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## SEXUALIZING THE STATE

### *Sodomy, Civil Liberties, and the Indian Penal Code*

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#### *Mobilizing against Section 377*

On 2 September 2004, the Delhi High Court ruled against a public interest litigation (PIL, Civil Writ Petition No. 7455 of 2001) challenging the scope of Section 377 of the Indian Penal Code (IPC).<sup>i</sup> Section 377 can be described as the ‘sodomy law’ that criminalizes sexual practices -- mostly oral and anal sex -- and, despite its emphasis on sexual practices, is widely interpreted to make same-sex sexual lives illegal in India.<sup>ii</sup> Naz Foundation (India) Trust, a Delhi-based organization working with Human Immuno-Deficiency Virus (HIV)/Acquired Immuno-Deficiency Syndrome (AIDS) issues, petitioned the court to ‘read down’<sup>iii</sup> Section 377 to exclude same-sex private adult consensual sexual practices from its purview.<sup>iv</sup> The court turned it down on the grounds that Naz (India) did not have the locus standi to file the PIL since it was not directly affected by the law, contrary to the point that a PIL may be filed by anyone, including those not directly impacted.<sup>v</sup>

These events are significant not least because the Naz (India) PIL was the second of two courageous attempts to decriminalize same-sex sexual practices and, by extension, same-sex sexual subjectivities in India. The AIDS Bhedbhav Virodhi Andolan (ABVA,

AIDS Anti-discrimination Campaign) led the way with the first petition filed in the Delhi High Court in 1994.<sup>vi</sup> At the time, state agents, including the then superintendent of Tihar Jail in Delhi, Kiran Bedi, prevented the distribution of condoms to protect inmates against sexually transmitted diseases, especially HIV/AIDS (Bhaskaran, 2001; Kapur, 2004). For Naz (India), the hindering of much-needed HIV/AIDS outreach efforts due to the criminalization of same-sex sexualities was the primary motivation against Section 377.<sup>vii</sup> As a community-based organization, Naz (India) does HIV/AIDS outreach work, promoting awareness, providing care and support for those infected with, and those affected by, the virus. Although the Naz (India) petition was turned down, the legal process is still underway; a special leave petition<sup>viii</sup> was filed with the Supreme Court on 17 February 2005 to reconsider the grounds upon which the Delhi High Court rejected the PIL.<sup>ix</sup>

Mobilization against Section 377 has deepened and widened across India since the two petitions were filed, and the law has become the lightning rod of protests against social and state discrimination of same-sex sexualities. Voices Against Section 377 is forged out of a coalition of Delhi-based groups, including women's and feminist groups, sexuality rights groups, child rights groups, and individuals united in their struggle to change the law.<sup>x</sup> The Million Voices Campaign is underway to gather and document a million voices opposed to the law.<sup>xi</sup> The National Campaign for Sexuality Rights, coordinated through the Bangalore-based sexuality rights organization, Sangama, is primarily oriented against Section 377. On 16 August 2005, in the aftermath of India's 58<sup>th</sup> independence anniversary, a coalition of Mumbai-based groups and individuals courageously rallied in Flora Fountain, the city's centre, to protest for legal change. These are among the vivid but not only examples of the widening circles of the struggle to change or repeal the law and, in effect, to decriminalize same-sex sexuality. Even though the law affects all sexually active persons in India, anyone who might consider anal or oral sex, the immediate impact is on same-sex sexualities.

Same sex sexualities is shorthand for gendered and sexual subjects insufficiently described through the terminology of gay, lesbian, bisexual, queer, transgender, Kinnar/Aravani/Hijra, Kothis, and men who have sex with men (MSM). These terms are contested ones. MSM was coined to signal the many and varied circumstances under

which men will have sex with men and to contest the ostensibly class-based and Westernized connotations of the term 'gay' (see Khan, 2001, 2000). However, others have objected to its implicitly behaviourist and depoliticized connotations while defending the salience of gay, lesbian, and bisexual as not always already Westernized and as the basis for political mobilization of sexuality rights (Khan, 2000; Vanita, 2001). Sexuality-rights based groups, Prism in New Delhi and LABIA (Lesbians and Bisexuals in Action) in Mumbai, incorporate the term queer as a means of forging political alliances.<sup>xii</sup> Among the most socially and sexually marginalized, Hijra is a long-standing, changing, and hybrid cultural identity within the subcontinent. Partly due to the derogatory use of the term and partly due to regional variations, the terms transgender, Kinnar (in the Delhi area), Aravanis (in the Chennai area) circulate along with Hijra.<sup>xiii</sup> Although some may self-define as neither man nor woman, most identify as women, and a few will refer to the self in masculine terms. A few are born intersexed, some voluntarily castrate, and almost all wear women's clothing at least some of the time and in most cases wear their hair long. Most importantly, they are expected to live by the cultural codes of their community (Cohen, 1995; Jaffrey, 1996). Often incorporated under the aegis of MSM, Kothis are largely described as feminine-identified men from the working classes who have sex with normatively gendered or hypermasculine men. Sexual partnering with men and women (some are married) varies according to circumstance and while some choose to cross-dress occasionally or mostly, others do not. This brief overview of the terms is not meant to suggest clear-cut differences for the terms circulate freely.<sup>xiv</sup> Rather, they are reminders of the gendered, sexuality- and class-based, regional and historical variations among same-sex sexualities and highlight that sexual violence is differently inflicted by state institutions, a point that is explored in the subsequent section.

State-based discrimination against same-sex sexualities cuts across South Asia and law is only one of its aspects. Similar laws exist in Bangladesh (Section 377 Bangladesh Penal Code), India (Section 377 IPC), Pakistan (Section 377 Pakistan Penal Code), and Sri Lanka (Sections 365 and 365A of the Penal Code). Activists in Sri Lanka have been at the forefront of challenges to sodomy laws in the subcontinent and their struggle has yielded important lessons about the redoubtable power of state institutions and legal structures. As a result of a legislative effort to undo the British colonial law

criminalizing sodomy incorporated into Sri Lanka's legal regime, Section 365 was not repealed and, to make matters far worse, members of parliament voted to expand the scope of the law to include women and worsened the possible penalty.<sup>xv</sup> But the effect of law extends beyond court prosecutions. In fact, as will be explored in the paper, few cases of same-sex consensual sexualities are prosecuted in the higher courts in India. Rather, state institutions, such as the police, abuse the law to commit physical violence, extort, blackmail, and harass.<sup>xvi</sup> Feminized males/men are the most frequent targets of state and extra-state violence.<sup>xvii</sup> This targeting is powerfully captured in the accounts of the Blue Diamond Society, an organization for sexual minorities in Nepal, where police abuses of sexual minorities are widespread and most often aimed against Meti (feminized males).<sup>xviii</sup> Section 377's egregious impact in India extends beyond physical violence to enabling a culture that defends discrimination of same-sex sexualities as public morality and supports intolerance and violence committed in intimate spaces of the family as maintenance of social order. The law and its prohibitions may be said to be widely internalized to defend people's prejudices against same-sex sexualities and, thereby, give false justification for violence against these sexualities (Narain and Bhan, 2005). Section 377 not only criminalizes some sexualities as non-normative but also *institutionalizes* unequal rights and lack of protections of citizenship. The importance of undoing Section 377 cannot be overemphasized for it is the first step toward ensuring legal recognition, rights, and protections for same-sex sexualities.

This article calls for a thoroughgoing scrutiny of the state and the role of state institutions in perpetrating social injustice through law and its enforcement. My analytical and political intervention here is not only to raise the issue of direct and indirect state violence against same-sex sexualities, which I do. It is also to see the state as a contested site. Critical activists and scholars are keenly aware of how state policies and laws thoroughly mediate citizenship as sexual and gendered. Recent challenges to national laws that criminalize homosexuality (Sri Lanka, Sections 365 and 365 A of the Penal Code; United States, *Lawrence et al. v. Texas*, 26 June 2003) demonstrate the impact of the state on matters of sexuality, especially for those denied equal access to the rights of citizenship.

Yet, we do not similarly attend to the conceptualization of the state, to state institutions and structures, their interrelations, from the lens of sexuality. As scholars and activists of sexuality and gender, our struggle is to not reproduce the state as monolithic, unified, and coherent. Rather our aim is to demonstrate the state as an unstable and complexly related set of structures, institutions, agencies, and discourses that are saturated with sexuality but also with the inconsistencies of power. The challenge is to identify the institutional arrangements of power while identifying the 'internal' inconsistencies as well as consistencies of operations. Such approaches help dispel the fiction of the state as overarching and encompassing (see Ferguson and Gupta, 2002) and avoid lending the state further strength.

Feminist scholars, especially those speaking to postcolonial contexts have been at the forefront of gendering analyses of the state (Enloe, 2000; Hasan, 1994; Kandayoti, 1991; Radcliffe and Westwood, 1996; Peterson, 1992; Stevens, 1999; Yuval-Davis, 1989). The significance of state policies and effects on women, the gendered, race-, religion-, and class-based inequalities of citizenship, and the gendered masculinist politics of state institutions, such as development and the military, are underscored in these contributions. While considerations of sexuality are implicitly part of these analyses, they are often seen as corollaries of gender. Exchanges across sexuality and gender studies illuminate the importance of not collapsing or separating considerations of these two constructs (Butler, 1994; Sedgwick, 1990). Sexuality and gender, like gendered and sexualized violence, are by no means interchangeable constructs (Abelove, Barale, and Halperin, 1993); yet, neither are they disconnected.

