

CRYSTALLISING QUEER POLITICS - THE NAZ FOUNDATION CASE AND ITS IMPLICATIONS FOR INDIA'S TRANSGENDER COMMUNITIES

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*In this paper, it has been argued that the **Naz Foundation** judgment extends beyond the mere reading down of Section 377 of the Indian Penal Code and provides the plinth for elimination of all forms of discrimination against persons, not merely on the basis of their sexual orientation but also their gender identity. A close reading of the judgment along with the sources and affidavits that the courts have relied on to come to their decision makes it abundantly clear that the **Naz Foundation** decision has direct implications for hijras, kothis, FTMs, MTFs, transsexuals and intersexed persons. The use of the Yogyakarta Principles and the extension of recognition to the concept of decisional privacy by the judges go a long way in striking at the roots of homophobia and gender identity-based discrimination. Through the discussion of identity politics, references to instances of harassment faced by all the abovementioned communities and the expansion of notions of equality, autonomy and privacy to embrace both sexual orientation and gender identity, the judgment is truly a landmark in the realm of transformative remedies that forms the essence of queer politics.*

LGBT: 'LGBT' is a commonly used abbreviation/term to denote Lesbian, Gay, Bisexual and Transgender persons.

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Gender Identity: Gender Identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Sexual Orientation: 'Sexual Orientation' is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

Transgender: A transgender person is someone whose deeply held sense of gender is different from his/her physical characteristics at the time of birth. A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though he was born with a female body. Similarly, a person may be a male-to-female transgender (MTF) in that she has a gender identity that is predominantly female, even though she was born with a male body or physical characteristics.

Transsexual: A transsexual person is one who has undergone physical or hormonal alterations by surgery or therapy in order to assume new physical gender characteristics.

Transvestite: A transvestite is a person who derives pleasure from cross-dressing.

Intersexuality: 'Intersexuality' is a general term used for a variety of conditions in which a person is born with a particular reproductive or sexual anatomy but doesn't seem to fit the typical definitions of female or male.

Hijra: An indigenous cultural term used in South Asia to refer to male or female transgender persons.

Kothi: A feminine homosexual man who usually is the receptive sexual partner.

Eunuch: A castrated male.

Aravani: The Tamil name for *hijras*. Aravanis trace their name back to the myth of Aravan, Arjuna's son who was given in sacrifice by the Pandavas before the Mahabharata war.

Queer: The word queer is increasingly being used in India to connote a diversity of ways of living that contest the embedded nature of heterosexism in law, culture and society. The term denotes a diversity of sexual orientations and gender identities in the Indian context that includes gay, lesbian, bisexual, transgender, hijra, kothi, transsexual, and intersexed persons.

The term ‘queer’ is, in some ways, both a deeply personal identity and a defiant political perspective. It embodies within itself a rejection of the primacy of the heterosexual, patriarchal family as the cornerstone of the society. In doing so, it rejects the assumption of compulsory heterosexuality – society’s firm yet unsaid belief that the world around us (and everyone in it) is heterosexual until proven otherwise. It captures and validates the identities and desires of gay, lesbian, bisexual, and transgender people, but also represents, for many, an understanding of sexuality, that goes beyond the categories of ‘homosexual’ and ‘heterosexual’. It speaks therefore of communities that name themselves (as gay or lesbian for example) as well as those that do not, recognising the spaces for same-sex desire and sexualities that cannot be captured in identities alone. To speak of queer politics is, in some sense, different from just speaking of gay, lesbian, bisexual, transgendered, kothi, and hijra communities. Queer politics does not speak only of the issue of those communities as a ‘minority issue’, but instead it speaks of larger understandings of gender and sexuality in our society that affect all of us, regardless of our sexual orientation. It speaks of sexuality as a politics intrinsically and inevitably connected with the politics of class, gender, caste, religion and so on, thereby acknowledging other movements and also demanding inclusion within them.

I. INTRODUCTION

The decision in *Naz Foundation v. Govt. of NCT*¹ (hereinafter “*Naz Foundation*”), which read down Section 377 of the Indian Penal Code² to decriminalize consensual sex between adults, has been one of the most publicly debated judgments in Indian history. Jurists and legal academics, lawyers, political commentators, celebrities, activists, and even a few politicians have welcomed the judgment. The decision has been welcomed for a variety of reasons. Section 377 enacted by the British in 1860, has been used over generations to harass, blackmail, extort, and in rare cases, arrest LGBT persons. While newspapers and televised debates (for a change) debated the impact of the case on homosexuals, what remained understated was the pioneering discourse on ‘gender identity’ and gender identity based discrimination that the case has examined. The reason it is important to emphasise that the *Naz Foundation* decision applies to discrimination based both on sexual orientation and gender identity is because these terms are often conflated. Since transgender and transsexual people can have any sexual orientation, it is important to distinguish their gender from their sexual activity.

