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# Impact of the Naz Foundation Judgment on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation



Centre for Health Law, Ethics and Technology  
Jindal Global Law School, O.P. Jindal Global University

#### Front Cover Design

The image created is a medley of forms, figures, bold and full colours. The figures in the background are engaged in actions that are taboo, which ought not to be held in contempt by society. The figures in the foreground represent the narrow-mindedness of society and general uneasiness which the sexually marginalised face on a daily basis in India.

The colours that have been used to fill the figures are representative of the disposition of the figures, and their uniform coverage aims to convey the spirit and the integrity of the queer movement in the country, as well as the global movement towards decriminalisation and equality for queer people.

The layer of pink, frothy dirt that covers parts of every segment of the picture is representative of society's notions of morality and the impact that these notions have on acts of perceived rebellion, sexual or otherwise. However, all the images are still visible beyond the froth, which represents the effect of the 2009 Delhi High Court judgment and the emergence of a new emancipatory morality.

*Front cover design by Rohan Kothari, 3rd year BA LLB Student, Jindal Global Law School*

# Impact of the Naz Foundation Judgment on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation

**Centre for Health Law, Ethics and Technology  
Jindal Global Law School  
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## Centre for Health Law, Ethics and Technology

The Centre for Health Law, Ethics and Technology (CHLET) at Jindal Global Law School (JGLS) undertakes research on issues related to health care from a developing world perspective on social justice. CHLET adopts a multidisciplinary approach and focuses particularly on access to drugs, health and sexuality, reproductive rights, realization of a constitutional right to health, implication of advancement in technology on access to health care, and anti-discrimination law and policy relating to contagious diseases in India and abroad.

CHLET seeks to foster informed dialogue among various stakeholders including policymakers, lawyers and the medical industry and profession. Through this dialogue, CHLET is dedicated to advancing the entrenched constitutional right to health irrespective of race, ethnicity, national origin, disability, gender or poverty. Implementation of the right to health has a distinct ring and distinct challenges in the Indian context. In this and other areas, CHLET aims to use its position within JGLS to engage in global-domestic research, dialogue, negotiation and, when necessary, the judicial system to achieve systemic reforms that advance social justice and equity in the many dimensions of health care.

The HIV/AIDS pandemic and recent bio terrorist threats have stretched health care systems even in countries like the United States and Canada. In countries like India that grapple with inadequate delivery of basic health care, a response to these new challenges is hindered by systemic problems. Access to health-care in India is compromised by poor infrastructure, cultural attitudes and practices, poverty and low levels of education, deficient resources and equally importantly the lack of effective legislation and policies on health related issues.

CHLET is in a unique position to tackle these complexities because it bridges the Global North and the Global South. Alliances are already being drawn for collaborations with research centres in developed countries to conduct joint research projects, enabling a unique transnational conversation on an issue that is unmistakably transnational in nature.

Last, in order to find effective solutions to pressing health challenges, it is imperative to merge theory and practice. CHLET is in an exceptional position to focus on both theoretical as well as empirical study on global health law issues by building an academic as well as a civil society network.

## Acknowledgements

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## Foreword

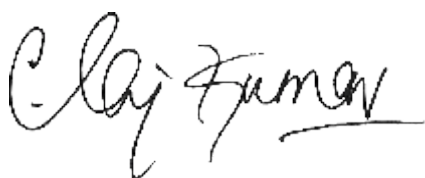
This report published by the Centre for Health Law, Ethics and Technology (CHLET), a research centre at the Jindal Global Law School of O.P. Jindal Global University is an important step in developing strong research capacities within academic institutions to rigorously analyze implications of judicial decision-making process in cases relating to constitutional law and human rights. It is essential that Universities use their intellectual resources with a view to advancing research in areas that are critical in shaping the contemporary social and political discourse.

The rights of the Indian LGBT community are a widely debated and reported legal issue in India in recent times. The Delhi High Court Judgment of 2009 (Popularly known as the Naz Foundation case) was seen as a welcome change in the legal matrix of human rights in India. This seminal study by the CHLET has unearthed the perceived impact of the judgment on the enforcement of rights and upholding of dignity as well as an increase in social acceptance (if any) of the LGBT community in the capital. The empirical analysis of detailed, in-depth personal interviews with respondents from diverse groups such as the MSMs, *hijras*, *kothis*, gay men and MSM outreach workers, from different parts of Delhi helped arrive at the following primary conclusions- an increase in self-acceptance and confidence among the impacted groups, a perceived reduction in police harassment and greater societal and familial acceptance (as is also evident in the change in the depiction of the impacted groups in the media).

In November 2011, the UN Office of the High Commissioner for Human Rights submitted a report (A/HRC/19/41) entitled: *"Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity"* to the 19th Session of the Human Rights Council. The report noted that since 2000, laws criminalizing homosexual acts between consenting adults have been repealed in Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Georgia, Fiji, India, the Marshall Islands, Nepal, Nicaragua, Panama and the United States, together with dependent territories of New Zealand and the United Kingdom. These developments have taken place in some cases by the courts overturning these laws; in others, repeal has taken place through a legislative process. Further, the report observed that through the universal periodic review, several States – including Mauritius, Nauru, Palau, Sao Tome and Principe, and Seychelles have accepted recommendations to decriminalize homosexuality. These are important milestones in the global efforts to uphold the right to equality and non-discrimination. The report concluded by recognizing that, *"...Governments and inter- governmental bodies have often overlooked violence and discrimination based on sexual orientation and gender identity...Further action is now needed, especially at the national level, if individuals are to be better protected from such human rights violations in future."*

The study reinforces the importance of the constitutional protection of the right to equality and non-discrimination, and the immediate need for the Indian courts to uphold the human rights of the LGBT community. The Naz Foundation judgment has bolstered the LGBT rights movement, and a countrywide decriminalisation will bring about greater social acceptance of the impacted groups, a change that is long overdue.

I congratulate the Lead Author of the report, Professor Dipika Jain for her passionate commitment and dedication to pursue this research. I appreciate the commendable work of the student researchers and other scholars who have helped in the publication of this report. I sincerely hope that this study is a beginning of many more initiatives that will bring together academics and practitioners to pursue rigorous research on various issues of contemporary relevance in law and society.

A handwritten signature in black ink, reading "C. Raj Kumar". The signature is written in a cursive style with a horizontal line underlining the name.

**Professor Dr. C. Raj Kumar**  
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Dean, Jindal Global Law School

# Contents

Centre for Health Law, Ethics and Technology (CHLET) .....	ii
Acknowledgements .....	iii
Foreword .....	iv
Glossary .....	viii
<b>Executive Summary .....</b>	<b>1</b>
<b>1. Introduction .....</b>	<b>4</b>
<b>1.1 History of the Legislation.....</b>	<b>4</b>
<b>1.2 Section 377 and Judicial Interpretation .....</b>	<b>5</b>
<b>2. The Naz Foundation Case: An Overview .....</b>	<b>8</b>
<b>2.1 The Petitioner .....</b>	<b>8</b>
<b>2.2 Reply by the Union of India.....</b>	<b>9</b>
<b>2.3 Protection of Rights .....</b>	<b>11</b>
<b>2.3.1 Article 21 of the Constitution of India.....</b>	<b>11</b>
<b>2.3.2 Article 14 of the Constitution of India .....</b>	<b>12</b>
<b>2.3.3 Article 15 of the Constitution of india .....</b>	<b>13</b>
<b>2.4 Jurisdiction of the Court .....</b>	<b>14</b>
<b>2.5 Final Judgment .....</b>	<b>14</b>
<b>3. Rationale of the Study.....</b>	<b>16</b>
<b>4. Methodology.....</b>	<b>18</b>
<b>5. Research Questions .....</b>	<b>20</b>
<b>6. Data Collection .....</b>	<b>22</b>



<b>7. Findings and Analysis .....</b>	<b>24</b>
<b>7.1 Increased Self-Acceptance and Confidence .....</b>	<b>24</b>
<b>7.2 Reduction in Police Harassment .....</b>	<b>25</b>
<b>7.3 Societal Acceptance .....</b>	<b>27</b>
<b>7.4 Familial Acceptance .....</b>	<b>28</b>
<b>8. Conclusion .....</b>	<b>32</b>
<i>Notes .....</i>	<i>34</i>
<i>Selected Bibliography .....</i>	<i>39</i>
<i>Annexure - I .....</i>	<i>43</i>

# Glossary\*

**Biological Sex:** Separate from gender, this term refers to the cluster of biological, chromosomal, and anatomical features associated with maleness and femaleness in the human body. It is a person's biological identity as male or female that one is assigned at birth. In reality, as the existence of intersex people point out, a multiplicity of sexes exist in the human population. Biological sex is determined by chromosomes (XX for females; XY for males), hormones (estrogen/progesterone for females, testosterone for males), and the internal and external genitalia (vulva, clitoris, vagina for females, penis and testicles for males). One's sex is often thought of as a much more concrete matter than it actually is: about 1.7% of the population can be defined as intersexual—born with biological aspects of both sexes to varying degrees. A person's assigned sex may or may not be the same as their present anatomical sex which may or may not be the same as their sex of identity. Sex, like gender, is a more complex issue than what it is believed to be. Sex terms are male, female, transsexual, and intersex.

**Bisexual:** A person who is attracted romantically/emotionally/sexually to both men and women.

**Closeted/ Being in the Closet:** It is a metaphor used to describe lesbian, gay, bisexual, transgender, queer/questioning and intersex (LGBTQI) people who have not disclosed their sexual orientation or gender identity and aspects thereof, including sexual identity and sexual behaviour.

**Coming out:** The process by which LGBT people recognize, acknowledge, accept, and typically appreciate their sexual/gender identities. To “come out” is to publicly declare one's identity, sometimes to one person in conversation, sometimes to a group or in a public setting. Coming Out is a life-long process—in each new situation a person must decide whether or not to come out. Coming out can be difficult because reactions vary from complete acceptance and support to disapproval, rejection and violence.

**Cross-dresser:** An individual who dresses in clothing that is culturally associated with members of the “other” sex. Many cross-dressers are heterosexual and conduct their cross-dressing on a part-time basis. Cross-dressers cross-dress for a variety of reasons apart from work, including pleasure and a desire to express behaviours and aesthetics associated to the 'opposite' sex. While some people may identify with the term transvestite, cross-dresser is considered a more neutral term.

**Gay:** A gay person is one who has significant (to oneself) sexual or romantic attractions primarily to members of the same gender or sex, or who identifies as a member of the gay community. One may identify as gay without identifying as a member of the gay community and vice versa. Though 'gay' is a common term for all homosexual persons, it is often used to describe people who identify as men who are attracted to other people who identify as men. Self-identified gay men do not necessarily have sex only with men, but occasionally may engage in sex with women.