The analytics of violence as gendered are crucial to the recognition of how women, transgenders, and men survive state policies and ideologies in the everyday and the exceptional. The violence that is nation state takes multiple forms, economic, ideological, physical, sexual, and is inflicted in ways that recognize persons—whether women, transgenders, men—as deeply and differently gendered selves and symbols of collectivities (Agnes, 1999; De Mel, 2001; Hasan and Menon, 2004; Rouse, 2004). In their instructive essay, Banerjee et al. (2004) show how a gendered analysis of violence reveals the commonality of women's experience across sexual brutalization, displacement, death, property, and more. How state violence is inflicted and experienced

by women of numerous ethnic, caste, religious, and class groups varies but what holds together the custodial rape of dalit women with that of the disenfranchised upper-caste Hindu widow are women's bodies as metonyms of sexuality, family, of community, and of nation. A gendered analysis of sexual violence tells us much about the deeply entrenched ideologies of gender and (hetero)sexual difference that make only women and girls the subject of rape laws in the Indian Penal Code to the exclusion of boys, transgenders, and males/men.<sup>xix</sup> That marital rape is not recognized under rape law, that rape rather than sexual assault is codified in law further reflects on the importance of questioning the gendered nature of violence and its institutionalization in the state in India.

A subtext of this article is the importance of also attending to the analytics of sexual violence in ways that are not grounded in unrelenting assumptions of heterosexuality. State violence rests not only on ideologies and regimes of gender difference. It also rests on relentless reproduction of the violence that is heteronormativity.<sup>xx</sup> What gives force to heteronormativity is its normalization through social institutions and structures, especially the nation state, and its active re-production as natural and eternal. Determining who belongs to the national community, the privileging of normatively gendered, heterosexual women and men from the dominant social classes as the bearers of respectable sexuality, and the precariousness of same-sex sexualities are directly shaped by the nation's heteronormative underpinnings (Aarmo, 1999; Gopinath, 2005; Puri, 2004). The citizen-subject of the national state is constituted through the social arrangements predicated on '*compulsory heterosexuality*' (after Adrienne Rich) and its conjunctions with ethnicity, radicalization, caste and class processes (Alexander, 1997; 1991; Luibhéid, 2002). Having to pass as a single heterosexual woman in order to retain one's flat and one's job in New Delhi, for example, to live in fear of physical and emotional violence should one's sexual orientation become known, denial of the gamut of rights of citizenship as a result of criminalization and invisibilization of lesbian sexuality, lack of state protections against discrimination give some indication of the tremendous costs exacted from women by the heteronormative mandate. Yet, as the presence of women who seek sexual intimacy with

other women makes plain, 'compulsory heterosexuality' is neither unchallenged nor the only possibility.

Between June and August 2003, I started researching the mobilization against Section 377. The Naz (India) PIL had served to bring the injustices of Section 377 into focus for the second time since ABVA's petition in 1994. Its outcome, the government response, the legal proceedings, and the role of the Delhi High Court in mediating a matter of potential public controversy were of urgent concern. The grounds upon which the Naz (PIL) petitioned the state for legal amendment, the strategies used, the gendered and class-based sexualities that were the subjects of the petition, the process through which the petition was developed, the support and the criticism expressed by sexuality rights organizations and activists were of as much concern to me as the petition's outcome. The Naz (India) PIL, the court hearings, the government's response filed a year and a half later in September 2003, the positions taken by the various agencies indicted in the petition provided invaluable insights into not just state power but also inconsistencies and fractures thereof. This research was expanded and deepened in the summer of 2005, from which I draw selectively, here.

For the purpose of this article, I highlight the Naz (PIL) as one example of the mobilization against the sodomy law in India. I draw on interviews conducted with Shaleen Rakesh, then Coordinator of MSM Project and person appointed as the organizational representative on the PIL, among others, and relevant documents and minutes of meetings. Particularly interested in the question of the state, I met with several of the official spokespersons of the various state agencies named in the Naz (India) petition. These included then Police Commissioner of New Delhi, a representative from the Police Commissioner's office, and an official from the judicial section of the Ministry of Home Affairs. The Director of the National AIDS Council, was unavailable despite repeated requests to meet. Though they are not named in the Naz (India) petition, I also met with a representative from the National Human Rights Commission. To this, I add research from the summer of 2005, which involved additional interviews with staff of the Ministry of Home Affairs and discussions with members of the Delhi police, especially constables. Formal recorded and informal interviews were the primary means of data collection, along with court documents and state-ments.

The Naz (India) PIL foregrounds questions about sexual and gendered subjectivities, law as a site of contestation, and state policies that promote sexual and gender- and class-based forms of violence. It presents questions not sufficiently contended with: how is the state conceptualized, imagined as the arbiter of rights, sexual and gender normality, and legality and criminality, and organized through the discourses of sexuality? This is the point of departure of this article. What critical readings of the state might the Naz (India) PIL against Section 377 enable? What insights about the nature and functioning of the state, how we conceptualize 'it,' might be derived by looking at the state through the framework of sexuality? Posed as such, these questions hearken Michel Foucault's (1978) framing of sexuality as a transfer point of power; how and in what ways do discourses of sexuality densely organize and permeate state institutions and agencies, their frequently fraught inconsistent interrelations, state agents and representatives, state policies, and, indeed, the terrain of governmentality?<sup>xxi</sup> The understanding of sexuality used here draws directly from Foucault's (1978, 1980) insights that it is no obdurate biological drive, but a historical construct, instrumental to the enactment of power through formation of knowledge, the simulation of bodies, pleasures, and the incitement of discourses of subjectivity, control, and resistance. Sexuality's instrumentality in the dispersal of power, especially at the level of institutions, is of concern in this article.

What is at stake, here, is the issue of resistance to state violence and effective challenges to strategies of power. By turning the lens on the unjust criminalization of some sexualities, the Naz (India) PIL takes an important step in that direction. I believe that the imagination of the state and approaches to the state that would help undermine its power, regardless of the legal outcome, are useful to consider. Inasmuch as the Naz (India) attempt to bring social change through legal reform may be read as failure due to the Delhi High Court's 2004 decision, such a reading lends further strength to the state; the imagination of the state as a cohesive, rather than a composite and unstable hegemon, is unwittingly reasserted. In contrast, the PIL gives us a necessary glimpse into the numerous points of fractures and inconsistencies that help undermine the reproduction of state power.

To analyse state structures from the intertwined lens of sexuality and gender, I draw upon queer theory, the insights of postcolonial feminist theory on law and violence against women, and critical, feminist approaches to conceptualizing the state. The intention is to underscore the heteronormative and masculinist moorings of not just state policies but also state institutions, agencies, and authorities. Insofar as analyses of sexuality leave the concept of the state unexamined, its hegemony may be reproduced and the analyses become unwittingly complicit with state power. In a nutshell, my purpose is to ‘sexualize the state,’ or in the language of queer theory, to ‘queer the state’ (Duggan, 1994: 1). Building on critical approaches to the state and sexuality, this paper argues the importance of seeing the state as a fragmented, inconsistent set of institutions and relations, both reproductive of domination and open to contestation. This analysis examines strategies for combating sexual and gendered violence materially and symbolically encrypted in Section 377. The regrettable outcome of the Naz (India) petition at the Delhi High Court makes these considerations and critical interventions especially urgent.

### *Legacies, Contexts, and Concerns*

Section 377 is rooted in the legacies of the British colonial state and the interlaced colonial anxieties of national, socio-sexual, and racial purity at home and in the colonies. In her informative essay, Suparna Bhaskaran (2001) locates the first British civil injunction against sodomy in 1533 by Henry VIII, thereby making sodomy a secular rather than ecclesiastical crime and challenging the Catholic Church and papal authority. Although an 1860 revision, implemented in 1862, reduced the punishment for sodomy from execution to ten years’ imprisonment in Britain, its introduction into the subcontinent a year later served to institutionalize what was in pre-colonial India a minor strand of homophobia (Vanita, 2001; Vanita and Kidwai, 2000). In their ground-breaking collection, *Same-Sex Love in India*, editors Ruth Vanita and Saleem Kidwai charge the introduction of this anti-sodomy law as Section 377, along with the suppression of Rekhti (Urdu poetry written in the vernacular that represents sexual intimacy among women)

and the heterosexualization of the ghazal (often extolling passion among men), as a key marker of the broadening scope of homophobia and its institutionalization under the state in colonial India. The intersecting vectors of racial, class, and sexual differences mark some of the early case law under Section 377, and work to specify and preserve a hierarchal colonial social order. Bhaskaran (2001) analyses early cases to show that racial differences are maintained between the colonizer and colonized, aggressive masculinity and sexual degeneracy is imputed to the colonized labouring classes in contrast to the effete ascribed to the colonized elite, and relentlessly heterosexist reasoning is used to decide cases.<sup>xxii</sup> The criminalization of same-sex sexual practices, regardless of age and consent, was symbolic of the gradual suppression and partial erosion of rich and varied traditions of same-sex eroticism, sexual practices, and representations within the subcontinent.

That this law was seamlessly incorporated into the legal structures of the postcolonial national states in the subcontinent disturbingly reflects dominant nationalism and normative sexuality. The imbrications of dominant nationalisms and sexualities in contemporary India have been particularly troubling. Perhaps no postcolonial nationalist myth on sexuality is more pervasive than the belief that homosexuality is alien to India (read as: Hinduism), and the outcome of Mughal invasions and Westernization. The questionable position taken is that the Indian, seen synonymous with Brahminical, past was devoid of expressions of homoeroticism and same-sex sexual practices until it was introduced through Mughal invasions (see Bacchetta, 1999). The trope of Westernization is also used to disavow rich histories of same-sex sexuality as un-Indian. Much needs to be and has been said to challenge this Hindu right-wing nationalist stance. One counter expression is the writing of alternate sexual cultural histories (Thadani, 1996; Vanita and Kidwai, 2000). These alternate histories seek to challenge dominant nationalisms by revealing an ancient and pre-modern past replete with expressions of same-sex love, desire, and behaviours, which, while sometimes disapproved and punished were nonetheless tolerated, and survived.

