

## **“No Going Back”. A Case Study of Sexual and Gender Minorities in India and their Legal Mobilisation.**

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### **Abstract**

This paper explores the legal mobilisation in India against section 377, the anti-sodomy legislation originally introduced by the British. The first part explores the legal mobilisation as experienced by sexual and gender minority activists themselves. In the second part, some themes that have emerged as important are discussed in light of existing research and literature on sexual and reproductive rights lawfare. While the initial decision to litigate was controversial, Indian activists now seem to agree that the impact of litigation has been overall positive. Factors that help explain the Indian case include the particular Indian institution of Public Interest Litigation, engagement on the wider social arena in parallel with the judicial, and positive media attention. Moreover, decriminalization may have been rather easy for everyone in the LGBT/queer community to rally around, regardless of ideological position. In an increasingly polarized India some tensions within the community may become more toxic, however.

**Keywords:** India, section 377, queer, LGBT, sexual and reproductive rights lawfare, legal mobilisation

### **INTRODUCTION**

Worldwide we see progressive steps as well as backlashes with regards to the rights of sexual and gender minorities. Many battles are fought out in the language of rights and through courts. In India there has been mobilisation against section 377 of the Indian Penal Code (Act No. 45 of 1860; short form: IPC). Section 377 reads as follows:

*Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.*

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

Although vague in wording, the provision has particularly impacted negatively on GBT/queer people. Such anti-sodomy legislation was introduced by the British in several of their colonies. In India it was introduced in 1860.

While focusing on India, this study is situated within a larger research project exploring sexual and reproductive rights (SRR) lawfare globally (SRR Lawfare, 2013). The project understands “lawfare” as “diverse and intentional strategies adopted by civil society actors that seek to engage legal institutions in order to further or halt policy reform and social change” (SRR

Lawfare, 2013: 1). Much of the SRR lawfare literature to date has focused on the US situation and is written by North-American authors. This study seeks to help address the gap, and show how the Indian situation may be similar but also differ from other situations such as the North-American. The first part of the paper explores the legal mobilisation against section 377 from the early 2000s till today as experienced by sexual and gender minority activists themselves in India. In the second part, I focus on some central themes and discuss these in light of existing SRR lawfare literature, in particular that relating to opportunity structure, impact of litigation (including backlash) and framing. The paper ends with some final remarks.

### METHOD AND DATA

The study is based on ten in-depth, semi-structured interviews and participant observation during my three-week field visit to Bombay, Bangalore and Delhi in November 2015. The informants can be considered key informants. They include academics, lawyers, journalists, artists, and community/movement organisers, many of whom have been central in the mobilisation for rights. Selection was mainly through snowball sampling. Several people were crucial and helped inform this study, but for the purpose of simple and narrative presentation I focus on the following in this paper:

- Vivek self-identifies as a queer cis-man, is in his mid-40s and is based in Delhi. He is a lawyer who used to work with Lawyers Collective, a Delhi-based collective of lawyers prioritising legal assistance to the underprivileged and Public Interest Litigation (PIL).
- Siddharth self-identifies as a gay cis-man, is in his mid-30s and is based in Delhi. He is an academic, and used to work as a lawyer with Alternative Law Forum (ALF), a Bangalore-based collective of lawyers committed to legal services, research and education on matters of concern to marginalised groups.
- Gautam self-identifies as a queer cis-man, is in his mid-30s and is based in Delhi. He is an academic, and member of the Delhi-based queer organisation Prism and Delhi-based queer art collective Nigah. He was active in Voices against 377.
- Raj self-identifies as queer and non-binary or masculine of centre, is in his 30s and is based in Bombay. Ze is an academic and active in the Bombay-based LBT organisation Labia.
- Pallav self-identifies as a gay cis-man, is in his early 40s and is based in Bombay. He is Director at the Bombay-based LGBT organisation Humsafar Trust.
- Sukhdeep self-identifies as a gay cis-man, is in his late 20s and is based in Delhi. He is a software engineer, and the founder and editor of the LGBT magazine Gaylaxy.
- Udayan self-identifies as a gay cis-man, is in his late 20s and is based in Bombay. He is human resources manager at Godrej Industries, project lead at the Indian LGBT Youth Leadership Summit, and founder and editor of the LGBT magazine Pink Pages.

The fact that everyone I spoke with was comfortable with me using their names and other personal details is in itself a testimony to how much the situation for sexual and gender minorities in India has improved over the years. Informants have had a chance to read an early draft and comment. One of the limitations of the study is the low number of non-cis-men informants.

