

# ‘RIGHT TO PRIVACY’ IN *NAZ FOUNDATION*: A COUNTER-HETERONORMATIVE CRITIQUE

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*The link between sex and privacy is not self-evident. The protection of the ‘right to privacy’ is accorded to only those sex acts that have the normative qualities of patriarchal, heterosexual marriage. Additionally, a privacy-focused legal intervention to extend protection and recognition to non-normative sexualities, could have problematic implications for queer politics itself. This article is an assessment of the ‘privacy argument’ as articulated in the **Naz Foundation** judgment, against the backdrop of this troubled relationship between non-normative sexualities and dominant understandings of privacy. While the court in *Naz* has moved away from a narrow ‘space-based’ notion of privacy, it continues to view privacy as a negative freedom, the scope of which is rather limited. Additionally, while the exclusivity and ideological dominance of the ‘private’ is busted by dissociating the claim to privacy with heterosexual marriage, the judgment introduces other normative codes for sexual relationships that are protected by privacy. The article notes that the privacy analysis in **Naz Foundation** has both possibilities, which must be emphasized and limitations, which must be regarded as areas of further struggle. In the final analysis, one must however acknowledge the limited role that any privacy-based intervention can play in counter-heteronormative struggles, since the ideas of ‘natural’ and ‘unnatural’ sexualities are left unexamined, no matter how one may frame the privacy question.*

## I. INTRODUCTION

One of the main pillars on which Justices Shah and Muralidhar found Section 377 of the Indian Penal Code (*hereinafter* “IPC”) to be bad in law was that it violated the right to privacy of adult homosexual citizens. The judges held that Section 377 authorized the State not only to enter the private domain of the citizens;

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it also gave the State the power to interfere with their private decisions. The judgment in *Naz Foundation v. Government of NCT*<sup>1</sup> (hereinafter “*Naz Foundation*”), and the grounds on which it was based, was not really unexpected, given that most legal victories around the world, involving decriminalization of adult consensual homosexual sexual acts, have been based on the right to privacy. The famous Wolfenden Committee Report that led to decriminalization of homosexuality in Britain was based on the principle that ‘it is not the function of the law to interfere in the private lives of citizens, or to seek to enhance any particular pattern of behaviour’.<sup>2</sup> Similarly, in *Dudgeon v. United Kingdom*<sup>3</sup>, the European Court of Human Rights found Northern Ireland’s legislation criminalizing same-sex sexual activities to be an unjustified interference with the petitioner’s private life. The decision of the Human Rights Committee in *Toonen v. Australia*<sup>4</sup> and that of the US Supreme Court in *Lawrence v. Texas*<sup>5</sup> too followed the same pattern.

One wonders how the ‘privacy argument’ came to be the pre-eminent legal strategy in decriminalization cases all over the world, instead of other more established legal concepts such as equality<sup>6</sup> or personal autonomy. I ask this question, for the choice of the ‘privacy argument’ in matters related to sex is far from obvious. The link between sex/sexual acts/sexuality and privacy is not a straightforward one, as the impressive track-record of the ‘privacy argument’ in decriminalization cases might suggest. It has been argued before<sup>7</sup> and I illustrate the same in this article, that the ‘right to privacy’ is not simply out there, which could be claimed to seek protection for sexual acts or anything pertaining to sex. It is the law that discursively constructs the private and the public, and legal claims are decided accordingly. This is particularly visible, in case of the non-normative sexualities, or what Nivedita Menon calls ‘counter-heteronormative’ sexualities. By the term ‘counter-heteronormative’ Menon refers to- ‘a range of political assertions that implicitly or explicitly challenge heteronormativity and the institution of monogamous patriarchal marriage’.<sup>8</sup> These are assertions that acquired the shape of a movement in India over the last two decades, due to increased visibility

<sup>1</sup> (2009) 160 DLT 277; W.P. (C) No. 7455/ 2001 of 2009 (Delhi HC).

<sup>2</sup> REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957).

<sup>3</sup> (1981) 4 E.H.R.R. 149.

<sup>4</sup> (1994) 1 INT. HUM. RTS. REPORTS 97 (No. 3).

<sup>5</sup> 539 US 558 (2003).

<sup>6</sup> See, e.g., Judgment of the South African Constitutional Court in *National Coalition for Gay & Lesbian Equality v. Minister of Justice*, 1999 (1) S.A.L.R. 6 (CC).

<sup>7</sup> E.g., RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITE: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (1996).