The Naz (India) PIL, as well as the 1994 petition by ABVA, signals a parallel political mobilization against state policies and laws. How the state institutionalizes heteronormativity, heterosexism, and homophobia through laws and their enactment

(especially, Section 377), through policies discrepantly enforced by its various agencies and representatives (for example, the National AIDS Control Organization's handling of the issue of HIV/AIDS) are of particular concern to the gathering momentum of sexual minority rights' activism in India. The state as a purveyor of violence against same-sex sexualities is a key target of the mobilization. Exhorting the Supreme Court to intervene against Section 377, long-standing gay activist Saleem Kidwai (2005) recently noted that the defunctness of the law makes it dangerous, for it is used to inflict material and sexual violence. He rightly observes that it is difficult for the state to prosecute people for same-sex sexual acts without vindictiveness. Section 377 has become a conductor for the mobilization against violence toward same sex sexualities that often stretches seamlessly across putative distinctions of state and civil society beyond the realm of law. The immediate purpose of the legal challenge presented by the Naz (India) PIL, however, is the decriminalization of same sex sexualities in India.

An important point to underscore is that legal decriminalization of same-sex sexual practices would not mean the lack of regulation of same-sex sexual subjects or that same-sex sexual subjects are no longer under the purview of the state. State regulation of sexuality is mediated by but extends beyond law. Counterintuitively, legal reform can serve to strengthen the state and give greater force to some institutions through changing and adding legislation. Feminist scholars Flavia Agnes (1999) and Nivedita Menon (2004) writing on law, gender, and sexuality in India, have carefully and compellingly pointed out the limits of what appear to be legal successes for women in the courts. For example, Menon problematizes the feminist argument that what's needed to protect women in India, and elsewhere, from sexual assault are better formulated laws by noting the decreasing number of successful convictions and the deeply misogynist assumptions underlying even favourable decisions and successful convictions. Critical race studies scholars, such as Kimberlé Crenshaw (1995) and Mari Matsuda (1996), have made a parallel argument about the institutional biases of law in the United States, which favour the privileges of whiteness, wealth, and maleness, and the limits of seeking justice through legal reform.

The Naz (India) PIL against Section 377 was filed in the Delhi High Court on 6 December 2001. Legal representation was provided by Lawyer's Collective HIV/AIDS

Unit, under the stewardship of the Director, Anand Grover.<sup>xxiii</sup> Since Naz (India) was willing to serve as the petitioner, the case was filed in the Delhi High Court. A favourable decision by the court would have had nation-wide legal impact, contingent on final approval by the Supreme Court to amend the law. As Vivek Diwan at the Lawyer's Collective suggested, the overall strategy was that should the Delhi High Court reject the petition, there would be recourse to the Supreme Court since it was a question of fundamental rights. While the upper courts may rule on any laws, matters of fundamental rights may be brought before the Supreme Court. This strategy is being explored as a subsequent petition to review the Delhi High Court's unfavourable decision was also turned down (3 November 2004, Review Petition No. 384/2004).<sup>xxiv</sup>

Organizations such as Naz (India) and ABVA stay clear of state-based funding. In the case of Naz (India), it has deliberately sought to protect itself from state scrutiny and tried to avoid compromising advocacy work on behalf of sexual minorities by looking for funding elsewhere. Naz (India) is currently supported by funds from MacArthur and Ford foundations, United States, and Lotteries Commission, United Kingdom, (now known as Community Fund), among other sources.<sup>xxv</sup> Ironically but expectedly, Naz (India) frequently finds itself at odds with the state on behalf of vulnerable groups, as Rakesh explained.<sup>xxvi</sup> This paradoxical situation repeats and endures, despite the fact that the state relies heavily on organizations such as Naz (India) to do the necessary HIV/AIDS outreach work. Naz (India) does not see itself as a rights-based organization but chooses to position itself as intervening primarily in sexual health-related matters. Still, as is well stated in the petition, matters of health, life, and rights are closely related.

While a thoroughgoing analysis of the petition, its possibilities and pitfalls, is outside of the scope of this paper, a summation gives insight into the strategies and orientations that shaped it. Developed over a three-year period, the PIL's legal strategy to petition the Delhi High Court to 'read down' Section 377 (see Footnote 2) to exclude private adult consensual sex was based on two factors. To repeal Section 377 of IPC, a bill would have to be introduced, debated, and voted upon favourably in the parliament, an unviable option due to the lack of sufficient support in the legislature, according to Rakesh.<sup>xxvii</sup> The second factor has to do with recourse to Section 377 in order to prosecute sexual assault against children. Existing laws narrowly address forcible sexual

intercourse or rape committed by men against women and girls (under sixteen years of age, or fifteen years if married) and altogether ignores sexual assault against boys. Violence against women, girls, and boys is selectively recognized by the law, which, in turn, perpetuates it; ignoring marital rape or sexual assault that goes beyond forcible penile penetration of the vagina paradoxically renders rape law another site of the normalization of violent sexuality. The ambiguous language of '*carnal intercourse against the order of nature*' (see Footnote 1) oddly is the only recourse to prosecute sexual assault on boys and aggravated sexual assault on girls that extends beyond the scope of penal-vaginal penetration.

The PIL was strategically shaped by an emphasis on health, which stages and subsumes issues of fundamental rights. It suggests that Section 377 jeopardizes the health of MSM and gay men and, in effect, their lives by promoting social stigma, enabling abuse by the police, and pushing homosexual acts underground. Thus, the constitutional validity of Section 377 is challenged on the grounds that it violates fundamental rights guaranteed by the state, namely Article 14 (Equality before Law), Article 15 (Prohibition of Sex Discrimination, argued to include sexual orientation), Article 19 (Fundamental Liberties), and Article 21 (Right to Life and Privacy).<sup>xxviii</sup> Of these, the right to privacy, under the ambit of ordered liberty and individual autonomy, and the violation of right to life, at once protected under Article 21, are emphasized. Sexual relations are among the most private aspects of a person's life and selfhood, which, according to the PIL, this law continually jeopardizes even when no harm is done to others.

The PIL highlights the material, endangering impact of Section 377 alongside its oppressive symbolism; the law promotes homophobia and discriminates against homosexuals by creating a class of people continually victimized in society and by state agencies, such as the police. As a legal code introduced under the British colonial state, Section 377's anachronistic, aberrant nature is out rightly criticized in the petition. The PIL argues that the law is Judeo- Christian<sup>xxix</sup> in orientation and inconsistent with Indian cultural history, which makes it especially egregious in its promotion of homophobia (Civil Writ Petition 7455 of 2001). Section 377 is also noted to be inconsistent with international law (Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention for the protection of Human Rights and Fundamental

Freedoms) by which India abides. Although more could be said about the deleterious impact of Section 377, this is a damning and needed indictment of the state from the perspective of same-sex sexualities by any count.

If the decision that a health-based, right-to-private-consensual-sexual-activity approach against Section 377 was likely to be better received by the courts, by the government, and the various respondents named (identified below) in the Naz (PIL), then it was not a decision without consequences. The limits of this approach are not only reflected in the language and positioning of the PIL but are reasons for reservations expressed by other sexuality rights activists and groups. For example, an autonomous feminist group in Mumbai challenged the absence of a fundamental, civil rights approach in the petition against Section 377.<sup>xxx</sup> A health-based approach does not sufficiently unsettle the structural and institutional underpinnings of heterosexism. It might solicit a practical logic to consider the legal recognition of adult, consensual same-sex sexual activity in private on the grounds that criminalization of same-sex sexualities is making them and others more vulnerable to the transmission of HIV. This, even if granted by the courts, would not build an adequate case for the recognition of civil liberties, fundamental rights, and, therefore, the assurance of equality of citizenship, and protection from discrimination. The logic that citizenship rights accrue to normative heterosexuality, insofar as it intersects with privileges of gender, class, ethnicity, and religion, would remain intact. Not only do the problems of heterosexism confound the health-based focus of the PIL but it is also marked by tensions of gender, of class, and of the variations among same-sex sexualities. The language of privacy becomes embattled from the perspective of groups who do not fit the profile of gay relatively privileged men.

The petition focused on gay men and MSM, groups identified as especially vulnerable to the spread of HIV and AIDS-related complications. Lesbian women, as a low-risk group for HIV infections, are sidelined in the petition. Nevertheless, lesbian women are not as well inured from the threat of Section 377. Only one case involving two consenting women has been prosecuted in the higher courts (see Bhaskaran, 2001), but the threat of Section 377 and the social sanctions against homosexuality saturate daily life with the violence of heteronormativity. Especially since the language of the law emphasizes penetration in its explanation section of 377, it leaves open the possibility of

prosecuting lesbian women (see Footnote 1); would the law emphasize *penile* penetration, women would be excluded from its purview (Vanita and Kidwai, 2000). Thus, even though lesbian, bisexual, or transgendered women are vulnerable to the threat of Section 377, the health-rights strategy of the PIL makes them partially invisible.

The language of privacy in the petition inadvertently foregrounds class privilege. Men without access to same-sex sexual activity in the privacy of a home or a hotel, especially those who are economically marginal, are directly vulnerable to the threat and enforcement of Section 377. Indeed, accounts of state and extra-state violence are told by men/males from the working classes.<sup>xxxii</sup> The petition foregrounds HIV/AIDS outreach workers and MSM, who are frequently though not always, from less resourced social class backgrounds. But, the language of privacy undermines the degree of protection that a possible amendment to Section 377 would allow these men/males. The paradoxical legacies of the hyper-sexualization of working class manliness and the presumption of sexual access to those who are not seen as conventionally male and conventionally heterosexual makes the threat of Section 377 all the more real for these males/men.

