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Creating Dignity Out of Despair: The Impact of the 2009 Decriminalization of Homosexuality in Delhi

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CREATING DIGNITY OUT OF DESPAIR:
THE IMPACT OF THE 2009 DECRIMINALIZATION OF
HOMOSEXUALITY IN DELHI

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GLOSSARY

Homosexual: A person who is sexually attracted to someone of the same sex.

Gay: A person (usually used exclusively to describe men) who is sexually attracted to someone of the same sex. In an Indian context, a gay man is masculine, and is less feminine than a *kothi*.

Kothi: (pronounced kur-ti) A feminine appearing man who is sexually attracted to men. Often a *kothi* will dress in feminine clothes, and prefer to be referred to with a female pronoun. *Kothis* will also take the feminine and submissive role in sex.

Lesbian: A woman who is sexually attracted to other women.

Bisexual: A person who is sexually attracted to both men and women.

Transgender: A person who does not identify with the gender that matches their biological sex. A transgender person often moves between the two gender identities of man and woman, or crosses the division of gender binary, acting out gender roles which do not match their biological sex. Their gender identity has nothing to do with their sexual orientation.

Hijra: (pronounced hee-dra) A person who may be biologically male, transgendered, intersex or eunuch, but dresses as a woman and performs cultural and ceremonial roles at events. *Hijras* are a completely separate community from the LGBT community in India.

Queer: An umbrella term for LGBT, intersex, gender non-conforming, and other sexual minorities.

LGBT: An initialism meaning lesbian, gay, bisexual, and transgender.

MSM: A term for Men who have Sex with Men. It is primarily used in HIV/AIDS work. While the term identifies male to male intercourse, it is not a presumption that either or both men are gay.

In the closet: A metaphor for when an LGBT person hides their sexuality.

Coming out: When an LGBT person reveals their sexual identity to one or more people. Coming out is a life long process, as an LGBT person must decide with every new person they meet if they will share their sexual identity.

Cruising areas: Hidden public areas, such as the corner of a park or a train station, where *kothi* and gay men congregate to meet other men for sex.

Heteronormativity: A cultural bias that privileges heterosexual relationships, and traditional gender roles as fundamental and natural within society.

Homophobia: The fear and prejudice of homosexuality.

ABSTRACT

Section 377 of the Indian Penal Code was created in 1860 and outlawed “carnal intercourse against the order of nature.” In the following years, even after independence, India used Section 377 to prosecute child sexual abusers. While the law was rarely used to prosecute adult same-sex intercourse, it created widespread homophobia and harassment for LGBT Indians. Finally, in 2001 the Naz Foundation filed a petition against Section 377. On July 2, 2009 the Delhi High Court struck down Section 377 in its application to adult consensual same-sex intercourse. The decision sparked celebration within the LGBT community, a massive media response, and widespread public discussion. This paper studies the impact of the 2009 decriminalization of homosexuality upon the gay community in Delhi. Beginning with harassment and discrimination before 2009, this study then looks at the level of increased self-confidence, social awareness, visibility in public spaces, decreased discrimination, and continued struggles that arose out of the court decision. In addition, this paper analyzes whether law or society causes social change and creates recognition of a marginalized group. Information was gathered for this project in April 2012, through background research and individual interviews with activists, lawyers, *kothi* and gay men.

INTRODUCTION

Discussions of sex, sexuality, and desire are hidden and private in Indian society. This silence originates from social conservatism and creates fear of deviance from heteronormality. Because patriarchy and heteronormativity are so strongly entrenched in Indian society, “deviant” sexuality, such as homosexuality, brings social rejection. Despite such social denial, these sexual minorities still exist in India. Currently Indian has a population of 1.21 billion people, and “according to studies in the modern West, 2-13% of the population is homosexual. However a 2006 study in India suggested that 20% of the population anonymously reported some homosexual feelings.”¹ With such social stigma, these sexual minorities remain hidden and afraid of their own sexual identity.

Homosexuality has long existed in India, far before colonization. Ancient texts refer to a variety of sexualities. Same-sex sentiments can be found in sacred texts and homosexuality is

¹ Sridhar Rangayan, "Project Bolo - A collection of oral histories of LGBT persons," Project Bolo, <http://www.projectbolo.com/about.htm>.

mentioned, although not celebrated, in the Kama Sutra.² Ancient law looked down upon homosexuality, prohibiting homosexuals from inheriting paternal property.³ Despite society and law ostracizing homosexuality, it had far less social stigma than in carries today. This is due to the influence of colonization and the spread of western Christian morals.

With the colonization of India, western morality swept through the subcontinent. Christian values of purity and morality were adopted. The rejection of homosexuality in the Bible, and in western society of the time, became adopted in India. Written by Lord Macaulay in 1860, the Indian Penal Code solidified the impact of British and western morality upon India and Indian law. Section 377 outlaws any carnal acts against the order of nature, which, based on social beliefs of the time and following judicial rulings, was interpreted to include homosexuality.

Much of the Indian Penal Code still exists in India today. But this causes a problem. In the 150 years following the writing of the Indian Penal Code, Indian and western society changed and evolved. Slowly, within the last 30 years, homosexuality has become more and more socially accepted in the West. In 1967, an act by Parliament legalized consensual sexual acts between males in England and Wales. This was extended to Northern Ireland in 1983 after the European Court of Human Rights, argued that the law was an interference of the right to life, and acknowledged that the understanding of homosexuality had changed since the mid-nineteenth century when the law was written.⁴ While the country originally responsible for the Indian Penal Code changed its views on homosexuality, India maintained its conservatism.

² Arvind Narrain, *Queer - Despised Sexuality, Law and Social Change* (Bangalore, India: Books for Change, 2004). Chapter 3.

³ Ibid., 36.

⁴ Sumit Baudh, "Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts In the Commonwealth, South and Southeast Asia," (The South and Southeast Asian Resource Centre on Sexuality, 2008), 9.

The continued use of the Indian Penal Code, specifically Section 377, in India, despite the modernization of much of the country, demonstrates the social conservatism and fear of sexual deviancy. The social stigma surrounding homosexuality creates a culture of homophobia, leading to discrimination and harassment. This in turn affects the self-confidence and dignity of LGBT Indians. Years of social discrimination and rejection has greatly affected their mentality and identity, as they continued to conform to Indian standards of heteronormativity and the tradition of marriage.

During the 2009 ruling that declared Section 377 unconstitutional in its application to homosexuality, the Indian legal system finally realized that privacy and dignity also apply to sexual minorities. Now, after almost 150 years of criminalization, Indian society and LGBT individuals must learn to adapt and evolve their notion of sexuality. Despite the ruling that “carnal intercourse against the order of nature” no longer applied to homosexuality, the LGBT community still faces the challenge of matching legal change with social change. This paper will examine the impact of the 2009 decriminalization of homosexuality upon the gay community as a larger analysis of whether law or society creates social change. In particular, this study looks at the identity and self-worth of LGBT individuals, the change in police behavior and social discrimination, and the continued challenges that remain after the 2009 ruling.

