

BREAKING SILENCES, CELEBRATING NEW SPACES: MAPPING ELITE RESPONSES TO THE ‘INCLUSIVE’ JUDGMENT

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*This paper analyses the Naz Foundation judgment and the reaction of the Indian society to it from a sociological angle. The initial parts of the paper traces the evolution of gay rights movement as a social movement and the past attempts by this movement to use the institution of law and courts of law as an agent of the social change it sought to bring about. Thereafter, the paper concerns itself with the analysis of responses to the decision by English language media in India, which, the author admits, is a reflection of the view points only of the urban elite section of the Indian population. The paper also discusses the heteronormativity of the Indian society that criminalises and suppresses alternate sexualities and the factors shaping the same.***

I. INTRODUCTION

“If there is a constitutional tenet that can be said to be the 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 generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracized.”¹

Considered as a landmark judgment from the Delhi High Court, this created an opportunity for an otherwise ‘taboo’ subject to be discussed publicly in the media—newspapers, television channels and blogs. This paper is an attempt to analyze the responses to the judgment as published in the English press made by academicians, activists and other supporters of the cause. It is important to

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¹ Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277, ¶ 130; W.P. (C) No. 7455/2001.

remember that this is a response of the urban educated elite. The rationale for this paper is based on the fact that it is important to document public response mainly because public memory is short lived and it needs to be analyzed both for posterity's sake as well as to understand the nature of debates that take place as a response to something which is termed historical, in this case the judgment. This paper is divided into the following parts:

- a) Tracing a history of what had been the efforts taken by the civil society and the responses of the legal system before the 2008 judgment. This is necessary in order to see the continuities and discontinuities with the past on the issue of homosexuality
- b) Categorizing the dominant responses to the judgment under certain conceptual discussions, namely, responding to a movement, upholding privacy rights and the spirit of the Constitution.

The cultural construction of sexuality negates any sexual activity that is 'non productive' of male semen. It penalizes homosexual men for the loss of the semen, which holds the seed for reproduction. The existence of Section 377, consensual homosexuality, discarded the legal notion of privacy held sacred when it comes to marriage.² This is what Martha Nussbaum argues when she says that there exists a fear of the erosion of traditional distinctions and boundaries. Fear of a type of female sexuality that is unavailable to men, fear of a type of male sexuality that is receptive rather than assertive.³ As this issue of sexuality has been discussed among some circles for more than a decade now, there is a rhetorical change. There has been a shift from LGBT⁴ politics to queer movement which signifies understanding oppositional sexuality in terms of fixed identities to understanding it in terms of a wide range of positions and attitudes, all of which aim to decentre the heterosexist norm. There are two important concerns around the queer identity that Arvind Narrain raised. It is important to understand that citizenship is hierarchically structured around sexuality and that unequal citizenship is being legitimized by societal institutions such as marriage and family.⁵

The work related to same sex sexualities in India can be categorized into that carried on by support groups, HIV/AIDS-related work and more explicit political activism. Support groups tend to be specific to particular identities or amongst people who engage in same sexual behavior without ascribing to an

² GEETANJALI GANGOLI, INDIAN FEMINISMS: LAW, PATRIARCHY AND VIOLENCE IN INDIA 66 (2007).

³ MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 185 (1999).

⁴ LGBT means Lesbian, Gay, Bisexual and Transgender.

⁵ Arvind Narrain, *Rethinking Citizenship: A Queer Journey*, INDIAN JOURNAL OF GENDER STUDIES, 14: 1 62 (2007).

identity (lesbians or MSMs).⁶ The work on the prevention and control of the spread of HIV/AIDS has tended to focus on modifying sexual behavior without exploring the underlying issues relating to homosexuality and its acceptance in society at large. The other category of work related to same sex sexualities is that of the explicitly political activist groups whose political activism at times combines with their role as resource organizations.⁷ The decisions of legal systems, the police, employers and health care services are frequently influenced by an individual's gender, sexual practice and identity, especially in the context of heterosexual marriage being the formal and approved frame of all sexual behavior. Those who do not conform are not to be allowed to freely associate with others to work, to live healthy lives, or to experience sexual pleasure.⁸ The practical difficulties of trying to live out such relationships come at every level: from nominees on bank accounts, to life insurance policies, to who is next of kin and takes charge of one's life and death by default. Even commercial transactions, medical decisions, etc. go to the next of kin who are defined only as relatives by blood or marriage. A first step towards resolving these issues would involve the broadening the concept of family, rather than going back to it, by interrogating and dismantling marriage or by relegating it to one way of living rather than the only one.⁹

II. A DECADE LONG JOURNEY: NARRATIVES FROM THE PAST

The 2009 judgment did not happen in a day or because of the great benevolence or rationality of Justices Shah and Muralidhar. This landmark decision needs to be seen in the light of the continuous efforts that have been made within the legal system, which in turn is a response to the larger societal or group demands. One of the first of these reported efforts happened in 1994. Between February and April 1994, there were several reports in national newspapers about the existence of 'rampant homosexuality' in New Delhi's Tihar jail, which is India's largest jail block for convicted criminals and under trials. A report by a team of doctors who visited the facility and interviewed the inmates revealed that 90% of them engaged in homosexual activity. As a consequence the doctors recommended that condoms be provided to prisoners in order to protect them from HIV. However, the Inspector General of Prisons at that time, Kiran Bedi, was opposed to the distribution of condoms on the reason that it would encourage homosexuality and to the acknowledgement that homosexuality existed in the prison. Moreover, the distribution would amount to the acceptance of the crime in the Tihar jail.¹⁰ Petitions had been filed by the AIDS Bhedhav Virodhi Andolan in 1994 (Movement Fighting

⁶ MSMs refer to Men who have sex with Men.

⁷ *Id.*,85.

⁸ GEETANJALI MISRA & RADHIKA CHANDIRAMANI, *SEXUALITY, GENDER AND RIGHTS: EXPLORING THEORY AND PRACTICE IN SOUTH AND SOUTH EAST ASIA* 13 (2005).

⁹ Rinchin, *Queering Marriage and Family*, *ECONOMIC AND POLITICAL WEEKLY*, February 19, 2005, 718-20.

¹⁰ RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 79 (2005).

AIDS Discrimination) against the Union of India challenging the constitutional validity of Section 377. The ABVA petition, filed shortly after the Tihar jail incident counters the indignation of those who view homosexuality as a ‘foreign contaminant’ by locating the emergence and visibility of gay, lesbian and bisexual identities within the narrative of an ancient Indian cultural tradition.

