

PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

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ABSTRACT

Homosexuality is one of the most ancient debated issues in almost every society. Lesbian, gay, bisexual, transgender, and intersex people in India face legal and social difficulties not experienced by non-LGBT persons. The fifth Law Commission, had undertaken a comprehensive review of the more than a century, old IPC, and sought 'informed public opinion' on decriminalization of homosexuality and the punishment provided therefore, and decriminalization of consensual sexual act between adults in private for suggesting reforms in the provisions of section 377 of the Penal Code. The Supreme Court in its September 6, 2018 verdict ruled that its 2014 NALSA judgment granting legal recognition to transgender cannot be applied to lesbians, gays and bisexuals. The judgment of Supreme Court of India, however, declared that insofar as Section 377 criminalizes consensual sexual acts of adults in private, it is violative of Articles 14, 15, 19 and 21 of the Constitution. The court unanimously ruled that individual autonomy, intimacy, and identity are protected fundamental rights. In the light of the Supreme Court's verdict of September 6, 2018 the present paper analyses the constitutional rights of the LGBT community in India, understanding section. 377 Judicial pronouncement on this issue.

INTRODUCTION

Lesbian, gay, bisexual, and transgender people are more likely to experience intolerance, discrimination, harassment, and threat of violence due to their sexual orientation, than those that identify themselves as heterosexual. This is due to homophobia (the fear or hatred of homosexuality). Some of the factors that may reinforce homophobia on a larger scale are moral, religious, and political beliefs of dominant group. In some countries, homosexuality is illegal and punishable by fines, imprisonment, life imprisonment and even death penalty. Human sexuality is diversely experienced, and can be fixed or fluid. Male/female sexuality is blurred further with the existence of transgender, transsexual and intersex identified people. Heterosexuality should no longer be assumed; the assumption is called heterosexism¹. Although many societies have made significant strides in human rights advocacy, LGBT rights struggle to find universal acceptance. The fact that the universal declaration of human rights (UDHR), drafted in 1948, does not specifically include sexual orientation allows some people to consider LGBT rights debatable.

Now more and more people are openly expressing their sexual orientation, and organizing and demanding their rights. Because of the work of these groups and their allies, acceptance of LGBT rights around the world is growing, and governments in certain countries are beginning to legislate in favor of LGBT rights and anti-discrimination laws. Influential international human rights organizations such as Amnesty international Human right watch continue to run effective campaigns. In the coming years the major issues for LGBT rights on a global scale will be: eradicating persecution based on sexual orientation; protection in the law from hate crimes and hate propaganda; equal rights and privileges (marriage, common law partnerships, medical-decision making, wills and estates, parenting and adoption) and to work and educate others on homophobia and heterosexism.

¹ Chatterjee Subhrajit, "Problems Faced by LGBT People in the Mainstream Society: Some Recommendations", Vol 1, No.5, *International Journal of Interdisciplinary and Multidisciplinary Studies (IJIMS)* 317-331 (2014).

CONCEPT OF LGBTI

LGBTI is an initialism that stands for lesbian, gay, bisexual, and transgender. That initialism LGBTI is intended to emphasize a diversity of sexuality and gender identity based cultures and sometimes used to refer to non who is non-heterosexual or non-cisgender instead of exclusively to people who are lesbian, gay, bisexual, or transgender. To recognize this inclusion, a popular variant adds the letter Q for those who identify as queer and/ or questioning their sexual identity as LGBTI, recorded since 1960s. The initialism has become Mainstream as a self-designation, it has been adopted by the majority of sexual and gender identity based community centers and media in the United States, as well as some English speaking countries. Essentially it represents characters that are not attracted only to the opposite sex or identify themselves as their gender of birth. Terms and definitions: LGBT, LGBTQ, LGBTQA, TBLG these acronyms refer to lesbian, gay, bisexual, transgender, queer or questioning, and Asexual or ally.²

Asexual: This means a person who generally does not feel sexual attraction or desire to any group of people.

Ally: Typically any non-LGBT person who supports and stand up for the rights of LGBT people, though LGBT people can be allies, such as a lesbian who is an ally to a transgender person.

Bisexual: A person who is attracted to both people of their own gender and other gender. Also called “bi “.

Cisgender: Types of gender identity where an individual’s experience of their own gender matches the sex they were assigned at birth.

Gay: A person who is attracted primarily to members of the same sex. Although it can be used for any sex (e.g gay man, gay women, gay person), ‘lesbian’ is sometimes the preferred terms for women who are attracted to women.

