

A NEW LANGUAGE OF MORALITY: FROM THE TRIAL OF NOWSHIRWAN TO THE JUDGMENT IN NAZ FOUNDATION

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Introduction

“Clauses 361 and 362 (the predecessor provisions to Section 377 of the IPC) relate to offences respecting which it is desirable that as little as possible be said...we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision.”

Lord Macaulay¹

“The offence is one under Section 377 IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.”

*Fazal Rab Choudary v. State of Bihar*²

“A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.”

*J. Albie Sachs, National Coalition for Gay and Lesbian Equality v. Ministry of Justice and others*³

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1. Report on the Indian Penal Code, Vasudha Dhagamwar, *Law, Power and Justice*, Sage Publications, New Delhi, 1992, p.117.
2. (1982) 3 SCC 9.
3. *National Coalition For Gay and Lesbian Equality v. Minister of Justice*, [1998] {12} PCLR 1517 at para 81

“In our view, Indian Constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBT’s are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

*C.J. Shah, Naz Foundation v. Union of India and others*⁴

The decision in *Naz Foundation v. Union of India*⁵, marks the culmination of a very important journey in Indian law. For the first time in Indian judicial history, LGBT persons were looked at not within the frame of criminality or pathology but rather from within the framework of dignity. The shift or transition was itself remarkable when one considers the history of the interpretation of Section 377 by the judiciary.

The historic ‘injustice’ of the law lay not only in sanctioning arbitrary state action against LGBT persons but more fundamentally in setting in place a regime of citizenship wherein the lives and loves of LGBT persons were consistently read within the framework of ‘unnatural sexual acts’. The question of love or intimacy, desire or longing was always reduced in the judicial register to ‘carnal intercourse against the order of nature’. The judicial archive hints at the possibility of recovering a lost history of love, by reading within the interstices and gaps of decided case law. To recover in some fashion, what Ranajit Guha would have called ‘the small voice of history’ this article will focus on the story of Nowshirwan Irani who was persecuted in 1932 Sind for having a consenting relationship with Ratansi. Nowshirwan stands in for a subaltern Oscar Wilde, an unwitting and largely unknown martyr who symbolized in his person the trials and tribulations of LGBT persons for over one hundred and fifty eight years.

It was not the coming into force of the Constitution which marked a moment of azaadi for LGBT persons in India, but really its re-interpretation by C.J. Shah and J. Muralidhar in 2009. The shift in what the Constitution was to mean for LGBT persons was signalled by the Justices in the oral arguments where for the first time, the judicial attitude to homosexuality changed. By showing empathy for LGBT suffering and by refusing to think and talk about homosexuality merely within terms of ‘excess’ and ‘societal degeneration’, the Justices gave a new vocabulary to the law in which to talk about homosexual expression.

4. 160 (2009) DLT 227.

5. *Ibid.*

The language the Justices evolved was the notion of ‘constitutional morality’, which was an advance in the way morality has been thought of in law. Morality as seen from the words of Lord Macaulay was a justification for the very enactment of Section 377 and the Judges turn the notion of morality upside down by concluding that constitutional morality requires that Section 377 be struck down. Constitutional morality requires that the values of the right to form intimate relationships be protected and that freedom from persecution by the law be guaranteed to LGBT persons.

This article will explore the paradigm shift from societal morality to constitutional morality, from carnal intercourse to a right to intimacy and from the tribulations of a Nowshirwan to the celebrations which greeted the Naz Foundation judgment.

Nowshirwan Irani : A subaltern Oscar Wilde ?

I never came across anyone in whom the moral sense was dominant who was not heartless, cruel, vindictive, log- stupid and entirely lacking in the smallest sense of humanity. Moral people, as they are termed, are simple beasts. I would sooner have fifty unnatural vices than one unnatural virtue. It is unnatural virtue that makes the world, for those who suffer, such a permanent Hell.

Oscar Wilde⁶

Another requirement of mine, was that these personages themselves be obscure, that nothing would have prepared them for any notoriety, that they would not have been endowed with any of the established and recognized nobilities—those of birth, fortune, saintliness, heroism or genius; that they would have belonged to those billions of existences destined to pass away without a trace; that in their misfortunes, their passions, their loves and hatreds, there would be something grey and ordinary in comparison with what is usually deemed worthy of being recounted; that nonetheless they be propelled by a violence, an energy, an excess expressed in the malice, vileness, baseness, obstinacy or ill-fortune this gave them in the eyes of their fellows and in proportion to its very mediocrity—a sort of appalling or pitiful grandeur.

Michel Foucault⁷

If there is one provision in the Indian Penal Code seemingly furthest from the language of love and intimacy it seems to be Section 377. With its focus on ‘carnal intercourse against the order of nature’ and its requirement of ‘penetration sufficient to constitute an offence’, there seems little possibility

6. This is from a letter written by Oscar Wilde after his imprisonment for two years for committing acts of gross indecency. cf. Colm Toibin, *Love in a dark time*, Picador, London, 2003.