What goes frequently un-stated but is not un-related is the threat of Section 377 to transgenders/Hijras/Kinnars/Aravanis. In yet another postcolonial twist to the persistent legacies of the colonial state, castration, whether forced or voluntary, is illegal under Sections 320 and 322 IPC (Gupta, 2002b; Talwar, 1999). Further, due to the pervasiveness of normative sexual dimorphism—two biological categories of female and male—in state laws and policies related to subjectivity and citizenship, the social and political status of transgendered people in India is constantly at risk; the lack of a systematic policy toward transgenders means an ambiguous civil and political status for them. This combination of lack of full recognition by the state, the criminalization of voluntary castration, and the tendency to perceive Hijras as erstwhile, and therefore essentially, males/men makes them especially vulnerable to the homophobia and heterosexism underlying Section 377. Relentless perceptions of transgenders -- whether castrated, male-bodied, or intersexed -- as males prevents them from filing a complaint of sexual assault with the police for fear of being booked under Section 377. Despite reports of wide prevalence of sexual violence against them, they are afraid that their complaints of sexual assault will be unjustly interpreted by the police as falsified accounts of a failed

commercial sex transaction and they will, instead, be accused of homosexual activity.<sup>xxxii</sup> How they are simultaneously recognized and rendered invisible within the terminology of MSM is relevant, here. The PIL and other discussions of MSM arguably include Hijras (see Khan, 2001). But, insofar as transgenders are subsumed under this category of same-sex sexualities the particularities of how Hijras become vulnerable to allegations against 'unnatural sex' differently from males/men, are lost and the significance of the laws against castration are sidelined.

The Naz (India) PIL represents a necessary and courageous move against the legalization of homophobia and heteronormativity in Section 377 toward the decriminalization of same sex sexualities in India. As a result of intense deliberations and strategic considerations, the PIL took a health-based, rather than sexual rights, approach against Section 377, which coincided with the organization's mission and orientation. The PIL rightly indicted the state on its failure to protect the lives, interests and the rights of those most vulnerable to HIV/AIDS. The petition and the process through which it was developed are not without significant criticisms, which are shadowed above. The PIL, the Delhi High Court hearings, and the responses of other state institutions present the nexus between state and sexuality. The petition against Section 377 is an opportunity to interrogate the state through a queer lens, to question the nature of the state, its inconsistencies across institutions and agencies, and effective ways in which to undo its predominance.

### *Scrutinizing the State*

What does it mean to scrutinize the state from the framework of sexuality, to sexualize the state? This speaks foremost to how the state is imagined. In their introduction to the book, *States of Imagination: Ethnographic Explorations of the Postcolonial State*, Thomas Hansen and Finn Stepputat (2001) note that in addition to the material aspects, modern states are also defined by the '*imagination of the state*' (p. 8); the idea of the state and its existence. The authors draw on Foucault to describe the materiality of the state as vivid and violent; the state is characterized by claims of territorial sovereignty through a

monopoly over violence, the gathering and control of knowledge about the population, and the generation of resources through a national economy toward the well-being of the population. What Hansen and Stepputat underscore is how important the idea of the state as a normal and permanent feature is to its continued existence. The institutionalization of law as the source of state authority, the materialization of the state in permanent signs, rituals, monuments, letterheads, etc., and the nationalization of the territory and state institutions through the writing of history and notions of a national community perpetuate the idea of the state (Hansen and Stepputat, 2001).

The imagination of the state is produced not just through state discourses and institutions but is collectively shared. Attempts to bring about social change through legal reform are important but also part and parcel of the shared production of the state as the overarching arbiter of rights and protections. Hardly limited to the Naz (India) PIL, this is true of the myriad and innumerable attempts at securing rights through state institutions and agencies. One of the initial points of criticism against the PIL, noted by sexuality rights activists not associated with it, questioned the value of directing resources toward legal rather than cultural change. Notwithstanding this criticism, the Naz (India) PIL to amend Section 377 and decriminalize homosexuality filed against state bureaucracies reflects how the imagination of the state as the permanent overarching authority is collectively sustained and how inescapable it may be.

Even though the idea of the state is preserved through recourse to legal reform, it becomes a ready icon of power's egregiousness that extends well beyond the putative boundaries of the state. Rallying against Section 377 may not only decriminalize same sex sexualities in India. The PIL helps stage Section 377 as the predominant symbol of state *and* social injustices against same sex sexualities around which a broad coalition of groups, individuals, and organizations can come together. For example, despite the reservations of several sexuality rights-based groups in Bangalore, Mumbai, and New Delhi against the Naz (India) petition, there is widely shared consensus that a collective movement against Section 377 could help create the awareness and sensitization necessary for change in social attitudes in civil society and state institutions, among ordinary people as well as state agents. According to Rakesh, setting into motion a gay and lesbian movement across India was part of the intended strategy of the Naz (India)

PIL;<sup>xxxiii</sup> although, unpredictably, it was the government's response to the PIL in September 2003 that rallied together a coalition of groups across the country and triggered the formation of Voices Against Section 377 in Delhi and National Coalition of Sexuality Rights in Bangalore. In her interview, a member of the group Voices Against Section 377 expressed her enthusiasm at this national mobilization but also her concern that the coalition would fragment once same sex sexualities were decriminalized.<sup>xxxiv</sup>

Perhaps no site is more implicated in how the state is imagined than scholarly writings. Few would dispute the point that the state is not a monolithic organization or a thing. Yet, conceptually and empirically the state is often treated as an 'it'; what Philip Corrigan has aptly called 'thingification' (1994: xvii, borrowing from Césaire, 1972, who coined the term). Insofar as part of the power of the state rests on *its* imagination, scholarly analyses that treat the state as a monolith unwittingly lend further force to this idea. Curiously, debates on the state, in particular how to theorize the relation between state and civil society, have helped sustain imaginations of the state.<sup>xxxv</sup> Notwithstanding well-established criticisms, the misleading distinctions between state and civil society continue to circulate widely, and lend weight to the state as a normal and necessary feature of society. In contrast, Timothy Mitchell (1991; 1999) insightfully notes that the state is a structural *effect* -- not a real structure, but a powerful and metaphysical effect that sustains the myth of its coherence, unity, and distinction from society. Moreover, assuming the distinctions between state and civil society obscures the point that these are hierarchical distinctions in which one is granted power (state) over the other (civil society). The hierarchy of state power is forcefully evident in James Ferguson and Akhil Gupta's (2002) important caution that the state is implicitly imagined and empowered as both the highest authority and the natural container of culture, society, and politics.

While some scholarship and theorizations may preserve state imaginations and power, critical interventions help unravel these imaginations, and denaturalize the state. I refer to the growing contributions of political anthropological work grounded in careful ethnographies of the state. Drawing strength from Philip Corrigan and Derek Sayer's (1985) approach to the state as cultural production, these ethnographies are also influenced by the theorizations of Antonio Gramsci (1971) and the insights of poststructuralism, especially Foucault's work on governmentality (1994). The writings

focus on the intricacies and nuances of state-making, the possible existence of more than one state, mundane routinized effects of the state, consistencies and inconsistencies, and hegemonic and contested aspects of the state, as well as the blurred boundaries between state, civil society, and community in numerous cultural contexts (Ferguson and Gupta, 2002; Gupta, 1995; Hansen and Stepputat, 2001; Joseph and Nugent, 1994; Ong, 1999; Scott, 1998; Steinmetz, 1999). Foucault's work (1978, 1980, 1985) linking sexuality to nation has afforded numerous feminist excavations exploring the relation of sexuality and gender to larger contests (see Diamond and Quinby, 1988; McClintock, Mufti and Shohat, 1997; Rubin, 1993; Sawicki, 1991; Stoler, 1995a). Other arguments attend to gender, such as Gupta (2001) and Seider (2001).

Seeing the state as disaggregated, possibly marked by fractures and disjunctions between and among the various parts whose internal consistencies and coherence cannot be prejudged is crucial to unravelling state power (Gupta, 1995; Hansen and Stepputat, 2001). The Naz (India) PIL exemplifies the promise (and pitfalls) of such an approach to the state. The petition takes the inconsistencies and disaggregations of the state as its starting point in two ways. First, the language of the PIL points out irregularities among the laws and rights guaranteed by the state. By juxtaposing Section 377 with the fundamental rights stated in Article 14 of the Indian Constitution (see discussion in section entitled, Legacies, Contexts, and Concerns), the PIL reveals how Section 377 is incompatible with the guarantees of fundamental liberties provided by the Constitution to all citizens. Insofar as such incompatibilities are strategies of power and state regulation, the PIL takes the position that this is outside the scope of the state's function, especially because the state ought to have no compelling interest in curtailing private sexual relations among consenting adults. Second, the PIL is directed against specifically named respondents, disaggregating 'the state' for those who see fundamental rights, including the right to life, in jeopardy. The respondents are listed in the following order: Government of National Capital Territory of Delhi, Police Commissioner of New Delhi, Delhi State AIDS Control Society, National AIDS Control Organization (NACO), Union of India's Ministry of Home Affairs, Ministry of Health Welfare, and Ministry of Social Welfare.

In his article on the discourse of state corruption in a north Indian village, Gupta (1995) similarly notes how regional newspapers and their readers, of necessity, are less likely to reify the state as a monolithic organization, to explicitly name the various state bureaucracies, and to highlight stories of corruption. While Gupta's observations are a useful reminder about polysemic interpretations, it helps me underscore the point that a disaggregated state is ineffective or weakened; rather, inconsistency and incoherence may not only characterize modern states, but also make them more powerful (Hansen and Stepputat, 2001). That state inconsistencies and state power are not mutually exclusive is ironically illustrated through the PIL. The PIL observes that though the Union Government does not recognize MSM, the same cannot be said of NACO, another state agency. Contrary to Section 377, NACO recognizes the presence of MSM and their susceptibility to HIV/AIDS, and directs prevention efforts toward them, attempting to protect and promote their rights, thereby making it incumbent on the Union Government and the law also to acknowledge and legitimize same-sex sexual subjects. The PIL and the broader mobilization for legal reform seek a just though uniform state policy toward same sex sexualities. Each of respondents named in the petition is argued to bear responsibility for the protection of the fundamental rights of life, privacy and human dignity for every member of the national community, including gay men and women. Political exigencies of decriminalizing same sex sexualities invoke state inconsistencies only to encourage state coherency. The state is unravelled and reassembled toward a just cause.