<sup>8</sup> NIVEDITA MENON, *Outing Heteronormativity: Nation, Citizen, Feminist Disruptions in Sexualities*, 3 (NIVEDITA MENON ed., 2007) The term ‘heteronormativity’ refers to a range of processes – political, economic, cultural and bio-medical – that work to make heterosexuality appear as ‘normal’ and ‘natural’. It refers to all those processes through which the heterosexual, monogamous, same-caste/class/religion, marital relationship is instituted as the ‘norm’. See, Michael Warner, *Introduction: Fear of a Queer Planet*, SOCIAL TEXT, 1991, 9 (4[29] 3-17).

and legitimacy accorded to sexuality as an issue. This is evidenced from the formation of support groups for gay men in towns and cities across India; *Hijras* making demands on the State for legal recognition and socio-economic facilities; civil rights groups conducting investigative studies highlighting human rights abuses on the basis of sexuality; the so called 'lesbian suicides' where women leave suicide notes expressing the fear of losing the women they love due to marriage or family pressure; collectivization of sex workers and so on. The campaign against Section 377 and the legal challenge must be seen as part of this larger project of drawing attention to sexuality as a site of oppression and also of political mobilization. 'Counter-heteronormativity', is thus a useful lens with which to look at the *Naz Foundation* judgment and evaluate specific aspects of it.

In Section II, I draw attention to the troubled relationship between privacy and non-normative sexualities, to argue that the achievement in *Naz Foundation* can only be appreciated and assessed, when situated in this context. In Section III, I review some of the concerns specific to the use of the 'privacy argument' in the *Naz Foundation* case, and in relation to queer<sup>9</sup> politics in general. Against this background, in Section IV, I look at some of the aspects of the privacy analysis in the *Naz Foundation* judgment, and assess the gains and the limitations of the same, and the implications it might have for counter-heteronormative politics centered on law. I argue that although problematic, 'privacy' as a value, is not entirely opposed to what a counter-heteronormative politics of sexuality would want to achieve.

## II. 'RIGHT TO PRIVACY' AND COUNTER-HETERONORMATIVE SEXUALITIES

The minority opinion by Justice Subba Rao in *Kharak Singh v. State of Uttar Pradesh*<sup>10</sup>, which was subsequently developed in *Govind v. State of Madhya Pradesh*<sup>11</sup> are usually credited for setting down the legal framework for the right to privacy in India. Both *Kharak Singh* and *Govind* viewed the issue of privacy strictly in terms of invasion of personal liberty and freedom of the individual by the State. Both judgments were built on the idea that a 'person's house, where he lives with his family, is his 'castle': it is his rampart against encroachment on his

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<sup>9</sup> Historically, the word 'queer' has been used in the West, to ridicule the homosexuals as 'odd' or 'strange'. But, by re-appropriating such a negative term as a political identity, the homosexual people sought to reject the power of those who defined and described them. The word 'queer' is seen to signify all those positions and perspectives that question the naturalness and inevitability of heterosexuality. See Arvind Narrain & Gautam Bhan, *Introduction* in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* (Arvind Narrain & Gautam Bhan eds., 2005).

<sup>10</sup> AIR 1963 SC 1295.

<sup>11</sup> AIR 1975 SC 1378.

personal liberty’.<sup>12</sup> But the analytical framework developed in these judgments is insufficient to explain how criminal law conceives of privacy in regulating sex. As Kapur and Cossman show, the treatment of the ‘private’ in criminal law is highly particular and contradictory<sup>13</sup>. Thus, while the offence of adultery justifies the intervention of the State in the private domain of the family to protect the husband’s sexual access to the wife from third party interference, in case of marital rape, the State refrains from intervening on the same ground that marital relationship is a private affair beyond the scope of the State’s purview. Again, while in marital rape, the private nature of the sexual act puts it beyond the reach of the State, in case of homosexual sex or sex for money, the private nature of the sexual acts becomes irrelevant. Based on their review of the criminal law’s regulation of sex within and outside marriage, the authors conclude:

“[R]unning through both the regulation of adultery and marital rape is an understanding of the marital relationship as the exclusive site of legitimate sexuality. By way of contrast, the regulation of homosexuality and prostitution are both unconcerned with the location of the sexuality in question, since the nature of sexuality renders it public.<sup>14</sup>”

Thus, when law protects privacy, it is only the ‘*right* kind of privacy’<sup>15</sup> and ‘private sex is immunized only if it is legitimate private sex, that is, sex within marriage’.<sup>16</sup> Below, I discuss two cases where the ‘privacy argument’ was unsuccessfully used, to illustrate that there is much more at stake in questions of privacy, than undue interference by the State. The cases discussed below help us to see that the right to privacy in matters pertaining to sex, is not built on the notion of a protected ‘space’, but is in fact contingent upon notions of normative sexuality.

#### A. RESTITUTION OF CONJUGAL RIGHTS AND THE RIGHT TO PRIVACY

Section 9 of the Hindu Marriage Act, 1955 provides that when the husband or the wife ‘withdraws from the society of the other’, without a reasonable excuse, the aggrieved spouse may approach the court for a decree of restitution of conjugal rights; and if the court is satisfied of the truth of the claim and if there is no legal infirmity in the same, the court may grant such a decree to the aggrieved spouse. In *T. Sareetha v. T. Venkata Subbaiah*<sup>17</sup>, the appellant challenged the constitutional validity of this provision before the Andhra Pradesh High Court.