Queer: An umbrella term sometimes used by LGBTQA people to refer entire LGBT community. An alternative that some people use to queer the idea of the labels and categories such as lesbian, gay, bisexual, etc. similar concept to the gender queer. It is important to note

² Lotta Samelius and Erik Wagberg, ‘Sexual Orientationand Gender Identity Issues in Development’, *A Study of Policy and Administration*, sida November,12 (2005).

that the word queer is an in group term, and a word that can be consolidate offensive to some people, depending on their generation, geographic location and relationship with the world.³

DEFINITIONS OF SEXUAL ORIENTATION AND GENDER IDENTITY

- *Sexual orientation*

Homosexual women and men (in the western world often referred to as gay men and lesbian women) have a sexual orientation towards persons of the same sex. Heterosexual women and men (in the western world often referred a straight person) have a sexual orientation towards persons of the opposite sex. Bisexual women and men have a sexual orientation towards a person of the same sex as well as opposite sex. Heterosexuality or Homosexuality and bisexuality are all regarded as “sexual orientations”. The term homosexual came into use by the second half of the nineteenth century. The term was used as a clinical description of men who displayed sexual desires to other men. In modern language the term homosexuality is equally ascribed to male as a female same sex sexual behavior. The homosexual identity developed in the late 19th and 20th centuries and diversified into a plurality of gay, lesbian, queer, etc. sexual orientation identities. All these identities are part of a modernity process. The identity creation process is an intricate and complex dynamics of relationship between the one who is placed in a category’s counteraction to re-negotiate the qualities and nature that is ascribed to the category.⁴

Among lesbian, gay and bisexual persons there is an ongoing debate of homo-and bisexual person’s best should be named. No definition is universally recognized, and the discussions are dynamic. Lesbian, gay, and bisexual have some cases consciously appropriate words that have been derogatory at one time and reevaluated them and changed negative words that often have been used to condemn, into positive self-definition words. An example of this can be found in South Africa and use of the word “Mpffie” a derogatory word defines a homosexual man. This word used to be only negative, but recently started to be used among homosexual man as a

³ Chuck Stewart, *The Greenwood Encyclopedia of LGBT Issues Worldwide*, 13 (Greenwood press, California, 2010).

⁴ *Ibid.*

positive word for themselves. In Sweden the same process is seen with the word “Bog” and “Flata” that used among homosexual man and women. Self-identified homosexual is another word that may have positive, natural or derogatory denominations when used to describe a person who has desires to have sexual contacts with a person of the same sex.⁵

➤ **Gender identity**

Gender should understand merely as a synonym for women and/or men. Contemporary gender research does not primarily focus on women and men, but how femininities and masculinities are constructed as unequal dichotomies, especially where distribution of (material) resource and power of central importance. The construction of gender is linked to societal process that involves inter alia class, sexuality age and ethnicity. Predominant gender affects the lives of LGBT and intersex persons as they do everyone else. LGBT and intersex people are often forget ten (or deliberately left out) in gender policy discussion. This is unfortunate as it reflect a hetero-normative attitude, by rendering lesbian, gay and bisexual persons and relations invisible, incomprehensible, and marginal. It is also limits the expansion of gender analysis and settles for a narrow outlook on gender and equality issues⁶.

➤ **Intersex Persons**

Intersex is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't fit the conventional definitions of being only male or only female. A person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside, or a person may be born with mosaic genetics, so that some of the person's cells have XX chromosomes and some of them have XY. A person may also be born with atypical genitals that appear to the onlooker to be in-between the usual male and female types.⁷ The standard protocol of treatment for these children is “gender corrective surgery” to alter the genitals of the person and thus ascribe them to one of the two recognized biological sex belongings; male *or* female. A small but growing intersex movement is fighting this practice, as it is discriminatory, disrespectful and often brings about physical as

⁵ Bina Fernandez and Humujinsi, “A Resource Book on Lesbian, Gay and Bisexual Rights in India”, *India centre for Human Rights and Law*, 44 (1999).

⁶ Arvind Narrain, ‘*Queer: Despised sexuality: Law and Social Change*’ 67 (Books for Change Publisher, Bangalore, 2004).

⁷ *Supra* note 2 at 15.

well as psychological harm. They strive to end gender corrective surgery on babies and children and make the practice regarded as a harmful traditional practice equal to FGM (Female Genital Mutilation) and thereby a denial, or violation of intersex persons' human rights. Intersex persons are extremely marginalized; their existence being virtually unknown by the society at large, and are often regarded as abnormal. Intersex persons are sometimes referred to as hermaphrodites. In this report the term Intersex is used for persons born with a physically or genetically indeterminate gender belonging.

LGBTI COMMUNITY

The LGBT community also referred to as the gay community, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality.⁸ LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, and conformist pressures that exist in the larger society. The term "pride" or sometimes *gay pride* is used to express the LGBT community's identity and collective strength; pride parades provide both a prime example of the use and a demonstration of the general meaning of the term. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of the LGBT community. Groups that may be considered part of the LGBT community include gay villages; LGBT rights organizations, LGBT employee groups at companies, LGBT student groups in schools and universities, and LGBT-affirming religious groups⁹. LGBT communities may organize themselves into, or support, movements for civil rights promoting LGBT rights in various places around the world.