7. Michel Foucault, *Power*, Penguin, London, 1994. p.160.

that the dry judicial record can actually speak of emotions like love and longing. The case law interpretation under Section 377 has by and large focused on non consensual sex between adults and children and the judiciary has been quick to characterize homosexuals and homosexuality as something to 'be abhorred by civil society', 'unnatural' 'animal like', 'sexual perversity' and 'despicable specimen of humanity.'

While it may be true that the majority of reported cases under the provision have to do with non-consensual sex, there is another more hidden narrative where couples who have engaged in consensual intimacy have been subjected to the persecution of the law. It is in these cases that if one reads from within the silent spaces in the judgment, one can notice that Section 377 does indeed persecute homosexual intimacy. One can also notice that the judiciary is remarkably blind to this possibility inspite of a wealth of evidence which points towards this inexorable conclusion. A look into the judicial archive finds three appellate court decisions in which the protagonists are consenting young men.⁸ One of these cases, the case of Nowshirwan Irani, will be examined more closely to get a sense of the forbidden history of desire which remains a part of the untold history of Section 377.

In a reported decision from Sind in 1935, Nowshirwan Irani a young Irani shopkeeper was charged with having committed an offence under Section 377 with a young lad aged around 18 called Ratansi. The prosecution story is that Ratansi visited the hotel of the appellant and had tea there. Nowshirwan asked Ratansi why he had not come to the hotel for sometime and Rantansi replied that he had no occasion for it. He then went to the pier to take a boat, but on finding that he had no money came back to Masjid Street where he saw Nowshirwan standing on the road a little distance from the hotel. Nowshirwan asked Ratansi to come to his house and when he did, he locked the door and started taking liberties with the youngster who resented the overtures and wanted to go away. Nowshirwan removed his trousers, loosened the trousers of Ratansi and made the lad to sit on top of his organ. Ratansi got up from his lap, but in the meantime Nowshirwan had spent himself, wiped his organ and put on his pants. The reason this incident came to light was that a police officer Solomon along with his friend Gulubuddin saw the incident through the keyhole, marched in and took both Ratansi and Nowshirwan to the police station.

8. The three obscure couples whose lives take on a kind of pitiful grandeur by mere virtue of having the misfortune to get prosecuted under Section 377 are Minawalla and Tajmahomed, (AIR 1935 Sind 78) Nowshirwan Irani and Ratansi (AIR 1934 Sind 206) and Ratan Mia and Abdul Nur ((1988) Cr.L.J. 980.

The judge was not convinced by the story of the prosecution that Ratansi had been subject to forcible carnal intercourse by Nowshirwan. The judge was convinced that Ratansi was made to pose as a complainant and hence made hopelessly discrepant statements. The judge was not prepared to rely on the evidence of Solomon and Gulubuddin the two eyewitnesses whose conduct he found strange. Further the medical evidence could neither prove forcible sexual intercourse (the prosecution story) nor did it prove an attempt to commit the act of sodomy. In the opinion of the Judge, 'as the appellant has not even if we take the worst view against him gone beyond a certain stage of lascivious companionship, I do not think he deserves to be convicted for any of the offences with which he was charged or could have been charged.'

The story of Nowshirwan and Ratansi is a story of sexual desire acting itself out between two men of different class backgrounds. The limited material present in the appellate decision gives us a clue that even the judge was convinced as to the consensual nature of the relationship. As the judge notes, 'Moreover the medical evidence militates against the story of a forcible connexion on the cot, the appellant who is a fairly hefty young man having intercourse in the manner stated originally. There is not the slightest symptom of violence on the hind part of the lad.' He concludes that, 'If he was in the house of the accused behind locked doors, I have not the slightest hesitation in believing that he had gone there voluntarily.'

The story of desire secreted within the judicial narrative seems to be that Nowshirwan and Ratansi knew each other and therefore Nowshirwan makes the first move and asks Ratansi why he had not come to the hotel for sometime. Ratansi after finishing his tea, leaves the hotel only to come back in the same direction. When he comes back, Nowshirwan is waiting on the road and asks him to come to his house. They seem to have some sort of pre-arranged code by which they signal to each other the desire to meet in Nowshirwan's room. Following this arrangement, they go to Nowshirwan's room. Due to a misfortune of an over zealous police man or a police man with a grudge, what should have been an intimate act between two consenting parties in their bedroom becomes a public scandal.

A consenting act between two men is sought to be twisted by the prosecution into a story of Ratansi being forced into having sex with Nowshirwan. Ratansi is coerced by the demands of those around him to pose as a complainant against the very person with whom he had earlier had a consenting sexual relationship. The fact that it is a consenting relationship

does nothing to exculpate Ratansi from ironically becoming a victim of judicial ire. There is indeed a special fury reserved by the Judge for Ratansi.

In the judges' words, '[Ratansi] appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse.' In the course of appreciating the medical evidence, the judge notes, "There was not the slightest symptom of violence on the *hind part* of the lad."