Primary information for this study was collected through a series of interviews conducted between April and May, 2012 in New Delhi, India, and through group observation. Most interview respondents were *kothi* or gay men living in Delhi. Lawyers and activists, who worked directly with the 2009 case or with the LGBT community, were also helpful in providing their accounts. Additional information was acquired through secondary, academic sources to provide

support to information gained through interviews, and to provide a more thorough understanding of homosexuality in ancient and modern Indian society.

UNDERSTANDING SECTION 377

The Indian Penal Code was written by Lord Macaulay in 1860, and prescribed a set of laws and morals upon Indian society. Section 377 was written to punish sexual immorality in India. It reads:

Unnatural Offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 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.⁵

Lord Macaulay wrote Section 377 with the intention to erase public discussion on the “revolting subject” due to the “injury which would be done to the morals of the community.”⁶ But this was impossible because of the ambiguity of the law, which forced the Indian judiciary to “produce an elaborate public discussion that [sought] to map perverse and ‘unnatural’ acts to particular identities and persons.”⁷ Courts were left with the difficulty of determining the meaning of “carnal intercourse against the order of nature.” The statutory explanation was helpful in understanding the law, as it describes that “penetration is sufficient to constitute the carnal intercourse.”⁸ But this still remains vague, as penetration of what and by what is left unclear.⁹ Throughout their discussion, Indian courts made “frequent references to bestiality, buggery [or

⁵ *Naz Foundation v. Government of NCT of Delhi and Others*, 160 Delhi Law Times 277, 4 (2009).

⁶ Nishant Shahani, "Section 377 and the "Trouble with Statism": Legal Intervention and Queer Performativity in Contemporary India," *Genders*, no. 50 (2009).

⁷ *Ibid.*

⁸ *Naz Foundation v. Government of NCT of Delhi and Others*.

⁹ Baudh, "Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts In the Commonwealth, South and Southeast Asia."

sodomy] and Biblical notions of the sin of Gomorah and the sin of Sodom.”¹⁰ Legally, Section 377 was applied to cases of child sexual abuse, oral sex, and in a few rare cases, sodomy.

CONVICTION AND PROSECUTION UNDER SECTION 377

During the 150 years in which Section 377 was used in India, 30 out of the total 46 cases (or 65%) were child sexual abuse cases.¹¹ The law was used more rarely in cases of non-consensual sex between a man and a woman, and even more rarely in same-sex cases. All sodomy cases dealt only with sex between men. This was due to the fact that Section 377 was (ignorantly) thought to not apply to lesbian sex because it did not involve penile penetration and because women did not have access to public spaces where cruising, public sex, and ultimately arrests by police occurred.¹² When ruling on a case of child oral sexual abuse in *Khanu v. Emperor* (1925), the Sindh High Court defined the natural object of intercourse as the possibility of conception of human beings, which excluded oral sex and homosexuality.¹³ In *D P Minwalla v. Emperor* (1935) a High Court convicted two men after they were caught by police in the act of having sex.¹⁴ In *Lohana Vasanthlal Deuchand v. The State* (1967) the court defined oral sex as socially unacceptable and against the order of nature.¹⁵ The lack of sodomy cases under Section 377 demonstrates the difficulty in collecting evidence and conviction. But the lack of sodomy convictions does not mean that there was a lack of police arrests. The ambiguity surrounding the law meant that it was difficult for police to know how to apply Section 377. This led to constant harassment and discrimination by police against anyone assumed to be gay or having sex with

¹⁰ Ibid.

¹¹ Narrain, *Queer - Despised Sexuality, Law and Social Change*: 54.

¹² Shivangi Rai, Senior Legal Officer, personal interview, April 28, 2012.

¹³ Narrain, *Queer - Despised Sexuality, Law and Social Change*: 49.

¹⁴ Ibid., 54.

¹⁵ Ibid., 53.

another man.¹⁶ In July 2001, this police harassment came to a head in what became known as the Lucknow Case. On a tip that gay men were cruising in a well known public park and workers from NGOs were distributing condoms, police arrested four activists, despite not catching anyone in the act of sodomy.¹⁷ After the arrests, police raided two NGOs who were working on safe sex issues and the media erupted with news stories laced with homophobia.¹⁸ Initially the men were denied bail, but were finally released upon appeal to the High Court.¹⁹ Five years later in Lucknow, four gay men were arrested in a sting operation by police, who arrested the innocent men based on their perceived sexual identity.²⁰ While these were extremely high profile cases, incidents like this occurred throughout India for years, continuing the atmosphere of homophobia and discrimination.

FROM LAW TO SOCIETY

Despite the lack of official persecution of homosexuals, Section 377 created a criminal class. In forming the law, British officials allowed Christian moral codes to enter the realm of state politics in India.²¹ The sins of Sodom and Gomorrah (from Genesis 19 of the Bible) were referenced in court cases as a social and moral reasoning behind the condemnation of homosexuality.²² The legal influences of Western and Christian morality entered into society and began to influence social thought. The realm of Section 377 expanded beyond the

¹⁶ Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals," *Economic and Political Weekly* 41, no. 46 (2006): 4820.

¹⁷ Ibid.

¹⁸ Narrain, *Queer - Despised Sexuality, Law and Social Change*: 70.

¹⁹ Ibid.

²⁰ Baudh, "Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts In the Commonwealth, South and Southeast Asia," 3.

²¹ Shahani, "Section 377 and the "Trouble with Statism": Legal Intervention and Queer Performativity in Contemporary India."

²² Narrain, *Queer - Despised Sexuality, Law and Social Change*: 50-51.

courtroom and into the very lives of all Indians with the growth of homophobia and fear of sexual deviancy.

The criminalization of homosexuality through Section 377 gave the state power to dictate morality and punish acts it considered immoral.²³ The law permeated social thinking and created an excuse for discrimination. Narrain states that “By its very existence, Section 377 crystallize[d] the deep societal repugnance towards homosexuality, considering it perverted, animal-like behavior. If people in law enforcement, medical practice and the judiciary treat homosexuals as people without rights, the power of the societal mindset comes from the law.”²⁴ The social disdain and view of the immorality of homosexuality permeates all spheres of society, creating discrimination by police, and other power figures, such as teachers, family, landlords, and employers. In the 2009 case against Section 377 the Indian government argued that “Law does not run separately from society. It only reflects the perception of society. Public tolerance of different activities changes and legal categories get influenced by those changes.”²⁵ But as demonstrated in the United States 2003 sodomy case *Lawrence v. Texas*, “a supermajoritarian moral belief does not necessarily provide a rational basis for criminalising conventionally deviant conduct.”²⁶ Public morality should not be the rational basis for criminalizing a group of people and overruling their fundamental rights.

²³ Shahani, "Section 377 and the "Trouble with Statism": Legal Intervention and Queer Performativity in Contemporary India."

²⁴ Arvind Narrain, "No Shortcuts to Queer Utopia: Sodomy, Law and Social Change," in *The Phobia and the Erotic: The Politics of Sexualities in Contemporary India*, ed. Brinda and Subhabrata Bhattacharyya Bose (Calcutta, India: Seagull Books, 2007), 257.

²⁵ Siddharth Narrain, "The Queer Case of Section 377," vol. 5, *Bare Acts: Sarai Reader 05* (Sarai, 2005). 486.

