On 16th September 2006, the following open letter for over-turning of section 377 of the Indian penal code’, addressed to ‘The government of India, members of the judiciary and all citizens’, was released at a press conference in New Delhi:

“To build a truly democratic and plural India, we must collectively fight against laws and policies that abuse human rights and limit fundamental freedoms. This is why, concerned Indian citizens and people of Indian origin, support the overturning of section 377 of the Indian penal code, a colonial era law dating to 1861, which punitively criminalizes romantic love and private, consensual sexual acts between adults of the same sex.
In independent India, as earlier, this archaic and brutal law has served no good purpose. It has been used to systematically persecute, blackmail, arrest and terrorize sexual minorities. It has spawned public intolerance and abuse, forcing tens of millions of gay and bisexual men and women to live in fear and secrecy, at tragic cost to themselves and their families. It’s especially disgraceful that section 377 has on several recent occasions been used by homophobic officials to suppress the work of legitimate HIV prevention groups, having gay and bisexual men in India even more defenseless against HIV infections.
Such human rights abuses would be cause for shame anywhere in the modern world, but they are especially so in India, which was founded on a vision of fundamental rights applying equally to all, without discrimination on any grounds. But presumptively treating as criminals those who love people of the same sex, section 377 violates fundamental human rights, particularly the rights to equality and privacy that are enshrined in our constitution as well as in the binding international laws that we have embraced, including the international covenant on civil and political rights.
Let us always remember the indisputable truth expressed in the opening articles of the Universal Declaration of Human Rights that ‘everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind.’

We will move many steps closer to our goal of achieving a just, pluralistic and democratic society by the ending of section 377, which is currently under challenge before the Delhi high court. There should be no discrimination in India on the grounds of sexual orientation. In the name of humanity and our constitution, this cruel and discriminatory law should be struck down.

Sincerely

...........................................

The letter went under the name of Vikram Seth, among the most famous Indian authors in the English language, himself openly bisexual (or ‘partially gay’ as he called himself in interviews to the mass media around the release of this letter); swami Agnivesh, a well known social activist to the ‘Arya samaj’ and most famous for his role in movements against bonded labour and caste-based violence; Siddharth Dube, a public health specialist consultant to the world bank and the united nations; Nitin Desai, a former UN under secretary General; Aditi Desai, a sociologist; a captain lakshmi Sahgal, described as a freedom fighter and recipient of the padma vibhushan. In addition, the letter was signed by more than 150 ‘eminent’ personalities, including the likes of anthropologist Veena Das, activist and writer Arundhati Roy, professor of Law, Upendra Baxi, film director Shyam Benegal, and an impressive assortment of actors, academicians, high level public servants, TV personalities, journalist, lawyers, pulp fiction writers, film makers, artists, doctors, designers, musicians etc. In short, this was a rather top heavy list, featuring some of the biggest names in elite India. The cherry on the top was a separate letter by Nobel laureate Amartya Sen in support of the Seth letter.

“Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a nation’s passion.”

2 The second highest civilian award bestowed by the Indian state on its citizens.
Nehru, as quoted in the Naz Foundation case

The LGBT Voices were heard first time by the Indian judiciary when Delhi high court ruled out in favour of homosexuals. The brouhaha over it notwithstanding, the least surprising thing about the Delhi High Court’s verdict in \textit{Naz Foundation v. Union of India} is the result of the case: that law has no business in the bedroom of consenting adults engaging in an activity that harms no one. But unfortunately, supreme court of India, though a custodian and protector of fundamental rights of all people including that of minorities; chose to display the very opposite of compassion and has shown exaggerated deference to a majoritarian Parliament by passing the ball to parliament’s court. The LGBT community’s struggle for their fundamental rights continues; but many of the homosexuals have lost hope and have gone ‘back to the closet’.

\section*{1.1 WHO ARE HOMOSEXUALS?}

Homosexuals are defined as people who are sexually attracted by other persons of the same sex. The words "gays" or "gay people" are also common synonyms used instead of "homosexuals", whereas "lesbians" are only used to describe female homosexuals. These fundamental definitions of homosexuals already indicate that this minority group is evenly distributed throughout the entire society. Homosexuals can be both men and women. They exist in all classes, social groups, races, positions, and countries, regardless of their age or origin.

From colonial times (with the enactment of criminal tribes Act, by which it was a crime for a man to dress up as a woman) to the contemporary (when hijras are talked about as the third sex and we celebrated the inclusion of ‘T’ box next to the ‘M’ and

\begin{itemize}
  \item \textit{Naz Foundation v. Union of India} 160 (2009) DLT 277 (129)
  \item The high court read down section 377 of the Indian Penal Code 1860 to exclude private consensual sex between adults from its ambit. Section 377 reads thus: \textbf{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 term which may extend to ten years, and shall also be liable to fine. Explanation: penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
  \item Supreme Court of India in Suresh Kumar Kaushal V. Naz Foundation SC AIR 2013 SC has recriminalized homosexuality by restoring sec. 377 IPC in its original form. SC has held that if Parliament wants then it is free to bring a law in favour of homosexuals or else can decriminalize homosexuality; until then sec. 377 will continue to operate.
\end{itemize}
‘F’ boxes on election commission identity cards or passport forms), the hijra appears as that which is always already and only gendered. Under the provisions of this statute, a eunuch was ‘deemed to include all members of the male sex who admit themselves, or in medical inspection clearly appear, to be impotent. Hijra emerges immediately gendered as the third alternative to being either man or woman. In Indian society, gays are considered as older men who liked ‘chikna’ boys. A ‘chikna’ boy is a smart or ‘smooth’ teenager, one who is thought to cultivate the gaze of older interested men for both pleasure and personal advancement. ‘Lesbians’ are biologically females with mannish mannerism, tomboy look, and are believed to be sexually driven towards womenfolk.

1.2 DISCRIMINATION AGAINST HOMOSEXUALS

History has also shown that gay people have always been discriminated against. Not only were gay people denied of equal treatment in court ("de jure"), but they also have been victims of violence and harassment not only in our own society on the base of their sexual orientation ("de facto") but those who have suffered similar discrimination globally. Homosexuality was labeled a felony crime in the past, existing "Sodomy Laws" which prohibit oral and anal sexual intercourse, even between consenting adults. In individual cases, homosexuals are often harassed, insulted, kicked, punched, and teased by fellow classmates, coworkers, and even family members just for being gay. These discriminations base on prejudices and stereotypes that society has of the gay community.

Based on this argumentation, homosexuals urged the government to ban discrimination of people on the basis of their sexual preference. However, up until the decades after the Second World War, in which Hitler did not only murdered Jews, but also homosexuals, there has been no powerful and effective gay rights movement. The reason for the ineffectiveness of the first movements lies in the fact that the gay community represents a so-called "invisible minority", that is a minority which "due to the fear of public inacceptance and disadvantage (losing one's job/public humiliation) do not openly reveal themselves"
In a similar fashion, homosexuals have been targeted when AIDS became a worldwide problem in the early years of the eighties. Gay men were primarily infected with HIV due to the fact that their sexual activity, which includes the semen transmission between two men, makes them extremely vulnerable. As females who have sexual contact with HIV-infected men were infected, and as children, drug-addicts who share infected needles, became potential targets of AIDS, homosexuals have been blamed as a threat to the innocent society. They were labeled disease carriers, and were said to "pollute" an innocent part of the human population.