Critical theorists have been long concerned about sexuality as a historical construct that deeply pervades and organizes nations and nationalisms (Berlant and Freeman, 1993; Eng, 1997; Gopinath, 1997; Mosse, 1985; Parker et al., 1992; Puri, 2002; Stoler, 1995b). Whether as eroticized nationalism or in the guise of respectable sexuality, this scholarship compellingly speaks to the imbrications of nationalism and sexuality. What must figure prominently is the role of the postcolonial state in perpetuating and perpetrating homophobic policies and laws. For the most part, the focus of activists and academics writing on these topics has been on cultural texts to the exclusion of material aspects, where the former is equated with the terrain of nationalism and the latter with the state; this, despite the usefulness of seeing the state as a cultural material/discursive site.

Indeed, while nations and nationalisms are consigned to the realm of affect and emotion, rationality is ascribed to the state (Stoler, 2004). The nation and dominant nationalisms overlap, but are not synonymous, with state structures and institutions, and the messy terrain of sexuality is just as deeply relevant to the state (Alexander, 1991, 1997; Banerjee, 2005; Bhaskaran, 2001, 2004; Duggan, 1994; Enloe, 2000; Herrell, 1996; Kapur, 2004; Luibhéid, 2002; Menon, 2004; Stevens, 1999; Uberoi, 1996). How the state serves as the material/symbolic site through which law, policies, and discourses on sexuality are produced cannot be subsumed in an exclusive focus on nationalisms and the terrain of cultural politics.

It would not do to disregard the significance of gender to 'sexualizing the state'. The dangers of detaching sexuality from gender within the context of state policies were amply evident in my own research, especially in how gender politics are deployed to bolster heteronormativity. In the interview with an official in the Delhi Police Commissioner's office, undertaken in July 2003, when asked about the PIL against Section 377 the official said that he wasn't aware of it and deflected the issue. He attempted to minimize and implicitly justified the violence encoded in Section 377 on the basis that few people fall under its purview. He referred to same-sex sexual activities as crimes, even as he took the position that as peripheral to the total volume of crime, they garner little police attention. Instead, what he focused on was the issue of (heterosexual) violence against women. Strongly and repeatedly, he instructed me to pay attention to Section 376, or rape against women and girls, rather than Section 377. His point was that (hetero)sexual violence against women is not only more widespread and threatening but also ought to be of greater interest to me as a (feminist) scholar. The official's concerns about violence against presumably heterosexual women are not unimportant but they are troublingly used to turn attention away from forms of violence against sexual minorities, including non-heterosexual women. Heterosexualized forms of violence are used to draw a wedge between matters of gender and sexuality. Yet, even within the context of heterosexual violence, only some forms of sexual violence could be acknowledged; and when pressed that Section 376 egregiously does not acknowledge marital rape, he chose to ignore my argument.

Another key point is that sexuality is not marginal to the state. Here, I find especially useful parallels to Stoler's (2004) attention to affect as not incidental or a mere side-effect of the rational, bureaucratic state. Against the grain of the Weberian rational state predominant in colonial studies, Stoler details how ascertaining affect, managing sentiments, 'private' feelings, 'public moods,' assessing their beneficial and subversive effects was, indeed, a central function of the late colonial state in the Dutch East Indies. Stoler challenges the idea of the rationally-minded, bureaucratically driven state where affect and sentimentality are seen merely as smokescreens of state rule that mask reasoned calculations or as factors of the state's racist ideologies toward colonized people. Invoking Foucault, Stoler argues that the Dutch state's concerns with affect and sentimentality, in fact, were not missteps of rule or metaphors for something else; rather, they were '*dense transfer point[s] for relations of power*' (Foucault 1978: 103; in Stoler, 2004: 7),<sup>xxxvi</sup> akin to discourses of sexuality. Social policy on educational reform, citizenship requirements, marriage laws, among others, political stances, the tone and content of archives produced about these issues were charged with calibrating and regulating sentiment and affect as instruments of power.

Indeed, state institutions, agencies, and relations in India are saturated with discourses of sexuality. Through the myriad laws that regulate sexuality (Section 377) but also through those that are not ostensibly about sexuality (Article 21/Right to Life), through the innumerable policies on matters of sexuality (population control) and those that regulate sexuality indirectly (educational materials), and through the innumerable agencies that impact sexuality (Family Planning Association of India), and institutions that appear to have little to do with it (Ministry of Home Affairs), material and discursive aspects of sexuality are articulated by the state. Not merely an arbiter of sexual rights and sexual citizenship, state institutions and structures serve as 'dense points of transfer of power'.

Even as Foucault (1978) cautions against focusing on the state as the only source of power, when the state is seen as a powerful symbolic and cultural site of discourses of sexuality, a part of the wider historical shift that Foucault (1994) indicts as governmentality, state institutions undoubtedly emerge as dense transfer points, though not the only ones, of power and regulation. These myriad discourses, sometimes

consistent and inconsistent at other times, are routinely generated whether it is through law, through its representatives and agents, through specially appointed commissions, through the regulation of film and other forms of media, and through the prosecution and persecution of certain sexual subjects. What is sexuality, what is normal sexuality, what is appropriate, indeed, respectable sexuality, under what circumstances, for which subjects, at what ages, how to manage this messy aspect of human life, how to channel it toward socially-productive ends, how to contain sexual excesses that might be inherent to sexuality are all key points of concern for the state in India and elsewhere.

In re-examining imaginations of the state, sexuality, a concept notoriously difficult to define, cannot be reified. Foucault's approach to sexuality as a historical construct, described above, is especially useful in seeing sexuality as not just including the discursive and material realm of sexual desires, practices, identities, beliefs, institutions, and structures thoroughly infused by relations of power and agency; sexuality is also the dense matrix that enables the proliferation of power through the production of knowledge and truth. The thoughtful contributions of Lesbian and Gay Studies (for example, Ablove, Aina and Halperin, 1993; Nardi and Schneider, 1998), attention to the production of heterosexuality (Katz, 1990; D'Emilio and Freedman, 1988; Halley, 1993), and the early insights of queer theory (Butler, 1990; De Lauretis, 1991; Fuss, 1991; Sedgwick, 1990) have further complicated any attempts to treat sexuality as unitary or monolithic, or as binary -- homosexual and heterosexual -- points that serve as useful cautions for how we see the state.

Sexualizing the state from a critical stance would mean eschewing binaries of homosexuality and heterosexuality. Lisa Duggan (1994: 1) called for 'queering the state' in response to Christian right-wing backlash against sexual and gender minorities in the United States in the 1990s, which continues unabated but not unchallenged. By way of a response that would effectively sidestep the pitfalls of identitarian politics, Duggan insightfully calls for disestablishment strategies.<sup>xxxvii</sup> Drawing a parallel to the debates about religion and the (assumedly secular, see Shapiro, 2006) state in the United States, Duggan explains the framework of disestablishment strategies: to show how the state systematically and constantly privileges heterosexuality; and to argue that the state should, in fact, divest itself of the promotion of heteronormativity. Duggan's approach is

useful to further a critical politics of sexualizing the state, one that draws its inspiration from the insights of queer politics and the need to engage the state creatively and assertively.

The Naz (India) PIL provides insight into the nexus of sexuality and state. Not only does it become a lens through which to examine the gendered and class-based nature of this nexus, it also becomes an occasion to examine how we imagine the state as a cultural/historical effect where power is organized through the framework of sexuality. The open-ended grids of institutions, agencies, and agents that make up what we collectively think of as the state, partly secured through discourses, law and its enforcement, and policies, fraught with the unevenness of power, are realized through the continually produced imaginations of the state as enduring, unified, and overarching. The framing of the PIL, the encounters with state representatives and the conjunctions of critical literature on state and sexuality alert us to the consistencies and inconsistencies across relations of power. Perhaps more than anything else, the Naz (India) PIL becomes a means to be reflexive about how we conceptualize state power so as to not lend further strength thereof. The fundamentals of queer studies, by which I refer to a profound scepticism toward the binaries of heterosexuality and homosexuality and the caution against reinforcing heteronormativity, help further unsettle strategies of power at the nexus of sexuality and the state (De Lauretis, 1991; Fuss, 1991; Sedgwick, 1990; Patton and Sánchez-Eppler, 2000; Somerville, 2000).

### *Queer States, Queer Subjects*

A queer analysis of the state demands that we go beyond accepting homophobia as the primary explanation for state resistance to decriminalizing same sex sexualities in India toward a thoroughgoing critique of heteronormativity. The issue of how sexual subjects are constituted through Section 377 reflects their regulation through the regime of law. The language of '*against the order of nature*' (see Footnote 1) in this code provides little indication that it is directed toward particular sexual subjects. The commentary (see Footnote 1) attached to Section 377 indicates that the law is meant to punish sodomy,

buggery, and bestiality; in other words, targeting sexual practices rather than sexual subjects who come to embody socially constituted perversities in the form of the homosexual. What underlies this discrepancy is a shift in the exercise and proliferation of power through the deployment of sexuality. Foucault (1978, 1985) documents the shifting modes of power by the early eighteenth century and through the nineteenth century in Europe whereby the discourses of sexuality become instrumental to the surveillance of the individual but also the social body. Away from the site of ecclesiastical authority, medical science, psychiatry, and pedagogy, and increasingly the state, became the sites of producing new knowledges and 'truths' about sexuality. Alongside the rendering of people as desiring subjects and subjects of desire was also the elaboration of perversity in new ways -- whereby practices such as sodomy were no longer mere acts perpetrated by their doers but embodied in the 'perverse' self. By the time Section 377 is introduced under the colonial state in India, concerns about the importance of regulating the subjects of vices, whether sodomy or prostitution, were part of state attempts not just to surveil sexuality and contain anxieties about race, gender, and class (Bhaskaran, 2001), but also part of the broader concern of the state with sexuality and the social body (Foucault, 1978). The language of the law may have been shaped by the legacy of a different space, but the question of 'perverse' sexual and colonial subjects was very much part of the colonial state's concern, and remain so in the postcolonial era.

