diasporic immigrant communities. Ironically, such an epithet of migration is never evoked for the Clementi family whose initial lack of acceptance of their son Tyler's sexuality remains a minor overlooked detail subsumed in the much

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<sup>333</sup> Chandan Reddy, *Freedom with Violence: Race, Sexuality the US State* (Durham, NC: Duke University Press, 2011).

graver tragedy of Clementi's suicide. Consequently, a range of social media commentary focused on incidents of aggression from Ravi's childhood, the details of his tech whiz-kid persona and other unrelated events – a selection of facts that is made relevant and intelligible into a coherent whole<sup>334</sup> in order not only to explicate cultural homophobia embodied in individual figures but also to evacuate the private components of an ordinary immigrant life.

Ravi's homophobia as understood to be rooted in his South Asian background is also discursively linked to the Siras case, viewed as an instance of homophobic violence through the invasion of privacy in a postcolonial context. Ravi as a public embodiment of homophobic South Asian culture in the American context becomes an ironic alibi for postcolonial residues of tradition and a rejection of queer desire. A non-negotiable, fixed epistemology of homophobia hinges on his shadow privacy in order to emerge as the definite, instrumental and unrelenting basis for the pursuit of justice for LGBTQ vulnerability and persecution. Ironically, such an epistemology also steers the course of justice on the behalf of Professor Siras in a postcolonial context troubled by the conflict between the ongoing pathologization of homosexuality and advocacy efforts to empower and emancipate it culturally, legally and politically. The mobilization of a fixed set of markers of sexual alterity – gay, homosexual, homophobe, public and private – constitutes the imperative to empower permanently visible subjects of lost privacy. The underlying implication in this *de rigueur* course isn't to lend veracity to Ravi's

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<sup>334</sup> Ian Parker, "The Story of a Suicide," *The New Yorker*. 6 February 2012 (Last visited 20 September, 2014 at: <http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide>).



homophobia as symptomatic of a larger South Asian cultural problem. Rather, it is to direct attention to the ways in which the fixed epistemology of homophobia circulates to bind postcolonial contexts of LGBTQ visibility in an impasse. Ravi's alleged homophobia and the specter of his deportation to India consolidate South Asian homophobia as a disproportionate symptom of cultural otherness in the American context. At the same time, the invasion of Siras's privacy at the Aligarh Muslim University by university authorities and local media under the mandate of Islamic customs and beliefs gives a material location to the homophobia that must be contextualized as a postcolonial residue, resistant to a discourse of LGBTQ rights and empowerment. While the pursuit of a project of LGBTQ rights in postcolonial contexts through an understanding of homosexuality as a private matter and homophobia as a public theater of shame is made urgent and necessary by the predicament of LGBTQ lives at the intersection of visibility and vulnerability, the enabling conditions of such a project necessarily rely on fixed non-negotiable markers of sexuality. Such fixity patently goes against several tenets of LGBTQ politics in India based on the fluidity of queer desire and gender non-normativity.<sup>335</sup> Thus on the one hand, an LGBTQ empowerment agenda must be advanced through appeals to the fluidity of sexual desires and the multiplicity and the richness of the modes of identification in India, while on the other hand, the pursuit of justice in cases of privacy violations of non-normative figures take

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<sup>335</sup> Ruth Vanita ed., *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (New York: Routledge, 2002). Also See, Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Books for Change, 2004). Also see, Arvind Narrain & Gautam Bhan eds., *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2006).

recourse to fixed categories of the private homosexual and the public homophobe. They also simultaneously render visible permanently public subjects for whom privacy is reduced to a symbolic gesture in the name of LGBTQ empowerment.

In the conclusion of this chapter, I analyze a final case of privacy violation, a media sting operation on the users of a gay dating service in Hyderabad, to further demonstrate the mobilization of fixed categories through an absent subject, a figure that never appears much like the behavioral subjectivity of the Indian men-who-have-sex-with-men (MSM) whose vulnerability to HIV/AIDS informs the privacy jurisprudence in India.

### **The Absent Subject: Privacy as Global, Publicity as Local**

In February 2011, a regional Indian TV news channel, TV9, telecast a story titled, “Gay culture rampant in Hyderabad” in Telugu<sup>336</sup> on prime time news in Hyderabad. Through a sting operation conducted on the users of a gay dating service called planetromeo.com, an undercover TV9 reporter contacted profile users on the website and engaged them in conversation, ostensibly for a sexual hook-up. The story replayed the recorded conversations and exposed the profile pictures of the Hyderabad users in sensationalizing overtones of moral panic. Indian LGBT activists called the episode a flagrant invasion of privacy of the service users as well as a violation of media ethics and the code of conduct set forth by the News Broadcasters Association of India (NBA).

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<sup>336</sup> Telugu is a regional South Indian language spoken in the state of Andhra Pradesh where Hyderabad is located.

The story caused national outrage especially among the LGBTQ groups in India. Subsequent events culminated in the imposition of a fine of \$2000 on TV9 and a further issuance of an apology by the channel as ordered by the News Broadcasters Standards Authority (NBSA), an entity that governs media code of ethics and broadcasting standards in India. Indian lawyers argue that this course of action became possible in the wake of the decriminalization of homosexuality in India in 2009 by the Delhi High Court Naz judgment that read down Section 377 of the Indian Penal Code.<sup>337</sup> The sting operation by TV9 on the city's urban gay culture and the legal framework within which the new channel's "investigative" practice became punishable suggests a disjuncture between the global discourse of LGBTQ rights and the local cultures of vernacular media in India.<sup>338</sup>

TV9 is a 24-hours news channel launched in the South Indian city of Hyderabad in 2004 by the Associated Broadcasting Company Private Limited (ABCL), an entity that describes its mission as "building a better society" through "free-spirited journalism."<sup>339</sup> *Planetromeo.com*, a gay networking service that started in Berlin, by its very name suggests a global presence.<sup>340</sup> The networking site went global in 2007 by adopting an

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<sup>337</sup> Danish Sheikh, "Privacy and Sexual Minorities," The Center for Internet and Society (CIS), 24 October, 2011 (Last visited September 21, 2014 at: <http://cis-india.org/internet-governance/front-page/privacy-sexual-minorities>)

<sup>338</sup> Sharma, Gay Pride.

<sup>339</sup> <http://www.tv9.net/mission.html> As a vernacular channel that broadcasts news in the regional language of Andhra Pradesh, Telugu, TV9 caters primarily to a middle-class, family-oriented demographic. Its 24 hours coverage and breaking news format through "bold and fearless journalism" ostensibly represents the global values in news reporting.

<sup>340</sup> <http://www.planetromeo.com/> The predecessor of the online dating service was gayromeo.com that started in Berlin in 2002 became global as the company set up offices in Amsterdam in 2007 to launch different language versions of its websites. By 2009, the

LGBT rights approach offering PLUS subscriptions<sup>341</sup> to its users in countries where homosexuality was illegal. The proliferation of planetromeo.com as an online space to regions like Asia where it has created a community of users is yet another iteration of the global flows of information that facilitate local articulations of sexual experiences and identities through processes such as transnationalism,<sup>342</sup> cultural transmission<sup>343</sup> and dubbing culture.<sup>344</sup> The Indian queer/LGBT activist movement emerged through similar processes albeit drawing upon pre-Internet media forms and rapidly expanding through online discussion groups connecting diasporic and national communities as well as gay individuals in remote parts of the country.<sup>345</sup> Even as spatial metaphors of proliferation, interconnection and expansion seem to characterize global flows as seamless, local mediations often disrupt this process towards varying outcomes. Where new identities and practices emerge, concomitant modes of policing them arise in response.

The TV9 sting operation on planetromeo.com exemplifies how the affordances offered by the visibility of urban gay cultures as an instantiation of the global flows of

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company had a million members. The current website is part of the Planet Romeo Foundation, a queer rights advocacy organization.

<sup>341</sup> A PLUS subscription enables greater security for users in countries where homosexuality is illegal.

<sup>342</sup> Inderpal Grewal & Caren Kaplan, "Global Identities: Theorizing Transnational Studies of Sexuality," *GLQ* 7:4 (2001) 663-679.

<sup>343</sup> Baden Offord, "Singaporean Queering of the Internet: Toward a New Form of Cultural Transmission of Rights Discourse," in *Mobile Cultures: New Media in Queer Asia*, ed. Chris Berry et al. (Durham & London: Duke University Press, 2003), 133.

<sup>344</sup> Tom Boellstroff, "Dubbing Culture: Indonesian Gay and Lesbi Subjectivities and Ethnography in an Already Globalized World," *American Ethnologist* Vol. 30, Issue 2 (2003): 225.