One can trace the history of formal laws that discriminate based on gender identity back to the British passing the 1897 amendment to the Criminal

¹ (2009) 160 DLT 277; W.P. (C) No. 7455/2001 of 2009 (Delhi HC).

² The Indian Penal Code, 1860, Section 377: Unnatural Offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Tribes Act of 1871³ that applied specifically to Eunuchs. The Criminal Tribes Act was enacted on the presumption that certain communities were more ‘predisposed’ towards committing a crime. This fitted in with their overall colonial strategy of segregating their subjects. T.V. Stephens, who introduced the Criminal Tribes Bill, justified it by saying “[P]eople from time immemorial have been pursuing the caste system defined job-positions: weaving, carpentry and such hereditary jobs. So there must have been hereditary criminals who pursued their forefathers’ profession.”⁴ As per the Act, all members of denotified tribes were required to register with an appointed authority, and their movements were also subjected to severe restrictions. In 1908, special settlements were constructed for denotified tribes, where they had to perform hard labour.⁵

Nehru, whose government repealed this legislation in 1951, in a speech he gave in Nellore in 1936 remarked,

“I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty...[A]n attempt [should] be made to have the Act removed from the statute book. No tribe can be classed [sic] as criminal as such and the whole principle [is] out of consonance with all civilized principles of criminal justice and treatment of offenders.”⁶

Even with the repeal of the law, a large part of the stigma, and harassment faced by these communities continued in postcolonial India. This happened due to colonial attitudes towards these tribes being transferred to the present day police and in the form of present day legislations like the Habitual Offenders Act enacted in 1951 in Bombay.⁷

³ Criminal Tribes Act, 1871, Act No. XXVII of 1871 modified in 1897. A more comprehensive version of this legislation was passed in Madras Presidency in 1911. See MEENA RADHAKRISHNA, *DISHONOURED BY HISTORY: ‘CRIMINAL TRIBES’ AND BRITISH COLONIAL POLICY* (2001).

⁴ DILIP D’SOUZA, *BRANDED BY LAW: LOOKING AT INDIA’S DENOTIFIED TRIBES* 3 (2001).

⁵ *Id.*, 42-52. At As per this legislation, local governments could declare a tribe ‘criminal’ if the government believed that the tribe, gang or class of persons is addicted to the systematic commission of non-bailable offences. Members of such criminal tribes were required to register before a designated official, and such records were kept with the District Superintendent of Police. Entire communities could be placed in reformatory settlement colonies. In powers reminiscent of the Australian white settlement policies, the local government had the power to separate children of these communities from their families and place them in reformatory settlements.

⁶ D’SOUZA, *supra* note 13, 57. While most of the state laws related to Eunuchs were also repealed, some like the Andhra Pradesh (Telengana Areas) Eunuchs Act, 1919, continue to be retained on the statute books. See Kalpana Kannabiran, *India: From ‘Perversion’ to Right to Life with Dignity*, *THE HINDU* (Bangalore) July 6, 2009.

⁷ The Habitual Offenders Act, 1959, was targeted at habitual offenders, that is, those with previous criminal records. In the language of their provisions, and the manner in which they were used by the police to target certain communities, legislations like this functioned as replacements for the Criminal Tribes Act. See D’SOUZA, *supra* note 13, 75-80.

Hijras or ‘eunuchs’ as they were referred to then, were brought under the ambit of this legislation in 1897. As per this Amendment, eunuchs were defined as:

“[A]ll persons of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent. Local governments were required to keep a register of the names and residences of all eunuchs who were “reasonably suspected of kidnapping or castrating children, or of committing offences under Section 377 of the IPC, or of abetting crimes under these provisions.”

Eunuchs who were registered were prohibited from being a guardian to any minor, make a gift or will and from adopting a son. They could be punished for imprisonment up to two years for violating these provisions. Eunuchs who kept in their charge boys who had not completed sixteen years of age could be punished with imprisonment for up to two years. Eunuchs who were registered were prohibited from appearing ‘dressed or ornamented like a woman’ in a public street or place. They could not dance, play music or take part in any public exhibition.

