Section 377 and the Myth of Heterosexuality

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This essay intends to ‘read’ the 105 page text of the Naz foundation judgement as a site for the de-historicisation of ‘homosexual’ subject(s). Employing Roland Barthes’ explication of ‘myth’, an attempt is made to understand how the text of the judgement constructs the myth of heterosexuality which de-naturalises the ‘homosexual’ subject as a naturally occurring ‘unnatural’ phenomenon. This essay probes into the contradictory ways in which the ‘homosexual’ subject is produced by the text. While on one hand the ‘homosexual’ is understood as a “class”, on the other, a radical anti-essentialist stance is exhibited in the evocation of the discourse of AIDS and particularly the category of MSM (men who have sex with men). The simultaneous ‘minoritising’ and ‘universalising’ stances present in the judgement produce the queer subject in confounding ways which inadvertently evoke and reinforce the specter of the closet. The essay also provides a critique of the ‘right to privacy’ in so far as it threatens to erase the queer subject from the public, thereby re-producing the closet. The metaphor of the closet is used to denote a space (or its lack) which functions to cohere heterosexuality and produce the ‘homosexual’ as its inevitable and often invisible other. By attempting to analyse the relationship between the queer Indian subject and the closet as produced by the text of the judgement, a theory of the closet is envisaged as not simply a feature of queer lives but all lives in general in a heteronormative context.

For sake of convenient reference, they would hereinafter be referred to as ‘homosexuals’ or ‘gay’ persons or ‘gay community’.

– Naz Foundation judgement

This apparently innocuous sentence rests self-assured on page 6 of the historic July 2009 Delhi High Court judgement of the Naz Foundation versus the Government of NCT of Delhi. But, of course, it is convenient: this collapsing of a constellation of terms that connote a multiplicity of sexual identifications and proclivities. I admit, nevertheless, putting homosexual and gay in quotations is smart; suggestive of how this convenience is rather inconvenient, that something is already lost; an insurmountable gap of difference has been mounted on a page.

It is also telling that gay when juxtaposed with community loses its decorative quotation marks. One wonders why. What does the word ‘community’ – such a 'social', 'harmonious' and 'stable' term – do to the

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word 'gay' that it becomes unproblematically gay? Or am I reading too close for comfort, for it may well be just an editorial slip? One cannot be certain, but since uncertainties demand questioning, I shall continue.

What the sentence manages to achieve, almost naively yet violently, is a collapse of history, a terrible error in conflation of identities, locations and desire and, most significantly, an attempt to naturalise the 'unnatural'. In absenting history, nature is reified: the homosexual/gay becomes a naturally occurring 'unnatural' phenomenon. It is precisely this cloistering of history, its camouflaging as nature, that produces the hegemonic heterosexual. In other words, the 'naturalness' and omnipresence of heterosexuality is manufactured by an elimination of historical specificities about the organisation, regulation and deployment of sexuality across time and space.

This essay will 'look' at such innocent sentences; will search for gaps and contradictions, will make silences on the pages of the judgement speak. This is not an effort to nullify the significance of the judgement, rather to ascertain the various ways in which it constitutes the becoming of queer selves and its articulation in contemporary queer politics in India. I will argue through the course of this paper, that the a priori de-historicisation of the queer subject forces any expression of queer politics to evoke the spectre of a closet. And in so doing, every 'outing' is simply another act of cloistering which reiterates the naturalness of the only natural sexual category – the heterosexual. The 'closet' is a site of the construction of a tautology – heterosexual is natural, or as it were, the myth of the heterosexual.

1. I use homosexual/gay interchangeably to suggest that de-historicising these terms allows one to use them interchangeably as though they posit the same meanings when they necessarily do not.
2. By hegemonic heterosexual, I imply the ideological construction of a particular alignment of sex, gender and desire that posits itself as natural, inevitable and eternal. Heterosexuality is the site where the male sexed masculine man's desire for the female sexed feminine woman is privileged over all other forms of sexual desire and becomes a pervasive norm that structures all societal structures.
3. The term 'queer' is fraught with contradictions. It has had a chequered history from being a derogatory term for 'homosexual' males to a term that connotes, in theory, the impossibility of fixed essences and identity locations and a refusal to envisage a formulaic relationship between one's sex, gender and desire. The resistance to any closure of meaning is what makes the term polemical and allows for continuous revisions. 'Queer' is fashioned as an inclusive term while acknowledging, at the same time, that any act of inclusion will create its own set of exclusions. The term, arguably, is used in at least three senses: 1. As a noun, where it functions as an 'umbrella' term aiming to bring together diverse sexual proclivities, gender identifications and sexual practices within its fold as an opposition to heterosexuality. This meaning of queer is commonly employed in political practice; 2. As a verb which poses a theoretical critique to the crystallisation of sexual identities into fixed essences; 3. As an adjective, whereby it operates as an identity marker for those who do or choose not to fit into LGBT categories and claim a more fluid sexuality. I use queer in this essay, whether as noun, verb or adjective as a term of resistance against the discourse of sexuality that privileges the heterosexual as natural and constructs all 'others' as unnatural.
This condensation of queerness, this censure of terms on the pages of the judgement, where 'gay' or 'homosexual' is metonymically made to connote the entire spectrum of sexual and gender difference carries with it the charge of concealing an 'essentially' variegated experience. One cannot help but register the rare occurrences of terms such as lesbian, *kothi*, *hijra* and so forth in the text of the judgement. This 'erasure' has a two-fold consequence: firstly, sexual and gender differences which have historical and contextual import are effectively lost and this loss is conveniently forgotten. 'Homosexual' and 'gay' then begin to function as universal signifiers of homosexuality, which itself appears as a homogenous, general (natural) phenomenon, easily understood and uncomplicated. Secondly, the historicity of the terms 'homosexual' and 'gay' is undermined; these words are uprooted from their context of deployment and emptied out of their cultural content. The term 'gay' connotes a specific historical intersection of class, gender, region and even race. Likewise, the 'homosexual' has had an arduous history to traverse in the pages of medical, psychiatric journals and writings on sexology of the late nineteenth and twentieth centuries. In the judgement, however, and arguably in the broader political context, these terms then simultaneously erase the histories of other terms as well as their own specific trajectories. Roland Barthes in his essay 'Myth Today' likens a myth to a second-order semiological system wherein “a sign in the first system becomes a mere signifier in the second.” He notes:

 [...] the signifier of myth presents itself in an ambiguous way: it is at the same time meaning and form, full on one side and empty on the other [...] As a total of linguistic signs, the meaning of the myth has its own value, it belongs to a history [...] in the meaning, a signification is already built and could well be self sufficient if myth did not take hold of it and

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4. Naz Foundation v. the Government of NCT of Delhi, 160 DLT 277, 382 (The term *kothi* features only once in the text of the judgement, in the section titled "Responses of Other Respondents." Respondent No. 8 is the coalition 'Voices against Section 377 IPC' which includes *kothi* persons who are then subsumed within the LGBT (lesbian, gay, bisexual and transgender) category. The term *hijra* is used five times in the text; firstly, as a part of 'Voices against Section 377 IPC' only to be subsumed within the LGBT category. The term is also evoked while citing the case of Jayalakshmi v. The State of Tamil Nadu in order to highlight police violence against *hijras*, where a *hijra* commits suicide due to custodial torture. Interestingly, this section begins with a sentence, "Then there is a reference to 'Bangalore incident, 2004' bringing out instances of custodial torture of LGBT persons." Again an attempt is made to erode the specificity of the *hijra* person by including her within the LGBT category.).

did not turn it suddenly into an empty parasitical form. The meaning is already complete; it postulates a kind of knowledge, a past, a memory, a comparative order of facts, ideas, decisions. When it becomes form, the meaning leaves its contingency behind, it empties itself, it becomes impoverished, history evaporates.  

For Barthes, myths have a specific schematic deployment. In a myth, “the sign” in the first system becomes a signifier in the second system” such that the materials of mythical speech (the language itself, photography, painting, posters, rituals, objects etc.), however different at the start, are reduced to a pure signifying function as soon as they are caught by the myth. The signifier of the myth is at once meaning (the signified or the final term of the first system of sign) and form (the signifier of the myth). What is signified by the myth is the concept. Just as the correlation between signifier and signified in language is termed as sign, the relationship between form and concept is termed as signification. In simple terms, in the case of a myth, symbols by themselves may have specific meanings but myth erodes or distorts such specific meanings to posit itself thereby emptying out the specific content of the symbols it uses. Keeping in mind this schema, I intend to show how heterosexuality as a concept employs terms such as ‘gay’ and ‘homosexual’ (and many others) transforming their meaning into form to create a specific signification i.e. heterosexuality as natural (normal) and homosexuality as unnatural (abnormal) or, simply put, how the myth of heterosexuality is produced.

There is but an ‘abnormal regression’ of the words ‘homosexual’ and ‘gay’ as they are transformed from meaning to form. Both words as meanings contain a geography, a history, a morality (or its lack), a literature, a pathology and so forth. ‘Gay’ conjures up mental images of subcultures of the 1960s in the west, the Stonewall Inn riots, the birth of the gay movement in the US and its mimesis all over the world from the mid-twentieth century onwards, gay communities, gay individuals (most often white, male, and middle class), gay identifications the world over, gay rights, gay men of colour often westernised and middle class (again),

7. The elaboration of the nature of linguistic sign is detailed in: Ferdinand de Saussure, Course in General Linguistics 65–67 (Wade Baskin trans., 1981) (Saussure writes “The linguistic sign unites not a thing and a name but a concept and a sound image.” A sign therefore is an amalgam of the signifier that which expresses and the signified (the concept). For instance the sign ‘tree’ is a two-sided entity composed of the word ‘tree’ (signifier) and the concept of tree (signified.).).
8. Barthes, supra note 6, at 137.
9. Id. at 140.
the 'plague' of AIDS, gay marriage, gay adoption, even gay promiscuity. The term 'gay' is rich, value-loaded, and pregnant with meanings. So, too, is the 'homosexual' born of the 'temporary' aberration that the sodomite was, and evolved into a pervert 'species';¹⁰ a naturally occurring anomaly. Although this anomaly was so named only as late as 1869,¹¹ the richness of meanings that 'gay' and 'homosexual' connote have to be depleted to sustain the myth of heterosexuality. Barthes points out:

> That the form does not suppress the meaning, it only impoverishes it, puts it at a distance, holds it at one's disposal [...] It is this constant game of hide-and-seek between the meaning and the form which defines myth.¹²

'Gay' and 'homosexual' when deployed as forms (as in the case of the judgement) have their meanings placed at a distance, have their richness tamed and are intentionally made the accomplices of a concept (what the form signifies). This concept is heterosexuality. The terms are used interchangeably and appear to connote sexual acts, sexual orientation, sexual behaviour and sexual identities (each, a different register of analysis) simultaneously. Barthes asserts that "the history that is drained out of the form is wholly absorbed by the concept."¹³