²⁶ Animesh Sharma, "Section 377: No Jurisprudential Basis," *Economic and Political Weekly* 43, no. 46 (2008): 13.

CREATING A CRIMINAL CLASS

Section 377 demonstrates social disapproval of homosexuality, but it goes further in creating a criminal class, and marking the bodies of homosexuals as different and deviant.²⁷ The law creates a criminal class based on sexual orientation, rather than conduct.²⁸ Even without its enforcement and the arrest and prosecution of homosexuals, the law expresses social disdain. Kushal and Vinod* both described the view society held of homosexuality as criminal, alien and untouchable.²⁹ Kushal even went so far as to say that “homosexuals are more Dalit than Dalits.”³⁰ This demonstrates that homosexuals live on the margins of society, forced to keep their identity secret for fear of blackmail and prosecution.³¹ In a study conducted on the impact of sodomy laws in South Africa, Ryan Goodman found that such laws

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.³²

Just because Section 377 is not enforced does not mean that it does not cause harm and fear in the daily lives of homosexuals. Through its mere existence the law creates a “certain criminality to the daily lives of homosexual men and puts them under the gaze of the law and constant threat of moral terrorism.”³³ Section 377 became the basis for homophobia within Indian society.

²⁷ Gupta, "Section 377 and the Dignity of Indian Homosexuals."

²⁸ Sharma, "Section 377: No Jurisprudential Basis," 13.

* Names have been changed.

²⁹ Kushal, personal interview, New Delhi, April 24, 2012 and Vinod, personal interview, New Delhi, April 16, 2012.

³⁰ Kushal, personal interview, New Delhi, April 24, 2012.

³¹ Misra Geetanjali, "Decriminalising homosexuality in India," *Reproductive Health Matters* 17, no. 34 (2009).

³² Dipika Jain, "Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation," (Centre for Health Law, Ethics and Technology, Jindal Global Law School, March 2012), 38.

³³ Gupta, "Section 377 and the Dignity of Indian Homosexuals," 4821.

Living in Fear

Because of the forced criminalization of their lives, homosexuals in India constantly lived in fear—fear of harassment from society, family, and especially police. Not only did the law tell them they are criminals and outlaws, social pressure also repeatedly punished them. Such social disapproval led Kareem* to be ashamed and guilty for having same-sex desires.³⁴ Vinod also described fear at being caught out in public with other men, even his own brother, as people would instantly assume they are gay.³⁵ Homosexuals had to constantly hide their identity, out of fear that it will be used against them. When attempting to find a job, Vinod was rejected multiple times until he dressed as a straight man.³⁶ Even Salim* had to consciously act and dress like a boy, with short hair and beard, because he was scared of police.³⁷ Social and legal rejection pushed homosexuals further in the proverbial closet, as they were not free to act as they wished; instead they were forced to assimilate to heterosexual cultural.

No Freedom in Public Spaces

Despite the legal, social and moral condemnation of homosexuality, gay men continued to act out their desires. The gay social scene in India existed only in urban cities, mainly Delhi and Mumbai.** But even then, gay men connected in the shadows. Gay social life was “limited to private parties and cruising in seedier sections of public parks...In Delhi, it was Tuesday nights at Peg N Pints.”³⁸ Now renamed Peppers, Peg N Pints had a gay night every Tuesday after 10pm. But this party, as well as other private parties around Delhi, was limited to the upper

* Name has been changed.

³⁴ Kareem, personal interview, New Delhi, April 17, 2012.

³⁵ Vinod, personal interview, New Delhi, April 16, 2012.

³⁶ Vinod, personal interview, New Delhi, April 16, 2012.

* Name has been changed

³⁷ Salim, personal interview, New Delhi, April 24, 2012.

** There was, and still is, little to no social scene for lesbian women in India. This is mainly due to the patriarchal nature of Indian society, and the fact that women are regulated to the home, while men are free to roam the streets.

³⁸ "Homosexuality | The start of a revolution," *Mint* 2011.

middle class of Indian society, who could afford to pay the entrance fee.³⁹ Other gay men connected in the shadows of the city. Anonymous sex with another man was available in the corners of public parks, train stations, or restaurants. These were (and still are) common cruising areas, for men to pick up other men for casual sex. But whether gay men meet in a private party or the corner of a public place, they still lived under fear of being caught by police. The social rejection and lack of public discourse about sexuality did not allow legitimacy for homosexuality.⁴⁰ The lack of public spaces occurred for homosexuals inside and outside the law, leaving them no place to go, and forcing them to fulfill their desires in secret, under the ever present fear of harassment and arrest.

Police Harassment

Law enforcement was the most common, and most feared, source of harassment and discrimination within the LGBT community. Police hold a large amount of power, and under Section 377, homosexuals had no hope of defense. Because of the ambiguous nature of Section 377 and the difficulty in prosecuting same-sex relations, police used the law as a threat rather than making many arrests. Police commonly “engage[d] in practices of illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families, which are all forms of violence practised against sexuality minorities.”⁴¹ Kareem was once stopped by police when he was with his partner. The police threatened them and forced them to give over their money or have the police tell their families that they were gay. Later, Kareem’s partner warned him to stop dressing up so feminine to prevent attracting the attention of police.⁴² The threat of outing a

³⁹ Sara, personal interview, New Delhi, May 1, 2012.

⁴⁰ Sabina Faiz Rashid, Hilary Standing, Mahrukh Mohiuddin, and Farah Mahjabeen Ahmed, "Creating a Public Space and Dialogue on Sexuality and Rights: A Case Study from Bangladesh," (2011), <http://www.biomedcentral.com/content/pdf/1478-4505-9-S1-S12.pdf>.

⁴¹ Narrain, "No Shortcuts to Queer Utopia: Sodomy, Law and Social Change," 256.

⁴² Kareem, personal interview, New Delhi, April 17, 2012.

man as gay to his family (most gay men were not out to their families) was often used to get men to hand over money or cell phones. Pradeep* was once found kissing his partner in a park and the “police came and arrest him and take him in police station and they beat him and they taking mobile and money and after they released him.”⁴³ Harshad* was once threatened by the police with sexual harassment.⁴⁴ Often police harassment occurred when there was no obvious act of same-sex intercourse, but simply when police suspected two men to be gay. For example, outreach workers of NGOs were often harassed when distributing condoms (like the Lucknow case) because they were supposedly encouraging sexual deviance.⁴⁵ Stories such as these were daily occurrences in the lives of gay people in India.

Harassment from Family

Because of the stigma surrounding homosexuality, Indian families are not accepting of their gay children, often misunderstanding them and harassing them, hoping they will change. Rural areas and older generations tend to be more conservative and view homosexuality as a stigma.⁴⁶ Vinod grew up feminine, as he liked to wear girl clothes, sarees, lipstick, and performing typically female activities, such as cooking and cleaning. His brothers and sisters bullied and teased him. His father told him to do (man’s) work, but he refused. Ultimately, Vinod left his home town and moved to Delhi.⁴⁷ Kareem faced discrimination from his brothers and his family, eventually becoming depressed. He often argued with his family about his relationships, as they said that “homosexuality is a shame.”⁴⁸ He was pressured to marry, as

* Name has been changed.