**Gender:** A complicated set of socio-cultural practices whereby human bodies are polarized into “men” and “women.” Words that describe gender are “masculine” and “feminine”, which represent the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women. Gender is socially and culturally produced and constructed, as opposed to being a fixed, static, coherent essence.

**Gender Expression:** The public expression and/or statement of one's gender identity. It refers to all the external characteristics through which people communicate their gender identity to others, such as behaviour, mannerisms, clothing, haircut, speech patterns, social interactions, and the emphasizing/de-emphasizing or changing their bodies' characteristics. Typically, transgender people seek to make their gender expression match their gender identity, rather than their birth-assigned sex. Gender expression is not necessarily an indication of sexual orientation.

**Gender Identity:** Refers to an individual's internal, deeply felt sense of self as a man, woman, transgender or other gender categories. Gender identity does not always match biological sex; for example, a person may be born biologically male yet identify as a woman. Because gender identity is internal and personally defined, it is not visible to others. In contrast, a person's “gender expression” is external and socially perceived. Gender identity may change over time and may not accord to dichotomous gender categories.

**Gender-based Violence:** Violence directed against a person on the basis of gender or sex. Gender-based violence can include sexual violence, domestic violence, psychological abuse, sexual exploitation, sexual harassment, harmful traditional practices, and discriminatory practices based on gender. The term originally described violence against women but is now widely understood to include violence targeting women, transgender persons, and men because of how they experience and express their genders and sexualities.

**Heteronormativity:** A hetero-normative view is one that promotes alignment of biological sex (female/male), gender identity (feminine woman/masculine man), and sexual orientation/behaviour (heterosexual). Heteronormativity is the assumption that heterosexuality and heterosexual norms are universal or at least the only acceptable conditions. Closely related to heterosexism, heteronormativity negatively affects LGBT people in a host of ways, from actively oppressing those who do not fulfill heterosexual expectations to rendering sexual dissidents invisible.

**Heterosexism:** The societal/cultural, institutional, and individual beliefs and practices that privilege heterosexuals and subordinate and denigrate LGBT people. It refers to culturally and institutionally entrenched attitudes and practices, which serve to oppress and marginalize LGBT persons and to support prejudices and discriminatory behaviour against them. Heterosexism, an extension of “sexism,” is a pejorative term designating the chauvinism that privileges heterosexuality to the detriment or exclusion of other sexualities.

**Heterosexual:** Person whose sexual/romantic/emotional feelings are for the opposite gender.

**Hijra:** In the culture of the Indian subcontinent, a hijra is a physically male or intersex person who is considered a member of "the third sex." Hijras are usually born as biological/anatomical males who reject their 'masculine' identity in due course of time to identify either as women, or not-men, or in-between man and woman, or neither man nor woman. The term 'Hijra' is used in North India, while 'Aravani' and 'Thirunangai' are used in Tamil Nadu.

**HIV/AIDS:** AIDS, byname of acquired immunodeficiency syndrome, transmissible disease of the immune system caused by the human immunodeficiency virus (HIV). HIV is a lentivirus (literally meaning "slow virus"; a member of the retrovirus family) that slowly attacks and destroys the immune system, the body's defence against infection, leaving an individual vulnerable to a variety of other infections and certain malignancies that eventually cause death. AIDS is the final stage of HIV infection, during which time fatal infections and cancers frequently arise.

**Homophobia:** The irrational fear of homosexuals, which manifests itself in disgust, contempt and hatred.

**Homosexual:** A person whose sexual/romantic/emotional feelings are towards those of their own sex/gender.

**Kothi:** Males who show obvious feminine mannerisms and who involve mainly, if not only, in receptive anal/receptive oral intercourse with men. Most of the Kothi-identified males show varying degree of feminine mannerisms/behaviour and also cross-dress occasionally. These persons are akin to "queens"/"drag queens" in western countries.

**Lesbian:** A person who identifies as woman and has significant (to oneself) sexual or romantic attractions towards another woman, or who identifies as a member of the lesbian community. In India, this term is used to indicate bisexual women also.

**LGBT:** Lesbian, gay, bisexual, and transgender; an inclusive term for groups and identities sometimes also grouped as "sexual minorities."

**MSM (Males who have sex with Males):** MSM is used as an umbrella term under which all biological males who have sex with other males are included, regardless of their sexual/gender identity.

**Sexuality:** Human sexuality encompasses the sexual knowledge, beliefs, attitudes, values, and behaviours of individuals. Its dimensions include the anatomy, physiology, and biochemistry of the sexual response system; identity, orientation, roles and personality; thoughts, feelings, and relationships. The expression of sexuality is influenced by ethical, spiritual, cultural, and moral concerns.

**Sexual minorities or Sexual minority community:** Refers to lesbian, gay, bisexual and transgendered/ transsexual persons as well as persons with other identities (such as *Kothis* and *Hijras*) as a minority group in a predominantly heterosexual total population.

**Sexual Orientation:** One's erotic, romantic, emotional and physical attraction. It could be to people of the same sex (homosexuality), to the opposite sex (heterosexuality), to either sexes (bisexuality), or none (asexuality). Trans and

gender-variant people may identify with any sexual orientation, and their sexual orientation may or may not change before, during or after gender transition.

**Sodomy:** Coined around 1050 by St. Peter Damian to denote sexual activity between men, "sodomy" is a shortened form of "the sin of Sodom," referring to the Genesis account of the men of Sodom who tried to have intercourse with two angels and were smitten with blindness. Historically, the exact meaning of "sodomy" has varied across time and place. Although in the early modern periods it often referred to undifferentiated vice, including heresy and treason, its meaning gradually became more specific, referring usually to sex between men--especially anal intercourse. But in some countries at varying times it has also been applied to oral sex, anal intercourse between men and women, sex between women, and even bestiality. The term is still used in the law codes of some countries, where it most often referred to sex between men, either anal or oral, but occasionally also to lesbian acts and anal and oral intercourse between men and women.

**Transgender (TG):** It is a broad term for all people who do not identify with or choose not to conform to the gender roles assigned to them by society based on their biological sex. Transgenders are those who transgress the social gender norms of the society they belong to; TG is often used as an umbrella term to mean all the people who defy rigid, binary gender constructions, and who express or present a breaking and/or blurring of culturally prevalent/stereotypical gender roles. This includes a wide range of identities and experiences, including but not limited to: pre-operative, post-operative and non-operative transsexual people; male and female cross dressers (sometimes referred to as "transvestites", "drag queens", or "drag kings"); intersex individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. (A male-to-female transgendered person is referred to as 'transgender woman' and a female-to-male transgendered person is referred to as 'transgender man').

**Queer:** Originally a synonym for "odd," this term -as both noun and adjective-became a derogatory epithet for gay men and lesbians in the twentieth century, especially in the United States, where it emphasized the alleged "unnaturalness" of homosexuality. Although many people still use "queer" as an anti-gay slur, since the 1980s the term has been reclaimed by members of the LGBTI communities to refer to people who transgress culturally imposed norms of heterosexuality and gender traditionalism. A term of political currency, 'Queer' might be broadly defined as a resistance to regimes of heterosexism. It is an inclusive umbrella term to refer to all non-normative experiences, both in terms of gender identities and of sexual practices/identities. Many lesbians and gay men, transgenders, transsexuals, bisexuals, and even heterosexuals whose sexuality does not fit into the cultural standard of monogamous heterosexual marriage have adopted the "queer" label. The term is sometimes used as a verb. To queer something is to replace and challenge heteronormative values.

# Executive Summary

This report, prepared by the Centre for Health Law, Ethics and Technology (CHLET) at Jindal Global Law School, aims to determine and analyse the impact of the landmark judgment of July 2, 2009 by the Delhi High Court on the lives of sexual minorities in Delhi. The Court's judgment was in response to a petition challenging the constitutional validity of Section 377 of the Indian Penal Code (IPC), which criminalised consensual sexual activities between homosexual adults conducted in private. In the judgment, the Honourable Chief Justice Ajit Prakash Shah and Justice S. Muralidhar held that Section 377 infringed upon fundamental rights under Articles 14, 15, and 21 of the Constitution of India, and declared the section to be unconstitutional to the extent that it criminalised private consensual sexual activity between adults.

This report begins with an introduction that includes the history of anti-sodomy legislation in English common law and its subsequent exportation to British India by Lord Macaulay, who drafted the Indian Penal Code. The report then explores the wording of Section 377 and its judicial interpretation through the years.

The introduction is followed by a detailed summary of the Delhi High Court judgment outlining various arguments of the petitioner and the respondents. The discussion of these arguments serves to illustrate various perspectives on the proposed function of Section 377 by the Indian Government, the actual application (and misuse) of the section, and its far-reaching impact on different aspects of peoples' lives. This introduction also touches upon the Court's discussion of the impact of Section 377 on society as a whole, particularly upon public health.

The next section lays down the rationale for the study: namely, that the impact of the Delhi High Court judgment on the LGBT community is an issue worth investigating. Submissions made in the judgment as well as other studies have shown that anti-homosexuality laws largely impact the LGBT community in two ways: (i) anti-sodomy laws affect the relationship of sexual minorities with law enforcement agencies, leading to differential treatment; and (ii) these laws directly (and adversely) affect individual notions of self-esteem, self-worth and play a major role in social and familial acceptance and respect. Thus, the research questions in this study ask (i) whether, after decriminalisation, members of sexual minorities have felt any difference in the treatment they receive from law enforcement officials, and (ii) whether they believe that they have achieved a greater level of respect and acceptance, from society as well as from their own families.

The research conducted for this study consists mostly of personal interviews with members of the LGBT community. Researchers interacted with individuals belonging to different sexual minorities who described their lives before and after July 2, 2009. The findings of the interviews have been compiled along with similar studies

conducted in other parts of the world: South Africa, the USA, Canada and Australia. These studies have been compiled and correlated in order to paint a global picture, showing that decriminalisation consistently leads to a rise in the level of social acceptance and, more importantly, self-acceptance of sexual minorities.

This impact assessment is the first of its kind in India and, apart from providing valuable first-hand accounts of LGBT life pre and post-decriminalisation of homosexuality, it aims to (i) bring attention to other issues (such as strategies for the promotion of familial acceptance of LGBTs) that still need to be addressed; and (ii) emphasize the role of other factors such as movies and the Indian media that, through their activities and support for the LGBT community, have had an important positive impact on societal acceptance.

The reading down of Section 377 by the Delhi High Court is a pivotal moment in Indian history. The findings of this report clearly show that the Delhi High Court judgment has positively impacted the LGBT community and has improved the quality of life of sexual minorities. However, greater efforts must be made, and strategies must be formulated in order to truly integrate the LGBT community into Indian society, eliminate stigma and discrimination, and award them the same opportunities as those available to other citizens.

