

# ‘SABSE BADTAR – TEEN-SO-SATATTAR!’ (THE WORST – 377!): Queer Mobilizing in India Against Anti-Sodomy Law

Vivek Divan

*‘If music be the food of life/ then laughter is its queen/ and  
likewise if behind is in front/ then dirt in truth is clean.’*

*Procul Harum, ‘Whiter Shade of Pale’*

## Preface - Introspection is a good thing

This piece of writing relates to a significant effort in the realm of sexuality politics – the attempts made by civil society in India to seek the decriminalization of sodomy (Section 377 of the Indian Penal Code) through the judicial system.<sup>65</sup> It is written as a firsthand account of occurrences from my vantage point, as the person who managed Lawyers Collective HIV/AIDS Unit (LCHAU), the non-profit lawyers group that strategized, drafted and filed the public interest litigation (PIL) on behalf of Naz Foundation (India) Trust in 2001, conducted the civil society mobilization that occurred in the long journey to the hearing of the case in 2008 climaxing in the victorious Delhi High Court judgment of 2009, and revived that mobilization in 2017 when the case was reaching its conclusive stage in the Indian Supreme Court. My unique position as the queer<sup>66</sup> person in LCHAU (and on behalf of Naz India) who was the bridge with the larger queer community provided me the privilege to participate in critical moments of this journey, nurturing it along from its filing in 2001 to the end of my work

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65 This piece was written mainly in 2016, since which time many events related to the case that it speaks about have occurred. For reasons of brevity, those events are traversed here but not in detail. That would require a good deal of more writing. Many of those events – including the revival of a national dialogue by the queer community related to the case – have been heartening. Some of the events – including the unilateral and self-serving attempts of a few in 2018 to litigate the case without any engagement with the larger queer community – are another illustration which informs some of the disappointment that is expressed in this paper. More reading on this can be found at <https://arc-international.net/blog/on-the-verge-of-a-kind-of-freedom-riding-india-of-section-377/>. Vivek would like to thank the many people whom he has worked with during his time at Lawyers Collective, and since. He is fortunate to have had the opportunity to have taken this journey, and learnt along the way. For this paper in particular he would like to thank Asmita Basu, Kajal Bhardwaj, Shumona Goel, akshay khanna and Malu Marin for their review of and perspectives on previous drafts.

66 The word ‘queer’ here is used in varied ways, and often for the sake of brevity. In this instance, that’s what I identify as. But in most other parts of the paper, it is used to represent the spectrum of LGBT people and the numerous, diverse Indian sexuality and gender identities. On occasion it could also cover men who have sex with men. I write this to clarify, although this focus on terminology is not particularly important to the essence of the paper.

with LCHAU in 2007. It was in these years that the case faced some of its gravest challenges – from expected quarters (the courts, the religious zealots, the AIDS deniers, the queerphobes) but also from the unexpected. The focus of this paper is on the latter. My engagement with the case was from more of a distance between 2008-2014 when I worked abroad, and was renewed when I returned to India.

This aspect of the journey has been scarcely written about or documented, and by no means is this meant to be a blow-by-blow account of what transpired. Instead, after providing a general context, I focus on certain critical moments in the journey to the courtroom and after, in order to contribute to reflections on what we have traversed as different actors in sexuality politics around the world, where we have come from and been, and how that has forged the way in which sexuality politics has occurred in our contexts and may be shaped in the future.

This is not an academic piece of theory or research. Rather, in the pages that follow I describe and critique sexuality politics – by using the example of the attempt to decriminalize sodomy through the judicial route in India – not in terms of the larger forces of the political economy, but as an inward looking exercise to examine how we do the work of advancing sexuality rights, what motivates and shapes us and the conduct of our work, and how we could do this better, by holding up a mirror to ourselves and aspiring to meet the human rights value frame that we try to champion. As an attempt at reflection, I am interested in the introspective task of probing how we engage with activism, advocacy, alliance- and movement-building. In that context, issues of representation, participation, and the ethics of accountability and attribution are important ones to consider when advocating political or human rights positions generally, and have been vital to the work I have been involved in. They impact efforts at solidarity, and affect outcomes in the long term, ultimately influencing the robustness of related movements and communities.

Representation is significant when aspects of sexuality rights that impact a large group of people are contested and advocacy efforts are undertaken on their behalf. The legitimacy of these efforts can be questioned based on whether the group's concerns and priorities are articulated to accurately represent the diversity of their voices, and the importance of their rights claims. A wide range of questions can be raised, such as: Who can speak for the group? How do class, economic background, gender, caste, religion inform representation? And, should they?

Indeed, the question of participation is also central to these debates. When advocating on behalf of the many, is there a responsibility towards ‘multilateralism’, in terms of ensuring that affected communities and their representatives are meaningful participants in strategic advocacy? What does ‘inclusiveness’ mean in a resource-limited, culturally and politically diverse, economically stratified context? Is there an ethical value basis (and questions of representation and participation are ethical questions) that should inform advocacy work? Do ends justify means? Is alliance-building, in contexts where solidarity efforts are crucial to success, so essential as to make us ignore the dubious conduct of potential allies? How are actors in this realm of work accountable to the communities they impact for their actions, for the consequences of these actions, and for shaping the agenda to advance a particular human rights issue? The issue of attribution raises questions of how the impact of work in the realms of human rights, sexuality, and HIV can be measured when there are multiple actions and influences toward the outcomes. How do ‘movements’ write their own histories? I hope some of these themes resonate in what follows, although I do not pretend to know the answers to these complex questions.

## Providing context – Queerness, HIV, and the law

Before moving forward, some words on the backdrop against which the Naz India case came about are apposite. The nub of the claim being made in the Naz India case was that Section 377 of the Indian Penal Code<sup>67</sup> in effect criminalized the sexual lives of queer adults engaged in consensual conduct with one another.<sup>68</sup> The petition argued that this provision of criminal law struck at the very core of queer people’s beings and elementally influenced the way they were able to live their lives (not freely, constantly under the threat of the law, and unable to realize their fundamental rights to liberty, equality, life, health, privacy, and freedoms of speech and expression), and how they were treated by the state and society (with opprobrium and bigotry), disempowering them from countering scorn and injustice, and making them highly susceptible to exploitation, abuse, violence and grave health consequences associated with HIV. In its petition, Naz India argued that 377 should be declared unconstitutional by the Delhi High Court as it violated these numerous fundamental rights of queer people.<sup>69</sup>

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67 Section 377 of the Indian Penal Code, 1860 is a British colonial legacy, which states as follows: “*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 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 offense described in this section.”