One of the few historical sources that we have of individual cases of the colonial period are records of cases that have come up to the High Courts or the Federal Court. One such case is related to a eunuch who was accused of singing publicly, dressed as a woman. In *Khairati*,⁸ the police, who has a eunuch under surveillance routine (presumably under provisions of the Criminal Tribes Act) calls for him when they are visiting his village. The police found Khairati ‘singing dressed as a woman among the women of a certain family’. The police subjected Khairati to a medical examination. They found a ‘distortion of his orifice in the shape of a trumpet’, and that Khairati had contracted syphilis in the past few months. Based on this, the police booked him for unnatural intercourse under Section 377 of the Indian Penal Code.

Khairati admitted to habitually wearing women’s clothes, but denied that he was dressed like this when the police found him, or that he had been subjected to unnatural intercourse. The lower court convicted Khairati for an offence under Section 377. On appeal, the judge of the Allahabad High Court (ironically called Justice Straight) quashed his conviction saying the evidence was too vague. “I fully appreciate the desire of the authorities at Moradabad to check these disgusting practices: but neither they nor I can set law and procedure at defiance in order to obtain an object, however laudable.”

For a long time, the discourse around the rights of *hijras* has been broadly centered on individual and sporadic cases. There is little research done so far on the nature of the legal claims made by *hijras*, or the manner in which the

⁸ Queen Empress v. Khairati [I.L.R. 6 ALL 204], decided on 31 January, 1884.

courts have dealt with them. One case that received a lot of media attention was related to the election of the first ever transgender mayor in the country. In 1999, Kamala Jaan, a *hijra* from Katni, Madhya Pradesh, was elected as the mayor of Katni, pipping her nearest rival by 99 votes. The losing candidates in the election challenged Kamala's election. The main ground on which they challenged her election was that the post of the mayor of Katni was reserved for females, and Kamala did not qualify as a female.⁹

The Katni Sessions Judge Virender Singh, while deciding this, addressed the question: Were *hijras* male or female? The judge quoted from the Shatpath Brahman, the Mahabharata, the Manusmriti and the Kamasutra; in historical sources – from the courts of Akbar, Alauddin Khilji, to say that there was a category of persons who were neither male nor female (*napunsaks*). The judge (Justice Singh) said that all the medical and historical evidence before him showed that *hijras* could be of two categories- male or female but to ascertain this, there had to be a medical examination (which the respondent had refused to undertake). But, after all this, the judge came back to the simplistic reasoning that the dictionary meaning of female is 'one who can produce' a child and therefore *hijras* cannot be females. Justice Singh came to the conclusion that *hijras* are castrated males, and therefore Kamala Jaan was not female.¹⁰ This decision was upheld by the Madhya Pradesh High Court despite a direction from the Election Commission (*hereinafter* E.C.) in September 1994 that *hijras* can be registered in the electoral roles either as male or female depending on their statement at the time of enrolment¹¹. This direction was issued by the E.C. after Shabnam Mausi, a *hijra* candidate from the Sohagpur Assembly constituency in Madhya Pradesh, wrote to the Chief Election Commissioner enquiring as to which category *hijras* were classified under.¹²

While there are very few instances of legal claims in courts by the transgender community, the struggle of transgender community at the political level has been extensively documented. In Karnataka, a systematic and dogged fight by sexual minority rights groups, most notably Sangama, has led to systems that have been put in place to intervene when there are police abuses and harassment. In 2003, in the first attempt of its kind, the People's Union for Civil Liberties (Karnataka) documented in detail the nature of everyday violations faced by the *hijra* and *kothi* community in Bangalore.¹³ Detailed accounts from Bangalore's transgender community have formed the basis for a series of political actions and demands that the state stop violating the rights of these communities.

⁹ Sadiq Ali & others v. Kamala Jaan, Election Petitions No. 12/2000, 13/2000, 18/2000 & 21/2000 (First Additional District Court, Katni) (Unreported).

¹⁰ *Id.*

¹¹ Kamala Jaan v. Sadiq Ali & others, Civil Revision No. 1294/2002, (M.P. H.C.) (Unreported).

¹² See Siddharth Narrain, *In a Twilight World*, FRONTLINE Vol. 20 Issue 21, October 11 - 24, 2003, available at <http://www.thehindu.com/fline/fl2021/stories/20031024002509800.htm> (Last visited on September 1, 2009).

¹³ PEOPLE'S UNION FOR CIVIL LIBERTIES (KARNATAKA), HUMAN RIGHTS VIOLATIONS AGAINST THE TRANSGENDER COMMUNITY: A STUDY OF KOTHI AND HIJRA SEX WORKERS IN BANGALORE (2003).