The concept, far from being an abstracted form, is suffused with history. It is history, a totality of our existence and our knowledge of reality. Heterosexuality intentionally employs 'gay' and 'homosexual' in tamed form in order to reinstate itself and assert its own ubiquity in history. In doing so, it robs these terms of their historicity. The word 'heterosexuality' appears only thrice in the judgement although the concept pervades each line of it as much as it pervades all societal structures. The concept intentionally deforms meanings to ensure that the signification "appears both like a notification and a statement of fact."¹⁴ The fact that heterosexuality is natural imposes itself on us as a fact, uncontested, frozen in time and eternalised. For Barthes, mythical signification is made possible by a motivated analogy. Unlike the sign, in which the signifier and signified is but arbitrary, mythical signification is never arbitrary; the relation between concept and form is one of analogy, however partial. For instance, the image of a mother loving a child to be appropriated as form demands that an analogy be established between

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¹¹. See generally Bandyopadhyay, supra note 5.
¹². Barthes, supra note 6, at 141-142.
¹³. Id. at 142.
¹⁴. Id. at 148.
the mother and heterosexuality; the mother is heterosexual. A mother is naturally heterosexual. A mother is always heterosexual. What is interesting to note is that the signification of heterosexuality is made possible not simply by motivated analogy but through motivated opposition as well.

'Gay' and 'homosexual' and indeed all queer terms (including the term 'queer' itself) as forms are not simply devoid of their particularities, they are naturalised as opposition to the concept of heterosexuality. They operate as empty signifiers enabling the very constitution of heterosexuality as the norm. The effect of this naturalisation is that they become eternally frozen as 'naturally unnatural', and the means through which the eternal naturalness of heterosexuality is realised. The myth of heterosexuality does nothing more than depoliticise and dehistoricise sexuality thereby sustaining the natural image of heterosexuality. The 105-page judgement is a mere testimony to the successful career of the myth. Within the text, queer terms operate only as form veiling history wherein homosexuality and heterosexuality appear as naturally occurring phenomena, the former hitherto criminalised and the latter the foundation of society.

I. The (Unnaturally) Natural Homosexual

Probing into the myriad ways in which the judgement resurrects the heterosexual myth entails a summary of the judgement even when the dissolution of the myth is intended. The judgement which has been the cause of much celebration holds that “Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.”\textsuperscript{15} The concluding paragraphs endorsing the theme of inclusiveness of the Constitution of India assert that “those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized” and that misconceptions about who the LGBTs\textsuperscript{16} (lesbian, gay, bisexual and transgender) are, should not inform law. The rest of the document is of course how the court arrives at this 'historic' judgement. Section 377 was born out of a desire to sexually discipline the colonial subject imagined as erotically perverse in 1860. It criminalises “unnatural offences” which include voluntary “carnal intercourse” against the “order of nature” with any man, woman or animal. Section 377 further explicates that penetration is sufficient to

\textsuperscript{15} DLT 277, 382.

\textsuperscript{16} LGBT (Lesbian, gay, bisexual and transgender) as a acronym gained political currency in the 1990s. It refers to communities based on sexual orientation and gender-based identities.
cause 'carnal intercourse'. 'Carnal intercourse' in this instance, has been interpreted as anal sex, oral sex and other forms of non-procreative although penetrative sexual acts.\textsuperscript{17}

Interestingly, the law does not discriminate between 'homosexuals' and 'heterosexuals'; both stand implicated and potentially culpable of going against nature. Please note that the words 'homosexual' and 'heterosexual' were yet to be invented when the law was drafted by Lord Macaulay and, since their invention, have not been incorporated in the law. Section 377, then, technically speaks to the image of the sodomite alone. The sodomite is a man with a wayward morality and aberrant sexual predilections; at least, by Christian standards (all salvation religions condemn sodomy, to be precise). Although the sodomite becomes a homosexual eventually, conflating a sodomite with a homosexual would be a discursive sin. A sodomite indulges in sexual acts that invite religious condemnation and legal proscription whereas a 'homosexual' is a person with an aberrant sexual identity. Sodomy connotes acts of transgression whereas the homosexual is constituted with a transgressive subjectivity.

The subjectivity of the sodomite, however, remains more elusive and interestingly generic; generic in the sense that it implies an immoral perverse 'satanic' disposition which can wreak havoc on any mind (the minds are yet to be heterosexualised/homosexualised). This anti-sodomy law puts into place certain stable equations. The natural is not criminal. It cannot be so for the natural also appears to be involuntary (an edict of the divine if you will). The unnatural is an act of volition hence the sodomite chooses to sin; sin is not yet his constituting essence. The sodomite is a mere rupture, a momentary rupture in the form of a sexually interdicted act in the otherwise natural world and naturalised being. Nature, in this case, can be restored. The sodomite can be converted to his naturally moral self (arguably through punitive measures). One must never forget that the natural is also always moral and one must also take cognisance of the fact that the moral is constituted as ahistorical. So the law puts into place the naturalness of coitus between a man and a woman.

Carnal intercourse between a man's penis and a woman's vagina is so natural that it did not even require an act of naming. Sodomy then functioned to name not simply a desire that dare not tell its name but also to speak of a desire so natural, moral and obvious that it

\textsuperscript{17} Alok Gupta, \textit{Section 377 and the Dignity of Indian Homosexuals}, XLI (46) Economic \& Political Weekly (November 18, 2006).
needn't have a name at all. Sodomy is appropriated to speak for the natural desire. While the former was an 'open secret', the latter was an objective, universal, religious fact. 1869 is the year when opposing twins are delivered to knowledge – 'homosexual' and 'heterosexual', with a view to underscore a specific shift that had been taking place in Europe regarding the understanding of sexuality.

