Sexual States

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Sometimes one needs to write pieces while breaking down into tears. That is the only way we can stay true to the fact that words are not enough to express our anguish and our disbelief but also our strength.

With these wrenching words, Ponni gave expression to the dismay and distress brought on by the Supreme Court judgment issued on December 11, 2013, effectively recriminalizing same-sex sexual activity. Issued in response to petitions by a ragtag group of individuals and groups, the apex court’s ruling was all the more jarring and unexpected, overturning as it did the historic 2009 Delhi High Court decision decriminalizing homosexuality. Although the previously named respondents, especially the government of India and regional and national state units, did not appeal the Delhi High Court ruling in favor of Naz Foundation, in an oddity of the Indian legal system the highest court allowed other opponents to intervene in the legal process, then, implicitly siding with them, it undercut the bid to undo the antisodomy law.

Through a lens sensitive to states’ subjectivities, this chapter explores the contrasts between the two court rulings; they could not have been sharper, and not only in terms of their outcomes. While biases appear in both documents, the Supreme Court ruling is overtly skewed in terms of justices’ affect and prejudices, and whereas the 2009 Delhi High Court decision is carefully crafted and extends constitutional rights to sexual and gender minorities, the Supreme Court version is sloppy, perhaps
hastily written, and inconsistent in its legal reasoning.² Probing these differences from the perspective of sexuality’s constitutive effects reveals the significant way in which the two judgments diverge: even as the Delhi High Court verdict sought to mitigate the power of the state, the highest court endeavored to safeguard state institutions and even expand governance through the regulation of sexuality.

Comparing the two texts also leads to the surprising insight that these are conflicting reactions to the imperatives of sexuality, state, and governance in postliberalized India. Building on critical commentaries on the extant sociopolitical context, this chapter considers the ways neoliberal modalities helped imagine a reduced role of the state and advance an individualized, assimilationist, and transnational rights regime, as such enabling the Delhi High Court’s decision to overturn the antisodomy law. Parsing the historic as well as flawed aspects of the judgment, I investigate the cornerstones of the first ruling, namely principles of privacy, equality, and constitutional morality, from the angle of the complexities of governance and the antisodomy law developed in the preceding chapters; Section 377 is not the only law governing homosexuality, and same-sex sexualities are not the only ones affected by it. The Supreme Court 2013 pronouncement was also shaped by the imperatives of postliberalization. Considering the justices’ views on the need to uphold the antisodomy law in a context of rapid social change, I show that reaffirming the state and prolonging governance through legislative intrusions seems more important than ever before.

Delving into the second phase of the struggle to decriminalize homosexuality, in 2006–13, this chapter picks up the threads after the Supreme Court’s 2006 directive returned the Naz Foundation writ to the Delhi High Court, instructing it to reassess the plea on its merits. Setting the stage for the 2009 Delhi High Court decision decriminalizing homosexuality, the discussion highlights the influential impact of Voices against Section 377, a coalition of Delhi-based groups that emerged in 2004 following the government’s inflammatory legal reply filed in the Delhi High Court.³ Juxtaposing the two legal texts, I account for how they could offer substantially different visions of the intersections of sexuality, state, and nation before going on to place them within the postliberalization context and analyze their limitations.
The Delhi High Court Redux

Much changed after the Supreme Court’s 2006 injunction to the Delhi High Court to reconsider the Naz Foundation writ on the basis of its merits; the struggle morphed from a legal initiative led primarily by a single organization to nationally coordinated political campaigns to decriminalize homosexuality. Taking their measure, Sophia, a member of several Delhi-based groups—CREA, Anjuman, Nigah, and Voices against Section 377—expressed her enthusiasm at the broad-based coalition against Section 377, while anticipating its regrettable fragmentation after the decriminalization of homosexuality. Among the coalitions to emerge was the Million Voices Campaign, aimed at documenting sexual diversity as well as opposition to Section 377 on pieces of cloth to be quilted together. In the city of Bangaluru, the sexuality rights organization Sangama coordinated the National Campaign for Sexuality Rights to forge a coalition of more than fifty organizations united against Section 377.

Mumbai-based organizations, including HumSafar Trust and LABIA, came together on August 16, 2005, following India’s fifty-eighth Independence Day to inform and educate the public about Section 377. Underlying the numerous coalitions, public demonstrations and rallies, open letters to officials, articles, press releases, and interviews were two interrelated legal-political strategies. Section 377 and the Naz Foundation writ were being used as platforms to inform and change public discourse on same-sex sexualities regardless of the eventual legal outcome, a process that was facilitated by the English-language media. Until 2003 efforts to decriminalize homosexuality mostly occurred outside the media, but this changed dramatically after the government’s reply became public; then the legal process began to be routinely reported, along with articles intended to have an informative bent, even if that wasn’t always apparent to the critical eye. Proliferating images of sexual and gender minorities at queer pride parades that were becoming an annual feature around the country, the media helped shape a climate in which homosexuality was a part of public discourse that exceeded a focus on HIV/AIDS. Furthermore, since the Delhi High Court justices had partly dismissed the Naz Foundation writ in 2004 due to lack of evidence of public opinion favoring the decriminalization of homosexuality, the other priority was to showcase the widespread support in favor of modifying Section 377. These efforts resulted in numerous public demon-
strations organized in cities around the country, as well as a friendly intervention filed by the Delhi-based coalition Voices against Section 377, which provided the scaffolding for the momentous ruling Naz Foundation v. Government of NCT of Delhi and Others.