Thus the story of an encounter between two people of the same sex who desire each other, gets reduced in the judicial reading to the act of a perverse failed sexual connection. The use of terms like 'animal like' and 'despicable' places the sexual act within the framework of moral abhorrence. One has to read the silence in the judicial text to hazard a guess as to the nature of the intimacy between Nowshirwan and Ratansi. The two knew each other and possibly had met before in Nowshirwan's room. Nowshirwan's room might possibly have been a space where the coercive heterosexism of the outside world could be dropped for the brief time which Nowshirwan and Ratansi spent with each other. That brief time they spent together might possibly have been a moment when they imagined a world not yet born and a time yet to come, when their desire would be accepted without a murmur. This imaginative realm of impossibility, is what is rudely interrupted when Solomon spies through the key hole.

One can guess that their meeting together might have been noticed on earlier occasions by Solomon, hence alerting him to take action on that fateful day in 1935 Sind when Nowshirwan met Ratansi yet again. Solomon stands in for the willed heterosexism of the larger world or what Oscar Wilde would have called the 'unnatural virtue' in which the world abounds which will give no space for any the growth of any intimacy which challenges its own laws.

It is this fragile experiment of creating this 'little community of love'⁹ outside the bounds of law's strictures and society's norms, which is set upon by society in the form of Solomon and then given the judicial imprimatur of a 'failed sexual connection'. The tragic story of Nowshirwan and Ratansi speaks to the absence of a certain vocabulary. The language of love and intimacy, longing and desire, and the expression of spontaneous bodily affection finds no safe habitation within the terms of the law. What

9. Lawrence Liang and Siddharth Narrain, *Striving for Magic in the City of Words*, http://www.himalmag.com/Magic-in-the-city-of-words_nw3197.html accessed on 28.08.09.

law seeks to do is degrade this act of experimental creation of new forms of intimacy and limit its expression. The language of law has an impoverishing effect as it strips the physical act of its rich emotional connotations and reduces the act of human intimacy to a 'perverse failed sexual connection.' By stripping the act of sex of its multiple meanings it produces Nowshirwan as a subject of the criminal law.

One could re-read Nowshirwan and Ratansi as unwitting frontiersmen in the history of the battle against Section 377 and among its first recorded tragic victims. In another register, Nowshirwan and Ratansi stand in for Oscar Wilde and Lord Alfred Douglas, with Ratansi being forced to stand in as witness not just against Nowshirwan but also forced to deny a part of his own being in terms of his own part in creating that 'little community of love'. Just as Oscar Wilde was betrayed by Alfred Douglas who described his lover as "the greatest force for evil that has appeared in Europe during the last three hundred and fifty years", so too Nowshirwan in his hour of greatest need is confronted by Ratansi who becomes the complainant against him. The story of Nowshirwan and Ratansi exemplifies the perversities of a law which turns lover against lover and converts the act of intimacy into the crime of carnal intercourse.

Nowshirwan's story remains emblematic of the ethical and moral poverty of the judicial discourse even as it grappled with homosexual expression for over one hundred and fifty eight years. It is important to note that in spite of the coming into force of the Indian Constitution with the language of equality, non discrimination, dignity, the judiciary continued to characterize homosexuality with terms such as 'unnatural', 'perversity of mind', 'immoral' and 'animal like'. This ethical language of rights was never seen fit to apply to LGBT persons. The first time the judiciary moved outside the range of responses outlined above was one hundred and fifty eight years after the coming into force of the Indian Penal Code and fifty nine years after the coming into force of the Indian Constitution. The occasion happened to be the hearing of the *Naz Foundation v. Union of India* and others.

The changed social context: From Nowshirwan to the Naz Foundation

The social context in the late nineties and the beginning of the new century is dramatically different from the time Nowshirwan happened to be persecuted. The norms which strait jacketed the expression of Nowshirwan and Ratansi and the law which deemed Nowshirwan a criminal begins to be questioned. This practice of questioning the set ways of the heterosexual

world begins with the emergence of the queer struggle with its insistence on problematising norms of gender and sexuality. It is this context of an emerging community far less isolated than the world which Nowshirwan and Ratansi tried to create far ahead of their times, which underpins any engagement with Section 377 in the contemporary era. In simple terms, when people like Nowshirwan are arrested under the law in contemporary times, it becomes a concern of people beyond the network of family and friends. Queer people across the country rally together and begin to support those who are subjected to the law's perSectionution. Thus people who are arrested under Section 377 be it the arrest of gay men in Lucknow 2006 or the arrest of HIV/AIDS workers in Lucknow 2001 become a part of a contemporary history of struggle against Section 377 as compared to unknown frontiersmen such as Nowshirwan and Ratansi.

The bringing together of the stories of Nowshirwan and Ratansi and those persecuted under the law in contemporary times finally culminates in a legal challenge to very same law. The petition challenging Section 377 is filed by Lawyers Collective on behalf of Naz Foundation before the Delhi High Court in 2001. The petition challenged the constitutional validity of Section 377 and made an argument for Section 377 to exclude the criminalization of same sex acts between consenting adults in private. The petition in technical terms asks for the statute to be 'read down' to exclude the criminalization of same sex acts between consenting adults in private so as to limit the use of Section 377 in cases of child sexual abuse.