Sexuality began to operate not through a calculus of prescribed and proscribed sexual acts but through a classification of persons and identities. Sexuality became a science. And science confirmed that the homosexuals are a separable species altogether; not a temporary aberration but a naturally occurring anomaly and until the late twentieth century, medical/ psychiatric science was steadfast in its reparative stance of undoing this anomaly. The faith that nature could be restored remained intact. It had a new name: heterosexuality. Some more stable equations follow: Heterosexual = natural and Homosexual = unnatural (but simultaneously naturally occurring); Natural = normal and abnormal = unnatural.

I am not consciously or unconsciously bypassing the nature/nurture debate on sexuality, especially homosexuality, because I am interested not in the causation of the phenomena but in their deployment. Whether homosexuals are born or created, they are deployed as always already present across history and society. It is not the issue of causation that naturalises the homosexual subject. It is not that if homosexuals are born, they become natural entities and if they are created, they become historical subjects. Homosexuals remain 'unnatural' natural occurrences whether born or created. History is always arrested so as to make the category of the homosexual a natural universal.

Section 377 operates on the accomplishment of this arrest and so does the text of the judgement. Law itself in this case is a crime against history. Section 377 becomes the site at which heterosexuality is produced as natural, first simply through the evocation of the temporary sodomite and then through a construction of an essential homosexual. Section 377, in the way it is worded, accomplishes two other 'facts' as intended afterthoughts: 1. Men are the sexual subjects therefore sex is always phallocentric (this as we shall see will be reiterated in the text of the judgement) and 2. A lesbian slip (unlike a Freudian one) where a woman's 'right' to sexual subjection is playfully ignored/missed. Both these 'facts' have far-reaching consequences.

18. See Foucault, supra note 10, at 1; Bandyopadhyay, supra note 5.
II. THE HOMOSEXUAL ERASURE FROM THE PUBLIC AND THE PRIVATE

Section 377 has been seldom applied in court judgements but its very existence has thrust criminality on same-sex desiring individuals forcing them 'underground', burying them under the edifice of a nation that excludes them and stymies their ability to avail opportunities toward a dignified life. One must eschew suggesting an absolute causal link between Section 377 and homophobia in India, yet the law provides a fecund site for the articulation of homophobia and responses against it. It renders any form of queer identification always already deviant. Not surprisingly, then, the two decades old queer movement in India has largely been a struggle against Section 377. In 1994, ABVA (Aids Bhedbhav Virodhi Andolan) a left-wing, non-funded group filed a petition against Section 377 in the Delhi High Court questioning its constitutional validity. The petition was filed at the behest of a medical report which confirmed that Tihar Jail had become a sodomite's haven. WHO (World Health Organization) had recommended distribution of condoms to the inmates. Fearing that it would add fuel to fire (or desire) and promote what the law already prohibits, jail authorities refused. The case came up for hearing in 2001 and was dismissed without the knowledge of ABVA, which had failed to keep track of it.

In 2001, the Naz Foundation in collaboration with the Lawyer's Collective filed a public interest litigation (PIL) to 'read down' Section 377 'to the extent that the said provision criminalises consensual sexual acts between adults in private'. The petition was initially dismissed.


21. The Naz Foundation Trust is a New Delhi-based NGO (founded by its parent organisation in Britain) working on HIV/AIDS and sexual health since 1994. It endeavours to sensitise the public on sexual health and provide support to people living with HIV/AIDS. It has a rights-based approach to issues pertaining to sexual health.

22. Established in 1981, The Lawyers Collective is a 'public interest service provider' in the field of human rights advocacy, legal aid and litigation, especially issues relating to women's rights, HIV/AIDS etc. Its members include professional lawyers, law students and human right activists.

23. The Naz petition was filed following the police raids of NGOs working with HIV/AIDS and the MSM community in Lucknow. In July 2001, the police arrested 10 people, one of whom was an activist from Bharosa (an NGO working with the MSM community) and raided the offices of Naz and Bharosa in Lucknow seizing safe sex materials. An FIR was registered under Section 377, Section 120B (conspiracy to commit an offence) Section 109 (abetment) and Section 292 (sale etc. of obscene material) of the Indian Penal Code, 1860. The incident was widely reported in the media and the NGOs were accused of running gay clubs and polluting young minds. For a detailed account of the Lucknow case, see Narain, supra note 20.
on the ground that Naz Foundation had no *locus standi* on the case. However, following a review by the Supreme Court, the case was up for hearing before the Delhi High Court in 2009. The petition was fortified by a coalition of NGOs – Voices Against Section 377 – in 2006 which campaigned vociferously against the 'draconian' law. The culmination of this struggle is the 105-page text which details the responses against the provisions of Section 377, most notably by Naz Foundation, NACO (National AIDS Control Organisation) and Voices against Section 377.

The petitioners argued that Section 377, insofar as it implicates consensual sex between adults in private, infringes upon the fundamental rights guaranteed under Articles 14 (right to equality), 15 (right against discrimination), 19 (freedom of speech and expression), and 21 (right to life) of the Constitution of India. The right to privacy, the petitioner noted, is implicit in the right to life and liberty and "since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie at the core of the 'private space', they are inalienable component of the right to life."  