**THE INTERMEDIARY: VOICES AGAINST SECTION 377**

Drafted by the Bangalore-based Alternate Law Forum, Voices against Section 377 (hereafter Voices) filed an intervention supporting the Naz Foundation writ in November 2006 and was represented in the Delhi High Court by the lawyers Shyam Divan, Arvind Narrain, and others. Although the Voices petition paralleled Naz Foundation’s constitutional challenge to Section 377—for violating the fundamental rights to equality, freedom of expression, dignity, privacy, and liberty—it also exceeded the scope of the earlier writ in ways that reverberated powerfully in the 2009 Delhi High Court judgment. Making the Voices plea distinctive was the fact that it was filed on behalf of a coalition that cut across homosexual and heterosexual lines, giving it broader legitimacy. Demonstrating a range of activities, expertise, and experience related to LGBT issues and more, including combating violence and discrimination, child rights, and sexual education, it positioned the coalition as “represent[ing] a substantive body of public opinion which favours the decriminalization of consensual homosexual sex between adults.”

Unlike the Naz Foundation’s strategic emphasis on public health and effective governance, Voices provided the Delhi High Court with a twofold conceptual critique of Section 377. First, the Voices writ argued that the law impacted all adults, regardless of their sexual orientation, but affected sexual minorities in particular by being the cause of brutal human rights violations, an obstacle to equal citizenship for a significant section of the population, and an impediment to the self-worth of those persons who identify as LGBT. Emphasizing Section 377’s hindrances to self-expression and personhood, the Voices writ stated:

> The history of violation and abuse . . . has as its locus the virulent homophobia sanctioned by Sec 377. The harm inflicted by a provision such as Sec 377 . . . radiates out and affects the very personhood of
LGBT people. Sexuality is an aspect of the human personality, which lies at the core of the individual. In the social climate fostered by Sec 377 it becomes difficult, if not impossible, to publicly own and express one’s sexuality thereby silencing a core aspect of one’s personhood. Sec 377 by its very existence chills the expression of one’s sexuality and its presence directly relates to the sense of self, psychological well-being and self-esteem of LGBT persons. There are numerous psychological ill effects suffered by LGBT persons in India due to the extremely adverse social climate fostered by Sec 377.11

The Voices petition detailed the physical and psychological harm that resulted from Section 377, but more compellingly noted Section 377’s stifling of a minority and marginalized group’s expression. Drawing attention to the intangible but no less significant harm caused by silencing a core aspect of personhood, the writ further argued, “Sec. 377 . . . , which criminalizes and stigmatizes homosexuality renders LGBT persons invisible and silences them. It therefore acts as a structural limit that does not allow for the possibility of freely exercising one’s rights of freedom of speech and expression.”12

This scathing assessment of Section 377 was carefully supported with evidence of injury to sexual and gender minorities, which turned out to be most persuasive to the justices issuing the 2009 Delhi High Court verdict. Naz Foundation v. Government of NCT of Delhi and Others reproduced in detail instances of harm cited in the Voices writ, for example, the arbitrary arrest of outreach workers from Bharosa Trust in 2001 under Section 377 and in 2006 the unjust use of Section 377 in Bangalore to arrest four hijras even though they had committed no offence, as well as other examples of sexual violence against hijras, gay men, and lesbians.13 The Naz Foundation petition had underlined the risks posed by Section 377 to all LGBT persons, keeping the emphasis on the violence experienced by MSM, but submitted little by way of supporting evidence. By calling attention to specific examples of sexual, physical, psychological, and emotional violence experienced by these groups, the Voices intervention offered a more evidentiary critique while also arguing that all LGBT persons are at potential risk due to Section 377, a point the justices affirmed in Naz Foundation v. Government of NCT of Delhi and Others.

Second, the Voices writ presented the court with a critique of state governance. Notwithstanding the paradox of seeking intervention from
one arm of the state to limit another, it introduced the principle of constitutional morality to argue that the state did not have a compelling interest to abridge same-sex sexualities’ constitutional rights to privacy, dignity, and autonomy. Constitutional morality was used to counter positions that homosexuality ought not to be decriminalized due to prevailing (notions of) public morality. At the same time, the petition showed that public opinion on homosexuality and indeed Indian culture itself was plural and dynamic; it cited changing attitudes and queer cultural traditions, such as the Aligal Thiruvizha festival derived from the Hindu epic Mahabharata and held annually in the southern state of Tamil Nadu, offering the Delhi High Court more ammunition to rule in favor of the Naz Foundation writ.

The gist of the Voices intervention lay in drawing parallels between the criminalization of same-sex sexualities and untouchability, caste discrimination, sati, and child marriage—all practices that have seen significant change in public opinion as a result of legislative intervention. By creating equivalences between gender and sexual minorities and those who have long been recognized by the courts as vulnerable—Dalits and other subjects of caste discrimination, widows, and others—it urged the justices to see same-sex sexualities as a minority in need of legislative protections by extending to them the rights to equality and prohibition from discrimination alongside the principles of privacy and constitutional morality. Together these rights and principles became the cornerstones of Naz Foundation v. Government of NCT of Delhi and Others and its litmus test.14

Divergent Outcomes: From Delhi High Court to the Supreme Court

Recalling the decisive moment on July 2, 2009, in the Delhi High Court when the justices decriminalized homosexuality, the emotional words of the scholar and activist Gautam Bhan evoked the profundity and power of the Naz v. Government of NCT of Delhi and Others ruling from the perspective of those most involved in the struggle against Section 377 and most impacted by it:

Court one, item one on the Delhi High Court’s cause list. Ten thirty in the morning on the 2nd of July. A high court pass secured by a few dozen activists each of whom was remembering moments from the
last decade of fighting Sec 377. It is these simple words and an electronic pass receipt that a movement lasting decades and a legal battle lasting eight years came down to. In the end, it was enough. When the judgment was read, you could feel the emotion in the room. Our tears flowed not just because we had “won.” They came for the judgment that had set us free.\textsuperscript{15}