⁸ Ruth Vanita, *Queering India: Same-sex love and Eroticism in Indian Culture and Society*, 33 (Routledge, Abingdon-on-Thames, 2001).

⁹ *Supra* note 6 at 70.

HISTORY OF LGBTI IN INDIA

The Arthashastra, an ancient Indian treatise on statecraft, mentions a wide variety of sexual practices which, whether performed with a man or a woman, were sought to be punished with the lowest grade of fine. While homosexual intercourse was not sanctioned, it was treated as a very minor offence, and several kinds of heterosexual intercourse were punished more severely. Sex between non-virgin women incurred a very small fine, while homosexual intercourse between men was sought to be censured by a prescription of a bath with one's clothes on, and a penance of "eating the five products of the cow and keeping a one-night fast" the penance being a replacement of the traditional concept of homosexual intercourse resulting in a loss of caste. The Mughal empire combined a number of the preexisting Delhi Sultanate laws into the Fatawa-e-Alamgiri, mandating a common set of punishments for Zina (unlawful intercourse), these ranged from 50 lashes for a slave, 100 for a free infidel, to death by stoning for a Muslim¹⁰. Though a Dutch traveler in Mughal Empire wrote that male homosexuality "is not only universal in practice among them, but extends to a bestial communication with brutes, and in particular with sheep.

The British Raj criminalised sexual activities "against the order of nature", arguably including homosexual sexual activities, under Section 377 of the Indian Penal Code, which entered into force in 1861. It was similarly instituted throughout most of the British Empire due to the Christian religious beliefs of the British colonial governments. In 1977 Shakuntala Devi published the first study of homosexuality in India. Whilst convictions under Section 377 were rare, with no convictions at all for homosexual intercourse in the twenty years to 2009, Human Rights Watch have said that the law was used to harass HIV/AIDS prevention activists, as well as sex workers, men who have sex with men, and other LGBT groups. The group documents arrests in Lucknow of four men in 2006 and another four in 2001.¹¹ Homosexual intercourse was a criminal offence until 2009 under Section 377 of the Indian Penal Code, 1860. This made it an offence for a person to voluntarily have "carnal intercourse against the order of nature."

¹⁰ Gautam Bhan and Arvind Narrain, *Because I Have a Voice: Queer Politics in India*, 22 (Yoda Press, Dehli, 2006).

¹¹ LGBT From Wikipedia, the free encyclopedia, available at <https://en.wikipedia.org/wiki/LGBT> (Last visited on 27 Feb. 2019).

TRANSGENDER IN INDIA

Transgender people are individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are ‘supposed’ to be. Transgender people have existed in every culture, race, and class since the story of human life has been recorded. The contemporary term ‘transgender’ arose in the mid-1990s from the grassroots community of gender-different people.¹² In contemporary usage, transgender has become an ‘umbrella’ term that is used to describe a wide range of identities and experiences, including but not limited to transsexual people; male and female cross-dressers (sometimes referred to as ‘transvestites,’ ‘drag queens’ or ‘drag kings’); inter-sexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.¹³ In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotypical gender norms. That includes people who do not self-identify as transgender, but who are perceived as such by others and thus are subject to the same social oppressions and physical violence as those who actually identify with any of these categories. Other current synonyms for transgender include ‘gender variant,’ ‘gender different,’ and ‘gender non-conforming.’ In India there are a host of socio – cultural groups of transgender people like hijras/ kinnars, and other transgender identities like – shiv-shaktis, jogtas, jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually¹⁴.

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities: like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy, and problems related to marriage and adoption. In 1994, transgender persons got the voting right but the task of issuing them voter identity cards got caught up in the male or female question. Several of them were denied cards with sexual category of their choice. The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social outcaste and many may end up begging and dancing.

¹² Manoj K jah, ‘Transgender Rights in India’, *IAS score,5 available at <http://iasscore.in/national-issues/transgender-rights-in-india>* (last visited on 27, 2019).

¹³ *Supra* note 6 at 72.

¹⁴ *Supra* note 8 at 39.

This is by all means human trafficking. Sometimes running out of all options to feed themselves, they even engage themselves as sex workers for survival.¹⁵ Transgenders have very limited employment opportunities.

