

## Vacillating between empathy and contempt: the Indian judiciary and LGBT rights

*Arvind Narrain*

Since the colonial era, laws criminalising same-sex conduct as well as gender expression have sought to curb the right of lesbian, gay, bisexual, transgender (LGBT) persons to freedom. However, recent times have seen a more powerful use of the constitutional framework to articulate, contrary to the criminal law, the rights of LGBT persons to freedom. A battle is now taking place between the old criminal law frameworks which shackle LGBT lives and the new constitutional interpretations which seek to confirm the inherent dignity to which LGBT persons are entitled. The rights of these individuals now stand precariously poised between empathy and contempt.

This chapter will map this oscillation between empathy and contempt by discussing five emblematic cases. Two of them encompass the situation of LGBT people in colonial India, and the remaining three pertain to the contemporary era. They span the period between 1884 and 2014, and the stories hidden within their interstices tell us how the law confines LGBT people in terrifying and tragic ways but also how they challenge those confines in inspiring ways.

Two cases (*Queen Empress v. Khairati*<sup>1</sup> and *Nowshirwan v. Emperor*<sup>2</sup>), which date from India's colonial history, presage patterns of persecution of LGBT persons in present-day India in important ways. They speak to Khairati's and Nowshirwan's aspirations for a better world in terms of the freedoms they sought, but which were denied by the law. The three contemporary cases (*Naz Foundation v. NCT Delhi*;<sup>3</sup> *Suresh Kumar Koushal v. Naz Foundation*;<sup>4</sup>

1 I.L.R. 6 All 205.

2 AIR 1934 Sind 206.

3 *Delhi Law Times*, vol. 160 (2009) 277.

4 2013 (15) SCALE 55: MANU/SC/1278/2013.

and *National Legal Services Authority v. Union of India*)<sup>5</sup> are relatively well known and embody the politics of hope for a better future as well as its betrayal.

### **Khairati and the question of gender identity**

The decision of *Queen Empress v. Khairati* in 1884 is the first reported case of the use of Section 377<sup>6</sup> against a person described by the court as a ‘eunuch.’<sup>7</sup> The ironically named Justice Straight was called upon to adjudicate whether a person who was arrested by the police on grounds of habitually wearing women’s clothes had committed the offence under Section 377. The medical examination of Khairati, according to the judicial record, showed that Khairati had ‘syphilis and exhibited signs of a habitual sodomite, had indeed committed the offence of sodomy’.<sup>8</sup> The sessions court judge noted:

The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon ... he is shown to have the characteristic mark of a habitual catamite – the distortion of the orifice of the anus into the shape of a trumpet and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.<sup>9</sup>

- 5 Supreme Court of India, *National Legal Services Authority v. Union of India, and others*, writ petition no. 400 of 2012 with writ petition no. 604 of 2013, judgment 15 Apr. 2014. See [http://orinam.net/377/wp-content/uploads/2014/04/Judgement\\_Nalsa\\_Transgenderrights.pdf](http://orinam.net/377/wp-content/uploads/2014/04/Judgement_Nalsa_Transgenderrights.pdf) (accessed 13 Mar. 2018).
- 6 Section 377 of the Indian Penal Code reads: ‘Unnatural sexual 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 imprisonment ... 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.’
- 7 The term ‘eunuch’ is today seen as a derogatory reference to the transgender section of society known as the *hijra* community. This community in India has a recorded history of more than 4000 years. Most hijras live in groups that are organised into seven *gharanas* (houses), situated mainly in Hyderabad, Pune and Bombay. Each house is headed by a *nayak*, who appoints gurus, spiritual leaders who train their *chelas* (wards) in *badhai* (dancing, singing and blessing), and protect them within and outside the community. The system replicates patriarchy, creating interdependence between the ageing guru and the chela who has been cast out of her family. The nayak and senior gurus acting as lawmakers decide any disputes that take place among the hijras, and administer punishments such as imposing fines and expulsion from the community.
- 8 *Queen Empress v. Khairati* I.L.R. 6 All 205.
- 9 Ibid.

Justice Straight decided that while he ‘appreciate[d] the desire of the authorities at Moradabad to check these disgusting practices’, he was unable to convict Khairati, as ‘neither the individual with whom the offence was committed, nor the time of committal nor the place is ascertainable’.<sup>10</sup> Although Khairati was acquitted in the end, the key point to note is the violence to which she was subjected during the entire legal and police process.

One should note the gratuitous violence of arresting a person merely because their gender does not match their biological sex. It can be conjectured that the arrest itself would not have been made with courtesy and civility as Khairati was considered to be a person engaged in what Justice Straight called ‘disgusting practices’. This effectively put her outside the ‘human pale’, and one can only imagine the nature of the arrest. After it, she was subjected to an anal examination by the civil surgeon. The violation of bodily integrity and assault on her dignity emerges vividly.

