PART THREE

OPPOSING LAW,

CONTESTING GOVERNANCE
By filing its challenge to the antisodomy law in the High Court of Delhi, Naz Foundation became the protagonist of an unparalleled struggle to decriminalize homosexuality in India, rendering New Delhi the epicenter and the state the antagonist. Naz Foundation worked closely with the Lawyers’ Collective to undo the criminalization of same-sex sexualities in a context facing what then appeared to be an HIV/AIDS pandemic. Even though the Lawyers’ Collective was headquartered in Mumbai, where the writ petition was scripted, and the Mumbai High Court had been a possible contender, the reach for justice gradually came to be centered in the capital city. Initially not widely known in Delhi or beyond, the writ progressively drew support from around the country but also early criticism that law and the state were being seen as the avenues for justice. As the legal process unfolded, though, the criticism gave way to robust support for undoing Section 377 and the battle lines solidified around the state.

In its early stages the Naz Foundation writ set into motion a tussle between sexuality and the state, or more precisely a confrontation between sexuality rights activists and the government and other state units, mediated by the judiciary. Over time the cast of characters and their positions changed, often dramatically; for instance, the government’s position shifted from being firmly opposed to decriminalization to implicitly supporting it in the Supreme Court after 2009, and, after initially dismissing the Naz Foundation writ on a technicality, the Delhi High Court went so far as to decriminalize homosexuality. Yet the limitations
of a struggle encumbered by the histories, procedures, and imperatives of law persisted.

First, the Naz Foundation writ had to hinge on a narrow legal strategy aimed at showing the unconstitutionality of the antisodomy law, thereby letting it bear all the weight of injustice and discrimination against sexual and gender minorities. Implicitly recognizing the unintended uses of the law, the writ sought to unhook the criminalization of same-sex sexualities from the prosecution of child sexual violence and sexual assault against women. The writ asked for Section 377 to be “read down” so as to exclude adult consensual same-sexual activity from its purview. It became incumbent to prove that Section 377 violated constitutional principles, while anchoring rights and protections for same-sex sexualities to the legal outcome.

Second, institutional parameters also shaped the nuances of the writ by influencing its angle and arguments—what would be persuasive to the justices, effectively reason with the government, and conform to legal precedents. Third, Section 377 had to become the lightning rod of institutionalized injustice. Criticisms of the antisodomy law were already in circulation, for a writ also filed in Delhi High Court by the AIDS Bhedbhav Virodhi Andolan (ABVA) in 1994 had sought its repeal, and trailblazers such as the Mumbai-based gay activist Ashok Row Kavi had previously called for the removal of this colonial relic. Other criticisms had taken the form of signature campaigns to undo the law—in the cities of Mumbai, Kolkata, and Patna—but it was in the aftermath of the Naz Foundation legal challenge that Section 377 became the flashpoint and decriminalizing homosexuality the priority in the struggle for justice for same-sex sexualities.²

A central task of this chapter is to sort through the entanglements of a historic effort that was circumscribed by its pivot to the state. A critical account of the Naz Foundation undertaking and the subsequent legal proceedings is still to be written; this chapter focuses on the first phase, the period between 2001 and roughly 2006, to tell the story of the writ, how its orientation to the state shaped its rationale and limitations, the basis for its support as well as criticisms, and its evolution into a national-level campaign. Beginning with the Naz Foundation initiative, the chapter arcs through the legal proceedings, the growing campaign against Section 377 fueled by the writ’s dismissal in Delhi High Court in 2004 on a mere technicality, Naz Foundation’s appeal to the Supreme
Court, and the subsequent apex court ruling in 2006 directing the lower court to decide the case on its merits. It draws on fieldwork at Naz Foundation and the Lawyers’ Collective, as well as interviews with sexuality rights activists and visits to organizations across five major cities: Bengaluru, Chennai, Kolkata, Mumbai, and New Delhi.

More conceptually this chapter uncovers sexuality’s significance to the state, surfacing as it did in the transactions between Naz Foundation—led efforts to decriminalize homosexuality and state units, especially the government. Particularly revealing were the inconsistencies of the government’s legal response filed in Delhi High Court in 2003 (and its later rejoinder to Naz Foundation’s appeal to the Supreme Court) that nonetheless cohered to help shore up the imperatives of the state and governance by regulating sexuality. Based on my fieldwork at the Ministry of Home Affairs, the state unit responsible for filing the government’s legal response, this chapter looks beyond the reply’s inflammatory rhetorics and seeming confusions to uncover the mechanisms through which it was crafted. Illuminating the biases and ideologies riving the government’s response, I analyze how the perils and excesses of sexuality were purposefully invoked to preserve the integrity of state institutions and justify state intervention.

Engaging the Manichaean State: The Naz Foundation Writ

Founded in 1994 by its director, Anjali Gopalan, Naz Foundation India Trust is an NGO focusing on HIV/AIDS prevention and treatment as well as other matters of sexual health. Since its inception, Naz Foundation has sought external funding—from the MacArthur and Ford foundations in the United States, the Lotteries Commission in the United Kingdom (now known as Community Fund), and the Standard Chartered Bank—to maintain distance from Indian state agencies even though units such as the National AIDS Control Organization (NACO) and its regional counterparts rely heavily on NGOs to do HIV/AIDS-related outreach work. As Anjali Gopalan explains, Section 377 presented an impediment to this work; police would frequently use it as an alibi to harass Naz Foundation staff and state officials refused to distribute condoms in prison on account of it, leaving little choice but to seek legal recourse with assistance from the Lawyers’ Collective HIV/AIDS Unit.

The Lawyers’ Collective was established in 1981 under the stewardship
of the project director, Anand Grover, subsequent to a Supreme Court ruling that expanded access to the courts and led to the widespread use of the kind of public interest litigation represented by the Naz Foundation writ. Inspired by his rapport with Dominic D’Souza, an activist who was incarcerated under the Goa Public Health (Amendment) Act of 1986 for being HIV-positive, Grover says that the experience made him aware of the import of sexuality and human rights, ultimately leading to the creation of the HIV/AIDS Unit in 1997 in Mumbai with financial support from the European Community. According to Grover, the Lawyers’ Collective HIV/AIDS unit was interested in legal action against Section 377 mostly because it criminalizes particular forms of sexual practices and undermines HIV prevention efforts.