Years of activism have put in place systems of ‘crisis intervention’ to deal with police harassment of the transgender community. However, there have been spurts of violence in recent times. For instance, in a recent incident in Bangalore, the police successfully converted a single case of alleged abduction of a minor into a situation where the entire community was targeted. The rights of the child then became the locus to mobilize and implement an anti-queer agenda, even though the police has till date not produced any legally recognized evidence of the child’s age.¹⁴ The police sent notices to landlords of the homes in which around 100 *hijras* lived, asking them not to rent out their homes to *hijras* who they claimed were involved in ‘immoral activities’. Under pressure from the police, the house owners began evicting *hijras* in the area.¹⁵ The charges of forcible castration of a minor can attract charges of kidnapping, attempt to murder and grievous hurt. The law, however, does not take into account that there are many adolescents who are willing to be castrated as their families have rejected them as gender deviants, and that these adolescents have therefore joined the *hijra* fold. Similarly, while begging and extortion are offences, the line between asking for money to earn a livelihood and extortion is thin. Besides Section 377 of the IPC, the most common charges used against them were that of extortion, begging¹⁶, theft, robbery, and nuisance, besides fining them for doing sex work (all offences under the IPC).

Transgender persons, especially *hijras*, FTM and MTF transgenders face issues related to documentation. In 2005, the Central Government introduced category ‘E’ in passport applications, meant for transgender persons. *Hijras* can now choose to be ‘T’ in passports issued by the Centre. Similarly, they can get voter identity cards with a third gender. These are positive developments, but there is a larger problem with the entire system of documentation where the identification of persons is done within a permanent gender binary. For transgender persons, changing their ‘sex’ or ‘gender’ in official documents can be a tedious, and difficult process, dependent on the whims of individual persons in the concerned government departments. Further, there is no official recognition of this possibility, or overall guidelines that government officials can use to make a simple change from female to male or vice versa.

One of the options before transgender persons are sex reassignment surgery (SRS). Current practices use hormone therapy and surgical reconstruction and may include electrolysis, speech therapy, and counseling and other psycho-therapeutic treatments. The surgical reconstruction could include the construction of a vagina, the removal of the penis, testicles, construction of clitoris etc. Some transgender persons have used certificates from doctors showing that they have had sex reassignment surgery to get these changes made.

¹⁴ *Duo’s Arrest Points to Racket*, TIMES OF INDIA (Bangalore), November 9, 2008.

¹⁵ See Clyde D Souza, *Landlords Pressure Transsexuals in Dasarahalli to Vacate Homes*, THE HINDU, November 12, 2008.

¹⁶ At times, the police put *hijras* in the Beggars Home. Then Sangama has to go through a formal process of applying to get them out. These procedures are laid down under the Karnataka Provision of Beggary Act, 1975. Of late the officials at the Beggars Home have begun asking for bribes in the form of provisions like food and groceries.

Unfortunately, many transgender persons do not have safe and affordable access to SRS. This has in fact, become one of the most important demands made by the LGBT community.¹⁷ Besides the prohibitive cost of the surgeries, the other complication is that the IPC criminalises the emasculation of someone (Section 320) as that falls under the definition of 'grievous hurt'. However, under Section 88 of the IPC, an exception is provided whereby if an action is undertaken in good faith and the person gives consent to suffer that harm, it is not included in the definition of grievous hurt. Though the legality of SRS remains in the grey zone, there are a number of hospitals that provide facilities for SRS. While there are no documented cases of doctors being prosecuted for SRS, the ambiguity in the law, and the existence of Section 377 on the statute book, has meant that transgender persons have so far been unable to access safe medical facilities for SRS.¹⁸

In recent times, organized efforts from transgender rights activists in Tamil Nadu have seen remarkable changes in the state. The Tamil Nadu government, through a series of measures, has officially recognized 'transgender' as a separate sex. In Tamil Nadu, a remarkable group of *aravani* activists have, through legal and advocacy measures, been able to get the Tamil Nadu government to constitute an *Aravani* Welfare Board, meant especially to look at the welfare of the *aravani* community. The Board has ten *aravani* representatives who act in an unofficial advisory capacity. As a result of both legal efforts and efforts made through the Aravani Welfare Board, Tamil Nadu has some of the most progressive measures for the transgender community in the country.