The petition itself though filed by a single NGO gradually began to represent the entire community. This process of making a 'public interest litigation' truly 'public' began by Lawyers Collective and Naz Foundation hosting a series of meetings on different stages of the petition. Over the next seven years, this process of continuous consultation with the community, contributed towards Section 377 becoming a more politicized issue. The key stages of the petition included the affidavit filed by the Union of India (Home Ministry) which indicated that the Government would stand by the law, the affidavit filed by the National AIDS Control Organization (NACO) which in effect said that Section 377 impedes HIV/AIDS's efforts and the impleadment of JACK (an organization which denied that HIV causes AIDS) and BP Singhal (a former BJP Member of Parliament, representing the opinion of the Hindu Right wing that homosexuality was against Indian culture) into the petition. This process of discussion fed back into the community fuelling feelings of outrage and indignation, hope and despair and anger and fear as each stage of the petition unleashed a torrent of emotions.

The periodic meetings were thus a way in which the activist community was kept deeply involved in developments and a way in which the community continued to respond to the changing scenario. What particularly tilted the balance was the impleadment of BP Singhal into the petition. Suddenly the scales seemed to have tilted with Naz appearing increasingly isolated among the cacophony of voices opposing the petition. It seemed that a range of forces were coming together to protect what the community saw as a patently unjust law. In a meeting called by Lawyers Collective to discuss this development, it was proposed that some queer groups should also implead themselves within the petition so as to support the petitioner.

It was with the birth of this idea that, Voices Against 377 (A Delhi based coalition of child rights, womens rights and LGBT groups) decided to implead themselves within the petition to support the petitioner. The key emphasis of Voices was the rights of LGBT persons while Naz because of its status as an organization working on HIV/AIDS would continue to emphasize on how Section 377 impeded HIV/AIDS's interventions and hence the right to health of LGBT persons.

There were enormous delays spanning a sum total of seven years when the case was initially dismissed by the Delhi High Court, appealed in the Supreme Court and finally sent back to the Delhi High Court. Initially the Delhi High Court dismissed the petition just as it was gathering steam on the ground that the petitioner Naz Foundation was not affected by Section 377 and hence had no 'locus standi' to challenge it. However when the dismissal was challenged before the Supreme Court, the Supreme Court sent the case back to the Delhi High Court to be heard expeditiously. Since the petition was filed by Naz Foundation in 2001 it has gathered greater public support both in terms of public opinion and in terms of an increasing support even within the sphere of the courtroom. It was in September of 2008 that after a long wait the matter was finally posted for final arguments before a Bench comprising Chief Justice Shah¹⁰ and Justice Muralidhar¹¹ of the Delhi High Court.

The final arguments before the Delhi High Court: Empathy, dignity and group sex

By the time the matter was posted for final arguments in September of 2008, seven years after the petition was initially filed, the key difference was it had become far more a part of the issues which defined contemporary

10. *Henceforth* referred to as C.J. Shah.

11. *Henceforth* referred to as J. Muralidhar.

India. There was a real buzz both in terms of the media coverage and there was an eager anticipation with respect to the final hearings. The Court itself during the hearings was attended by community members who closely followed each twist in argument and each response by the judges. The proceedings themselves as they unfolded were covered extensively and widely by the media and the community was also kept updated by daily minutes of the hearings which were posted on community online forums.¹²

The petitioner's core argument centered on the right to health and how Section 377 impeded HIV/AIDS interventions. The arguments were substantiated by case studies particularly of Lucknow 2001¹³ when Section 377 was used to target a HIV/AIDS intervention with the Men having Sex with Men (MSM) community. So Section 377 far from being justified by a compelling state interest actually was an impediment to achieving the right to health of a particularly vulnerable Section of the population.

The core argument of Voices Against 377 was that, "Section 377 is a law which impinges on the dignity of an individual, not in a nebulous sense, but affecting the core of the identity of a person..Sexual orientation and gender identity are part of the core of the identity of LGBT persons. You cannot take this away...". They argued that, "Morality is insufficient reason [to retain the law] in a case like this where you are criminalizing a category and affecting a person in all aspects of their lives, from the time the person wakes up to the time they sleep."

Mr. Shyam Divan, the Counsel for Voices, argued that if the court did not declare its relief limiting the scope of Section 377, it would cast a doubt on whether LGBT persons enjoyed 'full moral citizenship' of this country. He argued that, 'a moral argument cannot snuff out the right to life and personal liberty of LGBT persons.'

The core argument of the Government of India astonishingly was that if Section 377 was read down to exclude consenting sex acts between adults in private, it would affect the right to health of society.¹⁴ The Counsel

12. All the subsequent quotations with respect to the proceedings from the Delhi High Court are taken from the transcript of the proceedings. The transcripts do provide a rough idea of the way the proceedings went before the Delhi High Court, however they are not a verbatim transcript of all that transpired before the Court. It is available at www.altlawforum.org.

13. See Human Rights Watch, "*Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*", July 2002, Vol.14, No. 5(C), p.19. This Report was cited by the petitioners in their written arguments.

14. It should be noted that the affidavits filed by the Union of India were contradictory with the Home Ministry making the case that the law was required to keep in place a societal morality and NACO making the argument that the law hampered HIV/AIDS's interventions.

representing the Union of India was the Additional Solicitor General, Mr P.P. Malhotra. He cited various studies to show that homosexuality caused a very serious health problem. Citing one study he said, ‘the sexual activity enjoyed by homosexuals results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer. A study of homosexual practices shows 37% enjoyed sodomitical activities and 23% enjoyed water sports.’ Referring to notions of decency and morality the ASG noted that, ‘in our country it is immoral on the face of it. Society has a fundamental right to save itself from AIDS. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country. If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.’