<sup>345</sup> Sandip Roy, "From Khush List to Gay Bombay: Virtual Webs of Real People," in *Mobile Cultures: New Media in Queer Asia*, ed. Chris Berry et al. (Durham & London: Duke University Press, 2003) 133.

information are translated into a language of moral panic through a local address to Hyderabad's middle-class, heteronormative audiences.<sup>346</sup> The news story opens with a female reporter expressing shock at the drastically proliferating gay culture in Hyderabad. She says, "A boy trying to pursue girls is common but boys pursuing boys has become a fashion." She further reports that all the gay men in the city go to pubs and clubs and drink and dance with whomever they want. The visuals cut to the inside footage of a club. The alarming tone of the news reporter and the visuals of men dancing and drinking in a club mark the urban space of the pub/club as a form of cosmopolitan excess ushered in by Western lifestyles.

The reporter then describes the dancers as "software employees, rich kids and students" who are all drunk. Further sensationalizing the matter, she describes the party as "special" because all the men seen in the video are claimed to be "gay." She continues,

Having got to know about the gay parties the TV9 team went to "investigate" and found the truth. Meeting, drinking and partying like this on weekends has become a ritual to the gay men in this city. Taking private party permission as an excuse, all the gay men unite and party. It might sound astonishing to hear but this is the reality.

The figure of the "software employee" as an upwardly mobile subject functions to signal a global modernity ushered in by the development of the IT industry and a service economy in the city. The rhetoric of corrupting modernity continues through the global

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<sup>346</sup> Hyderabad is a South Indian city located in the Southeastern state of Andhra Pradesh. The city is home to Telugu-speaking Hindus as well as Urdu-speaking Muslims. Hyderabad is known for its history and traditional Islamist cultures as well as an Information-Technology (IT) hub for the corporate and educational sector. As an emergent cosmopolitan space, Hyderabad continues to be seen as a city with a predominant traditional culture with a rapidly developing IT and industrial sector.

figure of the software engineer even as the focus of the news story shifts to planetromeo.com and its users.

Describing planetromeo.com as the most popular among the gay websites on the Internet, the reporter provides user statistics from the website to substantiate her claims of an “outbreak” of homosexuality in Hyderabad. The number of users in the state of Andhra Pradesh is 6500, she reports, out of which “4604 are from Hyderabad alone”. At any given time, 200 users are always logged in from the city. The language of outbreak confounds the meanings of the terms the “global” and the “local” when she reports that software employees form the majority of the users “who fall prey to this gay culture.” Planetromeo.com, a *global* entity based out of Europe is refigured as a *local* space of homosexuality’s outbreak in India where the *local* gay man in his *global* avatar of the “software engineer” falls prey to a (Western) lifestyle. The language of reportage traffics in global metaphors and local idioms in its bid to “investigate” an online space that is both global and local as much as it is reality and fantasy at the same time.

As the story continues, the reporter contradicts her previous statement where the gay man who falls prey to this culture is now described as a sexual predator:

Sexy pictures, fashionable clothes, thrilling behavior and being able to communicate properly are the weapons used by a gay man to attract another gay man.

Here, the global modes of publicity and visibility offered by the website to enable users to communicate and connect with others are re-publicized to expose a local sexual subculture in online spaces. As the visuals show explicit pictures from user profiles to make this “investigation” more salacious, the next segment plays a conversation between

an undercover journalist and a planetromeo.com profile user. There are two conversations that are replayed. The second one is analyzed here.

The second conversation happens between the undercover journalist and a software engineer Sunil (name changed) who is described as “working for a well-known company, with a good salary” and as someone who “loves going to gay parties.” As the visual cuts to Sunil’s picture, the undercover journalist asks him questions about his age, address and sexual preferences. The journalist inquires about specific details such as where Sunil is at the time of the phone conversation, whether he has place to host a sexual hook-up, and what he likes in bed. As the conversation ends abruptly, the female reporter takes over and reinforces the link between the global service economy and homosexuality as lifestyle when she says:

A lot of employees in higher service positions, white collared workers, and highly qualified students are becoming slaves to this lifestyle which is against the natural way.

As the story visuals continue to show pictures uploaded by the users on their profiles, the last segment focuses on another kind of related predatory practice of blackmailing. The visual cuts to the picture of a man named Feroze (name changed) who is described as a part-time employee at a software firm whose actual business is “blackmailing.” The reporter then goes into details of how he blackmails gay men by “getting sexual pleasures from them,” “taking pictures and videos of them” and “snatching money from the same people from those pictures and videos.” Towards the end, the story offers reasons like the lure of money, new pleasures and bad company as to

why the men in Hyderabad are getting into an “anti-society lifestyle.” The story’s conclusion that shifts the blame on the business of blackmailing for victimizing the city’s gay men renders visible another local space of morally corrupt practice enabled by access to a globalizing culture.

Immediately after the TV9 telecast of its news story on gay culture in Hyderabad, the Indian LGBTQ activist groups began brainstorming legal action against the news channel on online lists like *lgbt-India*, *gaybombay* and *movenpick* that represent the conjuncture of global virtual space of human rights advocacy and local activist mobilization. The News Broadcasting Standards Authority (NBSA) of India determined that TV9 had violated its code of ethics and broadcasting standards on counts of privacy, sex and nudity, and sting operations. Even as privacy becomes the rallying point of initiating legal action against the news channel by the Indian LGBTQ activists, the profile users whose privacy was violated through their portrayal as sexual predators and slaves to a lifestyle, as well as further exposure through the telecast of their profile pictures, remain silent in this account. Their identities become flashpoints first in the TV9 story on local cultural degeneration through its emphasis on the global figure of the software engineer as both prey and predator, and then again through the LGBT activist response that elevates the figure of the local gay man in Hyderabad to the status of a global sexual subject that deserves a right to privacy. Nowhere in this scene of subjection and redemption do these men speak for themselves but their identities remain amenable to the news channel’s agenda of boosting its TRPs and the activist mission of resurrecting a sexual subject through a narrative of global human rights.



The geographer Jon Binnie has noted that the strategic essentialism implicit within the assumption of a common gay identity across the globe may be a necessity for the recognition of sexual citizenship by the state.<sup>347</sup> The profile users, both visible and invisible at once, become identified within the discourse of moral breakdown and sexual citizenship and LGBTQ rights in India in the aftermath of the sting operation. Despite the understandable silence of the profile users for possible reasons of fear of further persecution, social backlash and ridicule, the legal action against the TV channel and the subsequent retraction of the story and issuance of an apology on its part are important accomplishments of the LGBTQ advocacy in India.

In their bid to promote investigative journalism, the new channel's politics of outing is clearly driven by the sensationalist news values that motivated the sting operation on non-public figures made public through the language of moral panic and cultural corruption. Communication studies scholar Larry Gross's work on the politics of outing offers a way to distinguish between the motives behind outing within journalistic practices in America. He situates the act of exposing public figures and politicians who pursue an anti-gay public agenda despite being gay themselves, and the indiscriminate outing of individuals who are not public figures, on two extremes of a continuum. Observing the difference between privacy and hypocrisy, Gross addresses the real question:

the real issue is not to decide *whether* outing is, by one view, always a violation of journalistic and human ethics or, by the opposing view, a necessary political weapon of an oppressed minority whose pervasive invisibility fuels their oppression...the real question is, *where* in the

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<sup>347</sup> Jon Binnie, *The Globalization of Sexuality* (London; Thousand Oaks: Sage, 2004).

middle one draws the line, and *who* has the right to decide on which side of the line any particular instance falls.<sup>348</sup>

Gross's examination of the media ethics involved in the outing of public figures like actors and politicians in America relates to the journalistic practices of publicity and exposure within the context of the LGBT politics. Such politics is geared towards liberation and visibility that remains politically necessary in the face of pervasive LGBT invisibility and the AIDS crisis.

However, privacy as an ethical issue, as a human right, as a safeguard against intrusion by the state or non-state actors, was the central crux of the Delhi High Court Naz verdict in 2009 that linked such privacy to persons and not places. The broader social and cultural forces such as moral policing and panics, undue exposure and activist legal actions shape privacy in profoundly public ways such that it is reduced to a rhetorical strategy defining neither persons nor places. The planetromeo.com users who are the violated persons mark the key absence in the privacy discourse that is analogous with the absence of men-who-have-sex-with-men (MSM), represented in the Delhi High Court within a paradigm of governmentality and biopower, as alarming numbers of a public health concern.<sup>349</sup> Such an absence, when contextualized within the legal sublimation of privacy as transcending space and place to be embodied and invested in the autonomous person, is more broadly an abstraction, an evacuation of privacy's material foundations.

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<sup>348</sup> Larry Gross, *Contested Closets: The Politics and Ethics of Outing* (Minneapolis & London: University of Minnesota Press, 1993).

<sup>349</sup> Graham Burchell et al., eds. *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991).

## Conclusion

As demonstrated through the analysis of privacy violations in the Siras case, Clementi-Ravi incident and the TV9 sting operation, the primacy of the spatial foregrounds itself, whether in the assumed safety of the sexual bedroom or the mediated presence of online profiles, private yet public at once. The private persons in all three cases are rendered public effects with a presence that would only serve as a legal precedent in future cases of privacy violation and as violated specters in human rights archives that accrete to legitimize future agendas of empowerment.