Not going to the court, civil society also had a voice on Section 377 and spoke about the rationale as to why it needs to be repealed. It is in fact interesting that the Delhi High Court ten years down the line is using a similar argument, and one is left to wonder whether the media attention is simply dependent upon the Court enunciating the same reason in the form of a ruling. When a women’s group made rights based claims it neither got the visibility nor the public response. Reference is being made here to the memorandum submitted on February, 1999 by The Campaign for Lesbian Rights to the Committee on the Empowerment of Women: Appraisal of Laws relating to Women (Criminal Law) where it had demanded the repeal of Section 377.¹¹ The key highlights of the memorandum were as follows:

- The right to privacy is part of the fundamental right to life and liberty as guaranteed by Article 21 of the Constitution.
- Art 12 of Universal Declaration of Human Rights, 1948 recognizes right to privacy.
- Section 377 is violative of Article 14 of the Constitution since it encourages discrimination against persons purely on the basis of their sexual behaviour.
- According to established medical opinion like that of the American Psychiatric Association and the World Health Organization, female and male homosexuality and homosexual acts are perfectly normal, reflecting a different sexual orientation and pattern of loving cannot be considered abnormal anymore.

Another important step was the 172nd Report of the Law Commission of India, 2000 making a review of rape laws. The text proposed:

“In the light of the change effected by us in Section 375, we are of the opinion that Section 377 deserves to be deleted. After the changes effected by us in the preceding provisions (section 375 to 376 E), the only content left in Section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to just deserts.¹² This is being categorically mentioned in this

¹¹ Campaign for Lesbian Rights, *Memorandum to Committee for Empowerment of Women in LESBIAN EMERGENCE: CAMPAIGN FOR LESBIAN RIGHTS* (1999) as cited in Pramada Menon, *The Bigger Picture*, TARSHI (2009) available at http://www.tarshi.net/asiarsrc/plspk/2009_1/Bigger_Picture.asp (Last visited on September 14, 2009).

¹² LAW COMMISSION OF INDIA, 172nd Report, *Review of Rape Laws*, 35 (2000).

recommendation that the manner in which Section 375 is redefined; there shall be no requirement for Section 377.”¹³

As a follow up to the Law Commission Report the National Commission for Women came up with the proposal of amendments to rape and related provisions in 2003 saying that there needs to be a Criminal Law Amendment Act 2006. This suggests the deletion of Section 377 – “Section 377, Indian Penal Code (*hereinafter* “IPC”) shall be deleted and a new Section 377 shall be inserted as under: — ‘Section 377. Any adult person who has sexual intercourse with another adult person against the will and without the consent of the other adult person shall be punishable...’” These being the proposal of the NCW, it is notable that the Chairperson of the NCW however has not made any positive response to the judgment. Given that there has already been a move within some of the law and policy making bodies of the country on deleting the provision of Section 377, it is however unfortunate that the court decision in 2008 extends nowhere close to deleting the provision, but restricts it to the logic of decriminalization. One wonders whether one shall look at the judgment as a few steps taken back rather than forward.

Section 377 case law suggests that few cases of same sex adult sexual activity are prosecuted in the higher courts. Since 1830 there have been only four cases involving consensual acts of anal sex, of which three cases occurred before 1940.¹⁴ Although its threat is indisputable, there appears to be little indication of the persecution of adult same-sex consensual sex under this law. Out of the forty-six cases involving prosecution under Section 377, the vast majority of the cases, 30 out of the 46, involve sexual assault on children. Statistics from the lower courts are not available to know the extent to which this is consonant across the court system.¹⁵ What is certain is that Section 377 is wielded as a threat against sexual

¹³ *Id.* The definition as proposed in the Law Commission recommendation is the following:

Sexual Assault means:

- (a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of the person with
 - i) Any part of the body of another person; or
 - ii) An object manipulated by another person
- (b) manipulating any part of the body of another person so as to cause penetration of the vagina, the anus or the urethra of the offender by any part of the other person’s body,
- (c) introducing any part of the penis of a person into the mouth of another person,
- (d) engaging in cunnilingus or fellatio or
- (e) continuing sexual assault as defined in clauses (a) to (d) under conditions going against the person’s will or consent.

¹⁴ Sherry Joseph, *The Law and Homosexuality in India* (International Conference on Preventing Violence, Caring for Survivors: Role of Health Professionals and Services in Violence, November 28-30, 1998, YMCA, Mumbai) available at <http://gendwaar.gen.in/Sexuality/SE8.htm> (Last visited on September 15, 2009), citing Shamona Khanna, *Gay Rights*, ALE LAWYERS, June 1992.

¹⁵ *Id.*

minorities by the police and others in positions of authority as well as thugs and goons to harass, blackmail, threaten and assault vulnerable men.¹⁶ Section 377 opens opportunities for the abuse of other criminal laws¹⁷ which become excuses for harassment and blackmail by both police and members of the public, and for making arrests. This harassment is all the more effective because most victims have little knowledge of the law and fear the social repercussions of public knowledge about their sexual identity. While the law may not in itself generate homophobia, its very existence moulds beliefs and attitudes, and drives the demeaning and abusive treatment meted out to people of alternative sexualities and those who work with them.¹⁸

In 2001, there had been a harassment of outreach workers in the MSM community involving the arrest of HIV/AIDS workers from Bharosa Trust and Naz Foundation International in Lucknow. Although both these organizations had been involved in HIV/AIDS education and sexual health initiatives, they were alleged to be running a gay racket club. The police raided the offices seizing videos and magazines, as well as materials used for safe sex demonstrations branding them pornographic and charging them of offences under the obscenity and indecency provisions of the IPC. In terms of the media, the Lucknow case

¹⁶ Jyoti Puri, *Sexualizing The State: Sodomy, Civil Liberties, and the Indian Penal Code in Sexualities and National Bodies in Asia: An interdisciplinary Symposium at the Women's Studies Research Centre, Brandeis University*, available at <http://culturalproduction.wikispaces.com/Sexualities+in+Asia> (Last visited on September 25, 2009).