Anticipation and optimism had been building for months and weeks even as many braced for an unfavorable outcome. On the day before the decision, Atul’s excitement was palpable as he ended his email post, “Best of luck to all of us ‘queers,’ ‘faggots’ and ‘dykes.’”\textsuperscript{16} As the decision reverberated beyond the courtroom, the shock of relief gave way to joy and bursts of emotion among untold supporters within and outside of India, and images, interviews, editorials spread quickly, keeping the verdict in the print and digital media well after it was no longer front-page news.\textsuperscript{17}

\textit{Naz v. Government} was an extraordinary ruling. Issued by Chief Justice A. P. Shah and Justice S. Muralidhar, the judgment was crafted with the care and conscientiousness due a public document likely to set a precedent and is impressive not only for rupturing the legal discourse on homosexuality by modifying the 150-year-old colonial law but also for its substantive and detailed arguments. Despite favorable outcomes, judgments have been known to be deeply flawed and problematic in their reasoning, as feminist scholars have underscored, but \textit{Naz v. Government} stands apart due to its principled reasoning.\textsuperscript{18} Although Naz Foundation had petitioned the court to narrow Section 377, the court took the more radical stance of declaring it to be constitutionally invalid and reached beyond the writ’s emphasis on public health and more efficient governance to reframe health as a right with freedoms and entitlements.\textsuperscript{19}

The \textit{Naz v. Government} ruling exceeded the Naz Foundation writ in large part due to the Voices intervention. This is not to suggest that the justices might have ruled against the Naz Foundation writ or not so unequivocally promoted the principles of equality and inclusiveness without the intervention of Voices, for that is a matter of speculation. Rather what is evident is that the Voices writ, as well as the legal counsel’s arguments, persuaded the justices of the law’s harmful effects on LGBT persons and provided the language and the tools with which to take a principled stance against it. The range of materials and references introduced by
Voices during the court proceedings—for example, the Yogyakarta Principles and case law from Fiji, Nepal, and the United States—gave heft to the ruling as it decriminalized private, consensual adult same-sex sexual activity and brought sexual minorities for the first time within the fold of constitutional rights and protections.\(^20\)

*Naz v. Government*’s triumph lies in its spirited emphasis on Articles 21 (protection of life and personal liberty), 14 (equality before the law), and 15 (prohibition of discrimination) and the accent on the principle of constitutional morality as the only litmus test of compelling state interest. Linking personal liberty to the elusive but important concept of dignity, the judges emphasized that the constitutional provision means acknowledging “the value and worth of all individuals as members of our society.” Making the verdict truly unprecedented was their position that sexual orientation falls within the ambit of the private space of personhood. Potentially impacting not just sexual minorities but all manner of sexual orientations, sexual choice, and activity, they reason, “it [the constitutional protection of dignity] recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of dignity is the autonomy of private will and a person’s freedom of choice or action.”\(^21\)

A related aspect of the ruling’s significance was its creation of a legal standard for recognizing same-sex sexualities under Article 15 of the Constitution, which prohibits discrimination based on religion, race, caste, sex, or place of birth. Setting a precedent, the justices wrote, “The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning ‘normal’ or ‘natural’ gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex.”\(^22\) The protection against discrimination shields individuals against abuses by the state and, as Arvind Narrain and Marcus Eldridge clarify, also from discrimination by another citizen, making it incumbent upon the police, for example, to intervene in such instances.\(^23\)

Not least, the opinion affirmed judicial responsibility to uphold the principle of constitutional morality in order to protect the rights of sexual and gender minorities, regardless of public opinion. Taking a firm stance against the government’s position challenging judicial authority, the justices argued that the “role of the judiciary can be described as
one of protecting the counter majoritarian safeguards enumerated in the Constitution.” Although they conceded that courts would normally defer to the legislature while conducting a judicial review of law, the justices endorsed that courts ought to exercise sovereign jurisdiction when matters of constitutional importance are involved, such as constitutionally entrenched human rights. Since rights fundamental to an individual’s humanity—namely the right to personal liberty and equality—were at risk, they endeavored to safeguard them: “The role of the judiciary is to protect the fundamental rights. A modern democracy, while based on the principle of majority rule, implicitly recognizes the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view. It is the job of the judiciary to balance the principles ensuring that the government on the basis of number does not override fundamental rights.”

Taken together, these cornerstones of the Naz v. Government ruling vindicated an eight-year legal struggle for sexual justice that may have pivoted toward the state but had spilled onto the streets and into the media. The verdict helped brush aside any remaining differences and disagreements among the various sexuality rights constituencies and was collectively embraced as a monumental victory, inspiring numerous celebrations, commentaries, and efforts to inform and educate about its implications.

The enthusiasm, though, gradually eroded in the following months due to reports of continued abuses toward sexual and gender minorities within and beyond the jurisdiction of the Delhi High Court and the realities of law’s disconnect from social life that surfaced with the much publicized suicide of Dr. Siras, a language professor at the premier Aligarh Muslim University, who was targeted due to his sexual orientation. Emerging criticisms and concerns about the limited implications of the Delhi High Court decree soon gave way to fresh apprehensions that it might well be overturned as numerous appellants sought legal redress from the Supreme Court, ironically remaking Naz Foundation from a plaintiff to a defendant. Finally, when the Supreme Court verdict was delivered, and despite the tenor of the hearings that had fueled anxieties about an unfavorable outcome, it still came as a tremendous and unexpected blow.
THE SUPREME COURT, 2013

Ominously describing the last official act of a retiring Supreme Court judge, Vikram Raghavan offers an inside view of the hours before Suresh Kumar Koushal and Another v. Naz Foundation and Others was delivered on December 11, 2013, upholding the validity of Section 377: “On Wednesday morning, Justice Ganpat Singh Singhvi donned his black robes one last time. The judge with a smiling face had a busy day ahead of him. After hearing several cases, he would attend a late-afternoon retirement party on the Supreme Court’s lawns. But Singhvi’s first appointment was in the Chief Justice’s Court. Retiring judges spend their final day in that majestic chamber. There, a large crowd eagerly awaited Singhvi. They had gathered to hear his widely anticipated last judgment.”