The current continuance, and interpretation of the language, of the legal code of Section 377, therefore, is entirely relevant to understanding the postcolonial state's reach to determine sexuality and morality. Through questions of what constitutes unnatural sex, whether consent was involved, and what constitutes penetration, the present day courts read subjectivities into a law, which essentially criminalizes practices. In her overview of Section 377, Bhaskaran (2001) argues that whenever children and animals are involved or if forcible sex can be proved, only the perpetrators are punished and the assaulted are considered victims. Yet, according to her, in the few cases concerned with two adult men engaging in mutual sexual activity if either of them is shown to be a 'habitual sodomite,' both men are automatically punished. In other words, if one of the men is seen to be 'homosexual,' both are assumed to have consented. The point is that law is a means not

just to adjudicate but also to produce sexual subjectivities through its application—both ‘homosexual’ and, by implication, normative.

However, there is a nagging inconsistency between seeing Section 377 as a node in the production of state power and arguing that it is a prevalent site for the legal regulation of same-sex sexual subjects. Section 377 case law suggests few cases of same-sex adult sexual activity are prosecuted in the higher courts. Shamona Khanna (2002) observes that since 1830 there have been only four cases involving consensual acts of anal sex, of which three cases occurred before 1940. Although its threat is indisputable, there appears to be little indication of the persecution of adult same-sex consensual sex under this law. Indeed, Alok Gupta (2002a) notes that of the forty-six cases involving prosecution under Section 377, the vast majority of the cases, 30 out of the 46, involve sexual assault on children. Statistics from the lower courts are not available to know the extent to which this is consonant across the court system. What is certain is that Section 377 is wielded as a threat against sexual minorities by the police, another state agency; the police and others in positions of authority, as well as thugs and goons, use Section 377 to harass, blackmail, threaten, assault vulnerable men. Of that, there is little doubt. This became disturbingly obvious in the attack on Bharosa Trust, an organization that works to prevent HIV/AIDS among MSM, and the persecution of its members in the city of Lucknow in July 2001. At the time, police raided a cruising park in Lucknow and arrested a Bharosa Trust outreach worker. Subsequently, they raided and sealed the Bharosa Trust office as well as the office of Naz Foundation International, a Britain-based organization that supports and assists Bharosa Trust. The police arrested and imprisoned for several weeks the acting director of Bharosa and staff member of Naz Foundation International, Arif Jafar, and two other staff members. Among the criminal codes under which they were charged was Section 377 on the preposterous grounds that Bharosa Trust was running a ‘sex club,’ despite the fact that it is recognized by the Uttar Pradesh State AIDS Control Organization and the state relies on it for HIV/AIDS prevention work. This case of state violence received unusual attention due to its scope and the ensuing nationwide protests and anti-state coalitions, and exemplifies the quotidian and arbitrary ab/use of Section 377 to harass those seen to be associated with sexual practices *'against the order of nature'* (see Footnote 1).

The higher courts do not appear to be the active site of regulation of sexual subjects or their prosecution under Section 377. This point, in fact, is used in the Naz (PIL) to show that the law is archaic and anachronistic. Then, why is there not sufficient support across the respondents named in the PIL to ‘read down’ Section 377? Does its use (perhaps) at the lower court justify the need for state agencies to retain this code and its injunction against sexual practices regardless of age and consent? The answer is not clear since, as mentioned earlier, statistics from lower courts are not available. One obvious response for the lack of state support to amending Section 377 is: homophobia and the state’s role in preserving heteronormativity. The state is and ought to be indicted for systematically preserving and promoting heteronormativity; of this, and the promotion of heterosexism there is overwhelming evidence. Still, I believe the matter is more tangled than the expression of homophobia.

I caution against reading state practices as always already fully heteronormative and homophobic for two reasons. One, starting from the position that state practices are solidly and unrelentingly heteronormative assumes coherency and re-imposes ideological and material uniformity onto the state. Second, if state practices are unambiguously heterosexist and homophobic, it prematurely forecloses the state as an arena of resistance in which transformations may and have occur(ed), where heteronormativity may be not unrelenting, and where homosexuality may be decriminalized. Unquestionably reading heteronormativity into state practices ironically privileges the very problem. My point is not that criticism of the promotion of heteronormativity or the repression of non-heteronormativity is unjustified. My point, instead, is to raise the question: is it always already so? At stake, I argue, is the need for ‘denaturalizing’ the state as a site of unjust social policies and laws, and for unmaking this seemingly monolith, opaque, overarching state. If the Naz (India) PIL offered some direction in this regard, the government’s reply provides some indication of the fractures in state power.

### *The Government’s Reply*

On 6 September 2003, after significant delay and repeated injunctions from the Delhi High Court, the government filed a reply to the Naz (India) petition on behalf of the Union of India and its various subsidiaries, Ministry of Home Affairs, Ministry of Health Welfare, Ministry of Social Welfare, and none was filed on behalf of the other respondents, notably NACO. The court's decision delivered approximately a year later on 2 September 2004 proceeded without NACO's response. The statement, filed by the Judicial Division of the Ministry of Home Affairs, highlighted that Section 377 is not arbitrarily used, it is used to complement gaps in child rape laws, that the social disapproval of homosexuality in India is strong enough to criminalize it, that the law does not distinguish between procreative and non-procreative sex in its punishment of unnatural sex, and despite the tolerance toward homosexuality in the United States and the United Kingdom, it is not accepted in India (counter affidavit filed by respondent number 5 in the matter of Civil Writ Petition 7455/2001). Clearly, the reply is riven with homophobia and justifies heteronormativity, and supports a simplified history of heterosexuality in India.

Yet, notable in the government's reply to the Naz (India) petition is its degree of dissonance. On the one hand, the reply takes the unequivocal position that it objects to the writ petition to exclude same-sex consensual adult sexual activity from the purview of Section 377. So, the grounds upon which the reply objects to the Naz (India) PIL are that: consent to a crime does not make it lawful and Section 377 serves to protect public safety and defend health and morals; that proposed changes in law can well open the flood gates of delinquent behaviour and be construed as providing unbridled license for the same; rights named in the petition are not infringed and are subject to reasonable restrictions; Naz (India) has no locus standi since only those whose rights are directly affected by the law can challenge its constitutionality; the Naz (India) writ petition relates to the policy of law rather than its legality.

On the other hand, the government's objections to the petition are laced with what appears to be conciliatory logic. The reply reiterates that the law is used only when a complaint is filed by a victim (implicitly excluding consenting adults) and to fill a lacuna in child rape laws. It also suggests that private homosexual activity between consenting adults is not criminally prosecuted. Arguably, the government's reply is taking the

position that adult, consensual, same-sex private sexual activity is implicitly and practically excluded from Section 377. It notes that Section 377 is always understood in the context of particular cases and not in the abstract, as suggested in the petition. Courts are said to use contemporary meanings and consider changes since the law was passed to ascertain whether an alleged offence is covered by Section 377. Further, where there is doubt about the relevance of Section 377 to a particular subject, preference is given to the subject and those accused under this law can petition that the law is not relevant to the facts of the case, according to the government's reply. Section 377 is said to be applied only upon a complaint by a victim and is not arbitrarily used.

To say that the government reply is inconsistent is to understate the case. Inconsistency implies lack of coherence, something without consistence or firmness, incongruence. The reply takes a heteronormative nationalist stance in its position that *that the law does not distinguish between procreative and non-procreative sex in its punishment of unnatural sex, and despite the tolerance toward homosexuality in USA and UK, it is not accepted*. This is hardly unexpected if part of the state's function is to manage the conjunctions of nationalism and (respectable, normal) sexuality. But the response also suggests that private homosexual activity is not, in fact, prosecuted under the law, that courts use discretion in light of contemporary (perhaps, liberal) standards, short of guaranteeing that such prosecutions would not occur. A critical reading of the government's response to the PIL reinforces the point that inconsistencies across the government's reply, among or across state institutions does not connote weakness of the state or is simply an outcome of homophobia; points obscured when the state is treated as a monolith. This became compellingly evident in fieldwork at the Ministry of Home Affairs and among the Delhi police, described below. A 'queer' reading highlights the fractures and dissonances in the reproduction of heteronormativity at the site of state bureaucracies.

### ***Ministry of Home Affairs***

One straightforward analysis of the government's reply is that it is illogical precisely because the state has the power to be so. However, research persuasively suggests the need to understand more precisely the operations of state power and the

messiness of reproducing heteronormativity. By this, I mean the process through which the formal reply was developed in the Judicial Division of the Ministry of Home Affairs. According to the current Director of the Judicial Division, who had custody of the folder related to the Naz (India) PIL, the Division is charged with the responsibility of overseeing matters related to the Indian Penal Code or the Criminal Procedure Code wherever there is a question of amending or interpreting a law or the procedural code.<sup>xxxviii</sup> In June 2003, and between May-August 2005, I met with the two bureaucrats who served in the capacity of Director at the Judicial Division, and interviewed the Joint Secretary, and the Desk Officer, and Deputy Secretary, who helped draft the government's response.