My approach here is inductive and phenomenological in the sense that it takes the perception and experiences of the activists as a starting point. I seek to present the rich findings in a narrative form, honouring the various voices – sometimes converging, sometimes diverging – along the way. As mentioned, the interviews were undertaken in November 2015, and it should

be recognized that stories about the past are always coloured by the circumstances under which they are told. As will become clearer, at the time of the visit, the situation for sexual and gender minorities was complex and somewhat unclear, but overall we seemed to be moving in the direction of strengthened rights. While the study is focused on the informants' accounts, my own position has inevitably coloured both the interviews and the presentation here. I am born and bred in Norway, am of dual heritage with an Indian-origin mother, I identify as a gay/queer cis-man and am committed to strengthening the rights of sexual and gender minorities in India and elsewhere.

### **THE BUMPY BEGINNING**

Where shall we start? When and how does the legal mobilization with regards to sexual and gender minorities in India start? According to Vivek, the engagement of Lawyers Collective started in 1989 with Dominic D'Souza. In those early days of HIV/Aids in India, Lawyers Collective intervened for Dominic who had been forcibly isolated due to infection. (His story later inspired the Bollywood film *My brother... Nikhil*.) Before Dominic died, he got the commitment of Lawyers Collective that they would continue being involved in this issue. Lawyers Collective established a HIV/Aids unit to work on litigation, advocacy for new laws, research, capacity building and legal literacy work. They did not take funding from the government – but like much HIV-work in the mid-1990s, got foreign funding – since they were often opposed to the government in courts. There were ties with the government, however, with the National Aids Control Organization (NACO), which lies under the Health Ministry, having its Director in their steering committee. They also worked closely with HIV-affected people and NGOs targeting men who have sex with men (MSM). Naz Foundation (India) Trust was one such NGO in Delhi. Naz was increasingly experiencing problems with police harassing outreach workers. According to Vivek, Lawyers Collective's analysis was that this was happening partly due to section 377.

Vivek explains why a political route was not a real option: "There was no way that this would be something parliamentarians would consider. Even today there is little direct and planned lobbying, partly because of distrust in politics and it requiring a lot of resources." As Indian lawyers, they would rather go down the judicial route. Vivek continues, "We were trained as law students in the rich Indian history of Public Interest Litigation, trained to think that you can seek and get justice through the courts since the 1970s." However, they were also very aware that the courts would not be a completely safe bet. Vivek says, "You can never tell at any time how the courts will respond because of changes of judges. It is sometimes Russian roulette in Indian courts. We had strong grounds, but the result could still be influenced by the personal views of judges." For a while, Lawyers Collective had been trying to address this issue through judicial sensitization on HIV and related issues, including by inviting over Edwin Cameron from South Africa and Michael Kirby from Australia, both senior judges and gay, to have workshops with Indian counterparts. Other activists I interviewed agree that this seems to have been a crucial intervention.

In 2001 Lawyers Collective and Naz Foundation eventually filed a petition. The first big surprise was, according to Vivek, "the massive attack and backlash from some quarters of the LGBT community." Critics within the community – which included several, if not most, of those interviewed during my visit – raised various concerns. A cluster of concerns had to do with the choice of litigation over other strategies and the potential (lack of or even negative) impact of a judicial decision. Several argued that the goal was social transformation more broadly and law and litigation had only a limited impact, including that the police and members of society would harass sexual and gender minorities regardless. Others were concerned about potential

negative impacts. The issue of timing was raised, that India and the courts were not ready and it might backfire with even harsher legislation being introduced. Furthermore, the nature of judicial decisions, a more or less complete win or lose, was risky; if they did not win in court it would be very different from a temporary defeat in the legislature or elsewhere. Another possible unintended consequence and negative impact could be the awakening of – what some considered – a more or less sleeping law by bringing it into the limelight. In addition, there were concerns about the focus of the litigation on HIV/Aids; the focus, according to critics within the community, should be broader on the dignity and rights of sexual and gender minorities. An overall concern for many had to do with process, that it was not representative and consultative. Vivek says, “It was very emotional. I even lost some friendships, but many were fortunately regained.”

Lawyers Collective still went ahead with the case. Vivek explains,

*We felt that the law has limits. But still this would have a huge symbolic effect and take away a legal basis for harassment. It would make people legitimate in the eyes of the law, and HIV work would transform. And as a lawyer, I had a client and I work for this client. It's not like all women's groups are consulted when there is a case involving women's rights.*

The latter consideration pointing to a tension between individual litigation for a client on the one hand and community mobilization and activism on the other, is something that other activists also recognize – at least now in retrospect. According to Siddharth, it is quite understandable that Naz did not want to wait for the challenges they were facing to be addressed. He says, “Consultations could take long and probably there would be no consensus in the community at the time to take the case forward.”