The collaboration between Naz Foundation and the Lawyers’ Collective may have been close over the years, but its history is sometimes recounted differently. Shaleen Rakesh, who was initially the Naz Foundation representative in Delhi High Court, suggests that they approached the Lawyers’ Collective because of its efforts in the area of HIV/AIDS: “I think that we had actually initiated it in the sense that we had been looking at Section 377 as a major obstacle for our ability to do the work that we do. And, for that reason we were exploring what we need to do to challenge Section 377. We had absolutely no idea whether we need[ed] to go to court or whether we should go to Parliament, whether it should be a writ petition, whether there should be like a media advocacy campaign of some sort.” Seeing it otherwise, Vivek Diwan, who was an advocate with the Lawyers’ Collective, suggests that as a unit devoted to legal advocacy it was the Lawyers’ Collective that identified the need to challenge Section 377 and Naz Foundation as the petitioner.

How Delhi came to be the site of the legal challenge to Section 377 is also understood differently, for Rakesh implies that the writ was filed in Delhi High Court because Naz Foundation was the petitioner, while Grover suggests that the writ was filed in Delhi High Court because the previous challenge to the antisodomy law by ABVA was thought to still be pending. Filed under the leadership of the activist Siddharth Gautam and in the aftermath of the public controversy over the distribution of condoms to prisoners in Delhi’s largest and most infamous prison, Tihar Jail, the ABVA writ sought a complete repeal of the antisodomy law. In fact the judges ordered that the two petitions to be considered together, until it was learned that the Delhi High Court had dismissed the ABVA
a few months earlier, on March 22, 2001, due to nonprosecution. Grover notes that it would have been easier and more strategic to enter the writ in Bombay High Court, which is generally regarded as more liberal.

Submitted to Delhi High Court on December 6, 2001, the Naz Foundation writ was drafted primarily by the advocate Sharanjeet Parmar, in consultation with others at the Lawyers’ Collective, including Aditya Bondyopadhyay, and framed as a public interest litigation (PIL). Referring to such writs as social action litigation, Upendra Baxi distinguishes between Euro-American histories of PIL and the post-Emergency context of India, when Justices P. N. Bhagwati and V. R. Krishna Iyer helped relax the rules to provide better and cheaper access to the courts, especially for the rural poor and the socially marginalized. Indeed the Indian Supreme Court’s guidelines allow as little as a letter to serve as a PIL under what are considered egregious circumstances affecting the vulnerable, including issues related to bonded labor, child neglect, police harassment and death in custody, atrocities against women, torture of persons belonging to socially and economically disadvantaged groups, and more, as long as they entail a matter of fundamental rights and are of public interest.

Since the guidelines stipulate that a PIL may be entered on behalf of disadvantaged people who are unable to access the court or may involve issues of public importance, the issue of locus standi, or legal standing before the court, is flexibly treated. Rather than being filed only by an aggrieved party, a PIL might be filed by anyone on matters related to public injury, thereby opening the door for organizations such as Naz Foundation to challenge the constitutionality of Section 377. Further, since the writ was framed from the standpoint of the antisodomy law’s harmful effects on consenting same-sex adults and matters of public health, it could also meet the bar of public interest.

Additionally the Naz Foundation writ could be filed as a PIL because of the changing cultural context in which it took shape (and which it helped change further through the course of the legal campaign). By 2001 gay, lesbian, and same-sex desire–oriented groups and organizations had mushroomed across the metropoles and the second-tier cities, and two works of gay and lesbian literature, Yaarana: Gay Writing from India and Facing the Mirror: Lesbian Writing from India, emerged to displace a dubious collection of journalistic writing on homosexuality.
media routinely carried mostly puerile stories on gay men, hijras, and homosexuality, and leading magazines published dubious “sex surveys” that included questions of same-sex desire. But the greatest public attention occurred as a result of the controversy over Deepa Mehta’s film *Fire* and the vandalizing of theaters in Mumbai by members of the right-wing group Shiv Sena as well as the countermovements, especially the Campaign for Lesbian Rights, that heightened discourses and anxieties about same-sex desire while also thrusting them into the limelight.14

Nothing helped set the stage for the Naz Foundation writ more than the intensifying fears about HIV/AIDS, for India was in the grips of a health crisis of possibly epic proportions.15 While the Naz Foundation writ was being drafted, NACO and individual state-based AIDS control societies were implementing the National AIDS Control Programme and targeting specific populations, including women sex workers, injecting drug users, and truck drivers, but especially males who have sex with males (MSM) and hijras. NGOs such as Naz Foundation, Humsafar Trust (Mumbai), and Sahodaran (Chennai) expanded the reach of state governance by delivering services, but they also sought to protect sexual and gender minorities by fostering awareness of HIV/AIDS and safer sex practices. Yet, as Lawrence Cohen has shown, at the same time they were producing a grammar of “indigenous” and “elite” sexual identities in ways that came to haunt the Naz Foundation writ (more on this in chapter 6).16

Along with the increasing focus on same-sex sexualities as public health hazards, the precarious position of HIV/AIDS-oriented organizations affected the climate in which the Naz Foundation writ was filed. Mere months before the writ was filed, police in the northern city of Lucknow arrested several men who were outreach workers for the NGO Bharosa Trust. The offices of Bharosa Trust and its affiliate, Naz Foundational International (not related to the NGO Naz Foundation), were raided, material was confiscated, and outreach workers were imprisoned for more than a month, charged, among other counts, under Section 377. Autonomous groups, organizations, and individuals throughout the country rallied in support of Bharosa Trust and Naz Foundational International, and the gathering concerns about Section 377 were amplified by the Naz Foundation writ.
STRATEGIC ENCOUNTERS WITH THE MANICHAEAN STATE