Transgenders have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgenders in availing each facilities and amenities. They face similar problems in prisons, hospitals and schools. Most families do not accept if their male child starts behaving in ways that are considered feminine or inappropriate to the expected gender role. Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or woman. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child. Parents may provide several reasons for doing so: bringing disgrace and shame to the family; diminished chances of their child getting married to a woman in the future and thus end of their generation (if they have only one male child); and perceived inability on the part of their child to take care of the family. Thus, later transgender women may find it difficult even to claim their share of the property or inherit what would be lawfully theirs. Sometimes, the child or teenager may decide to run away from the family not able to tolerate the discrimination or not wanting to bring shame to one's family. Some of them may eventually find their way to Hijra communities. This means many Hijras are not educated or uneducated and consequently find it difficult to get jobs. Moreover, it is hard to find people who employ Hijras/TG people. Some members of the society ridicule gender-variant people for being 'different' and they may even be hostile. Even from police, they face physical and verbal abuse, forced sex, extortion of money and materials; and arrests on false allegations. Absence of protection from police means ruffians find Hijras/TG people as easy targets for extorting money and as sexual objects.

A 2007 study documented that in the past one year, the percentage of those MSM and Hijras who reported: forced sex is 46%; physical abuse is 44%; verbal abuse is 56%; blackmail for money is 31%; and threat to life is 24%. Hijras face discrimination even in the healthcare settings. Types of discrimination reported by Hijras/TG communities in the healthcare settings include: deliberate use of male pronouns in addressing Hijras; registering them as 'males' and admitting them in male wards; humiliation faced in having to stand in the male queue; verbal

¹⁵ *Supra* note 12 at 7.

harassment by the hospital staff and copatients; and lack of healthcare providers who are sensitive to and trained on providing treatment/care to transgender people and even denial of medical services. Discrimination could be due to transgender status, sex work status or HIV status or a combination of these¹⁶.

Social welfare departments provide a variety of social welfare schemes for socially and economically disadvantaged groups. However, so far, no specific schemes are available for Hijras except some rare cases of providing land for Aravanis in Tamil Nadu.¹⁷ Recently, the state government of Andhra Pradesh has ordered the Minority Welfare Department to consider 'Hijras' as a minority and develop welfare schemes for them. Stringent and cumbersome procedures and requirement of address proof, identity proof, and income certificate hinders even the deserving people from making use of available schemes. In addition, most Hijras/TG communities do not know much about social welfare schemes available for them. Only the Department of Social Welfare in the state of Tamil Nadu has recently established 'Aravanigal/Transgender Women Welfare Board' to address the social welfare issues of Aravanis/Hijras. No other state has replicated this initiative so far.

HIJRA: INDIA'S THIRD GENDER

India's Tran's women community, or Hijra, has been a part of the subcontinent for about as long as civilization has. With a recorded history of over 4,000 years and being mentioned in ancient texts, the Hijra community is a testament to the sexual diversity that is integral yet often forgotten in Indian culture. While Indian law recognizes transgender people, including Hijras, as a third gender, other South Asian countries, such as Bangladesh and Pakistan, have recognized only Hijras as the third gender. This is even when the larger LGBT community faces severe legal disadvantages and when same-sex sexual relations is illegal in the country¹⁸.

The Hijra community has been mentioned in ancient literature, the most known of which is the Kama Sutra, a Hindu text on human sexual behavior written sometime between 400 BCE and 200 CE¹⁹. Hijra characters hold significant roles in some of the most important texts of

¹⁶ *Supra* note 2 at 13.

¹⁷ *Supra* note 11.

¹⁸ *Supra* note 14 at 40.

¹⁹ *Ibid*.

Hinduism, including the Mahabharata and the Ramayana. One of the many forms of Shiva, a principal Hindu deity, involves him merging with his wife, Parvati, to become the androgynous Ardhanari, who holds special significance to many in the Hijra community. Hijras held important positions in court and various facets of administration during the Mughal-era India, from the 16th to 19th century. They were also considered to hold religious authority and were sought out for blessings, particularly during religious ceremonies²⁰.

However, when the Indian subcontinent came under colonial rule during the 19th century, British authorities sought to eradicate and criminalize the Hijra community through various laws. These laws were later repealed after India attained independence. While the Hijra community is still revered by society at large and celebrated in religious and spiritual ceremonies, they are often the victims of abuse and discrimination. Violence and hate crimes against the community are common, as is housing and other discrimination. The government has tried to address this by introducing bills for the protection of transgender persons, with prison terms and other punishments for those offending them²¹.

PROBLEMS FACED BY LGBTI PEOPLE

We do not yet live in a world free from homophobia, transphobia, prejudice and discrimination and we live in a world where majority wins and overpower the voices of the minority. In India, we need a space that listens to those who need to be heard. LGBT people are exactly that—a minority within our own homes, families, schools, institutions, communities, work places etc. Adding to their woes is Section 377 of the Indian Penal Code which criminalises Homosexuality. Many of these problems leave many among them feeling isolated, afraid, depressed and even suicidal. So a space for LGBT is needed to look at these specific issues not from a hetero-normative perspective or with pre-conceived binary notions. LGBT is in fact short for LGBTTQIIA.

²⁰ *Supra* note 15 at 7.