# Introduction

*“It is only in the most technical sense that this law is about who can penetrate whom and where. At a practical and symbolic level it is about the status, moral citizenship and sense of self worth of a significant section of the community.”*

Justice Albie Sachs

*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998) 6 BHRC 127 at 163 (paragraph 107) (Constitutional Court, South Africa).



The Naz Foundation<sup>1</sup>, an NGO in India, filed a writ petition in the Delhi High Court challenging the constitutional validity of Section 377 of the Indian Penal Code (IPC), 1860. This Section penalised crimes amounting to 'unnatural offences', which had the effect of criminalising consensual sexual intercourse between adults, even when conducted in private.

The petitioner argued that Section 377 infringed upon Articles 14<sup>2</sup>, 15<sup>3</sup>, 19<sup>4</sup> and 21<sup>5</sup> of the Indian Constitution. They also argued that the Section should only criminalise non-consensual penile, non-vaginal sex and penile, non-vaginal sex involving minors.

In a landmark judgment delivered on July 2, 2009, the Delhi High Court ruled that Section 377 of the Indian Penal Code violated a number of fundamental rights, including the right to privacy and right to dignity under the fundamental right to life and liberty (Article 21), the right to equality (Article 14), and prohibition of discrimination on grounds of sex (Article 15). The case has been appealed to the Supreme Court of India.

### 1.1 History of the Legislation

The first accounts of sodomy as a crime were recorded in the Common Law of England texts, in Fleta in 1290 and in the Britton in 1300.<sup>6</sup> In both texts, the recommended punishment for the crime of sodomy was to burn the perpetrators alive. Sodomy, also called buggery, was later punished by hanging, under the Buggery Act of 1533<sup>7</sup>. Under the 1533 law, buggery was described as the 'detestable and abominable Vice of Buggery committed with mankind or beast.'<sup>8</sup> The statute was repealed and then re-enacted in 1563 by Queen Elizabeth I.<sup>9</sup> In the 19th century, even though the sentences for sodomy were reduced, and oral-genital sexual acts were removed from its definition, sodomy still retained its criminal status.

Sodomy was frequently documented as a criminal act in scholarly publications as well. The renowned legal scholar William Blackstone described sodomy as an 'abominable crime' in his Commentaries on the Laws of England from 1765 and 1769.<sup>10</sup> Blackstone's writings on this subject had a substantial effect on the development of anti-sodomy laws in the Americas and other British colonies. Thus, the Common Laws of England, statutory provisions through history, and scholarly publications have played an important role in the dissemination of anti-sodomy laws in different parts of the world, including India.

In England, the Wolfenden Committee released a report in 1957 recommending that "homosexual behaviour between consenting adults in private should no longer be a criminal offence."<sup>11</sup> The report questioned the legitimacy of labeling homosexuality as

*“In England, the Wolfenden Committee released a report in 1957 recommending that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'.”*

“Pierre Elliott Trudeau in 1967: 'The state has no business in the bedrooms of the nation'.”

a disease, and went on to state that the function of law was not “to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour.”<sup>12</sup> Subsequent to the release of the report, law reform took place in England on introduction of The Sexual Offences Act in 1967.<sup>13</sup> This Act served to decriminalise homosexuality as well as private consensual acts of sodomy with adults, providing for a limited decriminalisation of homosexual acts given certain conditions. It decriminalised consensual sex between adults in private who have attained the age of 21. Still, this Act continued to discriminate between homosexuals and heterosexuals, instituting a higher age of consent for homosexual than for heterosexual acts, where the consent age was set at 16.<sup>14</sup> In 2004, the Sexual Offences Act, 2003 came into force, introducing neutral laws for everyone and removed the discrimination regarding the age of consent.<sup>15</sup>

Similarly, in another British colony, Canada, a law was passed in 1969 as part of an Omnibus Bill that amended the Criminal Code of Canada and decriminalised homosexuality.<sup>16</sup> The amendment was based on a simple aphorism offered by the minister Pierre Elliott Trudeau in 1967: “The state has no business in the bedrooms of the nation.”<sup>17</sup>

## 1.2 Section 377 and Judicial Interpretation

India has an anti-sodomy provision that is Section 377 of the Indian Penal Code. This section has been included in a Chapter of the Indian Penal Code titled 'Of Offences to the Human Body'. The sub-chapter in which Section 377 is located is titled 'Of Unnatural Offences'.<sup>18</sup> Section 377 reads as follows:

*“Unnatural Offences - Whoever voluntarily has carnal<sup>19</sup> intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

*Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”*

Lord Macaulay drafted the Indian Penal Code and introduced it in British India in 1861.<sup>20</sup> At that time, moral standards largely based on religious views (particularly Judeo-Christian beliefs) governed the inclusion of many laws. Thus, sodomy was criminalised because, according to Judeo-Christian beliefs, sexual intercourse for non-procreative purposes was 'against the order of nature'.<sup>21</sup> Section 377 reflects these beliefs and codifies them as part of Indian law.

Section 377, since its conception, has been the subject of changing judicial interpretation in India. Different tests have been prescribed over time to penalise crimes under this Section. Initially, in cases such as *Khanu v. Emperor*,<sup>22</sup> the court held that the test to determine whether carnal intercourse is against the order of nature is to see whether the sexual act is performed without the possibility of reproduction. Later cases such as *Lohana Vasantlal Devchand v. State*<sup>23</sup> and *Calvin Francis v. Orissa*<sup>24</sup> arrived at contradictory judgments as to whether oral sex fell within the ambit of Section 377. In *Calvin Francis*, the Court made its judgment using the guiding

conditions of 'sexual perversity' and 'abnormal sexual satisfaction'. Subsequently, in *Fazal Rab Choudhary v. State of Bihar*,<sup>25</sup> the Court held that for a crime to be punishable under Section 377, it would have to indicate a level of 'sexual perversity'. Therefore, the first test described in *Khanu* in order to determine whether sexual acts were against the order of nature was based on considerations of possibility of procreation, whereas the later test described in *Calvin Francis* and *Fazal Rab Choudhary* was based on considerations of sexual perversity.

In the judgment of *Brother John Antony v. The State*<sup>26</sup>, the Madras High Court held that “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.” The Court held that the petition fell within the ambit of Section 377 and the defendant would have to face trial.

The determination of the meaning of the term 'carnal intercourse against the order of nature' has been a matter of substantial judicial concern. The meaning of Section 377 was restricted to anal sex initially in 1884; it was expanded to include oral sex by 1935, and later was broadened further to include thigh sex. The absence of a consent-based distinction in the wording of the section has equated homosexual sex with rape and equated homosexuality with sexual perversity.

*“The absence of a consent-based distinction in the wording of the section has equated homosexual sex with rape and equated homosexuality with sexual perversity.”*

# The Naz Foundation Case: An Overview

*“This judgement is first and foremost a defence of liberty, equality, privacy, and a presumptive check on state power. It is a feature of these values that they are secure only when they are enjoyed by all. Privacy cannot be genuinely protected if the state is given arbitrary power over some groups; equality cannot be realized if invidious distinctions between citizens persist; rights of liberty cannot be genuine if they apply only to all those who are alike. The essence of toleration is that each one of us can be safe from the fear of stigma and discrimination, persecution, only when all of us are safe; otherwise what we get is a counterfeit toleration. So let it be clear: this judgement is not about a minority, not about valorizing a lifestyle, it is about the values that made us who we are as a nation. Neither the detractors of this judgement, nor its defenders for that matter, should forget that it is in the name of a genuine common morality that this decision can be defended.”*

## 2.1 The Petitioner

The Naz Foundation (the petitioner in the 2009 case) is an NGO that has been working for many years on HIV/AIDS intervention and prevention. In the course of its work, the petitioner has extensively interacted with sections of society that are especially vulnerable to contracting this disease, such as homosexuals, transgenders, and other sexual minorities. The petitioner argued that Section 377 should be limited for several reasons outlined below.

First, the petitioner argued that the existence of Section 377 of the Indian Penal Code caused extensive discrimination towards the gay community and transgendered individuals by state authorities (under the pretext of enforcing the provision of the IPC), severely impairing HIV/AIDS prevention efforts.<sup>1</sup> The discrimination that sexual minorities faced from the state authorities included atrocities such as physical and verbal abuse, harassment, and assault. According to the petitioner, the existence of Section 377 led to the denial of fundamental rights to these individuals.

Second, the petitioner contended that legislation criminalising consensual oral and anal sex was based on Judeo-Christian moral standards and had no place in modern society. According to the petitioner, Section 377 was predominantly used in contemporary India in cases of sexual assault and abuse of minors. Thus, criminalising consensual same-sex activity in private served as nothing more than a weapon for police brutality and abuse.<sup>2</sup> The existence of this section perpetuated discrimination, abuse, harassment, arbitrary arrests and detention amongst other human rights travesties. This in turn adversely affected HIV/AIDS prevention efforts, since these communities took their activities underground in fear of persecution and abuse and became largely inaccessible to AIDS prevention workers. The provision therefore directly resulted in the marginalisation and victimisation of a certain class of people for no legitimate reason.<sup>3</sup>

Third, the petitioner submitted that Section 377 of the IPC infringed upon the fundamental rights of privacy and dignity that fall within the ambit of Article 21 of the Indian Constitution. The petitioner argued that there was no aspect of a person's life more private than sexual relations, and because sexual preference is an integral part of the core of an individual's private space. It formed an inalienable part of the person's right to life. Section 377 conveyed the message that homosexuals were of less value than other sections of society by demeaning and humiliating them, and blatantly violating their right to live a dignified life. The petitioner argued that the fundamental right to privacy and dignity under Article 21 could only be waived in existence of a compelling state interest, but that such an interest was notably absent in the application of Section 377.<sup>4</sup>

Fourth, the petitioner submitted that Section 377 infringed upon the fundamental right to equality under Article 14 of the Indian Constitution because there was no rational

*“The existence of Section 377 led to the denial of fundamental rights to these human beings and perpetuated discrimination, abuse, harassment, arbitrary arrests and detention amongst other human rights travesties.”*

*“The Court stated that ‘popular morality or public disapproval of certain acts does not amount to justification of curtailment of the fundamental right bestowed under Article 21.’”*

connection between the legislative objective of the Section (to penalise 'unnatural sexual acts') and the classification created by this Section (differentiating between procreative and non-procreative sexual activities). Because it arbitrarily targeted the gay community, the petitioner contended that the classification was unreasonable.<sup>5</sup> The petitioner also submitted that the expression 'sex' in Article 15 of the Indian Constitution could not be read to include only gender but should also include sexual orientation. Therefore, since Article 15 outlined the right of non-discrimination, it implied that discrimination on the basis of sexual orientation (perpetuated by Section 377) violated this fundamental right.<sup>6</sup>