Such an argument around the absence and abstraction of privacy only seeks to trace the ways in which privacy's legality, social and sexual desirability and violability are all subject to an incrementally public mediation of its presence as a right that follows and *not* precede the subject it brings into our empathetic view. Privacy as a derivative of various constitutional freedoms both in India and the United States is bound to remain an incomplete project. This is true insofar as this privacy is an ever-evolving legal principle that must constantly return to its own precedents in the annals of privacy jurisprudence in order to be renewed as if altogether novel. Privacy is tasked with giving that freedom to sexual subjects – a freedom intended as a safeguard against state and non-state forces. When it is so tasked, privacy can emerge into full presence only in a moment of violation – an instance that serves as the foundational moment for sexual subjecthood and the attendant legal personhood. This is the legal *fait accompli* of privacy, to have no firm constitutional textual basis and to proceed anew from multiple precedents in order to intelligibly be counted as a right upon whose exercise safely hidden-away bodies may appear as fully constituted sexual subjects.

The Siras and Clementi cases, forever public, become visible through an exercise of such a right to privacy, inviting us to remember these figures as violated subjects, as precedents to be recounted in order to mitigate a regime of violence and vulnerability of LGBTQ subjects transnationally. Considered within the extended repertoire of privacy through the legitimacy of *consensual* same-sex conduct, their consent revoked in the moment of violation once is abrogated again to expedite the course of human rights empowerment and the pursuit of justice that must serve the larger project of LGBTQ empowerment invested in the rhetorical possibilities of such a pursuit. In their respective deaths, both Siras and Clementi, like Dominic D'Souza, cannot validate their own iconicity – a status to which legal, cultural and political practices of citationality nonetheless would attach. Yet their symbolic presence must remind us to rethink privacy as a productive and reductive discourse mobilizing fixed sexual taxonomies and hierarchies. Further, in continuing to define the homosexual as a private interest who must be left alone, the figure of the homophobic other is immediately situated publically, an epistemology oriented towards an explication of a culture of harm and violence. Dharun Ravi, a shadow figure of privacy, is subject to a categorical public scrutiny. He is constituted through his cultural homophobia, a recapitulation of the postcolonial rejection of homosexuality as not Indian, as western, as an elsewhere. Such an allegation of postcolonial homophobia emerging from the central location of LGBTQ rights empowerment, the sexually permissive and progressive America, ironically sutures the very real condition of homophobic violence inflicted upon Siras and the planetromeo.com users within the nascent emergence of LGBTQ rights discourse in the Indian context. Remaining subject to vernacular media cultures that script local subjects like Siras and

the planetromeo.com users in the scandalous parts of “morally corrupt” sexual others, the right to privacy inaugurates a regime of visibility within which its subjects may or may not be present. While Siras is iconic even in his death, the planetromeo.com users are conspicuously absent in the drama of privacy violation redress. Even as the Delhi High Court Naz judgment enabled the course of legal action by Indian LGBTQ activists against TV9’s flagrant violation of media ethics and sexual privacy of users of an online gay dating and hook-up service, the claiming of the same pathologized figures by the news channel and the activists marked an unnoticed absence, the profile users who clearly abstained from further publicity.

An attention to privacy as an absence, abstraction and abstention need not undermine the legal strides into the field of justice for Indian LGBTQ subjects who continue to appear at the intersections of social and cultural vulnerability and the subsequently empowering visibility and recognition. The project of legal emancipation and empowerment of such subjects will continue unabated in the face of an increasingly fraught cultural politics in India with the return of the Hindu Right Wing as in charge of the government and the re-mobilization of arguments around homosexuality as Indian or Western culture. However, an understanding of privacy as spatial, as material within the refuge of certain spaces and as an imperative for non-normative sexual conduct is paramount in the current moment, towards the furthering of the LGBTQ legal project in India.

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## Conclusion

*It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.*

Justice G.S. Singhvi, The Supreme Court of India in *Suresh Kumar Koushal and Another v. Naz Foundation and Others*, 2013, New Delhi.

Thus on December 11, 2013 the much-awaited verdict by the Supreme Court of India on the 2009 Delhi High Court verdict of homosexuality's decriminalization was delivered. The high court's reading down of Section 377 was to be set aside. The Supreme Court proposed, in the wording of its momentous reversal, that the law was in fact facially neutral and did not target any particular identity group. Given that the object of the law's criminalization is a range of "unnatural" carnal acts that may be committed by anyone, the Supreme Court remained unconvinced by the extensive documentation of institutional abuse of the law to inflict various kinds of injuries on non-normative bodies. As well, they remained unconvinced by the public health data on the numbers of HIV infected MSM groups served by Naz. The court further observed that the LGBT constituted a miniscule minority in India; the law should not be changed merely on the basis of abstract academic arguments about the law's place in modern society.

In insisting that the disuse of the law or even its abuse does not constitute grounds for its unconstitutionality, the court deferred the matter to the Indian Parliament as the most representative body of Indian people to make any amendments. The eagerly

anticipated verdict sparked outrage among various national and local LGBT groups, which organized a number of events, press conferences and protests. The word ricocheted globally about the reversal of the Naz decision.<sup>350</sup> The Supreme Court's technical reasoning to decipher the law's word as only concerned with certain "unnatural carnal acts" and not any identities in particular belied the law's institutional misuse by the police to crack down on certain gender non-normative bodies and HIV/AIDS outreach work in a public context. This was demonstrated by Indian LGBTQ activists and lawyers in the extensive human rights documentation submitted before the highest court for consideration in ruling on the provisional decriminalization of homosexuality granted by the Delhi High Court. However, the Court repudiated this documentation as merely abstract academic appeals, which were not a sound basis for repealing the sodomy law. Further, given the absence of an aggrieved body in the courtroom, such evidence could not be entertained. The absence of a subject in the courtroom as the embodiment of the sodomy law's wrongful application then proved to be a Rancièrian subject. We may recall that Rancière regards the moment of politics to be one in which the subject of a wrong or violation effects the verification of equality that has been constitutionally guaranteed under the law. By pointing to the absence of such a subject in the Naz court,

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<sup>350</sup> See for instance, the widely covered media event "Global Day of Rage against 377." Tasneem Nashrulla, "Activists Plan "Global Day of Rage" to Fight for India's LGBT Community," *BuzzFeed News* December 13, 2013. Accessed online at <http://www.buzzfeed.com/tasneemnashrulla/activists-plan-global-day-of-rage-to-fight-for-indias-lgbt-c#.bqPBwdpdG> on March 25, 2015.

the Supreme Court judges clearly enacted Rancière's logic of the dispute that leads to the challenging of the normative supposition of equality.<sup>351</sup>

The judges also deemed the public health data on HIV/AIDS and the MSM compiled by Naz Foundation and the National AIDS Control Organization (NACO) as unsubstantiated, effectively rendering tenuous any claims to privacy by the activists and lawyers on behalf of the violated sexual minorities. A few salient observations made by the Supreme Court in deciding the constitutionality of Section 377 are relevant in understanding how the court disaggregated the discourse of homosexual identity as the object proper of the sodomy law through criminalization and prosecution. On the subject of sexual acts that are liable to criminal prosecution under the section, the Court ruled that such acts could only be understood with reference to the act in question and should be considered within the circumstances of their execution. Such open-endedness about the nature of the acts as falling under the purview of the sodomy code reinforces the historical continuity with the vagueness surrounding both Macaulay's intention in writing the law and the postcolonial non-consensual cases discussed in Chapter 2 – the narrative interpretations which fed the constantly emerging meaning of sodomy in the courts of law. The deference of the meaning of a sexual act to the unique mechanics of each individual act in its context of commission by the court enabled the judges to circumvent laying down any standards of adjudication under Section 377. At the same time, this deference of meaning unwittingly expanded the scope of the law infinitely. Similar to privacy's changing meaning shifting from case to case as observed by the Supreme Court

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<sup>351</sup> Jacques Rancière, *Dissensus: On Politics and Aesthetics* (London & New York: Continuum Press, 2010).



in a previous instance, certain undefined sexual acts acquire an unlimited power of signification, by the highest court's verdict on the Naz judgment. The court attributed this power to certain acts without defining any corresponding identities. In a brief moment of ideological explicitness, the court dismissed the question of human rights violation by relegating the Indian LGBT subjects to the status of a "miniscule fraction of the country's population" and set aside the contention that the law created an unreasonable classification by targeting gays and lesbians.

Further disaggregating the issue of sexual identities as the law's criminal target, the court offered that the misuse of the law by the police to harass the LGBT was not a reflection of the vires of the law, which the court asserted, neither mandated nor condoned such harassment. Particularly criticizing the Delhi High Court's use of American case law and other western sources in its conferral of the rights of privacy, equality and dignity upon the LGBT, the Court cited a 1973 judgment in which the appellant challenged the efficacy of death penalty by referring to the Eighth Amendment of the American Constitution. Citing verbatim from that judgment, the Supreme Court held that it had grave doubts about the expediency of transplanting western experience in India. In summing up India's peculiar situation characterized by its linguistic and regional diversity, the disparity in morality and education among its large population and the variety of social upbringing, the court held that the abolition of death penalty could not be experimented with. Such a parallel on a comparably controversial issue allowed the court to repudiate the transnational basis of granting rights to LGBT subjects in a postcolonial context.