1.3 THE HISTORY OF GAY RIGHTS

By taking a close look at the history of gay rights, common prejudices against homosexuals, and the common arguments used on both sides of this topic without the emotional heat and biases, which is often linked with this controversial topic, one is able to think critically and approach the issue of homosexuality in a more reasonable way. Inspired by the African American Civil Rights Movement, homosexuals in America began to organize themselves and to fight for the equality and the justice they did not have in society. With the rise of gay rights activists, gay-rights opponents appeared, and the issue about homosexuals' rights turned into a controversial, legal battle, which today is still fought with neither party entirely winning.

Since homosexuals often compare themselves with other minority groups like the Jews or the African Americans, they were very inspired by the African American Civil Rights Movement by Dr. Martin Luther King, Jr. His ideas, concepts, and demands for equal protection were adopted by the gay community, and especially King's success is the key element for the sudden rise of the Gay Rights Movement only several years later.

The Gay Rights Movement is rooted in the so-called Stonewall riots, marking the first major attempt of gays to organize them and to resist discrimination. In the summer of 1969 policemen in New York started to raid unlicensed bars, resulting in closings of five gay bars with minor street disturbances. The Stonewall Inn, an unlicensed and Mafia-operated bar in Greenwich Village, was raided by nine policemen in the early
mornings of June 28th 1969. As the policemen arrested and escorted five employees and customers, they faced an unexpectedly angry and violent mob outside the Stonewall Inn, yelling, throwing coins, rocks, beer bottles, and bricks at the policemen. During the following forty-five minutes, the nine policemen were involved in a violent struggle, in which the protesters were beaten by policemen, and in which the crowd tried to set the bar with the policemen inside on fire. As police reinforcement arrived, the crowd which had already rose to about 400 angry protesters, finally spread out, but re-gathered for two additional nights around the then-closed Stonewall Inn to protest against the police's discrimination of gay bars, shouting slogans like "Gay Power", "Legalize gay bars", and "Gay is good."

The significance of this local incident, however, is tremendous, and it had an enormous influence on the national level. New gay rights groups were formed within days, "Gay Power" meetings were held in Greenwich Village, and existing gay rights groups started a series of activities to call for national, organized resistance against discrimination.

This rapid rise of organization in the entire nation achieved to change, at least, a part of the mainstream's cultural view on homosexuality. **Empirical data obtained by experiments, combined with this changing social norm, led the Board of Directors of the American Psychiatric Association to finally remove homosexuality from the Diagnostic and Statistical Manual of Mental Disorders in 1974, marking this first major success of the gay community.** It opened up doors for a series of new political campaigns of organizations, pushing for changes in the way gays were viewed by society, and for protection from discrimination in jobs and housing.

As homosexuality is becoming more and more socially accepted during the eighties, gay rights groups started to shift their campaign towards equal political treatment. Basically, gay rights movement is defined as the demand of gays to be treated as equal citizens with the same rights, privileges, and treatment as heterosexuals do.
Progressive success did the Gay Rights Movement gain during the last decades concerning the military issue. In 1942 the U.S. military took side in the controversial issue about homosexuality, as it banned all homosexuals and denied them the right to enter military service by arguing that their presence would make heterosexual soldiers feel "uncomfortable" and decrease their efficiency and productivity.

Although gays have been asking for equal rights since then, it was President Clinton who took the first pro-gay step. Being lobbied by successful gay rights activists, President Clinton introduced the so-called "Don't Ask, Don't Tell" policy. Although "Don't Ask, Don't Tell" does not remove the ban of homosexuals in the military (what President Clinton had promised the gay community during his political campaign), it legalizes the existence of gay soldiers in the military as long as they do not publicly reveal their sexual orientation ("don't tell"). Furthermore, military officials are not allowed to ask soldiers about their sexual orientation ("don't ask"). Until recently, when Barack Obama, Present President of United States of America openly supported emerging gay rights, US Military law remained anti homosexuals.

1.4 SECTION 377 & LGBT ACTIVISM IN INDIA

One of the first sparks for the emergence of the political consciousness of queer people in India was Section 377 of the Indian Penal Code, 1860, which conceptualized ‘queer’ as unnatural. It should be noted that a supposedly alien law has emerged to survive for over 154 years, impervious to both the anti-colonial struggle as well as the formation of a democratic India, which guaranteed Fundamental Rights to its citizens.6

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6 It might not be out of place to note that the British Government, through the implementation of the Wolfenden Recommendations, decriminalised consenting homosexual sex between adults in private in 1967. In the colonies however, the colonial powers, confined themselves to the codification of homophobic laws and not to their repeal. The colonial origins of anti-sodomy laws have long been forgotten and they have now acquired legitimacy through a nationalist rhetoric. See: Petersen, Carole J. 1997, 'Hong Kong and the Unprecedented Transfer of Sovereignty: Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong', Loyola Los Angeles International Comparative Law Review, Vol. 19, pp. 337, 340. Peterson argues that fear of conservative attitudes prevailing against homosexuality in Hong Kong prevented a follow up of Wolfenden-like reform.
It was through Section 377 that for the first time, homosexuality was criminalised explicitly as ‘unnatural sex’, with a serious punishment leading up to life imprisonment. The Indian Penal Code was drafted by Lord Macaulay in 1837, but came into force only in 1860.\textsuperscript{7} Section 377 of the Indian Penal Code, the dreaded source of homophobia throughout the former British colonies, read as follows:

Section 177: 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.

\textit{Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.}

Lord Thomas Macaulay, drafter of the Indian Penal Code, abhorred the very idea of discussion and debate on the ‘heinous offence’ that section 377 criminalises. It relates, he argued:

\textit{“To an odious class of offence respecting which 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 opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision”}\textsuperscript{8}.

Section 377, couched in ambiguous terms of ‘carnal intercourse against the order of nature’, in other words, has been marked by a silence from its very inception and, until recently, has not been a matter of public debate.


An Insight into the First reported case on Homosexuality

To indicate the nature of the task for queer legal history, we attempt to re-read the decision of Queen v. Khairati in 1884, the first reported case of the use of Section 377 against a hijra. The ironically named Justice Straight was called upon to adjudicate whether a person who habitually wore women's clothes, had been diagnosed with syphilis, and exhibited signs of a habitual sodomite, had indeed committed the offence of sodomy. The Sessions Court judge noted:

“The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon... he is shown to have the characteristic mark of a habitual catamite — the distortion of the offence of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months”.

Justice Straight decided that while he ‘appreciated the desire of the authorities at Moradabad to check these disgusting practices’, he was unable to convict Khairati, as ‘neither the individual with whom the offence was committed, nor the time of committal nor the place is ascertainable’.