Finally, the petitioner also submitted that Section 377 curtailed the basic freedoms guaranteed to all citizens under Article 19(1) (a), (b), (c) and (d). The petitioner argued that the section curtailed an individual's ability to make personal statements about one's sexual preferences, one's right of association/assembly, and one's right to move freely to engage in homosexual conduct.<sup>7</sup>

## **2.2 Reply by the Union of India**

The Union Ministry of Home Affairs opposed the writ petition on the grounds that Section 377 of the IPC led to justified interference of state authorities in citizens' lives for the sake of safeguarding public health and morals.<sup>8</sup>

In response to the petitioner's case, the Ministry of Home Affairs sought to retain Section 377, submitting first that there was no fundamental right to engage in same-sex activities. The Additional Solicitor General (ASG), representing the Ministry of Home Affairs in the case, called homosexuality in India 'abhorrent', and stated that the right to privacy could be curtailed in the presence of compelling state interest, which includes conditions of decency and morality, outlined in Article 19(2) of the Indian Constitution.<sup>9</sup>

In terms of protecting the morals of society, the Court first stated the known principle that if a law infringes upon the right to privacy (as Section 377 does), then it must satisfy the 'compelling state interest' test.<sup>10</sup> Enforcement of public morality does not amount to a compelling state interest, justifying invasion of the private sphere of an adult individual who chooses to engage in sex without harming others<sup>11</sup>. The Court stated that 'popular morality or public disapproval of certain acts does not amount to justification of curtailment of the fundamental right bestowed under Article 21'.<sup>12</sup> Moral indignation of the public, even if it is very strong, does not form a valid basis for denying individuals their fundamental rights of dignity and privacy.<sup>13</sup> The only type of morality that can pass the compelling state interest test is constitutional morality.<sup>14</sup> The Court stated that the Constitution of India 'recognises, protects and celebrates diversity', and to criminalise homosexuals solely on the basis of their sexual orientation would be totally against the notion of constitutional morality.<sup>15</sup>

Second, in response to the petitioner's argument that Section 377 infringed upon Article 14 of the Indian Constitution, the respondent submitted that because Section 377 was gender-neutral, it did not violate the fundamental right to equality under Article 14.<sup>16</sup> The Court's response to this argument is outlined in section 2.3 of this report.

The third argument of the respondent was that there was no need to read down Section 377 since the section was predominantly used in cases of child sexual abuse and not to punish homosexuality.<sup>17</sup> The Court found that this argument was contradicted by facts. It noted that various studies, documents and judgments confirm the misuse of Section 377 through abuse and persecution of homosexuals and other sexual minorities.<sup>18</sup> The Court also stated that if the ASG's assertions were true, and Section 377 was not being used to prosecute homosexuals engaged in consensual acts in private, then the provision was not necessary to protect morals or public health with regard to sexual minorities in particular. Therefore, Section 377 from this perspective would fail the 'reasonableness test'.<sup>19</sup> The Court also stated that since the respondent had admitted that Section 377 was rarely used to prosecute homosexuals, the criminalisation of same-sex conduct did not serve any public interest.<sup>20</sup>

In direct contradiction to the petitioner's first argument, the respondent submitted that Section 377 aided HIV/AIDS prevention, since the provision criminalised same-sex relations that were likely to foster the spread of HIV/AIDS. The ASG, arguing on behalf of the respondent, submitted that anal sex, conducted between men without the use of protection, was one of the main causes of HIV/AIDS. He submitted that decriminalisation of homosexuality would not serve any purpose since it would perpetuate this type of sex, which in turn would be detrimental to public health. In his submission, he regarded homosexuality as a disease, and prescribed medical treatment for homosexuals.<sup>21</sup>

The Court did not agree with the submissions of the ASG. First it rejected the characterization of homosexuality as a disease.<sup>22</sup> The ASG had submitted that Section 377 in no way impaired the ability of homosexuals to access healthcare and HIV/AIDS prevention measures, which the Court found to be false in light of the extensive studies on the impact of Section 377 done by the petitioner and NACO<sup>23</sup>. The Court found the argument of the respondent to be 'completely unfounded since it is based on incorrect and wrong notions', because there was no evidence showing the link between decriminalisation of homosexuality and the spread of HIV/AIDS.<sup>24</sup>

Responding to the petitioner's final argument regarding Section 377's violation of Article 19(1) of the Indian Constitution, the respondent contended that Section 377 did not impact the freedoms given under Article 19(1), since it criminalised only a sexual act, leaving people free to express their opinions on homosexuality and its decriminalisation.<sup>25</sup> Therefore, the respondents maintained that Section 377 was constitutionally valid.<sup>26</sup> However, in light of the Court's findings on Section 377 of the IPC's infringement on Articles 14, 15 and 21 of the Indian Constitution, the Court did not find it necessary to explore infringement of Article 19.<sup>27</sup>

Interestingly, the Ministry of Health and Family Welfare submitted an affidavit, prepared by the National AIDS Control Organisation (NACO) that took a contrary stance to the Ministry of Home Affairs. NACO's submission corroborated the petitioner's contention that homosexuals and other sexual minorities were highly susceptible to HIV/AIDS, and stated that the increased vulnerability of these particular groups stemmed from a higher level of unsafe activity as well as impaired decision-making abilities that hindered HIV/AIDS prevention.<sup>28</sup>

*“It was imperative that the gay community had the right to render themselves visible without fear of persecution by state authorities so that HIV/AIDS prevention could be successfully conducted.”*

In terms of the right to health (recognised as a part of Article 21 of the Indian Constitution)<sup>29</sup>, the Union Ministry of Health and Family Welfare argued that since homosexuals lived in constant fear of law enforcement, they were reluctant to reveal same-sex sexual behaviour. As a result, this large section of society carried out its sexual activities in silence, making it very difficult for public health workers to access them for the purpose of HIV/AIDS intervention and prevention. NACO submitted that it was imperative that the gay community had the right to render themselves visible without fear of persecution by state authorities so that HIV/AIDS prevention efforts could be effectively conducted.<sup>30</sup>

The Law Commission of India, in its 172<sup>nd</sup> report, recommended the removal of Section 377 before the judgment in 2000.<sup>31</sup> The Law Commission, in reviewing laws relating to sexual offences (in light of increased incidence of sexual assault of minors as well as custodial rape), endorsed the deletion of Section 377 along with amendments in Section 375 of the IPC to a new Section 376E.<sup>32</sup> The Law Commission recommended the redefinition of Section 375 under 'Sexual Assault', penalizing not only rape but also any non-consensual, non-penile-vaginal penetration.<sup>33</sup>

On these grounds, the Court was unable to accept the respondent's argument that Section 377 should be retained to cover consensual sex between adults in private in the interest of public health and morality.<sup>34</sup>

## **2.3 Protection of Rights**

### **2.3.1 Article 21 of the Constitution of India**

The Court, drawing on the judgment of the Supreme Court in *Maneka Gandhi v. Union of India*<sup>35</sup> outlined the test by which a law interfering with personal liberty was declared to be constitutionally valid. The test, known as the three-fold test, requires the following: (i) the law in question must have prescribed a procedure; (ii) the procedure must have withstood a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must have been liable to be tested with reference to Article 14.<sup>36</sup>

The Court stated that the dignity of an individual, which is specifically mentioned in the Preamble of the Constitution, lay on the notion that the physical and spiritual integrity of every individual was recognised, along with his or her humanity and value as a person, irrespective of the utility he or she could provide to others.<sup>37</sup> The Court, drawing on the words of Justice P.N. Bhagwati<sup>38</sup> and Justice V.R. Krishna Iyer,<sup>39</sup> described the right to dignity as a part of India's constitutional culture and an inalienable part of the right to life enshrined in Article 21.<sup>40</sup>

The right to privacy, though not codified in a separate provision of the Constitution, had been declared by various judgments<sup>41</sup> over the years to be an implicit part of the right to life and liberty under Article 21 of the Constitution.

The right to privacy had been called the 'right to be let alone'.<sup>42</sup> The Court, quoting from the dissenting judgment in the U.S. Supreme Court case *Bowers v. Hardwick*,<sup>43</sup> stated that this right was not merely a negative right by which one could occupy a particular space free from State interference, but a positive right by which individuals



could continue with their lives, make important decisions, and decide their intimate relations without fear of penalty.<sup>44</sup> The right to privacy recognised that every individual has a sphere around his or herself in which he or she could autonomously conduct human relationships in private, without interference from outsiders. The Court declared that the way in which one gave expression to one's sexuality was at the core of this sphere of privacy.<sup>45</sup>

The Court also said that every individual's sexual orientation and sense of gender was deeply embedded, and formed an integral part of his or her identity.<sup>46</sup> The personhood of an individual largely depended on his or her ability to exercise autonomy, allowing one to attaining fulfillment, to increase his or her self-esteem, and to and build relationships on his or her own terms, free from State interference<sup>47</sup>. The Court stated that Section 377 of the IPC denied persons their individual dignity and criminalised their 'core identity' on the sole basis of their sexuality, thereby violating their right to life under Article 21 of the Indian Constitution. According to the Court's judgment, Section 377 denied homosexuals the right to full personhood, which is implicit to Article 21 of the Indian Constitution.<sup>48</sup>

### 2.3.2 Article 14 of the Constitution of India

In seeking to determine whether Section 377 violated the right to equality under Article 14 of the Indian Constitution, the Court first stated the test of permissible classification by which a classification can be deemed to not infringe upon Article 14. In order to pass the test of permissible classification, two conditions are required, namely (i) the classification must have been founded on an 'intelligible differentia' that distinguished members grouped together from members excluded; and (ii) the differentia must have had a rational relation to the objective sought to be achieved by the law in question (Section 377).<sup>49</sup> The Court reiterated the judgment in *Budhan Choudhry v. State of Bihar*<sup>50</sup> and stated that it was imperative that there be causal connection between the basis of the classification and the objective of the law<sup>51</sup>. Another important factor about classification in the context of Article 14 is that it cannot be arbitrary. If a classification made by a law was arbitrary, then the law automatically infringed upon Article 14; when a law was arbitrary, it was inherently unequal.<sup>52</sup>

In *Deepak Sibal v. Punjab University*,<sup>53</sup> the Court stated that when the objective of a law was irrational and unreasonable, it followed logically that the classification made by the law was also arbitrary and unreasonable.<sup>54</sup> Section 377 criminalised private conduct of a consensual nature between adults without promoting public health or public morality. Thus, the sole objective of this law was to criminalise conduct which 'does not conform to the moral or religious views of a section of society'. Such an objective affected the dignity of homosexuals and other sexual minorities, and resulted in a denial of their rights.<sup>55</sup> Therefore, the Court stated that the objective of Section 377 was arbitrary as well as unreasonable.<sup>56</sup>

Addressing the respondents' claim that Section 377 penalised only acts and not people, the Court found that while the section may be neutral on its face, it unfairly targeted a specific class of people in practice.<sup>57</sup> The discrimination that resulted from