¹⁷ There are cases of § 377 being read in conjunction with other penal code provisions such as §116 (abatement) , or §109, interpreted as instigating or encouraging 'unnatural sex', in order to make arrests. Police also make arrests under a variety of criminal laws relating to loitering, soliciting, or indecency, all of which are open to ambiguous interpretations. Examples include various Public Nuisance Acts: § 268 (any conduct in a public place that causes injury/danger/annoyance to the public); §§ 292, 93, and 94 (the obscenity act and its provisions, which proscribes 'obscene' literature, paintings, and other objects, and "obscene" acts); § 375 (sexual assault); the Dramatic Performances Act of 1876 (whereby any play may be banned as "depraved"); the Indecent Representation of Women (Prohibition) Act of 1986 (empowering the state to define any representation of women as "corrupting of public morality"); the Juvenile Justice Act of 1980 (empowering the State to take away a child from parents deemed immoral or unfit); the National Security Act No. 65 of 1980 (acting in any manner prejudicial to the maintenance of public order); and even the Customs Act of 1962 (empowering the state to ban the import of any goods which affect the "standards of decency or morality). In addition to these national laws, several state and city/municipal acts contain provisions that could give police inordinate powers. Among the most notorious are sections under the Bombay Police Act — §110 (indecent behavior in public), §111 (annoying passengers in the street), and §112 (misbehaving with intent to breach the peace) — and sections §92 and § 93 (public nuisance) under the Delhi Police Act; (VOICES AGAINST 377, RIGHTS FOR ALL: ENDING DISCRIMINATION AGAINST QUEER DESIRE UNDER SECTION 377, 4-5 (2004); INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, INTERNATIONAL TRIBUNAL ON HUMAN RIGHTS VIOLATIONS AGAINST SEXUAL MINORITIES 15-17 (1995).

¹⁸ Radhika Ramasubban, *Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India*, available at, <http://www.sxpolitics.org/frontlines/book/sfxpolitics.pdf> pp 95 (Last visited on October 31, 2009).

marked a watershed in coverage of sexuality issues. Even in big metropolises, such as Delhi, media attention was mostly prurient and derogatory, prompting even greater police surveillance of cruising areas. Following every media expose, levels of extortion and blackmail of gay men, *kothis* and *hijras*, on pain of arrest under Section 377, rose dramatically.¹⁹ A Joint Statement issued after the Lucknow incident by Naz Foundation (India) Trust and other entities²⁰ addressed a crucial issue which is reiterated in the Delhi High Court judgment in 2009.

“Clearly it is difficult for MSM to access the precious few health services that are sensitive or specific to their needs, let alone official health agencies with the fear of being prosecuted and stigmatized. In order then to make services and information more accessible, many NGOs work with MSM population, providing counseling services, support groups and outreach, while maintaining confidentiality.... It is necessary to point out that many MSM also have sex with women and that a majority of them are married. This possibly exposes their wives and children to the risk of infection. This means that interventions with MSM must form an essential part of the response to the epidemic. What affects MSM, affects everybody.”²¹

The tremendous power that exists with the state agencies, namely the police is reflected in the attitude of the police officer in a large industrial city in the United States, being interviewed about the treatment of homosexuals.

“Now in my own cases when I catch a guy like that I just pick him up and take him into the woods and beat him until he can’t crawl. I have had seventeen cases like that in the last couple of years. I tell that guy if I catch him doing that again I will take him out to the woods and I will shoot him. I tell him that I carry a

¹⁹ ADITYA BANDHOPADHYAY, HUMAN RIGHTS WATCH 26 (2002) (“Policemen take advantage of this fear of the judicial process to threaten sexual minorities with Section 377. They employ such threats to blackmail, extort, rape and physically abuse their victims. And because obtaining rapid redress is a virtual impossibility, members of sexual minorities usually pay up or accede to the abuse. This also means that the police records never reflect the fact that the threat of 377 was used, for no case is ever registered. The lack of a paper trail – of records of the prosecution of consensual sexual acts between adult males – is in turn used by the police to claim that Section 377 is a benign provision chiefly enforced, as they falsely claim, to deal with cases of male rape ... Today the issue of Section 377 ... is a question of corruption, simply because it is one of the lucrative and easy sources of supplemental income for a venal police. Their real objection to its repeal is the fear of losing this easy money.”)

²⁰ The other entities referred to are the Milan Project, The Sangini Project, TARSHI, Lawyer’s Collective, Nirantar, IFSHA, Jagori, CREA, CFLR and Ankur.

²¹ BRINDA BOSE, GENDER AND CENSORSHIP (2006) (quoting a 2001 Joint Statement circulated through email).

second gun on me just in case I find guys like him and that I will plant it in his hand and say that he tried to kill me and that no jury will convict me.”²²

The above quote is used as an example of a ‘normal’ attitude and is not taken as a specific response to the issue of homosexuality by a police officer in a city in the US.

The judgment that is being celebrated has been delivered in July 2008, the journey to which started in 2001. Organizations such as Naz (India) and ABVA stay clear of state-based funding. In the case of Naz (India), it has deliberately sought to protect itself from state scrutiny and tried to avoid compromising advocacy work on behalf of sexual minorities by looking for funding elsewhere. Naz (India) is supported by funds from MacArthur and Ford foundations, United States, and Lotteries Commission, United Kingdom, (now known as Community Fund), among other sources. Ironically but expectedly, Naz (India) frequently finds itself at odds with the State on behalf of vulnerable groups. This paradoxical situation repeats and endures, despite the fact that the state relies heavily on organizations such as Naz (India) to do the necessary HIV/AIDS outreach work. Naz (India) does not see itself as a rights-based organization but chooses to position itself as intervening primarily in sexual health-related matters. Still, as is well stated in the petition, matters of health, life, and rights are closely related.²³ The following is a brief chronological narrative of the legal battle in the court.

2001: The petition filed by the Naz Foundation in the Delhi High court asked for the reading down of this law. The petition argued in the lines of Section 377 being a violation of privacy. It contained descriptions of the impact on the MSM community and highlighted the social stigma and police abuse that the provision enables and perpetuates. The Naz (India) Public Interest Litigation (PIL) represented a necessary and courageous move against the legalization of homophobia and heteronormativity in Section 377 and towards the decriminalization of same sex sexualities in India. As a result of intense deliberations and strategic considerations, the PIL took a health based, rather than sexual rights, approach against Section 377, which coincided with the organization’s mission and orientation. The PIL rightly indicted the State on its failure to protect the lives, interests and the rights of those most vulnerable to HIV/AIDS. The petition and the process through which it was developed are not without significant criticisms, which are shadowed above. The PIL, the Delhi High Court hearings, and the responses of other State institutions present the nexus between the State and sexuality. The petition against Section 377 is an opportunity to interrogate the State through a queer lens, to question the nature of the State, its inconsistencies across institutions and agencies, and effective ways in which to undo its predominance. Setting into motion a gay and lesbian movement across India was

²² *Supra* note 3, 184.

²³ *Supra* note 16.

part of the intended strategy of the Naz (India) PIL although, unpredictably, it was the government's response to the PIL in September 2003 that rallied together a coalition of groups across the country and triggered the formation of Voices Against Section 377 in Delhi and National Coalition of Sexuality Rights in Bangalore.²⁴

2002: Joint Action Kannur (JACK) filed an intervention supporting the retention of the law on the ground that HIV does not cause AIDS, and that this law is required to prevent HIV from spreading.