<sup>12</sup> *Kharak Singh*, ¶ 38. Similarly, in *Govind*, the Court stated, “Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing”. See ¶ 24.

<sup>13</sup> KAPUR & COSSMAN, *supra* note 7.

<sup>14</sup> *Supra* note 8, 124.

<sup>15</sup> *Id.*, 123.

<sup>16</sup> *Id.*

<sup>17</sup> AIR 1983 AP 356.

The appellant argued that Section 9 was in violation of Articles 14, 19 and 21 of the Constitution, inasmuch as it offended 'the guarantee to life, personal liberty and human dignity and decency'<sup>18</sup>. Justice Choudary held in his judgment that, Section 9 was indeed in violation of Article 21, as the grant of such a decree offended the right to privacy of the woman against whom such a decree is sought. The route through which the judge arrived at this conclusion is simple and straightforward. The Supreme Court had already established in *Govind* that individual privacy and dignity were protected by Article 21, with the rider that 'privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior'<sup>19</sup>. Thus, the task at hand was to examine the scope of the notion of privacy, and ask whether a decree of restitution of conjugal rights offended the same. While recognizing that privacy is a slippery concept, difficult to capture in a neat definition, in the judge's understanding, what was undeniable about any conception of privacy was its reference to the 'human body' and 'control over personal identity'.<sup>20</sup> Defined minimally, the right to privacy was 'bound to include body's inviolability and integrity and intimacy of personal identity'.<sup>21</sup> Thus, what Section 9 enabled the court to do through the decree of restitution of conjugal rights was in effect 'to coerce through the judicial process the unwilling party to have sex against that person's consent and freewill, with the decree holder'.<sup>22</sup>

Drawing on the privacy jurisprudence established in *Kharak Singh* and *Govind* on the one hand, and American case law on the other, the judge observed:

“[I]t should be held, that a Court decree enforcing restitution of conjugal rights constitutes the starkest form of Government invasion of personal identity and individual's zone of intimate decision. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity.<sup>23</sup>”

Shortly thereafter, the Delhi High Court considered the question of constitutional validity of Section 9 in the case of *Harvinder Kaur v. Harmander Singh Choudhry*<sup>24</sup>, where Justice Rohatgi made the [in]famous statement, that:<sup>25</sup>

<sup>18</sup> *Sareetha*, ¶ 17.

<sup>19</sup> *Govind*, ¶ 22.

<sup>20</sup> *Sareetha*, ¶ 24.

<sup>21</sup> *Id.*

<sup>22</sup> *Sareetha*, ¶ 17.

<sup>23</sup> *Sareetha*, ¶ 29.

<sup>24</sup> AIR 1984 Del 66.

<sup>25</sup> *Id.*, ¶ 34.

“Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14 have any place.”

The judgment did not deal with the specific privacy question raised by Justice Choudary in *Sareetha* at all, as any constitutional analysis was foreclosed by the statements quoted above. Instead the judge argued that Section 9 was not unconstitutional as the objective behind the provision was to protect the institution of marriage, and achieve reconciliation between estranged parties.

The Supreme Court got an opportunity to visit the question in *Saroj Rani v. Sudarshan Kumar Chadha*.<sup>26</sup> After reviewing the judgments and their respective reasoning in *Sareetha* and *Harvinder Kaur*, the judges observed that ‘there are sufficient safeguards in Section 9 to prevent it from being a tyranny’.<sup>27</sup> Like in *Harvinder Kaur*, even here the judges did not deal with the question of violation of right to privacy as framed in *Sareetha*, and held that restitution of conjugal rights ‘served a social purpose as an aid to the prevention of break-up of marriage’.<sup>28</sup>

Interestingly, both the Delhi High Court and the Supreme Court did address the issue of privacy, but not how Justice Choudary had framed the question. For the judges in *Harvinder Kaur* and *Saroj Rani*, the question of privacy was one of ‘marital privacy’ and not ‘individual privacy’ as was understood in *Sareetha*. The question was whether Section 9 of the Hindu Marriage Act authorized the court to cross the line separating the public and the private, and go into the sacred domain of marital relationship? The simple answer of the judges was that since Section 9 was meant for protecting the marital relationship, a decree granting restitution of conjugal rights did not offend privacy.

## ***B. SEX WORK AND THE RIGHT TO PRIVACY***

Sex work is regulated by the Immoral Traffic (Prevention) Act, 1956<sup>29</sup> which is primarily geared towards keeping the sex workers away from public places<sup>30</sup> such as places of worship, educational institutions, hotels, hospitals etc. But sex workers operating in private spaces are also within the purview of regulation of the Act. In *Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors.*<sup>31</sup> the petitioners

<sup>26</sup> (1984) 4 SCC 90.