*“Every individual's sexual orientation and sense of gender was deeply embedded, and formed an integral part of his or her identity.”*

this section was seen to be unreasonable, and the Court found that Section 377 violated Article 14 of the Indian Constitution.<sup>58</sup>

### 2.3.3 Article 15 of the Constitution of India

Article 15, which prohibits discrimination on several grounds, including on the basis of 'sex', was a direct application of the right to equality and flowed from Article 14 of the Indian Constitution.<sup>59</sup> The petitioner argued that 'sex' could not be taken to mean only gender, but must include sexual orientation as well, as a prohibited ground of discrimination based on sex. The petitioner's argument was based on the rationale behind this right: the reason for a fundamental right against sex discrimination was to prevent discrimination of people based on the fact that they did not conform to traditional notions of 'normal' gender roles that are based on stereotypical views.<sup>60</sup>

The Court drew on various judgments including *Toonen v. Australia*<sup>61</sup> and *Corbiere v. Canada*,<sup>62</sup> and held that the ground of 'sexual orientation' was analogous to 'sex' as mentioned in Article 15 of the Constitution of India. Therefore, since discrimination based on sex is prohibited by Article 15, it followed logically that discrimination based on the analogous ground (sexual orientation) would also violate Article 15.<sup>63</sup> The Court went on to clarify that this definition of sex would extend to Article 15(2) that prescribed the horizontal application of rights. Therefore, even discrimination of one individual by another based on sexual orientation would violate Article 15 of the Indian Constitution.<sup>64</sup>

The Court went on to analyse the recent case of *Anuj Garg v. Hotel Association of India*,<sup>65</sup> and the concepts of 'strict scrutiny' and 'proportionality review' discussed in the case. In *Anuj Garg*, the Court held that interference that is prescribed by a State for pursuing the ends of protection should be proportionate to the legitimate aims.<sup>66</sup> The Court specified that the standard used to judge proportionality should be capable of being called a reasonable standard in a modern, democratic society. The Court also pointed out that laws having the aim of 'protective discrimination' must be analysed with strict scrutiny to judge their implications.<sup>67</sup> The Court stated that when a law disadvantaged a vulnerable group, based on a consideration relating to personal autonomy of individuals, such a law must be subjected to strict scrutiny.<sup>68</sup>

Drawing on *Anuj Garg*, the Court in this case restated the inherent nature of personal autonomy in the grounds mentioned in Article 15 (such as sex). Grounds having the potential to weaken the personal autonomy of individuals (such as sexual orientation) were deemed analogous to the grounds mentioned in Article 15.<sup>69</sup> Therefore, the Court said that Section 377, as a provision that disadvantaged sexual minorities must not only be tested for 'reasonableness' under Article 14, but must also be subject to 'strict scrutiny'.<sup>70</sup>

Based on a proportionality review, the Court found that Section 377 disproportionately impacted homosexuals, solely based on their sexual orientation.<sup>71</sup> Since sexual orientation was a ground analogous to the prohibited ground of sex, discrimination on this ground was also prohibited under Article 15 of the Indian Constitution.<sup>72</sup> The Court stated that Section 377 branded a section of the population as criminal solely on the basis of moral disapproval of the State, and this provision

*“Section 377 criminalised private conduct of a consensual nature between adults without promoting public health or public morality; thus, the sole objective of this law was to criminalise conduct which 'does not conform to the moral or religious views of a section of society'.”*

adversely impacted the dignity of homosexuals.<sup>73</sup> The Court declared the provision as running 'counter to constitutional values' and the idea of human dignity that is the 'cornerstone of our Constitution'.<sup>74</sup>

## 2.4 Jurisdiction of the Court

The respondent submitted that the role of the judiciary, including the Court in the present case, was limited solely to interpreting the law as it was, and not to declare it invalid.<sup>75</sup> The respondent contended that the power of the Court, if it agreed with the petitioner, was limited to making a recommendation to Parliament to amend the law.<sup>76</sup>

The Court disagreed with the respondent and stated that the submission 'reflects rather poorly' on the respondents' 'understanding of the constitutional scheme'.<sup>77</sup> The Court went on to say that all three organs of the State derive their powers from the Constitution and the role of the judiciary is to protect the fundamental rights of the people. The Court stated that while a modern democracy goes by majority rule, there was still a need to protect the fundamental rights of those who did not conform to the majority's view.<sup>78</sup>

## 2.5 Final Judgment

The Court said that the one underlying theme of the Indian Constitution was 'inclusiveness,' a trait that had been deeply ingrained and reflected throughout Indian society. When a society displays inclusiveness, such persons within it are assured a life of dignity and non-discrimination. In the Court's view, constitutional law could not permit statutory criminal law to be governed by stereotypes and misconceptions regarding the identity of homosexuals and other sexual minorities.<sup>79</sup>

Therefore, the Court declared Section 377, as far as it criminalises consensual sexual acts of adults in private, to violate Articles 14, 15 and 21 of the Indian Constitution. The provision would continue to apply to non-consensual penile non-vaginal sex and penal non-vaginal sex involving minors. This clarification, the Court held, would hold until the Parliament decides to amend the law.<sup>80</sup>

*“Section 377 branded a section of the population as criminal solely on the basis of moral disapproval of the State, and this provision adversely impacted the dignity of homosexuals.”*

# Rationale for the Study

*“It is surprising that independent India has not yet been able to rescind the colonial era monstrosity in the shape of Section 377, dating from 1861. That, as it happens, was the year in which the American Civil War began, which would ultimately abolish the unfreedom of slavery in America. Today, 145 years later, we surely have urgent reason to abolish in India, with our commitment to democracy and human rights, the unfreedom of arbitrary and unjust criminalization.”*

Noted economist and Nobel laureate, Prof. Amartya Sen, in a letter supporting Vikram Seth, 2006.

In 2009, the Delhi High Court read down Section 377 of the Indian Penal Code, an archaic British law that criminalised same-sex sexual activity in India. In light of the appeal to the Supreme Court challenging the High Court Judgment, it is worth understanding if the original Naz Foundation judgment made a tangible difference in the lives of members of the LGBT community.<sup>1</sup>

Various reports, affidavits and judgments testify to the fact that Section 377 has been used in India numerous times to brutalise and abuse members of the gay community. The gay community in India is estimated to be approximately 25 lakhs and the lesbian and transgendered community is also estimated to run into several lakhs.<sup>2</sup> Through Section 377, these people were condemned to live their lives in the shadow of constant harassment, humiliation and demeaning treatment at the hands of state authorities.<sup>3</sup>

Homosexuality has historically been a part of almost all societies and, despite frequent attempts to prevent homosexual behaviour, it has become quite apparent that this cannot be achieved through the use of legislation. According to some academics, even though the continued presence of homosexuality in a community may run contrary to deeply-rooted and popular moral beliefs, discrimination against this group cannot be justified on any grounds.<sup>4</sup> Legislation entailing classification between homosexuals and heterosexuals leading to differential treatment of homosexuals is, by its very nature, dismissive of minority rights and individual rights. Such legislation also serves to raise important questions regarding the appropriate scope of the criminal law in regulating the activities and behaviour of individuals.<sup>5</sup>

In order to assess the real impact of the High Court judgment on the lives of the LGBT community in Delhi, the Centre for Health Law, Ethics and Technology at Jindal Global Law School has undertaken a qualitative empirical study. The study was undertaken from February 2011 to October 2011.

This study is the first of its kind in India to assess the impact of the judgment on the lives of sexual minorities. Similar studies have been undertaken in different countries such as Australia,<sup>6</sup> North America,<sup>7</sup> and South Africa.<sup>8</sup>

# Methodology

*“I have spoken against the injustice of apartheid, racism, where people were penalized for something about which they could do nothing, their ethnicity... I therefore could not keep quiet, it was impossible, when people were hounded for something they did not choose, their sexual orientation.”*

Archbishop Desmond Tutu while accepting the Outspoken Award from the International Gay and Lesbian Human Rights commission, 2008.

- The main aim of the study was to find answers to the research questions (listed below) and obtain insight into the daily lives of people from the LGBT community, before and after the Delhi High Court judgment.
- The study followed a qualitative research approach, involving semi-structured interviews as the primary method of data collection.
- In-depth, semi-structured, face-to-face individual interviews were conducted over a period of six months.
- Thirty-two randomly selected respondents were interviewed.
- The respondents were mainly recruited through two Delhi-based organizations working on sexual minority issues: Love Life Society Delhi and Aide et Action India.
- The participants consisted of individuals from diverse groups including MSMs, *hijras*, *kothis* and MSM outreach workers, all from different parts of Delhi.
- The participation in the study was absolutely voluntary.
- All participants were informed that they could withdraw from the study at any point if they became uncomfortable.
- Each respondent was asked open-ended questions in the interviews.
- Each interview usually lasted from 30 to 45 minutes.
- In order to set the participants at ease, the interviews were informal and absolutely confidential in nature.
- The interviews focused on self-perception of the participants with regard to the study questions (listed in section 5 of the study), as the research conducted was exploratory in its approach.

# Research Questions

*“The movement for equality is unstoppable. Its message will eventually reach the four corners of the world.”*

Justice Kirby addressed a crowd of 35,000 at the International Conference on LGBT Human Rights in Montreal, presiding over the Asia-Pacific Plenary, 2006.



The two research questions were:

1. Whether the judgment has had any perceived (positive) impact on the enforcement of rights and upholding of dignity of the LGBT community in Delhi? Whether the attitude of the law enforcement agencies in Delhi, especially the police, has been perceived to change towards the LGBT community since July 2009?
2. Whether the judgment has resulted in any greater social acceptance of the homosexuals, the transgenders and *hijras*? In other words, whether there has been a visible reduction in social discrimination and greater acceptance by the family?

# Data Collection

*“The right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy”*

Justice Blackmun

*Bowers v. Hardwick*, 478 U.S. 186 (1986) at 195-96.

Most participants wanted the interviews to be confidential and were not comfortable with video or audio recording. Hence, written notes were taken during the interview in Hindi and English and were later translated to English. After all the interviews were conducted, each participant was contacted for a second time to confirm their consent to be a part of the study, and their interviews were read back to them in the language that they were most comfortable in (predominantly Hindi).

All thirty-two interviews were carefully analyzed to avoid any discrepancies in data or in the findings/results/conclusion.

# Findings and Analysis

*“...if you are not like everybody else, then you are abnormal, if you are abnormal , then you are sick. These three categories, not being like everybody else, not being normal and being sick are in fact very different but have been reduced to the same thing”*

Michel Foucault, (2004) 'Je suis un artificier'. In Roger-Pol Droit (ed.), Michel Foucault, entretiens. Paris: Odile Jacob, p. 95. (Interview conducted in 1975. This passage trans. Clare O'Farrell).

The study arrived at four main findings, which will each be discussed in turn. These will be discussed in detail under four heads.