The petitioner further submitted that the expression 'sex' used in Article 15 cannot be read restrictive to 'gender' but includes sexual orientation within its ambit and hence equality on the basis of sexual orientation is implied in the right against discrimination. Moreover, it was argued that the classification of sexual acts into procreative and non-procreative sexual acts as manifest in Section 377 is based on "stereotypes and misunderstanding that are outmoded and enjoys no historical and logical rationale." Such classifications are necessarily 'arbitrary and unreasonable' and violate the provisions of Article 14 of the Constitution. The petitioner further surmised that Section 377 negates the freedoms guaranteed under Article 19 since "an individual's ability to make personal statement about one's sexual preferences, rights of assembly/ association and right to move freely so as to engage in homosexual conduct are restricted and curtailed." The petitioner also makes a strong case against Section 377 to the extent that efforts towards HIV/AIDS intervention and prevention is severely hampered because of the discriminatory attitudes towards the gay community which is particularly vulnerable to the disease. To support the above arguments, various court cases had been cited, provisions of international law has been quoted and snapshots of the nature of oppression that same sex desiring individuals face in India have been narrated. The verdict that

25. *Id.* at 286.
came in favour of the petitioner, in effect de-criminalised consensual adult sex in private.

The 'private' in this case, demands scrutiny. What does the right to privacy entail? In the text of the judgement, in the section titled “Section 377 as an infringement of the rights to dignity and privacy,” various definitions are available. Privacy has been understood as “a private space in which man may become and remain himself” or as the “right to be left alone.” The right to be left alone is not understood simply as a negative right against government intrusion but also as a right to “get on with your life, your personality and make fundamental decisions about your intimate relations without penalization.” It also entitles individuals “a sphere of private intimacy and autonomy which allows individuals to nurture relationships without interference from the outside community.”

It is noteworthy that any reference to privacy is always juxtaposed with the family or home. For instance Article 12 of the Universal Declaration of Human rights (cited in the text) states “no one shall be subjected to arbitrary interferences with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Article 17 of the International Covenant of Civil and Political Rights is also worded in a similar vein where privacy, family and home appear together. Likewise a reference is made to the case of *R. Rajagopal v. State of T.N.* (1994) where the court stated that “a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.”

Privacy then is concurrently deployed as a spatial metaphor and a metaphor for personal autonomy. As a spatial metaphor, it is telling that

26. *Id.* at 311.
27. *Id.*
28. *Id.*
29. *Id.* at 310.
30. *Id.* at 311.
31. *Id.* at 104.
'privacy' is aligned with the family or home so that privacy connotes a physical space – the private sphere. The notion that 'privacy' implies the 'private sphere' is strengthened by proclamations such as the one provided by NACO that "enforcement of Section 377 IPC against homosexual groups render risky sexual practices to go unnoticed and unaddressed inasmuch as the fear of harassment by law leads to sex being hurried, particularly because these groups lack 'safe spaces', utilise public places for their indulgence and do not have the option to consider or negotiate safe sex practices."34 Clearly, 'safe place' must mean the private sphere. The word 'risky' is worthy of note. Are same-sex acts 'risky' because they take place in the public sphere (in a hurried manner) and invite censure or are they 'risky' because of the very nature of such acts (apparently more prone to HIV infection)? Which same-sex sexual acts are particularly 'risky'? Is homosexuality 'risky' per se?

Moreover the notion of the 'public place'35 needs qualification. 'Public places' in this case could refer to public toilets, parks and even public transport. Undoubtedly, one needs to make a distinction between sex in public and exhibitionism. Gay sex in public is often veiled. There are rituals of practice which may well be invisible to anyone other than the practitioners themselves. This public space is at least partially closeted. Often queer readings of space begin with the insight that public spaces are "produced as ambiently heterosexual, heterosexist and heteronormative."36 Although one can question this presumption, it cannot be altogether dismissed. If one were to accept that public places are heteronormative, and same-sex sexual acts at least partially closeted, if not completely, then the judgement by intending to relegate 'homosexual' acts into the private sphere or 'safe places' would effectively reiterate the ambient heterosexism of the public space.

The outcome is an erasure of the 'homosexual' from the public. Counter-intuitively speaking, when queer acts are 'caught' in public, the seamless heterosexuality of the space is ruptured; the judgement aims to suture the same by rendering invisible the potential of public spaces being tainted by markers of same-sex desire. Allowing queer sex in private is deeply problematic too. As the aforementioned articles show, there is an unconscious conflation of the private with the home and family, even marriage. The family as a space is always already heterosexual. In

34. Id. at 283-291.
35. I use public place to refer to specific geographical locations whereas 'public spaces' is used refer to space in the notional/ ideological sense of the public-private.
most liberal discourses, it is also imagined as a natural/biological unit. Adding the two together, the family becomes a site for the reproduction of heterosexuality as natural. For most queer Indians (if not all), the family or home functions as public space too. The heteronormativity of the Indian family can force queer Indians inside the closet even within the private sphere. The judgement then rests on a utopic notion of a 'private' space which is erased from the public and does not exist in the private. The space then provided to the 'homosexuals' in India is in effect a non-space or simply an erased space.

Privacy also, as suggested earlier, implies personal autonomy. Relegating one's sexuality to the domain of the private also runs the risk of it being perceived as something innate, instinctive and outside the social, allowing it once again to slip into the abyss of the natural. Personal autonomy cannot but be exercised in a social context. The social context for queer Indians is overtly heterosexist. The argument against the 'reading down' of Section 377 forwarded by the Additional Solicitor General submits that "right to privacy is not absolute and can be restricted for compelling state interest." He contends that India has a higher standard of morality compared to western morality and likens homosexual sex to "gross male indecency." Moreover The Ministry of Home Affairs had stated that deletion of Section 377 could "open the flood gates of delinquent behaviour and can possibly be misconstrued as providing unfettered license for homosexuality."