Dashing the hopes and aspirations of sexuality rights activists and a legion of supporters, Koushal v. Naz was shocking not just because of the Delhi High Court’s earlier ruling decriminalizing homosexuality but also because of the considerably greater visibility of sexual and gender minorities at regional and national levels in the preceding years. Speaking amid the firestorm of anger, protest, and dissent contrasting sharply with the celebrations and sentiments following the lower court’s overturning of Section 377, Gautam Bhan said, “We are quite stunned. We didn’t expect this. Every trend—in everyday life, in court and jurisprudence—was pointing in the opposite direction.”

Koushal v. Naz was delivered in response to special leave petitions, much like the one Naz Foundation filed in 2005, asking the Supreme Court to reconsider the lower court’s decriminalization of homosexuality. Notably the appeals did not come from the government or the regional and national state agencies that were the focus of the original Naz Foundation writ but from a motley collection of individuals and organizations, such as Suresh Kumar Koushal, Krantikati Manuvadi Morcha Party, Utkal Christian Council, and the All India Muslim Personal Law Board. With the exception of two opponents, B. P. Singhal and JACK, these had not been part of the legal process thus far. Although the justices also entertained fresh interventions in favor of decriminalization—Voices against Section 377, Nivedita Menon and a number of other academics, and parents of LGBT children, among others—they did so without placing the burden on appellants to explain why the Supreme Court should accept pleas interfering in the lower court’s judgment or how they were affected by it.
In direct contrast to Naz v. Government’s accent on judicial obligations to protect the rights of minorities, the principle driving the Supreme Court judgment was judicial restraint, leading to its arguable conclusion that the lower court had wrongly exceeded its jurisdiction by decriminalizing homosexuality. Confirming that courts have an absolute right to review legislation, the verdict nonetheless argued that justices should declare laws unconstitutional or narrow them only in rare cases: “The Courts should accept an interpretation of constitutionality rather than one that would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the Courts.” Such an interpretation may be judicial prerogative, notwithstanding critics’ point that the case law cited in Koushal v. Naz does not actually support its arguments, but what needs to be accounted for is why the ruling seems so intent on castigating the Delhi High Court justices and defending the criminalization of homosexuality.

The apex court’s opinion found fault with Naz v. Government on the grounds that the Naz Foundation writ had not provided factual evidence supporting its constitutional challenge or its argument that Section 377 permits state-based discrimination of sexual minorities. This position could be reached only by purposefully ignoring the substantial evidence first submitted by Voices in 2006 and added to by others during the Supreme Court proceedings. Drawing a false comparison of numbers—that sexual minorities are but a “minuscule fraction” of the population and relatively few cases have been prosecuted under Section 377 over a 150-year period—the justices used biopolitical logic to refute the interpretation that it violates Articles 14, 15, and 21. Whereas the Delhi High Court ruling implied that the law’s small archive was a reason to undo a little-used statute and uphold the constitutional rights of sexual minorities, the Supreme Court justices used it to dismiss sexual minorities as too few to warrant protections (!) and ignored the law’s wider potential impact across sexual orientations.

That Koushal v. Naz is a decree in search of arguments is perhaps nowhere more evident than in the discussion on Article 21, where it purports to take up the issue of rights to privacy, dignity, bodily integrity, and sexual choice, but in ways that are left unreconciled (or could even be understood as favoring the decriminalization of homosexuality). Quoting extensively from legal cases that confirm these fundamental rights, the judgment merely juxtaposes several citations, for example, one argu-
ing that compelling state interest abridges women’s right to terminate a pregnancy with another unequivocally confirming the right to live with dignity, without offering any interpretation or reasoning of how *Naz v. Government* is on the wrong side of these precedents. But then, abruptly noting that police may misuse Section 377 to harass, blackmail, and torture, and diverging sharply from the Delhi High Court’s interpretations, it infers that the problem does not lie with the law itself.

*Koushal v. Naz* has invited much criticism not just because of the outcome but because its shoddiness and biases mark the tone and texture of this almost hundred-page text, belying law’s putative objectivity. As legal scholars have usefully noted, the ruling has factual errors, quotes with missing legal citations, and several inconsistencies between how legal precedents are used even though their outcomes do not actually support the justices’ interpretations.30 These subjectivities also organize the structure, arguments, and language of the opinion in ways that were anticipated by the hearings, for in contrast to the unofficial transcripts of the Delhi High Court hearings (September–November 2008), the notes for the *Koushal v. Naz* proceedings (February–March 2012) frequently include observations on the odd nature of the justices’ questions and affect.31 These differences are the result of the sometimes overtly and sometimes implicitly editorial nature of the unofficial transcripts available for both hearings, but they also speak to the peculiarities of how the Supreme Court justices sought to educate themselves about homosexuality, the scope of the antisodomy law, and the differences between abnormal and unnatural sex. Further, it is not that the *Naz v. Government* transcripts do not record the justices’ affect—their frustrations with the various parties, their personal opinions—but where those hearings are primarily focused on the histories, complexities, and nuances of the antisodomy law and the arguments pertaining to it, the Supreme Court proceedings lead a note-taker to write, “The justices are starting to enjoy the case. Ok, perhaps that’s not a respectful way of putting it, but there’s definitely a sense from today’s report that they are getting interested in the issue and also intrigued by some of the more bizarre aspects of S.377.”32

Almost half of *Koushal v. Naz* is devoted to reviewing the appeals and positions of the various litigating parties, but its more substantial discussion begins with an overview of the relevant sections of the penal code. In an odd move, the judgment juxtaposes the now amended Sections
375 and 376 with the antisodomy law, while failing to address how this law is no longer necessary to prosecute aggravated sexual assault that exceeds the scope of rape. (Also completely neglected is any mention of the provisions specifically addressing sexual violence against children, passed only months before, that further reduce the onus on the law.)