### **THE MARVELOUS MIDDLE**

Lawyers Collective decided to reach out to the community and start extensive consultations. Vivek says, “We decided to go for dialogue and use this opportunity as best we could, remove distrust and make this an inclusive process.” Many activists agree that these consultations were an important part of community consolidation and mobilization. According to Vivek,

*In a very real sense we got a collectivism and ownership that we had never seen before or again. With the consultations there was a massive shift in empowerment. We were saying this is the queer community's case and not just the case of lawyers or Naz. We reached out to queer people even in small towns.*

When in 2004 the Delhi High Court declined to consider the petition, saying that the petitioners lacked standing, the decision to appeal was collective and community-based. In 2006 the Supreme Court decided that the doctrine of PIL did in fact allow for the petition and that the Delhi High Court should consider it on the merits. Among the arguments of the respondents, including the Home Ministry, were that homosexuality did not fit with traditional Indian morality. In 2008 several organisations intervened in the case on the side of the petitioners as the coalition Voices against 377.

Gautam, who has been active in Voices, gives the following description of the coalition:

*Many of us had multiple roles such as being both feminist and gay, so we brought different issues into different fora. It was truly intersectional. In the coalition of twelve organisations, only a third were explicitly queer and LGBT. Human rights organisations, women organisations and others were standing with us.*

With regards to choosing a judicial route and intervening in the court case, he has this to say:

*When the government came with its horrible response and it got in the media, we had to respond. PIL is very Indian, so it is not peculiar for us to use the courts. All activists learn to speak as lawyers here. In PIL social reform can be debated and arguments are polycentric, not just strictly legal. Our strategy was to fight the case, but not just in court and not have the movement reduced to the case.*

Particular considerations arose for queer or LBT women. Raj – active in the LBT-organisation Labia – has not heard of 377 being applied to women. Ze says other laws such as those meant to protect against kidnapping are (mis)used in cases where women run off together with the police taking the side of their families. According to many activists I spoke with, the challenges of the LBTs are often related to women generally being more on the margins in India. According to Raj, they have been working closely with the women's movement and framed many issues as violence against women. As already mentioned, Voices was a broad coalition, and Labia, similar organisations and women organisations did join the coalition. It was partly about "backing the cause", according to Raj. However, ze also recognises that even if the specific target of 377 has been men, the mobilization and the case created publicity regarding wider LGBT/queer issues, also benefiting women and non-cis-men.

Challenges with regards to framing arose at several points of the petition. As already mentioned, the respondents largely argued based on tradition and morality. The petitioners responded to these arguments, by pointing to instances of Indian inclusion of LGBT/queer people and themes in Indian religion and society throughout history, and that 377 was in fact imperialist in origin. Mainly, however, the petitioners sought other framings than tradition and morality. While Naz and Lawyers Collective had largely framed the issue in terms of HIV/Aids and health, Voices and their lawyers in ALF framed it more broadly as one of dignity and rights. According to Vivek, the consultative process that Lawyers Collective had initiated years earlier meant that although there were tensions they were "on the same page". Similarly, Gautam says, "There were some tensions with Lawyers Collective and Naz but we worked through it." He continues, "We stressed equality and dignity, we wanted to win on this, stressing sexuality and intersectionality, but you can't speak academically in court so there was a need to translate and simplify. Vivek says, "We were learning along the way. We had to use words and arguments that the judges would understand, not intersectionality and queer, etc." According to Siddharth who was a lawyer with ALF at the time,

*The language and labels were discussed and shifted during the petition among the community and is reflected in the court proceedings: From MSM to gays, to also include lesbians even if they are not formally targeted, and finally not only LGBT as a Western identity label but also the Indian kothi, hijrah, etc.*

In addition, it was not unproblematic that the petition had been framed in terms of a right to privacy. ALF and Voices were conscious that 377 mainly impacted hijras, sex workers and other frequently lower class people who were breaking the law more or less in public, rather than in private. Gautam says, "We felt the privacy argument was difficult. We reframed it to

mean bodily integrity and autonomy so it would also for example protect sex workers in a brothel.”