68 In fact, the terms used in the 2001 petition were ‘men who have sex with men’ and ‘gay men’.

69 Most of the litigation papers related to the case as it traversed its journey of almost two decades are available at the queer Indian online resource [retreiveidfromorinam.net/377/](http://retreiveidfromorinam.net/377/).

But, why was it Naz India that made that claim? This was a justifiable question that was raised by those following the case, and indeed queer activists. For it to be answered it is necessary to provide a brief overview of HIV/AIDS in India. The response to HIV/AIDS in India was initially spurred through a World Bank loan to the Indian government in the early 1990s. The focus of efforts supported by these monies was mainly on prevention messages to the general population, with the aim of curbing what then seemed like a potentially sub-Saharan-like epidemic from blighting India. Funds were disbursed to government agencies tasked with HIV work, and to non-governmental organizations (NGOs), often considered best placed to undertake very sensitive work in contexts where discussions on sexual behavior, intimacy, sexuality, power and health were difficult at best.

Meager funds, however, went toward working with communities most vulnerable to acquiring HIV – the already unpopular, stigmatized fringe of sex workers, drug users, trans people and ‘men who have sex with men’. This latter term emerged in the HIV context as a public health definition framed to capture that vast gamut of men who indulged in such sex but would be highly unlikely to identify as gay, homosexual, or queer. Regrettably, for long the term was also used to subsume transgender people. With evidence mounting that these groups were the most susceptible to HIV for a complex set of socio-economic, physiological and behavioral reasons, an urgent need arose to work with them. That HIV was wreaking havoc among ‘men who have sex with men’ in India spurred a need to structure health interventions for them.

Of course, this need was contested by skeptics in health and bureaucratic systems who did not believe that homosexual behavior was anything more than a very rare aberration in India. But the seminal work of organizations like the Humsafar Trust in Mumbai, and Naz India in Delhi made the contestation redundant. Men were dying – men who mostly didn’t identify as ‘gay’ or even to any related indigenous queer identity, men who were often furtively having sex with other men while being married to women, and also men who did identify as ‘gay’ but who mostly kept that aspect of themselves unrevealed to the world at large. It was in this context that Humsafar and Naz India began their pioneering work in cities where a lot of male to male sex was happening. Funding finally became available to these NGOs to focus their work on reaching out to men at the sites where they gathered – public parks, public toilets, railway stations etc. – to educate them about the need to, and the methods of having safe sex, and to provide prophylactic tools such as condoms.

It was not easy work. It still is not. And NGOs such as Naz India were unable to do this work optimally due to the threat of criminality that doing this work entailed: Naz India would be aiding and abetting the crime of ‘unnatural sex’ (377) by distributing condoms to homosexual men, or teaching them about safe sex. Those needing these

health commodities could not get them if the police dangled the looming threat of criminal liability on Naz India's outreach workers. And, in this mess between far-sighted health priorities and misbegotten moralities, potential recipients of crucial interventions were being denied their right to health. Naz India's staff and outreach workers had shared their frustrations of arbitrary policing with LCHAU.

Early on in its spread, HIV revealed many hitherto hidden inequalities and marginalizations in society, and how these disparities and exclusions disempowered people from protecting themselves from the epidemic. Empowerment through the law – legal literacy, litigating rights, advocating for law reform – became one of the tools that could be used to mitigate marginalization, inequality and disempowerment, and contribute to effectively responding to HIV. It was this understanding that brought Lawyers Collective to work on HIV, initially intermittently and then in a sustained manner through its HIV/AIDS Unit. Over time LCHAU's work began to cover many areas related to, but also independent of HIV, including sexuality.

The LCHAU team was made up largely of lawyers. As a lawyer, one is trained and taught to be available to assist clients who seek legal advice, and represent them in dispute resolution if such a strategy is deemed necessary. While providing pro bono legal aid services in the context of HIV and sexuality there were two kinds of clients who approached LCHAU: the individual who was aggrieved and claimed judicial redress for a rights violation, or the organization seeking to make a legal case in the public interest, since it impacted an entire community or group of people it worked with or represented. There were more than a few instances of the latter, including HIV+ people's networks that filed PILs seeking a ban on advertisements claiming false cures for HIV/AIDS, or challenging patents on medicines. Another such instance was the case of Naz India, which routinely referred its clients who sought legal advice to LCHAU. And, in relation to the frustration Naz India had expressed about the criminalization that 377 imposed, the thought of filing a PIL challenging the constitutionality of this law was prompted in discussions with LCHAU.

To be sure, the recognition that 377 was a problem that impeded the human rights aspirations of queer people in India had emerged in discussions and debates among queer, feminist, and queer+feminist spaces since the 1980s. That this law was an impediment to the lives and health of queer men was also within the consciousness of these spaces, and among those working on HIV and male sexual health in the late 1980s and early 1990s.

Indeed, the nuisance of 377 saw articulation through judicial redress when AIDS Bhedbhav Virodhi Andolan (ABVA) challenged its constitutional validity in the Delhi High Court in the mid-1990s, claiming that it impeded

vital HIV and health work (and therefore violated the right to life) in prison settings, where condom distribution for inmates was prohibited by the police due to the law's existence.<sup>70</sup> ABVA was one of the early organizations working on HIV through the lens of human rights, at a time when few were and when few understood the ramifications of a serious epidemic in India. The organization comprised queer and non-queer people in a country that was not yet net-connected, and where queer organizing and collectivization were still nascent.

