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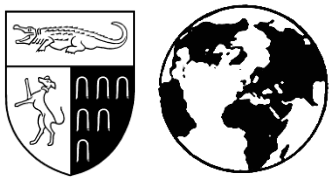

Insular and Inconsistent: India's *Naz Foundation* Judgment in Comparative Perspective

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I. INTRODUCTION

On December 11, 2013, the Indian Supreme Court issued a controversial ruling in *Koushal v. Naz Foundation*.[1] It upheld the constitutionality of Section 377 of the Indian Penal Code, which criminalizes "carnal intercourse against the order of nature." This decision reversed a 2009 Delhi High Court judgment holding Section 377 unconstitutional in its application to consensual, private sexual acts among adults, including homosexual intercourse.[2] The Supreme Court's judgment has already been analyzed in detail, with commentators noting its doctrinal flaws and muddled reasoning.[3]

While we agree with much of this criticism, our focus is not on the substance of the Indian Supreme Court's judgment, but on its troubling methodology. Unlike the Delhi High Court, which drew extensively on international and foreign legal materials, the Supreme Court adopted an insular approach in its *Naz Foundation* judgment. In the past, the Supreme Court has been willing to use international and foreign law as a means to shed light on the meaning and scope of domestic constitutional rights.[4] In *Naz Foundation*, however, the Supreme Court rejected any engagement with non-Indian sources of law. Such narrow-mindedness, in our view,

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1. Civil Appeal No. 10972 (2013) (India), *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070.
2. Naz Foundation v. Govt. of NCT of Delhi, WP(C) No.7455/2001 (Del. H.C.) (2009) (India).
3. *See, e.g.*, Shreya Atrey, *Of* Koushal v. Naz Foundation*'s Several Travesties: Discrimination and Democracy*, OXFORD HUM. RTS. HUB (Dec. 12, 2013, 6:33 PM), http://ohrh.law.ox.ac.uk/?p=3702; *The Unbearable Wrongness of Koushal v. Naz Foundation*, INDIAN CONST. L. & PHIL. BLOG (Dec. 11, 2013, 1:17 PM), http://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation.
4. *See, e.g.*, Vishaka v. Rajasthan, A.I.R. 1997 S.C. 3011 (India).

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is misplaced and counterproductive. We argue that the Court should have undertaken comparative analysis for two reasons: (1) this approach would be consistent with its past fundamental rights jurisprudence; and (2), the *Naz Foundation* judgment could have benefitted substantively by engaging with the experiences of other jurisdictions on similar issues.

This Essay has six parts. In Part II, we briefly overview the Delhi High Court and Supreme Court judgments in the *Naz Foundation* case. Part III examines the Indian Supreme Court's approach towards international and foreign law to demonstrate how the *Naz Foundation* Judgment is inconsistent with landmark past judgments. Part IV discusses South African and American case law on same-sex rights, noting that the Indian Supreme Court should have drawn from these cases to improve the substance of the *Naz Foundation* judgment and observe how comparative analysis can be used effectively. We conclude with a critical analysis of the Indian Supreme Court's approach in *Naz* Foundation and discuss how the Court might remedy this decision in future cases.

II. THE DELHI HIGH COURT AND SUPREME COURT JUDGMENTS IN *NAZ FOUNDATION*

The Delhi High Court's opinion in *Naz Foundation* has been lauded for its doctrinal creativity and for recognizing Section 377's perverse effects on the LGBT community.[5] The High Court found that Section 377 had been misused by the police as a tool for detention, harassment, and extortion of sexual minorities.[6] This abuse drove underground the activities of gay men, in particular, with severe consequences to their physical and psychological health. Citing NGO reports and academic studies, the High Court noted that Section 377 not only compromised HIV/AIDS prevention and treatment,[7] but also damaged the self-esteem and dignity of gay men and other sexual minorities.[8] The High Court found that by criminalizing private sexual acts that caused no injury, Section 377 was motivated not by any legitimate state purpose, but by animus, and that it targeted the LGBT community as a class.[9] The High Court therefore held that this provision, in its application to private acts between consenting adults, violated various fundamental rights guaranteed by the Constitution of India, including the right to privacy (implicit within the right to life under Article 21), the right to equality under Article 14, and the right against discrimination under Article 15.[10] The High Court