The legal mobilization had important effects on the LGBT/queer movement itself. According to Vivek,

*There is no such thing as a gay movement in India. At best there is an LGBT eco-system. There are many movements with diverse approaches and politics, but this case provided a common minimum basis, to get rid of this law. It galvanized the eco-system and it was utterly remarkable.*

Furthermore, even if the mobilization was focused on 377 and the court case, the movement did not focus on law and litigation narrowly. Gautam says,

*We held Prides to say that whatever happens with the case we are here and things are changing. Judges were also influenced by norms outside the court; they would refer to Prides in proceedings when opponents said that we were not part of Indian society. Both social norms and law has to change. It was complementary.*

All activists I spoke with agree that media played a crucial role in the social transformation. According to Siddharth,

*The court case provided the drama necessary for media. Especially the English-speaking media is generally liberal on matters of sexuality and morality, and felt this was wrong. And more and more people were coming out and being open and could be interviewed and take part in media.*

Gautam says,

*We held press conferences, wrote op-eds, did sensitization, and media started calling us to get our perspective. We could speak to media under the label of our organisations outside and then be Voices in court. And PIL is in many ways a public conversation, reported in media.*

Pallav, who is director of the LGBT-organisation Humsafar in Bombay, tells a story about how a politician with the help of the police once tried to stop Pride there. Eventually, Pallav spoke with the police chief who apologized. The politician then threatened to expose the participants to their families and wider public. Pallav turned it around, and used the media to tell the story of what the politician had done and effectively ended his career. According to Pallav, there are enough people from the LGBT/queer community or people who are otherwise sympathetic to the cause in the media for the sexual and gender minorities to have real power.

On 2nd July 2009, the Delhi High Court reached their decision. They declared that section 377, insofar as it criminalises consensual sexual acts of adults in private, violates articles 14 (equality before law), 15 (non-discrimination) and 21 (right to life) of the Constitution. They therefore “read down” section 377 so that sex between consenting adults was exempt. Gautam believes the court took their argument on equality and article 15. Sexual orientation was considered an analogous ground to sex, which is explicitly listed as a prohibited ground of discrimination. According to Raj, the protection against discrimination on grounds of sexual

orientation would apply to lesbians, bisexual women and other queer people as well as gay men, making it relevant to the entire community. Furthermore, not only state and direct discrimination is prohibited, but also societal, private and indirect. The petitioners were also successful in their arguments on privacy, with the court understanding the right to privacy, which is implicit in the right to life in article 21, as not just the right to freedom in the zone of your home but equally the right to make decisions about your intimate life. With regards to arguments of morality, the judgment clarified that "constitutional morality" is the only morality of relevance, and that inclusiveness is a value with a long tradition in India and a value that the Constitution rests upon.

Asked about the impact of the decision, Sukhdeep, who was in his early 20s at the time, says, "There was euphoria." He continues,

"This was also when I came out, and people who supported me would refer to the fact that it was even legalized by the courts so why should we have a problem with it. I started the Gaylaxy magazine, and there were many other such initiatives".

Udayan, also in his early 20s at the time, similarly started Pink Pages magazine. Other LGBT/queer magazines, films, book festivals and more soon followed. Gautam says, "There was a flood of events prior to the judgment. The good judgment then further strengthened and sped this up. Very much back and forth, the social and the legal."

### **THE OPEN ENDING**

While the Central Government decided to support the Naz judgment, it was soon appealed by conservatives – first by Koushal, a Hindu astrologer, who was later joined by the All-India Muslim Personal Law Board, the Apostolic Churches Alliance and others. On 11th December 2013, the Supreme Court overturned the decision of the Delhi High Court. The Koushal judgment stressed the presumption of constitutionality in favour of all laws, that courts must exercise self-restraint, and that changing laws is the role of the Parliament. Udayan says, "They passed on their responsibility. They did not give a negative opinion, however, they just did not take a stand." There are several statements in the judgment that activists react to, including that section 377 criminalises certain acts and not LGBT/queer people. As another of my informants put it, "You are now allowed to have an identity, but not sex." Overall, the judgment is heavily criticized for displaying poor legal reasoning as well as lack of understanding of the LGBT/queer issue.