²¹ Manish Goutham, 'Caste and LGBT in India', *Roundtable India*, 12 available at https://roundtableindia.co.in/index.php?option=com_content&view=article&id=8203:caste-and-lgbt&catid=119:feature&Itemid=132 (last visited on March 1, 2019).

It includes, lesbian, gay, bisexual, transgender, transexual, queer, questioning, intersex, intergender and asexuals. An in-depth understanding of all these terms and the in the end of the acronym gives us the idea how profound sexuality really is. While there is still so much confusion regarding what constitutes gender and what is one's sexuality, media hold primary responsibility in being sensitive, empathetic and rational while dealing with LGBT issues.

Some major problems faced by LGBT people across the world are:

- Marginalization and Social Exclusion
- Impact of Family Reactions on LGBT Children: Conflict and Rejection
- Problem of Homelessness
- Problems of Homophobia
- Harassment of LGBT Students in Schools
- Psychological Distress
- Poor Economic Condition and Discrimination in the Workplace
- Drug Addiction of LGBT people
- Barriers to Care
- Challenges facing LGBT elders
- Victims of hate Crimes and Violence
- Problems of Criminalization
- Legal Injustice
- Problems of Terminology

UNDERSTANDING SECTION 377

Before understanding the legal implications of the legislative enactment particularly on a specific section of the society, we must first understand the reason for incorporation of the section and the reasons for its continued existence. *Section 377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.²²

Herein, the religious aspect will be underlined; moreover the early British law and the law applicable in early days of British era will be chartered.

Religious indoctrination

Sec 377 began in the Book of Leviticus, which forms part of the Jewish Torah and the Christian Bible's Old Testament. Chapter 20, Verse 13, provides as follows:

*“If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death ...”*²³

There is a striking resemblance between these rules of Jewish-Christian religious law, and parts of Islamic religious law that are condemned by human rights lawyers today, i.e., the death penalty for adultery, blasphemy or male-male sexual activity. The particular prohibition of “a man with mankind” is so tainted by its origins in Jewish-Christian religious law that, absent any showing of harm to Indian society caused by this behaviour, I would argue that it has no place in the criminal law of India's Secular Democratic Republic. It reflects the hostile reaction of an ancient Middle Eastern society to a perceived violation of a strict gender hierarchy (the man penetrated by the other was "acting like a woman"), and to a perceived threat to the expansion of the society's population (the two men were "wasting their sperm" by engaging in sexual activity with no procreative potential).²⁴

British understanding of ‘Buggery’

The rule was part of Christian religious law (canon law), administered by the Roman Catholic Church in Western Europe, until King Henry VIII rejected the authority of the Pope and established the Church of England. Part of this conflict amongst Christians was the decision of

²² Sec 377 Indian Penal Code, 1860.

²³ Leviticus, *Chapter 20: Verse 13* available at: <http://etext.virginia.edu/toc/modeng/public/KIjvLevi.html> (Visited on March 1, 2019).

²⁴ *Ibid.*

the Parliament of England, in 1533, to pass an Act entitled "The Punishment of the Vice of Buggery."²⁵

"Forasmuch as there is not yet sufficient ... Punishment appointed ... by the due Course of the Laws of this Realm, for the detestable and abominable Vice of Buggery committed with Mankind or Beast ... it may be enacted ... That the same Offence be from henceforth adjudged Felony ... and that the Offenders being hereof convict ... shall suffer such Pains of Death ... as Felons be accustomed to do ..."

"Buggery" refers to penile-anal intercourse (male-male or male-female), or penile-animal intercourse, as opposed to penile-vaginal intercourse, the "natural" form, because it might have procreative potential if contraception is not used.

Introduction in India

It was this Act of 1562, making "buggery" a criminal offence punishable by death, was exported, directly or indirectly, to as many parts of the British Empire as possible. In 1828, the 1562 offence was replaced, for England and for all parts of India in which British criminal courts had jurisdiction,²⁶ by a new version, with identical wording and an identical death penalty for England and India:

"Every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon".

In this draft, "buggery" had been replaced by two crimes under the heading "Of Unnatural Offences":

Sec 361. "Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine."

²⁵ Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia 4* (Asian Journal of Comparative Law, 2009).

²⁶ Alok Gupta, *This Alien Legacy: The Origins of 'Sodomy' Lies in British Colonialism*, 33 (Human Rights Watch, New York, 2008).