In June 2003, the then Director, who has since been transferred to another state institution, agreed to speak confidentially so that his identity would be protected. I met him again in May 2005. His responses give some insight into the process through which the response was developed, which was confirmed by subsequent interviews in the department. The former Director's position on the Naz (PIL) was equivocal; a curiosity mitigated with fear of retribution for seeming sympathetic. Since the first interview occurred before the government filed its reply in September 2003, he did not feel at liberty to divulge its contents. What he did reveal is that junior-level bureaucrats craft a response usually. Further research revealed that a Desk Officer and his supervisor, Deputy Secretary, had formulated the first draft after some discussion within the department. Typically, and in this case, the Director and the Joint Secretary reviewed the response, making comments and notes. When the Joint Secretary considered it appropriate, it was shared with the politically appointed Minister of Home Affairs. The interviews confirmed that as each bureaucrat in the hierarchy of the department reviews the government response being crafted, not only do they leave a trail of their notes and comments in the folder, but also they can record their dissent, if any, to aspects of the state-ment. Also confirmed is that the final approval to the response comes from the Minister, who may ask for it to be significantly modified, even reversed.

What these interviews suggest is that many different opinions on this law prevail in the Ministry of Home Affairs. It was independently confirmed through the various interviews that the decision to not support the Naz (India) petition for amendment to

Section 377 was endorsed by the Minister. The former Director nonetheless acknowledged that some privately believed that homosexuality should not be illegal but were afraid to be seen promoting this view in the Ministry of Home Affairs. Examining the folder on Section 377, the current Director summarized:

*Internally, (it appears that) some felt that Indian society is laid back, resistant to change. Naz is asking for unnatural sex, promiscuity, and society is resisting. It is like sati; Indian society was resistant to change and it would not have been abolished had the law not been changed. But unnatural sex is a reality; we cannot simply put it down. It's very internal to human beings and will come up one way or another.<sup>xxxix</sup>*

It is hardly possible to describe the Director's analysis of the previous discussions, likely mixed with her personal positions, as liberal. She and other officials speak in their capacity as state agents but also as cultural subjects influenced by contested social attitudes. The expressions of homophobia are intertwined with questions of the responsibility of the state in difficult social matters. The analogy to sati speaks to perceptions of a society with deeply entrenched attitudes that marginalize same-sex sexualities but also reflects on the progressive role of law. The government's reply may have taken a counter-position to the Naz (India) PIL, but the insights into the process makes it likely that the apparent inconsistencies register the messiness of successive drafts building on various sets of comments. They also register the messiness of inconsistently heteronormative and homophobic discourses rife *within* the Ministry of Home Affairs.

The government's response underscores, in part, what is clearly reflected in case law: that Section 377 is not used to prosecute adult consensual private same-sex sexual activity. The fact that case law supports the government's position that Section 377 is not used to prosecute adult consenting homosexuals does not mean that they are not persecuted—either by the police, through other state bureaucracies (for example, by the National Human Rights Commission and the Ministry of Home Affairs). The police are

assigned the primary responsibility of enforcement of criminal laws, including Section 377.

### ***The Police***

The most consistent and troubling charge by same-sex sexualities against the state is police violence and brutality. When I tried to delve into this with the presiding New Delhi Police Commissioner in June 2003, the interview was terminated within a few minutes. At first, the Commissioner admitted that he wasn't aware of the Naz (India) PIL or its status even though this interview occurred approximately eighteen months after the petition was filed, and the court had repeatedly directed the state respondents to file their replies. When asked, he vehemently denied charges of police abuse against sexual minorities and insisted that the institution's role is merely to enforce the law; a point that would be hotly disputed by those who bear the brunt of this enforcement. The position that the police merely enforce law was repeated almost to the letter two years later in June 2005 by the New Delhi Commissioner of Police, who said *'We come into the picture only if there is something repugnant to the law; we enforce the law'*. What is being evaded in these denials of police brutality is how enforcement of law serves as an active production of sexual and gendered subjects, who is subjected to law enforcement, and how ought he/she to be treated.

A subsequent group discussion with 25 policemen at a police station in New Delhi in June 2005, about Section 377 was productive and disturbing. My purpose was to understand police perceptions, those charged with the direct enforcement of law, of what it means to exercise Section 377. All male, ranging from six years to thirty-two years of service, these policemen have served or continue to serve the beats—the streets, the parks, the neighbourhoods, etc. Notably, as a group, they were divided in their positions on the relevance of Section 377. A handful of vocal constables took the position that same-sex sexual activity is 'unnatural' and 'against nature'. To the question of whether Section 377 should be deleted or modified to exclude consensual same sex activity, several responded, “sex among men or women is wrong”; “this is against our culture”; “If this is removed it will increase in homosexual behaviour; what will happen to the population if everyone is doing unnatural sex, especially in the next 100 years; They were

emphatic. An equally vociferous group took the position that Section 377 should not be applied to two consenting adults. In a conversation entirely in Hindi, a police constable said surely: *'Har ek ko sexual satisfaction ka adhikar hai'* (translation: all have the right to sexual satisfaction). A second constable said to his colleagues in Hindi, “This law is wrong in the case of two adults who consent to sex. This law should change” while another said, “This law should be changed as now we are free from colonialism”; a few constables supporting deletion or modification of Section 377 took the position, “There should be a difference between forced and consensual sex.” The discussion and disagreement among the constables flowed through the discussion. Rather than predictably and overwhelmingly homophobic reactions, their responses as a group were tempered with differences.

In contrast, their responses to how Section 377 is enforced were cohesive and all the more troubling reflections on the conditions of police violence. They chorused that Section 377 is deployed *only* when there is a complaint (by implication, consenting adults are excluded), echoing the government’s reply filed in court. Hypothetical examples of two gay men holding hands in a public park were responded to unambiguously, even from those who expressed reservations on homosexuality, that there would be no question of Section 377 being utilized to harass. The position that they enforce the letter of Section 377 was shared and police abuse of gay men or MSM was categorically denied. Why Kinnars are consistently harassed elicited a different, disturbing set of responses. They said vehemently: *'Kinnars have sex in public places; they do it for money; they are doing wrong by having sex for money in a public place. Kinnars will take someone into a car and rob them of his clothes and money'*. The policemen did not have trouble conceding that sometimes Kinnars are beaten up by clients or the police. Rather, they openly admitted that police will threaten Kinnars in anticipation of sex work and to prevent them from committing petty and serious crime. Perhaps what could not be articulated in the hypothetical case of two gay men could be openly expressed and defended in the case of transgenders. These reactions reveal how strategies of enforcement are unevenly expressed and borne by subjects of law. The necessary qualifier is that violence against Kinnars is committed under the aegis of laws against public nuisance (Sections 268 and 290 IPC) and Sections 7 and 8 of the Immoral Traffic

(Prevention) Act of 1956 (amending Act of 1986, entitled, Suppression of Immoral Traffic in Women and Girls Act), which criminalizes soliciting and having sex in public places and *not* under Section 377. What emerges from the government's reply is an equivocal defence of Section 377 and tempered resistance to modification in the law. That the response is marshalled against the decriminalization of homosexuality is reprehensible. However, fieldwork complicates facile analyses that such resistance can be reduced primarily to homophobia, even though one is not hard pressed to find evidence. Fieldwork across the Ministry of Home Affairs and the police in New Delhi suggests that the reasons for the government's resistance to the Naz (India) PIL cannot be attributed to a single overarching factor. Rather, the government's response reveals the messiness of heteronormative reinforcements. Underlying its response to the petition is a process which elicits a range of competing, uneven positions on the decriminalization of same sex sexualities. Even though the government's reply, similarly echoed by the New Delhi police commissioners, is rife with homophobia, fieldwork points toward more complex analysis of heteronormativity across state institutions.

In interviews and discussions, state agents do not speak with one voice. While not devoid of homophobia and heterosexism, these responses reveal the fractures and dissonances in the reproduction of heteronormativity within these state institutions. The responses of police raise the challenging question of how to theorize heteronormativity and, more importantly, what counts as fissures and dissonances thereof. If the constables who oppose the modification or deletion of Section 377 can be seen as homophobic, rooted in heteronormative understandings of society, then can the views of the others who are critical of Section 377 be read more hopefully? Does the constable's affirmation that each of us has a right to sexual satisfaction signal lessening homophobia and does it unsettle heteronormative reasoning -- that gender dualism and heterosexuality are elemental to nature and society -- while acknowledging equal citizenship and belonging to all?

Lessening homophobia may not entail a weakening of heteronormativity; indeed, the reverse may be true. Police violence that is directed against transgenders presents a chilling example of the power of the heteronormative amidst possibly declining homophobia. Still, the examples of support for changes in Section 377 are grounds to

stake the claim that state support for Section 377 is neither uniform nor unquestioned and point toward the possibilities of engaging state agents and institutions. HIV/AIDS-related and sexual minority rights activists in India have long recognized the need to engage the institution of police, re-train members of the police force, to sensitize and educate them about same-sex sexualities, even though the work has proved to be arduous and frustrating.<sup>x1</sup> The Naz (India) PIL and a critical queer analysis of the state suggest that at the least law enforcement as well as the courts are the primary battlegrounds for state legitimization of same-sex sexualities. They are also the battlegrounds for thoroughgoing challenges to heteronormativity and its material and symbolic violence directed toward transgenders.

### *Conclusions and Speculations*

Critical writers have been sensitive to the effects of the state on sexual subjects and sexual policies. The story of the PIL, its process, the production of sexual subjects fraught with the limits of gender and class are important, and will be explored and expanded upon elsewhere. Here, I chose to turn the lens on state institutions, including the courts, in order to bring the state under more careful scrutiny, and by sexualizing the state, to explore how discourses of sexuality unevenly crisscross state institutions, policies, and laws in the operations of power, but not in consistent or unified ways. The Naz (India) PIL against Section 377 exposes a disjunction in the tangle of sexuality-state. The state-sexuality nexus is thriving through state policies and laws that institutionalise homophobia and heteronormativity. The material/cultural site of state violence is all too frequently ignored or simply subsumed through an emphasis on nationalism. The Naz (India) PIL helps reveal how state policies and law are not only a source of domination but also a site of resistance to state power and violence against sexual and gender minorities.