2003: The Government of India (Ministry of Home Affairs) filed an affidavit supporting the retention of the law on the grounds that the criminal law must reflect public morality and that Indian society disapproved of homosexuality. The Indian government said "while the respect for private and family life is undisputed, interference by public authority in the interest of public safety and protection of health and morals is equally permissible—that is precisely what S 377 does."²⁵ The reply takes a heteronormative nationalist stance in its position that that the law does not distinguish between procreative and non-procreative sex in its punishment of unnatural sex, and despite the tolerance toward homosexuality in USA and UK, it is not accepted. This is hardly unexpected if part of the state's function is to manage the conjunctions of nationalism and (respectable, normal) sexuality.²⁶

2004 (September): The Delhi High Court dismissed the petition on the ground that the petitioner, Naz Foundation, was not affected by Section 377 and hence had no *locus standi* to challenge the Law. The petitioners then submitted a review petition saying that the queer community in India, especially the MSMs is a socially disadvantaged group, who are unable to approach the court directly for fear of being identified and subject to discrimination, harassment and violence by the police and society.²⁷ In response to the petition, the government claimed an act that is technically unlawful cannot be rendered legitimate simply because it took place on a consensual basis. It went on to say, "Section 377 has been applied to cases of assault where bodily harm is intended and deletion of the said section can well open the floodgates of delinquent behaviour and be misconstrued as providing unbridled license for the same". The petition and the government's response have highlighted the dichotomy in the State's position. While on the one hand the government, through the National AIDS Control Organisation (NACO) and the various state AIDS Control Organisations encourages diverse sexual practices within a safe-sex, HIV/AIDS prevention framework, it still believes that Section 377 is necessary. Though NACO was party to the petition, it had not yet

²⁴ *Id.*

²⁵ Gautam Bhan, *Challenging the Limits of Law: Queer Politics and Legal Reform in India* in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* 468 (Arvind Narrain & Bhan Gautam eds., 2005) (giving Union of India's response to the Naz petition, September 6, 2003).

²⁶ *Supra* note 16.

²⁷ *Id.*, 468.

responded to the petition before it was dismissed. After much debate within the queer movement, a Special Leave Petition has been filed before the Supreme Court on the limited question of whether the court could dismiss the petition on the grounds that there was no cause of action.

2006: A combination of activities happened both legally as well as in terms of the movement.

- (a) On an appeal filed by Naz Foundation, the Supreme Court passed an order remanding the case back to the Delhi High Court so the matter could be heard on merits.
- (b) National AIDS Control Organization (NACO) filed an affidavit stating that the enforcement of Section 377 is a hindrance to HIV prevention efforts.
- (c) An intervention was filed by B.P. Singhal stating that homosexuality is against Indian culture and that the law needs to be retained.
- (d) An intervention was filed by Voices Against 377 supporting the petitioner and stating that Section 377 is violative of the fundamental rights of LGBT persons.

2008: The matter was posted for final arguments before C.J. Shah and J. Muralidhar.

2009 (2 July): Judgment delivered.

Certain conclusions may be made from the above historical narrative. The legal debates surrounding homosexuality in India is more on male homosexuality rather the lesbianism, this is definitely because Section 377 has a male person as an agent. Secondly, the health and sexuality interface is quite established both when the State agencies tackle the issue and when arguments are framed by groups against these interferences. This is done both because it is thought that to use the HIV/AIDS threat will be a more acceptable argument rather than only the non-discrimination logic. Thirdly, the issue of public morality had been an important component of the legal battle right from saying that homosexuality is alien to India to proposing that Section 377 needs to be continued to protect public order.

III. SILENCES OF YESTERDAY, SPACES FOR TOMORROW

The judgment was delivered on 2nd July and there has been overwhelming media coverage on the judgment. The full text of the judgment itself had been put up on sites enabling a section of the population to read it and rejoice the decision. In the history of a nation, it is not just political events that signify a change in ethos. Occasionally, the judiciary, as an important arm of the State and as an articulator of counter-majoritarian viewpoints, gives expression to what it considers to be the soul of the Constitution. Interpreting the Constitution is a delicate exercise as it enables the Constitution and the laws to adapt to the changing

times, without the lawmakers having to abrogate what seems obsolete. It is the urban English press that has been looked into for the kind of responses members of the civil society made on the judgment. What this section does is a mapping of the responses to the judgment under certain categories. That these responses may not be representing the voice of the country is well understood, however, it is definitely an exhaustive illustration of the urban educated middle class Indian. Law has served as a site of contest of sex and sexuality. It is not a celebratory space; it is a space that is explored only when rules are broken. But law plays the role in the construction of the subject and culture. It is important to make a distinction between law reform strategies on the one hand and litigation strategies on the other. The former seek to bring about new legislation to give legal recognition to rights claims, while the latter use existing laws either aggressively or defensively to advance such claims.²⁸ The Delhi High court judgment is obviously the latter. While analyzing the responses, five categories have been made to slot these responses. It is not to say that there cannot be other categories, however keeping in mind that the judgment itself is a response to certain issues being raised; these categories are taken from where some opinion or response to the judgment is provided rather than merely reproducing the text of the judgment. There are five categories within which the responses can be included are the following:

- *Responding to a movement*
- *Privacy and Dignity*
- *Beyond LGBT Rights*
- *Spirit of Constitution*
- *Organized religion, heteronormative reinforcement, accommodative voices*

A. RESPONDING TO A MOVEMENT

Many judgments on disadvantaged groups are a result of a collective struggle or movement. Famous examples from the women's movement are the Mathura rape case²⁹ and the Vishaka judgment³⁰, both of which affected the legal system in India in a significant manner. Four responses are discussed here:

“Like Roe v. Wade which legalized abortions in the United States, or Brown v. Board of Education, which ended racial segregation in public educational institutions, the Naz Foundation decision has the potential of being a case whose name conjures up the history of a particular struggle, celebrates the victory of a moment and inaugurates new hopes for the future.”³¹

²⁸ NIVEDITA MENON, GENDER AND POLITICS IN INDIA 286 (1999).

²⁹ Originally known as *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

³⁰ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

³¹ Lawrence Liang & Siddharth Narrain, *Striving for Magic in the City of Words*, available at http://www.himalmag.com/Magic-in-the-city-of-words-_nw3197.html (Last visited on September 24, 2009).

“Court one, item ne 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 Section 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. This judgment is a judgment about dignity.”³²

The use of the word ‘us’ reflects the collective, who had been fighting for a cause and waiting eagerly for that fight to get a legitimate recognition. The word us in everyday sociological inequalities always is in opposition to a ‘them’. In this case the dominant sexual orientation of heteronormativity as them is pitched against the minority sexual orientation of the collective of homosexuality/LGBT/queer.