All in all, the figures of authority were complicit in weaving a discourse based upon an attitude of disgust towards Khairati, who transgressed the norms of gender and sexuality. The civil surgeon’s anal examination found that the shape of the anus indicated that sodomy had been committed. The district authorities of Moradabad found the practice of singing dressed as a woman sufficient to arrest Khairati, and Justice Straight, though he acquitted her, supported the authorities’ desire to ‘check these disgusting practices’. The silence in the judgment is the voice of Khairati herself. It can be inferred that Khairati, though born a man, identified as a woman and lived her life as one. The fact that she never denied having ‘dressed and ornamentated as a woman’<sup>11</sup> can be interpreted as an indication of how important her chosen gender was to her. In spite of the fact that Khairati had been arrested, subjected to an anal examination, and found not to be a eunuch but to possess male genitals, her chosen identity survived all her tormentors’ efforts to criminalise what to her must have appeared ‘natural’. It was her gender transgression that implicated Khairati as a potential criminal under Section 377, a reality that she never denied but continued to stubbornly own. Her insistence on her chosen gender gave Khairati a dignity that was difficult to obliterate.

Khairati’s case points to the fact that the person of transgressive gender is largely absent in the colonial legal record. The fragment that records Khairati’s travails speaks to the question of a larger absence from history of the lives and stories of those who were persecuted on grounds of their gender identity. Khairati’s story also points to the work to be done to find and tell the story of how the law in colonial India was used for persecution based on gender identity.

10 Ibid.

11 Ibid.

***Nowshirwan v. Emperor: calling a new world into being***<sup>12</sup>

In a 1935 decision from Sind, a province of Pakistan, Nowshirwan Irani, a young Irani shopkeeper, was charged with having committed an offence under Section 377 with a youth aged about 18 called Ratansi. The prosecution story was that Ratansi visited the appellant's hotel and had tea there. Nowshirwan asked Ratansi why he had not come to the hotel for a while, and was told that Ratansi had had no occasion to do so. The latter then went to the pier to take a boat, but on finding he had no money, came back to Masjid Street, where he saw Nowshirwan standing on the road a short distance from the hotel. Nowshirwan asked Ratansi to come to his house, and when he did, he locked the door and started taking liberties with the young man, who did not welcome the overtures and wanted to leave. Nowshirwan removed his trousers, loosened Ratansi's trousers, and made the youth sit on top of his organ. Ratansi got up from his lap, but not before Nowshirwan had spent himself, wiped his organ and put on his pants. The reason this incident came to light was that Solomon, a police officer, and his friend Gulubuddin saw the incident through the keyhole, marched in, and took Ratansi and Nowshirwan to the police station.

The judge was not convinced by the prosecution story that Nowshirwan had forced Ratansi to have carnal intercourse. He believed Ratansi had been made to pose as a complainant and as a result made hopelessly discrepant statements. The judge was not prepared to rely on the evidence of the eyewitnesses, Solomon and Gulubuddin, whose conduct he found strange. Further, the medical evidence could prove neither forcible sexual intercourse (the prosecution story) nor an attempt to commit the act of sodomy. In the judge's opinion, 'as the appellant had not even if we take the worst view against him gone beyond a certain stage of lascivious companionship, I do not think he deserves to be convicted for any of the offences with which he was charged or could have been charged'.<sup>13</sup>

The story of Nowshirwan and Ratansi seems to be one of sexual desire acting itself out between two men of different class backgrounds. The limited material present in the appellate decision gives us a clue that even the judge was convinced the nature of the relationship was consensual. As the judge noted: 'Moreover the medical evidence militates against the story of a forcible connection on the cot [and] the appellant who is a fairly hefty young man having intercourse in the manner stated originally. There is not the slightest symptom of violence on the hind part of the lad.' He concluded: 'If he was in the house of the accused behind locked doors, I have not the slightest hesitation in believing that he had gone there voluntarily'.<sup>14</sup>

12 AIR 1934 Sind 206.

13 Ibid.

14 Ibid.

The story of desire secreted within the judicial narrative seems to be that Nowshirwan and Ratansi knew each other and that the former made the first move on that fateful day. He asked Ratansi why he had not come to the hotel for some time. Ratansi left after finishing his tea, only to come back in the same direction. When he returned, Nowshirwan was waiting on the road and asked him to come to his house. They seemed to have some sort of prearranged code by which they signalled to each other the desire to meet, and subsequently they went to Nowshirwan's room. However, owing to the misfortune of their liaison having been witnessed by an over-zealous policeman or a policeman with a grudge, what should have been an intimate act between two consenting parties in their bedroom became a public scandal.

The prosecution sought to twist a consenting act between two men into a story of Ratansi being forced to have sex with Nowshirwan. The former was coerced by those around him into posing as a complainant against the very person with whom he had earlier had a consenting sexual relationship. The fact that it was consenting did nothing to exculpate Ratansi from becoming a victim of judicial ire. Indeed, the judge reserved particular fury for him.