By the time I got involved in queer activism (in the late 1990s), the internet had begun to connect people in ways hitherto unimagined; and a serious albeit fraught HIV response was well underway through government and NGO efforts. This contributed to more frequent and deeper discussions on being queer: the challenges of family, patriarchy, masculinity, fears of violence, access to health services, economic independence, and homophobia were among the multitude of issues that were discussed within collectives, communities and support groups. I speak of contexts that I was involved in – urban, English-speaking, middle-, upper- class. Of course, these themes were common to queer people across class and caste, as I learnt when I began to meet queer men in all their stripes.

Most queer men's non-sexual networking – and politicization – in cities happened through HIV NGOs then, with a few queer collectives also providing such spaces. When I began to work in the area of HIV as part of LCHAU, these understandings were furthered, along with a realization that 377 played a very real part in queer men's lives. Being trained in the law, I already knew of the existence of 377, although most men who had sex with men whom I interacted with at work did not.

## Memories

To back up for a bit to my late teens and early 20s – and add elements of a personal aside – I went through law school largely stumbling from one class to another and not particularly focused on what I was studying, being distracted by all the testosterone swirling around me, developing serious crushes, falling in love with men, being initially confused about my sexuality but figuring it out as a young student. In the second year, I noticed that when Criminal Law, specifically the Indian Penal Code, was taught there was a Section 377, glossed

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70 A substantial account of how ABVA came to file this case is provided in "No One Else: A Personal History of Outlawed Love & Sex" by Siddharth Dube (Harper Collins India, 2015)

over by what I assume was a professor too embarrassed to talk of such things to a group of impressionable students, and who also probably did not see the point of focusing class time on a section which was rarely used, and used (in his mind) against reprobates anyway. Also that 377 was pointedly referred to in a later class in my penultimate year, although I cannot quite recall the context. My ears perked up and I became overly self-conscious that this was about me - because you had to be an idiot not to understand what 377 in all its ridiculous archaicness was about - and therefore pretended nonchalance in the moment. This was even though by then I was 'out' to at least a dozen friends - and to everyone but my father back home - on the assurance that they were to tell nobody under any circumstances. Such was the closet. The law affected me by its very existence, irrespective of whether it was ever used. Over time, the idea of 377 festered in my mind. Not to the extent that I had any thoughts that something needed to be done about it, but certainly to the extent that the injustice of a law that considered an essential part of me (who I had sex with consensually) to be criminal caused righteous indignation. What kind of equity was this?

I knew that this absurd law existed, but I had not looked at it closely until I began to interact as a queer person with other queer folk at support group meetings at Humsafar. Future colleagues from LCHAU attended one of those meetings as resource persons to explain the nexus between HIV vulnerability and criminal law. I began working with LCHAU shortly thereafter and the experiences of Naz India in Delhi became sharp and clear. It made no sense. The government was, on the one hand, supporting vital life-saving work performed by organizations like Naz India and, on the other, it kept intact a ludicrous law which impinged upon this very work. Among other rights violations, this contradiction made for a solid legal case to question 377's constitutional legitimacy.

## Traces of a diatribe

You may read some of what follows as a tirade, and in part maybe it is. I have wanted to write portions of this for many years now, but have felt emotionally too close to events to believe that I could do so with a modicum of balance and dispassion. While the passage of time in the 2010s helped somewhat, events in 2018 around the case have made emotional detachment challenging again. I have attempted to do some writing in the last few years. Yet, during all these years, since events began to unfold, writing continued to be a struggle. That is for several reasons. For one, the work at LCHAU during much of the 2000s was emotionally fraught. It meant dealing with an HIV epidemic at a time when the people one regularly interacted with were dying in the prime of their lives, and encountering a by-and-large callous health system and police machinery, which looked with disgust

at the HIV+ person, the sex worker, the trans person, the homosexual or the drug user. Being queer myself had something to do with the emotionality of it too, I'm sure, as I realized that a largely invisible community of 'my' people were unknowingly highly vulnerable to a then terminal illness, with heroic yet insufficient work being done to inform them of risks and provide the necessary tools to protect them.

The work also became emotional because some of it, and particularly the work around 377, received attacks from the least expected quarters – some queer activist circles. That emotion in the form of disappointment persists, since the work has revealed a queer activist ecosystem that is far more flawed than one had imagined or hoped for. Indeed, it is these flaws that have in part led to a context where the case has been conveniently misrepresented by certain gay petitioners who entered the battle against 377 in 2016 – which I shall refer to as the 'Navtej petition'<sup>71</sup> and their lawyers – as a fight that they have championed and won, despite coming into the case many years later and refusing to engage with the large queer ecosystem that has been involved with the case over a generation. This is in no way to denigrate the extraordinary and crucial work on queer emancipation and support that continues to happen all over India at local levels. My pessimism relates to the unlikelihood of an effective, unified, compassionate and ethical effort on the national front.

Being in a team of lawyers who made a case for the rights of unpopular and disenfranchised people, one expected opposition and hostility from the world at large. HIV and the legal issues it threw up were by their very nature controversial and discomfiting, informed as they are by sexuality, criminality, and societal disgust. That was fundamentally the nature of the work at LCHAU – litigating and providing legal support services for the abovementioned highly stigmatized populations. In fact, over time LCHAU also began to provide legal assistance for queer women, often couples fleeing hostile home environments, with the older one being charged with kidnapping the younger woman. Legal aid services were provided in tandem with advocacy for the human rights of the affected, in the form of capacity building workshops and seminars with judges, policy makers, the police, healthcare personnel, trade unions and employers. Given mainstream society's ill-conceived notions around sex and sexuality, one went into much of this work with such audiences assuming that ignorance and bigotry would be part of the deal.

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71 These petitioners were Navtej Johar, Sunil Mehra, Ritu Dalmia, Ayesha Kapur and Aman Nath.