⁴³ Pradeep, personal interview, New Delhi, April 18, 2012.

* Name has been changed.

⁴⁴ Harshad, personal interview, New Delhi, April 26, 2012.

⁴⁵ Hari, personal interview, New Delhi, April 14, 2012 and Anjali Gopalan, personal interview, New Delhi, April 23, 2012.

⁴⁶ Vinod, personal interview, New Delhi, April 16, 2012.

⁴⁷ Vinod, personal interview, New Delhi, April 16, 2012.

⁴⁸ Kareem, personal interview, New Delhi, April 17, 2012.

most Indian families believed that their son would stop acting so girlish after marriage.⁴⁹ A similar study on the impact of the Naz judgment explains:

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. 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.⁵⁰

Thus, the patriarchal and close-knit family unit in Indian society presents an added challenge for homosexuals. Most end up moving to cities, hiding their identity from their family, and living a dual life.

Rejection from Society

But escape to cities does not solve the problem, as society also harasses and discriminates against homosexuality. Most people are ignorant, and called gay men *hijras*.⁵¹ Gay men still had to hide their identity and their relationships from broader society. Harshad's relationship with his boyfriend was once discovered and his boyfriend was beaten and tortured by the villagers and police. Kushal described how other coworkers "used gay as a weapon against me, they see gay as a crime."⁵² Gay men face harassment and discrimination at work, in hospitals, in finding housing, and at bus stands. *Kothis* were even used for sex and then extorted and abused by other men in order to get money. No place in society was open for gay men, as they faced harassment and discrimination from everyone.

⁴⁹ Kareem, personal interview, New Delhi, April 17, 2012 and Harshad, personal interview, New Delhi, April 26, 2012.

⁵⁰ Jain, "Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation," 42.

⁵¹ Pradeep, personal interview, New Delhi, April 18, 2012 and Harshad, personal interview, New Delhi, April 26, 2012.

⁵² Kushal, personal interview, New Delhi, April 24, 2012.

FILING THE PETITION

The Naz Foundation was founded by Anjali Gopalan in 1994, after she returned from doing HIV/AIDS work in the United States and realized the lack of resources available in India.⁵³ Gopalan, with the help of the Lawyers Collective, filed a petition against Section 377 in the Delhi High Court for a variety of reasons. First was the difficulty in answering why homosexuality was illegal, when parents were told that it was natural for their child to be gay.⁵⁴ Second, Naz HIV/AIDS outreach workers were repeatedly harassed and arrested, and third, the organization faced continued difficulty in successfully addressing the HIV/AIDS crisis in India without working directly with the MSM community.⁵⁵ As Misra describes:

Section 377 is likely to have had an adverse impact on the fight against HIV and AIDS in India. Criminalising homosexuality increases the stigma attached to it, and therefore the practitioner. Social stigma, backed up by the threat of ten years' imprisonment for homosexuality, helps drive the epidemic underground and heighten the risk of transmission, as gay men may be less likely to present for testing, prevention services and treatment, lest they be found out.⁵⁶

These continued challenges pushed Gopalan to file the petition, in hopes that one day homosexuality would no longer be illegal.

Unlike earlier attempts, the petition was carefully worded to only strike down the part of law that applied to consensual same-sex intercourse, leaving the rest in place for child sexual abuse. At the fore of the petition was the negative impact Section 377 had on HIV/AIDS work. The petition then argued that it violated the right to life and liberty in the Constitution because it criminalized a person's sexuality, a vital part of their identity, and finally the petition argued that it violated the right to equality because of the social stigma and police abuse that resulted from

⁵³ Anjali Gopalan, personal interview, New Delhi, April 23, 2012.

⁵⁴ Hari, personal interview, April 14, 2012 and Anjali Gopalan, personal interview, April 23, 2012.

⁵⁵ Anjali Gopalan, personal interview, April 23, 2012.

⁵⁶ Geetanjali, "Decriminalising homosexuality in India."

the law.⁵⁷ The fact that the law was a pre-Constitutional statute worked in favor of the Naz Foundation, as pre-Constitutional statutes do not have the presumption of constitutionality.⁵⁸

Initially the petition was denied by the Delhi High Court in 2003 because the Court argued that the Naz Foundation did not have a *locus standi*, or a relevant stake in the case, as they were an NGO filing on behalf of a class of people, not the people themselves. Upon appeal to the Supreme Court, the Delhi High Court was forced to hear the case. In the early years of the case, there was little support from the LGBT community, as they were afraid of repercussions if they voiced public allegiance.⁵⁹ Finally, years later, in 2006, parts of the community rallied in support, particularly the group, Voices of 377, which was a coalition of LGBT, women and human rights activists. Ironically, during the case, Naz had both support and resistance from the government. The Ministry of Health and Family Welfare (specifically the National AIDS Control Organisation) supported the petition because it would improve HIV/AIDS work, but the Ministry of Home Affairs opposed the petition, arguing that Section 377 represented the correct belief that homosexuality was wrong and evil.⁶⁰ The case was decided in favor of the Naz Foundation on July 2, 2009.

DECISION IN *NAZ FOUNDATION V. GOVERNMENT OF NCT OF DELHI*

The judgment in *Naz Foundation v. Government of NCT of Delhi* was very well written and favorable to the LGBT community. Chief Justice Shah and Justice S. Muralidhar wrote the joint decision and used language never before heard in any sodomy decision in the world. Both

⁵⁷ Narrain, "The Queer Case of Section 377," 486.

⁵⁸ Shivangi, personal interview, New Delhi, April 28, 2012.

⁵⁹ Anjali Gopalan, personal interview, New Delhi, April 23, 2012.

⁶⁰ *Naz Foundation v. Government of NCT of Delhi and Others*.

judges had experience in the LGBT, MSM, and AIDS community.⁶¹ Ten years earlier, Justice S. Muralidhar was a lawyer advocating for the distribution of condoms in an all male prison. Because the language of LGBT was familiar to the judges, they did not hesitate to use it in their decision, making it the most similar decision to South Africa's anti-sodomy case.⁶²

The decision was strongly rooted in Indian History, international law, and in the Constitution. The Court found that Section 377 violated Article 21 of the Indian Constitution, as it denied people dignity and criminalized their core identity, inhibiting their right to life.⁶³ Also, after acknowledging the unfair treatment and discrimination faced by LGBT people through the use of Ryan Goodman's study, the Court argued that Section 377 violated Article 14, the right to equality.⁶⁴ Finally, after recognizing that although Section 377 is facial neutral, its application to sexual orientation has greatly harmed LGBT individuals, the Court argued that Article 15, non-discrimination, applies because sexual orientation is analogous to sex.⁶⁵ The addition of Article 15 was an added bonus to the already positive decision, as the petition only argued upon the grounds of right to life, equality, and privacy.⁶⁶ The decision is laced with terms of privacy and dignity, demonstrating that the judges had a strong sense of the impact of Section 377 on the LGBT community. Drawing upon the theme of inclusiveness and the promise of dignity from within the preamble to the Indian Constitution, the Court recognized that "we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human

⁶¹ Shivangi, personal interview, New Delhi, April 28, 2012.