In the judge's words, Ratansi 'appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse.' In the course of appreciating the medical evidence, the judge noted: 'There was not the slightest symptom of violence on the *hind part* of the lad'.<sup>15</sup> Thus, the story of an encounter between two people of the same sex who desired each other, was reduced in the judicial reading to an act of a perverse failed sexual connection. The use of terms like 'animal-like' and 'despicable' placed the sexual act within the framework of moral abhorrence. One has to read between the lines of the judicial text to hazard a guess as to the nature of the intimacy between Nowshirwan and Ratansi. The two knew each other and had possibly met before in Nowshirwan's room, which might possibly have been a space where the coercive heterosexism of the outside world could be forgotten for the brief time that they spent with each other. That short interlude might have been a moment when they imagined a world not yet born and a time yet to come, when their desire would be accepted without a murmur. This imaginative realm of impossible desires was what was rudely interrupted when the policeman, Solomon, spied through the keyhole.

It can be surmised that Solomon had noticed their previous meetings, hence he was on the alert to take action on that eventful day in Sind in 1935. Solomon stands for the compulsory heterosexism of the larger world or what Oscar Wilde would have called the 'unnatural virtue' in which the world abounds, which will give no space for the expression of any intimacy that challenges its own laws.

15 Ibid.

It was this fragile experiment of creating a 'little community of love' (Liang and Narrain, 2009), outside the bounds of law's strictures and societal norms, that society was attacking via Solomon, giving it the judicial imprimatur of a 'failed sexual connection'. The tragic story of Nowshirwan and Ratansi speaks to the absence of a certain vocabulary. The language of love and intimacy, longing and desire, and the expression of spontaneous bodily affection, find no safe habitation within the terms of the law which degrades such experimental creation of new forms of intimacy. Its language has an impoverishing effect as it strips the physical act of the rich emotional connotations of human intimacy and reduces it to a 'perverse failed sexual connection'. By stripping the act of sex of its multiple meanings, it produces Nowshirwan as a subject of the criminal law.

One could look at Nowshirwan and Ratansi as being unwitting frontiersmen in the history of the battle against Section 377 and as being among its first recorded tragic victims. In another register, Nowshirwan and Ratansi stand in for Oscar Wilde and Lord Alfred Douglas, with Ratansi not just forced to become a witness against Nowshirwan but also to deny a part of his own being in terms of his role in creating that 'little community of love'. Just as Oscar Wilde was betrayed by Alfred Douglas, who described his lover as 'the greatest force for evil that has appeared in Europe during the last three hundred and fifty years' (Murray, 2000, p. 221),<sup>16</sup> so too was Nowshirwan, in his hour of greatest need, betrayed by Ratansi who became the complainant against him. Their story exemplifies the perversities of a law that turns lover against lover and converts an act of intimacy into the crime of carnal intercourse.

Nowshirwan's story remains emblematic of the ethical and moral poverty of the judicial discourse, even though it grappled with homosexual expression for more than 158 years. It is important to note that despite the Indian Constitution coming into force with the language of equality, non-discrimination and dignity, the judiciary in the postcolonial era continued to characterise homosexuality with terms such as 'unnatural', 'perversity of mind' and 'immoral'. The ethical language of dignity and rights was never perceived as applying to LGBT persons (see Narrain, 2008).

16 Though it should be noted that this statement was made a long time after Oscar Wilde's three trials. During the trial and its immediate aftermath, Lord Alfred Douglas stood by Oscar Wilde. He was the only friend of Oscar Wilde to remain in London during the trial, even though he was under threat of arrest. He also petitioned the authorities to release Oscar Wilde. As Murray notes: 'Unlike Wilde's other friends, Douglas worked for him tirelessly, never giving up hope that he might be able to change if not the sentence, at least other people's attitude to it' (2000, p. 92).

***Naz Foundation v. NCT Delhi: the promise of hope***<sup>17</sup>

The first time the judiciary moved outside the range of responses outlined above was 158 years after the Indian Penal Code came into force and 59 years after the Indian Constitution did so. The social context pertaining in the late 1990s and the beginning of the new century differed dramatically from the one that existed at the time of Nowshirwan's persecution. The norms that straitjacketed Nowshirwan and Ratansi from expressing their sexual identity, and the law that deemed the former a criminal, were beginning to be questioned. This practice of questioning the set ways of the heterosexual world began with the queer struggle's emergence with its insistence on problematising norms of gender and sexuality. It is this context of an emerging LGBT community – one that simply did not exist in Nowshirwan's and Ratansi's day – that underpins any present-day engagement with Section 377. In simple terms, when people like Nowshirwan have been arrested under the law in recent times, people beyond the family and friend network have got involved. Queer people across the country rally together and begin to support those who are subjected to the law's persecution. Thus, any story about those who are arrested under Section 377, be it the arrest of gay men in Lucknow (2006) or the arrest of HIV/AIDS workers in Lucknow (2001), become part of a contemporary history of struggle against Section 377. This stands in stark contrast to the persecution of frontiersmen in earlier struggles against it, such as Nowshirwan and Ratansi.