B.P. Singhal made a strong argument that Section 377 was against Indian morality. In the words of his counsel, homosexuality was ‘a perverted kind of sex [...] in the name of thrill, enjoyment and fun the young shall walk into the trap of homosexual addiction. The tragic aspect of this is that alcohol, drug and disease are the natural concomitants of homosexual activity.’ He ‘submitted that he was on morality, the joint family structure and that we must not import evils from the west. We have traditional values and we must go by that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.’

JACK’s counsel submitted that there was ‘no scientific evidence that HIV causes AIDS’, that a ‘change in this provision would mean that all marriage laws would have to be changed’, and that ‘under Section 269 and 277 of the IPC anyway any intentional spreading of an infectious disease would be an offence’. JACK’s counsel then asserted that Naz did not come to Court with clean hands and was part of an international network which was using HIV to push an agenda.

Judicial empathy: Listening to LGBT voices.

The Court in the post liberalization era has not been a hospitable space or indeed the last refuge of what the Supreme Court had characterized as the ‘oppressed and the bewildered’. In fact the Court has been positively hostile to a whole range of applicants right from slum dwellers to all sections of organized labour. So it was with a great deal of trepidation that queer activists awaited the hearing. How would the judges indeed understand

complex issue of sexuality and rights? How indeed would we be able to persuade them that this was an issue of rights? Should we not have learnt from the experience of Public Interest Litigation in the 90's and stayed away from the Court as any guarantor of rights were some of the thoughts circulating like a nervous eddy through the queer community.

The judicial response has generally been subject to analysis in terms of the reasoned argument and the decided case. By contrast little attention has been paid to the gamut of responses by judges on a day to day basis in Courts. As Lawrence Liang notes, 'Witnessing the courts functioning on a day to day basis also allows you to uncover another secret archive, an archive of humiliation and power. It is said that seventy percent of our communication is non verbal and this must be true of legal communication as well. The secret archive that interests me consists not of well reasoned judgments or even the unreasonable admonishment of the courts, but the various symbolic signs and gestures that accompany them. An incomplete index of the archive includes the stare, the smirk, the haughty laugh, the raised eyebrow, the indifferent yawn, the disdainful smile and the patronizing nod amongst many others.'¹⁵

In this secret archive of what Liang correctly characterizes as 'humiliation and power', what emerged almost as a complete surprise was another index of responses, which can rightly be characterized as standing in for the quality of judicial empathy. What came through the questions and comments of the Judges was not an intention to humiliate but instead a strong sense of empathy for the suffering of LGBT persons.

C.J. Shah communicated this judicial empathy in ample measure and took judicial notice of the social discourse of homophobia by saying that we all know with what kind of sneers and mockery this issue is treated in society. To substantiate this point, he narrated the moving instance of a boy who was subject to jibes and sneers because of his sexuality and so was unable to do his exam. It was only after a judicial intervention he was allowed to do his exam without harassment and in C.J. Shah's words, 'he thankfully passed.'

If one were to abstract three important moments in the Court room arguments spanning over eleven days:

The first important moment was when the Counsel for Naz, Mr. Anand Grover read the opinion of Albie Sachs in *National Coalition For Gay and*

15. Lawrence Liang, *Devastating Looks: Smirks, Quirks and Judicial Authority*, <http://kafila.org/2007/05/04/devastating-looks-smirks-quirks-and-judicial-authority/> accessed on 10.01.9.

*Lesbian Equality v. Minister of Justice*¹⁶. This decision by the South African Constitutional Court ruled that the offence of sodomy violated the right to equality and dignity and struck it down. J.Sachs passionately argued concurring opinion was in particular animated by the high ideals of the South African Constitution and exceeded the staid limits of conventional judicial prose in its ability to evoke empathy. It conveyed with intensity and power, the extent of injustice perpetrated by an anti sodomy law. As J. Sachs powerfully noted, ‘In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.’¹⁷

The Judges were visibly moved by J. Sachs opinion and conferred among themselves. C.J. Shah wished the Additional Solicitor General (ASG) was in Court to listen to J. Sach’s opinion. Almost subtly, you could sense that the burden had shifted from the Counsel to the judges. They now had to contend with the weighty presence of J. Sachs and the burden of history when they wrote their judgment. In case there were any doubts on this point, Voices Against 377 submitted an outline of submissions which argued that, ‘This case ranks with other great constitutional challenges that liberated people condemned by their race or gender to live as second class citizens, such as *Mabo v. Queensland*¹⁸ (where the High Court of Australia declared that the aboriginal peoples of Australia had title to lands prior to colonization), *Brown v. Board of Education*¹⁹, (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the 14th Amendment) and *Loving v. Virginia*²⁰, (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional).²¹

The Second important moment was when the judges zoned in on what they saw as the core argument for retaining Section 377, public morality. They asked counsel for Voices Against 377 how would he respond to the

16. *National Coalition For Gay and Lesbian Equality v. Minister of Justice*, [1998] {12} PCLR 1517.