While Koushal was a setback in terms of law strictly speaking, most activists I spoke with believe that it may have led to an even stronger mobilisation and had various unintended positive effects. The movement organized a Global Day of Rage with slogans such as "No Going Back". And the outrage extended far beyond the LGBT/queer community. Almost all major Indian newspapers decried the decision. Even the Central Government petitioned the Court to review its judgment. According to Gautam, "There is no going back. The case matters in a way much less now. 2001 till 2013 is a long time for people to come of age and change to happen. Young queer people have reinforcement elsewhere now." He mentions various social events, that most universities have a public campus queer group, that now we can assume therapists are LGBT-friendly, and that if someone tries to use 377 organizations can be called and there will be protests and legal action. He concludes, "These changes must be partly because of the case; it allowed us to come together and organize. And the movement was not reduced to the case. We managed to create a social movement." Sukhdeep, one of those who have "come of age" during Naz, says,

*The 2013 judgment had an opposite effect of the intended I think, with a lot of social support, and people are still coming out. Whatever started and was consolidated during Naz, such as Prides etc., have continued. I think Koushal only increased people's resolve.*

Still, there may also be some negative effects. While activists believe that the increased attention to section 377 has been overall positive, they also mention some incidents that could support the initial objection that bringing the law into the limelight could also lead to more abuse. Sukhdeep himself continues to say, "It has left those vulnerable such as sex workers, the poor and the closeted, even more vulnerable. And now people who oppose me, such as some friends and family, refer to it being criminal also." According to Pallav at Humsafar Trust, support from organisations may be a crucial mediating factor. He says,

*Due to the cases and attention many more know about section 377. Often LGBT people are scared of the police and don't report cases of abuse, but when it does happen – often with the support of organisations like ours – the police have been supportive. Recently, they arrested a gang that tricked people in and then blackmailed them. Using fear of 377 to blackmail or extort is criminalized.*

Since Koushal there has been another, more progressive Supreme Court judgment on a related matter. Transgender people have had a particular legacy and acceptance in India, but the British criminalised them during their reign. In 2012 the government agency National Legal Services Authority (NALSA) took the lead in filing a petition for the Court to effect measures to correct for this historical injustice and its consequences. On 15th April 2014 the judges in what is known as the NALSA judgment decided in favour of the petitioners, ordering the Central and state governments to effect several positive measures for transgender people to comply with articles 14 (equality before law), 15 (non-discrimination), 16 (equality of opportunity in public employment), 19 (freedom of expression) and 21 (right to life) of the Constitution. This has been followed up in Parliament and in state legislatures. According to Siddharth, "Even if the language is not great – with much pitying – the parliamentarians were quite impressive, partly due to the cultural acceptance in India for transgender, their socio-economic position and visible marginalization."

While there may still be much harassment and discrimination of transgender people, most activists I spoke with seem to agree that there is now more confidence, support from organisations, and issues are often successfully raised with the police and courts.

In addition to positive effects for the transgender community, NALSA may also have consequences for the wider LGBT/queer community. While the judges were careful not to directly contravene the Koushal judgment, and section 377 still applies, many of the same arguments and articles in the Constitution were raised. And, as Pallav explains, "The definition of transgender can be very broad. For example, the term kothi [included in the NALSA judgment] has also been appropriated by gay men who are penetrated sexually."

While the legal mobilization around 377 managed to bring different people and organisations together, there seems to be more variation and differences again now. Vivek says, "But it is also good that now there is more confidence in more people to articulate themselves." Gautam seems to largely agree,



*We narrowly called ourselves Voices against 377 to focus on one common minimum issue. After 2009 there has again been diversion. We are much more divided today, but it is a good thing. There are many more out people that want different things and the movement is broader. There are varying motivations rather than a minority impulse to agree against a majority.*

So, what is the way forward now? After review petitions against Koushal were rejected, curative petitions were filed, the final legal resort. At the time of my visit, these were pending. Siddharth says, "The legal route has a logic of its own with the curative petitions. And I think there will be new legal challenges even if it fails, because the space has been opened up and it is bound to be challenged again."

Pallav says, "The curative petition may now have a chance because the NALSA arguments are based on the same constitutional rights." As before, the question of the judges and their personal and ideological backgrounds will be a crucial point, according to many of the activists. Siddharth, while more pessimistic with regards to the curative petition, also puts emphasis on the question of the judges:

*I'm not optimistic about the curative petition because it is a very new innovation, that has rarely succeeded, never been used in this context, and the judges will probably be cautious not to open up to a floodgate of such petitions. But you never know with Indian judges. Especially on a topic like this it depends on the judge, their own views, whether they have LGBT friends; this is not just an abstract thing but also about empathy.*