No encounter with the state remains impervious to its imaginations, and the Naz Foundation writ was no different in this regard from similar legal challenges that see the state as capable of withholding and conferring rights, continuing wrongs or making right. The Naz Foundation writ usefully dehomogenized the state into its constituent parts, naming among its respondents national-level state institutions and agencies housed in New Delhi—the Union of India, including the Ministries of Home Affairs, Health Welfare, and Social Welfare, and NACO—and regional-level institutions: the Government of National Capital Territory of Delhi, the police commissioner of New Delhi, and the Delhi State AIDS Control Society. Despite its emphasis on the discrepancies between state institutions such as NACO that work with same-sex sexualities and the antisodomy law that criminalizes them, it held firmly to a Manichaean view of the state.17

Also at play was the widely held belief that law may be the last bastion of intervention into an otherwise impregnable state and, in contrast to the intractability of politicians and the police, courts are the most likely arbiters of justice. Repeating this commonly held view, Gopalan told me that although state bureaucracy and the government can be regressive and inefficient, the Indian courts have been progressive. According to Rakesh, the legislature was not considered a viable option for repealing Section 377 without the support necessary to introduce a bill and debate and vote on it favorably; this resulted in the choice of the High Court of Delhi.18

Shaped by the discourses and logics of law, the writ took a threefold strategy. First, anticipating the argument that Section 377 also pertained to sexual assault on children and women, it disengaged the criminalization of homosexuality by asking the court to exclude private adult consensual sex from the purview of Section 377, leaving the rest of it intact. Second, the writ hinged on the unconstitutionality of Section 377 and assumed the burden of proving how the law violated the fundamental rights of same-sex sexualities guaranteed by the Constitution, especially by Article 14 (equality before the law), Article 15 (prohibition of sex discrimination, argued to include sexual orientation), Article 19 (fundamental liberties), and Article 21 (right to life and privacy).19

Third, using the twin concepts of ordered liberty and individual autonomy, the Naz Foundation writ reprised the well-known position
that, privacy is about the right to be left alone, arguing that this right is violated by Section 377. Citing Indian case law and foreign jurisprudence, the Naz Foundation writ argued that private consensual sexual relations lie at the core of intimacy and are therefore included in the right to privacy: “No aspect of one’s life may be said to be more private or intimate than that of sexual relations. Individual choices concerning sexual conduct, preference in particular, are easily at the core of the ‘private space’ in which people indeed decide how they become and remain ‘themselves.’” Giving privacy a spatial twist, the Naz Foundation writ pledged that only adult consensual same-sex sexual activity conducted in private would be exempt from Section 377’s purview. Understood both abstractly and literally, privacy in this sense was used to emphasize that what occurs between consenting adults in private spaces ought not to be of concern to the state, while anticipating judges’ concerns that decriminalizing homosexuality would also license sex in public. Thus in one of the early court hearings (January 28, 2002) Grover asked that the word private be inserted in the final entreaty to the judge, “for a declaration that Section 377 of the Indian Penal Code, to the extent it is applicable to and penalizes sexual acts in private between consenting adults, is violative of Articles 14, 15, 19 (1)(a–d) and 21 of the Constitution of India.”

If the Naz Foundation intervention had to conform to law’s parameters, then it also had to be persuasive in the courts, resulting in a public health approach. Concurrent with the HIV/AIDS crisis and the unprecedented scrutiny on same-sex sexualities, the writ underscored the need to protect public interests by promoting, respecting, and protecting the human rights of the vulnerable, especially the gay/MSM communities, and effectively checking the spread of HIV/AIDS infections. Arguing that Section 377 drives same-sex sexual activity underground, it reasoned that the law not only imperils gay men and MSM but also jeopardizes the well-being of their wives and partners and, in turn, the public: “It is submitted that Section 377 serves as a serious impediment to successful public health interventions. Social non-acceptance of sexuality minorities denies them the liberty to court or have relationships openly, thus driving them underground, limiting their choice and restricting their freedom to have safe-sex; which thereby increases the spread of HIV/AIDS. Having been driven underground, safe sex campaigns aimed at the MSM and gay community are extremely difficult to implement.” Seeking to align the decriminalization of homosexuality with state interests, the writ gam-
bled that the courts and the government were much more likely to be sympathetic if the issues were framed by the epidemiology of HIV/AIDS. But it was a strategy not without consequences, for the writ implicitly yoked decriminalizing homosexuality to more effective governance; that is, narrowing Section 377 would allow the state to better regulate gay men and MSM in the interests of public health.

The language and the logic of the writ resonated in two broad ways among sexuality rights organizations and individuals in the years after it was filed in Delhi High Court: it helped amplify wide-ranging criticisms of Section 377, and the writ itself drew strong criticism. By 2005, when I met with individuals and organizational representatives across the five metropoles (Bangalore, Chennai, Kolkata, Mumbai, and New Delhi), the need to counter Section 377’s impact on consenting same-sex sexualities had crystallized. There was consensus on the material harm of Section 377 as well as its oppressive symbolism, for it was noted that the code is a barrier to the rights and recognition of same-sex sexual subjects insofar as it inherently criminalizes them. What also resonated was the Naz Foundation writ’s argument that as a colonial product of Christian morality, the antisodomy law is inconsistent with a more diverse and tolerant Indian cultural history. Similarly it was strongly believed that Section 377 has no place in a modern society that recognizes diversity, and the writ’s argument that the statute is at odds with international law (Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms), to which the Indian state is a signatory, was also echoed.

Another criticism of Section 377 emphasized its instrumentality to the state because it pitted sexual orientation against children’s rights, as noted by the representative of Haq: Center for Child’s Rights, based in New Delhi. Dr. Ramakrishnan, a member of the Chennai-based Solidarity and Action against the HIV Infection in India, observed that family members and acquaintances frequently cite Section 377 as justification for stigmatization, and others underscored that the law also accounts for discrimination in the workplace, housing, and other aspects of daily life. Even though it was acknowledged in the formal and informal discussions that Section 377 was not the only inspiration for homophobic practices, it was seen as an ongoing threat. Most compelling, Abha, a member of the Delhi-based group Jagori, underscored the fear among
minority sexualities simply because of the law, which is likely why the arrests in the city of Lucknow in 2001 were repeatedly cited in the interviews and discussions. Not surprisingly, then, the state’s arbitrary (mis) use of the law remained the most pressing point of concern among the supporters of the Naz Foundation legal challenge.