But the resentment that became manifest from parts of the queer activist world – who one assumed would be natural allies – when the Naz India case was filed was wholly unexpected. This antipathy emerged from a perception that Naz India and LCHAU had failed to protect the queer community’s interest by filing the case in a non-consultative and non-participatory manner. This unexpected turn led to much distrust. Friendships were lost in the process (and some have been regained since); even attempts to malign reputations – including allegations of homophobia against Naz India and LCHAU – were made but failed. This rupture would lead to an opportunity that LCHAU took to unite and galvanize the queer activist community around the case. However, this effort at inclusion and engagement also dissipated – to be revived only in 2017 and 2018 by Lawyers Collective and myself – despite some queer collectives and individuals stepping up to be part of the legal challenge, lending strength to the litigation. The hypocrisy of much of this still rankles, as does the failure of queer activism to introspect and candidly reckon with its own conduct. The hypocrisy became even more stark when none of these critics of Naz India and LCHAU questioned why strategic issues including the implications of filing the Navtej petition were not discussed by its team with the broader queer community before going ahead with the petition.

## Fissures

What were the grouses that some queer activists had to the filing of the Naz India case? They were many. First, they believed that LCHAU and Naz India had no business to file it without consulting the broader queer activist community in India. Second, that HIV vulnerability being the basis on which the law was being challenged -- as violating the right to health -- by an HIV NGO was deeply problematic, a highly limited lens through which to claim queer emancipation. Third, that social change precipitates legal change and not the other way around. Given this, any proposed litigation needed to be conscious of social realities, and the India of then was not the right time. The critiques also pointed to the language in the petition being deeply flawed, including the use of terms such as ‘men who have sex with men’, the use of ‘private’ to qualify the sex that was being sought to be decriminalized, and the invisibility of lesbians and transgender people in the pleadings. Some voices even claimed that 377 was irrelevant to the lived realities of most queer people because it was rarely used, and whether or not it remained on the books would not change the ways in which queer people experienced hate, violence, or police highhandedness.

To be sure, there were legitimate counter views to each of these grievances that LCHAU and Naz India held. First, on consultation: it was far from clear who that should have included – the queer activists who were

internet connected, or part of organizations? What about those who lived and worked in remote contexts, or within informal collectives? And, what about the duty of lawyers to their client when a justifiable legal case was made out for litigation? Moreover, over the course of a year prior to the filing of the case the LCHAU team had indicated the possibility of such a filing at different queer meetings it had attended.<sup>72</sup> Second, on HIV being the basis of challenging the law: a plain reading of the original petition makes it clear that the full array of legal arguments was made seeking the striking down of 377. The impact of HIV and the denial of the right to health was only one in that range of grounds. It was a wholly justifiable reason to demand decriminalization given the stealthy toll HIV was having on queer people (and it continues to have). Third, on social change leading to legal change, and not vice versa, LCHAU recognized it as a reasonable argument, while also recalling that instances could be cited of legal prescriptions by the courts that had precipitated changes in social attitudes, conduct and relations. Sexual harassment at the workplace, and environmental standards to curb vehicular pollution were two examples.<sup>73</sup> Indeed, as things transpired, unified activism around the litigation over the years did raise awareness and discussion in various segments of society on 377 and has often positively influenced perceptions of queerness, and the multiple relationships that queer people have with families, friends and colleagues. In those years, between the filing of the case in 2001 and the Delhi High Court judgment of 2009, social change efforts worked in tandem with a litigation strategy to transform conversation on sexual orientation and diversity issues in India.

Fourth, on the inappropriateness of language and of certain arguments: to begin with, as queer people our understandings of sexuality and gender identities is continually evolving. Consequently, a current reading of the terminology used in the Naz India petition reveals apparent flaws. Yet, in the early 2000s, some of this language

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72 Having got its fingers burnt in the past – when it opposed the decision of the Indian Supreme Court taking away the right of HIV+ people to marry, thereby enraging some in the women’s movement who felt this was a positive judicial step to protect women – LCHAU was conscious that it needed to reassure potential adversaries that it would take care to account for their concerns before filing the case. To that end it held meetings with child rights groups in Delhi in 2000 – 377 was used in cases of child sexual abuse, the only law which covered such crimes in India then – to explain that it did not plan to seek the complete striking down of the law, but a ‘reading down’ of it to exclude only consensual sex between adults. The rightful concerns of children and their custodians would be thereby respected.

73 Through its ruling in Vishaka’s case (1997), brought by women’s groups claiming fundamental rights violations to equality, life and liberty, the Indian Supreme Court recognized that sexual harassment was a serious problem for women in the workplace, and laid down guidelines to govern the same, pending legislation, which was finally passed in the form of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*. In the *MC Mehta v Union of India* case related to vehicular air pollution, the court passed directives since 1998 to regulate emission standards and ensure switching of vehicles to clean fuels over a phased period of time. Although these cases differed from the Naz India case to the extent that they did not seek striking down of an unconstitutional law, nonetheless they influenced stakeholders to introduce and enforce standards that protected fundamental rights, even if their implementation has left much to be desired.

as well as the logic of exclusion or inclusion in the text were adopted with full knowledge and after genuine deliberation on contemporary understandings. For example, the thinking was that since, as per the explanation in 377, ‘penetration was sufficient to constitute intercourse’ and since lesbians had not been subject to the law it was thought best not to draw attention to them. This caution could well have been subconsciously influenced by the raging and violent controversy that had been provoked by political parties on the release of the lesbian themed movie ‘Fire’ a few years prior. It could also have been influenced by the fact that some queer women’s groups had voiced that they did not view 377 as a priority in emancipation struggles. The critique that *hijras* were not mentioned in the petition is baffling even today. I can only imagine (but certainly not justify) that because the HIV response in 2000-01 framed ‘men who have sex with men’ as including *hijras* and other transgender women who were born biologically male, the phrase was used – albeit very problematically and inappropriately – as an umbrella term. Indeed, at that time any discussion on transgender people’s issues and rights happened mostly in the context of HIV.