5. *See, e.g.*, Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 NUJS L. REV. 397 (2009); *Gay Sex Judgment Greeted with Delight and Jubilation*, THE HINDU, July 4, 2009, http://www.hindu.com/2009/07/04/stories/2009070451260300.htm.
6. Naz Foundation v. Govt. of NCT of Delhi, WP(C) No.7455/2001, ¶50.
7. *Id.* ¶¶61-62.
8. *Id.* ¶¶48-50.
9. *Id.* ¶¶91, 94.
10. *Id.* ¶126.

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upheld Section 377's criminal prohibitions on "non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."[11]

The Supreme Court reversed the High Court's judgment, holding that Section 377 did not violate the fundamental rights of the LGBT community as a class or of its individual members.[12] The Court began by discussing the value of judicial restraint in a constitutional democracy; it stressed the presumption of constitutionality that attaches to any law enacted by Parliament.[13] After establishing this deferential tone, the Court described Section 377 as merely identifying "certain acts which if committed would constitute an offence," without discriminating against a particular gender or sexual orientation.[14] It added that the LGBT community constitutes only a "miniscule fraction" of India's population, and that over the past 150 years, fewer than 200 individuals have been prosecuted under Section 377.[15] This implies that even if sexual minorities form a class, it is too small and insignificant a class to warrant constitutional protection.

The Court then dismissed the claim that Section 377 violates Article 21 on similarly shaky grounds. Article 21 provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."[16] While it is framed negatively, the Supreme Court has gradually expanded the ambit of Article 21 to impose positive obligations on the state to ensure that citizens live meaningful lives.[17] Thus, Article 21 today incorporates the right to dignity,[18] privacy,[19] and personal liberty.[20] Moreover, the Indian Supreme Court has adopted the doctrine of substantive due process from the United States, requiring that laws are not only procedurally sound, but also "just, fair and reasonable."[21]

The Supreme Court's opinion in *Naz Foundation* acknowledged Article 21's vast scope[22] and conceded that police have misused Section 377 "to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community."[23] Nonetheless, the Court held that the "mere fact" of such abuse did not affect the law's constitutionality, as "this treatment is neither

11. *Id.* ¶132.
12. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 54 (2013) (India) *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070.
13. *Id.* ¶¶26-28.
14. *Id.* ¶42.
15. *Id.* ¶43.
16. INDIA CONST. art 21.
17. *See generally* M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1179-1250 (6th ed. 2010) (outlining the history of Article 21 jurisprudence).
18. Mullin v. Adm'r, Union Territory of Delhi (1981) 2 S.C.R. 516, 527-29 (India).
19. Malkani v. State of Maharashtra, (1973) 2 S.C.R. 417, 427 (India).
20. Singh v. State of Uttar Pradesh, 1963 1 S.C.R 332, 335 (India).
21. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 45 (2013) (India), *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070; *see also* Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).
22. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶¶45-50.
23. *Id.* ¶51.

mandated by the section nor condoned by it."[24] In keeping with its theme of judicial restraint, the Court simply noted that such misuse "might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377."[25]

The Court's embrace of judicial restraint seems disingenuous in light of its past jurisprudence in which it has ventured beyond the traditional judicial role, recognizing new rights under the Indian Constitution and intervening regularly to monitor their enforcement.[26] Since the Court was willing to overcome notions of judicial restraint to recognize, inter alia, rights to education, shelter, health and sleep under Article 21,[27] it is difficult to believe that it felt obligated to adopt a more modest role towards well-established fundamental rights such as equality in *Naz Foundation*.