CONCERNS, CRITICISMS, AND QUESTIONS ABOUT ORIENTING TO THE STATE

Section 377 may have emerged as the lightning rod of institutionalized injustice following the arrests in Lucknow and the filing of the Naz Foundation writ, but building a campaign around it initially drew only equivocal support from sexuality rights–oriented organizations and individuals. The most incisive concerns hinged on the lack of a substantial critique of the state, as was captured by Pramada Menon, a feminist and queer-rights activist based in New Delhi, in her interview. Noting that laws are meant to uphold and not deny rights, she said, “We need to start questioning the state. Section 377 needed to be questioned, but we need to hold the state accountable. . . . The state needs to be accountable to us.” Advancing this line of thought, members of LABIA, an autonomous feminist group in Mumbai, asserted that decriminalizing homosexuality would not lessen the role of the state in regulating the lives of homosexuals but in fact give it greater reach and power.

Other critics honed in on the limitations of law as an instrument of social justice, echoing long-standing concerns of Srimati Basu, Nivedita Menon, and other feminists. Conveying their ambivalence in interviews and group discussions about the impact of law, these detractors wondered whether sexual and gender minorities would face less stigma and harshness at the more intimate level of the family even if homosexuality were to be decriminalized, a point that was also expressed among those who remained staunchly supportive of the Naz Foundation writ. For example, in their discussion group Naz Foundation outreach members hoped that undoing Section 377 would bring relief from police abuse but also noted that it was unlikely to mitigate the atrocities committed within the family. A representative of Jagori stated that Naz Foundation’s focus on decriminalization articulated what sexuality rights groups and organizations do not want rather than offering ways of lessening cultural and social homophobia that are not focused on the juridical aspects of the state.
The writ’s appeasement of the state in place of a fundamental rights-based challenge to Section 377 was a related worry articulated by feminist and sexuality rights–based groups. Early on, members of LABIA observed that a health-based approach does not sufficiently unsettle the structural and institutional underpinnings of heterosexism, and they questioned the lack of emphasis on a civil rights approach in the petition. Sharing these concerns, representatives of Saheli, a Delhi-based autonomous feminist group, noted that for all its strategic emphasis on public health, the writ would not be able to build an adequate case for the recognition of civil liberties and fundamental rights, the assurance of equal citizenship, and protection from discrimination. And, not least, critics accused the writ of placating the state by introducing the rider of privacy, essentially leaving sex in public to the harsh effects of Section 377 even though heterosexual activity in public carries a far lesser punishment. Their concern was that the writ ignored the implications of social class and feminist cautions that private zones, even the proverbially intimate bedroom, ought not to be inherently protected. The crucial distinctions between strategies that reinforce the power of the state and those that aim to undermine it were thus articulated in these initial criticisms of the Naz Foundation writ.

If Naz Foundation’s orientation to the state and law were points of contention, the organization’s single-handedness posed another problem. By working more or less independently, Naz Foundation had assumed the primary responsibility for reforming Section 377 and lost an opportunity to mobilize a social movement that could shift public awareness and the social climate in which courts work. Members of Saheli saw law not as a mechanism of social change but a platform to foster awareness and stage political protest, making Section 377 an avenue for disseminating information, bringing awareness, and altering social attitudes toward homosexuality and gender minorities. The concern was that, regardless of the legal outcome, the process by which the petition was filed would not enable a broader social movement that would be crucial for long-term gains for sexual minorities. For this reason, Deepti and Laxmi, representatives of Saheli, emphasized the differences between the ABVA and Naz Foundation writs: ABVA was a nonfunded group committed to forging coalitions and, in turn, a broader movement for sexuality rights that exceeded the decriminalization of sodomy.28

Another area of consideration, and a frequently mentioned point, was
the lack of consultation in the process leading up to Naz Foundation’s petitioning the Delhi High Court. Discussion participants described the process ABVA used as democratic and inclusive, for the group had led a demonstration against police harassment and torture of gays and lesbians and widely circulated a letter inviting participation and solidarity from a wide range of constituents, while in contrast Naz Foundation was criticized for operating autonomously and excluding constituencies outside of Delhi. This allegation was disputed by Rakesh, who identified three consultative meetings over the three-year period when the writ was being drafted, and a memorandum shows that one such meeting was held on May 16, 2000, by the Lawyers’ Collective and was attended by members of fifteen Delhi-based groups. Capturing the strategies and options discussed at the meeting, the memorandum recommended that the Lawyers’ Collective broaden the consultative process to include other cities and that the draft of the writ be circulated especially among groups working on sexual health issues, as a result of which two additional meetings were held outside of Delhi, in Bangalore (2000) and Mumbai (2001).

Seeing these efforts as mostly superficial and insufficient, many individuals and representatives of organizations continued to echo concerns about the single-handedness of an initiative of national relevance and great import, particularly if it were to result in an unfavorable judgment, jeopardizing a fresh challenge to the law for a significant length of time. Participants repeatedly criticized Naz Foundation for not making a greater effort to include other funded and nonfunded groups, inform them, and dialogue with them on issues of critical political importance to a wide range of groups and communities. Sappho, a support group for lesbian, bisexual, and transgender women in Kolkata, pointed out that they become aware of the Naz Foundation’s legal challenge to Section 377 well after the fact, for they had no knowledge about the petition prior to its filing, hearing only vague reports about its being under preparation. Others felt that no concerted attempts were made to address the concerns and questions that were raised about the petition that remained essentially limited to one organization and one city.