Some are also more open to a political route today. During the 2014 political campaigns, several parties included decriminalisation as part of their agendas. The Hindu Right party BJP, however, sent mixed signals, and were eventually the victors in the general elections. Since then the matter has also been raised in Parliament, but the government has argued that it is sub-judice in the courts. Pallav says, "Initially, we had to go to courts because no MP would have raised the matter and introduced a bill in Parliament. But now this is changing." At the time of my visit, in connection with the Delhi Pride, the Finance Minister, voiced strong support for decriminalization. And, shortly after my visit, Shashi Tharoor, an MP for Congress, did try to introduce a private member's bill. The majority in Parliament voted against admitting it, however. BJP is continuing to come out in different voices on the issue. Many of the activists believe it is both possible and necessary to engage with them. Udayan says, "There is scope for engagement with the BJP, as they don't have a policy either for or against. Hindus don't bring up the religious argument since there is nothing in the scriptures to condemn homosexuality." Pallav says, "It's a funny thing with BJP". He continues,

*The PM has not said a word on the matter, most are quiet, a few loud and against, but many when meeting face to face are quite understanding. It is not that the BJP is not sympathetic, but they need to frame this in their own way. BJP spokesperson Shaina, who herself is from the fashion industry and probably knows gays personally, says that it cannot happen over night and we need dialogue.*

Asked about the choice between judicial or political routes, Siddharth says "They are not divorced" and continues,

*In informal talks most BJP politicians say that this is not the time. But there is much happening on trans rights. Maybe with regards to LGB rights it is more the time for judiciary and regional state level engagement. But trans rights are very much on the agenda even of this government. So it is still possible to work with LGBT rights.*

Finally, the question of intersectionality and solidarity with other marginalized people has become a burning question in today's India. There are LGBT/queer people allied to the Hindu Right, and as mentioned the BJP is not entirely hostile to the issue of LGBT/queer rights. This is creating some tensions within the movement. Some informants mention "a curious incident in Bombay", where Labia had taken an intersectional and solidarity stand, and then the Pride organizing committee came out with an official statement saying they don't have a position on this, "going out of their way to distance themselves". Meanwhile, during my visit in November 2015, the intersectional and solidarity approach was dominant in both the Bangalore and Delhi Prides. Signs included "I like my men beefy" alluding to the increasingly heated controversy around beef, which especially impacts Muslims and Dalits. Shortly after my visit, Prides in other major cities, including Calcutta, followed up this approach. As several of the activists point out, many have multiple identities – being both gay and Muslim, lesbian and Dalit, etc. – so it makes sense to have an intersectional approach. Some believe it is also strategic to ally with other social movements. It is also important in itself, for many LGBT/queer activists, to show solidarity with those marginalized, whatever the reason for the marginalisation.

#### **DISCUSSION IN LIGHT OF EXISTING SRR LAWFARE LITERATURE**

Much of the literature on social movements in general has employed the notion of opportunity structure to explain why they embrace particular strategies. Gloppen (2009: 467), defines it as

*their total set of possible avenues for pursuing their substantive aim. The set is determined by their resources as well as the costs associated with the different (combinations of) strategies, and the choice of strategy depends on where likely benefits or chances of success are perceived to be greatest relative to the costs.*

In many contexts, courts have emerged as active participants, offering new opportunities. On the basis of comparative case studies, Epp (1998) still emphasizes the crucial role of material support, however: "Combining rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights is still crucial" (p. 17). Often, pursuing the legal option is a lengthy and costly process that requires considerable resources. Wilson and Rodriguez (2006) show that the resources necessary are contingent on the rules that guide access to and the cost requirements of the court, however, and in their particular case of Costa Rica these mean that even groups with little financial, organizational and other resources may succeed with their claims.

In our case, Lawyers Collective had funding, organization and expertise. Moreover, India has large, established social movements such as the women's movement, which the sexual and gender minorities, eventually allied with. Still, one of the most important factors in the Indian case – and one mentioned by several of the informants – is Public Interest Litigation (PIL). Baxi (1985) discusses this institution under the label "Social Action Litigation". In the 1970s Supreme Court judges proclaimed that a shift was needed to "the humanitarian concept of protection of the weaker section of the people" (Kesavnanda case, quoted in Baxi, 1985: 112). Since then the courts have often been considered the best option for social movements. When the Delhi High Court in 2005 initially dismissed the Naz case due to standing and the

petitioners appealed, the Supreme Court followed the PIL doctrine that any person, NGO or institution can approach the court seeking legal remedy in cases where the public interest is at stake. (Indeed, even a letter from someone, who is concerned but not affected, raising a public interest issue has been considered sufficient.)