The judgement only records the voice of various figures of authority. The Civil Surgeon conducts an anal examination and finds that the shape of the anus indicates that sodomy was committed. The district authorities of Moradabad find the practice of singing while dressed as a woman sufficient to arrest Khairati and Justice Straight appreciates the desire of the authorities to 'check these disgusting practices.'

The silence in the judgment is of the voice of Khairati herself. We can infer that Khairati, though born a man, identified as a woman and lived her life as one. The fact that she never denies or defends the fact that she 'dressed and ornamentated as a woman', can be read as an indication of how important her chosen gender was for

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9 Queen Empress V. Khairati I.L.R. 6 All 205.
10 Ibid.
Khairati. In spite of the fact that she is arrested, subjected to an anal examination, is found to be not a eunuch but possessing male genitals, her chosen gender survives all efforts by her tormenters to criminalise what to her must have appeared ‘natural’. What implicates Khairati as a potential criminal under Section 377 is her gender transgression, a reality which Khairati never denies but instead continues to stubbornly own. The insistence on the gender of her choice, gives Khairati a dignity which is difficult to obliterate. Thus, tracing a queer legal history is thus not only about studying the colonial roots of homophobia; it is equally about recovering the voices of its victims.

The core problem with Section 377 has been its blanket coverage of both exercise as well as consensual sex within its prohibition. The wording of ‘carnal intercourse’ remains vague enough to encompass all sexual acts which are non-progressive in nature. The broad wording of the provision itself gives the police enough power to target queer people arbitrarily. The social stigma around homosexuality, combined with the vague and general nature of Section 377, makes the provision akin to a blackmailer’s charter. Section 377 also acted as a significant marker of second class citizenship for queer people during both the colonial period and significant parts of the post independence era when the queer voices were entirely absent.

While homosexuality was subject to some strictures in pre-colonial texts such as the Manusmriti, it is unclear whether it was homosexuality per se that was sought to be punished or more general sexual transgression or the violation of caste norms.\textsuperscript{11} It was only colonial law which introduced clear strictures against homosexuality. This is enforced by laws like the notorious Section 377 of the Indian Penal Code, and Criminal Tribes Act, 1871. On 2 July 2009, the Delhi High Court in Naz Foundation v. 

\textsuperscript{11} Ibid., p. 210. Ruth Vanita argues: The Manusmriti concern is for the loss of virginity and the consequent unmarriageable status of the girl, thus a virgin who manually penetrates another virgin is supposed to be punished with a fine and a whipping, and also the payment of double the penetrated girl’s bride price, while a mature woman who does it to a virgin is supposed to have her head shaved and two of her fingers cut off. This is the most severe punishment prescribed for any form of same sex intercourse in the Hindu law books. But exactly the same punishment, having two fingers cut off, is also prescribed for a man who manually penetrates a virgin. This punishment, then, is not for same sex intercourse, but for the act of taking a girl's virginity, thus imperiling her chance of marriage.
NCT, Delhi & Ors.,\textsuperscript{12} handed down a watershed verdict reading down Section 377 of the Indian Penal Code (IPC), 1860, decriminalising consensual sex between adults. The judgment was more than just a legal verdict as it marked the beginning of the process by which queer people became subjects of rights.

The moment of the judgment is indeed the moment of queer people becoming citizens as the Court declared Section 377 to be violative of the rights of equality, privacy and dignity of queer people. The Court recognized that what was at stake was not only the decriminalisation of a particular Sexual act but rather the decriminalization of the intimate lives of queer people. It also recognized that sexuality was integrally linked to identity and that ‘for every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes’\textsuperscript{13} The court concluded that the expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.\textsuperscript{14}

Comprehensive legal analyses of high court and Supreme Court pronouncements on this provision, for instance, identify a mere 131 cases since its inception 144 years ago. That this provision is now a familiar feature in the mass media in India, and arguably one of the most meaningful provisions of law today, is then a peculiar fact.

1.5 THE CRIMINAL TRIBES ACT, 1871

While Section 377 has attracted a fair share of notoriety, what has remained relatively unnoticed is the Criminal Tribes Act, 1871, which specifically targeted hijras. The Criminal Tribes Act, 1871, is a product of repugnance of the British administration towards certain tribes and communities who were in the words of the statute, ‘addicted

\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
to the systematic commission of non-bailable offences. These communities and tribes were perceived to be criminals by birth, with criminality being passed on from generation to generation. It fitted in well with the hierarchical Indian social order, in which some communities were perceived as criminals by birth and polluted since birth. The idea of criminal tribes was based on the notion that ‘crime as a profession passed on from one generation of criminal caste to another: like a carpenter would pass on his trade to the next generation, hereditary criminal caste members would pass on this profession to their offering. The link between sexual non-conformity and criminality was made more explicit in the 1897 amendment to the Criminal Tribes Act of 1871, which was sub-titled ‘An Act for the Registration of Criminal Tribes and Eunuchs’. Under the provisions of this statute, a eunuch was ‘deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be important. The local government was required to keep a register of the names and residences of all eunuchs who are ‘reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code’. Any eunuch so registered who appeared ‘dressed or ornamented like a woman in a public street….or who dances or plays music or takes part in any public exhibition, in a public street….[could] be arrested without warrant and punished with imprisonment of up to two years or with a fine or both.’ If the eunuch so registered had a boy under the age of 16 years within his control or residing in his house, he could be punished with imprisonment of up to two years or fine or both. A eunuch was considered incapable of acting as guardian, making a gift, drawing up a will or adopting a son. A phrase used by a British officer for the criminal tribes is equally appropriate to describe the colonial perception of the

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15 Section 2 of the Criminal Tribes Act, 1871.
17 Section 24 of the Criminal Tribes Act, 1871.
18 Section 24A of the Criminal Tribes Act.
19 Section 26 of the Criminal Tribes Act, 1871.
20 Section 27 of the Criminal Tribes Act, 1871.
eunuchs: ‘they are absolutely the scum, the flotsam and the jetsam of Indian life, of no more regard than the beasts of the field.’\textsuperscript{21}

The sexual non-conformity of the eunuch thus earned severe strictures and penalties from the colonial administration. Narain writes:

\textit{Being a eunuch was a criminal enterprise, with surveillance being the everyday reality. The surveillance mechanism criminalised their existence as the quotidian reality of a eunuch’s existence, namely cross-dressing, was a criminal offence. Further the ways in which eunuchs made their livelihood, i.e. singing and dancing, were criminalised. Thus, every aspect of the eunuch’s existence was subject to surveillance, with the surveillance itself being premised on the threat of criminal action. The police were thus an everyday reality in the lives of eunuchs. Further, the very concept of personhood of eunuchs was done away with through disentitling them from basic rights such as making a gift or adopting a son.}\textsuperscript{22}

Jawaharlal Nehru, in strong criticism of the Criminal Tribes Act stated:

\textit{I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty... An attempt should be made to have the Act removed from the statute book. No tribe can he classed as criminal as such and the whole principle is out of consonance with all civilized principles of criminal justice and treatment of offenders.}\textsuperscript{23}

However, the eunuchs did not merit a single voice from the nationalist movement in their support and were completely marginalized. Their despised sexuality rendered them unworthy of any sympathy, far less any rights.