The bringing together of the stories of Nowshirwan and Ratansi, and those persecuted under the law in contemporary times, has culminated in a legal challenge to that very same law. The Lawyers Collective filed a petition challenging Section 377 on behalf of the Naz Foundation before the Delhi High Court in 2001.<sup>18</sup> It challenged the constitutional validity of Section 377, and made an argument for it to exclude the criminalisation of same-sex acts between consenting adults in private. In technical terms, the petition asked for the statute to be 'read down' to exclude the criminalisation of same-sex acts between consenting adults in private, limiting the use of Section 377 to cases of child sexual abuse.

The important shift that had been made, as compared with the colonial period, was the use of the fundamental rights chapter to test the constitutional validity of the law. In particular, the petition argued that Section 377 violated

17 Delhi High Court, 2009, *Naz Foundation v. NCT Delhi*, 160 Delhi Law Times, 277.

18 Materials filed in the Delhi High Court are on file with the Alternative Law Forum (ALF).



Figure 8. Protest against the Supreme Court ruling that reinstated Section 377, recriminalising consensual same-sex acts in India, Delhi, India, 11 December 2013. Photo credit: *No Easy Walk to Freedom*, Envisioning Global LGBT Human Rights.

the right to equality,<sup>19</sup> the right to privacy and dignity,<sup>20</sup> and the right to expression.<sup>21</sup>

The petition itself, though filed by a single non-governmental organisation (NGO), gradually began to represent the entire community. The Lawyers Collective and the Naz Foundation began this process of making a ‘public interest litigation’ truly ‘public’ by hosting a series of meetings dealing with different stages of the petition. Over the next seven years, this process of continuous consultation with the community contributed towards Section 377 becoming a more politicised issue, a process that in turn led to Voices Against 377, a Delhi-based coalition of NGOs working for the rights of LGBT persons, women and children, filing an intervention. The petition’s key stages included the affidavit filed by the Union of India (home ministry), which indicated that the government would stand by the law; the affidavit filed by the National AIDS Control Organization (NACO), which in effect said that Section 377 impeded HIV/AIDS efforts; and the impleadment of Joint Action Kannur (JACK, an organisation denying that HIV causes AIDS) and of B.P. Singhal (a former Bharatiya Janata Party (BJP) Member of Parliament, who represented the opinion of the Hindu right wing that homosexuality was against Indian culture).

19 Art. 14. The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

20 Art. 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

21 Art. 19. (1) All citizens shall have the right – (a) to freedom of speech and expression.



Completely new was the chance to challenge the law under which Khairati and Nowshirwan had been prosecuted. The challenge could now be posed in terms of the Indian Constitution, which came into force in 1950, on the basis that the law violates the fundamental rights of LGBT citizens. Even though it is now possible to mount such a challenge, India, especially in the post-liberalisation era, has not been a hospitable space in recent times, and is certainly not a final refuge for those characterised by the Supreme Court as the ‘oppressed and the bewildered’.<sup>22</sup> In fact, the Supreme Court has been positively hostile to a whole range of applicants, right from slum dwellers to all sections of organised labour (see Suresh and Narrain, 2015). So it was with trepidation that queer activists awaited the hearing. How would the judges understand the complex issue of sexuality and rights? How indeed would we be able to persuade them that this was a rights issue?

The judiciary has generally been subject to analysis in terms of the reasoned argument and the decided case. In contrast, little attention has been paid to the gamut of other kinds of responses by judges day-to-day in the courts: their questions, their expressions, the tone of their comments, their personal reactions. As Lawrence Liang (2007) noted:

Witnessing the courts functioning on a day-to-day basis also allows you to uncover another secret archive, an archive of humiliation and power. It is said that seventy per cent of our communication is non-verbal and this must be true of legal communication as well. The secret archive that interests me consists not of well-reasoned judgments or even the unreasonable admonishment of the courts, but the various symbolic signs and gestures that accompany them. An incomplete index of the archive includes the stare, the smirk, the haughty laugh, the raised eyebrow, the indifferent yawn, the disdainful smile and the patronising nod amongst many others.

In this secret archive of what Liang correctly characterises as ‘humiliation and power’, another category of responses emerged almost as a complete surprise. These can be characterised as representing the quality of judicial empathy. The questions and comments of the judges in the *Naz* case revealed not the intention to humiliate but instead a strong sense of their empathy for the suffering of LGBT persons. Chief Justice Shah communicated this empathy in ample measure and took judicial notice of the social discourse of homophobia by saying that we all know the kind of sneers and mockery this issue attracts in society. To substantiate this point, he narrated the moving instance of a boy mocked for his sexuality and thus unable to take his exam. It was in this context of harassment that the boy approached the court for a chance to do his exam again (Narrain and Eldridge, 2009, p. 49).