“Tracy Chapman once wrote of talking about a revolution, and how it sounds like a whisper. It is said that a prisoner once weathered down a thick prison wall by whispering stories into its walls over a number of years. The Naz Foundation case is a good instance of how the stubborn and formidable walls of prejudice that inform most public institutions can be broken down, and the next barrier is to spread the whisper around a bit. And by outing sexuality into public discourse in a manner never done before, the Naz Foundation decision is already talking about a revolution.”³³

“By acknowledging the distinct status of persons, whose only common bond is sexual orientation, and addressing them as a collective [actually using the phrase ‘LGBT’], the Naz Foundation recognises the emergence of new social identities, while carefully sidestepping lingering concerns about their elite roots and urban biases. The mass publicity and fanfare heralding the decision presents a rare opportunity for activists to reshape public opinion and influence a wider social debate about gay rights.”³⁴

³² Gautam Bhan, *On freedom’s Avenue*, INDIAN EXPRESS July 3, 2009, available at <http://www.indianexpress.com/news/on-freedoms-avenue/484509/> (Last visited on September 25, 2009).

³³ *Id.*

³⁴ V. Venkatesan, *Defining Moments*, THE HINDU, August 3, 2009, available at <http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=20090731261502900.htm&date=f12615/&prd=fline&> (Last visited on September 25, 2009).

The judgment seems to directly impact its beneficiaries by instilling a sense of freedom experienced by a captive group. This is freedom from a legal bondage which reflects the normative framework of the society.

“There was little time for the news to really sink in, to truly appreciate the enormity of the moment. As they all stepped out into a beautiful Delhi day, the activists and lawyers were mobbed by the television media asking their favourite and most inane question — “How do you feel?” As one activist put it later in the day, “How can you explain what freedom feels like?””³⁵

B. PRIVACY AND DIGNITY

There needs to exist certain fundamental rights to be available to people with homosexual orientation. a) the right to be protected against violence, b) the right to have consensual adult sexual relations without criminal penalty, c) the right to be free from discrimination in housing, employment and education, the right to military service, the right to marriage and/or the legal and social benefits of marriage, the right to retain custody of children and/or adopt.³⁶ On interpreting the Delhi High Court judgment, it is clear that India is far behind achieving the desired international standard of rights of people with homosexual orientation. Starting with a public discourse in the early nineties, in 2008, the court for the first time just decriminalizes the activity—it is a long route ahead. While the petitioners in *Naz* relied on this time tested strategic value of ‘right to privacy’ to challenge the constitutional validity of Section 377, there has been some discomfort with the notion of privacy itself, within those involved closely with the queer movement and the legal challenge. For instance, Arvind Narrain admitted that the legal challenge asking for decriminalization of sex in private would only have limited consequences for the wider queer community, for Section 377 would be operative with respect to the public space.³⁷ Similarly, in a piece on the limits of any legal action in bringing about social change, Gautam Bhan wondered if an appeal to privacy would not be similar to an appeal to notions such as ‘modesty’. Bhan asked, “[H]ave we not learnt anything from the two decades of the women’s movement that has sought to pierce the barrier of family privacy to expose the violence and silencing of sexuality that lies within? Are we now submitting to the same dictates? Tomorrow, will we be unable to speak of domestic violence within gay couples because we consider sexuality a ‘private’ affair?”³⁸ Given these concerns already having been raised earlier, the following three responses have

³⁵ Kajal Bharadwaj, *Reforming Macaulay*, DECCAN CHRONICLE, July 5, 2009 available at <http://www.deccanchronicle.com/node/43776/print> (Last visited on September 15, 2009).

³⁶ *Supra* note 3.

³⁷ Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7(2) HEALTH AND HUMAN RIGHTS 142, 156 (2004).

³⁸ *Supra* note 26, 46.

been chosen to represent the attitude on the most important rational basis of the judgment—privacy and dignity.

“Simply put, the judgment says that the state has no presumptive right to regulate private acts between consenting adults. It protects privacy. That is our value. The judgment says that individuals should not feel so stigmatised that they are unable to seek medical help. That is our value. We should not minimise the fact that social change in matters as delicate as sexuality is difficult to negotiate in any society. The judgment is admirably tactful in pointing out simply one fact: the state has not been able to prove that it can demonstrate that serious harms result as a consequence of these private acts. Claims of such harm are often causally unfounded, based on prejudice and often even less plausible than harms that result from many of the practices we do tolerate. At least on this much there is a consensus amongst the 126 nations who have decriminalised this practice before India. Even for those, otherwise uncomfortable, at least this much should be enough to ground the basic legal claim the court has made. There ought to be at least overlapping consensus on this point.”³⁹

“The Court’s interpretation of ‘privacy’ to mean much more than spatial privacy or privacy in the home to a much broader notion of autonomy and personhood has meant that 377 cannot be applied in public spaces where much of same sex intimacy takes place. This expansive interpretation of privacy has tremendous potential, in other spheres like women’s reproductive rights.”⁴⁰

Privacy as a legal and moral concept has at least three dimensions—physical, informational and decisional. In the physical sense, privacy refers to an agent’s enjoyment of spaces from which others may be excluded, and within which the agent’s activities are not readily monitored without his/her knowledge and consent.⁴¹ It is understood that this judgment uses privacy in the physical sense.

“The court located the notion of ‘dignity’ in the Preamble to the Indian Constitution. This is one of the seminal contributions of the Naz judgment, in that the right to privacy was given a firmer base in Indian constitutional jurisprudence. It is one thing to see the right to privacy as a derivative right, refracted from

³⁹ Pratap Bhanu Mehta, *It’s about All of Us*, INDIAN EXPRESS, July 4, 2009, available at <http://www.indianexpress.com/news/its-about-all-of-us/484966/> (Last visited on September 24, 2009).

⁴⁰ *Supra* note 31.

⁴¹ William A. Edmundson, ‘Privacy’ in *Golding*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, 272 (2005).