⁶² Arvind Narrain, personal interview, telephone, April 17, 2012.

⁶³ Jain, "Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation."

⁶⁴ *Naz Foundation v. Government of NCT of Delhi and Others*.

⁶⁵ Jain, "Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation."

⁶⁶ Shivangi, personal interview, New Delhi, April 28, 2012.

relationships without interference from the outside community.”⁶⁷ Such a strongly worded application of fundamental rights improved the impact of the decision.

The Court’s ruling also made clear that discrimination based on public morality was unacceptable.⁶⁸ The decision stated that the “enforcement of public morality does not amount to a ‘compelling state interest’ to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.”⁶⁹ The recognition of the harm caused by public morality reconfigured the notion of harm, as “the question was no longer whether homosexuality ‘harmed’ abstract notions of family values and social fabric but about how the provisions of 377 had harmed members of the LGBT community by marginalizing, oppressing and exploiting them.”⁷⁰ This important shift changed the view of homosexuals from criminals prosecuted under the law to people who deserved protection under the law rather than persecution from society. Ultimately, the ruling provided a solid foundation for the protection of LGBT rights grounded within international law and the Indian Constitution.

When the decision was announced on July 2, 2009 there was widespread celebration in LGBT community. Members of the community gathered that evening at Jantar Mantar in Delhi to celebrate. The positive ruling sparked a massive media reaction, which became increasingly favorable toward LGBT issues, and that in turn sparked public debate.⁷¹ The media played a critical role in spreading the news across the country and into rural communities, creating public discussion. The community discussions following the decision and media response were equally responsible in changing the attitude of many in society, and opening up a new space for

⁶⁷ *Naz Foundation v. Government of NCT of Delhi and Others*, 33-34.

⁶⁸ Kushal, personal interview, New Delhi, April 24, 2012.

⁶⁹ *Naz Foundation v. Government of NCT of Delhi and Others*, 61.

⁷⁰ Geetanjali, "Decriminalising homosexuality in India."

⁷¹ *Ibid.*

discussions of sexuality.⁷² In the following years, the media played a critical role in bring LGBT issues to the front of national discussions, often publishing articles about harassment, death, gay Pride parades, and continued court and government action around Section 377. Emboldened by the decision and positive media reaction, people, queer and straight alike, from all over Delhi and the surrounding community, come together for the annual pride parade every November, as well as a celebration on July 2nd commemorating the 2009 decision.

Immediately after the decision in 2009, the case was appealed to the Supreme Court. Because the case was not challenged in any other state high courts, and because the Supreme Court did not allowed a stay of the decision (which would have prevented the decriminalization from going into effect), the Delhi High Court's ruling applied to the entire country.⁷³ Importantly, the Delhi High Court's ruling only decriminalizes homosexuality, and does not legalize homosexuality, as that would require a law passed by parliament.⁷⁴ As of early May 2012, the case has been heard by the Supreme Court, and their decision should be announced before November 2012.

FINDINGS: LIFE AFTER 377

After the decriminalization of homosexuality, LGBT individuals finally became "free."⁷⁵ Free from criminalization under the law and free from the threat of arrest. This simple, but powerful, act by the Delhi High Court greatly affected the lives of homosexuals.

⁷² Kareem, personal interview, April 17, 2012.

⁷³ Shivangi, personal interview, April 28, 2012.

⁷⁴ Hari, personal interview, April 14, 2012.

⁷⁵ Salim, personal interview, New Delhi, April 24, 2012.

Dignity and Empowerment

The ruling gave people confidence⁷⁶ and “gave dignity to LGBT people in the eyes of the law.”⁷⁷ They were no longer criminals, and could proudly look at themselves in the mirror.⁷⁸

Gupta correctly predicted in his 2006 article that “the public benefits of this decriminalisation would start with a sense of self-acceptance, comfort, confidence and evolving pride among gays, bisexuals, lesbians, transgenders, hijra—all of whom are in some way or the other caught within the broader meaning of 377.”⁷⁹ The ruling was a moral boost,⁸⁰ as it spoke of the fundamental right of dignity and proved to homosexuals that they were not “wrong,” giving them the confidence and empowerment to be proud of their identity, in public and in private. There were more Pride parades and events in Delhi after 377,⁸¹ which demonstrated the increased dignity and confidence gained by the LGBT community.

Open Identity

This newfound self-acceptance and pride gave LGBT individuals the confidence to be “out” and open with their identity in public.^{***} Pradeep describes “we can go outside full of freedom.”⁸² They have nothing to fear from the public or from police. While they were still teased and called names by society, they ignored the comments.⁸³ Salim finally grew out his hair and dressed like a girl.⁸⁴ Public spaces also began to open up for gay and lesbian parties.

Pradeep said that before the 377 decision, “there were raids, if there were gay parties there police

⁷⁶ Hari, personal interview, New Delhi, April 14, 2012.

⁷⁷ Arvind Narrain, personal interview, telephone, April 17, 2012.

⁷⁸ Arvind Narrain, personal interview, telephone, April 17, 2012.

⁷⁹ Gupta, "Section 377 and the Dignity of Indian Homosexuals," 4822.

⁸⁰ Kushal, personal interview, New Delhi, April 24, 2012

⁸¹ Group observation, Queer Campus, Q(C)-onversations, New Delhi, April 21, 2012.

^{***} This freedom remains only in urban cities such as Delhi, which lacked the ignorance and conservatism of rural India.

⁸² Pradeep, personal interview, New Delhi, April 18, 2012.

⁸³ Vinod, personal interview, New Delhi, April 16, 2012; Pradeep, personal interview, New Delhi, April 18, 2012; and Apoorva, personal interview, New Delhi, May 3, 2012.

⁸⁴ Salim, personal interview, New Delhi, April 24, 2012.

come and arrest everybody, [but] after we can have gay parties openly.”⁸⁵ The Tuesday nights parties at Peg N Pints “lost their exclusivity. After the high court verdict, more restaurants, pubs and clubs in Delhi have started offering gay special nights.”⁸⁶ There are gay specific events, like film festivals and book readings. More LGBT groups began forming, such as Queer Campus Delhi, a group of LGBT identified college students in the Delhi area that gather at regular meetings and correspond online.⁸⁷ The online space as also increased, making it easier for LGBT people to connect with each other.⁸⁸ But these spaces are restricted by access, to those that can pay the entry fee at parties, to those that can pay for college, and those who can afford internet access.⁸⁹ Despite this disparity, the physical and metaphorical opening of public spaces has provided more freedom for LGBT Indians.

Coming Out

Soon after the 2009 announcement, people flocked to Delhi.⁹⁰ Driven by the positive judgment, LGBT individuals came to Delhi hoping for increased social acceptance. More people were willing to come out of the closet as gay.⁹¹ Emboldened by the High Court’s legal ruling, and the increasing number of openly gay people, more Indians found the courage to come as gay.⁹² While they may not extend that openness about their sexuality to their family or their job, the mere fact that more Indians were willing to admit to themselves that they were gay was a step forward. It meant that they understood they did not fit into the rigidly assigned heterosexual culture, but instead choose to belong to the still socially deviant homosexual culture.