An informal coalition of lesbian, gay, bisexual, hijra, sexual rights, transgender rights, kothi, MSM, and HIV/AIDS groups circulated a letter registering their protest against Naz Foundation shortly after the peti-
tion was filed in Delhi High Court. Signed by thirteen groups based in Bangalore, Chennai, Hyderabad, Kolkata, Mumbai, and Pune, the letter faulted Naz Foundation and the Lawyers’ Collective for initiating a legal campaign without their involvement despite their long-standing work and commitment to the repeal of Section 377, registered their dissent against the legal challenge, and demanded copies of the writ petition and related documents, while urging a more inclusive tack. In his written response, Grover, lead counsel on the writ, stressed that the process had been open and inclusive and refuted charges that information had been withheld by the Lawyers’ Collective. Clarifying the distinction between a campaign and a writ petition challenging laws, he explained that, unlike processes for legislative amendments or the drafting of bills, the legal process cannot be open and exhaustively consultative, and he kept the focus on the law by inviting groups to support the Naz Foundation petition through formal interventions in the courts.

Most of the concerns and criticisms of the Naz Foundation writ stayed out of public view, with either strong or tacit support expressed in the media. Newspapers mostly published updates on the legal process in the months and first couple of years following the petition and interviews with Rakesh and others, alongside the usual fare of titillating stories on same-sex sexuality, including gay parties, discotheques, and “coming out” narratives, among others. Some sexuality rights activists wrote articles strongly supporting the decriminalization of homosexuality, even as others withheld public approval, a situation that changed dramatically with the government’s first response, filed in Delhi High Court in 2003. Press coverage of the struggle to decriminalize homosexuality exploded as a result, and the criticisms of the Naz Foundation writ gave way to a rallying cry for sexual justice from the state.

The Imperatives of Governing Sexuality: Legal Proceedings and the State’s Response

Between December 2001 and September 2004, the Naz Foundation writ was listed in the Delhi High Court fourteen times. However, while the court listings and orders issued are documented, court proceedings are typically not made available, unlike in U.S. courts, for example. Nothing substantial transpired on some of the dates when the writ was listed,
whereas other hearings were relevant and turned out to be decisive. On January 28, 2002, the Lawyers’ Collective informed the court about the pending ABVA petition, as a result of which the presiding justices ordered the two writs to be considered together, though it was later discovered that the ABVA writ had been previously dismissed.

Two interventions hostile to the Naz Foundation PIL were filed, the first on behalf of the organization Joint Action Counsel Kannur (JACK), which was founded by Puroshothanam Mulloli in the 1970s but came into public visibility in the aftermath of the HIV/AIDS crisis. Taking the position that HIV/AIDS was manufactured by multinationals to forge a single global economy, Mulloli and his partner, Anju Singh, were especially critical of Naz Foundation and the grounds on which they were challenging the constitutional validity of Section 377. Arguing that Naz Foundation could not seek to test the validity of the law without reporting any specific injury as an organization, the JACK affidavit questioned Naz Foundation’s locus standi to file a PIL, while making the farfetched claims that Naz Foundation is part of an international network of market forces using the decriminalization of homosexuality as an avenue for establishing and legalizing the sex industry. Suggesting that sexual acts between consenting adults “are not always natural, normal or permissible under the law” just because they are consensual, the affidavit ironically took the position that Section 377 was helping prevent the spread of HIV (even though JACK sees HIV as a corporate invention).

In one crucial moment, amid a series of uneventful hearings, the presiding judges ordered that the chief justice of the Delhi High Court should preside over subsequent hearings, which is why, after many twists and turns, the 2009 Delhi High Court decision was crafted partly by Chief Justice Shah. The more definitive moment in the Naz Foundation–led struggle against Section 377 finally came on September 6, 2003, when, after significant delay and repeated injunctions from the court, the government filed its response to the writ. As became evident over the next year, it had a polarizing effect: it swayed the first decision of the Delhi High Court, furnished in September 2004, against the Naz Foundation writ, while precipitating widespread support for the writ among sexuality rights groups and organizations throughout the country and consolidating a struggle against the state.
THE GOVERNMENT REPLIES

In a nutshell, the government’s response (Counter Affidavit on Behalf of Respondent No. 5 in the matter of Civil Writ Petition 7455/2001) did not support the Naz Foundation writ to modify Section 377. Early responses to the government’s reply dismissed it as homophobic and contradictory, if not, as some critics insisted, confused. For example, in his essay “Getting the State out of the Bedroom,” Rakesh Shukla argues that the response was on shaky legal grounds and lacked substantive arguments while buttressing social prejudice. Numerous other responses, published in English-language print media and posted in listservs, sought to systematically demolish the government’s reply, questioning its linking of homosexuality with crime and defense of sanctions against homosexuality on the grounds of Indian morality and culture. Though such criticisms are useful, they stop short of more complex and layered analyses of sexuality’s relevance to the state.

The government’s reply began by casting doubt on Naz Foundation’s locus standi on the grounds that only those whose rights are directly affected by the law can question its constitutionality. Arguing that consent is irrelevant to acts considered unlawful, it took the stance that “no person can license another to commit a crime.” Further, denying that there was evidence indicating acceptance of same-sex sexual practices in precolonial India, it claimed that social disapproval of homosexuality continued to be strong enough to warrant its criminalization. Citing the Law Commission of India’s 42nd Report as evidence, the government’s response noted that even if homosexuality was now tolerated in the United States and the United Kingdom, Section 377 reflects the prevailing values and mores of Indian society.

For all its defense of the imperative to criminalize homosexuality, the reply was also laced with conciliatory logic. Emphasizing that Section 377 is used mostly to punish child sexual abuse and to fill a lacuna in rape laws, it argued that Section 377 had been rarely used to penalize homosexuality, that the law was always applied to the particulars of a case, and that courts used contemporary meanings to consider whether an offense fell within the ambit of Section 377. Maintaining that the law was used only when a victim filed a complaint, it countered that for all practical purposes private consensual or homosexual activity was excluded from prosecution under Section 377, further foregrounding the ambivalent, inconsistent nature of the government’s reply. Closer investigation,
however, cautions against reading these apparent confusions as signs of either an incompetent state or the condescension of power and point instead to the subjectivities of state structures and procedures through which such statements are crafted.