Articles 19 and 21, which can be restricted by an invocation of “reasonable restrictions” or the “procedure established by law”. It is another matter altogether when the argument is that privacy must be respected and protected as a ‘right’, because it is bound up with fundamental constitutional values such as dignity and autonomy of the individual.”⁴²

The judgment quotes a Canadian 1999 case which had stated that human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.⁴³

C. BEYOND LGBT RIGHTS: INTERSECTIONAL JURISPRUDENCE

Rights talk becomes obligatory when entering into the domain of law. The claims of a social movement about rights claim makes an assumption that these rights are protected by the state. Thus the state and its institutions are definitely strengthened with the language of law. This judgment undoubtedly lays down broader spheres to which these rights can extend and this is where the judgment seems most important sociologically. The scope of the judgment is more expansive than restrictive. It is important to know that the spirit of the decision has been interpreted to be applicable to many other groups facing disadvantage. That is one of the reasons why it can be called landmark, because it has a wide coverage and it is beyond time and space barriers. It extends from the logic of dignity as is mentioned in the previous section.⁴⁴

“Four key innovations under Article 15 in this judgment have given it a new lease of life. If confirmed by the Supreme Court, these innovations will provide unprecedented constitutional protection from discrimination to all vulnerable minorities —

⁴² Mandal, Saptarshi, ‘*Right To Privacy*’ in *Naz Foundation* available at <http://www.lawyerscollective.org/magazine/august2009/features/feature-1> (Last visited on August 31, 2009).

⁴³ *Naz Foundation*, *supra* note 1, ¶ 28.

⁴⁴ Kannabiran, Kalpana, *India: From ‘perversion’ to right to life with dignity*, as available at <http://www.sacw.net/article992.html> (Last visited on 7 November, 2009) (“Importantly, it also inaugurates intersectional jurisprudence that examines questions of constitutionalism in relational terms that underscore inclusiveness. By this token then, it is not merely a judgment that bears significance for the rights of lesbian, gay, bisexual and transgender peoples (LGBT). It makes the articulation of LGBT rights a torchbearer for a more general understanding of discrimination, oppression, social exclusion and the denial of liberty, on the one hand, and the meaning of freedom and dignity, on the other.”)

including Muslims, Christians, women, tribals, Dalits, gays and disabled persons. It is odd, then, that some of those who are likely to be the biggest beneficiaries of this interpretation are also the ones who most vociferously want to see it overturned..... The first important innovation in the case was to include those grounds “that are not specified in Article 15 but are analogous to those specified therein ... those which have the potential to impair the personal autonomy of an individual”. Therefore, even though grounds such as disability and pregnancy are not specified in Article 15, they now have its protection. Notice that the high court had already held that “sex”, a specified ground, includes “sexual orientation”.⁴⁵

The mystification of the family as a sphere of love and harmony has been one of the primary foci of the feminist critique. The family has been identified as one of the sites of oppressing any kind of sexual orientation other than the heterosexual one. The law protects the family structure and also produces the body as a series of binary opposites—male/female, healthy/disabled, heterosexual/homosexual.⁴⁶ The judgment questions the idea of ‘normal’, and also indirectly addresses disadvantage and not just homosexuals. Although the archetypical ‘normal’ person may not be impacted by the judgment, but therein lies the importance of the decision—by bringing within and raising a voice about the any kind of minority identity.

“It may seem that this judgment does not obviously benefit Hemanshu, who is Hindu, English-educated, male, able-bodied, north Indian, straight, Hindi-speaking and upper-caste. But should Hemanshu lose his legs in an accident, or get posted in a non-Hindi speaking or non-Hindu-majority area, he too will be protected. The court has recognized that pluralist societies rarely have permanent majorities or minorities. The Constitution stands for the principle of minority protection, whoever they might happen to be.”⁴⁷

On the other hand, Ashley Tiles, a gay rights activist in Delhi wrote:

“Why was this entire case, based as it is on Constitutional provisions, not built on analogous reasoning with various other minorities like Dalits, adivasis and religious minorities, through the histories of progressive legislation with these groups, rather

⁴⁵ Tarunabh Khaitan, *Good For All Communities*, THE TELEGRAPH, July 9, 2009, available at http://www.telegraphindia.com/1090709/jsp/opinion/story_11202656.jsp (Last visited on September 24, 2009).

⁴⁶ MENON, *supra* note 29, 264.

⁴⁷ *Id.*

than on international cases to make theoretical arguments about equal treatment and reasonableness? Why was it not seeking to build bridges, like the proposed Equal Opportunity Commission, to show the common cause of minorities, to build a stronger collective politics? That would have achieved many things. It would have set the platform for the coming together of minorities of different kinds to turn the Constitutional words into action; it would have stymied the responses of, and offered a dialogic future to, religious minorities whose protests the media are now communally parading; it would have offered a model of homosexuality and sexual minoritarianism that is truly inclusive, in keeping not with the Nehruvian nonsense about the spirit of the Objective Resolution but with the Ambedkarite point (also quoted in the judgement but not read closely at all) that we are a sham democracy and have to learn to build democracy into the fabric of the social and the political, one step at a time."⁴⁸

The above is particularly a comment that raises a question on the principle of the judgment itself, which is a rare critique other than those coming from religious community with a different focus altogether. This comment is addressing a fundamental question about the need for co-ordination and dialogue between the different forums of the legal system, which usually does not happen and there remains an internal incoherence.

D. SPIRIT OF THE CONSTITUTION

There is a lot of positive response on the judgment comprehending the spirit of the constitution and not the formalism of the constitutional provisions. It is the constitution which creates an image of the excluded citizen. The abstract figure of the citizen needs to have a specific character so as to be deserving of rights. In India, in spite of the scope of the 'citizen' being expanded to include marginal figures like child labourer, prisoner, or street dweller; one of the excluded categories have been that of queer sexualities. This judgment is the first occasion where the concept of citizenship⁴⁹ is understood. This understanding of citizenship does not cover areas relating to marriage, divorce or adoption, where the queer person is still the absent figure. Marriage as an institution is based on exclusion and exclusivity both of which are anti-thetical to any proper concept of democracy.

⁴⁸ Ashley Tellis, *Why I Can't Join the Party*, THE HINDU, July 12, 2009, available at <http://www.hinduonnet.com/mag/2009/07/12/stories/2009071250120400.htm> (Last visited on September 23, 2009).

⁴⁹ According to Marshall, citizenship rights cover civil or the natural rights of life, liberty and property, free expression and free association. Political rights include the right to participate in governing and social rights are those that allow equal opportunities for participation in society, like access to education, economic, physical welfare and security. See JODI O'BRIEN & JUDITH A. HOWARD, *EVERYDAY INEQUALITIES: CRITICAL ENQUIRIES* 364 (1998).

Marriage presumes exclusivity which as a choice is not by itself problematic. But the problem is that marriage as an institution occupies the normative field, leaving no space for non-normative, non-exclusive relationships. Not discussing issues surrounding marriage or family, this judgment reiterates the need to creatively interpret the constitution because that is what will conceptually extend the rhetoric of the constitution to unspecified spaces.