The Tamil Nadu High Court has issued orders to the government, to ensure wide publicity through the print and visual media, of the fact that *aravanis* are entitled to get registered in electoral rolls and that transgender individuals could choose either 'male' or 'female' as their gender when applying for official identity documents.¹⁹ The state's education department issued a G.O. creating a third gender category for admission in educational institutions. As per this order, government-aided colleges will have to admit transgenders and they will share 30 per cent of the seats reserved for women. As per this order, educational institutions have to issue application form for undergraduate courses that will include transgender as a separate category. This will permit transgender students to join any college of their choice, whether co-educational, men's or women's colleges.²⁰ Further, the government has issued guidelines for schools to provide for counseling of transgender students, counseling for families of transgender students to ensure they don't disown them, and ensuring disciplinary action against schools and colleges who refused to admit *aravanis*.²¹

¹⁷ See, e.g., *Political Demands*, available at <http://bengalurupride.googlepages.com/politicaldemands> (Last visited on September 5, 2009).

¹⁸ *Supra* note 1, 66-71.

¹⁹ Social Welfare and Nutritious Meal (SW8) Department, G.O. (Ms) No.199 dated December 21, 2006.

²⁰ *Gender Rights*, ECONOMIC AND POLITICAL WEEKLY (Mumbai) June 21 - June 27, 2008, 7.

²¹ *Supra* note 28. (cant be supra note 28)

The Tamil Nadu government's circular asks the Health Ministry to consider providing free SRS facilities to transgenders who have undergone counseling, thus accepting one of the most vocal demands of the transgender community. The government has asked Collectors to conduct 'special grievance day redressal meetings' meant especially to deal with issues related to *aravanis* like the distribution of ration cards and ID cards. The government has provided for small loans and training programs for *aravani* self-help groups.²² Recently, there were reports of the government planning separate toilets for *aravanis*- a proposal that received mixed responses.²³

While these changes are important, they have been couched in the language of 'behavioural disorder'²⁴, and have not changed the foundations of gender-identity based discrimination. For instance, the Tamil Nadu G.O. being discussed here describes *aravanis* in the following manner:

"*Aravanis* are biologically born male who define themselves as a 'woman trapped in a man's body'. This behavioral disorder makes them behave like girls. Most of the *aravanis* leave their home, and after joining their community live miserable lives, seeking out a living by begging, dancing and prostitution; thus becoming vulnerable to diseases like HIV/AIDS. They are also prone to sexual and verbal abuses from the general public. Due to lack of identity to a particular gender, these *aravanis* are discriminated by the society and remain isolated."²⁵

In comparison to the language used here, the *Naz Foundation case*²⁶ is a significant moment in the history of the struggle for transgender rights, opening up the debate on discrimination based on gender identity, covering new ground when it comes to the language of transgender rights, and questioning the foundations of discrimination based on gender roles and stereotypes.

II. THE NAZ FOUNDATION JUDGMENT

While it is true that the operative order in the *Naz Foundation* decision only deals with reading down Section 377, it goes far beyond just decriminalization and strikes at the roots of homophobia and gender identity-based discrimination. The judges have used a vast array of material to come to their remarkable decision. A large part of this material deals with discrimination against the transgender community in India.

²² *Id.*

²³ P. Vijian, *Special Toilets For Transsexuals In Chennai*, available at <http://www.bernama.com/bernama/v5/newsworld.php?id=403542> (Last visited on September 15, 2009).

²⁴ See Aniruddh Vasudevan & Padma Govindan, *The Razor's Edge of Oppositionality: Exploring the Politics of Rights-Based Activism by Transgender Women in Tamil Nadu*, Working Paper presented at Law and Social Sciences Network Conference, New Delhi, 2009.

²⁵ *Supra* note 28.(check *supra* note 28)

²⁶ *Supra* note 10.

For instance, the judges talk about *Jayalakshmi's* case²⁷ (a case which was decided by a bench headed by Chief Justice Shah when he was the Chief Justice of the Madras High Court.) This case dealt with an *aravani* who committed suicide by immolating herself in a police station. The police had picked her up on charges of theft and had sexually and physically abused her on a routine basis. Her brother filed the petition. The court in this case, found the police guilty, and ordered compensation of Rs 5 lakhs to the petitioner's brother.