⁸⁵ Pradeep, personal interview, New Delhi, April 18, 2012.

⁸⁶ "Homosexuality | The start of a revolution."

⁸⁷ Group Observation, Queer Campus, Q(C)-onversations, New Delhi, April 21, 2012.

⁸⁸ "Homosexuality | The start of a revolution."

⁸⁹ Kushal, personal interview, New Delhi, April 24, 2012.

⁹⁰ Kareem, personal interview, New Delhi, April 17, 2012.

⁹¹ Hari, personal interview, New Delhi, April 14, 2012.

⁹² Group observation, Queer Campus, Q(C)-onversations, New Delhi, April 21, 2012.

Police Harassment

With the decriminalization of homosexuality, there was hope that there would be a decrease in police harassment. Most interview respondents agreed that discrimination from police had lessened, although some still experienced abuse.⁹³ *Kothis* experienced heightened harassment because their visibly feminine appearance often draws unnecessary attention and harassment from police. But the most important result of the judgment against 377 was that it gave LGBT people a “weapon”⁹⁴ and the strength to stand up and defend themselves against police. As Vinod described, “I am not scared to challenge police because we have already [been] released from 377.”⁹⁵ They can challenge police and say that they are free from 377. But often the police were unaware of the change in the law. When harassed by police, outreach workers and employees of the Naz Foundation could defend themselves by showing their Naz card or calling the office and having their boss speak to the police.⁹⁶ While there are no statistics, most respondents agreed that violence has gone down drastically in Delhi,⁹⁷ despite the fact that police still laugh and tease them.⁹⁸ They are no longer afraid of police, because the power of the law and criminalization was taken away.⁹⁹

Social Acceptance

The judgment on Section 377 created more “openness in public to discuss sexuality.”¹⁰⁰ Before Section 377, most Indians were ignorant of homosexuality, but the community

⁹³ Kareem, personal interview, New Delhi, April 17, 2012 and Vinod, personal interview, New Delhi, April 16, 2012.

⁹⁴ Kushal, personal interview, New Delhi, April 24, 2012.

⁹⁵ Vinod, personal interview, New Delhi, April 16, 2012.

⁹⁶ Kareem, personal interview, New Delhi, April 17, 2012 and Salim, personal interview, New Delhi, April 24, 2012.

⁹⁷ Arvind Narrain, personal interview, telephone, April 17, 2012.

⁹⁸ Kareem, personal interview, New Delhi, April 17, 2012.

⁹⁹ Salim, personal interview, New Delhi, April 24, 2012 and Harshad, personal interview, New Delhi, April 26, 2012.

¹⁰⁰ Misha, personal interview, New Delhi, April 14, 2012.

discussions after the 2009 decision expanded public knowledge. Generally, social acceptance and awareness has increased.¹⁰¹ Media coverage also played a significant role in changing public perceptions, opening a space for dialogue, and educating society.¹⁰² Bollywood films, like *Fire* and *Dostana*, have also played a part in opening space within society for homosexuality. But the most important impact on social perceptions of homosexuality has come from the confidence and dignity of LGBT Indians. No longer afraid to hide their sexuality in public, they have pushed open the doors of society, establishing their place within the heteronormative culture. Salim walks around proudly as a *kothi* and lives openly with his boyfriend.¹⁰³ Apoorva,* a beautiful dancer, invites other *kothi*, transgender and *hijra* friends over, ignoring comments from neighbors and society.¹⁰⁴ LGBT youth live can live freely, with less social pressure to marry, instead with the hope of living a happy life with their future partner.¹⁰⁵ They also carry the hope of finding a job were they can be open and accepted with their sexuality. In the few short years since the 2009 decision, society has begun to gradually shift, and spaces have been to open for LGBT Indians, but there is still a long way to go to achieve a majority of social acceptance.

Family Acceptance

The decriminalization of homosexuality has also begun to change the opinion of some families. Kareem's family is now supportive of him, and has stopped pressing him for marriage.¹⁰⁶ Harshad has been accepted as *kothi* by his family, and his boyfriend's family has

¹⁰¹ Jain, "Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation," 40.

¹⁰² Vinod, personal interview, New Delhi, April 16, 2012.

¹⁰³ Salim, personal interview, New Delhi, April 24, 2012.

* Name has been changed.

¹⁰⁴ Apoorva, personal interview, New Delhi, May 3, 2012.

¹⁰⁵ Group observation, Queer Campus, Q(C)-onversations, New Delhi, April 21, 2012.

¹⁰⁶ Kareem, personal interview, New Delhi, April 17, 2012.

accepted him as a second son.¹⁰⁷ Some families also attend Pride parades in support of their children.¹⁰⁸ But, unfortunately, a large majority of families are still not supportive. Pradeep explained that “because this is only law, we can’t change the mentality of families.”¹⁰⁹ Most families still uphold the traditional idea of marriage, rejecting their children if they do not conform to heterosexuality. This still allows police to exploit LGBT individuals by threatening to expose their sexuality to their families.¹¹⁰

Empowering Youth

The ruling on Section 377 has also empowered youth and given hope for future generations. While there is still teasing and harassment, the wider social acceptance and awareness of homosexuality has eased the path for the next generation of LGBT Indians. Both Kushal and Harshad believe that things are better for the younger generation.¹¹¹ Kareem and Apoorva argued that the college community is more progressive, logical, and therefore more supportive of gay people.¹¹² The change in the law has drastically altered the future for LGBT youth, giving them the opportunity to live free of harassment and discrimination from society, police, and hopefully, one day, their family. But as Anjali Gopalan warned, progress will take many generations as “it is only younger people who may want to bring about change.”¹¹³

¹⁰⁷ Harshad, personal interview, New Delhi, April 26, 2012.

¹⁰⁸ Misha, personal interview, New Delhi, April 14, 2012.

¹⁰⁹ Pradeep, personal interview, New Delhi, April 18, 2012.

¹¹⁰ Jain, "Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation," 43.

¹¹¹ Kushal, personal interview, New Delhi, April 24, 2012 and Harshad, personal interview, New Delhi, April 26, 2012.

¹¹² Kareem, personal interview, New Delhi, April 17, 2012 and Apoorva, personal interview, New Delhi, May 3, 2012.

¹¹³ Anjali Gopalan, personal interview, New Delhi, April 23, 2012.

CONTINUED CHALLENGES

Because the decriminalization of homosexuality only occurred three years ago, and society has been resistant to change, LGBT individuals still face many challenges in their day to day life, most against power figures in society, such as police, employers, and landlords.

Lack of Knowledge about the Ruling

One of the strongest barriers to social change is the lack of awareness about the ruling on Section 377. There are still people within the LGBT community, in Delhi and outside it, who are unaware of the decriminalization of homosexuality.¹¹⁴ It is unclear as to what percentage of LGBT individuals in India remain unaware of the decision, but their lack of knowledge prevents them from standing up against harassment and discrimination. Another important group that remains ignorant of the decision on Section 377 is law enforcement. With their lack of knowledge in the change of law, police continue to harass and discriminate against LGBT individuals.