With these observations, the Supreme Court of India set aside the Delhi High Court order to decriminalize homosexuality on December 11, 2013. A follow-up review petition to reconsider the Supreme Court's ruling was also dismissed.<sup>352</sup> A curative petition filed as a last resort has been pending at the time of the writing of this dissertation. A curative petition is the last judicial resort available to redress grievances in the court and it is normally considered by judges in their chambers without granting opportunity to parties to argue the case. It is meant to cure defects that may lead to gross miscarriage of justice after the dismissal of a review petition.

Under the current political regime of the Hindu Right Wing National Democratic Alliance (NDA) that vehemently opposes homosexuality, any further public mobilization by LGBTQ activists is unlikely to gain traction. Indian LGBTQ activists, public health NGOs and various support groups have continued to mobilize against the Supreme Court judgment, especially in the wake of the rising concerns around the increased use of the law since its reinstatement.<sup>353</sup> These cases highlight the urgent need for an interventionist framework to protect those who identify as LGBTQ or take on professional identities as HIV/AIDS health workers within necessarily public contexts. Their visibility remains an ambiguous predicament that places them at the intersection of imminent empowerment and potential vulnerability. In attempting a more complex and nuanced reading of privacy

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<sup>352</sup> FP Staff, "Section 377: SC Rejects Review Petition, Gay Sex Remains a Crime," *First Post*, January 29, 2014. Accessed online, April 24, 2015: <http://www.firstpost.com/living/section-377-sc-rejects-review-petition-gay-sex-stays-a-crime-1362969.html>.

<sup>353</sup> Nupur Sonar, "The Unending Nightmare of Section 377," *Tehelka Magazine*, December 20, 2014. Accessed online, April 24, 2015: <http://www.tehelka.com/the-unending-nightmare-of-section-377/>. Also see, Shemin Joy, "600 Homosexuals Arrested in 2014," *Deccan Herald*, January 1, 2015. Accessed online, April 24, 2015: <http://www.deccanherald.com/content/451095/600-homosexuals-arrested-2014.html>

in the context of non-normative sexual behavior, identities and practices, this dissertation has demonstrated the fraught entanglements of privacy with conditions of visibility and exposure under which those who identify and often become identified as LGBTQ acquire a public presence under the sign of violation.

This project has developed an analytical lens to understand privacy as a materially urgent affordance whose legal counterpart is often mobilized under conditions of violation and violence. The development of LGBTQ rights in terms of legal recognition in India in the near future remains beholden to the Hindu Right Wing government's politics of fostering a national Hindu culture in which homosexuality clearly has no place except in its status as pathology, stigma and medical deviation. The subsequent greater visibility in legal representation and other forms of cultural mediation brought about through legal and cultural turns, some of them described here, foreshadow privacy as an unwitting consequence of being permanently public. Such a contradiction, instead of being understood as a categorical structuring of privacy, should enable us to imagine alternative modes of accommodation and acceptance of homosexuality outside the legibility of labels and implications of public identification.

I now offer some concluding reflections on privacy's axiomatic relationship with homosexuality, a linkage that has been at the analytical core around which the arguments about visibility, public identification and sexuality have been advanced in this dissertation.

### **Complicating Privacy Further**

This dissertation's engagement with the legal, social and humanitarian discourses around the right to privacy as the basis of homosexuality's decriminalization has proceeded with the view that privacy brings materiality to experiences of gender and sexuality. Among the set of rights supporting homosexuality's decriminalization by the Delhi High Court in 2009 – right to life, equality, dignity and non-discrimination – privacy remains the most materially urgent. Yet its own derivative foundations in the law and its inherent instability in meaning that depends on the context render it tenuous as the basis of decriminalization. Essentially in terms of the law and the use of precedents in privacy violation cases, there can be as many arguments for granting a right to privacy, as there are to impose limits on its exercise. Just like the inherently undefined “unnatural” sexual acts in the Supreme Court's view, acts whose larger cultural meaning can only be assessed in relation to its unique mechanics, privacy is fated to be similarly adjudicated. This would lead to defining privacy over and over, which in effect, might also shift privacy as the basis of homosexuality's decriminalization. It is entirely possible to imagine a scenario where privacy, in its constantly shifting form, might go against the decriminalization argument if it comes up again in the future.

In undertaking a genealogical analysis of privacy in relation to the sodomy law, Section 377 of the Indian Penal Code, this project has demonstrated the various entanglements and contradictions from which privacy cannot be easily extricated. The various legal logics employed by the postcolonial courts, the Delhi High Court and the Supreme Court of India in the cases pertaining to Section 377 analyzed in the dissertation become operable through multiple slippages, confluences and disaggregation. The right to

privacy as the precondition of decriminalization by the Delhi High Court becomes tenable only through the conflation between the MSM, a demographic that never claims identification, as a health subject and the self-identifying gay subjects who are the visible face of the LGBTQ movement in India. Such a conflation of subjectivity facilitates privacy's status as a right to safeguard homosexuals without attention to the necessarily ambiguous publicly private contexts within which the MSM subject is situated. Similarly, privacy and consent as the liberal bases of legalizing same-sex behavior to redress the partly symbolic injury of criminalization rests on a tenuous distinction between consensual and non-consensual. As shown in the analysis of non-consensual cases in Chapter 2, privacy and consent as distinguished from non-consensual behavior remains a tenuous distinction in the matter of homosexuality's decriminalization as long as the sexual act under consideration is the same. Because the object of criminalization under Section 377 was the sexual act that remains undefined in the Supreme Court's view, sodomy, whether consensual or non-consensual, homosexual or heterosexual, has always been a troubling signifier of moral corruption and modern excess.

Such an interpretation clearly emerges from my analysis of the Siras case, the professor who was accused of indulging in immoral sexual acts on the moral geography of the Aligarh Muslim University (AMU), as well as of the TV9 sting operation in which the figure of the upwardly mobile software engineer was framed as an embodiment of cosmopolitan excess and cultural corruption. It is worth reiterating that the Delhi High Court's formulation of the right to privacy was expansive in imagining the scope of privacy as related to persons and not just places. That is, the Court offered a notion of privacy that empowered the individual in her ability to define privacy through

personal/decisional autonomy. This, the LGBTQ activists and lawyers proclaimed to be a more desirable conception of privacy, superior to the supposedly narrower zonal/spatial logic. However, the Siras case clearly highlighted the zonal/spatial of the bedroom space to be the primary order of privacy violation and the decisional autonomy to be subsequent to the professor's exposure in local media. His decisional autonomy only became legally operable when he claimed an injury as a gay man under the Naz ruling of decriminalization, which was binding at the time in 2010. It follows then decisional autonomy's superiority to the zonal/spatial logic is premised upon public identification as gay or lesbian, requiring the violated to come out in order to claim legal redress. Similarly, decisional autonomy as linked to public identification of sexual personhood marks an absence when the PlanetRomeo profile users, when exposed by TV9, never came forward to ask for privacy-based justice. Without their physical presence in the story, privacy as decisional autonomy becomes evacuated without a proper decision-maker.

In a liberal democracy and especially within the Naz framework of LGBTQ rights, such a linear course of rights-based adjudication would be assumed to function smoothly where justice is attained upon the exercise of rights. But in postcolonial India, the visibility brought about by the exercise of rights reduces the violated to the very markers to which privacy as decisional autonomy would attach. The spatial should not be relegated to a narrower and lesser version of privacy even though there may be arguments to the contrary. Spatial privacy in India remains a classed affordance available to the elite minority who can safely identify as gay or lesbian in public and partake of the queer culture in spaces like clubs, pubs, pride parades and other social venues. One could also

argue that the Aligarh Muslim University mobilized a particularly spatial logic to suspend Siras when the institution claimed that homosexuality even in the privacy of the home is immoral. That the professor's home was located on campus, a moral geography structured by religious beliefs and ideas then certainly attenuates any claim to spatial privacy, the attribution of morality to space as unique notwithstanding. However, to return to one of the rationales that gave Naz judgment its progressive orientation, religious, popular or public morality was also deemed invalid as the basis of the cultural disapproval of homosexuality. The Delhi High Court judges had ruled that constitutional morality that is secular in its orientation, and not public or popular morality, was to be the basis of extending rights to the LGBTQ subjects. By that standard, the AMU's invocation of its own religious morality in suspending the professor on grounds of his homosexuality also becomes extra-legal.