During the hearings the judges displayed sensitivity, not only to instances of brutal violence but equally to the more subtle language of discrimination.

22 *State of Rajasthan v. Union of India* (1977) 3 SCC 634 at 70 (per Justice Goswami).

This created a magical space for the brief duration of the court proceedings. Lesbian, gay, bisexual and transgender persons, who were so used to the sneers and jeers of society, suddenly felt that they were not only being heard but also respected. Simply through the art of empathetic listening the judges restored dignity to a section of society upon whom the government seemed intent on pouring nothing but contempt and scorn. The judges involved in the hearings did something unique. They spoke about sex without a sneer, and for the first time in the recorded judicial history of India homosexual sex was discussed within a context of intimacy, love, affection and longing. That discourse became part of the judicial register and displaced the relentless focus on the stripped down homosexual act as a threat to civilisation at its very roots. The conflation of homosexuality with excess, through the focus on group sex, was challenged by the nature of judicial questioning, and the discourse about homosexuality was linked to contexts of emotion and feeling. A new path was being forged in learning to talk about the intimacy that Nowshirwan and Ratansi shared, within the terms of the law. For the first time, it seemed possible to see Nowshirwan and Ratansi and many others like them in terms other than the basely carnal, and for opening up that possibility, one should credit the empathetic listening demonstrated by Chief Justice Shah and Justice Muralidhar.

In such circumstances, the *Naz* judgment could well have been justified in making the argument for the decriminalisation of homosexuality, based on Hart's (1967) position that it was not the law's business to regulate a zone of private morality. Such an understanding would have been sufficient to achieve the result of reading down Section 377 to exclude consensual sex between adults from the ambit of criminalisation. However, the judges chose to tread a more ambitious path. They began their written decision by referencing Dr Ambedkar, who in the Constituent Assembly had noted: 'Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.'<sup>23</sup> They continued:

Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality.<sup>24</sup>

In addition: 'Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our

23 *Naz Foundation v. Union of India and others* (para. 79), see <https://indiankanoon.org/doc/100472805/> (accessed 27 Feb. 2018).

24 *Ibid.*

scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.<sup>25</sup>

What the judges did, by articulating the notion of constitutional morality, was to change the terms within which the judiciary considered homosexual expression. From the first tentative steps when Hart, as well as the famous Wolfenden Committee Report, had made space within the law for 'private immorality', now homosexual expression was to be seen as not just something that has to be 'tolerated', but rather as something that needs to be protected. This is because protecting the expression of homosexuality goes to the heart of the meaning of the freedoms guaranteed under the Indian Constitution. In a reversal of the terms of the debate, it became 'moral' to protect LGBT rights and 'immoral' to criminalise people on grounds of their sexuality.

Constitutional morality in the judges' reading requires that LGBT persons are treated as equal citizens of India, that they cannot be discriminated against on grounds of their sexual orientation, and that their right to express themselves through their intimate choice of partner must be fully respected. It's only when the dignity of LGBT persons is respected that the Indian Constitution lives up to its foundational promise. Taken one step further, constitutional morality also requires the court to play the role of a counter-majoritarian institution, which takes upon itself the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe. In the judges' apt conclusion:

If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.<sup>26</sup>

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

Indian law seems to have traversed the journey from Nowshirwan to the Naz Foundation, from being persecuted for same-sex intimacy to making some space for the 'little communities of love'. However, the victory in some ways proved fragile, as the decision in 2013 in *Suresh Kumar Koushal v. Naz Foundation*<sup>27</sup> was to show.

25 Ibid., para. 86.

26 Ibid., para. 130.

27 2013 (15) SCALE 55: MANU/SC/1278/2013.

### **Suresh Kumar Koushal and the failure of citizenship**

Suresh Kumar Koushal, an astrologer, was not a party before the Delhi High Court in the *Naz* case. He brought a Special Leave Petition (SLP) challenging the *Naz* decision before the Supreme Court just seven days after the historic Delhi High Court judgment. He was joined subsequently by 14 others from the spectrum of Indian society, comprising all religions, all united by one thing only, opposition to the *Naz* judgment.<sup>28</sup> This vociferous opposition from representatives of all major Indian faiths prompted a response from those in favour of the Delhi High Court judgment. As a result, the parties before that court, Voices Against 377 and Naz Foundation, were joined by 19 parents of LGBT persons, 14 mental health professionals, 11 law teachers, 16 teachers and Shyam Benegal, a public-spirited intellectual, who all filed interventions before the Supreme Court.