III. THE INDIAN SUPREME COURT'S SCHIZOPHRENIC APPROACH TO COMPARATIVE ANALYSIS

The Supreme Court's *Naz Foundation* opinion ends with a sweeping conclusion that disparages both the LGBT community and the Delhi High Court's use of comparative materials. It states:

> In its anxiety to protect the so-called rights of LGBT persons . . . the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.[28]

This statement misconstrues the Delhi High Court's approach to comparative constitutional law. As Sujit Choudhry has pointed out, the High Court does not blindly borrow from foreign judgments, but instead engages "dialogically" with a range of comparative materials to reflect on the values and assumptions underlying the Indian Constitution.[29]

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24. *Id*. ¶51.
25. *Id*.
26. *See* Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 176 (2013) (noting that for its combination of interventionism and doctrinal creativity, the Indian Supreme Court has been called "the most powerful court in the world"); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985).
27. *See In re.* Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Sec'y, Union of India, (2012) 4 S.C.R. 971 (India); Consumer Education and Research Centre v. Union of India, (1995) 3 S.C.C. 42 (India); Krishnan v. State of Andhra Pradesh, (1993) 1 S.C.R. 594 (India); Tellis v. Bombay Mun. Corp., (1985) 2 S.C.R. Supp. 51 (India).
28. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 52 (2013) (India) *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070.
29. *See* Sujit Choudhry, *How to Do Comparative Constitutional Law in India:* Naz Foundation, *Same-Sex Rights, and Dialogical Interpretation*, *in* COMPARATIVE CONSTITUTIONALISM IN

The Supreme Court, too, has adopted this approach, most notably in *Vishaka v. Rajasthan*. In that case, several social activists and NGOs filed a writ petition alleging that widespread sexual harassment in India violated certain fundamental rights of working women.[30] These included Articles 14, 15, and 21 of the Indian Constitution as well as the right to engage in any trade or profession under Article 19(1)(g).[31] Writing for the Court, Chief Justice J.S. Verma stated that these fundamental rights should be construed broadly "to encompass all the facets of gender equality including prevention of sexual harassment or abuse."[32] Moreover, the Court noted that international conventions and norms play a role in the interpretation and application of fundamental rights, particularly in the absence of any domestic legislation.[33] Thus, the Court drew from international sources,including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to develop guidelines on sexual harassment in the workplace.[34] These guidelines formed the basis of a sexual harassment law recently passed by the Indian Parliament.[35]

While *Vishaka* differs from *Naz Foundation* in that it concerned an issue on which there was no existing legislation, it presents a very different approach towards constitutional interpretation—one that has been adopted in a number of landmark constitutional law cases.[36] In *Naz Foundation*, the Supreme Court diverges from these precedents and adopts what Choudhry would call a "particularist" view of the Indian Constitution.[37] This view rejects engagement with foreign legal sources and seeks to interpret the Indian Constitution with reference only to domestic cultural norms.

Justice G.S. Singhvi, the author of the *Naz Foundation* judgment, does not elaborate on how best to interpret the Constitution. He does, however, cite a number of cases that suggest an anti-Western brand of particularism. For instance, he

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SOUTH ASIA 45, 46 (Sunil Khilnani, Vikram Raghavan & Arun K. Thiruvengadam eds., 2013)**;** *see also* Raju Ramachandran, *The Sentinel Who Will Not Protect*, J. INDIAN L. & SOC'Y (Dec. 13, 2013), http://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect (arguing that the Supreme Court misconstrued the Delhi High Court's approach to comparative analysis in *Naz Foundation*).

30. Vishaka v. Rahasthan, A.I.R. 1997 S.C. 3011, ¶1 (India).
31. *Id*. ¶3.
32. *Id*. ¶14.
33. *Id*.
34. *Id*. ¶16.
35. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, No. 14 of 2013, Gazette of India, section 1(2) (Apr. 23, 2013), *available at* http://wcd.nic.in/wcdact/womenactsex.pdf.
36. *See, e.g.*, Rajagopal v. Tamil Nadu, (1994) 6 S.C.C. 632, 650 (India) (adapting the "actual malice" standard from New York Times v. Sullivan, 376 U.S. 254 (1964), to defamation suits against public officials in India); Gandhi v. India, (1978) 2 S.C.R. 621 (India) (drawing from American jurisprudence on the Fifth and Fourteenth Amendments to adopt substantive due process under Article 21); Singh v. Uttar Pradesh, (1964) 1 S.C.R. 332, 347-49 (India) (relying on American and British cases to establish that the term "personal liberty" under Article 21 of the Indian Constitution confers a right to privacy in one's home).
37. *See* Choudhry, *supra* note 29, at 58-59.