That public morality is steeped in homophobia needs no reiteration. But the fact that the homosexual is always excluded from and stands outside the moral public is an issue that cannot be ignored. Personal autonomy will not make any sense unless 'homosexuals' become a part of the moral public. It is precisely at this point that the notion of privacy as space and privacy as autonomy intersect. The former presupposes the latter and vice versa. Queer Indians are spatially and structurally erased and morally excluded from the public. The right to privacy does not ensure inclusion into the moral public.

Not surprisingly, one of the strategies that NACO adopts for prevention of infection (HIV/AIDS) reads thus: "reinforcing the traditional moral values of abstinence, delayed sexual debut till marriage and fidelity among the youth and other impressionable groups of the population." 'Tradition', 'marriage' and 'fidelity' appear as words from a heterosexual script and 'impressionable groups' is an instance of just how cryptic

37. See Naz Foundation, supra note 15, at 300.
38. Id. at 287.
39. Id. at 291.
and vague language can get. An assertion of personal autonomy by queer individuals runs the risk of ensuring their exclusion from the public (morality), which they were never a part of at the first place. It’s a Catch-22 situation; public morality does not include the 'homosexual' as part of the public while an assertion of personal autonomy invariably excludes the 'homosexual' from the public since the public is always already imagined as heterosexual.

Consensual same sex acts between adults 'in private' functions only as a form (as a historical and structural impossibility) usurped by the concept of heterosexuality. Homosexuality to the extent that it is framed as an opposition to heterosexuality signifies the heterosexual myth by erasing its own signification. The judgement is peculiar precisely because at the moment of the 'outing' of queer Indians, they are closeted by the very logic of the judgement. The judgement then evokes the spectre of a closet.

III. **All the World’s a Closet**

What, then, is a closet? Or more specifically what does the closet hide? The closet seems to be a space whose boundaries, although continuously porous, are a defining feature of queer lives. Closets exist and they hide social information. They hide certain socially proscribed sexual desires, certain unnamable sexual acts deemed 'unnatural' by the cultural context and law, certain identities which dare not speak their name and certain forms of behaviour which can make an individual susceptible to stigma and oppression. The closet does not simply hide this susceptibility; it hides stigma and oppression itself. It marks the silencing of different voices, a silence which is achieved by a gross violation of lives that inhabit the closet, through both violence and pain inflicted by significant others both within and without the closet and instances of self-inflicted pain and violence. The closet also hides pleasure, myriad sexual expressions and furtive encounters that gratify the self. The closet also conceals the possibility of disease and death. Sedgwick asserting that the closet is “the defining structure of gay oppression” states that:

> [the] gay closet is not a feature only of the lives of gay people. But for many gay people it is still the fundamental feature of social life and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.”

Taking this a step further, I wish to argue that the closet is not simply a feature of queer lives; rather all lives in a hetero-patriarchal context have a relationship with the closet. The closet is maintained both from within and outside; more prominently from the outside. The closet represents an unknowing, an ignorance, a forgotten secret which if tampered with can challenge the naturalness or the inevitability of compulsory heterosexuality. The closet then functions as a space to imprison the signs and signifiers that pose a threat to compulsory heterosexuality. The closet is that empty form in which a history of desire is locked and then forgotten. The relationship that heterosexuality shares with the closet is one of denial – a denial which ensures the systematic opposition between the 'normal' heterosexual who occupies the outside of the closet and the deviant 'homosexual' who occupies the space within. The boundary of the closet then circumscribes the homosexual as well as the heterosexual; one lives inside it, the other ignorant of it. But of course this ignorance is painstakingly maintained.

The tragedy of the homosexual resides in the fact that not only must he/she exist within the closet but he/she must deny the closet altogether and perpetuate the myth of heterosexual normalcy. The homosexual while occupying the closet also erases it by creating a non-space and pretending to be outside the closet. Interestingly, then, the closet acts as a double-bind in a homosexual's life: he/she is supposed to exist within it by feigning to exist outside it. The closet is a feature of all lives: both heterosexuality and homosexuality erase its epistemology through structural homophobia. The closet is a ubiquitous space which does not exist as a marker of homosexuality, rather as an erasure of it to ensure the pervasiveness of heterosexuality. In a subverted sense, the closet represents the site where heterosexuality is in effect made compulsory.

A movement steered at securing the rights of queer individuals must then confront the closet and by that logic compulsory heterosexuality. Confronting the closet would mean reclaiming markers of all desires, identities and acts which challenge it. A political dismantling of the closet has often been described as the process of 'coming out'. The phrase 'coming out' underscores a closed space but, as I have argued, the closet is a non-space and connotes an erasure of a space to exist or be. 'Coming out' in this sense would imply reclaiming a space which never existed in any real sense.

'Coming out' is never a finished process, it is always work in progress, a matter of degrees. An individual, who 'comes out' has to keep 'coming out' and offer social information about himself/herself. Hence, the metaphor of 'coming out' itself functions as a form always reifying the
concept of the closet, for outing oneself appears as an act of vacating the closet, which is always already an empty form. The relationship between the closet and 'coming out' is a relationship of opposition between two forms which serve the concept of heterosexuality. The heterosexual is always exempt from this terrible and perpetual state of repetitive coming out to which the homosexual is doomed. The heterosexual is always already outed, ever present, always known.