*Sec 362. "Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."*²⁷

The Indian Penal Code became an Act of the (British) Governor-General in (his all-British Legislative) Council on October 6, 1860.²⁸

The final version of sec 377 retained the caption "Unnnatural offences", but merged the two broad offences in the 1837 draft (presumably because consent was later deemed irrelevant) into one narrower offence of "carnal intercourse against the order of nature". This offence was narrower than the 1837 draft, because it required some form of penetration, as opposed to mere "touching". Compared with the 1828 offence of "buggery", sec 377 was potentially broader, depending on what interpretation the courts would give to "carnal intercourse against the order of nature". Sec 377, however, effected at least one improvement, even though it probably inspired no celebrations at the time. From at least January 1, 1862, it repealed (at least impliedly) the death penalty for "buggery" that existed in some parts of India, and substituted a maximum penalty of "transportation for life" to the Andaman Islands,²⁹ which was replaced by "imprisonment for life" in 1955.

Having been modified in Indian criminal law, what became of the offence of "buggery" in English criminal law? The 1828 version was repealed, along with the death penalty (from November 1, 1861), and replaced by the Offences against the Person Act, 1861 §61:

"Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or for any Term not less than Ten Years."

In 1885, "buggery" was supplemented by a new offence of "gross indecency" between male persons, which probably gave the English offences the same scope as the 1837 draft for India

²⁷ A Penal Code prepared by the Indian Law, Commissioners and published by command of the Governor General of India in Council 47 (1838, reprinted in 2002).

²⁸ Act No. 45 of 1860 (of the Legislative Council for India, not the UK Parliament).

²⁹ Law, Commission of India, 39th Report (July 1968), 4, 9, available at <http://lawcommissionofindia.nic.in/1-50/Report39.pdf>. (last visited on March 1, 2019).

(in the case of male-male sexual activity), by encompassing any touching for the purpose of "indecenty".

Aftermath of British Law on Sexual Offences

In 1895, the writer Oscar Wilde was convicted of "gross indecenty" and given the maximum sentence: two years in prison with hard labour. "Buggery" and "gross indecenty" were later united, under the heading "Unnatural Offences", as §12 and §13 of the Sexual Offences Act, 1956. The Wolfenden Committee's Report of 1957 led to the Sexual Offences Act, 1967 which decriminalised sexual activity between consenting men aged 21 or more in private. That age (the age of majority in 1967) was reduced to 18 in 1994,³⁰ and then to 16 (the same age as for male-female and female-female sexual activity) in 2000 finally, the Sexual Offences Act, 2003, a comprehensive reform of this area of English criminal law, abolished the "unnatural offences" of "buggery" and "gross indecenty". In short, after appearing in criminal statutes for most of the 470-year period from 1533 to 2003, England's equivalent of sec 377 no longer exists,³¹ and all offences that discriminate directly or indirectly on the basis of sexual orientation have been eliminated from English criminal law.³²

CONSTITUTIONAL RIGHTS OF LGBT'S PEOPLE IN INDIA

The fundamentals of the Indian Constitution are contained in its Preamble which secures to its citizens, justice, social, economic and political; Liberty of thought, expression, faith and worship; Equality of status and opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation It was to give effect to these objectives that the Fundamental Rights and the Directive Principles of State Policy were enacted in Part-III and Part-IV of the Constitution and though them the dignity of the individual was sought to be achieved and maintained.

³⁰ Sec 143, 145 Criminal Justice and Public Order Act, 1994.

³¹ Sec.69 of the 2003 Act creates a new offence of "intercourse with an animal". The offences of rape, sexual assault (sec.3), and sexual activity with a child (*sec.9*) apply both to different-sex and same-sex sexual activity.

³² R. Wintemute, *Sexual Orientation Discrimination in Individual Rights And The Law In Britain*, 491-533 (C. McCrudden & G. Chambers eds., 1994).

- Section 377 is violative of Article 14 being wholly arbitrary, vague and has an unlawful objective.
- Section 377 penalizes a person on the basis of their sexual orientation and is hence discriminatory under Article-15.
- Section 377 violates the right to life and liberty guaranteed by Article 21 which encompasses all aspects of the right to live with dignity, the right to privacy, and the right to autonomy and self-determination with respect to the most intimate decisions of human being.

In **National Legal Services Authority v. Union of India and Ors**,³³ this Court granted equal protection of laws to transgender person. There is therefore, no justification to deny the same to LGBT persons.³³

JUDICIAL PRONOUNCEMENTS ON THE ISSUE

Although not explicitly defined, “carnal intercourse against the order of nature” has been taken by the Indian courts in the intervening years to include anal sex, oral sex, and in some cases other non-procreative sexual acts, such as mutual masturbation.³⁴ Although heterosexual couples also partake in these acts, the weight of the law over the centuries has fallen on homosexual sex.³⁵ Even when such sex is consensual, the “voluntary” provision in the law makes it illegal.

Naz Foundation v. NCT Delhi

In *Naz Foundation v. NCT Delhi*, the Delhi High Court noted that the term “carnal intercourse against the order of nature” lacked a precise definition and discussed how Sec 377 has been subject to a variety of judicial interpretations.³⁶ Indian courts have interpreted the provision to

³³ In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 4 at 2.