More peculiarly it sees fit to introduce Black's Law Dictionary definitions of buggery, carnal, carnal knowledge, and nature that, along with a cursory and incomplete review of the history and case law of Section 377, allows for the following deduction: “It is true that the theory that the sexual intercourse is only meant for the purpose of conception is an outdated theory. But, at the same time it could be said without any hesitation or contradiction that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature.”

Revealing as this language is about the justices' personal biases, it also indicates their affect by registering, as Pratiksha Baxi incisively notes, “the shudder of disgust that grips the judicial body” as they weigh in on the antisodomy law. These judicial dispositions and passions confirm the thoroughly subjective aspects of law and facilitate more critical understandings of the two texts and the complexities of sexuality, juridicality, and the state underlying their differences. Koushal v. Naz may have elicited much criticism, in contrast to the mostly laudatory readings of Naz v. Government, but there is more room for deeper and more nuanced analyses of both texts and their limitations.

Competing Visions, Shared Contexts

In a nutshell, Naz v. Government attempted to mitigate state regulation of same-sex sexualities, thereby decriminalizing homosexuality and arguably reducing the state’s influence, whereas Koushal v. Naz represented an effort to reinforce the state through its continuing control over sexuality. The Delhi High Court ruling may have unwittingly reaffirmed and even expanded aspects of the state—the relevance of the constitutional charter and the role of the judiciary—but it did endeavor to remove consenting same-sex sexual practices from being subject to the institutional reach of law. It may have offset decriminalization by bringing sexual mi-
norities under the law's rights and protections in new ways, and yet it is hard to ignore the symbolic and material implications of declaring the antisodomy law invalid for same-sex consenting adult sexual activity. Further, insofar as the antisodomy statute became the symbol of state and social injustice, its undoing did matter, despite the complexities of Section 377. Thus at least in one meaningful and unparalleled way the Delhi High Court justices tried to curb governance, diminishing, in effect, the prospect of the state.

Koushal v. Naz's withering criticisms of the Delhi High Court ruling and its interpretations, however, are most fruitfully understood as an attempt to reinforce the state and, more specifically, the legislature's purview over sexuality, which also explains why the court seemed so concerned about overstepping judicial boundaries. Defending the legislature's role over the making and amending of laws, Koushal v. Naz reasoned that lawmakers best understand the needs of the people, a position that is particularly difficult to sustain for a colonial relic authorized by a body that was hardly representative of the people it was governing. Begging a thoughtful consideration of the antisodomy law, the justices sought refuge in the inaccurate assertions that Parliament had repeatedly refused to reconsider Section 377 even though the Indian Penal Code had been amended some thirty times since independence, most recently in 2013 to incorporate changes in sexual assault laws, and the 172nd Law Commission Report had recommended its deletion. On the contrary, the antisodomy statue had not repeatedly come up for debate, which was one reason ABVA and Naz Foundation sought recourse in the high court, nor did it feature prominently in debates on modifications to rape laws, which explains why the justices offered no specific evidence to support their reading of the legislature's disposition.36

Beyond merely shoring up the role of the legislature in general, the ruling governs matters of same-sex sexualities in particular. Not content to weigh in on the merits of the lower court's verdict, Koushal v. Naz is generative on matters of same-sex sexuality, drawing sharp distinctions between those “who indulge in carnal intercourse in the ordinary course” and those “who indulge in carnal intercourse against the order of nature.” Even though the apex court justices argued that Section 377 does not discriminate against any group of people, they defined sexual minorities as a separate class of people. Despite the crucial fact that the government, acting on behalf of the various state agencies first named
as respondents in the Naz Foundation writ petition, chose not to appeal the Delhi High Court ruling, the matter was turned over to the legislature for further deliberation. The most crucial player in the legal process, the Home Ministry, entered an affidavit on March 1, 2012, on behalf of the government, stating that it was not contesting the decriminalization of homosexuality, yet the justices were reluctant to undo the antisodomy law and at pains to uphold the regulation of same-sex sexualities as the preserve of the state. Concluding, “Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 from the statute book or amend the same as per the suggestion made by the Attorney General,” they allow for modifications in the antisodomy statute, but not without implying the importance of the state and its mechanisms of governance.

Alongside other recent changes in laws related to managing sexuality, the impulse to preserve legislative aspects of the state and prolong governance is evident. Legislative changes have resulted in more capacious definitions of sexual assault, a wider understanding of sexual violence—including acid attacks on women and stalking—and harsher punishment. The Protection of Children from Sexual Offences Act of 2012 represents even greater state intervention and governance for it introduced laws that are specific to children, explicitly criminalizing sexual assault and other offenses against them, including sexual harassment, pornography, and abetting in such crimes, and also details criminal procedures and the setting up of special courts. A hard-won victory by children’s rights activists, the upshot of this Act may well prove to be useful, but it is part of a broader trend toward more legislation that is being reinforced by the Supreme Court justices’ decision to not decriminalize homosexuality. Indeed while the judgment makes a passing reference to the Criminal Law (Amendment) Act of 2013, it does not include so much as a nod to the Protection of Children from Sexual Offences Act and uses the antisodomy law to endorse the legislature and legislative action.