An analytics of the contemporary postcolonial state, specifically through a critical framing of sexuality, is central to this essay. It proceeds on the grounds that critical analyses of state-sexuality are a step in undermining images of the monolithic,

impenetrable state. At the same time, these analytics ask that we go beyond justifiable critiques of the unitary state's implication in the production and perpetuation of homophobia/heteronormativity. Anything less would strengthen the scope and power of the state, and render invisible the struggles for justice of sexual minorities. My point is hardly to redeem the state, for state violence articulated through homophobia and heteronormativity is rife. Still, state institutions, relations, agencies, and state agents are surfeit with fractures and disjunctures in terms of sexual discourses, policies, and stances. The Naz (India) PIL provides useful direction in challenging and disaggregating the state even though the imagination of the state as an overarching and cohesive container of society endures and the legal outcome is still unclear. Such tensions and tactics continue to be relevant to the process of mobilizing for the legal recognition of homosexuality. Given the experiences of the first ABVA petition and the one brought by Naz (India), the next steps are being formulated by Lawyer's Collective HIV/AIDS unit. If the Supreme Court rules in favour of returning the PIL to the Delhi High Court for review, as it probably will, another decision by the Delhi High Court will be in process.<sup>xii</sup>

A final point about the nature of state power revealed through the government's response to the Naz (India) PIL. The Bharatiya Janata Party (BJP) was the government in power at the national level while this petition was in the Delhi High Court. The BJP government's and Hindu nationalist positions on social and sexual minorities are a matter of record and have been addressed in this volume and elsewhere (Bacchetta, 1999; Chatterji, 2004). Yet, I am not at all confident that the government's response and subsequent court decision would have been substantially different under the present Congress regime. Extending well beyond the governments in charge at any given moment are enduring effects of state institutions and ideologies that must be called into question. I believe that the government's reply filed in the Delhi High Court to the Naz (India) PIL, after significant delay, indicates the messy but rife nature of heteronormativity across and within state institutions. This response and related fieldwork also points us toward the fractures and disjunctions in the relentless reproduction of heteronormativity. Theorizing the state's inconsistent but not necessarily attenuating role in the reproduction of heteronormativity as well as theorizing the

inconsistencies of heteronormativity are crucial if heteronormativity is to be undermined within and beyond the courts.

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<sup>i</sup> See Sen (2004); Letter from Naz Foundation (India) Trust & Lawyers Collective HIV/AIDS Unit (2004).

<sup>ii</sup> The law, its explanation, and the attached general commentary states: Whoever voluntarily has *carnal intercourse against the order of nature* with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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

General Comments: This section is intended to punish the offence of sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.

For a website with a listing and language of sections of the Indian Penal Code, see India Law Info (2000).

<sup>iii</sup> Rather than the deletion of the law, the Naz (India) PIL asked that the law be 'read down', which is to say instead of asking for the law to be repealed, the petition asked for it to be modified to exclude same-sex adult consensual sex conducted in private from its purview.

<sup>iv</sup> Naz Foundation (India) Trust is a separate organization from the Britain-based Naz Foundation International, which is described later in this article.

<sup>v</sup> See Mohapatra 2003 on this point about PILs.

<sup>vi</sup> By the time that the Naz (India) PIL was submitted in the courts on 6 December 2001, the ABVA petition had been dismissed. This fact was not widely known and the exact date of its dismissal by the court is not clear.

<sup>vii</sup> Interview with Shaleen Rakesh, the Naz (India) organizational representative in the courts.

<sup>viii</sup> As per the rules of the Supreme Court of India, a special leave petition may be filed when an appeal to a High Court/Tribunal to review its decision is turned down and a petitioner wishes to challenge the order. See the Supreme Court website (Supreme Court, circa 1999) for further details.

<sup>ix</sup> The Supreme Court is asked to deliberate on the grounds of the Delhi High Court decision, not directly speak to the merits of amending Section 377.

<sup>x</sup> Interviews, New Delhi, May-June 2005.

<sup>xi</sup> This campaign was launched by Voices Against 377 on the eve of Human Rights Day, 9 December 2004. Interview, New Delhi, May 2005.

<sup>xii</sup> Based on personal observations and consultations of their writings.

<sup>xiii</sup> These terms are not exhaustive and many more such terms circulate within India and across South Asia. I will alternate between these terms, including transgender.

<sup>xiv</sup> Kinnars in Delhi will playfully refer to each other as 'Kothi' (interview, New Delhi, June 2005). Self-identified Kothis are not always from the working classes (for example, interview, New Delhi, August 2005) and some working class men will identify as 'gay' rather Kothi or MSM (interviews in Mumbai, July 2005).

<sup>xv</sup> See the website [www.lines-magazine.org/textmay03/yasmin.htm](http://www.lines-magazine.org/textmay03/yasmin.htm) for the precise language of Sections 365 and 365A. In an amendment to the subsection, 365A, the language of 'male persons' was changed to 'persons', thereby expanding the scope of prosecution to women. Also, see Thompson (2001), and related stories on Sri Lanka on this point. Based on my conversations, I learned that sexual rights activists, such as Vivek Diwan, Elarvathi Manohar, and members of the lesbian group, Humjinsi, Mumbai, were concerned about the possibilities of a backlash to the PIL against Section 377 in India similar to the one that occurred in Sri Lanka.

<sup>xvi</sup> In the case of India, see the report by the People's Union of Civil Liberties (PUCL)- Karnataka, see PUCL (2003). Also see, Gupta (2002a). See Aditya Bondyopadhyay and Shivananda Khan (2003) for violence against MSM in Bangladesh.

<sup>xvii</sup> Based on interviews conducted in Chennai August 2005, Mumbai July 2005, New Delhi August 2005.

<sup>xviii</sup> For details of some of the incidents, see Blue Diamond Society's website.

<sup>xix</sup> See Sections 375 and 376 of the Indian Penal Code, see India Law Info (2000).

<sup>xx</sup> By heteronormativity, I draw partly upon Michael Warner's (1993) explanation: as the belief that heterosexuality is an elemental form of human association, is a model of inter-gender relations, is the indivisible basis for community, and the means of reproduction without which society would not exist (p. 21).

<sup>xxi</sup> By the term governmentality, Foucault refers to the modern disciplinary forms of state power that operate by producing knowledge about populations and their justifying regulation by state institutions and bureaucracies. See the chapter on governmentality in Foucault (1994) for further discussion on this concept.

<sup>xxii</sup> By heterosexism, I mean the privileging of the belief that the world is composed of two sexes/genders—women and men—who are naturally and consistently heterosexual, and the concomitant marginalization of all others. Seen this way, heterosexist beliefs and practices are part of the broader normalizing framework of heteronormativity. Examples of the heterosexist reasoning in case law under Section 377 include Bhaskaran's (2001) point that in one case (AIR 1982, 48), the judge grants a woman the right to divorce her husband on the grounds that she did not consent to sodomy and in another case (*Ratan Mia v State of Assam*), since the victim is determined to be a 'catamite', the charges against the perpetrator are dropped. I will return to the latter point, shortly.

<sup>xxiii</sup> Lawyer's Collective HIV/AIDS Unit is based in Mumbai; see website <http://www.lawyerscollective.org/>

<sup>xxiv</sup> During the time that this article was being revised the Supreme Court still had not set a hearing date to announce its likely decision to return the case to the Delhi High Court.

<sup>xxv</sup> The Infinity Foundation, with Hindu nationalist leanings, in New Jersey, United States, initially provided a small amount of funding to Naz (India) for the outpatient department. This is surprising given

the group's leanings. However, this funding was inexplicably withdrawn later, according to Anjali Gopalan, Director of Naz (India); personal communication, 2005.

<sup>xxvi</sup> Personal interview, July 2003.

<sup>xxvii</sup> Personal Interview, June 2003.

<sup>xxviii</sup> For descriptions of the articles of fundamental rights, see Bakshi (2005).

<sup>xxix</sup> Judeo-Christian refers, in fact, to ideologies and practices that are often Christian, and obscures the history of European anti-Semitism.

<sup>xxx</sup> Here, the purpose is not to identify particular groups and their criticisms but to identify the positions taken.

<sup>xxxi</sup> See the citations mentioned in Footnote 15.

<sup>xxxii</sup> Based on interviews with Kinnars in New Delhi and Aravani in Chennai, June-July 2005.

<sup>xxxiii</sup> Personal Interview, July 2003.

<sup>xxxiv</sup> Personal Interview, May 2005.

<sup>xxxv</sup> For useful summations of the state versus society debates, see Mitchell (1991) and Steinmetz (1999).

<sup>xxxvi</sup> Insert [] is mine.

<sup>xxxvii</sup> The term identitarian politics encapsulates Duggan's concerns about how responses to right-wing homophobia all too easily fall into the trap of having to claim gay and lesbian sexualities as biological given the difficulties of advancing constructionist arguments in the popular domain. Duggan also notes the problems with politics that proceed on the assumptions that categories of sexual identity—gay, lesbian, bisexual, heterosexual—are mutually exclusive and stable.

<sup>xxxviii</sup> Interview, New Delhi, May 2005.

<sup>xxxix</sup> Interview, New Delhi, May 2005.

<sup>xl</sup> Personal communication with Shaleen Rakesh about the training sessions he conducted with the police in New Delhi.

<sup>xli</sup> While this article was being revised, the Ministry of Home Affairs filed a response to the Naz (India) Special Leave Petition (SLP) in the Supreme Court on behalf of the Union of India [Special Leave Petition (Civil) NO. 7217-7218 OF 2005]. The response did not support the Naz (India) SLP.

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