### 7.1 Increased Self-Acceptance and Confidence

Within the stakeholder groups, most people noticed a change after the Delhi High Court judgment. They claimed to feel improvements in self-awareness, self-acceptance, self-confidence and emotional security after the judgment. The judgment has empowered them, enabling them to defend themselves and fight for their rights, even against law enforcement and state authorities. The majority of respondents felt more confident and fearless while dealing with the police and with public harassment, since they now had the support of the law and their behaviour was no longer criminal. One of the respondents said:

*“There is a difference. There is a lot of change. Now we feel braver and can speak up for our rights, even against the police. We are not scared of them like before.”*

After the judgment, many respondents took comfort in the knowledge that their natural homosexual or bisexual tendencies were not 'wrong' as the law earlier made them out to be. Before Section 377 was read down, the fact that their behaviour was considered criminal in nature only added to the confusion and uncertainty they were already experiencing while trying to understand and accept their sexuality. One respondent said:

*“I feel a lot braver now, after the judgment. I can face the police with courage now that I am not doing anything wrong in the eyes of the law.”*

Some respondents also reported that they could now argue with the police since they know that 'there is no Section 377 in the law books any more'. Technically, the section is still in the law books and criminalizes non-consensual penile, non-vaginal sex and penile, non-vaginal sex involving minors. However, because the section did not apply to the homosexual community after the judgment, it was perceived by a respondent that the section was not in the law books. Another respondent said:

*“Police still trouble me, they know that I am gay and they make fun of me and laugh. But I have become braver now and can stand up for myself.”*

Another respondent said:

*“We have more courage and confidence now. It should be decriminalised all over India because there has been a change.”*

Thus, it is evident from the interviews that the decriminalisation of homosexuality has led to increased self-confidence and self-acceptance among the respondents and has resultantly made them stronger and more assertive.

*“After the judgment, many respondents took comfort in the knowledge that their natural homosexual or bisexual tendencies were not 'wrong' as the law earlier made them out to be.”*

*“From the interviews, it appears that police harassment has reduced significantly among MSM outreach workers, but only to a small extent among the hijra and kothi groups. The responses from the latter group were varied.”*

Various studies have outlined the negative impacts of laws that criminalise homosexuality on the gay community. Professor Ryan Goodman, for instance, conducted a study on the impact of sodomy laws on the gay community in South Africa.<sup>1</sup> He conducted extensive field research on the impact of sodomy laws, and found that they created an environment where homosexuals were constantly being surveyed in a widespread manner. This atmosphere of dispersed surveillance created a sense of illegality in the very identity of homosexuals. Such an atmosphere also served to perpetuate and reinforce public disapproval and disgust at the notion of homosexuality, and led the public to view members of the gay community as abhorrent or diseased.<sup>2</sup>

Professor Goodman found that while the sodomy laws did not serve the ultimate purpose of forcing individuals to conform to recognised 'heterosexual' societal norms, the laws severely impacted the self-esteem, self-worth, and personal identities of homosexuals.<sup>3</sup> The laws also greatly affected the relationship of homosexuals with other members of society, due to the public disapproval that was generated. He organised his study by categorising different ways in which the self-esteem and self-worth of homosexuals eroded, namely through (i) self-reflection; (ii) self-reflection through the family; (iii) verbal assessment and disputes; (iv) residential zones and migrations; (v) restricted public places; (vi) restricted movements and gestures; (vii) 'safe' places; and (viii) conflicts with law enforcement agencies and state authorities.<sup>4</sup> This study illustrates the extent to which sodomy laws and the legal criminalisation of homosexuality can affect the very identity of individuals through various aspects of their lives.<sup>5</sup>

Similarly, after the ban on homosexuality in the military in Canada was lifted in 1992, a study was undertaken to study the effect of the same in the military. The final report stated that after the ban was lifted, there was a significant reduction in the number of reported cases of assault.<sup>6</sup>

Other studies, in-keeping with Prof Goodman's study, show that sodomy laws criminalising homosexuality have the same effect worldwide: they reduce the status of homosexuals to 'unapprehended felons' and create an atmosphere where discrimination is encouraged in different spheres of life. This was further confirmed by the interviews in Delhi undertaken for this study.

## **7.2 Reduction in Police Harassment**

The effect of criminal sanctions against homosexual behaviour include violence against homosexuals, blackmail, police intimidation and entrapment, reluctance by homosexual men to report rapes or other crimes for the fear of implications with homosexual activity, adverse psychological effects, which may even result in suicide, and the inability to acknowledge and express sexual preferences without fear of social discrimination, stigmatisation and ridicule.<sup>7</sup>

Most respondents said that the police were generally abusive towards them, verbally and physically, often interrogating them without any specific reason. From the interviews, it appears that police harassment has reduced significantly among MSM

outreach workers, but only to a small extent among the *hijra* and *kothi* groups. The responses from the latter group were varied. This group continues to face harassment at the hands of the police. One respondent stated:

*“The problem is that the police very often arrest without any reason and accuse and charge us under false sections. This creates a lot of tension in our lives and especially amongst our families.”*

Another respondent, a programme coordinator with a well-known NGO, was not optimistic about any change following the judgment. He said:

*“After the judgment, police harassment has not reduced much. Four to five months ago, my friend and I were in his car. We were not doing anything. The police came and started knocking on the door of the car because the car had been parked on the side. They accused us of having sex.”*

However, on a more optimistic note, another respondent stated;

*“Police does not trouble me as much after the judgment as they did earlier. The media supports us.”*

Some respondents stated that police often misused their power and tried to sexually exploit them, but there has been a decrease in incidents of sexual harassment after the judgment. One respondent said:

*“Police supported us only when we rendered sex services to them. Otherwise they troubled us and they would even snatch our belongings. After judgment, such harassments have definitely reduced”.*

Another respondent was more optimistic and stated:

*“There is also a lot of positive change in police behaviour. Generally, there is a lot more awareness about who we are, which is the reason harassment has reduced and acceptance is gradually increasing.”*

One of the respondents offered an extremely optimistic response:

*“There has been a difference in the last two years. People respect me more. I live with my Guruji now. I left my family ten years ago. I have even complained to the police by calling the control room and they did come to help me. The police have definitely started respecting us after the judgment.”*

Some respondents also claimed that the while police harassment has reduced in a few areas in Delhi, it is still very high in some areas. One respondent stated:

*“Some police officers harass and some do not. But the awareness has increased and I am braver now after the judgment... Except for a few places like ISBT and Azadpur, things have improved a lot.”*

*“Laws criminalising homosexuality have the same effect worldwide: that of reducing the status of homosexuals to 'unapprehended felons' and creating an atmosphere where discrimination is encouraged in different spheres of life.”*

*“Police harassment still continues, but now we have the law on our side.”*

*“While total acceptance of the sexually marginalised sections will be a gradual process, there has certainly been a marked change in societal perception and awareness since the judgment.”*

The fact that homosexuality is no longer a punishable offence, coupled with increased awareness and assertiveness of people belonging to the LGBT community has resulted in a positive change where the gay community is more confident, aware and even able to negotiate with the police. For instance, one respondent said;

*“Police harassment still continues, but now we have the law on our side.”*

The problem of police harassment persists due to a significant number of homophobic police officers who will continue such practices unless given regular sensitisation training on this issue.

### **7.3 Societal Acceptance**

After the judgment, general acceptance of gay, MSM, and *kothi* men in society has increased. While total acceptance of the sexually marginalised sections will be a gradual process, there has certainly been a marked change in societal perception and awareness since the judgment. Many respondents stated that societal acceptance has grown and people have been treating them with respect. The media has also played a part in this process, with many relevant movies and news items being released after the judgment. A few participants attributed reasons for such change to movies like *Dostana*, wide media coverage of the Naz Foundation judgment and the queer pride march in the city. One of the respondents said:

*“I am much braver after the judgment and have been able to speak up and explain to people who I am. And most people have understood and accepted me. So there has been a change in people's thinking also.”*

Another respondent said:

*“Dostana has brought about a lot of change. It resulted in spreading knowledge”.*

An optimistic respondent said:

*“People often made fun of me when I walked. They teased me. Now, since the past one year, things are looking different. There are some who still taunt and tease, however I know that if the Supreme Court also passes the same judgment, all such harassment will reduce further.”*

On a similar note, another respondent said:

*“After this judgment people have started accepting us to a certain extent. Some people still pass comments, but now my co-workers have started supporting me and I am respected in my office.”*

There appears to be greater acceptance of the LGBT community in some sections of the society as compared to others. One respondent feels that educated people are more accepting than uneducated people, as they are more aware. One respondent said:

*“Upper middle class and the elite class is fine but the lower section of the society has a lot of problems with us. The reason for this is also less awareness and social stigma.”*



On a similar note, another respondent said:

*“I feel that the Supreme Court should also pass laws of anti-discrimination along with the judgment. There should be stringent anti-discrimination laws like the SC/ ST Law which provides punishment for discrimination.”*

In certain areas like Badarpur, discrimination and harassment levels are still high. One respondent living there said:

*“In the area where I live there are a lot of MSMs so harassment is very common. They take away our money and beat us up. In some affluent areas, societal acceptance is higher.”*

Similarly, another respondent said:

*“People did not know much about our community earlier and used to tease us, but now many are aware and respect the way we are. In areas like Saket, where people are educated and more aware, people do not tease and pass unnecessary comments.”*

Many respondents seemed to think that the Supreme Court reaffirming the High Court's judgment would result in greater positive changes in society. One respondent said:

*“I have noticed a lot of difference among the normal people. Now people talk properly with us and respect us. Earlier, I was scared to admit to myself that I was gay. No one spoke openly about being gay but after this judgment people have started coming out in the open.”*

Another respondent said:

*“Gay people used to hide their sexuality but people have now started coming out. And all this is happening only because of the decriminalisation.”*

There will always be a social minority which will harbour intensely homophobic feelings. Decriminalisation is unlikely to alter this, but many homosexuals in "non-criminal" jurisdictions have, on the whole, felt that they have become a more accepted part of society as a result of legal reforms.<sup>8</sup>

#### **7.4 Familial Acceptance**

Although there was general optimism about change with respect to the three aspects mentioned above, the same did not hold true when it came to how respondents viewed the potential for acceptance by their families. Most respondents stated that they would not disclose their identities to their families. Some also admitted that they had faced severe discriminatory treatment from their families, on such disclosure. One of them said:

*“I cannot even go home as my sister has to get married. I feel that there should be an environment in which we can live more openly. Parents play a huge role in discriminating. Even they tease. Why should I be blamed because I do not get attracted to girls? There has to be anti-discrimination laws to protect us and then families will be more accepting.”*

*“Earlier, I was scared to admit to myself that I was gay. No one spoke openly about being gay but after this judgment people have started coming out in the open.”*

*“Many families fear that they may lose respect in society and face ridicule if their children are open about their sexuality. Hence, they either force them into heterosexual marriages or disown them, leaving them with little or nothing.”*

Another respondent said:

*“People's behaviour has changed a lot... But I am still scared to come out to my family as I am afraid of how they will react.”*

It also seems that for some of them, a few members in the family are more sympathetic than others.