According to Baxi (1985), the most crucial general factor affecting PIL – or Social Action Litigation, as he chooses to call it – is the fluctuating composition of judges and their backgrounds. As we have seen, Lawyers Collective considered this from the start and also sought to influence it through sensitisation. The judges – their prejudices and (lack of) contact with LGBT/queer peers – were stressed as a crucial factor by many activists interviewed to explain the results of Naz, Koushal and NALSA as well as a future result of a curative petition. This is in line with the contact hypothesis that was first developed by Allport (1954) and later has been applied to the LGBT/queer context by for example Herek and Glunt (1993). The latter showed that contact between gay and straight people predicted attitudes toward gay men better than any other social psychological variable. With more people coming out in India, we may expect that inter-group contact could have further positive effects on many arenas, social, political as well as legal. Over the years, the Indian opportunity structure has certainly changed. As many informants mentioned, politicians are more positive to the cause now, and political routes are considered as well as the judicial.

Scholarly and activist discussions about the limited (e.g. Rosenberg, 1991; 2008) or even negative (e.g. Klarman, 2004) consequences of litigation and judicial decisions have been widely influential in the USA, including in the LGBT/queer rights context. We saw similar arguments being made by the early critics of the Naz petition in our case, and there was a tension between individual litigation for a client and wider community and activist considerations. Similarly, Keck (2009) shows that to litigate or not has been a subject of considerable debate within the American LGBT/queer rights movement for a long time, and that when the Hawaii suit was filed in 1991, most leaders of the movement opposed the effort, but the case was initiated by three same-sex couples and their private attorney.

Keck (2009) seeks to nuance the general argument about the limited or even negative impacts of litigation. While agreeing with Rosenberg and Klarman that courts usually will not act until some progress has been made in the culture at large, he believes they may still act before any other lawmaking institution is willing to do so. During the years of the Naz petition and proceedings, progress was made in the culture at large, and the courts were much more likely to act before the Parliament or other lawmaking institutions. While there seems to more political will today, attempts to raise the matter in Parliament have failed.

Keck (2009) admits that controversial court decisions sometimes do provoke backlashes (see Klarman, 2004), but even then, their long-term causal implications tend to be complex and multidirectional. A particular feature of the Indian case is that the Naz case took so long – from the petition in 2001 till the decision in 2009 – and the movement continuously engaged in the wider social arena in parallel with the judicial. Thus, Naz was widely celebrated, including by the wider public and politicians. However, it was also soon appealed by a group of conservatives, which included major religious institutions. On the face, Koushal was a negative decision and disappointment after Naz and it has certainly had some negative consequences, especially for the most vulnerable. However, most informants agree that it mainly had the unintended positive consequence of further mobilizing the movement and increasing support for the cause.

Overall, the legal mobilization in our case also seems to have had two other effects mentioned by Keck (2009): Successful instances often heighten expectations that further change is possible; and they may have an “agenda-seizing” effect (Eskridge, 2002: 3, referred to in Keck, 2009). With regards to the last point, Rosenberg (2008) documents increased media attention on LGBT/queer people and issues in the USA, but, as Keck (2009) points out, he fails to recognise the potential of dramatic lawsuits in generating such mainstream media attention. Links between the Naz case and the legal mobilization more broadly on the one hand and the media on the other were stressed by all my informants as one of the crucial factors in explaining the social transformation that Indian society has undergone. The LGBT/queer issue also got on the agenda of parliamentarians.

While difficult to attribute various phenomena to litigation, most of my informants – even those who had been initial skeptics of legal mobilization – were convinced that Naz and the legal mobilization was crucial in effecting positive changes in Indian society. Many informants also mentioned the importance of the legal mobilization for the movement itself and the individual and collective sense of self and self-perception of LGBT/queer Indians. Much like Keck (2009) I am also critical of treating law and culture as wholly separate independent variables as Rosenberg and Klarman seem to do at times. My informants also stressed the complex links between court decisions, media attention and wider social change. As Gautam said, “Very much back and forth, the social and the legal.”

A third SRR lawfare discussion of relevance to our case concerns framing. According to Goffman (1974), framing refers to the cognitive schema by which people organize information about the world. In social movement analysis frames have most often been understood as means of building social movements and mobilizing collective action (Smith, 2007; Olsen, 2014). To the extent that a rising social movement can frame its claims in line with the dominant discursive constructions, it is more likely to achieve influence (Smith, 2007). In our case, we see that there are some initial tensions with Naz and Lawyers Collective focusing on HIV/Aids, and Voices and ALF focusing on dignity and rights. The respondents in court, meanwhile, seek to frame the issue in terms of morality and tradition. This is similar to what Smith (2007) and Olsen (2014) found in a North American context regarding same-sex marriage. The rights frame was prominent among same-sex marriage proponents while a moral frame involving references to tradition and religion was dominant among opponents. Still, the Indian case differs somewhat from the American, with the sexual and gender minority activists and the progressive Naz (and later also NALSA) judges also engaging with the tradition, religion and morality framing. The different context means that Indian activists and progressive judges can make references to historical tendencies of LGBT/queer inclusion in Indian society and religion, and argue that the criminalization came with the British imperialists.