SUBJECTIVITIES OF STATE MECHANISMS: MINISTRY OF HOME AFFAIRS
The Judicial Division of the Ministry of Home Affairs (or Home Ministry) oversees matters related to the Indian Penal Code or the Criminal Procedure Code whenever there is a question of amending or interpreting a law, which is why it also responds to writs like the one by Naz Foundation that challenge the constitutionality of a law and names the government of India among the defendants. Thus what is interpreted to be the government’s response or the state’s response is in fact the position of one division of one ministry, under the leadership of the home secretary and home minister. While the home minister is a political appointee of the government in power, bureaucrats staff the middle and upper layers of the Judicial Division of the Home Ministry, often for no more than one year.

It turns out that typically junior-level bureaucrats draft the government’s response after some discussion within the department; in this case a desk officer and a deputy secretary crafted the government’s writs, including the one filed in September 2003. The director and the joint secretary review the draft, making comments and notes. When the joint secretary considers it appropriate, the draft is shared with the home minister. The interviews with the directors of the Judicial Division and a joint secretary confirm that as bureaucrats in the hierarchy of the department review the response in the making, they will leave their notes and comments in the folder, and they can also record their dissent, if any, to aspects of the statement. The final approval of the response comes from the minister, who may ask for it to be significantly modified or even reversed.

Inconsistencies in the government’s reply are partly the result of subjective opinions on the challenge to Section 377 that prevailed in the Ministry of Home Affairs. My interviews with the two directors, the desk officer, and the deputy secretary at the Judicial Division confirmed that the decision to not support the Naz Foundation writ was endorsed by the home minister. However, as Director G. Venkatesh acknowledged,
all members of the unit did not share the view that homosexuality should be criminalized, but, as he put it, they were afraid to be seen promoting this view, even as he cautiously expressed his support for the decriminalization of homosexuality in our meeting. Likely, then, the seeming confusions and equivocations of the government’s reply were the product of the varying views of state bureaucrats and the political appointees who had input, and its unwieldiness was the result of successive edits, inflammatory comments, and caveats that worked nonetheless to preserve the state through its dominion over sexuality.

REGULATING SEXUALITY, PRESERVING THE STATE
Underpinning the assortment of excuses for why Section 377 should not be modified in the government’s affidavit were discourses of sexuality as an object of regulation and affirmations of the state as a crucial source of governance. The government’s reply was notable for the way it produced sexuality, for example when it incited the perils of sexual practices that could be unleashed by the overturning of Section 377:

A perusal of cases decided under Section 377 . . . shows that it has only been applied on the complaint of a victim and there are no instances of its being used arbitrarily or being applied to cases of assault where bodily harm is intended and/or caused and the deletion of the said section can well open flood gates of delinquent behavior and be misconstrued as providing unbridled licence for the same. Sections like Section 377 are intended to apply to situations not covered by other provisions of the Penal Code and there is neither occasion nor necessity for declaration of the said section unconstitutional [emphasis added].

It is unclear from the response why the deletion (or really, modification) of the statute would unleash the “flood gates of delinquent behavior” or be misconstrued as “providing unbridled licence,” but there is little ambiguity about the picture of sexuality’s excesses.

If the inflammatory language was used to invoke the dangers of sexuality, then upholding Section 377 was used to endorse the role of law and the state: “While the Government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large. If this is not observed, whatever little respect of law is left would disappear, as law would have lost its legitimacy.” In other words, law’s very legitimacy comes to rest on the
continued criminalization of homosexuality. The response repeatedly endorses the state’s role in protecting public safety, health, and morals.

The indispensability of the state in safeguarding against the ills of sexuality was reiterated more than once in my meetings with state officials, including another director of the Judicial Division, Kamala Bhasin, some two years after the government filed its reply. Since she had not been in this position for long, and in fact seemed to know little about the Naz Foundation writ, she turned to the folder in her possession—roughly four inches thick, green in color, and tied with a jute cord. Peering into the folder in the relative dark of her office as a result of the electric cuts on a hot summer afternoon, she said, “Internally, some felt that Indian society is laid back, resistant to change. Naz is asking for unnatural sex, promiscuity, and society is resisting. It is like sati; Indian society was resistant to change, and it would not have been abolished had the law not been changed. But unnatural sex is a reality; we cannot simply put it down. It’s very internal to human beings and will come up one way or another. But higher authorities felt that there is no demand in Indian society for change. Naz is only one organization, and change will lead to promiscuity. And society is not demanding change, society is not ready for it.”

That sex, particularly same-sex sexual practices, is a reality that cannot be repressed and therefore must be managed by law in the interests of a society unprepared for it was reiterated frequently. In another revealing moment, the more senior joint secretary of the Judicial Division had this to say when pressed on the matter of Section 377: “I will quote philosophy. In our thought, the sexual act should have dignity, elegance to it, should be between male and female, should go by the order of nature—in animals as well [we] see the same thing. Why should there be any deviation from the order? When the first Law Commission was formed in 1832, it was decided that unnatural sex should be an offense. But what is happening now is that human nature is volatile and wants to express all kinds of fantasies. The question is whether individuals should be allowed to fantasize at the cost of society.” The discursive productions of same-sex sexuality as unnatural, deviant, and volatile are notable in this response, as are the functions of law in protecting the natural and social order. Sexuality may be repeatedly invoked as an object of regulation but in ways that serve the imperatives of the state.
Shifting Landscapes: Gathering Mobilizations and Legal Wranglings

Exactly a year after the government’s reply, the first phase of the struggle to decriminalize homosexuality came to an abrupt end with the Delhi High Court ruling on September 2, 2004, dismissing the Naz Foundation writ. Echoing the government’s stance, the court turned it down on the grounds that Naz Foundation did not have the necessary locus standi. Choosing to not treat the Naz Foundation writ as a PIL, the justices of Delhi High Court brusquely wrote, “In this petition we find there is no cause of action as no prosecution is pending against the petitioner. Just for the sake of testing the legislation, a petition cannot be filed.”

Citing a 1972 decision, Vijay Kumar Mundra v. Union of India and Others, before the liberalization of PILs discussed earlier, the court took the position that Naz Foundation was not aggrieved by the law and dismissed the writ as merely an “academic challenge.”