Seeking the decriminalization of ‘private’ consensual sex between adults in the Naz India case seemed entirely reasonable at the time. But critiques justifiably pointed out that the use of ‘private’ was superfluous and inappropriate. After all, if the court issued a favorable decision to Naz India’s claims it would be patently understood that it was not permitting public consensual sex. More importantly, for many queer people, it was precisely in the public domain that their lives were constantly under stress, particularly on the streets. Therefore, ‘privacy’ should not have been cast in terms of a physical space, but rather as an essential part of personal autonomy. Indeed, it was with this latter understanding that the case was finally argued before the courts, certainly aided by the critiques that were made, and understandings that therefore evolved. And, it was on the basis of this understanding that the Delhi High Court imbued the notion of dignity to queer people, recognizing their personal agency (and privacy) to choose how they wanted to live their lives. This understanding of autonomy and privacy has been further emphatically articulated in the Indian Supreme Court’s 2017 judgment clarifying the fundamental right to privacy in *Justice KS Puttaswamy v Union of India* (in which the court essentially repudiated its own ruling of 2013 recriminalizing sodomy, effectively reviving the challenge to 377 that succeeded in September 2018). Moreover, this understanding of ‘privacy’ being about more than a spatial notion finds eloquent amplification in the 2018 Supreme Court judgment that finally decriminalized consensual same-sex sex between adults.

Finally, on the irrelevance of 377 on queer people’s lives: there was no claim ever made that its striking down would solve all problems for queer people. Yet, there was a strong belief that 377’s removal would be powerfully

symbolic, rein in abusive state and police action, advance the right to health, and be the first and necessary step in queer emancipation. Yet, this also came with an understanding that law itself, good or bad, was limited in its ability to effect positive change in marginalized contexts, and often failed to address complex issues of human behavior, and social and class dynamics. And indeed, the justice system was not structured to tackle nuances in identity, language or behavior. The case was not going to be a salve for all problems related to being queer, but a victory would be a huge fillip, and far from futile.

Although these critiques initially precipitated defensive posturing and insularity on my part, over time they encouraged me to contemplate whether there were ways to patch over the divisions that had emerged around the case and forge renewed alliances. This also led to the putting aside of ego and a move towards building bridges, while knowing that LCHAU served our client as lawyers should. Naively, the contours of the debate also led me to believe that the critique against Naz India filing the 377 case came from a genuine viewpoint that aspired to a collective notion of queer activism, informed by inclusiveness, accountability, and openness. That has unfortunately not proven to be the case. The way in which narratives have represented the goings-on in relation to the Naz India case has been painful viewing, and a great disservice to many involved in this work.

The documentation of this struggle that has occurred since the 2009 Delhi High Court judgment, has left out vital aspects of the journey, including why it became as energized and unifying as it did for a few years. These tellings reveal a failure to be inclusive, accountable or open, and betray how personal ambition, and first-to-the-publisher and documentarian zeal have failed queer folk in sustaining what could have been a true movement of sorts, and threaten the future possibility of such collectivization taking place. Confirming this trajectory, in 2018 more unaccountable and non-representative conduct revealed itself in the action of those involved in the Navtej petition who disingenuously held themselves out as pioneers representing the queer community – apparently the first gay people to approach the court (having conveniently erased the fact that queer people had filed affidavits before the courts a decade prior) and speaking on the queer community's behalf to fundraise without having ever interacted with it despite being invited to – and contriving a national and international media strategy of self-promotion on this basis.

## Doing the right thing

Going back to the Naz India case, I must also recognize that critiques of it ultimately led to significant efforts being made to set aside differences and work in unison toward an effective legal and advocacy strategy in

support of the challenge to 377. Most vitally, it created an ecosystem of cooperation and a sense of united purpose in queer activist circles in India for a period of 5-6 years (2003-08) that had not existed prior (and was revived around the case in 2017-18). Those were difficult, critical, yet heart-warming times. They put paid to questions of representation (at least for a while), and for that brief period also gave a (false but valuable) sense that a queer ‘movement’ had emerged in India.

When the then government filed its affidavit in reply to Naz India’s petition in 2003 (almost two years after the case was filed), it was on expected lines – hostile, homophobic – but lacking in legal arguments. It created worry within the queer activist community, and was the moment when realization dawned that bridges needed to be built if we were to rid India of 377. It was from then that momentum gathered to set aside differences.

LCHAU reached out extensively to queer activist communities across the country through a series of meetings that were held over the next few years to engage them on the substance of the petition and court proceedings, the implications of the government response, the support and assistance that queer communities could provide in terms of data gathering and identifying experts from various disciplines – history, anthropology, mental health – and people in public life who would support the case through affidavits in court. These gatherings also discussed strategies for alliance building that queer folk could do with women’s movements, child rights movements, and trade unions, and the possibility of locating a person who had been directly affected by 377 to be willing to file a challenge as such. This method of arduous consultation, demystification of the law, and participatory strategic thinking proved effective in engaging the wider queer community in what was otherwise an arcane legal process. These meetings were held in cities across the country and were attended at their peak by 75 participants who arrived representing their various collectives and organizations. The discussions were diligently documented with minutes shared, including of the roles and responsibilities of various queer groups and individuals in following up on agreed courses of action. The sense of ownership and steadfastness that emerged was extraordinary to witness and be a part of. Participants represented a gamut of queerness – wealthy, lower caste, trans, *hijra*, men, *kothi*, upper caste, *aravanis*, women, or economically deprived.<sup>74</sup>

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74 Trans men, and trans women who did not identify as hijra or aravani were not present in these meetings – those identifying as the former were not visible at that point, and those identifying as the latter were not involved in political activism to the best of LCHAU’s knowledge.

To grasp the richness and flavor of the process reproduced are a few excerpts from minutes of these meetings:

In Mumbai on March 10<sup>th</sup>, 2004:<sup>75</sup>

‘Suggestions were then made based on the idea of collecting affidavits – EM mentioned NIMHANS. AG felt it was possible to make them parties or ask for individual doctors or the institution to file an affidavit. VD mentioned that LCHAU has already been in dialogue with Dr. Shekhar Seshadri of NIMHANS in this regard. Also, in a meeting with Dr. Bharat Shah, psychiatrist at Leelavati Hospital, Mumbai he expressed interest in trying to identify other doctors and support efforts in the case. BK pointed out that all psychiatrists may not support the case. AG explained that it will be necessary to approach them tactfully.’