refers to *Singh v. Uttar Pradesh*, which concerned the legality of a death sentence, and expressed "grave doubts about the expediency of transplanting Western experience in our country."[38] He also cites *Pal v. Arora*, where the Court refused to follow the English approach to a family law dispute.[39]

This skepticism towards developments in "Western" jurisdictions is unfortunate in itself. But Justice Singhvi seems also to have overlooked an important aspect of the Delhi High Court's judgment. The High Court relies substantially on jurisprudence from the South African Constitutional Court,[40] a non-Western source of law from a country whose experience with colonialism, discrimination and recent transition to constitutional democracy should be very instructive in the Indian context.

IV. SOUTH AFRICAN AND AMERICAN JURISPRUDENCE ON LGBT RIGHTS

In this section, we compare *Naz Foundation* to judgments on LGBT rights from the South African Constitutional Court and the U.S. Supreme Court. We have chosen these courts not only as they have ruled on similar issues, but also because they operate within comparable constitutional frameworks. All three courts enforce justiciable constitutional rights and may strike down laws incompatible with those rights. The Delhi High Court also relied on jurisprudence from these two courts in its *Naz Foundation* decision—an approach that we commend and wish to substantiate.

We advance two claims in this section: (1) that *Naz Foundation* could have been more clearly and convincingly reasoned if it engaged with these foreign judgments; and (2) that such engagement would have resulted in a more nuanced understanding of how to do comparative constitutional law.

A. *How the Naz Foundation Judgment Could Have Benefitted Substantively from Comparative Engagement*

Justice Singhvi's opinion in *Naz Foundation* rested on two major premises. First, he did not seem to grasp the various forms of discrimination faced by the LGBT community and its effects, which were set out in detail by the Delhi High Court.[41] Justice Singhvi implied that discrimination alleged by the LGBT community was exaggerated or somehow inadequate to justify reading down parts of Section 377. For instance, he referred disparagingly to the "so-called rights of LGBT persons" and suggested that because they constitute only a "miniscule fraction" of the Indian population, they should not receive constitutional protection.[42] The second premise is that even if substantial discrimination occurred, respect for

38. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 52 (2013) (India) *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070 (quoting Singh v. Uttar Pradesh, (1973) 1 S.C.C. 20 (India)).
39. *Id*. ¶53 (quoting Pal v. Arora, (1974) 2 S.C.C. 600 (India)).
40. *See* Naz Foundation v. Govt. of NCT of Delhi, WP(C) No.7455/2001, ¶¶52, 56, 81, 103.
41. *See id.* ¶¶48-50, 61-62.
42. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶43, 52.

the separation of powers required judicial restraint in this case. Moreover, the Court stressed that "the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 . . . from the statute book" or amend the law as it sees fit.[43] The South African and American jurisprudence shows, however, that the discrimination faced by the LGBT community is more subtle and multifaceted than Justice Singhvi acknowledges and that courts can rule in ways that protect fundamental rights without causing separation of powers concerns.

1. *Discrimination in Many Forms and with Multiple Effects*

In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the South African Constitutional Court was asked to determine the constitutionality of the common law offense of sodomy, the inclusion of sodomy in schedules to certain Acts of Parliament, and a section of the Sexual Offences Act, which prohibited sexual conduct between men in certain circumstances. [44]

Justice Laurie Ackermann's majority opinion analyzed the various ways in which these laws affected the LGBT community in South Africa. It concluded that they engaged in unfair discrimination based on sexual orientation, as the Constitution expressly provides that sexual orientation is a prohibited ground for discrimination.[45]