<sup>27</sup> *Saroj Rani*, ¶ 15.

<sup>28</sup> *Saroj Rani*, ¶ 17.

<sup>29</sup> Hereinafter referred to as ‘the Act’.

<sup>30</sup> Section 2(h) of the Act defines ‘public places’ as any place intended for use by, or accessible to, the public and includes any public conveyance.

<sup>31</sup> (2004) 2 GUJ. L. REP. 1764; MANU/GJ/01110/2004.

challenged the constitutional validity of certain provisions of the Act. One of the grounds of the challenge was that Sections 7, 14 and 15 of the Act gave unguided and arbitrary power to the police to conduct search without warrant, in the homes of the sex workers. This power to conduct search without warrant, it was argued, resulted in rampant violation of the sex worker's right to privacy which they were entitled to as per Article 21 of the Constitution. The Gujarat High Court held:

“Prostitution is quite different from the protected sphere of private intimacy where expression of sexuality, not the commercial aspect, is at the core. Central to the character of the activity of prostitution is that it is indiscriminate and loveless. It is, accordingly, not the form of personal and intimate sexual expression that is penalised, nor the fact that the parties possess certain identity. The law aims at sex which is both indiscriminate and for reward. The privacy element falls far short of deep attachment and commitments to the necessarily few individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life. By making her sexual services available for hire to strangers in the market-place, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. It would be undoubtedly correct that this does not strip her of her right to be treated with dignity as a human being and to be respected as a person. But, it does place the prostitute or sex worker far away from the inner sanctum of protected privacy rights. We accordingly conclude that expectations of privacy of those involved in prostitution are relatively attenuated.<sup>32</sup>”

The portion of the judgment quoted above is self-explanatory. This is a rather explicit illustration of the point made earlier, that sex is not a quintessentially private matter. Sex is accorded the protection of privacy only if it is within the normative boundaries of heterosexual marriage, where sex is not loveless, not for reward and not indiscriminate.

Both *Kharak Singh* and *Govind*, built up the 'privacy argument' on the basis that the home and the family were natural sites, protected by the privacy principle. And the cases discussed above emphasized that marital privacy is the only legitimate form of privacy that the law protects. As I have tried to illustrate, there is an inescapable link between the two arguments. To invoke the argument of the inviolability of the private sphere is to implicitly drag in the issue of marital

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<sup>32</sup> *Sahyog Mahila Mandal*, ¶ 20.

privacy as well. What appears from the above judgments is that the ‘privacy argument’ does not imply a protected ‘space’ but a protected ‘institution’, which is the heterosexual patriarchal marriage. Privacy, thus operates on the one hand, by foreclosing any consideration for decisional autonomy in sex within marriage, while on the other hand, excluding all forms of non-normative sex from its protection.

### III. QUEER POLITICS AND THE PERILS OF PRIVACY

The petitioners in *Naz Foundation* argued that the ‘zone of privacy’ which was protected by Article 21 related to one’s private life and intimate relationships. It was not ‘marriage-centered’ but was envisaged as a ‘sphere of private intimacy and autonomy...[that allows]...persons to develop human relationships without interference from the outside community or from the State’.<sup>33</sup> But having argued that the constitutional protection of privacy went beyond the narrow spatial aspect, the petition asked for excluding adult consensual sex ‘in private’ from the purview of Section 377.

While the petitioners in *Naz Foundation* relied on the time tested strategic value of ‘right to privacy’ to challenge the constitutional validity of Section 377, there has been some discomfort with the notion of privacy itself, within those involved closely with the queer movement and the legal challenge. For instance, Arvind Narrain admitted that asking for decriminalization of same-sex sexual acts in private would have limited consequences for the wider queer community, for Section 377 would continue to be operative with respect to the public spaces.<sup>34</sup> This was a valid concern as the nature of harm and violence inflicted or enabled by Section 377 is mostly public in nature. In 2001, People’s Union for Civil Liberties, Karnataka (PUCL-K) published a report entitled ‘Human Rights Violations against Sexual Minorities in India’<sup>35</sup> and in 2003 it published ‘Human Rights Violations against the Transgender Community’<sup>36</sup>. Both documents, key milestones in the history of queer mobilization in India, documented instances of violence and harassment faced by gender non-conforming people. The common thread running through the violations documented – routine extortion, harassment, abuse, illegal detention, custodial rape – was that all of them took place in public spaces and all of them involved the ‘Police’. Further, as Narrain said, the ‘existing panoply of nuisance laws found in the IPC and state Police Acts’<sup>37</sup> would continue to be used

<sup>33</sup> Written Submission by the Petitioner (Available on file with the author).