*“I have a big family – my mom and sister, supports me a lot. I do not get that much support from my dad and brother.”*

Some families seemed to think that their child's sexual orientation could be changed or 'corrected' through heterosexual marriage.

One respondent said:

*“My family does not know about me. They will never accept it. I will not be able to survive there if I tell them. Some family members force us to get married. But we don't want to spoil the lives of women. We are helpless.”*

Contrary to popular belief, however, decriminalisation may actually serve to promote the institution of family. The knowledge that society and the law censure their relationships can be very difficult for homosexuals who are trying to accept their own sexuality. One consequence of the anti-sodomy laws is that many feel compelled to conceal this aspect of their lives from their family and friends, sometimes marrying for appearance's sake.<sup>9</sup>

In the presence of anti-sodomy laws, it has been seen that many homosexuals enter into heterosexual marriages to keep up appearances and prevent societal condemnation. These marriages are often unstable and fail, to the loss of both partners as well as any children that may result from the marriage.<sup>10</sup>

According to a report by the Peoples' Union for Civil Liberties, the institution of family reinforces the heterosexist organisation of society.<sup>11</sup> Rather than supporting their homosexual children and protecting them from social violence, families often reflect social intolerance; and those who do not conform to these social norms are humiliated, ill-treated and even disowned by their own families.<sup>12</sup>

It is clear that one of the major reasons for non-acceptance by families is the fear of social alienation. Many families fear that they may lose respect in society and face ridicule if their children are open about their sexuality. Hence, they either force them into heterosexual marriages or disown them, leaving them with little or nothing. This often leaves LGBT individuals little choice but to hide their sexuality and lead a dual life.

One respondent, who was disowned by his family when they found out about his sexual orientation, was very distressed about being thrown out of his house without even getting his rightful share in the family property. He suddenly found himself not only abandoned by his family, but also without any money or assets, and very little means to support himself. He said:

*“Family support is also important, and if they do not support, then at least we should get our share in the property. They just can not disown us like that.”*

This non-acceptance and fear of non-acceptance has other dangers as well. It is clear that the police often succeed in harassing these individuals because they are able to blackmail them with information about their sexual orientation to their families. One of the respondents said:

*“I am scared of the police as my family does not know that I am gay and I do not want them to find out. I am concerned about my reputation in the society. I once got caught with another man but I managed to escape from the police and I do not know what happened to the man.”*

# Conclusion

This study concludes that the decriminalisation of homosexuality will ensure that sexual minorities in India are one step closer to living with dignity. It will ensure greater self-confidence among the LGBT community leading to a gradual but steady acceptance of sexual minorities by their families and society as a whole.

The findings of this study are in line with the results of Professor Goodman in his study of the impact of sodomy laws in South Africa. He stated that even if sodomy laws in a particular jurisdiction only reflected the moral beliefs and sentiments of a small minority of the population, their presence in the law books would give the impression that criminalisation of homosexuality represented the sentiments of society as a whole. This representation results in the laws having a 'far-reaching' and 'self-reinforcing' effect.<sup>1</sup>

According to Professor Goodman, sodomy laws have a variety of impacts. First, sodomy laws influence the attitudes of society towards the state with members of the LGBT community fearing state authorities. Second, sodomy laws change peoples' relationships with public spaces; since these individuals are not awarded an equal level of protection by the law,<sup>2</sup> they acquire a more vulnerable status and have a less active relationship with public space in the society. Third, sodomy laws impact the boundaries of what constitutes a civic community.<sup>3</sup> Laws that criminalise specific communities lead to exclusion, marginalisation and victimisation. Since sodomy laws have such a strong influence on social norms and can successfully transform them,<sup>4</sup> the justice they bring must be analysed in this social context.

One important conclusion of this study is that there has been a definite increase in confidence and self-acceptance among LGBT community members. All the respondents interviewed unanimously agreed that even if decriminalisation did not change attitudes of the police and people in general, it did result in an improvement in their own self-confidence. This is in keeping with the results of prior studies, which have found that jurisdictions criminalising homosexuality have been home to individuals from sexual minorities with low levels of self-esteem and self-worth. But jurisdictions that decriminalised homosexuality have been associated with gay citizens who demonstrate greater levels of self-acceptance.

Police harassment has definitely reduced after the judgment, though it seems to be more prevalent in some areas of Delhi than others. Acceptance by society as well as by families has increased slowly, but there is still much work to be done. Apart from the law, the media and movies have also played their part in effecting a change in societal perception of the LGBT community.

Decriminalisation can remove much of the stigma associated with homosexuality, and can help homosexuals feel more accepted in society as well as within their own families. Decriminalisation has also been seen to be associated with more self-

*“This study concludes that the decriminalisation of homosexuality will ensure that sexual minorities in India are one step closer to living with the same dignity. It will ensure greater self-confidence among the LGBT community leading to a gradual but steady acceptance of sexual minorities by their families and society as a whole.”*

acceptance as well as psychological and emotional security among homosexuals and other sexual minority groups. Such qualities help homosexuals form healthy relationships and build and strengthen familial ties. In fact, it is encouraging to note that parents of several homosexual children have filed interventions in the Supreme Court praying for decriminalisation of homosexuality. Even though family acceptance of LGBT people still seems to be bleak, this situation will improve if the Supreme Court upholds the High Court judgment on Section 377.

# Notes

## Glossary

- \* Venkatesan Chakrapani, Ashok Row Kavi, L Ramakrishnan, Rajan Gupta, Claire Rappoport, Sai Subhasree Raghavan, HIV Prevention among Men who have Sex with Men (MSM) in India: Review of Current Scenario and Recommendations (April 2002), [http://www.indianglbthealth.info/Authors/Downloads/MSM\\_HIV\\_IndiaFin.pdf](http://www.indianglbthealth.info/Authors/Downloads/MSM_HIV_IndiaFin.pdf) (5th March, 2012).
- \* Compiled by Aniruddhan Vasudevan and Adele Tulli, <http://www.queer-ink.com/?a=qilingo> (7th March, 2012).
- \* TARSHI, Basics and Beyond - A Manual for Trainers, Integrating Sexuality, Sexual and Reproductive Health and Rights (2006).
- \* Keith Dorwick, Robert Siliciano, M.D., Kara Rogers, AIDS from Encyclopædia Britannica, <http://www.britannica.com/EBchecked/topic/10414/AIDS> (23rd Feb, 2012).

## Acknowledgments

1. Aide et Action India is an organization that supports and works with people belonging to the LGBT community. It has branches all over India, its South Asia Headquarters is located in Chennai, Tamil Nadu. The organization also works on various other social issues relating to health awareness, HIV and AIDS awareness, education and empowerment of women, etc.
2. Love Life Society is an organization in Delhi working with and providing support to people belonging to the LGBT community. It works to spread awareness about various issues relating to the LGBT community and is also actively involved in HIV/AIDS awareness.

## 1. Introduction

1. The Naz Foundation (India) Trust (NI) is a New Delhi based NGO that has been working on HIV/AIDS and sexual health from 1994 onwards. Through the years, Naz India has evolved and implemented a holistic approach to combat HIV, focusing on prevention as well as treatment. It focuses on reaching out to marginalised populations infected and affected by HIV. It also aims to sensitise the community about the prevalence of HIV, as well as highlight issues related to sexuality and sexual health.
2. Constitution of India, Article 14, is as follows: Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
3. Constitution of India, Article 15 is as follows: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public (3) Nothing in this article shall prevent the State from making any special provision for women and children (4) Nothing in this article or in clause ( 2 ) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
4. Constitution of India, Article 19, is as follows: Protection of certain rights regarding freedom of speech etc. (1) All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (f) omitted (g) to practice any profession, or to carry on any occupation, trade or business (2) Nothing in sub clause (a) of clause ( 1 ) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security

of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence (3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause (4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause (5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe (6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

5. Constitution of India, Article 21, is as follows: protection of life and personal liberty. It states that no person shall be deprived of his life or personal liberty except according to procedure established by law.
6. Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, 13 (2008).
7. *Id.* at 14.
8. Michael Kirby, *The Sodomy Offence: England's Least Lovely Criminal Law Export?*, *Journal of Commonwealth Criminal Law*, 22, 24 (2011).
9. H. Montgomery Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain*, (Boston, Little Brown 1970) as seen in footnote 45, 14 of Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, New York (2008).
10. W. Prest, *Blackstone and His Commentaries: Biography, Law, History*, 3 (Oxford, Hart 2009).
11. The Wolfenden Report, *Report of the Committee on Homosexual Offences and Prostitution*, 23 (1963).
12. *Id.*
13. Ten years after the report was published, the recommendations on male homosexuality were translated in a modified form into law, in the 1967 Sexual Offences Act for England and Wales; Jeffrey Weeks, *Wolfenden and beyond: The Remaking of Homosexual History* (19<sup>th</sup> Feb, 2012), <http://www.historyandpolicy.org/papers/policy-paper-51.html>; Matthew Waites, *Regulation of Sexuality: Age of Consent*, 54 (3) *Oxford Journals*.
14. Matthew Waites, *Regulation of Sexuality: Age of Consent*, 54(3) *Oxford Journals*.
15. Sexual Offences Act, 2003, S. 7; R Wintermute, *Sexual Orientation Discrimination in Individual Rights and the law in Britain* (C McCrudden and G Chambers eds., 1994) as seen in Sandra Fredman, *Discrimination Law*, Clarendon Law Series (2nd ed. Oxford University Press).
16. Canadian Prime Minister Pierre Elliott Trudeau adopts a government bill removing some provisions of the Criminal Code, effectively decriminalizing certain sexual practices (gross indecency, sodomy) committed between consenting adults (21 years of age) in privacy and not restricted to homosexual people. Before this, homosexual relations were illegal as they contravened the Criminal Code and were punishable with imprisonment. With a new law known as the Omnibus Bill, the State effectively decriminalized homosexuality. See Donald Wilfred, *Lesbian and gay liberation in Canada: a selected annotated chronology, 1964-1975*, ECW Press/Homewood Books (1996).
17. Pierre Elliott Trudeau, Canadian minister of justice, Remark to Newsmen, Ottawa, Canada, (December 21, 1967) (Reported by The Globe and Mail, Toronto, December 22, 1967, p. 1) He was commenting on the government's proposal to overhaul Canadian criminal law, giving new recognition to individual rights in several areas, including sexual behaviour.