IV. MINORITISING MANOEUVRES

A section titled “Section 377 IPC targets homosexuals as a class” in the Naz judgement holds:

Sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity [...] The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalized and turned in on itself.”

The clubbing of homosexuals as a class of persons is a minoritising exercise and an act of single vectored interpellation. It creates a picture of a concomitance between sexual acts and sexual identity. Locating a personhood is imperative for a liberal discourse on rights, for acts cannot have rights, individuals have rights. The acknowledgement of homosexuals as a specific class/species indulging in certain acts that follow from their essential being ensures the reification of its privileged other – the heterosexual.

41. See Naz Foundation, supra note 15, at 355.
42. Sedgwick, supra note 40, at 86 (Sedgwick notes “to be gay [...] is to come under the radically overlapping aigises of a universalizing discourse of acts and a minoritizing discourse of persons. Just at the moment, at least within the discourse of law, the former of these prohibits what the latter of them protects; but in the concurrent public-health constructions related to AIDS, for instance, it is far from clear that a minoritizing discourse of persons (“risk groups”) is not even more oppressive than the competing, universalizing discourse of acts (“safer sex”). Sedgwick intends to highlight the simultaneous yet contradictory strands of separatist (essentialist discourse of persons) and integrative (constructionist discourse of acts) understanding of sexuality inform the public discourse of same-sex desire coupled (more often than not) with the discourse of HIV/AIDS. Her analysis is particularly germane to help understanding the contradictory arguments in favour of reading down Section 377 and the ways in which they speak to the metaphor of the closet.).
43. I use ‘single vectored interpellation’ to suggest a subject interpellated by only a single vector in this case, sexual desire. Such an interpellation is always a reductive exercise since subjects are interpellated through multiple vectors such as class, race, gender, region of birth and so forth which intersect in complex ways.
If the homosexual is a distinct person, then so must be the heterosexual. Whatever the terms and conditions of negotiation between the majority (heterosexual) and the minority (homosexual) may be, they always occupy mutually exclusive spaces. In such a situation, the closet as a non-space which reiterates compulsory heterosexuality is altered, no doubt. It no longer remains a non-space or an erasure but a space filled with variants of sexual identities. An easier way of putting it would be that the minoritising discourse propels the 'coming out' of identical homosexual selves as distinct from the heterosexual who exists outside, hitherto colonising the closet.

The closet stands colonised insofar as it continues to render coherence to the heterosexual who stands outside it. But this 'coming out' is also a 'filling in' of the closet to the extent that the closet is a non-space whose ontology is established only through the act of 'coming out' for the closet does not exist before this act. But this filling of homosexuals in the closet is what I call a form of 'heterosexual condescension'. The closet, in such an instance, does become a signifying economy for homosexual desire but only insofar as the already privileged heterosexual provides this space for such sexual variance. It is important to note that in a heteronormative context, the heterosexual is always already privileged; the minority homosexual, as he comes out, remains secondary, if not inferior, to the heterosexual. Yes, a space is created. The closet is marked and it posits homosexuality but at what cost? The closet reinforces what then appears as outside of itself – compulsory heterosexuality.

Ranjita Biswas notes in her essay *The Lesbian Standpoint:*

Heterosexuals are called upon to acknowledge homosexuals and understand their lives to give them space within the hegemonic. But never do we question the dominant order. It is important to note that against a backdrop of institutional primacy and legitimisation of the middle class monogamous reproductive heterosexual framework; in particular homosexuality would emerge as deviant and marginal, at best variant. The hegemony of the heterosexual order functions through a securing of its boundaries. And to do so it has to create it's 'other'. Without a certain precipitation of the deviant, heterosexuality cannot posit itself as normal; without the image of a copy gone bad, heterosexuality cannot be called original.44

With this as a focal point, I argue that a minoritising gesture (as ennobled it may be) is only a function of heterosexual condescension which is equivalent to saying: 'Look, you poor homosexual. I understand

you are an anomaly (of nature/culture or whatever) but in my self-proclaimed privilege, I give you some space.' Such a space remains marginal, a million homosexual outings notwithstanding. A 25-year old gay man who I interviewed45 told me, "I do feel I'm abnormal in a way and I wish I was straight." A minoritising discourse sustains this wish rather than wipe it out and it is precisely at the site of this sustenance that compulsory heterosexuality reigns supreme.

Contrastingly, an argument in favour of reading down Section 377 holds:

According to NACO, those in the High Risk Group are mostly reluctant to reveal same-sex behaviour due to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them. The situation is aggravated by the strong tendencies created within the community who deny MSM behaviour itself. Since many MSM are married or have sex with women, their female sexual partners are consequently also at risk for HIV/infection. Clearly, the main impediment is that the sexual practices of the MSM and gay community are hidden because they are subject to criminal sanction.46

Such an argument, possibly more effective, nevertheless poses two problems: a) A politics framed on the medicalisation of same-sex sexuality comes dangerously close to the nineteenth century medical construction of 'homosexuality' as a deviant or aberrant sexuality, even though medical science and psychiatry has absolved homosexuality of its alleged 'sickness',47 a politics linking same-sex practice to AIDS (as valid as the link maybe) retains the homosexuality and disease nexus which is counter-productive to a more positive view of same sex desire. In India, where the common sense perception of homosexuality remains one of sickness, even among medical practitioners48 such framings do more harm than good to queer persons.