The Criminal Tribes Act was repealed by the government of independent India, but the law continued in the statute books of various states. Illustrative is the Andhra Pradesh (Telangana) Eunuchs Act 1329 F, which continues to be in force in Andhra

\textsuperscript{21} MacMunn, Lieutant General Sir George. 1933, The Underworld of India. London: Jarrolds, c.f.
\textsuperscript{22} Narain, Arvind., Pg. 38, ‘ Queer Perspective on Law’, Yoda Press, 2011.
Pradesh even post independence. The Act reproduced the provisions of the 1897 amendment to the Criminal Tribes Act. Even in states which had no such law, repeal had no positive impact. This is illustrated by the continuity in law enforcement with officials treating hijras as thieves and hence as a criminal tribe. As the Peoples' Union for Civil Liberties-Karnataka (PUCL-K) noted:

What is important about this historical background is that the contemporary perception of hijras as thieves as well as the brutal violence which is inflicted against them can be forced back to this colonial legislation which stands repealed today in theory has continue to exist as part of the living culture of Indian law.\(^{24}\)

The invidious role played by the Criminal Tribes Act was also recognized by the _Naz_ judgment when the judges noted that, ‘while this Act has been repealed, the attachment of criminality to the hijra community still continues.’\(^{25}\)

### 1.6 PROTESTING INJUSTICE: EMERGENCE OF QUEER ACTIVISM IN INDIA

The opposition to this state of marginality towards homosexuals gave birth to a queer political consciousness forged in the crucible of struggles around the law. This emergence of a queer political consciousness is signposted by activist publications like the ‘Less the Gay Report’ (1991), 'Campaign for Lesbian Rights' (CALERI Report) (1997), ‘Humjinsi’(1999), and the PUCL-Karnataka reports on Human rights violations against sexuality minorities and the transgender community in 2001 and 2003 respectively. These documents, as they articulated a greater vision for queer rights were significant milestones for change and created a foundation for a demand for rights.

The first collective and public reaction to the various injustices perpetrated on queer people was when the AIDS Bedbhav Virodhi Andolan (ABVA) organised a public demonstration in 1992 against police harassment of gay people. This is the first


documented protest for gay rights in India. Suddenly furtive and silent same sex interaction became visible, the subject of both opposition and a demand for rights. ABVA in a memorandum submitted to the police asked:

*When will the police get rid of its homophobia? Is it a crime for two consenting adults (of the same sex) to meet in a public place, become friendly and have a healthy discussion on sexuality or any other matter—which may or may not end up in sexual activity at a place other than a public place?*  

Through a path breaking report on queer rights called *Less than Gay*, ABVA created a prophetic vision of queer rights. It placed the violence faced by gays and lesbians within a wider culture of intolerance by the medical establishment, activist groupings and even intellectual circles. The Report spoke of subversive queer desire and the 'intimate experiences, fears and longings of gay men and lesbians'. What it succeeded in doing as early as 1991 was to provide an explanatory framework which was then picked up and elaborated by queer activism in the coming years.  

The 1992 ABVA protest against police harassment was not the last and the next two decades would be followed by numerous other such protests. Queer activism was now defined by the willingness to respond to violations, which began to capture national and even international attention. There were several campaigns of a local nature (much on the lines of the ABVA protest in 1992) against police harassment and violence. Slowly these campaigns began to reverberate nationally and even internationally.

Ten years later, when a case under Section 377 was filed against staff of an organization working with HIV/AIDS, it resulted in widespread protests. The case popularly known as the *‘Lucknow four’*, refers to the arrest of four HIV/ AIDS activists and the sealing of two organizations working with HIV/AIDS on grounds of

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26 ABVA Memorandum to the Commissioner of Police, New Delhi, 11.08.92 on file with the Alternative Law Forum.  
28 For example, on 16 August 2006, the queer community in Bombay gathered at Flora Fountain in joint protest against Section 377, which was widely reported across the media. See: ‘Gay Community seek reforms in archaic sexuality law’, Times of India, 17 August 2005. Similarly there were protests in Bangalore, Delhi and Kolkata against police harassment.
conspiracy to promote homosexuality.\textsuperscript{29} At the end of a sustained campaign which witnessed support in major cities across India, the four activists were finally released after having spent over a month in jail. The Lucknow case also demonstrated that the very presence of Section 377 on the statute books meant that the potential for its use was always there. As long as it continued to exist on the statute books, Section 377 could never be a dead letter of the law.

The campaign against the arrests in Lucknow represented a new activist zeal. It resulted in the formation of People for the Rights of Indian Sexual Minorities (PRISM), one of the first political groups focusing on queer rights in Delhi, which later played a crucial role in the formation of a coalition called Voices against 377. As an intervener in the Delhi High Court, -Voices was instrumental in highlighting the abuse of human rights implicit in Section 377.\textsuperscript{30}

\textit{Asserting the Right to Love: The Struggles of Queer Women}

While the first public demonstration was the 1992 ABVA protest, it was as early as 1988 that two police women called Leela and Urmila decided that they wanted social recognition for their relationship and proceeded to get married. Though both women were dismissed from service on the specious grounds of 'long leave of absence', their courageous act served as an inspiration for emerging queer activism.\textsuperscript{31} ABVA oppositely referred to Leela and Urmila as ‘frontier women in the country’s social landscape with their courageous and unusual marriage.’\textsuperscript{32}

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\textsuperscript{30} In 2006, in another incident four gay men were arrested in Lucknow by an entrapment laid by the Police, with false alarms of 'public sex' and an 'online gay group'. There were protests across the Country against the arrests in what came to be known as Lucknow H. See: 'Rights Groups Protest Gay Arrests', Indian Express, 13 January 2006. See also the preliminary report of the Fact Finding Team on the arrest of four men in Lucknow under IPC 377, available at http://www.yavningbread.org/apdx_2006/imp-249.htm, accessed on 29.12.11.


\end{flushleft}
The much publicized marriage of Leela and Urmila was followed by a Fact Finding Report by ABVA in 1999, called ‘Like People Like Us’ on the joint suicide attempt by Mamta and Monalisa. The Report showed how lesbian and bisexual women often find themselves trapped in a prison whose walls are made up of normative notions of gender and sexuality. It demonstrated how lesbian women’s expressions of personhood are so hemmed in by patriarchal constraints that suicide seems to be the only option left.  