The Court also considered a number of affidavits filed before it by one of the petitioners, *Voices Against 377*, where a number of LGBT persons testified and described the manner in which Section 377 was used against them. Amongst these, the judges in the *Naz Foundation* decision specifically mention the Bangalore incident. The victim of the torture was a *hijra* from Bangalore, who was at a public place dressed in female clothing. The person was subjected to gang rape and forced to have oral and anal sex by a group of hooligans. She was later taken to a police station where she was stripped naked, handcuffed to the window, grossly abused and tortured.²⁸

Another case placed before the judges dealt with a *kothi* who said that besides false cases filed under Section 377 by the police, she faced police harassment on a routine basis because of her gender identity, "That as a person who does not hide her identity as a *kothi*, I am always subject to police harassment. I face constant threats of extortion, physical abuse and verbal abuse from the police."²⁹

Another female to male transgender person, in his affidavit talked of how he faced discrimination and harassment from family, society and the police on account of his gender identity. "The existence of a law such as Section 377 of the IPC results in a social climate which is intolerant towards female to male transsexuals. The fact that I was born a male and want to behave as a woman is seen as unnatural behavior by both the police and the society," he said.³⁰

What these cases, and a lot of the material filed by the petitioners in this case indicated was that the 'unnatural sex' that 377 was used to target had as much to do with gender identity as sexual orientation. It is apparent that this link was recognized by the judges in the manner that they cite these two categories together in most parts of the decision. The clearest indication that the judges intended this decision to apply to discrimination based on gender identity is in the section that deals with identity politics. The judges refer to the growing jurisprudence in human rights law that deals with ensuring human rights protection

²⁷ *Jayalakshmi v. The State of Tamil Nadu*, (2007) 4 MLJ 849.

²⁸ W.P.(C)7455/2001. See *Naz Foundation v. Union of India*, *supra* note 1, ¶ 22.

²⁹ Affidavit filed by *Voices Against 377* in the *Naz Foundation* case (available on file with the author).

³⁰ *Id.*

to all, regardless of sexual orientation or gender identity. They refer specifically to the Yogyakarta Principles³¹, a set of international human rights principles relating to sexual orientation and gender identity that have been distilled from existing laws and principles. These principles define both sexual orientation and gender identity, making a distinction between the two. As per these principles, 'sexual orientation' is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;³² and 'gender identity' is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.³³

The definition of 'gender identity' is of a very wide ambit, if not exhaustive. They apply not only to *hijras* and *kothis*, but also to a range of transgender persons, whether FTM, MTF, or transsexual. The said principles recognize that human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights; that all persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity. They state that every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity.³⁴

A. GENDER IDENTITY AND THE RIGHT TO PRIVACY

In its reasoning related to Article 21, the Court adopted a view of human dignity that privileges the ability to make choices about one's life based on the autonomy of private will and a person's freedom of choice and action. The Court derives a notion of privacy from this notion of dignity. The Court's notion of privacy deals with persons, not places.³⁵ The court goes beyond the concept of spatial privacy and recognises decisional privacy. It held that the right to privacy is not merely the right to do what one wants in 'private spaces' like the home, but also a right to make choices about how to live one's own life. Privacy has been held

³¹ *Supra* note 1.

³² *Naz Foundation v. Union of India*, *supra* note 1, ¶ 44.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*, ¶ 47.

to protect personal autonomy.³⁶ The judges quote from the *National Coalition of Gay and Lesbian Equality (NCGLE)* judgment³⁷ of the South African Constitutional Court to strengthen their point:³⁸

“For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home.”

Thus, the judges reading of the right to privacy, autonomy and dignity has important implications for transgender persons. This would mean that even though the judges have decriminalized consensual sex between adults in private, in effect, the decision has provided protection to same sex intimacy in public spaces, as well as to *hijras*, *kothis* and other transgender persons in public spaces. Therefore, a *hijra* harassed by the police because she was intimate with a partner in a park, a *kothi* who is verbally abused because of the way she walks, or a FTM who is harassed by bystanders in a bus stop because of his gender identity or a transgender who is threatened because of her dress are equally protected by this decision.

This judgment has very serious implications for the manner in which gender identity has been medicalised, and ‘treated’. By the two main diagnostic systems – the World Health Organisation’s ICD³⁹ 10 and the American Psychiatric Association’s DSM⁴⁰ IV, the need to ‘change sex’ has been identified as Gender Identity Disorder (GID).⁴¹ This category medicalises strong and ongoing cross-gender identification, and a desire to live and be accepted as a member of the other sex. Persons with GID are given treatment to harmonise their psychological sex with their physical sex. Similarly, it is common for doctors in India to surgically correct the anatomy of intersex children without their consent, based on the appearance of their genitals. At the heart of such medicalisation is the assumption that all persons need to be assigned to one particular gender and that gender is fixed and invariable.⁴²

³⁶ See ARVIND NARRAIN & MARCUS ELDRIDGE, *THE RIGHT THAT DARES TO SPEAK ITS NAME: DECRIMINALISING SEXUAL ORIENTATION AND GENDER IDENTITY IN INDIA* 13-14 (2009).