Justice Ackermann, however, went beyond this technical reasoning. He observed that gay men were a vulnerable minority group and that the sodomy laws in question degraded and devalued them.[46] Thus, these laws not only violated their right to equality, but to privacy and dignity as well. This, in Justice Ackermann's view, gave greater weight to the Court's decision, which ultimately held that criminal prohibition of sodomy was unconstitutional, as it violated rights to equality, dignity and privacy.[47]

Justice Albie Sachs concurred, noting that human rights are more effectively defended in an integrated rather than dislocated fashion.[48] What made the anti-sodomy laws particularly egregious, in his view, was not simply that they violated the right to equality of gay men, but that they also violated the right to privacy by touching upon a deep, invisible, and intimate side of these citizens' lives. Citing the vital position of dignity, self-worth, and equality in the Constitutional Court's jurisprudence, Justice Sachs argued that what gave rise to inequality was differential group-based treatment that resulted in disadvantage, leading to "scarring of the sense of dignity and self-worth" associated with belonging to the LGBT

43. *Id.* ¶56.
44. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.).
45. *See id*. at paras. 15-27.
46. *Id.* at paras. 25-28.
47. *Id.* at paras. 27 & 57.
48. *Id*. at para. 112.

community.[49] While the Delhi High Court drew from the South African experience to locate such discriminatory effects in the Indian context, the Supreme Court judgment in *Naz Foundation* lacked this engagement and analysis.

Finally, Justice Sachs pointed out that the South African Constitution required law and public institutions to recognize the variability of human beings and affirm that equal respect and concern should be shown to all as they are, with little consideration extended to what is statistically normal. As he noted, "what is statistically normal ceases to be the basis for establishing what is legally normative."[50] This stands in sharp contrast to Justice Singhvi's statement in *Naz Foundation* that because only "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders…[there is no] sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."[51] The Indian Supreme Court would have benefitted from engaging with Justice Sachs' opinion, which recognizes—as the Indian Supreme Court itself had recognized in prior cases—that the size of the affected group has little bearing on the validity of its fundamental rights claims.

Following the South African Constitutional Court's lead, the U.S. Supreme Court held that laws criminalizing sodomy between consenting adults are unconstitutional in *Lawrence v. Texas* (2003).[52] In the process, it overturned *Bowers v. Harwick* (1986),[53] a decision similar to *Koushal v. Naz Foundation*. In *Bowers*, the U.S. Supreme Court upheld a Georgia statute that criminalized sodomy between consenting adults.[54] While the Supreme Court in *Bowers* did not extend the right to privacy (recognized in 1965 *Griswold v. Connecticut*) to homosexual acts,[55] it held in *Lawrence* that private sexual conduct was protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[56] And, in an extraordinary testament to how quickly views on same-sex rights had evolved in the United States, Justice Kennedy's majority opinion pronounced not only that *Bowers* was overruled, but that "it was not correct when it was decided" a mere seventeen years earlier.[57]

In *United States v. Windsor* (2013), the U.S. Supreme Court went one step further by holding that the federal law definitions of "marriage" and "spouse," which excluded homosexual couples, were unconstitutional.[58] In the context of the Defense of Marriage Act (DOMA), the Court held that these narrow definitions violated the guarantee of equal protection of the laws under the Fifth

49. *Id*. at para. 125.
50. *Id*. at para. 134.
51. Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 43 (2013) (India) *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070.
52. 539 U.S. 558 (2003).
53. 487 U.S. 186 (1986).
54. *Id*. at 196.
55. *Id*. at 189-93; Griswold v. Connecticut, 381 U.S. 479 (1965).
56. Lawrence v. Texas, 539 U.S. at 575-79.
57. *Id*. at 578.
58. 133 S. Ct. 2675 (2013).