While the report inaugurated a discussion around some of the core issues faced by queer women in India, what really brought a national spotlight on queer women was the controversy over the film *Fire*. Directed by Deepa Mehta, the film described a relationship between two women with great sensitivity. The Hindu Rights Activist called for the film to be banned. The controversy rocked the Indian Parliament, and the Supreme Court intervened against the attempts to ban the movie. When converted an academic discussion into a raging street battle was the decision of the Shiv Sena to attack theatres where *Fire* was being screened. Such blatant attacks on the very screening of *Fire* mobilised civil society in India to support the core democratic value of 'freedom of speech and expression'. These extremist groups

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33 ABVA. 1999, For People Like Us. New Delhi: ABVA. Mamta and Monalisa were not the last women in relationships with each other to attempt suicide with the next two decades witnessing a continuing epidemic of lesbian suicides. See: V. N., Deepa. 'Queering Kerala', in Gautam Bhan and Arvind Narrain (eds), Because I Have a Voice. New Delhi: Yoda Press, 2005, pp. 175-196.

34 *Fire* (1996) directed by Deepa Mehta, more details can be found at http://WWW.imdb.com/title/tt0116308/; *Fire* has had a far reaching impact beyond the short term controversy it created in opening up a discussion on lesbian women in India. See: 'Understanding the Lesbian', FEMINA, 1 September 2002.

35 See: *Yusuf Khan Alias Dilip Kumar and Ors. v. Manohar Joshi and Ors. (2000) 2 SCC 696*. Eight petitioners, including the producer of *Fire* filed a Writ Petition under Article 32, seeking the intervention of the Supreme Court to prevent the Shiv Sena led attacks against cinemas screening *Fire*. However, somewhat serendipitously, during the hearing the Shiv Sena lost its majority in the State assembly elections thus taking away the heat from the protests. The Supreme Court found an easy way out and disposed of the matter with a sworn undertaking from the Home Secretary for the State of Maharashtra that steps were being taken to prevent any attacks. Thus, free speech clouded the issue of lesbianism—which was never mentioned or referred to in the decision.
worked tirelessly against the screening of *Fire*, and then reacted similarly during the release, almost 10 years later, of another controversial movie called *Girl Friend.*

The struggle to protect the release and screening of *Fire* was framed as a free speech issue, perhaps almost consciously overshadowing its depiction of lesbianism. This omission resulted in the formation of CALERI (Campaign for Lesbian Rights), which sought to put lesbian rights at the center of the debate. However, the articulation of lesbian rights was done with much trepidation. As one of the proponents put it:

*Even as organizers prepared for the demonstration...there was conflict among us... some [protester] the use of the word ‘lesbian’ in the press statement. There was pressure to speak instead of ‘women-women relationships.’ There were problems with the word ‘sexuality’....There was an assertion that the person on the street was not ready to hear these words.*

What CALERI’s work did, in the words of another protagonist, was to challenge the assumption that lesbianism was a ‘question of personal choice—therefore not a legitimate area of concern when the broader framework is human rights.’

Due to the work of CALERI, the mainstream human rights movement had to contend with the issue of the ban on *Fire* not just as a freedom of speech issue but also as a lesbian rights issue.

**Broadening Queer Concerns: Emergence of Struggles Based On Gender Identity**

Queer activism of the late 1980s and early 1990s focused on the concerns of the lesbian, gay and bisexual community. However, as the 90s progressed, more and more articulate transgender women joined the queer struggle. The first public recognition of

36 See http://www.imdb.com/title?A10414714 (accessed on 19.09.2011). Girlfriend was a controversial lesbian movie, as it portrayed lesbians as man-hating, mentally disturbed, abused in childhood, psychopaths and serial killers. However that did not stop the Sena from protesting against the very portrayal of lesbianism. See: 'Sena turns the heat on Girlfriend', Times of India, 15 June 2004.


38 Ibid.
the concerns of the transgender community was the publication of the PUCL Report on 'Human rights violations against the transgender community'.

By focusing on the stories of hijras and kothis, the 2003 report foregrounded the issues and concerns of the transgender community, and by doing so, broadened the very understanding of who is queer beyond lesbian, bisexual and gay identities. This was significant as previously, the concerns of queer activism had been largely confined to lesbian, gay and bisexual people. The 2003 report also highlighted the need to incorporate gender-based demands into queer activism like the right to define and express one's gender identity. Sexual orientation could no more be the sole basis of queer politics, as the source of 'extraordinary' violence was evidently the 'everyday' transgression of gender norms.

The 2003 report, by focusing on the rights of hijras and kothis, also opens queer politics to the issue of class and economic disparities that form a central axis of division in Indian society. The demands for gender identity documents, ration cards and voting rights for hijras, and access to free healthcare and education are a product of an inclusive queer politics that goes beyond the lens of sexuality and perceives the hijra community through multiple frameworks of gender, sexuality, religion, caste and class.

**The Struggle against the Violence of 'Normal Times'**

The first gay protest by ABVA, the protests around Fire and those around the Lucknow arrests were inaugural moments of queer activism.

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39 The term gender identity itself made its belated way into international law with the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007). It can be argued that the reason gender identity became an important concern was itself due to the reporting of violations from the global south, where it became increasingly apparent that gender identity was the core axis of human rights violations. For a record of violations based on gender identity, see WWW. Iglhrc.org, accessed on 10th December, 2013.

40 However, even the perspective which privileges the lens of gender identity alone might be inadequate to communicate the reality of queer lives. Gayatri Reddy, in her recent work argues that hijras cannot be perceived through the lens of a sexuality politics alone. The hijra community needs to be understood through the multiple frameworks of religion, class, kinship as well as sexuality. See generally: Reddy, Gayatri. 2006, With Respect to Sex. New Delhi: Yoda Press.

This violence faced by the queer community has been documented by the PUCL-K in two separate reports in 2001 and 2003. The 2001 report demonstrated that the impact of Section 377 had to be understood not merely in terms of decided cases but also in terms of the filing of an FIR or the mere threat to file an FIR, as well as the practices of sexual violence, extortion, abuse, outing and illegal detentions by the police, all of which leave no legal trace. The 2001 report also outlined the various structures which are responsible for queer oppression apart from the law including the police, the family, medical establishment and popular culture.  

The everydayness of violence faced by them extends to their inability to access civil rights. Queer people, as a priori criminals, are absent from the records of who the state treats as a citizen, deserving of rights and benefits. They are neither named nor prohibited in civil law, and queer desire and its potential to form meaningful relationships is silenced except when referred to as 'unnatural intercourse. By a detailed analysis of the laws relating to marriage, divorce, inheritance, labour and insurance, what we can conclude is that to benefit under any of these laws, we must be related either by blood or marriage. A gay or lesbian partner would not be entitled to inherit property on his partner death or to any labour law benefits or benefits from Insurance policies, as all such benefits only accrue to members of the 'deserving' homosexual family.

To address the wider gamut of issues which define the 'ordinariness of everyday violence', the essential legal roadblock, Section 377 remained. Through a various points in time, queer activists have tried to focus on issues beyond 377, attention has invariably returned to the infamous section as the law remained a serious impediment to other legal reform.