The paradox is that mitigating rather than reaffirming state regulation of same-sex sexualities is traceable to the same postliberalization context, where law assumes ever greater prominence in mediating conflict. Indeed “law struggles,” through which ordinary people or groups pin their aspirations on new and better-enforced laws in the postliberalization context, are what predisposed Naz Foundation to focus on Section 377 as the starting point of a movement for sexual justice.
through the prism of sexuality, these law struggles help identify the ways ongoing economic and political changes—especially trends toward the gradual undoing of the developmental state as a means of social redistribution, privatization of infrastructure, greater access to transnational finance, the rise of NGOs—allow justices to alternatively reduce and reinforce the state.\textsuperscript{39} But more attention to the judgments’ sociopolitical context encourages analyses of how, despite its praiseworthy attempt to attenuate governance, the \textit{Naz Foundation} opinion is constrained by neoliberal logics and \textit{Koushal v. Naz} is understood as a forward-looking endorsement of the arguably beleaguered state.

**NEOLIBERAL LOGICS AND THEIR LIMITS**

\textit{Naz v. Government} could in fact imagine a diminishing of the state by drawing on a neoliberal understanding of gay rights that, particularly in the context of India, has gained currency in the shadow of the HIV/AIDS crisis and postliberalization policies. Vigorously challenged by critical scholars and activists as a universalizing, individualizing, and privatizing discourse emanating from the Euro-American West, often beginning with decriminalization and geared toward assimilation and inclusion, this rights regime hinges on the relationship between the individual and the state, typically mediated by law, while sidestepping the urgencies of economic, cultural, and social justice.\textsuperscript{40} Equally important, it obscures colonial histories, for this version of gay rights is not simply exported to postcolonial contexts such as India but gets uniquely associated with issues of national modernity and progress in ways that were previously indexed by “women and development.”\textsuperscript{41} Advanced by the Naz Foundation writ and embraced by the \textit{Naz v. Government} ruling, this approach called for the retrenchment of the state from the lives of sexual minorities, but just as not all women were seen as symbols of modernizing states, not all disenfranchised groups and communities were equally included in the vision of a plural democratic nation—an analysis that becomes increasingly evident through careful consideration of \textit{Naz v. Government}.

**FAULT LINES OF PRIVACY**

As discussed in chapter 5, the Naz Foundation writ introduced the idea that privacy—in the sense of personal liberty and autonomy—is integral to the sanctity of personhood and that consenting same-sex sexual activity conducted in private spaces ought to be free from the state’s
intrusions, arguments that subsequently became a cornerstone of Naz v. Government. Deriving from the Voices writ’s discussion of privacy as including the right to make decisions related to the intimate aspects of life, the justices went on to offer a nuanced and robust understanding of the discursive aspects of privacy as a fundamental right due to sexual and gender minorities. Persuaded that sexual orientation should be a matter of privacy, personal liberty, and autonomy, they defined it as a “private space in which man may become and remain himself.”42 They ceded that the Indian Constitution does not offer a specific right to privacy, citing earlier decisions in Indian case law that provide for the “right to be left alone” and allow for the abridging of personal rights only if compelling state interest can be shown.43 Noting these landmark decisions as well as U.S. jurisprudence, they summarized:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 . . . denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution.44

The judgment relied heavily on the Voices intervention to present an understanding of privacy not as a matter of private places but more broadly about self-autonomy and personhood, in ways that would have had considerable ramifications for Indian jurisprudence.45 Yet in the last instance the judgment narrowed decriminalization to same-sex sexual activity in private spaces, leaving same-sex sexual activity in nonprivate spaces still prosecutable under Section 377 (rather than falling under the scope of indecency laws and such similar to heterosexual activity in public). More important, it raised questions about the limitations of using privacy to safeguard rights, a point that resonates with Katherine M. Franke’s critique that the U.S. Supreme Court territorialized the right to intimacy within the bedroom and strengthened a de-radicalized and domesticated vision of sexual rights among gay communities with the Lawrence v. Texas decision.46

Much like Lawrence v. Texas, the rider of privacy papers over pertinent
gender and class differences among queer groups. As Ponni, a member of the Delhi-based groups Anjuman and Nigah, suggested in her interview, Section 377 does not impact all queer groups equally or in the same way, and the Naz Foundation writ does not spell out clearly how the law impacts those who are differently gendered, for even if women do not cruise in public parks, they are affected by Section 377. Even though MSM and other socially disadvantaged groups were the basis on which the Naz Foundation writ moved the Delhi High Court, working-class gay men and MSM are the ones least likely to have access to the privacy of a home or a hotel, leaving them exposed to the threat of Section 377. In fact sexual contact, especially among working-class, non-English-speaking males, kothis, and hijras, frequently occurs in public settings such as parks and urinals, which adds to their vulnerability from the police and cancels privacy in the sense of safety from intrusion.

Thus self-responsibilization (after Nikolas Rose), or in this case having to assume the burden of ensuring one’s personal liberty, mediates the decriminalization of homosexuality in the Naz v. Government judgment, in keeping with concerns about the neoliberal (mis)uses of empowerment especially among vulnerable communities. Mindful of the implications of this approach, the Voices intervention deliberately omitted the privacy clause and some closely involved with the Naz Foundation writ regretted including it, but ultimately the ruling could not and did not sidestep a contradiction haunting the legal process: the initial focus may have been on working-class gay men and MSM, but privileged gay men would likely have been the chief beneficiaries had homosexuality been decriminalized.