17. *Ibid.* at para 127.

18. (1992) 175 CLR 1.

19. 344 U.S. 1 (1952).

20. 388 U.S. 1 (1967).

21. See Outline of Arguments on behalf of Voices Against 377 para 12.4, submitted in *Naz Foundation v. Union of India*, Writ Petition no 7455 of 2001. cf. Arvind Narrain et. al., *The Right that dares to speak its Name*, Alternative Law Forum, Bangalore, 2009. pp-29-47.

public morality justification for retaining Section 377? Mr. Shyam Divan response on behalf of Voices Against 377 was ‘Any law or statutory provision that denies a person’s dignity and criminalizes his or her core identity violates Article 21 of the Constitution. Section 377 operates to criminalize, stigmatize, and treat as “unapprehended felons”, homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalizes individuals upon attaining majority, for no fault of the person and only because he is being himself. Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not even an argument of “compelling State interest” can sanction a statute that destroys the dignity of an estimated 25 lakh individuals.’²²

This argument that the state cannot plead, ‘compelling state interest’ when the core value of dignity is at stake, seemed to resonate deeply with the judges with them repeatedly asking the ASG to respond to what they characterized as ‘a very strong argument on dignity’.

The third important moment were the series of exchanges between the Judges and the ASG and the counsel for B.P. Singhal and JACK. By contrast to the evident empathy with which the judges heard both Naz and Voices the ASG as well as the counsels for JACK and BP Singhal were subject to questions which showed the judicial impatience with the nature of arguments and hinted at the deep structure of their judicial sympathies. I will just highlight one such exchange:

At one particularly funny moment counsel for BP Singhal, Mr Sharma, referred to *R. v. Brown*²³ which was a decision of the House of Lords in which they ruled that consensual sado masochistic practices between adults was not entitled to protection on grounds of privacy.

Mr. Sharma then referred to *R. v. Brown* to make the point that “homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and when they were consenting adults, criminal acts warranting prosecution were committed in the course of such perversity.” He said that “it was disconcerting to see tendency of homosexuals to indulge in group sex.”

Chief Justice Shah noted that “when the *R. v. Brown* judgment was delivered, sodomy was not a crime in the U.K. So even if Section 377 is read down and homosexual acts between consenting adults does not amount to

22. *Ibid.* at para 9.2 and 9.3.

23. [1993] 2 All ER 75.

an offence under Section 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if partner has consented to it.”

Chief Justice Shah wanted to know about the relevance of the judgment. Mr. Sharma responded that “anus is not designed by nature for any intercourse and if the penis enters the rectum, victim is found to get injury”. The activity itself causes bodily harm.

Chief Justice Shah asked whether the submission that this act itself causes injury, because it is unnatural or is likely to cause injury had been argued before. Whether in any culture, western, oriental, in several countries where ban is lifted, in WHO Reports, has anyone argued that act itself causes injury? Can you force Brown to the logical conclusion that sex between two males itself is a cause of injury? This submission has never been raised before any Court till now? Why is that?

Mr. Sharma continued to read from Brown to make the point that “drink and drugs are employed to obtain consent and increase enthusiasm, there is genital torture on anus, testis, blood letting. Burning of penis...”

Mr. Anand Grover intervened to say that Brown was to do with violence and dealt with a fact situation not contemplated by Wolfenden and that this was recognized by the judgment itself.

Counsel for B. P. Singhal read from this judgment to make the point *that* ‘homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and [.....]criminal acts warranting prosecution were committed in the course of such perversity. He said that ‘it was disconcerting to see tendency of homosexuals to indulge in group sex.’

C.J. Shah sharply interjected to ask if it was based on personal knowledge that Mr Sharma knows that homosexuals enjoy group sex’?

The social context of empathy: Where does it come from ?

The empathy demonstrated by the Judges in the course of the hearings, their sensitivity not only to instances of brutal violence but equally to the more subtle language of discrimination and this made the Court proceedings for the brief moment of the hearings a magical space. LGBT persons who were so used to the sneers and jeers of society suddenly felt that they were not only heard but also respected. The judges just through the art of empathetic listening restored dignity to a section of society on whom the Government seemed intent on pouring nothing but contempt and scorn. The Judges in the hearings did something unique. They spoke about sex without a sneer

and for the first time in recorded judicial history of the Indian Courts managed to actually talk about homosexual sex within the context of intimacy and love. The discourse of love and affection, intimacy and longing became a part of the judicial register and displaced the relentless focus on the stripped down homosexual act as a threat to civilization at its very roots. The conflation of homosexuality with excess through the focus on group sex, was challenged by the nature of judicial questioning and the discourse about homosexuality was linked to contexts of emotion and feeling. A new path was being forged in learning to talk about the intimacy which Nowshirwan and Ratansi shared, within the terms of the law. For the first time it seemed possible to see Nowshirwan and Ratansi and many others like them in terms other than the basely carnal, and for opening out that possibility, one should credit the empathetic listening which C.J. Shah and J. Muralidhar demonstrated.