Harassment

Despite the change in legal status, LGBT individuals still experience harassment and abuse from police, mostly due to their ignorance of the court ruling, or their prejudice. While less likely to physically abuse LGBT people now, police still exploit them and take their money.¹¹⁵ Their ignorance extends beyond the law, as they do not understand the differences between *hijra*, *kothi*, gay and sex worker. Often LGBT individuals are harassed because the police believe they are only around for sex.¹¹⁶ Harshad explained that the situation has not

¹¹⁴ Apoorva, personal interview, New Delhi, May 3, 2012.

¹¹⁵ Vinod, personal interview, New Delhi, April 16, 2012 and Kareem, personal interview, New Delhi, April 17, 2012.

¹¹⁶ Harshad, personal interview, New Delhi, April 26, 2012.

changed much, as they are still harassed by police, but now they are not arrested.¹¹⁷ The repeated abuse and discrimination at the hands of law enforcement give LGBT individuals no one to turn to for help.¹¹⁸

Broader Indian society also continues to discriminate against homosexuals. The deep entrenchment of heteronormativity and homophobia creates social resistance to change. *Kothis* are still harassed based on their feminine appearance, and deviance from social norms.¹¹⁹ Social rejection and discrimination remains higher in rural areas, as those tend to be more conservative and distanced from the rapidly changing urban cities. But even within Delhi, the interview respondents each described some form of public harassment that occurred well after the 2009 ruling, demonstrating the slow pace of social change. In 2010, Professor Siras at Aligarh Muslim University in Uttar Pradesh, was caught on tape having sex with another man in the privacy of his own home. Immediately after, amid public outcry, the University fired Dr. Siras. After going to court and earning his job back, Dr. Siras was found dead, from supposed suicide, two days after returning to his post.¹²⁰ Such a story demonstrates the still widespread social disgust of homosexuality.

Employment

Despite the improved dignity and social awareness of homosexuals, they still face quite an uphill battle in encountering discrimination everyday. Misra describes “The reading down of Section 377 leaves several legal questions unanswered. As Hunter has warned, ‘decriminalisation is not deregulation.’ Family and employment law, for example, may continue

¹¹⁷ Harshad, personal interview, New Delhi, April 26, 2012.

¹¹⁸ Salim, personal interview, New Delhi, April 24, 2012.

¹¹⁹ Pradeep, personal interview, New Delhi, April 18, 2012.

¹²⁰ Deepu Sebastian Edmond, "Gay AMU Prof Found Dead in Aligarh Home," Indian Express, <http://www.indianexpress.com/news/gay-amu-prof-found-dead-in-aligarh-home/601699/0>.

to discriminate against people based on their sexual orientation.”¹²¹ Most interview respondents experienced some form of harassment in attempting to get a job. Vinod arrived in Delhi and interviewed for hotel employee positions, but was always immediately rejected because he looked feminine. Only when he arrived at an interview dressed as a heterosexual man did he get a job.¹²² Most *kothi* do stereotypically feminine jobs, such as a hairdresser, a makeup artist, an interior designer, or a dancer, because they experience much less discrimination in those fields.¹²³ Often, LGBT individuals have to hide their sexuality in the workplace or face discrimination. There are no laws protecting people from discrimination based on sexual orientation from employers, or protecting them from harassment from coworkers. This forces LGBT individuals into the closet, for fear of losing their only means of income and livelihood.

Housing

Just as LGBT individuals have little or no protection from discrimination in employment, so too do they face unequal treatment in housing. Landlords often flat out refuse to allow a *kothi* or gay man to live somewhere.¹²⁴ Landlords assume that LGBT people will act immorally and cause problems. These assumptions are either based on previous tenants, or on the uneducated belief that LGBT people are sex workers. If they do allow housing for an LGBT individual it often comes attached with special and unfair rules, such as not permitting guests (who landlords fear will be other “sexually deviant” people).¹²⁵ Because the repeal of Section 377 only decriminalized homosexuality, rather than approve or defend it, LGBT individuals have no protection against (legal) harassment from landlords or employers. Without the help of the

¹²¹ Geetanjali, "Decriminalising homosexuality in India," 6.

¹²² Vinod, personal interview, New Delhi, April 16, 2012.

¹²³ Harshad, personal interview, New Delhi, April 26, 2012.

¹²⁴ Vinod, personal interview, New Delhi, April 16, 2012.

¹²⁵ Pradeep, personal interview, New Delhi, April 18, 2012.

police, and with the added discrimination from these social power figures, LGBT Indians have no protection or escape, besides hiding their true identity, from society.

Backlash

While the decriminalization of homosexuality has given more dignity to LGBT Indians and raised social awareness, some fear a social backlash. With increased confidence and openness in society, Kushal fears that “gay people will become too much of an attention point for others and give society a reason to point out the difference.”¹²⁶ Quoting Former Prime Minister Nehru, Kushal argues that “freedom brings responsibility” and that the LGBT community should not be showy.¹²⁷ With increased awareness and attention from society, Misra theorizes about the possibility of a social backlash, where LGBT individuals “may find themselves more vulnerable to physical and verbal attacks.”¹²⁸ The legal, and slowly social, recognition of homosexuals will bring new challenges and new forms of discrimination, requiring India to face similar problems as the West, such as fighting for same-sex marriage.

ANALYSIS: LAW VERSE SOCIAL CHANGE

When examining the impact of the decriminalization of homosexuality, it is important to analyze the social change that occurred through the legal striking down of part of Section 377 and through the following reaction from society. The courts remain a vital part of social change, as they are an avenue to defend fundamental rights and address social wrongs. But, using the judiciary as an avenue for change remains complicated because of the government’s prior complicity in discrimination against homosexuals and its failure in offering any form of

¹²⁶ Kushal, personal interview, New Delhi, April 24, 2012.

¹²⁷ Kushal, personal interview, New Delhi, April 24, 2012.

¹²⁸ Geetanjali, "Decriminalising homosexuality in India."

protection and assistance to victims of minority movements in the past.¹²⁹ Therefore, “while LGBT Indians certainly cannot be under the illusion that court systems are benevolent allies or sympathetic protectors [...] they also cannot afford to relinquish the court systems as a map of contestation.”¹³⁰ The judiciary holds power outside of the influence of public morality, enabling it to determine constitutional morality and protect the fundamental rights of individuals, no matter their sexual orientation or their position within society. As Shahani states in his article, “the legal reading down of Section 377 not only performs a symbolic contestation of heteronormative colonial law, it also enables more queer affirmative modes of political activism to circulate within a national imaginary that has been ideologically constructed as anti-queer.”¹³¹ The repeal of Section 377 in its application to consensual same-sex sex through the judiciary has challenged Indian heteronormative society, and provided an opportunity for LGBT Indians to use the law and their fundamental constitutional rights to defend themselves in society. The legal ruling has also gone a long way to establish dignity, self-confidence, and openness among LGBT individuals.