Thus neither decisional autonomy that mandates public identification as gay or lesbian nor spatial affordance that is exclusionary and often subject to religious and moral edicts strengthens privacy in the postcolonial Indian contexts. It is, however, myopic to regard spatial as being less empowering a conception of privacy than decisional autonomy. As also demonstrated in chapter 3 in which was recounted the history of gender and sexuality based public violations of largely gender non-normative bodies, privacy in public space is yet another layer of complication in making a right to privacy the basis of decriminalization. Even as the evidence of such violations served to concretize the case for decriminalization, the very fact that those violations were committed in public on gender non-normative bodies as an embodiment of deviance, stigma and pathology did not give the judges a pause. In rehearsing their rights-based

arguments to decriminalize homosexuality, the judges, on the one hand conflated a range of sexual and gender subjectivities (MSM, transgender, gay) in their indictment of the sodomy law, and failed to meaningfully analyze the fundamental contradiction between the public context of the violations and the reparative reach of the right to privacy. In fact, in the Supreme Court's technical reasoning on the law's vires in the Indian Constitution, the attention to Indian society and difference is clearly pronounced as noted above. To reiterate, privacy in its historically axiomatic relationship with homosexuality is indeed materially urgent. Yet its derivative legal status and its contested cultural meanings as well as exclusionary logics warrant an interrogation of privacy's mobilization in the service of homosexuality's decriminalization in India.

That privacy stands on murkier, messier grounds becomes evident in three recent cases following the revocation of the Naz judgment by the Supreme Court of India to recriminalize homosexuality. Pertaining to heterosexual marriage, these cases have become cultural flashpoints to debate the purpose of Section 377 and its ongoing damage not just to homosexual or bisexual men but also to heterosexual women, especially in the context of re-criminalization of homosexuality. I summarize them briefly here in order to show not the unwitting reinvigoration of a law that had ironically been seen to suffer from desuetude, but the humanitarian investment in privacy as grounds for legitimacy of engaging in homosexual behavior.

In October 2014, a Bangalore-based software engineer who was married to a woman was booked under Section 377 of the Indian Penal Code for having sex with another man. His encounters had been recorded by his wife on a secret surveillance camera that she had installed in their apartment after her suspicions about her husband's



sexuality grew. The wife's suspicions were owing to her husband's use of pink lip-gloss, face packs and long showers as well as effeminate mannerisms.<sup>354</sup> Following a police complaint filed by her, the husband was booked not under the adultery code, Section 497, but Section 377, which presently carries a maximum sentence of life imprisonment for engaging in "unnatural" sexual behavior. Sandip Roy, a San Francisco based journalist, observes that the patriarchal nature of Indian society pressures a number of gay men to enter into heterosexual marriages. However, the author further notes, that this was a software engineer who had financial independence; he rightfully could not evade his responsibility to the wife. Roy sees this as a case of gay men trying to have their cake and eat it too.<sup>355</sup>

While Roy's observation about the patriarchal pressure on men to get married is certainly true in the Indian context, his prescriptive observations oddly mirror and recapitulate the popular morality logic repudiated by the Delhi High Court in decriminalizing homosexuality. There is too much assumption about the husband's actions as self-centered in the absence of his side of the story. However, the privacy in this case becomes murkier given the culprit is the gay man who was caught having sex on camera. If gay sex had been legal, how would we approach the question of the husband's

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<sup>354</sup> FP Staff, "Bangalore: Woman Films Husband's Gay Encounters, Police Book him Under Section 377," *First Post*, October 30, 2014. Accessed online, April 25, 2015: <http://www.firstpost.com/living/bangalore-woman-films-husbands-gay-encounters-police-book-him-under-sec-377-1779287.html>

<sup>355</sup> Sandip Roy, "Booked Under Section 377: Bangalore Techie's Story Gets Extra Punch Thanks to Outdated Law," *First Post*, October 31, 2014. Accessed online, April 25, 2015: <http://www.firstpost.com/living/booked-under-section-377-bangalore-techies-story-gets-extra-punch-thanks-to-outdated-law-1780029.html>

privacy in a heterosexual marriage with the countervailing rights of the wife? The answers may be as varied as the moral logics around sexuality, marriage and gender.

But let's look at another case of a married doctor involving seven youth with whom the former had sexual relations in June 2014. The youth were booked under an extortion law and Section 377 for blackmailing the doctor for money, with the threat of exposing his sexual encounter on an alleged videotape. The police were also exploring the possibility of charging the doctor under Section 377 since technically he was guilty of having engaged in "unnatural" sexual relations with the men.<sup>356</sup> The case easily lends itself to the trappings of a public sex scandal within which the doctor, despite being a victim of privacy violation, would be seen as a culprit for extra-marital relations with men.

In the most recent case in April 2015, an All India Institute of Medical Sciences (AIIMS) doctor committed suicide in a hotel room after she discovered that her husband was gay. She left behind an anguished Facebook note in which she claimed that the husband tortured her and never consummated their marriage in the five years that they were together. In a vein similar to the Bangalore techie's story, Sandip Roy characterizes the wife as an "unwitting" victim while the husband is simply unwilling. Roy believes that in this day and age of the Internet networking and extensive resources for LGBT identified or struggling men, gay men have a responsibility to not cave into the pressure to get married. Observing that the Internet has made it easier for people to lead double

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<sup>356</sup> FP Staff, "Section 377: 7 Booked for Blackmailing Doc, Who also Faces Arrest," *First Post*, June 23, 2014. Accessed online, April 25, 2015: <http://www.firstpost.com/living/section-377-7-booked-blackmailing-doc-also-faces-arrest-1584263.html>

lives, Roy holds that the least gay men can do is to not get married even if they don't want to come out or participate in pride parades.<sup>357</sup>

Implicit in Roy's moralizing take on the two stories – the Bangalore techie's and the AIIMS doctor's suicide – is an essentializing undertone that takes married gay men as necessarily victims of patriarchy. Struggling with their sexuality, they must avail of the LGBT support resources offered by NGOs like the Humsafar Trust in Bombay and the Naz Foundation in Delhi. Roy also seems to subscribe to the idea that gay men with material resources at their disposal must not give into the pressure to get married and potentially ruin a woman's life subsequently. In this prescriptive teleological becoming and acceptance is the linear narrative of repression, struggle, support, acceptance and public visibility and identification that also defines the queer visibility politics in not just India but elsewhere as well.

By indicting this prescriptive moralizing geared towards "helping" certain victims of patriarchy who cause further harm to others, I certainly do not aim to condone or defend the gay men or other stakeholders by a constructing a narrative of empathy. I have aimed instead to demonstrate why the axiomatic narrative relation of privacy and homosexuality is not neatly contained through the liberal discourse of LGBTQ rights. The postcolonial modes of adjudicating matters of gender and sexuality constitute an extra-legal formation of excess that besets any claims to identity-based rights. Such identity, more often than not, cannot be meaningfully understood without taking into

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<sup>357</sup> Sandip Roy, "AIIMS Doctor and her 'Gay Husband': So Why didn't He Stay Single?," First Post, April 20, 2015. Accessed online, April 25, 2015: <http://www.firstpost.com/india/aiims-doctor-gay-husband-didnt-stay-single-2203766.html>

account the intersectionality of class, caste, gender, religion and occupation among other things. While rights-based modes of justice rely on fixed markers of difference, the particular case of the right to privacy as the basis of decriminalization homosexuality is problematic. This is true insofar as same-sex relations and homosexuality continue to be pathologized culturally, medically and socially. Further the privacy claims of gay men – if they were tenable legally – become attenuated in the context of heterosexual marriage that often takes priority over one’s sexual identification as gay. Although the outcomes in these cases are tragic and devastating, the prescriptive morality in these accounts is exactly the kind of normative impulse that this dissertation has critiqued. This moral position insists that at the very least gay men should not marry and should come out with the help of NGO support resources. Popular or public morality was repudiated by the Delhi High Court as the basis of disapproving homosexuality in culture and society. Instead the High Court made constitutional morality (defined as secular gaze of the law that treats all minorities as equal) to be the basis of legalizing homosexuality. The recourse to a similarly charged morality that prescribes an honest and self-affirming course of sexual identity to gay men unwittingly recapitulates and reproduces the narrative of homosexuality as pathology, in need of public intervention. This prescriptive impulse then aims to normalize homosexual behavior as identity towards creating a safe, open, honest and pure queer culture. Inherent within the need for privacy is not always the want to necessarily be an empowered homosexual but also the desire to be secretive, guarded and strategic about one’s sexuality that does not always comfortably co-exist with sexual pride and visibility. To recognize alternative logics of sexual visibility embedded within the desire for privacy has been the animating motivation of this work.