³⁴ A. Gupta, *Section 377 and the dignity of Indian homosexuals*. Economic and Political Weekly. 18 November 2006.

³⁵ K. Bhardwaj. *Reforming Macaulay*. The Asian Age. 5 July 2009. www.asianage.com/archive/htmlfiles//OPED/Reforming%20Macaulay (last visited on March 2, 2019).

³⁶ *Naz Foundation v. NCT Delhi*, 2009 SCC Del. 1762, at p. 5.

apply to sex that is 'non-procreative' or 'imitative,'³⁷ or, more broadly, to acts of 'sexual perversity.' Specifically, Indian courts have held that Sec 377 outlaws oral sex, anal sex, and the penetration of other orifices, such as the space between the thighs or folded palms.³⁸ In sum, sec 377 has been understood to criminalize all sex that is not a penis penetrating a vagina on the ground that such acts are perverse, non-procreative and thus against the order of nature.³⁹

Sec 377 has been used to prosecute underage and non-consensual sex. In this case, the Indian Ministry of Home Affairs argued that Sec 377 should be left untouched because it had been invoked to prosecute cases of child sexual abuse and to address 'lacunae in the rape laws.' However, the plain language of Sec 377 is a blanket prohibition of "unnatural" intercourse and does not make consent or age of the person relevant as a defence.

In 2004, the High Court dismissed the petition on the ground that it failed to state a cause of action, as there was no plaintiff being prosecuted under Sec 377. The Court did not want to engage in what it perceived as a purely 'academic challenge to the constitutionality of the legislation.' Naz Foundation filed a review petition of the High Court's order, which the High Court dismissed.⁴⁰ The petitioners subsequently appealed the High Court's refusal to hear the matter to the Indian Supreme Court. The Supreme Court ordered the High Court to reconsider the challenge, holding that because *Naz v. NCT Delhi* was a PIL, a specific aggrieved plaintiff was not required, and the High Court's grounds for dismissal did not apply.

In 2009, the High Court reconsidered the issue of whether to decriminalize homosexuality. In its opinion, it read down Sec 377 to decriminalize consensual sexual acts between adults in private. The court accepted the public health argument that criminalizing homosexuality drove homosexual activity underground and affected homosexuals' ability to access services related to HIV/AIDS prevention and treatment. In its opinion, the court focused on constitutionally enshrined rights to dignity, privacy, equality, and non-discrimination. Further, it explored the nexus between dignity and privacy and the autonomy to make one's own sexual choice. The

³⁷ "Imitative" sex is sex that imitates a penis entering a vagina, such as penile penetration of the space between the thighs or folded palms.

³⁸ *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 SCC 1, 39-40.

⁴⁰ *LGBT Section377*, Lawyers Collective, <http://www.lawyerscollective.org/vulnerablecommunities/lgbt/section-377.html> (last visited on March 2, 2019).

court agreed that Sec 377 disproportionately penalized homosexuals because their sexual acts were frequently interpreted as ‘carnal intercourse against the order of nature’. In sum, the High Court concluded that Sec 377 discriminated against homosexuals and violated their constitutional right to express a core aspect of their personal identities.⁴¹

Without annulling Sec 377, it ‘read down’ the penal provision to exclude from its ambit consensual private sexual behaviour by adults on the basis that it grossly violates constitutional provisions that prohibit discrimination (Article 15) and that guarantee the right to equality (Article 14) and the right to life and liberty (Article 21).

Suresh Kumar Koushal v. Naz Foundation

The government did not appeal *Naz v. NCT Delhi*. Instead, the High Court's decision was appealed by astrologer Suresh Kumar Koushal, religious individuals, and faith-based groups, including Hindus, Muslims, and Christians. As legal practitioner and scholar Vikram Raghavan notes, the appellants “shared no particular religious or ideological creed” and were united only in their belief that homosexuality is an abomination. Many of the appellants were not even parties to the Delhi High Court's decision in *Naz v. NCT Delhi*; “when asked about their standing, they claimed that homosexuality hurt their religious sentiments” or that it “was against public morality.” The Supreme Court gave special leave to every appellant, even though none of the primary parties before the High Court in *Naz v. NCT Delhi* (that is, neither the Union of India, the Delhi government, nor Naz Foundation) wanted to appeal the matter.

The Supreme Court in *Koushal* determined that because of the presumption of constitutionality for every piece of legislation enacted by Parliament, courts must exercise judicial restraint when asked to read down legislation. The Court reasoned that the abuse of Section 377 by police officers and others in power to target and harass innocent queer people did not affect the constitutionality of the law, as legislation is not unconstitutional simply because it is misused. The Supreme Court also reasoned that the High Court relied too heavily on international precedent while failing to adequately consider whether such precedent should apply in the Indian context. For these reasons, the Supreme Court upheld Sec 377 as constitutional and refused to read down the law to decriminalize homosexuality. The Court stated, however, that Parliament was free to amend or eliminate Sec 377 as it deemed fit.