The information brought before the court in the *Koushal* petition by those supporting the *Naz* judgment included affidavits testifying to harassment and violence, all inflicted under the shadow of Section 377. However, in its judgment the court chose to disregard the violations it had caused. With infamous logic, the judges concluded:

A minuscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.<sup>29</sup>

The decision is best described in Vikram Seth's eloquent words as a 'bad day for law and love' (2013). As an exercise in reasoning, the *Koushal* judgment failed to demonstrate why it reached the conclusion that Section 377 was constitutionally valid. However, the failure of the *Koushal* case goes beyond a mere breakdown in reasoning, to questions that go to the heart of what the

28 *Suresh Kumar Koushal and another v. Naz Foundation and others*, Special Leave Petition (SLP) no. 15436 of 2009 was the first SLP to be filed against the *Naz* judgment. Since then, 15 other parties have also filed SLPs challenging the *Naz* judgment: *Apostolic Churches Alliance through its Bishop v. Naz Foundation*; *S.K. Tizarawala v. Naz Foundation*; *Bhim Singh v. Naz Foundation*; *B. Krishna Bhat v. Naz Foundation*; *B.P. Singhal v. Naz Foundation*; *S.D. Pratinidhi Sabha v. Naz Foundation*; *Delhi Commission for Protection of Child Rights v. Naz Foundation*; *Ram Murti v. Government of NCT of Delhi*; *Krantikari Manuvadi Morcha Party v. Naz Foundation*; *Raza Academy v. Naz Foundation*; *Tamil Nadu Muslim Munnatra Kazhagam v. Naz Foundation*; *Utkal Christian Council v. Naz Foundation*; *Trust Gods Ministry v. Naz Foundation*; *All India Muslim Personal Law Board v. Naz Foundation*; *Joint Action Kannur v. Naz Foundation*.

29 *Suresh Kumar Koushal v. Naz Foundation*, 2013 (15) SCALE 55: MANU/SC/1278/2013.

Indian Constitution means (Coalition for Sex Workers and Sexual Minorities' Rights, 2014).

Beyond equality, privacy and dignity, the one concept developed in the *Naz* judgment that has resonated widely is the notion of constitutional morality. In an inspired move, Justice Shah went to the Indian Constituent Assembly Debates. Employing the concept of *constitutional* morality as articulated by noted jurist, economist, politician and social reformer, Dr B.R. Ambedkar, the judge made the point that a notion of *public* morality cannot be used as a basis to deprive a minority of their rights. In other words, if India was a form of democracy based upon majority rule only, then 'any legislative transient majority in tantrums against any minority'<sup>30</sup> could discriminate at will against women, Muslims, Christians and disabled people. Rejecting this notion of majoritarian oppression, the *Naz* court underlined the point that India is a constitutional democracy rooted in a tradition of inclusiveness, and therefore the fundamental rights of all persons of whatever stripe or persuasion are non-negotiable. The *Naz* court applied this notion of constitutional morality derived from Dr Ambedkar, and the notion of inclusiveness as expressed in 1947 by Jawaharlal Nehru,<sup>31</sup> to LGBT persons. The ruling was based on a profound appreciation of the deepest meaning of the Indian Constitution's commitment to protect the fundamental rights of all persons and groups, however 'miniscule' those groups might be.

It is this particular understanding of the Constitutional Court's role that the *Koushal* judgment failed to appreciate. By arguing that it was duty bound to respect the will of parliament, which represented the 'will of the people', it abdicated the responsibility of the judiciary to protect all minorities from the vicissitudes of majority opinion. Its conclusion that a 'miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders', and hence it was unnecessary to adjudicate the

30 Concurring opinion of J. Krishna Iyer in *Maneka Gandhi v. Union of India* (1978) I SCC para. 81.

31 In his 'Tryst with destiny' speech, Constituent Assembly, delivered at midnight, 14–15 Aug. 1947, on the eve of independence, available at: <http://nehru memorial.nic.in/en/gift-gallery.html?id=214&tmpl=component> (accessed 27 Feb. 2018). Nehru, while introducing the Objectives Resolution, which went on to become the Preamble of the Indian Constitution noted: 'Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion [... The Resolution] seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.' The *Naz* judgment read Nehru's aspiration as an aim for inclusiveness. As they put it: 'Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the "spirit behind the Resolution" of which Nehru spoke so passionately.' See *Naz Foundation v. NCT Delhi*.



Figure 9. Pride, Delhi, India, 28 November 2011. Photo credit: *No Easy Walk to Freedom*, Envisioning Global LGBT Human Rights.

validity of Section 377, did profound disservice to the very meaning of Indian constitutionalism.<sup>32</sup>

While reason is a key component of the law, emotion is not alien to it either. Judicial decisions at their best are not cold and unfeeling but display a profound empathy for human suffering. A court that is moved by human suffering produces judgments like that for the pavement-dwellers (*Olga Tellis*)<sup>33</sup> and the bonded labourers (*Bandhua Mukti Morcha*).<sup>34</sup> It could be argued that by responding to human suffering, judges embody a form of constitutional compassion that should really be at the heart of the judicial function.