All that is wrong with our sexual universe: Symbolism of Section 377

When ABVA organized the first public protest against Section 377 in 1992, not to many people knew what was being protested. However by 2006, Shefalee Vasudev

could write in the *Outlook* magazine that Section 377 of the IPC no longer needs a qualifying line. More time we take to kill it, the longer it will live as a reference to talk about sexual minorities, human rights and HIV/AIDS issues.\(^{44}\)

What marked a significant turning of the tide in terms of public opinion was the open letter in 2006 by Vikram Seth and Amartya Sen arguing for decriminalizing an expression of romantic love. The open letter was built upon over a decade of work by LGBT activists in the form of Fact Finding Reports, activist intervention, conferences and writing in the media on the pernicious effects of the law. Vikram Seth condemned Section 377 as a law which 'punitive[ly] criminalises romantic love'.\(^{45}\) Amartya Sen, in a letter written in support of this, argued:

> Gay behaviour is, of course, much more widespread than the cases that are brought to trial. It is sometimes argued that this indicates that Section 377 does not do as much harm as we, the protesters, tend to think. What has to be borne in mind is that whenever any behaviour is identified as a penalizable crime, it gives the police and other law enforcement officer’s huge power to harass and victimize some people. The harm done by an unjust law like this can, therefore, far larger than would be indicated by cases of actual prosecution.

Together these two letters signalled a significant mobilisation of public opinion against Section 377.

In 1991, Less than Gay had lamented that only 19 out of the 80 prominent intellectuals in India had responded to a survey on homosexuality, out of which only a handful had anything positive to say. The letter by Vikram Seth got over 100 signatures of prominent persons belonging to the fields of education, law, theatre, film, arts, academia, journalism, social movements, bureaucracy and medicine, thereby signalling a major shift in understanding among what ABVA called 'opinion makers'.\(^{46}\) The letter itself was reported widely in both the national and international media and


\(^{46}\) Ibid.
played a role in consolidating a certain level of public opinion as unequivocally in favour of gay and lesbian rights.

**Out of the Closets and Onto the Streets**

Protests have been integral to the recognition of queer people as human beings entitled to rights. Protests have often been organised around local issues of police harassment in Bangalore, Delhi and Bombay. With the arrests in Lucknow in 2004 eliciting protests in Delhi, Bangalore and Bombay, they took on a more national character. While the protests were dearly about unacceptable levels of police violence, the large queer presence at the World Social Forum, 2004, in Mumbai, had a more celebratory air.

The Pride marches which began in 2003 in Kolkata on 29 June (Stonewall Day) before spreading to the other major Indian cities, have taken forward the spirit of celebration which characterized the queer presence at the World Social Forum (Mumbai). The symbolism of 29 June was that it commemorates one of the most significant days in global queer history as it is the date when the homosexual community in New York began to spontaneously protest against the police raid of a bar called Stonewall in Greenwich Village. It marked the beginning of the queer movement in the west.

The character of the Pride marches is such that unlike the other protests, these marches were not focussed on the issue of violations alone, but rather became a way of celebrating queer lives in all their diversity.

On 29 June 2008, Kolkata was joined by Delhi and Bangalore as the Pride march focussed national attention on the demands of the queer community. It was organized simultaneously in Delhi, Bangalore and Kolkata (it was the sixth Pride march in the city of Kolkata). The Pride marches were unique because, for a change, queer people were mobilized around issues of their choosing and at a time of their choice. Later that year, the queer community in Mumbai marched on 16th August, a day after the Independence Day celebrations, specifically to highlight how the queer community still lacked its freedom. Symbolically the march started from August Kranti Maidan.
where Gandhi had issued his 'Quit India' call, to further reinforce the continued alien legacy of Section 377.47

Queer pride marches provide a platform for lesbians, gays, bisexuals, hijras to come together. In a very public sense it fostered a sense of a diverse and vibrant community which cuts across boundaries of class and gender. The placards in the pride ranged from 'I am the pink sheep of the family' and 'Hindu Muslim Sikh Isai Hetero Homo Bhai Bhai', to demands such as 'Repeal 377' and ‘I am a Dadi but not a Rudhivadi’. The Pride thus provided a valuable corrective to the notion that sexuality was an elitist preoccupation. The Pride marches had equal number of heterosexual friends, family members and general supporters who came out to march. The marches were celebrated with increased fervour and enthusiasm beginning since 2009, with more cities such as Bhubaneswar and Chennai joining in.

1.7 NAZ FOUNDATION V. SURESH KAUSHAL: THE BATTLE BEGINS...

In 2001, the Lawyers Collective HIV/AIDS Unit, on behalf of Naz Foundation, filed a constitutional challenge to Section 377 in the Delhi High Court on the grounds of equality, privacy and freedom of expression.48 Right from the beginning this Public Interest Litigation was unique in the consultative mode adopted by Lawyers Collective who, by organizing consultations, kept the community involved and informed about the various decisions to be taken during the various stages of the litigation process. In 2004 however, before any substantive arguments could be addressed, the petition was

47 Outlook published both the letters in its 16 September 2006 issue; 'Backing gay rights', Times of India, 17 September 2006; 'Vikram Seth Leads fight against anti-gay law', DNA, 16 September 2006; Sengupta, Somini. 'Notables Urge India to End 145 Year Ban on Gay Sex', New York Times, 16 September 2006. However, it is important to note that while the open letter did mark a significant advance there were many troubling questions as well. It was not able to carry forward some of the lessons of the queer struggle. What was significant by its absence was a mention of the lesbian and the fact that the particular circumstances of her oppression. Similarly, the figures of the hijra and kothi who might very well constitute the group most directly affected by Section 377, were completely absent as subjects in the open letter.

dismissed by the Delhi High Court on grounds of *locus standi*. It was only when the petitioners filed a review petition before the Supreme Court that the matter was remanded back to the Delhi High Court which was directed to hear the matter on account of the seriousness of the issue raised in 2006. In the course of the litigation, others joined in to oppose the demand for reading down the law, namely Joint Action Kannur (JACK) and B.P. Singhal who argued that HIV does not cause AIDS and that Section 377 was essential to protect Indian society. The interventions opposing the petition of Naz Foundation sparked a vigorous discussion in one of the consultation meetings called by Lawyers Collective about how the petitioner could be further supported. This discussion resulted in the decision to file an intervention in the name of a Delhi-based coalition of sexuality, gender and child rights groups called 'Voices against 377'.

As the petition wound its way through the Delhi High Court, it became more visible in the public eye. The proceedings in the case were widely reported and keenly followed by national and local newspapers. The fact that after seven years of filing, the final arguments actually began in September 2008, made the possibility of change more imminent. The seven years served as an important gestation period garnering more supportive public opinion and seeing the emergence of a more articulate queer political voice. For example, before the arguments began in September 2008, the first Pride marches across the country were still fresh in memory. The fact that the judgement in 2009 was preceded by a second year of Pride marches, although coincidental, points to the uniqueness of the struggle against Section 377, in that it was simultaneously a political demand and a legal battle.