In Bangalore on June 13<sup>th</sup>, 2004:

‘EM pointed out that for kothis, because of S.377 they cannot complain about rape. Police would not treat such cases of sexual violence as such but as a crime under S.377. There is much violence against sexuality minorities but because of S.377 nothing can be done. AN raised the issue of harassment etc. and the question of a direct link with S.377 – there is always a link but it may not be so direct. Yet, if the link can be demonstrated it would be useful.’

In Mumbai on January 9<sup>th</sup>, 2005:

‘ARK said that over the last 4 years there had been a slow and steady change in the National AIDS Control Organization’s views on LGBT issues. But it was important that bisexual and lesbian groups also write to them to put pressure. The demand should be to direct Project Directors in State AIDS Control Societies to talk to commissioners of police and sensitize them.’

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75 The minutes of all these community meetings were shared with a vast representation of queer activists and organizations in India by sending them to individually to participants, and also shared for the large membership on [lgbt-india@yahoogroups.com](mailto:lgbt-india@yahoogroups.com), the then most-read queer activist list-serve in the country. They are now matters of public record (albeit anonymized out of abundant caution), and available on the Indian queer resource website [orinam](http://orinam.net/377/background-of-sec-377/community-effort-battle-against-s377/) at <http://orinam.net/377/background-of-sec-377/community-effort-battle-against-s377/>.

This last-mentioned meeting occurred at a nadir in the case's journey. The Delhi High Court had dismissed Naz India's case in late 2004 on the reasoning that as an NGO it lacked standing (*locus standi*) to approach the court, as it was not affected by a law that criminalized sexual conduct. The discussion at this meeting focused on collectively deciding whether an appeal should be made to the Indian Supreme Court for restoration of the case back to the Delhi High Court. There was great risk in going to the apex court – it could dismiss the case and that would be the end, or it could hear it itself (and not send it back to the Delhi High Court where Naz India would have an opportunity to be heard in the first instance, before approaching the Supreme Court in appeal if it lost). LCHAU explained the pros and cons, risks and rewards of the options available from a legalistic position so that all could get a well-rounded sense of the choices that lay ahead. It was palpable in that meeting that in the span of a year or so this had become everyone's case, not just Naz India's.

A turning point in this entire journey occurred for me soon after, when an activist from Tamil Nadu, supporting the view that Naz India should go to the Supreme Court, said that if that court threw the case out, he would march naked with his fellow *kothis* on the streets of his town, expressing his anger at a system which refused to recognize his fundamental personhood (I paraphrase). He was angry when he said it, and he expressed it with a kind of courage and determination that I had not seen before. It was an articulation of being fed up, and of not backing down. Queer folk were finding common cause, and with that they were also finding strength in comradeship and support across regions, contexts, classes and languages. I will never forget that moment, and what it symbolized there and then. Later, with much more distance I realized that the criticism of and hostility against Naz India and LCHAU, albeit unfounded, had paid dividends. It had undoubtedly provoked the efforts made by LCHAU to convene the community meetings. As a result, queer activist communities, LHCAU and Naz India rid themselves of intransigence, and began setting aside their myriad differences. LCHAU was coaxed into creating a process of unity and purpose that had already begun to ride on its own momentum. It must be said that although this was the largest queer-unifying process underway, queer groups were doing (and continue to do) much work at their local levels to build alliances of support outside the queer world. At critical moments of pressure when there was a need to organize public protests, media events etc., it was these efforts that galvanized and demonstrated a wide swathe of support for India's queers.

Then, in 2006, a 'community' petition was filed by Voices Against 377 (Voices), a coalition of queer, feminist, child rights and other organizations and collectives, to support the main Naz India petition. Based on discussions that had taken place during LCHAU's community consultations, it was felt that voices of queer groups and individuals would add strength to a case that originated from an HIV NGO, and mitigate any fears of locus standi challenges,

which the case had already endured. One would have fairly assumed that the bugbear of representation was mostly behind us. Yet, it was not, and to some extent justifiably so. Although coalitions like Voices in Delhi, Sangama in Bangalore, and LABIA in Mumbai had begun to build links with potential allies such as women's movement constituents, trade unions, and child rights groups, articulations of the intersectionality of sexuality rights with other claims of empowerment and de-marginalization were still nascent and only then beginning to take shape. Therefore, indeed, historic Dalit oppression was not a prism through which the complexity of sexuality rights claims were being then viewed in the context of 377.

I would suggest that from LCHAU's perspective this was for a few reasons that did not include, however, any aversion to engage on these aspects. Mainly, as lawyers we are trained to look at rights claims in silos: litigation was not imagined as a tool through which the inter-linkages between caste and sexuality marginalization could be articulated. Given this, there was blindness to these complexities. Moreover, the community consultations that took place were focused squarely on the court case and the queer community's support of it; they were not opportunities for discussions on larger questions of intersectionality. That these discussions did not occur is undoubtedly true due to time constraints, limited understandings and a focus on litigation strategies. Undoubtedly too, 'representation' was robust but never ideal despite best efforts: community discussions on the case were yet to yield ways to understand queerness in the contexts of other marginalization such as disability, caste, economic or religion. Queer activism in India today still struggles with this, as it does with class privilege, which has been manifest in the manner the Navtej petition was filed in 2016 by five "highly accomplished" and "prominent members of the LGBT community", an attempt at using class privilege to appeal to the most cynical instincts of a judiciary that is widely considered to be inaccessible to the common Indian. Moreover, in terms of the law, English is the language of the courts and this privileges some of us to engage with the law over others. Whether any sense of ideal representation can ever be achieved in voicing queer concerns in a highly kaleidoscopic environment such as India is debatable.