The Delhi High Court ruling further galvanized the broad support for the Naz Foundation writ that had emerged in the aftermath of the government’s response. The government’s reply, its stance, inflammatory language, and seemingly confused reasoning had the unintended but useful effect of drawing the ire of sexuality-rights activists, including those who had previously expressed reservations about the writ. Although lending support to the writ and efforts to repeal Section 377 were not the same until then, the government’s reply helped turn them into common cause and ignited a struggle for justice that was subsequently waged on city streets, on the Internet and television, and in print media. Fueling this incipient legal-political mobilization, the Delhi High Court’s dismissal of the Naz Foundation PIL helped consolidate it into a national campaign and solidify opposition to the state.

Once the Lawyers’ Collective appeal (Review Petition 384 of 2004) to the Delhi High Court ruling was rejected on November 3, 2004, national consultation meetings were organized to collectively strategize on the next steps. Deliberations about strategy had already started to take place informally among activists and on Internet-based discussion groups, especially LGBT-India@yahoo.com, as well as formally in meetings in Delhi (September 13 and 16, 2003) and Mumbai (September 28, 2003). In sharp contrast to the circumstances in which the Naz Foundation writ was first filed, the Lawyers’ Collective organized consultative meetings
in Mumbai (March 10, 2004) and Bangalore (June 13, 2004), wherein a broad range of constituencies considered ways of shoring up the legal challenge by demonstrating to the Delhi High Court that the Naz Foundation writ was widely supported and documenting the harmful impact of Section 377 on gender and sexual minorities. Although all of this was preempted by the Delhi High Court’s dismissal of the writ, these forums facilitated a process of collective decision making about whether the court’s ruling ought to be appealed in the Supreme Court, not least because, as Vivek Diwan of the Lawyers’ Collective suggested, the Naz Foundation writ entailed questions of fundamental rights.50

However, the decision to seek recourse from the apex court was neither inevitable nor without risks and was the result of three meetings consecutively organized in Mumbai (October 24, 2004), Bangalore (December 12–13, 2004), and then again in Mumbai (January 9, 2005).51 At the first meeting three main options were identified in anticipation of the Delhi High Court’s rejection of the appeal to reconsider its dismissal of the writ and then subsequently deliberated upon: (1) to not pursue the case any further, (2) to ask the Supreme Court to direct the Delhi High Court to reconsider its decision on the mere technicality of locus standi, and (3) to file writs against Section 377 in other high courts.52

The first alternative, to drop the case, which was seen as equivalent to doing nothing, was never seriously discussed, and while the third possibility, to file new writs in other high courts, was considered, the discussion came to rest primarily on the second and most viable option: to file what is known as a special leave petition (SLP) to appeal the court’s ruling in the Supreme Court.53 This was not without significant risk, for had the apex court rejected the SLP, it would have effectively ended the legal campaign to decriminalize homosexuality for the foreseeable future. A second and equally significant risk was that the Supreme Court would deliver a binding judgment on the merits of the Naz Foundation writ, thereby bringing the entire legal process to a definitive end. While some contributors at the second Mumbai meeting supported the proposal, others were strongly opposed due to the risks of an adverse judgment from the apex court. Even though no vote was taken, support was overwhelmingly in favor of filing an appeal in the Supreme Court, and since such appeals need to be submitted within ninety days of the high court’s ruling, the Lawyers’ Collective entered a petition on February 17, 2005.54
The Supreme Court Steps In

Following legal procedures, the Lawyers’ Collective filed an appeal (SLP, Civil, No: 7217–7218 of 2005) with the Supreme Court of India, challenging the high court’s 2004 dismissal of the Naz Foundation writ. A relatively brief document, the Naz Foundation SLP highlighted two questions for the apex court’s consideration: whether the Delhi High Court was right to dismiss the Naz Foundation writ on the grounds that it was not personally aggrieved and whether the constitutionality of Section 377 is merely academic, especially given its salience to MSM and, in turn, public health. Put differently, the appeal to the Supreme Court hinged on the arguments that the Naz Foundation writ should be legitimately seen as a PIL and that Naz Foundation had the locus standi to file such a constitutional challenge. Countering the Delhi High Court’s reliance on a 1972 decision (Vijay Kumar Mundhra v. Union of India) to reject the Naz Foundation writ as a PIL, the SLP specified that the ruling decision occurred prior to the liberalization of PILs and cited later higher court decisions to argue that courts have allowed organizations to intervene, especially when socially or economically disadvantaged groups, such as MSM, cannot move the courts on their own behalf.

On the related argument of locus standi, the SLP underscored Naz Foundation’s history and orientation as an organization and its bona fide interest in the constitutionality of Section 377 given the law’s impact on its HIV/AIDS-related work and outreach among sexual minorities vulnerable to the law. Citing a series of such decisions from the higher courts, the SLP emphasized instances when individuals and organizations not personally affected may challenge constitutional violations; for example the Supreme Court allowed a public interest group, People’s Union for Civil Liberties, to challenge the constitutional validity of the Prevention of Terrorism Act of 2002. Arguing that the lower court had dismissed the Naz Foundation PIL on a mere technicality, the SLP asked the justices simply to “remand the matter back to the Hon’ble Delhi High Court and direct it to hear the matter on merits.”

As a respondent, the government was required to file a reply to the Naz Foundation appeal. Compared to its earlier delays and equivocations, the reaction was swifter and more combative. Reiterating its stance that the Naz Foundation writ could not be seen as a PIL, it argued that the Delhi High Court was indeed right in dismissing the writ as merely aca-
demic, for no specific evidence had been offered to support the claims that the criminalization of homosexuality was hampering the organization’s work and that third parties, such as Naz Foundation, could not invoke the courts to enforce the fundamental rights of the accused in matters pertaining to criminal law. Upholding the state’s obligation to regulate sexuality, this round of the government’s reply noted, “Even if it is assumed that the rights of sexual minorities emanate from a perceived right to privacy, it is submitted that the right to privacy cannot be extended to defeat public morality, which must prevail over the exercise of any private right.”