Amendment.[59] Justice Kennedy, who authored the majority opinion in *Windsor*, recognized what the Indian Supreme Court in *Naz Foundation* did not: that the impugned law was motivated by animus towards the LGBT community, and not by any legitimate state interest.[60]

2. *Protecting Rights and Exercising Judicial Restraint*

In *Minister of Home Affairs v. Fourie* (2005), the South African Constitutional Court ruled that same sex couples have the constitutional right to marry.[61] Appellants contended that by not allowing them to marry, the law excluded them from publically celebrating their happiness in violation of Articles 9(1) and 9(3) of the South African Constitution.[62] This exclusion arose from the common law definition of marriage in South Africa, which was restricted to unions between one man and one woman. Writing for a unanimous court, Justice Sachs held that this definition ostracized homosexual couples and violated their rights under Articles 9(1) and 9(3).[63]

For our purposes, this judgment is significant for its sensitivity to both individual rights and separation of powers. In order to strengthen the decision, to safeguard against charges of countermajoritarianism, and to increase public acceptance of the decision, the Constitutional Court in *Fourie* set a deadline of a year for parliament to make a law remedying the Marriage Act. This led to the passage of the Civil Union Act in 2006, making South Africa one of the first countries to recognize same sex marriage. The South African experience therefore demonstrates, *contra* Justice Singhvi, that a Court can recognize the rights of sexual minorities while still respecting the separation of powers.

The U.S. Supreme Court made a similar showing in *Hollingsworth v. Perry*.[64] Petitioners in this case challenged a California District Court's ruling that the state's ban on same-sex marriage was unconstitutional. [65] The ban was instituted through a ballot initiative known as "Proposition 8". Respondents, two same-sex couples who were denied the right to marry under this law, filed suit in the District Court and challenged the law's constitutionality under the Fourteenth

59. *Id.* at 2694.
60. *Id.* at 2693 (quoting H.R. REP. NO. 104-664, at 16 (1996) and noting that the House Report "concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'").
61. *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.). Our description of the case draws from the summary on the website of the South African Legal information Institute. *Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005)*, SOUTHERN AFRICAN LEGAL INFO. INST., http://www.saflii.org/za/cases/ZACC/2005/19.html (last visited Apr. 28, 2014).
62. Article 9 (1) guarantees equal protection of the law to all citizens, while Article 9(3) prohibits discrimination, inter alia, on the grounds of sexual orientation.
63. *Fourie*, (1) SA 524 at 49-50 paras. 78-79.
64. 133 S. Ct. 2652 (2013).
65. *Id.* at 2652.

Amendment to the U.S. Constitution.[66] They prevailed, and the government officials named in that suit decided not to appeal this ruling to the Ninth Circuit.[67] However, petitioners, who were supporters of Proposition 8, intervened to defend the law before the Ninth Circuit, and upon losing that appeal, before the Supreme Court.[68]

Chief Justice Robert's majority opinion held that petitioners did not have standing to defend Proposition 8 in federal court.[69] While the Court declined to issue a ruling on the merits—potentially one that recognized a constitutional right to same-sex marriage[70]—it exercised judicial restraint in a manner that should lead to greater recognition of same-sex marriage throughout the United States. In California, the immediate effect of the decision was to preserve the District Court's judgment, which Californian officials have construed to allow same-sex marriages to be administered across the entire state.[71] More broadly, as Michael Klarman has argued, the Court's decision to avoid merits-based ruling in this case was motivated, at least in part, by a desire to avoid political backlash.[72] By sidestepping the merits in *Hollingsworth*, the Court ensured that no barriers were placed on the (seemingly inexorable) road towards a federal constitutional right to same-sex marriage.[73]

Here, unlike its Indian counterpart in *Naz Foundation*, the U.S. Supreme Court exercised judicial restraint in a manner that led to greater recognition of same-sex rights; it enabled same-sex marriage in California and, ultimately, perhaps throughout the country. The U.S. Supreme Court was arguably justified in choosing to avoid the merits: there was a legitimate issue of standing before it in *Hollingsworth*.[74] The Indian Supreme Court had no such justification in *Naz Foundation*.