## Dénouement

Unfortunately, over time the imperfect yet unique participatory process that was galvanized in the mid-2000s did not sustain. The Voices petition in the case could have been the fulcrum around which community energy was maintained and built, yet this did not occur. Fatigue and sanguinity after the success of the Delhi High Court judgment in 2009 may have had something to do with this, even though new anti-queer forces revealed themselves in the form of the full array of religious and other bigots appealing this verdict in the Supreme

Court. Discussions in the context of the LCHAU meetings with the broader queer community did not take place between 2009 and the hearing of the appeal in the Supreme Court in 2012.<sup>76</sup> To reinvigorate a participatory process, Lawyers Collective revived these meetings in 2017 (to which the Navtej petition petitioners and their lawyers were invited, but declined to attend or never replied). Before then, the case became privy to a few queer activists and lawyers who were focused on generating supporting interventions from parents of queer people, mental health professionals and academics. Since the Supreme Court's mischievous judgment of 2013, which re-criminalized queer people by setting aside the Delhi High Court judgment of 2009 and upholding 377, a distinct lowness of morale undoubtedly contributed to the lack of energy.

It has also been said that queer activism had begun to move beyond the law as a site for engagement and that may have had something to do with the activist world losing steam in rallying around the case. The latter is not borne out by my interactions with many in queer activist circles. On the contrary, the need to contest State interference and State-surrogate violence through the law are considered more important than ever by many in present day India, which is witnessing vigilante justice and majoritarian zeal with unnerving frequency.

As for fatigue and low morale, these are certainly factors, but a sense of rudderlessness after 2009 was also a reason that contributed to a collapse of this process of unity and consensus. Indeed, LCHAU was well placed to bring sometimes very disparate queer voices to the table to find common cause – despite being a non-queer organization (a feature that had been highly criticized by some within the queer community). This ability to convene may have had something to do with the wide reach LCHAU had within the HIV world where much of the men who have sex with men-related work and activism did happen. An unhealthy suspicion of HIV-focused, donor-driven NGOs may also have contributed to an unhinging of tenuous yet workable alliances. Those who did not work on HIV failed to understand the impact the epidemic was having on queer people. It was an invisible impact (and continues to be) because it was more rife in non-identifying queer men and *hijras* who were often economically disadvantaged.

Non-participation became an even more serious issue as the Naz India case travelled from the high of victory in 2009 to the low of re-criminalization in 2013, and onwards through to the process of the curative petition, and fresh petitions filed in 2016. While the momentum and ownership that was built toward the Delhi High

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<sup>76</sup> Apart from the patent perversity of the Supreme Court judgment in *SK Koushal v Naz Foundation*, it is important to note that although the case was argued in March 2012, the Supreme Court issued its judgment only in December 2013, on the last day of the tenure of the judge who passed it.

Court hearings over the previous many years saw a courtroom full of eager queer folk listening daily to the proceedings and feeling this was their case as much as Naz India's or LCHAU's, only a handful of folk were present during the Supreme Court arguments to show solidarity with the efforts of the lawyers. Although I was away from India between 2009 and 2014 (except when I was in Delhi to follow the Supreme Court hearings in 2012 in the courtroom), on returning it became apparent that queer activism had splintered in ways that persist. Some of these fissures existed prior to the 377 case, which only patched things over and became common cause for a dissonant lot of actors.

Broad-based national consultation and an inclusive discursive approach did not occur after 2008, until discussions were revived in 2017. On the contrary, the case in the Supreme Court had become one that many queer people felt distant from, now the domain of some lawyers and a few in the queer community. Some of these critics had been part of discussions through the 2000s. Others were younger and did not see themselves necessarily as 'activist' but desired to contribute or participate in some way to the removal of 377. The latter also had no idea that a participatory process of discussion and ownership existed in the build-up to the Delhi High Court judgment. That has led me to believe that as a queer community we do ourselves a great disservice by telling our own histories inaccurately and incompletely. Indeed, this apathy towards representing things as they have happened created fertile ground for those involved in the Navtej petition to create fictions promoting how they were the pioneers who led the way to queer emancipation, and to act unilaterally despite commitments to collaborate, while all the time disregarding the larger discursive process in the queer community that preceded their efforts against 377.

Erasure or tardiness in documentation does not lend itself to learning from the past, or being honest and ethical for the future. A holistic history that is thoroughly researched and of multiple perspectives can be instructive in demonstrating the possibilities of collectivization in increasingly fissured contexts, even if it is void of charismatic individuals. For a process that for a time had been propelled by real efforts to ensure participation and inclusion, it has been disheartening to see the way in which attempts to document it have taken place. PhD theses have been written about this journey and documentary films have been made. Many of these come with their slants and shoddiness. As a result they often fail to capture the multiple voices that engaged in this journey from their respective positions. In the most egregious instances some even feature people who had nothing to do with the struggle for decriminalization, while others who tried to subvert the litigation are portrayed as champions.

Celebration of the Delhi High Court ruling occurred in many parts of the world; I have witnessed it abroad in

queer activist communities, in academic institutions and in multilateral organizations. Yet, I have also witnessed and been told of the ways – astonishing and disingenuous at best – in which individuals and institutions have attributed success to themselves, in a process that was nothing if not collective. Sometimes success has been attributed without any basis to larger extraneous forces. While I was on a panel speaking about the Naz India case at Yale University in 2010, I heard a co-panelist say that the Delhi High Court judgment was ‘culturally inevitable’ – after all hit Hindi films such as ‘Dostana’ (premised on two Indian men *pretending to be gay in Florida*) had begun to positively represent queer lives. George Chauncey was in the audience that day. I wondered what he thought of this preposterous thesis, as a historian of queerness. Less gravely, I watched aghast around the same time when Oprah Winfrey was told that she had been responsible for the 2009 decriminalization due.

When waters are muddied in the telling of our histories, it cannot bode well for the future; and when a community is not rigorous in recognizing the deficiencies in its conduct, chances are that honesty and accountability will fall by the wayside in its actions down the road. With a few queer activists involved in the Naz India and related cases that I have spoken to, the impression is of an ‘each-one-for-himself’ attitude, instead of viewing that documentation of the case’s history is integral to being at the vanguard of an activism of principle, informed participation, accuracy of attribution and transparency – some of the very expectations that were raised of LCHAU and Naz India early on.