<sup>34</sup> ARVIND NARRAIN, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7(2) HEALTH AND HUMAN RIGHTS, 2004, 142-164, 156.

<sup>35</sup> PEOPLE’S UNION FOR CIVIL LIBERTIES, HUMAN RIGHTS VIOLATIONS AGAINST SEXUAL MINORITIES IN INDIA, (2001).

<sup>36</sup> PEOPLE’S UNION FOR CIVIL LIBERTIES, HUMAN RIGHTS VIOLATIONS AGAINST THE TRANSGENDER COMMUNITY: A STUDY OF HIJRA AND KOTHI SEX WORKERS IN BANGALORE, (2003).

<sup>37</sup> *Id.*



to harass and prosecute queer people in the public spaces. Thus, it was important to ask, if the protection sought for homosexual sex in private would be available to those who were vulnerable in public on account of their sexuality or appearance.

Similarly, in a piece on the limits of any legal action in bringing about social change, Gautam Bhan wondered if an appeal to privacy would not be similar to an appeal to notions such as 'modesty'.<sup>38</sup> Bhan asked:<sup>39</sup>

“Have we not learnt anything from the two decades of the women’s movement that has sought to pierce the barrier of family privacy to expose the violence and silencing of sexuality that lies within? Are we now submitting to the same dictates? Tomorrow, will we be unable to speak of domestic violence within gay couples because we consider sexuality a ‘private’ affair?”

Bhan raises important questions about the strategic use of law by social movements and the risks that it entails. In this case, the risks of deploying the ‘privacy argument’ could feed into the patriarchal notion of the ‘private’ as a sphere beyond the reach of the State. The other risk was that if the ‘privacy argument’ was successful and if it influenced the nature of future legal claims or the direction of queer politics, the latter could run counter to feminist politics, which had so far been considered a natural ally in resisting heteronormativity and patriarchy. The dilemma of privacy as articulated by Bhan is in fact, the opposite of the dilemma that the women’s movement has had to confront in its engagement with law: whether to involve the State in every matter, and if yes, then to what extent, for every time the State is called upon to act on a particular issue (by legislating on it), it just gives more power of the State vis-à-vis the citizens.<sup>40</sup>

Another scholar, Oishik Sircar, expressed concern that by not being attentive to the fact that access to private space is a matter of privilege, the petition pushed out the *Hijras* from the scope of legal claims.<sup>41</sup> Sircar felt that this could lead to creation of normative standards of sex within the queer community, and result in a hierarchy between those who had sex in private (good sex) and those who would like to or could only have sex in public spaces such as parks, bath houses and public lavatories (bad sex).<sup>42</sup>

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<sup>38</sup> Gautam Bhan, *Challenging the Limits of Law: Queer Politics and Legal Reform in India* in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* (ARVIND NARRAIN & GAUTAM BHAN ed., 2005).

<sup>39</sup> *Id.*

<sup>40</sup> FLAVIA AGNES, *Protecting Women against Violence? Review of a Decade of Legislations, 1980-89*, *ECONOMIC AND POLITICAL WEEKLY*, April 25, 1992, WS 19 – 33.

<sup>41</sup> OISHIK SIRCAR, *Questions of Visibility*, IN *PLAINSPEAK*, Issue 2, 2008, available at [http://www.tarshi.net/asiasrc/plspk/2008\\_2/issue.asp](http://www.tarshi.net/asiasrc/plspk/2008_2/issue.asp) (Last visited on August 20, 2009).

<sup>42</sup> See GAYLE RUBIN, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (Carol Vance ed., 1984), for better appreciation of the argument made by Sircar.

Yet another concern related to the questions raised by Narrain and Sircar, is pertaining to the politics of visibility. The nature of oppression of queer people is such that they are either made invisible by discourses that discipline the boundaries of the ‘normal’ and the ‘natural’, thus erasing them from history and culture, or they are rendered hyper-visible as criminals/deviants by law, as caricatures of gender non-conformity by media or as carriers of deadly diseases by medicine. The peculiarity of both these aspects – invisibility and hyper-visibility – is that the queer people seldom have control over their own representations. In resistance to both these trends, queer activism has come to be centered on a project of self-definition and visibility. Protests that took place against the attacks on the film *Fire* by the Hindu Right, ‘Queer Pride Marches’ in major cities and discussions on sexuality in mainstream academic settings, are all informed by this politics of affirming and visibilising sexuality.<sup>43</sup> Privacy on the other hand has the dubious history of working against this politics of visibility. The Wolfenden Committee Report referred to earlier is usually hailed as heralding the modern approach to regulation of sex whereby, what consenting adults do in private is not to be the State’s business. Subsequent research has revealed however, that the Committee was more concerned with how best to *hide* homosexuality from the public view and in suggesting decriminalization of adult consensual same-sex sex in private, it ‘found the most efficient means by which to relegate sexual activity to the hidden world of privacy’.<sup>44</sup>

Against the background of such concerns and criticisms emanating from the activists and interested commentators alike, the next section looks at the *Naz Foundation* judgment and the way it has dealt with the notion of privacy, and assesses the openings or foreclosures it holds for the future of counter-heteronormative politics.