The idea that gains currency is: if homosexuals are not sick enough in themselves, they still are carriers of grave sickness. Such framings

45. This interview was a part of my research for my M.Phil. dissertation titled 'Truth and Other Lies: Telling Queer Stories' based on accounts of gays and lesbians living in Kolkata and Delhi. The interview was taken after the Delhi High Court judgement of 2009. The M.Phil. was carried out under Prof. Sibaji Bandhopadhyay's supervision at the Centre for Studies in Social Sciences Calcutta.
46. See Naz Foundation, supra note 15, at 326.
47. Arvind Narrañ & Vinay Chandran, 'It's not my job to tell you that it's okay to be gay': Medicalization of Homosexuality: A Queer Critique, in Because I Have a Voice: Queer Politics in India 55 (Arvind Narrañ & Gautam Bhan eds., 2005).
48. Id. at 59-62.
retain the easy dichotomy between the healthy 'heterosexual' and the potentially sick and polluting homosexual. It affirms the notion that they are natural aberrations, mistakes made by nature. By highlighting the possibility that married men who have sex with men can transmit the disease to women and children, such a framing also appears to strengthen the heterosexual family and constitute 'homosexuals' as a threat to the health and vitality of the wayward heterosexual males and their families.

In a masterstroke, heteronormativity allows the normative male who does not identify his same-sex practice to put the entire onus of the act on the non-normative male for his masti/ discharge/ sex just as it allows a normative male to put the onus of sexual assault of women on women themselves. The categorisation MSM – men who have sex with men – which marks a universalising attempt whereby sexual acts are privileged over sexual identities is itself problematic on various accounts. Shivananda Khan in his essay MSM, HIV/ AIDS and Human Rights in South Asia asserts that the term signifies “a range of masculinities and gendered behaviour(s) with differing contextualization of sexual practices, sex partner choices, perceived sexual needs, pleasures and desires.” He also problematises the 'male' in the term for the term straddles both normative males (who can easily pass off as 'heterosexual') as well as 'non-males' or effeminate men who, in a hetero-patriarchal context, would not qualify as men at all.

The inclusive nature of the term is made possible by a series of exclusions and omissions ignoring the specificity of gender, class and sexual orientation among men who engage in same-sex practice. Such a term then conflates identities with acts without doing adequate justice to either. For instance, how does one read a sex act between a kothi (feminised male who is penetrated) and parik/ panthi (manly male who penetrates), for what appears as a homosexual act has overtly

49. Shivananda Khan, Making Visible The Invisible: Sexuality and Sexual Health in South Asia: A Focus on Male to Male Sexual Behaviours 32 (1996) (Masti/discharge/sex refer to sexual 'play' which may not impinge upon the sexual identity of those involved. Khan notes: "The word [masti] is not easily translated but in a sexual context it means sexual "playfulness," and is usually used in the context of sexual play between males. It is not seen as a serious act, because it does not involve a woman. Nor is it really seen as sex. To some extent it is even socially permissible, 'Young men letting off steam'. So long as it remains invisible. This does not differentiate this form of sexual playfulness from others, for all sexual behaviour, whether socially legitimate (sex between married partners) or otherwise must also remain invisible.")

heterosexual connotations when gender identifications and role-taking are taken into account. The kothi disturbs the alignment between sex and gender by coalescing a male body with a 'feminine' subjectivity whereas the panthi iterates the alignment between male sex and masculinity. Precisely because the panthi does not disturb the sex-gender alignment; that of masculinity with penetrative sex, he is able to 'pass' as normative whereas the kothi fails to do so. Can the sexual act between the kothi and panthi, whose gender identifications reiterate heteronormative standards of desire, be reified as homosexual by simply divorcing it from the subjectivities of actors performing the act? Does it not simplify the question of what constitutes a homosexual act in the first place? Is this not a violently reductive exercise which underplays the possibility of interesting slippages in the way homosexuality and heterosexuality are employed as opposing categories?

The term MSM, in emphasising the transience of same-sex acts and implicating it within the discourse of fun/masti or casual encounters, plays upon another trenchant dichotomy between procreative sex and recreational sex, where the former is privileged. It functions to trivialise same-sex sexuality against the more 'responsible' heterosexual act of human reproduction. I do not wish to trivialise reproduction itself but only to assert that the easy equation 'heterosexuality = procreative = meaningful = responsible = natural against homosexuality = hedonistic = irresponsible = meaningless = naturally unnatural' is untenable and only reinforces a distaste for queer persons. Given the heteronormative context in which such 'deviant' acts are located, it reinforces the alleged direct correspondence of acts, identities and behaviours between heterosexual men and women, thereby justifying the heterosexual claim to normality and naturalness.

From the above discussions, it is amply clear that queer politics simultaneously employs the minoritising discourse of persons with the universalising discourse of acts. What are the consequences of such an exercise on the closet? The closet 'appears' as a hitherto hidden space emptied out of its assortment — secret typifications of identities and registers of acts, of contestations of the heterosexual matrix. This 'appearance' conjures an image of dismantling the closet itself. On the contrary, I argue that the closet is a space marked by the absence of homosexual signification; it is not emptied out of its content, rather content is attributed to it. Homosexuality conceived either as a compendium of identities or an assortment of acts is articulated in a
way that ends up supporting the heterosexual hegemony. The closet far from being dismantled through queer politics is reconfigured as a space of the 'other' simply as a 'form', devoid of content, emptied out of the complex social histories of 'othering', which by dint of its opposition to the concept of 'heterosexuality' crystallises it as a myth, eternal and foundational to sociality.