³⁷ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6.

³⁸ *Id.*, ¶ 47.

³⁹ *International Classification of Diseases* .

⁴⁰ *Diagnostic and Statistical Manual of Mental Disorders*.

⁴¹ *Supra* note 22, 66-71.

⁴² See Mayur Suresh, *Pendulous Penises and Couture Clitorises: What Medical Men Do to Intersex Infants* (Draft paper presented at the Law and Social Sciences Network Conference, New Delhi, 2009).

B. GENDER IDENTITY AND THE RIGHT TO EQUALITY

After laying down their general conception and scope of the right to equality, the judges address the specific point of whether discrimination based on sexual orientation can be read into Article 15⁴³ of the Constitution. The reason the judges refer only to sexual orientation in this section is because the petitioners had framed their arguments in this manner. The petitioners had argued that Section 377 discriminates on the ground of ‘sexual orientation’, which although not specified in Article 15, is analogous to the grounds mentioned. However, implicit in their assertion that sexual orientation can be read into the grounds listed in Article 15(1), is that sexual orientation *and gender identity* can be read into the grounds listed in Article 15(1). This can be inferred from the logic that the judges used to come to address the petitioner’s argument that ‘sex’ in Article 15, cannot be understood to apply only to ‘gender’ and should be applied to ‘sexual orientation’ too.

The judges first elaborated on the right to equality in Articles 14 and 15 of the Constitution and in doing so referred to the Declaration of Principles of Equality issued by the Equal Rights Trust in April 2008, which they describe as the current international understanding of principles of equality. Part-II of the Declaration lays down the right to non-discrimination. The right to non-discrimination is stated to be a freestanding fundamental right, subsumed in the right to equality. Here, discrimination is defined as follows:⁴⁴

“Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or career status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, *sexual orientation, gender identity*, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.”(Emphasis in original)

The judges, while agreeing with the petitioners’ contention that sex should be read to mean sexual orientation, say:

“The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalizations concerning ‘normal’ or ‘natural’ gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex.”

⁴³ Article 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.

⁴⁴ *Supra* note 1, ¶ 93.

Clearly if the crux of the problem is discrimination based on ‘normal’ and ‘natural’ gender roles, the judges’ understanding of the term ‘sex’ includes aspects of both sexual orientation and gender identity.⁴⁵

Even assuming that this argument does not hold, one can read discrimination flowing from gender identity to be based on a ground analogous to those specified in Article 15. Legal commentators have stated that the applicability of the *Naz Foundation* decision can be extended to grounds that are analogous to those specified in the Article, based on the ‘immutable’ nature of the ground of gender identity and its effect of potentially impairing the personal autonomy of an individual.⁴⁶ Since all autonomy-related grounds can now claim the protection of Article 15, there can be no doubt that ‘gender identity’ is one of these grounds.

Since the judges have provided horizontal protection i.e. discrimination by private individuals and against indirect harassment and discrimination, this decision has far-reaching impact on those facing discrimination based on gender identity. Persons who are not admitted in hospitals, or who are denied entry into public toilets, denied jobs or admissions in schools and colleges based on their gender identity- whether *hijra*, *kothi*, FTM, MTF, intersexed, or transsexual, all have a remedy under the law. Existing legislations that specifically target *hijras*, like the Andhra Pradesh (Telengana Areas) Eunuchs Act⁴⁷ can be challenged. Transgender persons struggling to secure documentation related to their gender - whether school records, birth certificates, ration cards, or passports, can now claim recognition based on this decision.

III. CONCLUSION: TOWARDS A QUEER POLITICS OF LAW

The *Naz Foundation* case stands in stark contrast to the two major precedents in recent comparative constitutional law- the NCGLE case delivered by the South African Constitutional court in 1999⁴⁸, where the court struck down anti-sodomy laws in the country, and the Lawrence case⁴⁹ in the USA, where the Supreme Court overturned an existing precedent and declared the anti-sodomy laws on statute books of various states to be unconstitutional. Though the courts deal with the notions of dignity, equality and privacy, the pleadings in these cases, and the discussion by the judges in these cases is clearly about sexual orientation and the rights of gay and lesbian persons. In fact, the words ‘transgender’ and ‘gender identity’ are barely mentioned in the texts of these judgments. This is in stark contrast to the *Naz Foundation* case where the transgender community and the right not to be discriminated based on gender identity form an important part of the proceedings in the case, and the text of the judgment.