Historically there has been a difference between Nehru and Ambedkar on approaching the hierarchical social structure in India. Nehruvian understanding of the social structure linked to the family and the community is in sharp contrast to Ambedkar's interpretation of the individual with his/her acquired identity (and not the ascribed identity) to be the unit enjoying rights. This judgment thus celebrates the constitutional morality of individual rights bearer and not the public morality determining exclusion of communities, which had been the case with the criminalizing of homosexuality.

“This judgment is a return to Ambedkar. The judges reminded us of the Ambedkar who so passionately fought for the constitution of his imagination. In Ambedkar's India, he wrote fervently that the courts of law of our land must be ruled by a ‘constitutional morality’ and not a public morality. State interest, he argued, cannot be governed by public morality but by the spirit of the Constitution.”⁵⁰

It is important to consider constitutions as philosophical texts propagating a vision of the country rather than a mere administrative document. It is the ability to read the text in the former perspective that keeps the hope in the legal system—that they may be institutions facilitating transformations in the society.

The following comment highlights how dreams need to be realized.

“Citing the Union of India's estimates of the number of MSM at around 25 lakh and the number of lesbians and transgenders at several lakhs, the High Court said this vast majority was denied “moral full citizenship”. The High Court thus opined that Section 377 grossly violated their right to privacy and liberty embodied in Article 21 insofar as it criminalised consensual sexual acts between adults in private. The rationale of the judgment has been provided by recalling the words of Jawaharlal Nehru, expressed when he moved the Objective Resolution in the Constituent Assembly on December 13, 1946. Nehru said: “Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit

⁵⁰ *Supra* note 31.

and of a Nation's passion. . . . [The Resolution] seeks very feebly to tell the world that we have thought or dreamt of so long, and what we now hope to achieve in the near future."⁵¹

The judgment reflects both a strategic and a collectivization approach. The court route is always a preferable option, after the importance of PILs increasing in the country whenever debatable disputes need to be settled. Although the same courts have struck down similar demands made earlier, and yet a collective has some hope in the judiciary. In fact, this is also true in case of the women's movement in India—keeping its confidence in the legal system. ⁵²

Ratna Kapur's concept of sexual subaltern⁵³ has been addressed through this judgment. The concern over the pandemic on HIV/AIDS has led to harnessing of cultural arguments on both sides of the good sex/bad sex binary. Sexual subalterns argue it is sexual repression rather than sexual license that is a Western import. Just like the prostitution law (Immoral Traffic Prevention Act, 1986) has a punitive response to the sex-worker, similarly Section 377 also criminalized the sexually 'marginal'. The punitive response on sex work takes the form of either incarcerating women under morality laws or criminalizing the public manifestations of her work, like soliciting. Legal reform through rehabilitation is not meant for the bad sex. In fact it has been argued that if gay sex is legalized then a related legislation on prostitution also needs to be made legal.

“One of the unintended consequences of the July 2 verdict is that it has reduced, if not eliminated, the scope for Section 377

⁵¹ *Supra* note 33.

⁵² There are two ways in which one can get rid of a provision of law. The first is the legislative route. Basically this means approaching Parliament to amend the law. From our reading of the situation at that time, it was clear that the government, and for that matter, even individual Members of Parliament (MPs) were not ready for it. Therefore we could not opt for that route. The only other route was to challenge the constitutional validity of the section. We did not have much of a choice. Challenging the constitutional validity was the only way. Moreover from what has happening around the world the court route seemed more favourable. In fact later when I met a prominent Minister in the Government during that period, who also happens to be a prominent lawyer, he agreed with our strategy that the court route was the only way. He opined categorically that “our MPs will not do it.” A crucial challenge was to frame the petition. We had good precedents to follow. At one level (amendment by Parliament) there was the change initiated by the Wolfenden Committee of 1967 in Britain to go by. At the other level (court route) we had the decisions of various courts, particularly the South African case of the Constitutional Court decided in 1998 (*The National Coalition of Gay and Lesbian Equality v. Minister of Justice*) to guide us. Both routes, the legislative and the court, had opted for decriminalizing consensual sex between adults in private. See, Anand Grover, *The Challenge to 377 IPC: Lessons from the Road to Success*, available at <http://www.lawyerscollective.org/magazine/august2009/cover-story> (Last visited on September 20, 2009). He was one of the lawyers' of Lawyer's Collective, Delhi, who was framing the draft on behalf of the respondent.

⁵³ RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 69 (2005).

IPC being used against gay clients of male prostitutes or gigolos. For, prior to the judgment, the police could have booked gay clients under Section 377 even if no offence was made out under the Immoral Traffic Prevention Act 1986 (PITA). Gay clients are safer now because Section 377, which carries a maximum penalty of life sentence, cannot any longer be invoked unless the male prostitute is below 18 or the sex was not consensual. Male prostitution has received a boost from the ruling under which homosexuality per se is no more an “unnatural offence” under Section 377. Incidentally, the judgment comes on top of a concession already made to male prostitutes under PITA. For the offence of seducing or soliciting a client for prostitution in a public place, PITA strangely imposes a higher penalty on women. While the penalty for the first offence in the case of women is imprisonment up to six months, the corresponding punishment for men does not extend beyond three months.”⁵⁴

This is an important matter to be considered that a High Court judgment does not ensure that the rhetoric towards homosexuality has shifted in India. This is because this is just a judicial decision and there have not been legislative changes, yet. Moreover, an issue like homosexuality is not addressed in Section 377, it is implicitly present in other private and public laws. One court decision needs cannot be celebrated in isolation in the long term. Certain other related changes need to happen in order for this judgment to go down in the annals of legal history in India as a path breaking judgment by following up on the spirit of the judgment.

E. ORGANIZED RELIGION, HETERONORMATIVE REINFORCEMENT, ACCOMMODATIVE VOICES

Although the *Naz Foundation* insists on a strictly secular approach in adjudicating constitutional claims, it wisely avoids any reference to religious or moral dimensions, even though petitioners explicitly touched upon them in oral and written submissions (they argued that Section 377 was based on “Judeo-Christian” values).⁵⁵ There has been a concerted opposition by all religious groups of the country. The religious leaders keeping all differences apart seemed united as one against the gay ruling, terming it “immoral”, “dangerous” and “unacceptable” to the Indian society and religious communities. Just like most issues of controversy,

⁵⁴ Manoj Mitta, *If Gay Sex Is Legal, Why Not Prostitution*, TIMES NEWS NETWORK, July 11, 2009 available at <http://timesofindia.indiatimes.com/NEWS/India/If-gay-sex-is-legal-why-not-prostitution/articleshow/4764785.cms> (Last visited on September 20, 2009).