It is in this void that other disconcerting developments occurred in the recent past: as part of its foreign policy designs in 2015, under Barack Obama, the US Embassy in Delhi put out a call for applications to support ‘the development of a nationwide network focused on supporting the LGBT Community’. Before that, in 2014, the World Bank undertook an unsolicited study on the ‘Economic Costs of Homophobia’ in India. From within India, in early 2015 a Facebook campaign plea was made to Obama when he visited India to make the case for decriminalization of all LGBT Indians (presumptuously on all our behalfs) to Narendra Modi. It was supported and emulated by a US-based international NGO, which has deeply troubling views on sex work – conflating it with trafficking, and against which it wants laws in India ramped up – and is obviously ignorant of the fact that some queer people in India are sex workers, and female sex worker organizations have been allies in the struggle to strike down 377. Moreover, this plea was made to the head of a government that turns the screws on some of the very queer people whose emancipation was being pleaded, through severe pressure tactics utilized by the US Trade Representative and hand-in-gloves big pharma to ensure that all kinds of extra-legal hurdles such as free trade agreements are promoted to deny access to affordable AIDS medication by needy Indian queers. It should be said that we have been scrupulous in India to avoid getting allies abroad to speak on our

behalfs on the 377 case – given the fertile ground this would otherwise create for ‘foreign’ agenda allegations to emanate – to maintain a homegrown initiative. Well-meaning gestures of assistance – to file interventions as international experts in the case, or to stir international campaigns to castigate the Indian government on occasion – have been kept at bay. In the case of the US government it becomes even more ludicrous to seek assistance of any kind given its aforementioned hypocrisies.

As the 377 case meandered through the judiciary over 17 years, India has leapt towards capitalism, and in this emerging India there is increasingly a new (or more visible) breed of queer activists, who are not particularly ‘political’ when it comes to making rights claims. For them, economic arguments for queer emancipation are perfectly legitimate in the hyper-capitalist India where they have come of age, and Obama’s model of ‘LGBT rights’ as foreign policy is not only kosher, but to be welcomed. Again, most of them have no knowledge of the community process that led to the striking down of 377 by the Delhi High Court in 2009. As mentioned earlier, the Navtej petition was filed in mid-2016 unbeknownst to the queer activist world – a fresh case challenging 377 in the Indian Supreme Court, aided by queer lawyers already involved in interventions supporting the Naz India proceedings in court. The victory in September 2018 that led to the striking down of 377 has been orchestrated in media to lionize these petitioners and their lawyers, representing the journey to fight 377 in a manner that is unrecognizable to many who have been involved in the long run, and contrary to its fundamentally participatory nature. Rarely has a struggle for justice fought by so many been contrived to showcase the deeds of so few.

## Understanding ‘what these Ithakas mean’

India is morphing in ways and at a pace that is unprecedented. Obviously, this is also reflected in queer sections of society. In this tumult there are ways in which society is being cleaved that are apparent and insidious. Among those is how privileged urban Indians are able to live having very little engagement with the ‘wrong side of the tracks’ or with non-conformism and diversity. Delhi is an interesting illustration, where the slums are hidden from view, and one only sees gated communities while riding through the avenues. Mumbai, which was never like that, is allowing these dynamics to enter its landscape – increasingly cloistered high rises, and little understanding or respect for the deprived or the different. Homogenization is increasingly encouraged in political rhetoric, popular culture, and in institutions. To make a generalization, the privileged are deeply ashamed of the wrong side of the tracks and often frustrated that India is portrayed as such in media. All this is occurring with a sense of entitlement that is honed in one of the most classist human contexts.

Class has always caused a rupture in queer India, and the lack of grappling with it and its discontents now is stock. The US (or a deeply flawed image of it) is considered an ideal by some, because it is the economic powerhouse that it is. And for the 'haves', many of whom have arrived there after stultification in so-called socialist India, unhinged capitalism is the ultimate emancipator, not justice or the Constitution (which dangerously few seem to have any idea of), or the welfare state. Lack of faith in the court system is not particularly surprising – it is hugely under-resourced, inefficient and remote. Yet, the higher court system is the only public institution that functions above par and is not lined with criminals to the extent of the executive or the legislature. The non-profit sector (NGOs) has been demonized – as unaccountable and against national interest – by the government, a notion that is permeating larger society.

In this context, annual battles are fought online in the queer world to keep the private sector at bay from swamping queer Pride marches as they have on 5<sup>th</sup> Avenue. Concurrently, the homogeneity of homosexuals is vocalized by many without compunction – desire for the 'straight acting', the 'masculine', and phobia against the effete, the trans. Online discussions announcing Pune Pride 2017 were shocking in their demand for conformity, non-flamboyance and regimental discipline. Queer activism continues to be determined by the 'haves', and often portrayed in media as a struggle that comprises only of elites (where I am certainly located). It is hard to imagine what the 377 case would have looked like if it were to be initiated today – possibly just like the privilege-reeking Navtej petition of 2016 vintage. In a far more divided, yet more diverse queer India, representativeness, inclusion and accountability would likely be low priorities.

Yet, the journey of the Naz India case has left behind much, including how the possibilities of a movement can create hope, how unity in difficult contexts can be of immense strength, and how understanding one's battles in relation to other marginalizations is vital to create a freer and more egalitarian society. There have been other consequences – while recriminalization by the Supreme Court in 2013 appeared to have seen the increased use of 377 against adults – to threaten them, or against closeted gay men by their wives, for instance – it also led to more people coming out, which has sustained and likely increased with the victory in 2018.

These have been some of the many upshots and downsides of the case. It has instilled in me the great value of inclusiveness and transparency in efforts at social change. Yet is much of the work related to human emancipation possibly simply a matter of serendipity, of kismet and timing – that things happen as they do at a certain moment when crisis brings collectivization, when a moment in the politics of a place allows for such coming together which sustains for a while, and dissolves as remarkably? And, is individual ambition and personal gain so inherent to human effort that collective action is eventually bound to fragment? Maybe a

'movement', if it has to happen cannot be leaderless and requires to be driven by personalities. I certainly do not claim to have answers to any of what I have ruminated on over the years, and shared here. But there is success just in the trying.