This idea of compassion as central to the very purpose of the constitution finds a place in Jawaharlal Nehru's famous 'Tryst with destiny' Constituent Assembly speech of 1947 to welcome India's independence. Referring to Gandhi, he said: 'The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us but as long as there are tears and suffering, so long our work will not be over'. Clearly, from the perspective as articulated by Nehru, constitutional functionaries – such as the judges of the Supreme Court – should bear in mind that they have a great constitutional responsibility to redress the causes of 'tears and suffering'. In *Koushal*, the court turned a blind eye to human suffering. Two affidavits read out in court testify to this wilful blindness. Senior counsel, Mr Shyam Divan,

32 Ibid.

33 *Olga Tellis and others v. Bombay Municipal Corporation and others etc.*, see <https://indiankanoon.org/doc/709776/> (accessed 27 Feb. 2018).

34 *Bandhua Mukti Morcha v. Union of India and others*, see <https://indiankanoon.org/doc/595099/> (accessed 27 Feb. 2018).

read out the one from Kokila, a transgender person who was brutally raped by the police.

In the police station I was subjected to brutal torture. The police took me to a room inside the police station, stripped me naked and handcuffed my hands to a window. Six policemen all of whom seemed to be drunk, allegedly drunk, hit me with *lathis* and their hands and kicked me with their boots. They abused me using sexually violent language, including the statements: ‘we will fuck your mother’, ‘we will fuck your sister’, *khoja* [derogatory word used against transgenders] and *gandu* [one who gets penetrated anally, a derogatory word].

I suffered severe injuries on my hands, palms, buttocks, shoulder and legs. The police also burned my nipples and *chapdi* [vaginal part of the hijra body] with a burning coir rope. One policeman of the rank of SI [Sub Inspector of Police] positioned his rifle on my chapdi and threatened to shoot me. He also tried pushing the rifle butt and lathi into the chapdi and kept saying, ‘Do you have a vagina, can this go inside?’ while other policemen were laughing. This was done with the specific purpose of insulting me by insisting that I as a transsexual woman was not a real woman as I was not born with a vagina.<sup>35</sup>

Senior counsel, Mr Ashok Desai, read out the second affidavit from Vijaylaxmi Rai Chaudhari, the mother of a gay man:

My child is living with the agony and disrespect of being penalised at any point of time under an unjust law. It stopped him from coming out for long. Even after he came out, he always felt insulted since he can’t live his life equally celebrated and accepted by the law and the society. The thought that Anis could for no fault of his own be harassed by the state, makes Section 377 totally unacceptable for any otherwise law-abiding, just and self-respecting citizen.<sup>36</sup>

The narratives of rape, torture and harassment suffered by LGBT persons did not move the court, nor did the reports of parents of LGBT persons, who stated that the law induces a profound sense of fear and destroys the ability to enjoy a peaceful family life. As such, the judgment profoundly fails to satisfy constitutional promises. Beyond the question of law, *Koushal* also does disservice to the idea that a place exists where law and love can meet. The right to love was left unspoken in *Naz*. Although *Naz* never used that phrase, the decision did open out judicial horizons to the possibility of a place where law could generously meet love.<sup>37</sup> Until the *Naz* judgment, the lives of LGBT

35 On file with the ALE.

36 On file with the ALE.

37 Justice (ret'd.) A.P. Shah (2015) noted: ‘The Delhi High Court judgment started an important conversation in this country, one that is spiritedly continuing today, and that is compelling a move away from the language of homophobia, towards a vocabulary of choice, personal autonomy, the fundamental right to love, and greater sensitivity towards the “variability of the human kind”’.

persons were understood merely in terms of the desired freedom to perform certain sex acts in the privacy of bedrooms. *Naz* was instrumental in breaking down those closet doors and strongly asserting that ‘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’.<sup>38</sup> From this articulation of sexual orientation and gender identity (SOGI) as integral aspects of personhood, the judges continued: ‘It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.’<sup>39</sup>

Thus, *Naz* asserted that questions pertaining to SOGI were not really about the freedom to perform sexual acts in private but rather about the identity and personhood that flows from the freedom to form profound intimate attachments with people of your own choosing. It is this right to a form of public expression of an individual’s personhood – which goes beyond what they do in their own bedroom – that is deeply imperilled by the *Koushal* judgment. For all those who believe in the right of individuals to express themselves through forming intimate attachments not constrained by the barriers of caste, religion and sexuality, the decision in *Koushal* represents an undeniable setback.

### ***National Legal Services Authority v. Union of India: recognising transgender citizenship***

A little over four months since the serious setback suffered by those involved in the *Suresh Kumar Koushal* case, another bench of the Supreme Court delivered a remarkably progressive judgment in *National Legal Services Authority v. Union of India*,<sup>40</sup> this time in the context of transgender rights.

The judges began with a powerful acknowledgement of the wrongs inflicted on the transgender community.

Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.<sup>41</sup>

They then traced out a place for the transgender community in both Indian mythology and history. By referring to its presence in two great epics of India,

38 *Naz Foundation v. NCT Delhi*.