CONSTITUTIONAL MORALITIES AND THE HAZARDS OF INDIVIDUALISM

Constitutional morality, a concept introduced by the Voice writ and borrowed from the framer of the Indian Constitution and Dalit activist Dr. B. R. Ambedkar, was used in the Naz v. Government verdict as a bulwark against claims of public morality. Public morality was used repeatedly, most notably in the government’s 2003 response in the Delhi High Court to oppose the Naz Foundation bid on the grounds that Indian society disapproves of homosexuality enough to criminalize it and attitudes in India have not sufficiently changed to justify the modification of Section 377. In another hostile intervention, this one filed in 2006 by B. P. Sin-
ghal, an individual who positioned himself as an able representative of the “Indian masses,” the argument was that public morality was strongly opposed to homosexuality for it represented a threat to the sanctity of the family and the nation.\textsuperscript{52}

Offering the principle of constitutional morality, first invoked by Ambedkar in a speech delivered on November 4, 1948, to enshrine the independent nation as a liberal democracy, the 2006 Voices countered arguments of public morality by arguing, “In fact there is a large body of opinion which favours the reading down of [Sec] 377, on the precise grounds that Sec 377 is an affront to a constitutional morality based on the protection of rights.”\textsuperscript{53} Reasoning that public morality is an inadequate reason to curtail the rights to dignity, autonomy, and, for that matter, privacy, the Voices intervention called on the justices to affirm and uphold the secular and constitutional principles on which liberal democracies are based.\textsuperscript{54} Persuaded by these arguments, the justices firmly contradicted the government’s position that public morality is grounds for restricting fundamental rights: “Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.”\textsuperscript{55}

But the concept of constitutional morality is also profoundly tied to the sanctity of the individual over the collective in ways that do not travel well across time. Ambedkar may have used it to defend the Draft Constitution against criticism that it was based on a Western model and give primacy to the individual over what he called village republics—dens of provincialism and communalism that were ruining India—declaring, “I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.”\textsuperscript{56} Yet whereas individualism may have promised liberation over the forms of caste, religious, and gender oppressions wielded at the community level in the years following independence, it looks suspect in the context of postliberalization. Rather than offering protections and rights to the marginalized, it results in an uneven distribution of justice by working in favor of those who are already advantaged—as is clear in the earlier discussion on privacy.

Furthermore individualism’s potentials have not been realized in pre-
venting ongoing caste-, communal, and gender-based violence, and it is unlikely to shield most sexual and gender minorities who are persecuted not as individuals but as members of communities, especially under laws with much lower thresholds than Section 377’s. In other words, the violence of law and law enforcement and forms of social stigma are profoundly attached to what are perceived as pejorative characteristics common to a group—hijras, kothis, gays, and others—in ways that I gestured to in chapter 2 and made starkly evident in chapter 4 (when police inflict preemptive violence on hijras or entrap them simply because of their identity). In his reflections on intensified policing of hijras in the city of Bangalore in the aftermath of the Naz v. Government judgment, Arvind Narrain suggests that the most crucial lesson to be drawn is that decriminalizing the antisodomy law has little impact on the most vulnerable gender and sexual minorities.57

PITFALLS OF EQUALITY

Naz v. Government was exalted as both sign and effect of a liberal democratic national state for upholding the values of a democratic nation and equal citizenship and providing a pathway for additional constitutional protections to all vulnerable minorities, including Muslims, Christians, women, tribals, Dalits, and disabled persons.58 The legal scholars Lawrence Liang and Siddharth Narrain compared it to Roe v. Wade and Brown v. Board of Education to suggest that the ruling will likely have an impact well beyond its apparent legal scope.59 Laying the foundations for the principles of equal rights and citizenship endorsed in the ruling, the Voices writ implored the justices to place same-sex sexualities on par with Dalits, religious-cultural communities, and other minorities already afforded constitutional protections, a view then reinforced by the justices’ position that courts ought to take the lead on behalf of sexual minorities much as they had done by abolishing forms of discrimination such as untouchability, caste discrimination, sati, and child marriage.

Although the principles of equality and inclusion are held to be among the most promising and perhaps far-reaching aspects of the Naz v. Government judgment, they are tempered by the disconnect between formal equality and extant inequality that has been a long-standing feminist concern.60 Further, if formal equality cannot ensure justice, then the equivalences between sexual minorities and other groups implied in the judgment are no guarantee that all minorities will be seen as emblems...
of national modernity. Noting that the term minority is restricted to religious groups in official terminology, Zoya Hassan cautions that despite discourses of religious pluralism, constitutional bindings of equality have not translated into the lives of Muslim communities. The gravest issue is that demands for equality for religious-cultural groups are historically and presently constructed as a threat to the national fabric and, especially in the case of Muslim communities, seen as antimodern and somehow more prone to sexual deviance. At issue, then, is not only the gap between equality’s formal provisions and its substantial absences but also the frequently heard concerns that some religious-cultural minorities are not deserving of inclusion, and the reverse logic that equality for some religious-cultural minorities (read: special treatment) undermines the integrity of the modern democratic nation. Thus Naz v. Government is not immune from cautions that neoliberal logics distinguish between citizens—those who contribute the essentials of enterprise and modernity—and populations who are seen as unworthy of the privileges of citizenship.

**SEXUALITY AND THE SEEMINGLY IMPERILED STATE**

After December 11, 2013, the lower court judgment’s pronouncements became moot but all the more heroic because of the apex court’s reinstatement of the antisodomy law. Seen in light of this binding decision, the regional high court’s reliance on neoliberal logics, with all of their flaws and biases, seems far more palatable and preferable to the draconian alternative that reaffirms the criminalization of homosexuality. However, despite the disturbing outcome, deeply flawed reasoning, and endorsement of an archaic law in contradistinction to the lower court, the Supreme Court’s position does not represent a throwback to the past but, parallel to the lower court’s opinion, an urgency of the present and the path ahead, a view that is amply reflected in the text and also anticipated in the hearings for Koushal v. Naz.