⁴¹*Naz Foundation v. NCT Delhi*, 2009 SCC Del. 1762, at p.8

The Court's reasoning in *Koushal* has significant jurisprudential and technical shortcomings. For example, the *Koushal* bench inadvertently cited cases where the Court had overturned colonial-era laws to support its position that the Court had historically afforded great deference to such laws, including Sec 377. Further, the *Koushal* bench's rejection of foreign precedent appears contrary to existing Indian jurisprudence that does engage with foreign and comparative law. Additionally, many have criticized the Court's adherence to judicial restraint as hypocritical given its activist history in PILs.

Though the Supreme Court of India did not comment on the fears of the appellants in *Koushal v. Naz* that the Delhi High Court ruling promotes the social evil of homosexuality, it nevertheless overruled *Naz v. Delhi* on the basis that Sec 377 represents the "will of the people." Chiding the Delhi High Court for its "anxiety" to protect the "so-called rights" of a "miniscule fraction" of the Indian population (in reference to homosexual persons)," the Supreme Court maintained that the penal provision merely regulates certain sexual *conduct* regardless of gender identity and sexual orientation. Thus, according to the Supreme Court, the constitutional provisions of India that prohibit discrimination and guarantee the right to equality and the right to life and liberty do not apply to the examination of Sec 377.

The Supreme Court arrived at this conclusion on the basis that no changes have been made to Sec 377, even though Indian Parliament has amended the IPC over thirty times since independence in 1947 and the adoption of the IPC in 1950. Moreover, Parliament has not acted on the 2002 decision of the Law Commission of India's recommendation to delete the penal provision. Thus, the Supreme Court applied the principle of "presumption of constitutionality" and observed that it must uphold the constitutionality of Sec 377 in order to maintain "separation of powers ... out of a sense of deference to the value of democracy that parliamentary acts embody."

Promptly after the Supreme Court issued the opinion in *Koushal*, both the government of India and decriminalization advocates filed a review petition calling for immediate technical review of *Koushal*, based on errors of law on the face of the record. Unfortunately, the Supreme Court rejected their review petition. Decriminalization advocates subsequently filed a curative petition with the Supreme Court. Instead of calling for immediate technical review, this petition alleged "that there was a larger, gross miscarriage of justice that had to be corrected." As of the

writing of this Article, the Supreme Court has not yet issued a decision on the merits of the curative petition.⁴²

In the *Suresh Kumar Kaushal* case it was held that the term carnal intercourse cannot be ‘culled from past reported cases.’ Acts that fall within the ambit of this section can only be determined with reference to the act itself and the circumstances in which it is executed but it is difficult to prepare a list of acts covered by this section. This section would be applicable irrespective of age and consent, thereby merely identifying certain acts which constitute the offence regardless of gender identity or orientation.

Therefore, it can be seen that the concept of carnal intercourse doesn’t have a particular definition and thereby not being adequately explained enough to distinguish from sexual intercourse.

Navtej Singh Johar v. Union of India

This a landmark decision of the Supreme Court that has decriminalized all the consensual sex among adults in private including Homosexual sex. Certain portion of Section-377 relating to sex with the minors, non-consensual sexual acts and bestiality remain in force.

Previously the verdict given by the two bench judge was against LGBT community but this time Supreme Court with the five constitutional bench of judgment made it possible for the LGBT community to have the fundamental rights which they are previously deprived from.⁴³

CONCLUSION

The framers of the Code, obviously, relying upon the then prevailing sexual mores and the common law offence of buggery, decided to criminalize ‘carnal intercourse against the order of nature’ and to subject its perpetrators to imprisonment for life or for a term up to ten years with fine. Rationale and propriety of ‘unnatural offences’, including buggery and bestiality, criminalized under section 377 of the Code has always been doubted. Gays and lesbians ‘rights

⁴² Suresh kumar koushal v. Naz Foundation (2013) civil appeal no.10972.

⁴³ Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 121 of 2018.

activists have been vocal in assailing it, inter alia, on the ground that it unreasonably restricts their sexual autonomy and orientation, brings them stigma, social as well as legal, for their 'choice' and subjects them to social ignominy and contempt.

India is a largest democratic and developing country which consists of a minority of transgender people. The rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprise 7-8% of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity. A person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed with a stigma.

The Supreme Court's verdict on 6th September 2018, has declared that a hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. In penalizing such sexual conduct, the statutory provision violates the Constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their Constitutional rights to lead fulfilling lives. Section 377 of the Penal Code, in so far as it criminalizes consensual sexual conduct between adults of the same sex, is unconstitutional. Member of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution. Member of the LGBT community are also entitled to the benefit of an equal citizenship, without discrimination and to the equal protection of law.