#### IV. ‘RIGHT TO PRIVACY’ IN *NAZ FOUNDATION*: COUNTER-HETERONORMATIVE POSSIBILITIES

The court in *Naz Foundation* stated that although the Indian Constitution did not have an enumerated right to privacy, it could nevertheless be derived from the freedoms guaranteed under Article 19(1) and the right to life and liberty under Article 21 of the Constitution.<sup>45</sup> This was just an affirmation of what has been held by the courts in a number of earlier judgments. The judgment

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<sup>43</sup> ARVIND NARRAIN, QUEER: DESPISED SEXUALITY, LAW AND SOCIAL CHANGE 7 (2004).

<sup>44</sup> Kate Gleeson, *Is the Wolfenden Report a Liberal Document?* (Paper presented at Australasian Political Studies Association Conference, 2007) available at <http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/feminism-and-gender-politics/gleeson.pdf> (Last visited on August 20, 2009); See also Emma Henderson, *Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalization Debates*, 20 MELB. U. L. REV. 1023 (1995-1996) for a discussion of how privacy can also work as a form of social control, meant to ‘disappear’ homosexual men and women.

<sup>45</sup> *Naz Foundation*, ¶ 31.

reviewed how the right to privacy is treated in international conventions, in the US and the relevant case law in India. But instead of a formulaic application of the principles derived from international human rights conventions and cases from foreign jurisdictions, to the case at hand, the judges took a different route. The judges foregrounded their application of the right to privacy in this case, with a discussion of the concept of 'dignity' and its presence in the Indian Constitution. The court observed:

“At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of dignity is *the autonomy of the private will and a person's freedom of choice and action*.<sup>46</sup> (Emphasis supplied)”

Tying up privacy with dignity is not really an innovative contribution of *Naz Foundation*. The connection had already been made in *Kharak Singh* and even the judges in *Govind* referred to the 'privacy-dignity claims'. It could be argued nevertheless, that the contribution of *Naz Foundation* is in defining the notion of dignity and further, it could be argued that the *Naz Foundation* judgment gave the right to privacy a firmer base in Indian constitutional jurisprudence. It is one thing to see the right to privacy as a derivative right, refracted from Articles 19 and 21, or as flowing from the 'common law right of a man'<sup>47</sup> as Justice Ayyangar put it in *Kharak Singh*. It is another matter altogether when the argument is that privacy must be respected and protected as a 'right', because it is enmeshed with fundamental constitutional values such as dignity and autonomy of the individual. But on the flipside, the failure of *Naz Foundation* is that although it builds on the notion of privacy from where *Govind* had left, the discussion on privacy is still open-ended and analytically weak. Even if the discussion of dignity mentioned above, is taken as a 'test' for privacy, it remains vague and abstract. Subsequent cases relying on this aspect of *Naz Foundation* alone can tell, as to how helpful it would be to frame legal claims in terms of the 'privacy-dignity test' discussed in *Naz Foundation*. In what follows, I look at specific aspects of the privacy analysis in *Naz Foundation* to see if it is helpful in framing counter-heteronormative legal claims.

### A. ZONAL AND DECISIONAL PRIVACY

Having established dignity as a constitutional value and having discussed the evolution of the right to privacy in India, the court concluded that 'privacy deals with persons and not places'.<sup>48</sup> Implying that the right to privacy is not only a claim to a space, free from State intervention, but that it also protects the

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<sup>46</sup> *Naz Foundation*, ¶ 26.

<sup>47</sup> *Kharak Singh*, ¶ 19.

<sup>48</sup> *Naz Foundation*, ¶ 47.

‘autonomy of the private will and a person’s freedom of choice and action’ referred to earlier. In the words of the court, right to privacy is both ‘zonal and decisional’. This is strongly reminiscent of Justice Choudary’s understanding of privacy in *Sareetha*, that is, privacy as decisional autonomy and control over one’s body and self. Such a view of privacy is less concerned with the spatial (home) or institutional (marital relationship) dimension of privacy, and more with affirming autonomy of the individual in matters pertaining to her.