The judgement came at a fortuitous moment of convergence between legal and political thinking and social attitudes. The 105-page judgement has inaugurated a new discourse on queer people moving away from the terms of 'carnal intercourse' and inhabiting the new language of dignity, privacy, equality and inclusiveness. The

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49 In 1994, ABVA had filed a similar petition, also in the Delhi High Court, which was dismissed for default. It was numbered as Writ Petition (Civil) No. 7455 of 2001.

50 The Delhi High Court further stated: ‘...an academic challenge to the constitutionality of a legislative provision cannot be entertained. Hence, the petition [is] dismissed.’ Unreported Order dated 2 September 2004 of the Delhi High Court in Writ Petition No. 7455/2001.
Judges have literally overturned a 154-year old discourse which only saw homosexuality within the frame of unnatural sexual intercourse. The Court held that criminalisation of consensual sex between adults in private violates the Constitution's guarantees of dignity, equality, and freedom from discrimination based on sexual orientation (Articles 21, 14 and 15). In technical terms, the judges 'read down' or interpreted Section 377 in such a way that it no longer criminalises consensual sex between adults in private.

It was a unique example of a judgement which drew closely from the experiences of the queer community and was able to reflect the lived and existential realities of being queer, both in its very structure and in its reasoning. In a direct sense, the judgement quoted instances of violence faced by the queer community. Thus the judgement was firmly anchored in the experiences of the queer community and this ability to empathize with the pain of the queer community ran through the legal reasoning of the judgement.

The judgement begins by adopting a view of human dignity that privileges the ability to freely make choices about how to live one's life.\textsuperscript{51}

\textit{At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others (Para 26, Naz Judgment).}

From this notion of dignity, the court derives a concept of privacy that '...deals with persons and not places'. That is, the right to privacy is not merely the right to do what one wants in 'private spaces' like the home, but also a right to make choices about how to live one's own life. Privacy protects personal autonomy, both zonal and decisional.

This includes the right to sexual expression, which necessarily entails being able to choose sexual partners without unjustified interference by the state. As the Court eloquently put it, ‘[t]he expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves’ (Para 47).

The judgement emphatically recognizes that even without actual enforcement, laws like Section 377 serve to stigmatize an entire section of society, thereby violating their dignity as citizens. By making a specific reference to the colonial-era Criminal Tribes Act, the judgement notes the horrendous instance of the criminalisation of sexual minorities. The judges also note how Section 377 has the effect of viewing all gay men as criminals.

*The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class... When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because (of) what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalized and turned in on itself (Para 94).*

The Justices thus construe the meaning of 'sex' in Article 15 to include not merely biological or physical sex, but also sexual orientation. The Court says:

*The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning 'normal' or 'natural' gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex (Para 99).*

The Justices note that the Supreme Court has read the right to life in Article 21 of the Constitution to include a right to health. This right to health includes various entitlements, such as an equal opportunity to access a functioning healthcare system.
The Justices concluded that Section 377 infringed on the right to health of LGBT persons because it hampered HIV/AIDS prevention efforts.

The Court held that the public's moral opinions cannot be used as a justification for limiting LGBT persons' fundamental rights. The Court says:

*Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality* (Para 79).

This 'constitutional morality' that the Court identifies is based on the liberal democratic ideals that underlie the Indian Constitution, and not on any particular religious or cultural tradition. They derive the concept from Dr. Ambedkar, who in the Constituent Assembly noted, 'constitutional morality is not a natural sentiment. It has to be cultivated. The Judges conclude that to stigmatize or to criminalise homosexuals only on account of their sexual orientation would be against constitutional morality.

Reinforcing their commitment to constitutional morality, the Judges highlight the role of the judiciary in a constitutional framework as being 'to protect the fundamental rights of those who may dissent or deviate from the majoritarian view'. The Judges thereby assert the responsibility of the judiciary in protecting fundamental rights regardless of the opinion of the legislative majority. Thus the judiciary as an institution has a responsibility in ensuring that 'legislative majorities in tantrum against a minority' did not 'sterilize the grandiloquent mandate' (para 125).

In conclusion, the Court draws upon the notion of equality, which underlies the Indian Constitution and makes an organic connection between the intentions of the founding fathers and the need to ensure that LGBT persons are not discriminated against today:

*The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech,
moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, 'Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion.... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future (Para 129).

The Court goes on to say:

*If there is one constitutional tenet that can be said to be (the) underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that (the) Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised (Para 130).*

**In Suresh Kumar Kaushal …**

The Counsels appearing for one of the 16 (so far) different Special Leave Petitions (SLP),\(^\text{52}\) in their vehement opposition against the Delhi High Court decision, sought the Supremes Court's intervention, not because consensual sex between adults is legal, but because they feared that gays and lesbians will now marry.\(^\text{53}\) There is a certain

\(^\text{52}\) What in effect the judges do by using the reasoning of analogous grounds, is to keep the door open to other groups which might suffer discrimination, availing the protection of Article 15. As the judges note, once again drawing from South African case law, some guidelines can be laid down as to what could be an unspecified [analogous] ground of discrimination. 'In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features' (Para 103). This stands in sharp contrast to the *2003 decision of the US Supreme Court in Lawrence v. Texas* where even while ruling Texas's sodomy laws unconstitutional, 1. Kennedy was careful to limit the finding. He held that, 'it does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.' See: *Lawrence v. Texas*, 539 U. S. 538 (2003).

\(^\text{53}\) The Special Leave Petitions have been filed by Suresh Kumar Kaushal and his brother (both astrologers), Bhim Singh (Chairman of the Jammu and Kashmir National Panthers Party), B. P. Singhal (member of the Vishwa Hindu Parishad, former Parliamentarian, also intervened at the Delhi High
positive recognition in their repugnance—of the right to love, which is at the heart of the queer struggle. At the same time it is the 'imagined' fear that homosexuality poses a threat to the institution of marriage and what Adrienne Rich would call the law of 'compulsory heterosexuality', which is at the heart of the strong opposition against the Naz decision. Queer people may not be criminal, but they cannot be allowed to marry and form alternate families.

Decriminalising homosexuality is seen as a conspiracy to destroy the nuclear Indian family. A one-line poster campaign led by the Vishwa Hindu Parishad (VHP) to gather support against the Naz judgement, says: 'Agar tera baap samlaingik hota, to tu paida nahin hota' (If your father was homosexual, you would not have been born). All this has led to the filing of appeal in Supreme Court against Delhi High Court Landmark Judgment. The intentions and efforts of the so-called custodian of Indian culture, morality and succeeded and homosexuality was again recriminalized in India. A bench of Justice GS Singhvi & Justice S J Mukopadhyaya reversed the landmark judgment of Delhi high court of 2009, decriminalizing consensual private acts of homosexuality by adults & upholds the constitutional validity of S.377 IPC.