18. Indian Penal Code, 1860.
19. “Carnal” is defined as “of the body or flesh; worldly” and “sensual, sexual” *as seen in* Concise Oxford Dictionary (9th ed. 1995).
20. 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*, 513-557, 32(3) *Modern Asian Studies* (1998).
21. Siddharth Narrain, *The Queer Case of Section 377* (Feb. 16, 2012), Sarai Reader 2005: Bare Acts 466. [http://www.sarai.net/publications/readers/05-bare-acts/06\\_siddharth.pdf](http://www.sarai.net/publications/readers/05-bare-acts/06_siddharth.pdf)
22. AIR 1925 Sind 286
23. AIR 1698 Guj 252
24. 1992(2) Crimes 455
25. AIR 1983 SC 323
26. 1992 Cri.L.J. 1352

## 2. Naz Foundation Case: An Overview

1. Naz Foundation v. Government of NCT and Ors., 160 (2009) DLT 277.
2. Peoples' Union for Civil Liberties, *Human Rights Violations against the Transgender Community: A study of kothi and hijra sex workers in Bangalore, India* (2003).
3. *Supra* note 1.
4. *Id.* at 8.
5. *Id.* at 22.
6. *Id.* at 9.
7. *Id.* at 10
8. *Id.* at 50
9. *Id.* at 23
10. Gobind v. State of MP (1975) 2 SCC 148
11. *Supra* note 1, at 61
12. *Id.* at 64
13. *Id.* at 72
14. *Id.* at 64
15. *Id.* at 65
16. *Id.* at 24
17. *Supra* note 1.
18. *Id.* at 60
19. *Id.*
20. *Id.* at 73
21. *Id.* at 57
22. *Id.* at 56
23. *Id.* at 57
24. *Id.* at 59
25. *Id.* at 24
26. *Id.* at 24
27. *Id.* at 101
28. *Id.* at 51
29. *Id.* at 51
30. *Id.* at 51
31. *Id.* at 67
32. *Id.*
33. *Id.* at 68

34. *Id.* at 60, 73
35. (1978) 1 SCC 248
36. *Supra* note 1, at 25
37. *Id.* at 26
38. *Id.*
39. Prem Shankar Shukla v. Delhi Admn. (1980) 3 SCC 526
40. *Supra* note 1, at 27
41. Kharak Singh v. State of UP (1964) 1 SCR 332; Gobind v. State of MP (1975) 2 SCC 148
42. Olmstead v. United States, 277 US 438 (1928), 478
43. 478 US 186 (1986)
44. *Supra* note 1, at 34
45. *Id.* at 35
46. *Id.* at 39
47. *Id.*
48. *Id.* at 40
49. *Supra* note 1
50. AIR 1955 SC 191
51. *Supra* note 1, at 74
52. Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722
53. (1989) 2 SCC 145
54. *Id.* at 74
55. *Id.* at 77
56. *Id.* at 76
57. *Id.* at 79
58. *Id.* at 82
59. *Id.*
60. *Id.* at 83
61. No.488/1992 CCPR/C/ 50/D/488/1992, March 31, 1994
62. [1999] 2 S.C.R. 203
63. *Supra* note 1, at 85
64. *Id.* at 85
65. (2008) 3 SCC 1
66. *Id.* at 88
67. *Id.*
68. *Id.* at 91
69. *Supra* note 1
70. *Id.*
71. *Id.*
72. *Id.* at 92
73. *Id.*
74. *Id.* at 91
75. *Id.* at 93
76. *Id.* at 99
77. *Id.*
78. *Id.* at 100
79. *Id.* at 104
80. *Id.* at 105

### 3. Rationale of the Study

1. It is pertinent to mention that the scope of the interviews was limited to gays, bisexuals and transgenders. The study did not look at or interview any lesbians. The Centre is undertaking another study to understand the reason for the inexplicable exclusion of lesbians from the agenda of the decriminalization campaign in India and the scope of the High Court petition and judgement.
2. Naz Foundation v. Government of NCT and Ors., 160 (2009) DLT 277 at 15.
3. *Supra Note 1.*
4. Melissa Bull, Susan Pinto and Paul Wilson, *Homosexual Law Reform in Australia*, in Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology, 1991)
5. K Sinclair, MW Ross, "Consequences of Decriminalization of Homosexuality: A Study of Two Australian States" 12(1) Journal of Homosexuality (Fall 1985)119-27.
6. G Geis, R Wright, T Garrett, P R Wilson, "Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven American States", Journal of Homosexuality Vol.1 Issue 4, pp. 419-426 (Summer 1976)
7. Inge Lauw, *Victimless Crimes: Decriminalisation of Homosexual Sexual Activity*, Vol. 1 No. 3, Murdoch University Electronic Journal of Law (1994) Available at <http://www.murdoch.edu.au/elaw/issues/v1n3/lauw132.html> (Feb. 16, 2012); Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics', California Law Review, Vol 89, No 3, May 2001.

### 7. Findings and Analysis

1. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics*, 89(3) California Law Review (2001).
2. *Id.* at 688-690
3. *Id.* at 689-690
4. *Id.* at 690-711
5. *Id.* at 690-694
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8. Inge Lauw, *Victimless Crimes: Decriminalisation of Homosexual Sexual Activity*, (Feb. 16, 2012), 1(3) Murdoch University Electronic Journal of Law (1994), <http://www.murdoch.edu.au/>.
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# **Annexure - I**



**O.P. Jindal Global University**  
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O.P. Jindal Global University (JGU) is a non-profit global university established by the Haryana Private Universities (Second Amendment) Act, 2009. JGU is established in memory of Mr. O.P. Jindal as a philanthropic initiative of Mr. Naveen Jindal, the Founding Chancellor. The University Grants Commission has accorded its recognition to O.P. Jindal Global University. The vision of JGU is to promote global courses, global programmes, global curriculum, global research, global collaborations, and global interaction through a global faculty. JGU is situated on a 60-acre state of the art residential campus in the National Capital Region of Delhi. JGU is one of the few universities in Asia that maintains a 1:15 faculty-student ratio and appoints faculty members from different parts of the world with outstanding academic qualifications and experience. JGU has established four schools: Jindal Global Law School (JGLS), Jindal Global Business School (JGBS), Jindal School of International Affairs (JSIA) and Jindal School of Government and Public Policy (JSGP).



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In 2009, JGU began its first academic session with the establishment of India's first global law school, Jindal Global Law School (JGLS). JGLS is recognised by the Bar Council of India and offers a three-year LL.B. programme, a five-year B.A. LL.B. (Hons.) programme and an LL.M. programme. JGLS has established research centres in a variety of key policy areas, including: Global Corporate and Financial Law and Policy; Women, Law, and Social Change; Penology, Criminal Justice and Police Studies; Human Rights Studies; International Trade and Economic Laws; Global Governance and Policy; Health Law, Ethics, and Technology; Intellectual Property Rights Studies; Public Law and Jurisprudence; Environment and Climate Change Studies; South Asian Legal Studies, International Legal Studies, Psychology and Victimology Studies and Clinical Legal Programmes. JGLS has established international collaborations with law schools around the world, including Harvard, Yale, Columbia, Michigan, Cornell and Indiana. JGLS has also signed MoU with a number of reputed law firms in India and abroad, including White & Case, Amarchand & Mangaldas & Suresh A. Shroff & Co., AZB & Partners, FoxMandal Little, Luthra and Luthra Law offices, Khaitan & Co. and Nishith Desai Associates.



Jindal Global Business School (JGBS) began its first academic session with an MBA programme in 2010. The vision of JGBS is to impart global business education to uniquely equip students, managers and professionals with the necessary knowledge, acumen and skills to effectively tackle challenges faced by transnational business and industry. JGBS offers a multi-disciplinary global business education to foster academic excellence, industry partnerships and global collaborations. JGBS has established several research centres and JGBS faculty are engaged in research on current issues including: Applied Finance; Corporate Governance & Applied Ethics; Digital Media & Communications; Emerging Economies & Markets; Family Business & Wealth Creation; Social Entrepreneurship, Supply Chain & Logistics Management; Infrastructure, Energy & Green Technologies; Innovative Leadership & Change; and New Consumer Trends Studies. JGBS has established international collaborations with the Naveen Jindal School of Management, University of Texas at Dallas, Kelley School of Business, and Carleton University.



Jindal School of International Affairs (JSIA), India's first Global Policy School, is enhancing Indian and international capacities to analyse and solve world problems. It intends to strengthen India's intellectual base in international relations and affiliated social science disciplines that have hitherto been largely neglected by Indian academic institutions. JSIA commenced its academic session in August 2011 with a Master of Arts in Diplomacy, Law and Business [M.A. (DLB)]. The programme is the first of its kind in Asia, drawing upon the resources of global faculty in Jindal Global Law School, Jindal Global Business School, as well as the Jindal School of International Affairs to create a unique interdisciplinary pedagogy. The [M.A. (DLB)] is delivered on week days to residential students and on weekends for working professionals, including diplomats, based in the National Capital Region (NCR) of Delhi. JSIA has established international collaborations with the United Nations University in Tokyo and the School of Public and Environmental Affairs (SPEA) of Indiana University. JSIA hosts India's only Taiwan Education Centre, which has been established by National Tsing Hua University of Taiwan with the backing of the Ministry of Education, Government of Taiwan. JSIA publishes the Jindal Journal of International Affairs (JJIA), a critically acclaimed bi-annual academic journal featuring writings of Indian and international scholars and practitioners on contemporary world affairs.



Jindal School of Government and Public Policy (JSGP) of O.P. Jindal Global University (JGU) promotes public policy research that facilitates better understanding of issues related to governance and public policy. The programmes at JSGP bear in mind the contribution that the faculty and the students of the school can make towards meeting the challenges of governance with a view to improving its efficiency drawing upon comparative and international perspectives in public policy. JGU promotes interdisciplinary studies and joint teaching and research programmes at the schools of law, business, international affairs, government and public policy. MA in Public Policy (MPP) is an interdisciplinary degree programme that bridges the gap between theory and practice. The programme teaches the students to delve into the contemporary issues in a coherent and holistic manner, to see the linkages among various aspects of public policy and governance.



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#### Back Inner Cover Description

This image symbolizes the queer movement in India. The rainbow in '2009' is located at Delhi on the map of India. The figure in the centre with its arms wide open is symbolic of self-esteem, confidence and freedom. The scales of justice on the right side represent the courageous role of the Indian judiciary in reading down Section 377. The symbol turns into a question mark at the bottom, questioning the impact and effect of the decision. The bars are a symbol of restrictions placed on freedom, liberty and dignity of sexually marginalized persons. The small figure of a female (almost hidden behind the bars) represents the hidden presence of lesbians in India. The other small figures are secluded (even from each other) due to the lack of love, acceptance and opportunities they receive from Indian society.

*Back cover design by Kudrat Dev, 3rd year BA LLB Student, Jindal Global Law School  
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