The court went on to note how criminalizing homosexual acts has a devastating impact on the identity and sense of self of a certain section of the population. Relying on the ‘extensive material placed on record’<sup>49</sup> that testified to such impact, the court noted that- ‘The criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel [sic] and degrading treatment at the hands of the law enforcement machinery.’<sup>50</sup>

The implications of such a formulation of the scope of the right to privacy, is thus much broader than what the petitioners had asked for. Thus, the right to privacy not only protects same-sex sexual acts ‘in private’ from interference, but it also extends protection against any act of the State that offends the dignity and autonomy of a person, even beyond the private zone. Surely, this is not to argue that same-sex (or even opposite-sex) sexual acts in the public are protected. But, the significance of this part of the judgment is that it recognizes that although Section 377 seemed to be targeted against certain sexual ‘acts’ alone, it was used to harass people not on the basis of what they did but based on what they seemed to be. It thus opened up the possibility of challenging the provisions dealing with public nuisance in the IPC, the vagrancy laws and various state police Acts that are invoked to harass and prosecute gender non-conforming gay men, *Kothis* and *Hijras* on the ground of offending their right to privacy, among other rights.

## ***B. PRIVACY AS POSITIVE FREEDOM?***

While the distinction made between zonal and decisional privacy is significant in certain specific contexts, it does not resolve all the questions raised by the concept. Both zonal and decisional privacy are valuable in framing legal arguments for counter-heteronormative struggles. But, as we saw in the restitution of conjugal rights cases, the two conceptions of privacy can also play against each other. How do we decide, what value to attribute to either conceptions of privacy? Zonal privacy is important, for we do not want any interference from the State in certain matters. But to place zonal privacy above individual/decisional privacy is to validate the idea of the unregulated private domain that leaves the existing power relations and distribution of goods in the private domain untouched.

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<sup>49</sup> *Naz Foundation*, ¶ 50.

<sup>50</sup> *Naz Foundation*, ¶ 52.

On the other hand, the feminist experience with the abortion question shows that arguing for decisional autonomy as a matter of privacy, is not entirely helpful either. The feminist campaigns in the West in the sixties framed the issue of women's right to abortion as a right to (decisional) privacy, only to replace the privacy argument with the equality argument twenty years later. In *Roe v. Wade*<sup>51</sup>, the US Supreme Court held that the State may not interfere with a women's right to abortion, for the latter was protected by the constitutional right to privacy. This reasoning was subverted in later cases like *Maher v. Roe*<sup>52</sup> and *Harris v. McRae*<sup>53</sup>, where the court held that the right to privacy only guaranteed a woman's right to terminate the pregnancy; but it did not cast an obligation on the State to provide federal funding for it. The point of this detour into the abortion debate, is to suggest that even if we frame questions of autonomy as a matter of privacy, it only helps in preventing the State from infringing our autonomy to decide for ourselves, but it does not recognize the State's affirmative duty to provide conditions in which such decisional autonomy could be exercised or prevent others (non-State actors) from infringing such rights.<sup>54</sup>

Keeping in mind, the concern expressed by Bhan referred to in the previous section, we should ask: how may we theorise privacy so that it enables us to retain control over the private (both zonal and decisional), while at the same time enabling us to seek intervention of the State in certain matters, such as violence between couples?

One such way is to emphasize privacy as positive freedom (as well). Much of the modern privacy jurisprudence is based on the liberal value of freedom. JS Mill, for instance, regarded that the State could legitimately curb individual freedom, only if the act in question resulted in harm to others, or if the act was, what he called an 'other-regarding act'.<sup>55</sup> But freedom, even in Mill's understanding, is not merely freedom from interference but also entails being provided with freedom affirming conditions. Framing privacy as positive freedom does not deny the distinction between the public and the private, thus allowing us to defend personal privacy. But it involves urging the State to recognize its affirmative duty to ensure that the citizens enjoy genuine freedom, which would require the State to regulate the private sphere, in certain situations.

As the Indian case law on privacy shows, the right to privacy is usually seen as a negative freedom, that is, freedom from State interference; or as the courts put it most cases, the 'right to be let alone'. *Naz Foundation* does not add anything

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<sup>51</sup> 410 U.S. 113 (1973).

<sup>52</sup> 432 U.S. 464 (1977).

<sup>53</sup> 448 U.S. 297 (1980).

<sup>54</sup> Which is what the argument would be or should be, if we were to seek positive regulation of the private sphere by the State.

<sup>55</sup> JOHN STUART MILL, ON LIBERTY (1869).

new to the conception of privacy as negative freedom. What is emphasized in *Naz Foundation*, is the State's duty not to infringe privacy. But there is nothing in the judgment that could suggest that the State also has a duty to protect privacy. Thus, the theoretical understanding of privacy has remained incomplete and one is left with an 'either-or' situation between the feminist rejection of privacy as a 'masculinist' tool for shielding inequality in the home on the one hand and the invocation of privacy by queer rights groups in decriminalization cases such as *Naz Foundation*, on the other. One of the failings of *Naz Foundation* is that it does not attempt to fill this theoretical void, even when it had the opportunity to do so.