⁴⁵ *Supra* note 1, ¶ 99.

⁴⁶ See Tarunabh Khaitan, *Good For All Minorities*, THE TELEGRAPH (Kolkata) July 9, 2009.

⁴⁷ D’SOUZA, *supra* note 15.

⁴⁸ *Supra* note 47.

⁴⁹ Lawrence v. Texas, 539 U.S. 558 (2003).

The extensive focus on gender identity in the *Naz Foundation* case has possibly to do with the centrality of the transgender community to the LGBT movement in South Asia. The two contemporary cases that do touch upon the rights of transgender persons are the Nepali Supreme Court case⁵⁰, cited in the *Naz Foundation* decision,⁵¹ and the recent Pakistani Supreme Court case where the Court ruled that all members of Pakistan's *hijra* community should be registered as part of a government survey with the end goal of better integrating them into society.⁵² While the Pakistani case dealt specifically with police raids on the *hijra* community in Taxila, the pleadings in the Nepal case were framed very broadly; challenging a host of laws in Nepal that discriminate on the basis of sexual orientation and gender identity. The Nepal case deals in detail with the harassment and discrimination faced by the transgender community and the right to protection from discrimination based on gender identity.⁵³

The reason that the Nepali Supreme Court case and the *Naz Foundation* decision have taken on board gender identity has to do with the nature of the LGBT struggles in India and Nepal. *Hijras* and *kothis* in India, and *metis* (transgender persons) in Nepal, have been an important part of the queer movement in these two countries. Preventing violent attacks, and discrimination against the *meti* community has been central to the campaign for LGBT rights in Nepal. In India, *hijras* and *kothis* have been the backbone of street protests around LGBT issues in cities like Bangalore.

Upendra Baxi contextualizes the importance of transgender claims in the larger struggle for queer politics:⁵⁴

“This monograph highlights the distinction between nascent lesbian and transgender movements. The right to sexual orientation and conduct aims itself at liberation from heterosexist and homophobic politics of denial of equal worth of all human beings. It affirms lesbian and transgender right to difference constituting a new frontier of ‘universal’ human rights. Transgender communities extend this contestation even further. They crystallize queer

⁵⁰ Sunil Babu Pant v. Government of Nepal, Writ No. 917 of the year 2064 (BS) (2007) (Supreme Court of Nepal).

⁵¹ *Supra* note 1, ¶ 58.

⁵² Basim Usmani, Guardian Online, *Pakistan to Register Third Sex Hijras*, July 18, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/jul/18/pakistan-transgender-hijra-third-sex> (Last visited on September 10, 2009).

⁵³ Incidentally, the Nepali Supreme Court, in this case, directed the Government of Nepal to set up a committee “to carry out the study on the issues of same sex marriage and marital status of overall LGBT persons as well as the legal provisions of other countries amongst the issues raised by the petitioners.”

⁵⁴ PUCL (KARNATAKA), REPORT ON HUMAN RIGHTS VIOLATIONS AGAINST THE TRANSGENDER COMMUNITY (2003), *Foreword by Upendra Baxi*.

theory and its politics. The difference is crucial. Lesbian and gay struggles pursue affirmative remedies; queer politics, in contrast, seek transformative ones.”⁵⁵

The *Naz Foundation* case has been decided in an age where there is exhaustive material related to transgender issues in the media, in popular culture, academic scholarship and human rights documentation. The petitioners in this case presented some of this material before the court. The judges also had the benefit of the Yogyakarta Principles, which were formulated as recently as 2007. The judgment has benefited immensely from this material, challenging the roots of discrimination based on gender identity and sexual orientation and the rigidity of ‘natural’ and ‘normal’ gender roles. Chief Justice A.P. Shah and Justice S. Muralidhar have recognised how crucial these rigid boundaries are in keeping intact structures of compulsory heterosexuality. The *Naz Foundation* decision, in its recognition of discrimination based on gender identity, has destabilized legal conceptions of what it means to be a man and a woman, a homosexual and a heterosexual. Through its expansion of notions of equality, autonomy and privacy to embrace both sexual orientation and gender identity, and most importantly through its protection of persons who are not in conformity with generalization concerning ‘normal’ or ‘natural’ gender roles, the *Naz Foundation* judgment has set a truly queer precedent.

⁵⁵ *Supra* note 21, 13.