Smith (2007) in her case also identifies a queer culture frame, deployed by critics within the community. In the Indian context the term “queer” has particular usages that we should be aware of (see also Khanna, 2013). It can refer to everyone who is not heterosexual, including LGBT and the Indian labels of hijrah, kothi, etc. However, it can also (for example, in Bangalore and Delhi) refer to a political perspective critical of hetero-normativity. In particular this latter understanding has enabled alliances and exchanges with other emancipatory movements such as the women’s movement and Dalit movement, and involves an intersectional and inter-group solidarity approach. In our case, queer and intersectional perspectives certainly entered with the intervention of Voices. And while, as Gautam said, “there was a need to translate and

simplify", the Naz judgment with its innovations on non-discrimination and privacy largely took their arguments. Importantly, since the concern in India was not marriage or another institution that could be considered hetero-normative, but rather decriminalization, it may have been easier for everyone in the community to rally around, regardless of ideological position. Today, informants pointed out, there is an increasing plurality of people and positions within the community, but this can also be considered a good development. In an increasingly polarized India, however, some tensions may also become more toxic, such as those between the Hindu Right versus the more radical queer who take an intersectional and solidarity approach.

### **FINAL REMARKS**

In this paper I have sought to contribute to the literature on sexual and reproductive rights lawfare. I first presented the experiences and perceptions of Indian LGBT/queer activists with regards to the legal mobilisation since the early 2000s till today. Then I discussed some of these experiences and perceptions in light of existing research and theory, in particular that relating to opportunity structure, impact of litigation (including backlash) and framing.

As in other contexts such as the North-American, the decision to litigate was initially controversial within the Indian LGBT/queer movement with some activists claiming that it would have little social impact or even lead to backlash. With regards to the question of opportunity structure, one feature that is particular to the Indian case is the institution of Public Interest Litigation, which has enabled Indian social movements to regularly engage successfully with courts. A related factor that has been highlighted as important is the background of judges, including their (lack of) contact with LGBT/queer peers. Another particular feature of the Indian case is that the Naz petition and procedure took so long – from the petition was filed in 2001 till the decision fell in 2009 – and the movement continuously engaged in the wider social arena in parallel with the judicial. Activists also agree that media attention, which was largely tied to the Naz case and mobilization, played a crucial role in the social transformation. While the positive Naz judgment was appealed by conservatives and resulted in the disappointing Koushal judgment in 2013, even the latter seems to have had positive effects – albeit unintended – such as triggering outrage and increasing support for the cause. At least at this point in time, activists seem to agree that the impact of litigation has been complex, mixed but overall positive. At the time of writing, further hope has been kindled with an expanded Supreme Court bench on 2nd February 2016 accepting the curative petitions, deciding it was a matter of constitutional dimensions and that a Constitution Bench with five Supreme Court judges would be set up.

Similar to other contexts such as the North-American, there have been various framings of the issue, in particular in terms of morality and tradition, rights, and queer ideology. However, there are also important particular features with Indian LGBT/queer activists engaging with the morality and tradition framing of conservatives, referring to historical tendencies of LGBT/queer inclusion in Indian society and religion, and arguing that criminalization was British and imperialist. Since the concern in India was not marriage or another institution that could be considered hetero-normative, but rather decriminalization, it may have been easier for everyone in the LGBT/queer community to rally around, regardless of ideological position. In an increasingly polarized India some tensions may become more toxic, however. An important question for many LGBT/queer Indians now and for the future, a question that may contribute to defining both their individual and collective identity, is the following: Shall we focus narrowly on promoting LGBT/queer rights, perhaps even entering into an alliance with

the Hindu Right in power, or shall we show solidarity and ally with other, increasingly marginalized and oppressed categories of people?

### NOTE

The author would like to especially thank Arvind Narrain for fruitful conversations, sharing his vast knowledge of the issue and putting me in touch with various people and institutions in India. This research was made possible by funding through the Centre for Law and Social Transformation at the University of Bergen. It is part of a larger project on Sexual and Reproductive Rights (SRR) Lawfare coordinated at the centre and funded by the Norwegian Research Council.

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