66. *Id*. at 2660.
67. *Id.*
68. *Id*. at 2660-61.
69. *Id*. at 2668.
70. *See* Marty Lederman, *The Court's Five Options in the California Marriage Case*, SCOTUSBLOG (Mar. 1, 2013, 11:11 AM), http://http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case/.
71. *See* Lyle Denniston, "*Proposition 8" Case Ends*, SCOTUSBLOG (Aug. 14, 2013, 6:00 P.M.), http://http://www.scotusblog.com/2013/08/prop-8-case-ends/.
72. Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 147-52 (2013).
73. *Id*. at 160 (arguing that the rapid shift in public opinion in favor of same-sex rights indicates that the Supreme Court will soon reconsider this issue and rule that the Constitution protects the right to same-sex marriage).
74. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997) (holding that individual members of Congress lack standing to challenge a law affecting Congress as a whole, unless they can show particularized injury); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that a litigant must show, *inter alia*, a concrete, particularized injury to have standing in federal court).

B. *How Comparative Analysis Should be Used*

Unlike *Naz Foundation*, the South African Constitutional Court cases and U.S. Supreme Court cases on LGBT rights use comparative materials to inform and refine their legal analysis.[75] This allowed justices to gain a fuller understanding of the effects of discrimination on the LGBT community and to reveal some of the underlying values of their constitutional schemes.

The South African Constitutional Court employed cases from common law jurisdictions such as Canada, Australia, and New Zealand, but also drew from international tribunals such as the European Court of Human Rights. For instance, Justice Ackermann in *National Coalition for Gay and Lesbian Equality* cited to *Norris v. Republic of Ireland*[76] and *Vriend v. Alberta*[77] to support the view that discriminatory provisions like anti-sodomy laws inflict psychological damage on gay men.[78] It is worth noting that the South African Constitutional Court need not have engaged with any comparative materials. Section 9(3) of the South African Constitution explicitly prohibits sexual orientation-based discrimination and a mechanical application of that provision would have sufficed in this case. However, the Court affirmatively looked to international sources to gain a fuller understanding of the nature of this discrimination, which strengthened its ruling.

In *Fourie*, Justice Sachs devoted an entire section of his opinion to the consideration of international law on the issue of same-sex marriage.[79] Interestingly, opponents of same-sex marriage cited international law in this case to advance their claims. They focused in particular on Article 16 of the Universal Declaration of Human Rights (UDHR), which sets forth the right of "men and women" to marry[80] and declares "family" as "the natural and fundamental group unit of society."[81] Justice Sachs, however, dismissed these arguments, noting that the UDHR does not limit its conception of marriage or family to heterosexual couples,[82] and, further, that "rights . . . will atrophy if they are frozen."[83] He added, "It would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right."[84] Thus, even though internation-

75. Section 39 of the South African Constitution requires the Constitutional Court to consider international law and permits it also to consider foreign law in interpreting constitutional rights. S. AFR. CONST., 1996, § 39. The Indian and U.S. Constitutions are silent on this issue. While this textual difference likely contributes to the South African Constitutional Court's greater openness to comparative analysis, nothing prevents the Indian and U.S. courts from engaging in such analysis and both have done so in their past rights-based jurisprudence.
76. 142 Eur. Ct. H.R. (ser. A), para. 2 (1991).
77. [1998] 1 S.C.R. 493, para. 102 (Can.).
78. *See National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 25-26 para. 23 (S. Afr.)..
79. *See Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) at 62-63 para. 99 (S. Afr.) .
80. Universal Declaration of Human Rights, art. 16(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217(III) (Dec. 10, 1948).
81. *Id.* at art. 16(3).
82. *Fourie*, (1) SA 524 at 64 para. 101.
83. *Id.* at 64-65 paras. 101-02.
84. *Id*. at 66 para. 104.

al law was distinguished in this case, it played a useful role in clarifying how South African constitutional rights represent a progression in human rights jurisprudence over the past half-century.