### *C. FREEING PRIVACY FROM THE MOORINGS OF NORMATIVE SEXUALITY*

Having discussed and illustrated how the legal determination of the private and the public is informed by notions of normative sexuality and marital privacy, it becomes important to ask if *Naz Foundation* has been able to transcend this association or has it succumbed to it? What is the scope of the protection that *Naz Foundation* gives to non-normative sex in private? Is it helpful in furthering a truly counter-heteronormative politics of sexuality? Or is it just like the idea of 'marital privacy' which protects some and excludes others?

The treatment of privacy in *Naz Foundation* is tremendously significant from a counter-heteronormative point of view, as it does not associate the right to privacy with either marriage or heterosexuality. To that extent, *Naz Foundation* is a radical judgment that breaks the association between privacy and normative sexuality. But it must be concluded that the scope of the protection that it gives to non-normative sexualities is limited on other counts. For one, quite obviously the discussion on privacy in *Naz Foundation* is particular to the question of same-sex sex alone, and has no direct implication for other non-normative sexualities. For instance, if one were to ask the hypothetical question: would the constitutional challenge in the *Mahila Sahyog Mandal case*<sup>56</sup>, be successful, if it were to rely on the privacy argument of *Naz Foundation* and argue that search without warrant in the homes of sex workers is a breach of the sex workers' right to (zonal) privacy? It is unlikely that such a challenge would be successful. Because the 'zone of privacy' that *Naz Foundation* recognized houses only 'intimate relations', a phrase frequently used in the judgment and the cases that it referred to. But the sex that sex workers engage in is not regarded as 'intimate' at all; in fact, it is 'loveless', 'indiscriminate', 'with strangers' and 'for money'.<sup>57</sup> Thus, at one level, it seems that if 'marriage' was the justification for respecting and protecting privacy earlier, post-*Naz Foundation*, it has been substituted by 'intimacy', in effect replacing one normative standard for sex with another.

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<sup>56</sup> *Supra* note 25.

<sup>57</sup> *Id.* This is borne out by the South African experience. In *National Coalition for Gay & Lesbian Equality v. Minister of Justice*, the South African Constitutional court held that the Sexual Offenses Act that criminalized homosexuality was unconstitutional. Four years

### D. BUSTING THE EXCLUSIVITY OF THE 'PRIVATE'

Possibly, the most significant contribution of *Naz Foundation* is that, while it strengthens the position of the 'right to privacy' in terms of legal or strategic value, it devalues the ideological significance of the 'private' at the same time. This is directly related to the concerns expressed by Bhan, referred to earlier. Bhan feared that an appeal to privacy in addition to foreclosing any attempt to involve the State in gay relationships, would end up reifying the private domain, identified by the patriarchal, heteronormative family. But, it must be remembered that the ideological hegemony of the 'family' is owing to its exclusivity. The boundaries of the 'family' or the 'private' are closely guarded by strict rules of admission based on caste, sex, gender etc. By opening up the claim to the revered and protected private space to people other than heterosexual, same-caste, monogamous, married couples, the *Naz Foundation* judgment has breached the exclusivity of the private.

### V. CONCLUSION

As mentioned at the beginning, the *Naz Foundation* judgment and the success of the 'privacy argument' in this case were not unexpected. But despite being predictable, the significance of *Naz Foundation* stands out when juxtaposed against the reluctance of the courts to accept and apply the 'privacy argument' in the restitution and sex work cases. But ultimately what 'value' we attribute to privacy should not be determined by the judicial reliance on it. It must be emphasized that the role of legal arguments is not strategic alone. Law and legal arguments also perform a discursive role, whereby they attribute meanings to acts, identities, individuals and groups. They impact the future of legal claims and influence the trajectory of social movements, the kind of issues that are foregrounded and the kind of alliances they form. The questions around the idea of privacy that this article mapped were informed by such an understanding.

I have argued in this article that the treatment of the 'privacy argument' in *Naz Foundation* has both limitations and radical possibilities. But the limitations should not lead us to conclude that the 'privacy argument' is not important. It is indeed to the contrary, as *Naz Foundation* has shown. However, it is important to acknowledge that any privacy-focused legal intervention could only have a limited impact and consequently, can play a limited role in any counter-heteronormative struggle. If anything could be concluded from the review and assessment that this article undertook, it is that no matter how well we frame the 'privacy argument', it

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later, in *Jordan v. State*, 2002 (11) BCLR 1117 (CC), the petitioners, who were sex workers, relied on the logic of National Coalition to challenge the constitutional validity of a statute that criminalized prostitution. The court refused to extend the privacy analysis of National Coalition to the sex workers on the ground that the latter were intimately related to the men with whom they had sex.

is always possible to not ask the most basic and fundamental question to any counter-heteronormative politics: the validity of the idea of 'natural' and 'unnatural' sex. The strongest evidence of the limited role of the 'privacy argument' in any counter-heteronormative politics, is that the court in *Naz Foundation* decriminalized same-sex sex between consenting adults, but left the ideas of 'natural' and 'unnatural sex' untouched and unexamined.