But, despite the good intentions of the judiciary, the problem remains that there is no mechanism to enforce their decisions. Even though the decriminalization applies to all of India, there is no method for ensuring the government and law enforcement follows the decision. The only true social change comes from the community. In his article *No Shortcuts to Queer Utopia: Sodomy, Law and Social Change*, Narrain states that “the law remains an important site of struggle but one needs to locate legal change as a necessary part of wider socio-political change. The premise of change with respect to sexuality is as much about change in societal mores as it is

¹²⁹ Shahani, "Section 377 and the "Trouble with Statism": Legal Intervention and Queer Performativity in Contemporary India."

¹³⁰ Ibid.

¹³¹ Ibid.

about legal change.”¹³² The change in dignity and openness of the LGBT community after the ruling forced open a new public space for deviancy from heterosexuality. But the true social change was caused by public reaction to the 2009 decision. Media publications on the ruling, community discussions on sexuality, and even outcry against the decision began to evolve notions and beliefs of sexuality in India. Only this gradual change of social mentality will lead to the true enforcement of the Delhi High Court’s ruling, social equality, and social change.

Despite the change in legal status of homosexuals in India, they still face daily discrimination, and the majority of Indians view homosexual sex as “unnatural.” The much slower pace of social change presents a challenge in reconciling legal and social status of LGBT Indians. Ultimately, when asked what true changes have occurred since the ruling on Section 377, all interview respondents answered that while life may have improved some (for example, given them increased dignity), society still has a long way to go before homosexuality will ever be accepted. As Arvind Narrain stated, “the legal ruling is not a magic wand, but it is a basis for fighting and struggle.”¹³³ Now it is up to the LGBT community to decide how to use the law, and where to go from here.¹³⁴ Without social change, and change in the attitude of the government (especially police), the legal ruling means nothing, and will remain unenforced. Social change is a very slow process, as it will take years and generations before homosexual sex is no longer seen as unnatural. The LGBT community must mobilize and push the boundaries of society or the legal ruling will mean nothing. While change in the law can occur at a much faster rate than social change, both are necessary to create lasting change and acceptance of the LGBT community.

¹³² Narrain, "No Shortcuts to Queer Utopia: Sodomy, Law and Social Change," 261.

¹³³ Arvind Narrain, personal interview, telephone, April 17, 2012.

¹³⁴ Arvind Narrain, personal interview, telephone, April 17, 2012.

THE WAY FORWARD

Education and Sensitization

The largest avenue for social change begins with peer education. The ruling on Section 377 and the following media reaction created a new space for social dialogue on the previously taboo subject of sexuality. But that space must be expanded, to educate all of society about differences in sexual orientation.¹³⁵ Spaces such as this can be opened through public education forums and conferences, such as the one that occurred in Bangladesh on Sexual and Reproduction Health in May 2009. Indian youth must also be educated on issues of sexuality,¹³⁶ in part to help prevent the spread of HIV and AIDS, and in part to create a more open and accepting society for women and sexual minorities. Educating society that homosexuality is natural and normal will lessen its social stigma, the teasing and harassment in public, and the discrimination from power figures, such as police, employers and landlords. Police education and sensitization will also greatly help to lessen harassment, discrimination, abuse, and exploitation of LGBT individuals.¹³⁷ The more knowledgeable police are of sexual minorities, the less likely that they will continue discrimination and unfair treatment, and the more that LGBT people will be able to look to the police for protection from other forms of mistreatment and abuse.

Laws on Non-Discrimination

Another method to prevent discrimination and harassment is through creating laws and establishing rights for the LGBT community through acts of Parliament. Many interview

¹³⁵ Kareem, personal interview, New Delhi, April 17, 2012 and Harshad, personal interview, New Delhi, April 26, 2012.

¹³⁶ Hari, personal interview, New Delhi, April 14, 2012.

¹³⁷ Hari, personal interview, New Delhi, April 14, 2012.

respondents agreed that laws should be made to protect their rights.¹³⁸ Kareem even argued for the legalization of gay marriage, property rights, and access to similar rights as women.¹³⁹ But Parvati believes that “we are a long way from getting a law on any of these issues, and therefore it’s very important for communities to come together and form larger coalitions and get people who are not only part of the community to join hands and mount pressure.”¹⁴⁰ While legalization, recognition, and protection of homosexuality might be an unrealistic expectation in the near future, it is the next step in LGBT rights in India.

Rights can also be gained through the judiciary. In the Delhi High Court’s decision, their use of Article 14, right to equality, and Article 15, no discrimination on the basis of sex (which they argued included sexual orientation), could be the starting point for more cases defending the rights of LGBT individuals. The abuse and unequal treatment of homosexuals could be brought to court under Article 14, arguing that it is unconstitutional, as the fundamental right of equality applied to all people. Under Article 15, cases could be brought against discrimination of an LGBT individual, using the Delhi High Court’s decision to argue that non-discrimination applies to sexual orientation. But such a development is a long way off. Article 15 may not even be applicable in the future as the Supreme Court could overturn the extension of non-discrimination to sexual orientation when it announces its decision later in 2012. Ultimately, legal protections will only come with the recognition of the discrimination faced by LGBT individuals and their gradual social acceptance.

¹³⁸ Kareem, personal interview, New Delhi, April 17, 2012 and Harshad, personal interview, New Delhi, April 26, 2012.

¹³⁹ Kareem, personal interview, New Delhi, April 17, 2012.

¹⁴⁰ Anjali Gopalan, personal interview, New Delhi, April 23, 2012.

CONCLUSION

While the rights of LGBT individuals still has a long way to go in India, the impact of the 2009 ruling on Section 377 has been largely positive. LGBT Indians have increased dignity and self-confidence. They are proud of their identity and can stand up to police using the law. They have become more open with their sexuality and often go openly in public looking feminine or walking with their boyfriend. More LGBT Indians have also gained the courage to come out of the closet. This is due in part to the increased acceptance or tolerance of society. While much of society still views homosexuality as “unnatural” the increased visibility of homosexuality in the media, and the increased community discussions have provided a space for sexual minorities. Physical and metaphorical public spaces have opened up, increasing social awareness of homosexuality. This increased awareness has empowered youth and given future LGBT generations a brighter future. Therefore, despite the continued struggles of LGBT individuals and those considered sexually deviant by society, their life has much improved in the three years since the 2009 judgment.

The improved life of LGBT Indians demonstrates the possibility of social change through law. The well written judgment created a strong legal foundation, upon Constitutional and fundamental rights, for decriminalizing homosexuality. But society, despite the majority still opposed to homosexuality, also played a role in creating that social change. With the 2009 decriminalization, media reaction and social discussions, even those criticizing the judgment, opened up a new space for homosexuality. Ultimately, while the legal case was the spark that ignited the change, society played a role in changing the lives of LGBT Indians.

India has come a long way from pre-colonial times and origins of the 1860 Indian Penal Code. While much of Indian society and law are still dominated by public morality, based upon

conservative Christian, Hindu and Muslim traditions, change is occurring. Modernization, at least in the cities, has begun to change the lives and thinking of the younger generations, encouraging wider discussion of issues such as sexuality. Many LGBT Indians have hope that in the future Indian society will come to fully accept sexual minorities as natural, embracing them and treating them as equals.

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