In the American context, *Lawrence* was significant for Justice Kennedy's willingness to consider the experience of foreign jurisdictions.[85] Responding to Chief Justice Burger's concurring opinion in *Bowers*, stating that the condemnation of homosexual practices "is firmly rooted in Judeo-Christian moral and ethical standards,"[86] Justice Kennedy pointed to counterexamples from Europe. In 1957, a committee advised the British Parliament to repeal laws criminalizing homosexual conduct, which the Parliament enacted ten years later.[87] Moreover, in a case similar to *Bowers* (and decided five years earlier), the European Court of Human Rights held unconstitutional a Northern Ireland law prohibiting homosexual conduct.[88]

These limited references to foreign law served an important purpose in *Lawrence*. They showed that moral disapprobation of homosexuality was not as widespread or uniform as the *Bowers* Court had claimed, and therefore undermined the credibility of that judgment. These cases indicate that even in the 1970s, attitudes were evolving towards greater recognition and protection of same-sex rights—a point that Justice Kennedy stressed and relied upon in striking down the Texas anti-sodomy law.[89]

The Indian Supreme Court, by contrast, did not look to any international or foreign sources of law in *Naz Foundation*. While the Delhi High Court in *Naz Foundation* devoted considerable attention to human rights treaties, international principles and foreign judgments, the Supreme Court simply dismissed this approach as misguided.[90]

V. CONCLUSION

While the apex courts of other major constitutional democracies have recognized various rights for same-sex couples and sexual minorities, the Supreme Court of India, in the largest democracy in the world, has failed to do so. This is due, at least in part, to its parochial approach to the issue of same-sex rights, in which it refused to even consider the jurisprudence of other major constitutional democracies and departed from its past interventionism in favor of (often more controversial) fundamental rights claims.

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85. To be sure, comparative citation is not an accepted practice among U.S. Supreme Court Justices. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 622-28 (2005) (Scalia, J., dissenting).
86. Bowers v. Hardwick, 487 U.S. 186, 196 (Burger, C.J., concurring).
87. *See* Lawrence v. Texas, 539 U.S. 558, 572-73 (referring to COMM. ON HOMOSEXUAL OFFENSES & PROSTITUTION, THE WOLFENDEN REPORT (1963)).
88. *Id*. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)).
89. *See id*. at 571-72.
90. *See* Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 52 (2013) (India) *available at* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070.

Going forward, we hope that the Indian Supreme Court rejects Justice Singhvi's misleading and poorly articulated approach to comparative analysis in favor of an open approach that engages with foreign materials like that adopted by the Delhi High Court. In *Naz Foundation*, the Indian Supreme Court conceded that "[foreign] judgments shed considerable light on various aspects . . . and are informative in relation to the plight of sexual minorities," but concluded that foreign sources ought not to be "applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature."[91] The Delhi High Court, of course, did no such thing; it used comparative analysis to unravel some of the normative assumptions underlying the Indian Constitution. The High Court "rejected the choice between universalism [of which the Delhi High Court is accused] and particularism as reflecting a false dichotomy."[92] The Supreme Court did not grasp this important nuance, which led to its own very particularistic judgment in *Naz Foundation*.

We conclude by observing an important structural aspect of the Indian Supreme Court. The Court comprises thirty-one justices, who generally hear cases in panels ("benches") of two or three justices.[93] Justice Singhvi's opinion in *Naz Foundation*, for instance, emerged from a two-judge bench. However, the Indian Constitution requires that a minimum of five justices hear cases involving a "substantial question" of constitutional interpretation.[94] While the Supreme Court just rejected a review petition to rehear the *Naz Foundation* case,[95] it will likely consider cases on same-sex rights in the future. Perhaps then, a five-judge bench that is more receptive to comparative analysis will be convened and arrive at a very different—and hopefully better reasoned—judgment.

91. *Id*.
92. Choudhry, *supra* note 29, at 46.
93. *See generally* Robinson, *supra* note 26 (discussing the impact of the Indian Supreme Court's structure on its jurisprudence and role in Indian society).
94. INDIA CONST. art. 145 § 3.
95. *See* Anuj Agarwal, *Supreme Court Rejects Naz Foundation Review Petition; Says No Reason for Interference Made Out*, BAR & BENCH (Jan. 28, 2014, 7:06 PM), http://barandbench.com/content/212/supreme-court-rejects-naz-foundation-review-petition-says-no-reason-interference-made#.Uutk_XkjRcR.