## References

- Alan Hyde, *Bodies of Law* (Princeton, NJ: Princeton University Press, 1997).
- Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals," *Economic and Political Weekly* 41 No. 46 (2006): 4815-4823.
- Alok Gupta, "This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism," *New York: Human Rights Watch*, 2008.
- Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (Chicago: University of Chicago Press, 2002).
- Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Durham & London: Duke University Press, 2009).
- Anjali Arodekar, "Time's Corpus: On Sexuality, Historiography and the Indian Penal Code," in *Comparatively Queer: Interrogating Identities and Cultures Across Time*, ed. Jarrod Hayes et al. (New York: Palgrave Macmillan, 2010).
- Ann Laura Stoler and Frederick Cooper, "Between Metropole and Colony: Rethinking a Research Agenda," in *Tensions of Empire: Colonial Cultures in a Bourgeois World* ed. Frederick Cooper & Ann Laura Stoler (Berkeley, Los Angeles, London: University of California Press, 1997).
- Arturo Escobar, "Discourse and Power in Development: Michel Foucault and the Relevance of his Work to the Third World," *Alternatives: Global, Local, Political* 10: 377 (1984): 377-400.
- Arturo Escobar, *Encountering Development: The Making and the Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995).
- Arjun Appadurai, "Disjuncture and Difference in the Global Cultural Economy," *Theory, Culture and Society* 7 (1990): 295
- Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minnesota: University of Minnesota Press, 1996).
- Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change), 2004.
- Arvind Narrain, "The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva," *Sexuality, Human Rights and Health* 7 No. 2 (2004), 142-164.

Arvind Narrain and Vinay Chandran, "It's Not my Job to Tell You It's Okay to be Gay: Medicalization of Homosexuality, A Queer Critique," *Alternative Law Forum*. Accessed March 16, 2015 <http://www.scribd.com/doc/192268531/It-s-Not-My-Job-To-Tell-You-Its-Okay-To-Be-Gay>

Arvind Narrain and Gautam Bhan ed., *Because I have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005).

Arvind Narrain, *The Right that Dares to Speak its Name: Decriminalizing Sexual Orientation and Gender Identity in India* (Bangalore: Alternative Law Forum, 2009).

Arvind Narrain et al. "Policing Morality at AMU: An Independent Fact-Finding Report," 10 March 2010. Accessed April 25, 2015 <http://www.fridae.asia/gay-news/2010/03/10/9724.policing-morality-at-amu-an-independent-fact-finding-report>

Arvind Narrain & Alok Gupta, ed., *Law like Love: Queer Perspectives on Law* (New Delhi: Yoda Press, 2011).

Ashley Tellis, "Ethics, Human Rights and the LGBT Discourse in India," in *Applied Ethics and Human Rights: Contextual Analysis and Conceptual Applications*, ed. Shashi Motilal (New Delhi: Anthem Press, 2010).

Ashley Tellis, "Disrupting the Dinner Table: Re-thinking the 'Queer Movement' in Contemporary India," *Jindal Global Law Review* Vol. 4 Issue 1 (2012): 142-387.

Baden Offord, "Singaporean Queering of the Internet: Toward a New Form of Cultural Transmission of Rights Discourse," in *Mobile Cultures: New Media in Queer Asia*, ed. Chris Berry et al. (Durham & London: Duke University Press, 2003).

Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London, New York, 1983).

Benjamin Law, *Gaysia: Adventures in the Queer East*. (Victoria, Australia: Black Inc., 2012).

Brinda Bose and Subhabrata Bhattacharyya, ed., *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India* (Calcutta: Seagull, 2007).

B V Subrahmanyam, ed., *Modi's Textbook of Medical Jurisprudence and Toxicology*, 22<sup>nd</sup> Edition (New Delhi: Butterworth, 1999).

Chandan Reddy, *Freedom with Violence: Race, Sexuality the US State* (Durham, NC: Duke University Press, 2011).

Christopher Pullen, ed., *LGBT Transnational Identity and the Media* (Basingstoke: Palgrave Macmillan, 2012).

Danish Sheikh, "Privacy and Sexual Minorities," The Center for Internet and Society (CIS), 24 October 2011 (Last visited September 21, 2014 at: <http://cis-india.org/internet-governance/front-page/privacy-sexual-minorities>)

David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham and London: Duke University Press, 2010).

David Halperin, *How to do the History of Homosexuality* (Chicago: University of Chicago Press, 2002).

David M. Halperin, "How to do the History of Male Homosexuality," *GLQ: A Journal of Gay and Lesbian Studies* Vol. 6 No. 1 (2000): 87-123.

David Morley and Kevin Robins, *Spaces of Identity: Global Media, Electronic Landscapes and Cultural Boundaries* (London & New York: Routledge, 1995).

David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies* 32 No. 3 (1998): 513-557.

Darshana Sreedhar, "Sahayatrika in its Making: Queer Visibilization in Kerala." Unpublished manuscript. Accessed May 3, 2015.  
[https://www.academia.edu/3552893/Sahayatrika\\_in\\_its\\_making\\_Queer\\_Visibilization\\_in\\_Kerala](https://www.academia.edu/3552893/Sahayatrika_in_its_making_Queer_Visibilization_in_Kerala)

Dennis Altman, "Rupture or Continuity? The Internationalization of Gay Identities," *Social Text* (1996), 77-94.

Dennis Altman, "Globalization and the International Gay/Lesbian Movement," in. *Handbook of Lesbian and Gay Studies*, ed., Diane Richardson & Steven Seidman (London: Sage, 2002).

Dennis Altman, *Global Sex* (Chicago: University of Chicago Press, 2002).

Dennis Altman, *The End of the Homosexual?* (Queensland: University of Queensland Press, 2013).

Dipika Jain, "The Impact of the Naz Foundation Judgment on the Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation," Center for Health, Law, Ethics and Technology, Jindal Global Law School. March 2010. Accessed April 10, 2015  
[http://orinam.net/377/wp-content/uploads/2013/12/Report\\_ImpactoftheNazFoundationJudgment.pdf](http://orinam.net/377/wp-content/uploads/2013/12/Report_ImpactoftheNazFoundationJudgment.pdf)

Durba Ghosh, *Sex and the Family in Colonial India: The Making of Empire* (Cambridge: Cambridge University Press, 2006).

Edwin Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights," *South African Law Journal*, 110 (1993): 110-450.

Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23 No. 3 (2005): 631-683.

Elizabeth A. Povinelli & George Chauncey, "Thinking Sexuality Transnationally," *GLQ* Vol. 5 No. 4 (1999): 439-449.

Ella Shohat and Robert Stam, eds., *Multiculturalism, Postcoloniality and Transnational Media* (Rutgers, NJ: Rutgers University Press, 2003).

"Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India," A Human Rights Watch Report, Vol. 14 No. 5 (C). Accessed February 25, 2015 <http://www.hrw.org/reports/2002/india2/india0602-05.htm>

Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959).

Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley Los Angeles: University of California Press, 1990).

Flavia Agnes, "Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law," *Economic and Political Weekly* Vol. 37 No. 9 (2002): 844-847.

Flavia Agnes, "To Whom do Experts Testify? Ideological Challenges of Feminist Jurisprudence," *Economic and Political Weekly* 40 No. 18 (2005): 1859-1866.

FP Staff, "Section 377: SC Rejects Review Petition, Gay Sex Remains a Crime," *First Post*, January 29, 2014. Accessed, April 24, 2015 <http://www.firstpost.com/living/section-377-sc-rejects-review-petition-gay-sex-stays-a-crime-1362969.html>

FP Staff, "Bangalore: Woman Films Husband's Gay Encounters, Police Book him Under Section 377," *First Post*, October 30, 2014. Accessed April 25, 2015 <http://www.firstpost.com/living/bangalore-woman-films-husbands-gay-encounters-police-book-him-under-sec-377-1779287.html>

FP Staff, "Section 377: 7 Booked for Blackmailing Doc, Who also Faces Arrest," *First Post*, June 23, 2014. Accessed, April 25, 2015 <http://www.firstpost.com/living/section-377-7-booked-blackmailing-doc-also-faces-arrest-1584263.html>



- Gabriele Griffin, *Representations of HIV/AIDS: Visibility Blue/s* (Manchester: Manchester University Press, 2012).
- Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (New Delhi: Yoda Press, 2006).
- Geeta Patel, "Risky Subjects: Insurance, Sexuality and Capital," *Social Text* 89 Vol. 24 No. 4 (2006): 25-65.
- Graham Burchell et al., ed., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991).
- Gregory Pappas et al., "Males who have Sex with Males (MSM) and HIV/AIDS in India: The Hidden Epidemic," *Public Policy Journal* 16 (1). (2001): 4-17.
- Harry G. Cocks, *Nameless Offences: Homosexual Desire in the 19<sup>th</sup> Century* (IB Tauris, 2003).
- Ian Parker, "The Story of a Suicide," *The New Yorker*. 6 February 2012. Accessed 20 September, 2014 <http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide>).
- Ien Ang, *Living Room Wars: Rethinking Media Audiences for a Postmodern World* (London: Routledge, 1996).
- Inderpal Grewal, "Global Identities: Theorizing Transnational Studies of Sexuality," *GLQ: A Journal of Lesbian and Gay Studies* Vol. 7 No. 4 (2001): 663-679.
- Ivan Dalley Crozier, "The Medical Construction of Homosexuality and its Relation to the Law in Nineteenth-Century England," *Medical history* 45 (2001): 61-82.
- Jacques Rancière, *Dis-agreement: Politics and Philosophy* trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999).
- Jacques Rancière, *Dissensus: On Politics and Aesthetics* (London & New York: Continuum, 2010).
- James Clementi, "Looking for Tyler: How My Baby Brother's Legacy is Helping Build a Better Culture for Vulnerable Youth," HuffPost Gay Voices, *The Huffington Post*, 22 September, 2013. Accessed 20 September 2014 [http://www.huffingtonpost.com/james-clementi/tyler-clementi\\_b\\_3957463.html](http://www.huffingtonpost.com/james-clementi/tyler-clementi_b_3957463.html)
- Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham and London: Duke University Press, 2007).