39 *Ibid.*

40 Supreme Court of India, *National Legal Services Authority v. Union of India and others*, writ petition no. 400 of 2012 with writ petition no. 604 of 2013, judgment 15 Apr. 2014. See [http://orinam.net/377/wp-content/uploads/2014/04/Judgement\\_Nalsa\\_Transgenderrights.pdf](http://orinam.net/377/wp-content/uploads/2014/04/Judgement_Nalsa_Transgenderrights.pdf) (accessed 13 Mar. 2018).

41 *Ibid.*, pp. 1–2.



the *Mahabharata* and *Ramayana*, the judges recognised a cultural sanction to transgender existence. The fact that this section of society was not discriminated against and in fact was a part of the ruling class under the Muslim Mughal rulers was also referenced by the judgment. In the court's opinion, the reasons for the current abject status of the hijra community had to do with colonial intervention. In 1871 the British passed the Criminal Tribes Act under which the very existence of the hijra community was rendered criminal. By referencing the unjust arrest of Khairati,<sup>42</sup> which, as noted above, was the first documented case of the use of Section 377, the judges recognised that using it formed another part of the colonial apparatus that ends up targeting the hijra person. The judgment holds that the denial of rights to the transgender community is a violation of the right to equality (Article 14), the right to non-discrimination (Article 15), the right to affirmative action (Article 16), the right to freedom of expression (Article 19(1)(a)) and the right to dignity (Article 21).

The *National Legal Services Authority* judgment (*NALSA* judgment) is particularly innovative in its understanding of what freedom of expression means. In the judges' opinion:

Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality.<sup>43</sup>

The judges also read the right to life and personal liberty under Article 21 very broadly: 'Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution ... Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.'<sup>44</sup> In conclusion, the judges held that:

Discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.<sup>45</sup>

The *NALSA* judgment was remarkable both for its inclusive language and its range of progressive orders. The state and central governments were directed to

42 *Queen Empress v. Khairati*.

43 Supreme Court of India, *National Legal Services Authority v. Union of India, and others*, as above.

44 *Ibid.*, p. 69.

45 *Ibid.*, p. 73.

implement a spectrum of measures on health, social welfare and combatting stigma. The state was also directed to recognise the self-identified gender of persons, be they male, female or third gender, without surgery being a prerequisite.

The *NALSA* judgment stands in stark contrast to the *Koushal* one. The former implicitly acknowledges the contradiction between the worldviews of the two courts. Though the judges stated that they could not express an opinion on the constitutionality of Section 377 – since that question had already been adjudicated in *Koushal* – they made the important point that Khairati's persecution highlighted the fact that 'even though he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons.'<sup>46</sup>

The fact that the *Koushal* and *National Legal Services Authority* cases expressed such contrary opinions on the impact of Section 377 only highlights the need for a larger bench of the Supreme Court to resolve the contradiction.

### **Towards a conclusion**

The stories of Khairati and Nowshirwan illustrate the lack of a language of empathy and a judicial inability to comprehend what Khairati and Nowshirwan experienced. Unfortunately, this lack continues into independent India. Too often it has not been seen fit to apply the language of the Indian Constitution to LGBT persons and their lives. It was only in 2009 that the *Naz* decision cracked open this legal mould. In the decision, the limited legal view that LGBT lives only raise issues of criminal law under Section 377 was broken. Only after this judgement could the courts and the wider public begin to see these issues and these lives through the lens of the rights to equality, dignity and privacy.

The fact that the 2009 decision was overturned in 2013 in *Koushal*, and LGBT persons were denied their constitutional rights, was a setback. The acknowledgement of the discrimination faced by the transgender community and the fact that the people who belong to it are full human beings with rights in *NALSA*, won back part of what was lost through *Koushal*. The Supreme Court has now decided to re-examine *Koushal* through the constitution of a new bench in the curative petition. This has reignited hope that the judgment will be set aside. The Supreme Court, in its order dated 2 February 2016, noted:

Since the issues sought to be raised are of considerable importance and public interest and some of the issues have constitutional dimensions including whether the curative petitions qualify for consideration of

46 *Ibid.*, pp. 13–14.

this court in the light of the judgement in Rupa Hurra's case, it will be more appropriate if these petitions are placed before a Constitution bench comprising five Honourable Judges of this Court.<sup>47</sup>

One hopes that the Supreme Court will resolve the contradiction between *Koushal* and *NALSA* in favour of a broader and more encompassing vision of LGBT people as full human beings entitled to all human rights. Such a decision would honour the constitutional promise of full equality for all persons, regardless of SOGI. However, until such time as the court takes a decisive step in favour of LGBT rights, it should be noted that rights are won not only in the courts but also on the streets. The right to expression, as well as the right to love, continues to be asserted in myriad ways, despite the court decision in *Koushal*. The question really is: 'How long will a decision that goes against a right that has been established on the ground continue to stand?'

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