Leaving aside the question of the eventual judgment, the question which interests us is what accounted for the judicial empathy for LGBT suffering? We can essay some possible reasons.

Firstly, it has often been noted that the difference between the *Bowers* judgement which retained the sodomy law in 1986 and the *Lawrence* judgment which struck down the sodomy law in 2003 in the United States was that in the *Lawrence* Court every judge knew somebody who was gay or lesbian where in the *Bowers* Court, not a single judge knew any gay or lesbian people. Both Judges in this case knew J. Cameron and J. Kirby two openly gay judges who have spoken in India in judicial academies and other such forums about LGBT rights. These public meetings with fellow judges who were gay gave a face and a name to homosexuality. What appears strange and distant is made familiar, and what might have evoked dislike and misunderstanding evokes empathy and understanding.

Secondly, much had changed since 2001 when the petition was originally filed. In the intervening period the range of activities on queer rights has brought queer issues to a center stage as never before. Section 377 had moved from merely being a provision in the IPC to becoming a metaphor for all that is wrong with our sexual universe. The open letter signed by eminent luminaries such as Vikram Seth and Amartya Sen, the pride parades in major Indian cities the periodic media reporting of LGBT rights violation all signaled a changing India, an India to which the judiciary could not be blind to. If Indian society was changing to encompass new understandings of rights, the judiciary could not be completely immune to this current.

Finally, regardless of how much we theorize to understand the powerful societal influences which were brought to bear upon the final arguments, there still needs to remain some space for the highly subjective and deeply personal. What was it in the very being of C.J. Shah and J. Muralidhar which accounted for their remarkable empathy? Where did that remarkably human quality of relating to human suffering come from? That will continue to remain a mystery and we can do no more than hope that the quality of judging continues to be imbued with the spirit which makes judges listen to the voices of human suffering.

The judgement in *Naz Foundation v. Union of India: From private immorality to constitutional morality*

While the judgment in *Naz Foundation v. Union of India* deserves to be studied from many perspectives,²⁴ this final Section will focus on the judicial use of the term ‘constitutional morality.’

The question of morality has been central to the concerns around Section 377 and were sought to be addressed by different parties in the *Naz Foundation* case. Both the Union of India as well as intervenors such as B.P. Singhal and JACK constantly sought to make the point that reading down the Section would destroy society’s morals. The Judges too were deeply troubled by the question of morality and constantly sought to get the parties to respond to the question of morality as a ground for retaining Section 377.

The way the judgment dealt with the question of morality was by introducing the term ‘constitutional morality’ which became the term on which the rest of the judgment hinged. To understand the key role that the notion of ‘constitutional morality’ played in the judgment its important to contextualize the debates on the LGBT rights and morality which was played out historically and which formed a part of the debates before the Delhi High Court.

24. To do a quick listing of its many innovative approaches:

- 1) It redefines privacy as not just being about the place but about the person. ie that the right to privacy is also about the protection afforded to decisions about one’s intimate life.
- 2) It reads sexual orientation as an analogous ground of discrimination to sex and thereby opens out the possibility that the prohibited grounds under Art 15 could move beyond the specifically listed grounds. It also notes that the protection of Art 15 extends not only to discrimination by the state but also to discrimination by civil society.
- 3) It links sexuality and identity and makes the case that though Sec 377 may be facially neutral in its operation it ends up targetting LGBT persons and hence violates the equal protection clause in Art 14.
- 4) It also argues that the judiciary is not bound to defer to the legislature when it comes to the question of fundamental rights and has a sovereign role in protecting unpopular minorities. See Arvind Narrain et. al., Eds., *The Right that Dares to Speak its Name*, Alternative Law Forum, Bangalore, 2009.

The very origins of the law has its historical roots in a notion of morality which was rooted in a Judeo Christian sensibility. It can be traced historically to a time when there was no separation between law and morality and law was meant to reflect a religious morality. Thus the offence of sodomy for which the initial punishment was death penalty was a part of Canon law which became in turn a part of English Law and finally ended up on the statute of the Indian Penal Code. This notion of law and morality as an integrated system, was first challenged by the Wolfenden Committee Report in 1957 which was set up to examine the criminalization of homosexuality.

The Report in its recommendations made a strong argument for the decriminalization of consenting same sex acts between adults in private. As the Wolfenden Committee famously noted, “It is not, in our view, the function of the law to intervene in the private lives of citizens....Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality, which is, in brief and in crude terms, not the law’s business”²⁵

The Recommendations of the Wolfenden Committee Report in turn became the subject matter of one of the most famous legal debates in history between Lord Devlin and Prof. H.L.A. Hart, which has remained a staple of legal education around the world, ever since it first took place.

Lord Patrick Devlin articulated the classic defence of why homosexuality should continue to remain a criminal offence. In his view, even if homosexuality was a private immorality it should continue to be punished as Devlin argued that homosexuality was an attack upon a ‘society’s constitutive morality’. In his view a society’s existence depended upon the maintainance of shared political and moral values. To maintain those values and in fact to ensure societal survival it was essential that even a private immorality like homosexuality should continue to remain a criminal offence.