- Jason Keith Fernandes, "The Dilemma after the Decision: Strays Thoughts after Gay Liberation," *Tehelka Magazine*, 14 Aug 2009. Accessed January 4, 2015.  
[http://archive.tehelka.com/story\\_main42.asp?filename=Ws220809The\\_Dilemma.asp](http://archive.tehelka.com/story_main42.asp?filename=Ws220809The_Dilemma.asp)
- Jed Rubinfeld, "The Right of Privacy," *Harvard Law Review* 102 No. 4 (1989): 781.
- Jennifer Terry, *An American Obsession: Science, Medicine and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).
- Jerry Pinto, "Stories from a Crisis," *Infochangeindia.org*, Accessed May 3, 2015  
<http://infochangeindia.org/hiv-aids/media/stories-from-a-crisis.html>
- Jon Binnie, *The Globalization of Sexuality* (London: Sage, 2004).
- John Stuart Mill, *On Liberty* (Mineola, NY: Dover Publications, 2002).
- John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (Amherst: University of Massachusetts Press, 1988).
- José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York: NYU Press, 2009).
- Joseph Massad. "Re-Orienting Desire: The Gay International and the Arab World," *Public Culture* Vol. 14 No. 2 (2002): 361-385.
- Judith Butler, "Critically Queer," *GLQ* 1 (1993): 17-32.
- Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).
- Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex."* (London: Routledge, 1993).
- Judith Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York: NYU Press, 2005).
- Kate Zernike, "After Gay Son's Suicide, Mother finds Blame in Herself and her Church," *The New York Times*, 24 August, 2012. Accessed September 20, 2014  
[http://www.nytimes.com/2012/08/25/nyregion/after-tyler-clementis-suicide-his-parents-make-painful-changes-in-the-search-for-why.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/25/nyregion/after-tyler-clementis-suicide-his-parents-make-painful-changes-in-the-search-for-why.html?pagewanted=all&_r=0).
- Kath Browne, Jason Lim and Gavin Brown, ed., *Geographies of Sexualities: Theory, Practices and Politics* (Aldershot: Ashgate, 2005).

Kath Weston, *Families We Choose: Lesbians, Gay, Kinship* (New York: Columbia University Press, 1991).

Katherine Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 No. 5 (2004): 1399.

Kama Maureemootoo, "The Nation as Mimicry: The (Mis) Reading of Colonial Masculinities in India," in *Masculinity and its Challenges in India: Essay on Changing Perceptions*, ed., R.K. Dasgupta & K.M. Gokulsing (Jefferson, NC: McFarland & Company, 2014).

Kaustav Bakshi & Parjanya Sen, "India's Queer Expressions On-Screen: The Aftermath of the Reading Down of the Section 377 of the Indian Penal Code," *New Cinemas: Journal of Contemporary Film*, 10 No. 2 & 3 (2012): 167.

Kevin G. Barnhurst, ed., *Media/Queered: Visibility and its Discontents* (New York: Peter Lang, 2007).

Kendall Thomas, "Beyond the Privacy Principle," *Columbia Law Review* 9 No. 6 (1992): 1431.

Kendall Thomas, "Corpus Juris (Hetero) Sexualis: Doctrine, Discourse and Desire in *Bowers v. Hardwick*," *GLQ: A Journal of Gay and Lesbian Studies* Vol. 1 No. 1 (1993): 33-51.

Kenneth Ballhatchet, *Race, Sex and Class under the Raj: Imperial Attitudes and Policies and their Critics, 1793-1905* (London: Weidenfeld and Nicolson, 1980).

Kimberlè Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and the Violence Against Women of Color," *Stanford Law Review* (1991): 1241-1299.

Larry Gross, *Contested Closets: The Politics and Ethics of Outing* (Minneapolis: University of Minnesota Press, 1993).

Larry Gross, *Up from Invisibility: Lesbians, Gay Men and the Media in America* (New York: Columbia University Press, 2001).

Lawrence Cohen, "The Kothi Wars: AIDS Cosmopolitanism and the Morality of Classification," in *Sex in Development: Science, Sexuality and Morality in Global Perspective*, ed., Vincanne Adams and Stacy Leigh Pigg (Durham & London: Duke University Press, 2005).

Lawrence James, *Raj: The Making and Unmaking of British India* (New York: St. Martin's Press, 1997).

Lawrence Liang. "Media's Law: From Representation to Affect," *Bioscope: South Asian Screen Studies* 2: 23 (2011): 23-40.

Lawrence Liang & Siddharth Narrain. "Striving for Magic in the City of Words," *The Himal Magazine*, August 2009.

Leshu Torchin, *Creating the Witness: Documenting Genocide on Film, Video, and the Internet* (Minneapolis: University of Minnesota Press, 2012).

Lisa Duggan, *The Twilight of Equality: Neoliberalism, Cultural Politics and the Attack on Democracy* (Boston: Beacon Press, 2003).

Louise M. Bourgault, "AIDS messages in three AIDS-themed Indian movies: Eroding AIDS-related stigma in India and beyond," *Critical Arts: South-North Cultural and Media Studies*, 23 no. 2 (2009): 171.

Lucia Graves, "Gay Teen Suicides Pervasive, A 'Hidden Problem': Expert," *The Huffington Post*, Oct 22, 2010. Accessed April 10, 2015  
[http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem\\_n\\_772707.html](http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem_n_772707.html)

Lynda Johnston and Gill Valentine, "Wherever I Lay my Girlfriend, That's My Home: The Performance and Surveillance of Lesbian Identities in Domestic Environments," in *Mapping Desire: Geographies of Sexualities*, ed., David Bell & Gill Valentine (London & New York: Routledge, 1995).

Mark Goodale & Sally Engle Merry, ed., *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

Martin Manalansan, "In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma," *GLQ: A Journal of Lesbian and Gay Studies* 2 No. 4 (1995): 425-438.

Martha Nussbaum. *Hiding from Humanity: Disgust, Shame and the Law* (Princeton: Princeton University Press, 2009).

Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010).

Mary Gray, *Out in the Country: Youth, Media and Queer Visibility in Rural America* (New York: NYU Press, 2009).

Matthew Waits, "Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles," *Contemporary Politics* 15: 1 (2009): 137-156.

Michael O' Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles," *Human Rights Law Review* 8 No. 2 (2008): 207-248.

Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002).

Michel Foucault, *The History of Sexuality: An Introduction Vol. 1* (New York: Vintage, 1978).

Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon, 1972).

Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977).

Naisargi Dave, *Queer Activism in India: A Story in the Anthropology of Ethics* (Durham and London: Duke University Press, 2012).

Neil Cobb. "Contagion Politics: Queer Rights Claims, Biopower and the "Public Health" Rationale for the Repeal of Sodomy Laws," *Jindal Global Law Review* Vol. 4 Issue 1 (2012): 60-387.

"NHRC, the Law and the Police," *Law and Other Things: A Blog about India's Laws and Legal Systems, its Courts and its Constitution*. July 24, 2009. Accessed February 27, 2015 <http://lawandotherthings.blogspot.com/2009/07/naz-foundation-and-nhrc.html>

Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Chicago: University of Illinois Press, 2004).

Nivedita Menon, *Sexualities* (New Delhi: Kali for Women, 2007).

Nupur Sonar, "The Unending Nightmare of Section 377," *Tehelka Magazine*, December 20, 2014. Accessed April 24, 2015 <http://www.tehelka.com/the-unending-nightmare-of-section-377/>

Paola Bacchetta, "When the (Hindu) Nation Exiles its Queers," *Social Text* No. 61 (1999): 141-166.

Partha Chatterjee, "Colonialism, Nationalism and Colonized Women: The Contest in India," *American Ethnologist* 6 No. 4 (1989): 622.

Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton NJ: Princeton University Press, 1993).

Patralekha Chatterjee, "AIDS in India: Police Powers and Public Health," *The Lancet* 367 No. 9513 (2006), 805-806.

Parvez Sharma, "Gay Pride only goes so far in India," *theguardian*, December 30, 2010. Accessed September 19, 2014 at: <http://www.theguardian.com/commentisfree/2010/dec/30/gay-pride-india-queer-delhi-western>).

Peggy Phelan, *Unmarked: The Politics of Performance* (London, New York: Routledge, 1993).

Pratap Bhanu Mehta. "It's About All of Us," *The Indian Express*, July 3, 2009.