⁵⁵ Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, July 07, 2009 http://lawandotherthings.blogspot.com/2009/07/navigating-noteworthy-and-nebulous-in_08.html (Last visited on September 25, 2009).

the debates surrounding homosexualities has religious groups united, as well as counter marginal, but progressive voices being heard in the media as a response to the judgment. The following are some of the comments made by religious leaders:

According to Baba Ramdev, the decision of the High Court, if allowed to sustain will have catastrophic effects on the moral fabric of society and will jeopardize the institution of marriage itself. This offends the structure of Indian value system, Indian culture and traditions, as derived from religious scriptures, Ramdev, quoting Spanish psychiatrist Enrique Rojas, contended that homosexuality is a disease that is curable. "It can be treated like any other congenital defect. Such tendencies can be treated by yoga, *pranayam* and other meditation techniques," The High Court has erred in its ruling by interpreting the terminology sex as sexual orientation. In fact, the term sex referred under Article 15 is in relation to the male or the female sex. It can't be interpreted in context to the sexual orientation of a person," the petition said. He alleged the verdict would promote homosexual activities which would adversely affect population growth in the country. "Homosexual relationships, if encouraged, would bring population growth of a country to a halt and may deprive this country of its greatest asset of human resources," he said.⁵⁶

Expressing his views, Mujtaba Farooq, secretary of the Jamaat-e-Islami Hind, minced no words in his condemnation against the Delhi High Court allowing plea of gay rights activists. "Same-sex unions will derange the society and will completely destroy the family order. It is unnatural and it bars procreation," he said. "Those who are sick we should serve, but those who are going to be sick we should stop and protect. We should not approve this ruling that can cause a disorder in the society and create problems," he added.⁵⁷ "Homosexuality does not jell with India's 'mizaaj' [cultural ethos] and cannot be tolerated in our society. Moreover, medical evidence has also been found of homosexuals being carriers of HIV-AIDS," the Maulana Syed Jalaluddin Umri, Amir (president) of Jamaat-e-Islami Hind said. In Islam, homosexuality is treated as "gunaaah" [sin], and is against the concept of a family as a unit. If the family is destroyed, the society gets disintegrated. This is the commonly-held view among Muslim clerics.⁵⁸

Other accommodative, less rigid voices from the different religious communities were heard, like Swami Agnivesh saying that the judgment was being opposed by self-styled "owners" of religious faiths. "We should treat the

⁵⁶ *Baba Ramdev to challenge Court verdict on gay sex*, THE HINDU, July 7, 2009, available at, <http://www.hindu.com/thehindu/holnus/002200907072033.htm> (Last visited on September 20, 2009).

⁵⁷ Atiq Khan, *Muslim clerics feel family system will be destroyed*, THE HINDU, July 3, 2009, available at <http://www.hindu.com/2009/07/03/stories/2009070361341800.htm> (Last visited on September 20, 2009).

⁵⁸ *Centre urged not to fight Section 377 ruling*, THE HINDU, August 25, 2009, available at <http://www.thehindu.com/2009/08/25/stories/200908253360400.htm> (Last visited on September 20, 2009).

Constitution as our Dharma Shastra today,” he said, describing the High Court judgment on Section 377 of the IPC as one of the best judgments India has seen because it upholds constitutional morality.⁵⁹ Asghar Ali Engineer, Islamic scholar and rights activist, welcomed the Delhi High Court order since upholding basic human rights was central to the judgment. The judgment was only referring to instances where two consenting adults were involved, and there was no question of any force or violence, he said. Citing verses from the Koran, Dr. Engineer said it was deemed punishable only when it was practised by an entire community and not in individual cases. Homosexuality was an age-old practice and even Mughal king Babar’s diary had references to him being enamoured by a young boy in his adolescence, Dr. Engineer said. Christians need to rethink their stance on homosexuality, says an Indian Protestant leader who organized a debate on a recent court verdict which decriminalized gay sex. Most Churches in India are reacting to the verdict without really studying the issue, says Reverend Christopher Rajkumar, secretary of the Justice, Peace and Creation Commission of the National Council of Churches in India (NCCI). The council is the umbrella organization of 30 Protestant and Orthodox Churches and 17 regional Christian councils in India representing 13 million people.⁶⁰ K.C. Abraham from the Church of South India said that the final goal of all religions was to move towards an inclusive society and not isolate anyone.

IV. UNRESOLVED CONCERNS

The judgment brings within the public domain certain discussions which gets recognition. A question which is naturally raised is whether all these responses come in from a particular section only because the court has responded to the issue? This question comes because the debates surrounding rights of people with homosexual orientation has been doing rounds since the early 1990s, with activists, NGOs and victims deliberating upon it. It remains to be seen whether this judgment actually brings a wider community within the field of discussion about an issue which has long been put under the closet. The judgment breaks the silence on this count at least. Or is it because the judiciary claims a status and credibility in India more than activists and NGOs and that is the reason why the urban educated elite definitely have some opinion on the judgment? The arguments given in the judgment undoubtedly sound; are not being made for the first time. In fact it can be argued that when the Campaign on Lesbian Rights Memorandum, 172nd Law Commission Report and the Sexual Assault Bill drafted by the National Commission for Women had proposed deletion of S 377, the judgment stops at merely decriminalizing and goes a few steps backward, rather than forwarding an already existing approach. The first legal step comes only after nearly 15 years of struggle. It is all the more discouraging when it is seen that the Chairperson of the

⁵⁹ *Id.*

⁶⁰ *Protestant leaders: Churches need to rethink stance on homosexuality*, August 3, 2009, available at, <http://www.indiancatholic.in/news/storydetails.php/12908-1-6-Protestant-leaders>, (Last visited on September 25, 2009).

National Commission for Women after the judgment says that there needs to be a nation-wide debate on homosexuality, speaking in a different voice from the NCW position seven years ago. The NCW had in the past strongly advocated repeal of Section 377 of the IPC, which criminalised homosexual behaviour. But today, fearing a backlash, the commission is jittery. In a bill seeking amendments in laws punishing rape, the NCW had sought deletion of the present definition of 'unnatural sex' under Section 377 and replacing it with 'non-consensual sex'.⁶¹

It is also realized how over periods of time positions on 'controversial' social issues change like shifting political ideologies and that there is so little consensus among different organs, departments, commissions of the government. The judgment is definitely a well researched document addressing and even defining some of the basic legal principles. It is a judgment which causes for celebration as has expectedly happened, but it also raises doubts on whether this can be sustained, and the legislature will start from where the judiciary ended rather than reinventing.

⁶¹ Vinita Pandey, *Even NCW Hedges on Section 377*, DNA, July 5, 2009, available at http://www.dnaindia.com/india/report_even-ncw-hedges-on-section-377_1271159 (Last visited August 12, 2009).