Departing from its 2003 iteration in the high court, the government’s reply in the Supreme Court sought to reassert the imperatives of governing sexuality by limiting the role of the judiciary. Taking the stance that courts have no jurisdiction over prohibited acts, it argued, “It is essentially a matter of legislative policy and there are no judicially manageable standards by which to assess as to whether a particular act should be made an offence or not.” Seeking to safeguard institutional reach over sexuality, the government’s statement threw into question the right of the judiciary to review and decide whether particular acts should constitute offenses. Invoking the recommendations of the 172nd Law Commission to widen the scope of the rape laws, make them gender-neutral, and delete Section 377, the response argued that any changes to Section 377 ought to be directed by the legislature and not by a judiciary acting beyond the scope of its authority, thereby protecting the domain of the state.

As it turned out, the Supreme Court justices did not agree with the government’s statement, and a year later the justices ruled in favor of the appeal, instructing the Delhi High Court to reconsider the Naz Foundation writ on its merits. In a succinct order passed on February 3, 2006, the justices wrote:

The challenge in the writ petition before the High Court was to the constitutional validity of Section 377 of the Indian Penal Code, 1860. The High Court, without examining that issue, dismissed the writ petition by the impugned order observing that there is no case of action in favour of the appellant as the petition cannot be filed to test the validity of the Legislation and, therefore, it cannot be entertained to examine the academic challenge to the constitutionality of the provision.
We are, however, not examining the issue on merits but are of the view that the matter does require consideration and is not of a nature which could have been dismissed on the ground afore-stated. In this view, we set aside the impugned judgment and order of the High Court and remit Writ Petition (C) No. 7455 of 2001 for its fresh decision by the High Court.61

Directing the Delhi High Court to reconsider the Naz Foundation writ, the Supreme Court justices also invited the general public to weigh in on the possibility of decriminalizing homosexuality.

Provisional Thoughts on an Unfolding History

By challenging Section 377 in the Delhi High Court, the Naz Foundation writ furthered what had been set in motion by ABVA. Despite their differences and the less than enthusiastic support for the Naz Foundation pleas, the two writs shared a focus on HIV/AIDS and the demand to decriminalize homosexuality. Yet the Naz Foundation legal challenge made far more headway than ABVA’s due to changes in the broader cultural context—public health concerns about HIV/AIDS, greater state scrutiny of sexual and gender minorities, but also increasing visibility as a result of English-language media, including film, television, and print media—to say nothing of differences in access to resources. Unlike ABVA, an autonomous nonfunded group, Naz Foundation and the Lawyers’ Collective had access to external funding for legal advocacy, which allowed them to pursue a long legal process.

Naz Foundation did not pursue broad-based endorsement but proceeded single-handedly on a matter of collective significance and social justice for sexual minorities. Most cogently articulated by autonomous feminist-oriented organizations, these criticisms echoed Nivedita Menon’s insight that renouncing law may not be an option, but it diverts ethical and emancipatory impulses.62 Resonating with Srimati Basu’s caution that the turn to law can have both uncertain and mixed results, critics of the Naz Foundation writ petition saw law, at best, as a tool to foster public awareness of social injustices and mount political campaigns.63 Shaleen Rakesh, the initial Naz Foundation representative to the Delhi High Court, noted that political mobilization had always been a component of the strategy regardless of the legal outcome, but it could
not be realized initially as a result of the exclusion of constituencies in and outside of Delhi.  

Even as the Naz Foundation plea sought to move the courts, its critical impulses were already blunted, to paraphrase Derrida, by having to subject itself to the very force of law. In the legal struggle against the anti-sodomy statute, the state became an icon of power’s egregiousness (as well as beneficence) that, ironically, structured the contestation itself. Amplifying anxieties swirling around law, the Naz Foundation strategy reinforced the view that Section 377 was the primary instrument of the state’s symbolic and material persecution of the homosexual as sodomite. Ignoring the more complex histories and possibilities related to the exercise of the law, and the possibilities that same-sex sexualities are not the only ones impacted by it, Section 377 was made to carry the weight of showing how same-sex sexualities are unfairly targeted. Unable to mount an offensive deriving from the ensemble of laws, practices, policies, and discourses—vagrancy laws, policies against sex work, views of hijras as criminals, among others—through which sexual and gender minorities bear the brunt of governance, the initiative was beholden to procedural constraints and strategies that would likely have a successful outcome.

Arguing that the state has no compelling interest in criminalizing consensual same-sex sexual activity among adults in private, the Naz Foundation petition relied on the HIV/AIDS crisis and individual and public health concerns to be persuasive to the court. In effect the writ took the position that it would be in the collective interest to stop the spread of HIV/AIDS by decriminalizing homosexuality, and that it would make for more effective governance. Further, the process of filing the writ prevented Naz Foundation from rallying other constituents into a collective struggle, but it also had to avoid being seen as politicizing the challenge against Section 377, for that would have prejudiced the judges against the merits of the plea.

Naz Foundation’s interpellation of state agencies and institutions triggered affirmations of the state and its reach over the perils inherent to sexuality. A closer look at the specifics of the government’s first substantial writ in the Delhi High Court and the mechanisms through which it was developed by the Judicial Division of the Home Ministry offers a fuller view of the subjectivities that color what Sudipta Kaviraj has aptly called “the state of great reach.” It invites a fresh understand-
ing of the ways both of the government’s replies—the one submitted to the Delhi High Court in 2003 and the one submitted to the apex court in 2005—produced sexuality as essentially disorderly and given to excess in ways that require the tempering effects of the state on behalf of the public.

But such positions, as well as the Delhi High Court’s dismissal of the Naz Foundation writ in 2004, also had the unintended effect of rendering the antisodomy law the flashpoint for a national legal and political countercampaign. The early reservations of several sexuality rights–groups based in Bangalore, Chennai, Mumbai, and New Delhi against the Naz Foundation petition gave way to a collective struggle to decriminalize homosexuality as a sign of social justice for sexual and gender minorities. Inasmuch as there appeared to be little choice but to rally behind the Naz Foundation–led pivot to the state, Section 377 also became a platform from which to influence public attitudes and launch awareness regarding same-sex sexualities. It was at this moment that the National Coalition of Sexuality Rights formed in Bangalore, and Voices against Section 377, the coalition that was to impact the next phase of the struggle to decriminalize homosexuality, emerged in Delhi.