Throughout the hearings the justices emphasized the changing nature of Indian society, especially in response to appellants’ claims that same-sex sexual activity is against the natural order of things, and pointed instead to new technologies such as blood and sperm donation and in vitro fertilization. They underscored the mutability of words such as unnatural a number of times during the hearings, and also, according to the unofficial transcripts, sought to analyze the relevance of Section 377 in the
modern context. The senior justice and the author of the fateful verdict took a dynamic view of sexuality, noting that same-sex sexual activities were recognized in India and represented in art well before the advent of the British and the colonial law. Continuing this thread, the judgment sought neither to restore India to an ageless past nor to consign it to an unchanging present, thus raising the question of how to contextualize its unequivocal stance on criminalizing homosexuality.

Quoting at length from a precedent on capital punishment, the justices underscored the imperatives of staying on a path best suited to India. Highlighting the differences between what are characterized as social conditions as well as general intellectual levels across India and the West, they argued that India cannot risk “experiments” such as abolishing capital punishment or, by extension, the antisodomy statute. Further raising the specter of following Western sexual mores, this time by turning to a previous ruling upholding the customs of arranged marriage, they cautioned against circumstances when legal changes elsewhere are “blindly followed in this country without a critical examination of those principles and their applicability to the conditions, social norms and attitudes existing in this country.” Thus the injunction against homosexuality may be a Western import, but, according to the justices, its continued criminalization by the state in a context overrun by Coca-Cola and fashion parades even at the village level is best suited to India. In other words, where Naz v. Government responded to the dynamics of sexuality, political economy, and nation in the present moment by decriminalizing homosexuality, Koushal v. Naz found a reason to recriminalize it.

Fragments

Naz Foundation’s legal challenge to Section 377 gradually coalesced into a political campaign for decriminalizing homosexuality that, as a result of the twists and turns in the courtrooms, has precipitated a nascent sexuality rights movement in India. This shift in mobilization, kindled by the government’s reply to the Delhi High Court in 2003 and fueled by the court’s dismissal of the Naz Foundation writ in 2004, meant collectively embracing a struggle whose flashpoint was the antisodomy statute. If that meant becoming complicit with law, in the sense of what Gayatri Chakravorty Spivak has described as folded togetherness, which is to say breathing new life into Section 377 to show its detrimental effects
on same-sex sexualities, it also enabled broader critiques of law and governance, signaled by the Voices intervention in the Delhi High Court in 2006. While transnational flows of a liberal gay rights approach, particularly resonant in the wake of the HIV/AIDS crisis and liberalization policies in the Indian context, informed the Naz Foundation writ, the Voices intervention was driven by a more radical and instructive vision of queer politics, reflected in the words of its primary author, Arvind Narrain: “A queer vision is not merely about equal rights for LGBT persons but about loosening up the rigid structures of caste, gender, and compulsory sexuality. It is about questioning notions of purity, muddying rigid boundaries and opening up a space for those at the margins of hegemonic structures which make up our society. What a queer vision also calls for is an open-ended political project which has the capacity to be self-reflexive and take on new concerns.” And whereas the Naz Foundation writ focused narrowly on law and was shaped by what Jacques Rancière has called the partition of the perceptible, that is, the internal frontiers created within marginalized groups for fear that some among them would weaken the arguments for equal rights, the Voices intervention sought to use the courts to mount a vision of rights and protections due sexual minorities that exceeded decriminalization. Yet both these writs are also fruitfully understood as products of their time, marking shifts in a political consciousness that was forged in an unfolding legal campaign. Many of those closely associated with the Naz Foundation writ came to ally themselves more firmly with Voices’ vision, blurring ideological lines. But it is also true that these two writs reflect enduring differences in a common political struggle between a discourse of gay rights and what might be called a discourse of the disadvantaged, whereby justice for sexual minorities is entwined with other social equities, including caste, class, religion, and gender.

Issued at their crosshairs, the Naz v. Government verdict was both historic and unfinished. Building on what was initiated by the Naz Foundation intervention and advanced through the Voices plea, the justices reduced the reach of governance by decriminalizing homosexuality. A closer analysis of the text, however, shows that it could not sidestep the structural constraints plaguing the quest for reform, pivoting around one law and one putative subject. Unable to contain the differences of social class and gender expression that mediate the antisodomy law’s
effects on same-sex sexualities, the ruling circumscribed the rights of sexual minorities through the principle of privacy. Since Section 377 and a host of other laws, policies, and practices of governance affect hijras, kothis, and others collectively, the individualized rhetoric of constitutional morality would likely also have fallen short of its promise. And, ignoring the antisodomy law’s potential impact on religious-cultural minorities, the ruling raises the question of whether some sexual minorities can portend the possibility of postcolonial progress while other minority groups are ignored by modernity.

In contrast to the more nuanced interpretations encouraged by Naz v. Government, Koushal v. Naz has little to recommend it, not only because the outcome is on the wrong side of history but because of the reasoning through which it arrives at this position. The lower court used the antisodomy law to bring sexual minorities into the fold of Indian gay history, but the apex court’s ruling sought to reaffirm the history and structures of governance that pertain to and extend beyond the scope of this law. The antisodomy law may not have been used much, and sexual and gender minorities may nonetheless have been implicated by it, but that was not reason enough for the Supreme Court to deliver justice or weigh in on the side of the lower court. Revealing a remarkable sense of discomfort with same-sex sexual practices in the hearings as well as the decision, the justices ignored the spirit of Naz v. Government to fault it for overstepping judicial restraints, even though the same qualms did not seem to apply in other cases on which the senior judge ruled. Insisting that the judiciary must modify laws only in the rarest of cases, they opened the door for further legislative intrusions, which is all the more concerning since they believe that the legislature has thus far shown no interest in decriminalizing homosexuality. Amplifying legislative activity related to sexual violence, such as the Criminal Law (Amendment) Act and the Protection of Children from Sexual Offences Act (which could make Section 377 defunct), they charged the legislature with the task of determining the interests of a nation amid rapid changes that are filtering down “even” to the village level, thereby endorsing the sanctity of the state and miscarrying sexual justice.