SC in case of Suresh Kumar Kaushal V. Naz Foundation has held “high court committed serious error by declaring section 377 IPC as violative of article 14, 15 & 21 of the constitution in so far as it criminalizes consensual sexual acts of adults in private completely”. Supreme Court also held that HC was not right in observing that
s.377 IPC obstructs personality development of homosexuals or affects their self esteem. SC Bench also ruled that anal intercourse between two homosexuals is a high risk activity, which exposes both the participating homosexuals to the risk of HIV/AIDS.

Both the Judges further held that-

“Homosexual acts are unnatural & against the order of nature. Base upon the modest medical findings, the human body is simply not designed to engage in homosexual acts. Every part of body is meant to perform a specific purpose & must be used for that purpose only; conversely the opposite is absolutely true; the sexual activity is perfectly designed to be between a man & woman. If homosexuality is legalized the instances of HIV/AIDS will increase & overall health status of people in our country will go down”.

Lastly, quoting religion, society and culture judges further held that Decriminalizing consensual sex between persons of the same sex is against our religious teachings & would give rise to male prostitution. Deviation from conventional sexual morality leads to hostility in the society.

Since this verdict came in 2013; LGBT Activism has faced a huge setback on their fundamental rights. The struggle continues but the confidence, courage and hope in the eyes of homosexuals have faded.

1.8 WHY A SOCIO-LEGAL RESEARCH?

The role of ‘Samaj’…

The reality is that, homegrown homophobia and the perception of homosexuals as deviants, manifest itself through the ‘samaj'. The role of the society is instrumental and cannot be neglected as they dictate the terms for regulation of sexual desires. The contemporary salience of these age-old debates around the role of the samaj in regulating sexuality is best illustrated by the statement of RSS ideologue S. Gurumurthy on the Naz judgement:
The king or the state in India had refrained from handling most issues which the society or families could handle. It is the colonial state, with its laws and courts that began to intrude the sovereign domain of the family and society. The Indian discipline was always built around unenforced social and family norms; not state laws. Self-restraint and shyness were the tools to regulate the deviants from the norms, not the police or courts. Even today, it is this non-formal moral order – read dharma – not the laws of Parliament or State assemblies that largely govern this society.... In the Indian tradition, homosexuals, as elsewhere, were thus regarded as deviants. But, here, unlike in the Abrahamic religions, the right of these deviants to exist without being punished was never denied; and will never be. Yet no one can argue here or elsewhere that homosexuality is a virtue. No law or court of law can declare it as a virtue.56

Coming from a completely different perspective, yet agreeing with some part of what Gurumurthy says, one powerful argument that emerges is that the domain of sexuality is policed not so much by the state in India but by the samaj.57 The control on sexuality is not exercised by law alone, but a larger notion of the ‘samaj’ —a term in which the institutional aspects of society and their moral and political attributes are happily collapsed. Thus the control of sexuality devolved on those authorities and instruments—panchayats, prescriptions, prohibitions, etc., which governed the system of alliance.

Therefore, in any discussion regarding the control of sexuality, the role of the samaj is far from benign. This is as true for the Bengal of 1849 as it is for the India of the twenty-first century, where couples marrying across caste and religious lines are killed for violating the rules of the samaj. Suffice it to say that one cannot discuss regulation of sexuality in present India by an exclusive reference to the law alone; and this marks the necessity to have a socio-legal research on this topic.

Further chapters of this thesis is an attempt to do a multi-dimensional research and the snapshots of the chapters goes like this:

Chapter-Two

The origin & development of homosexuality is hard to be traced with complete accuracy, as it was a subdued affair for all ages. But the various anthropological, archaeological & literary evidences have confirmed existence of homosexuality in all primitive societies of the world. This chapter is an attempt to locate the origin & trace the development of homosexuality in world.

Chapter- Three

Religion plays an important role in shaping one’s ideology, beliefs, customs, traditions and to some extent overall outlook of a person, community, as well as a country. The world is full of religious & cultural diversity. Our beliefs, pride & prejudices are also governed to some extent, by religion apart from other factors such as social, economical & political reasoning. Religion lays down the rules for morality. Morality lays down rule of sexuality & civility. Civility & sexuality further classifies behavior as normative & non-normative. Homosexuality is considered as non-normative behavior & the genesis for this belief is that all major religion of the world is against homosexuality. This chapter is written with an aim to have an insight into various religions only with the purpose to introspect & discover their stand on homosexuality.

Chapter- Four

Homosexuality is believed to be deviant form of sexual orientation and behaviour by most of the people around the globe. Except the psychologist and experts on science and human rights the common man belief regarding homosexual orientation varies immensely. Many beliefs that it is a mental disease, few believe that homosexuals are sexually obsessive beast with filthy mindset and inhumane sexual behaviour. Many belief that homosexuality is not a result of nature, but an outcome of how a person is nurtured. This chapter aims to identify the factors behind homosexual orientation and its implication on oneself and the society.

Chapter- Five
Society mainly has two views of homosexuality. These are conservative view and the progressive view. The conservative view propounds that Homosexuality is an aberration, the orientation is a disorder, and the behaviour is pathological. The progressive view propagate that Homosexuality is a normal variant in the human condition and that homosexual behaviour is natural. Conservative thinkers argue that an individual's upbringing can directly influence sexual orientation. Also tied in with many of these debates is the morality of homosexuality. Sexual orientation is experienced in complex and variable ways, which are undoubtedly influenced by both biological and societal factors. As homosexuality is practiced in society, this chapter aims to study its correlation with the society in the light of various sociological theories. It also analyses a survey conducted globally with respect to acceptance of homosexuality in society.

Chapter-Six

Gender and sexuality have been important and contested areas in definition of cultural and national identity of India. A country whose culture is imbibed with morality, religiosity, normative values, customs and age old traditions, acceptance of homosexuality is a struggle for the LGBT Community. This chapter is an attempt to trace history, present position and activism regarding homosexuality in India. Also legal and social stand on same-sex marriage is also discussed in brief.

Chapter- Seven

This chapter aims to identify the problems of homosexuals as a class as well as experiences of queer people of different genders to illustrate the complexity of homophobia and discrimination, which cannot always be illustrated by broad brush strokes but are nuanced by a range of factors other than sexual orientation.

Chapter- Eight

Advocacy for legalization of homosexuality and criminalization of homosexuality has been in news in India since last decade. This chapter is an attempt of advocacy,
discussing case laws and precedents on this issue; beginning with *Khairati case* and ending on *Kaushal Case*.

**Chapter- Nine**

This chapter has incorporated the periodical effects of legalizing homosexuality in India. An attempt to describe possible effects and encountering negative effects of legalizing homosexuality in India is also committed.

**Chapter- Ten**

This chapter is a termination of this thesis and discusses crucial interpretation of section 377 IPC, critical analysis of Naz judgment, critical analysis of Suresh Kumar Kaushal Judgment, law commissions’ recommendation of 2000 and why it could not be implemented is also discussed with concluding remarks on the topic of thesis. Some legal measures and recommendations are also incorporated in this chapter. Few submissions for LGBT Community, Government, and Society at large are also integrated in this chapter.