It was as a counter to Devlin’s statement that Prof. H.L.A. Hart articulated the classic defense of the Wolfenden Committee Recommendations. Hart, following from Mill’s defence of liberty argues that the basis of the criminal law lies in preventing harm to others. There is no basis in Hart’s philosophy for the law to actually intervene to legislate a public morality. Hart argues that there is no empirical evidence for the proposition that if law did not support a public morality, society would collapse. If such was indeed the case we should assume that there can be no change in societal

25. Wolfenden Committee Report, 1957 at para 24.

morality as any change in social morality becomes equated to a collapse of societal morality. In effect Hart offered a resounding defence of the core recommendation of the Wolfenden Committee that, 'there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business.'²⁶

Suffice it to say Hart's work in general and definitely the work which came out of his debate with Devlin has been central to debates around the criminalization of homosexuality in legal circles around the world. Even when conservative judges and lawyers have been unsympathetic to the homosexual voice, they have been able to relate to the philosophical core of the positivist argument i.e. law has no place in enforcing morality. There was little space in England of the 60's for an articulation of a queer viewpoint which would have had acceptance in mainstream legal circles. To illustrate this climate of disgust towards homosexual rights as it were Lacey quotes one example, "C.P. Harvey, a judge, was sympathetic to legalization, but only because of the need to reduce the risk of blackmail used by one homosexual partner on the break up of a relationship. He also so fit to congratulate Herbert on 'a remarkable feat' in having 'worked up such a dazzling display from such squalid material'."²⁷

The impact of Hart's thinking in India cannot be underestimated. Every student of law and jurisprudence has had to contend with his thinking. So every student of law encounters homosexuality and the defense of decriminalization through the Hart-Devlin debates. Legal academic circles and in particular jurisprudence professors will still swear by Hart's work as the acme of positivist jurisprudence. Academically minded judges too have cited Hart in the judgments of the Indian High Courts and Supreme Courts. In short, in a difficult terrain of a complete lack of exposure to the discourse of homosexual rights, the work of H.L.A. Hart provides a remarkably useful starting point for speaking to judges, lawyers and legal academics in a language that they not only know, but have been taught to venerate.

Such being the case, the Naz judgment could have been well justified in making the argument for the decriminalization of homosexuality based on Hart's position that it was not the law's business to regulate a zone of private morality. Such an understanding would have been sufficient to achieve the result of reading down Section 377 to exclude consensual sex between adults from the ambit of criminalization. However the judges choose to tread on a more ambitious path.

26. Wolfenden Committee Report, 1957 at para 24.

27. *Ibid.* p.259.

The judges begin by referencing Dr. Ambedkar, who in the Constituent Assembly noted, “Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.”²⁸

They go on to state that, “Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective 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.”²⁹

*“Moral indignation, howsoever strong, is not a valid basis for overriding individual’s fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.”*³⁰

What the judges do through articulating the notion of constitutional morality is change the terms in which homosexual expression has been thought of by the judiciary. From the first tentative steps when Hart and Wolfenden made space within the law for ‘private immorality’, now homosexual expression is seen as not just something which needs to be ‘tolerated’ but rather as something which needs to be protected as protecting the expression of homosexuality goes to the heart of the meaning of the freedoms guaranteed under the Indian Constitution. In a reversal of the terms of the debate it become ‘moral’ to protect LGBT rights and ‘immoral’ to criminalize people on grounds of their sexuality. To protect what Devlin might have called, ‘society’s constitutive morality’ and the Judges call ‘constitutional morality’, it becomes essential to ensure that LGBT expression is protected.

Constitutional morality in the judges reading, requires that LGBT persons are treated as equal citizens of India, that LGBT persons cannot be discriminated against on grounds of their sexual orientation and that LGBT persons right to express themselves through their intimate choices of who their partner is be fully respected. Its only when the dignity of LGBT persons is respected that the Indian Constitution lives up to its foundational promise. Taken one step further constitutional morality also requires the court to

28. *Naz Foundation v. Union of India and Ors.*, (para 79), 160 (2009) DLT 227.

29. *Ibid.*

30. *Ibid.* para 86.

play the role of a counter majoritarian institution which takes upon itself the responsibility of protecting Constitutionally entrenched rights, regardless of what the majority may believe.

In the Judges fitting conclusion, “If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.”³¹

The theme of ‘constitutional morality’ thus brings about a paradigm shift in the way the law thinks about LGBT persons. Protecting the rights of LGBT persons is not about only about guaranteeing a despised minority their rightful place in the constitutional shade, but equally it speaks to the vision of the kind of country we all want to live in and what does it mean for the majority.

Indian law seems to have traversed the journey from *Nowshirwan* to the *Naz Foundation*, from persecution for intimacy to making some space for the ‘little communities of love’. However the victory still remains fragile and needs to be nurtured and safeguarded. One of the hopes of what the *Naz* judgment could portend is best articulated by the Judge who was one of the inspirations for the judges in *Naz Foundation*, J. Albie Sachs. J. Albie Sachs looking to the future of a South Africa, post decriminalisation of homosexual expression noted, ‘It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.’³²

31. *Ibid.* para 130.

32. *National Coalition For Gay and Lesbian Equality v. Minister of Justice*, [1998] {12} PCLR 1517 at para 138.