Prashant Iyengar, "Limits to Privacy," Center for Internet and Society, Bangalore India (2011). Accessed December 31, 2014 <http://cis-india.org/internet-governance/publications/limits-privacy.pdf>

Pratiksha Baxi, "Ban the Two-Finger Test in Rape Cases," Blog Post, January 4, 2013. Accessed March 22, 2014 <http://lawandotherthings.blogspot.com/2013/01/ban-two-finger-test-in-rape-trials.html>

Pritam Baruah, "Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity," *NUJS Law Review* 2 (2009): 50

R. Benedito Ferrão, "Gay Globalization Via Goa in *My Brother...Nikhil*," *Journal of Creative Communications*, 6 no. 1-2 (2011): 141.

Rajeswari Sunder Rajan, *Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Durham and London: Duke University Press, 2003).

Ranajit Guha, "Chandra's Death," in *A Subaltern Studies Reader 1986-1995*, ed., Ranajit Guha (Minneapolis: University of Minnesota Press, 1997).

Ratna Kapur, "Too Hot to Handle: The Cultural Politics of "Fire"," *Feminist Review* 64 (2000): 53-64.

Ratna Kapur, *Erotic Justice: Law and New Politics of Postcolonialism*. (London: Glasshouse Press, 2005).

Ratna Kapur, "Out of the Colonial Closet but Still Thinking 'Inside the Box': Regulating 'Perversion and the Role of Tolerance in De-Radicalizing the Rights Claims of Sexual Subalterns," *NUJS Law Review* Vol. 2 No. 381 (2009): 381.

Ratna Kapur, "Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in the Law," *Jindal Global Law Review* Vol. 4 Issue 1, (2012): 36-387.

Richard Meyer, *Outlaw Representation: Censorship and Homosexuality in Twentieth-Century American Art* (New York: Oxford University Press, 2002).

Robert Aldrich, *Colonialism and Homosexuality* (London & New York: Routledge, 2003).

Roland Barthes, *Camera Lucida: Reflections on Photography* (Hill and Wang, 1979).

Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (Princeton: Princeton University Press, 1987).

Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester and New York: Manchester University Press, 1990).

Ruth Vanita, ed., *Queering India: Same-sex Love and Eroticism in Indian Culture and Society* (London & New York: Routledge, 2002).

Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics," *California Law Review* 89 No. 3 (2001): 643-740.

Saidiya Hartman, *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997).

Sally Engel Merry, "Transnational Human Rights and Local Activism: Mapping the Middle," *American Anthropologist* 108 No. 1 (2006): 38.

Sandip Roy, "From Khush List to Gay Bombay: Virtual Webs of Real People," in *Mobile Cultures: New Media in Queer Asia*, ed., Chris Berry et al. (Durham & London: Duke University Press, 2003).

Sandip Roy, "Bringing It Home: Indian Film Tackles HIV, Gay Life with Family Tale," *News America Media*, June 24, 2005.  
[http://news.newamericamedia.org/news/view\\_article.html?article\\_id=fa0101b29f8103276d765f83fc524aa0](http://news.newamericamedia.org/news/view_article.html?article_id=fa0101b29f8103276d765f83fc524aa0)

Sandip Roy, "Booked Under Section 377: Bangalore Techie's Story Gets Extra Punch Thanks to Outdated Law," *First Post*, October 31, 2014. Accessed April 25, 2015  
<http://www.firstpost.com/living/booked-under-section-377-bangalore-techies-story-gets-extra-punch-thanks-to-outdated-law-1780029.html>

Sandip Roy, "AIIMS Doctor and her 'Gay Husband': So Why didn't He Stay Single?," *First Post*, April 20, 2015. Accessed, April 25, 2015  
<http://www.firstpost.com/india/aiims-doctor-gay-husband-didnt-stay-single-2203766.html>

Sanford H. Kadish. "The Model Penal Code's Historical Antecedents," 19 *Rutgers Law Journal* 521 (1987): 521.

Saptarishi Mandal, "Right to Privacy in Naz Foundation: A Counter-Heteronormative Critique," *NUJS Law Review* 2 (2009): 525.

Scott Herring, *Queering the Underworld: Slumming, Literature, and the Undoing of Lesbian and Gay History* (Chicago and London: University of Chicago Press, 2007).

Shemin Joy, "600 Homosexuals Arrested in 2014," *Deccan Herald*, January 1, 2015. Accessed April 24, 2015 <http://www.deccanherald.com/content/451095/600-homosexuals-arrested-2014.html>

Sherry Joseph, "Gay and Lesbian Movement in India," *Economic and Political Weekly* 31 No. 33 (1996), 2228-2233.

Shivananda Khan, "Culture, Sexualities, and Identities: Men who have Sex with Men in India," in *Gay and Lesbian Asia: Culture, Identity Community*, ed., Gerard Sullivan & Peter A. Jackson (New York: Harrington Park Press, 2011).

Shohini Ghosh, "Queer Pleasures for Queer People: Film, Television, and Queer Sexuality in India," in *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society*, ed., Ruth Vanita (New York and London: Routledge, 2002), 207-221.

Shohini Ghosh, "False Appearances and Mistaken Identities: The Phobic and the Erotic in Bombay Cinema's Queer Vision," in *The Phobic and the Erotic: The Politics of Sexualities in Contemporary India*, ed., Brinda Bose & Subhabrata Bhattacharya (Calcutta: Seagull, 2007), 417-436.

Sohini Chakravorty. "Gay Fun or Cause?," *The New Indian Express*. February 27, 2010. Accessed May 4, 2015 <http://www.newindianexpress.com/cities/hyderabad/article216395.ece?service=print>

Somini Sengupta, "Gay-Themed Film Tests Sensibilities in India," *The New York Times*, April 6, 2005. Accessed May 4, 2015 [http://www.nytimes.com/2005/04/06/movies/06bomb.html?\\_r=1&](http://www.nytimes.com/2005/04/06/movies/06bomb.html?_r=1&)

Sonia Katyal, "Criminal or Cultural: South Asian Gay Community Weighs in on Dharun Ravi," School of Law Newsroom, Fordham University. March 14, 2012. Accessed September 20, 2014 at: <http://law.fordham.edu/25660.htm>

Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism," in *Social Perspectives in Lesbian and Gay Studies: A Reader*, ed., Peter M. Nardi & Beth E. Schneider (London, New York: Routledge, 1998), 134-159.



Steven Seidman, *The Social Construction of Sexuality* (New York & London: W.W. Norton & Company, 2003).

Steven Seidman, "Identity and Politics in a "Postmodern" gay culture: Some Historical and Conceptual Notes," in *Fear of a Queer Planet: Queer Politics and Social Theory*, ed., Michael Warner (Minneapolis: University of Minnesota Press, 1993).

Subir Kole, "Globalizing Queer?: AIDS, Homophobia and the Politics of Sexual Identity in India," *Globalization and Health* 3: 8 (2007): 1-16.

Suparana Bhaskaran, "The Politics of Penetration: Section 377 of the Indian Penal Code," in *Queering India: Same-Sex Love and Eroticism in Indian and Culture and Society*, ed., Ruth Vanita (London: Routledge, 2002).

Suparna Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/National Projects* (New York: Palgrave Macmillan, 2004).

Tasneem Nashrulla, "Activists Plan "Global Day of Rage" to Fight for India's LGBT Community," *BuzzFeed News* December 13, 2013. Accessed March 25, 2015 <http://www.buzzfeed.com/tasneemnashrulla/activists-plan-global-day-of-rage-to-fight-for-indias-lgbt-c#.bqPBwdpdG>

Tarunabh Khaitan, "Good for All Minorities," *The Telegraph*, July 9, 2009.

Teemu Ruskola, "Gay Rights versus Queer Theory: What is Left of Sodomy after *Lawrence v. Texas*," *Social Text* 23 No. 3-4 (2005): 84-85.

Thessa Mooij, "The New Bollywood: No Heroines, No Villains," *Cineaste*, 31 no. 3 (2006): 30.

Thomas Waugh, "Queer Bollywood or 'I'm the Player, You are the Naïve One': Patterns of Sexual Subversion in Recent Indian Popular Cinema," in *Keyframes: Popular Cinema and Cultural Studies*, ed., Matthew Tinkcom & Amy Villarejo (London & New York: Routledge, 2001).

Tom Boellstroff, "Dubbing Culture: Indonesian Gay and Lesbi Subjectivities and Ethnography in an Already Globalized World," *American Ethnologist* Vol. 30, Issue 2 (2003): 225.

Upendra Baxi, *Towards a Sociology of Indian Law* (New Delhi: Satvahan Publications, 1986).

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

Vimal Balasubrahmanyam, "Gay Rights in India," *Economic and Political Weekly* 31 (1996): 257-258.

Voices Against 377, "Rights for All: Ending Discrimination against Queer Desire under Section 377," 2004.

Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton NJ: Princeton University Press, 1995).

William Cohen, *Sex Scandal: The Private Parts of Victorian Fiction* (London & Durham: Duke University Press, 1996).

Zaid Al Baset, "Section 377 and the Myth of Heterosexuality," *Jindal Global Law Review* Vol. 4 Issue 1 (2012): 89-387.