

**National University of Advanced Legal Studies, Kochi**



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THE TOPIC

**THE STATE OF LGBTIQ+ RIGHTS IN INDIA AND TAKING THE  
NARRATIVE FORWARD: LIVING FREE AND EQUAL**

Under The Guidance and Supervision Of

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## **CERTIFICATE**

This is to certify that **DIANA LAURENCE PAUL**, Reg. No: **LM0120021** has submitted her dissertation titled, “*The state of LGBTIQA+ rights in India and taking the narrative forward: Living Free and Equal*”, in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that, the dissertation submitted by him is original, bona-fide and genuine.

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## **DECLARATION**

I declare that this dissertation titled, “*The state of LGBTIQA+ rights in India and taking the narrative forward: Living Free and Equal*”, researched and submitted by me to the National University of Advanced Legal Studies in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of Prof (Dr)Mini.S is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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DIANA LAURENCE PAUL

## LIST OF ACRONYMS & ABBREVIATIONS

1. AIDs:	Acquired Immune Deficiency Syndrome
2. AIR:	All India Reporter
3. Apr.:	April
4. Cri. LJ:	Criminal Law Journal
5. cl.:	Clause
6. Cir.:	Circuit
7. Dr.:	Doctor
8. DB:	Division Bench
9. DEL:	Delhi
10. DLT:	Delhi Law Times
11. ECHR:	European Court of Human Rights
12. Feb.:	February
13. Govt.:	Government
14. Hen.:	Henry VIII
15. IPC:	Indian Penal Code, 1860
16. ILO:	International Labour Organisation
17. Lah.:	Lahore
18. LR:	Law Review
19. LGBTQA:	Lesbian Gay Bisexual Transgender Queer Asexual
20. Mad.:	Madras
21. Mar.:	March
22. NALSA:	National Legal Services Authority
23. No.:	Number
24. Ors.:	Others
25. P.:	Page
26. Para:	Paragraph
27. POCSO:	The Protection of Children from Sexual Offences Act, 2012
28. Prof.:	Professor
29. SA:	South Africa

30. Sect.:	Sector SCC Supreme Court Cases
31. SCR:	Supreme Court Reporter
32. STDs:	Sexually Transmitted Disease
33. &:	And
34. U.D.H.R.:	Universal Declaration of Human Rights
35. UN:	United Nation
36. U.O.I:	Union of India
37. U.P:	Uttar Pradesh
38. U.S.A	United States of America
39. v.:	Versus
40. WHO:	World Health Organization
41. W.P:	Writ Petition

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# **1. CHAPTER -I**

## **INTRODUCTION**

The term "lesbian, gay, bisexual, and transgender, gender diverse, intersex, queer, asexual, and questioning (LGBTIQ+)," which is more commonly abbreviated as LGBT, refers to a broad coalition of groups that are diverse in terms of gender, sexual orientation, race/ethnic origin, and socioeconomic status. The communities encompassed by this widely used umbrella term face distinct gender identity and sexual orientation issues. The LGBT community represents the various aspects of gender, sexuality, romance, and other spectrums, and diversity, self-love, acceptance, courage, and sympathy are humane virtues. India is the homeland and birthplace of the Hijra community, a term that translates as transgender. *This community was once revered and considered holy messengers, and their blessings were sought on significant occasions such as marriage and childbirth. The community is now treated as beggars, and the term Hijra is frequently used as a derogatory slur.*<sup>1</sup> The broad concepts of sexual orientation and gender identity are critical for comprehending the term LGBTIQ+ in its entirety. In developed and developing countries, LGBTIQ+ is referred to by a variety of acronyms and terms. The wide range of terms and languages related to them are given below.

- sex
- bodies
- gender
- sexuality
- sexual attraction
- experiences
- legal and medical classifications

It is critical to acknowledge the complexity of people's lived experiences and recognize that the aspects mentioned above may apply differently and at different times throughout an individual's

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<sup>1</sup> *India and the Evolution of LGBTQIA+ Rights*, LAW EXPRESS (Last accessed on, July 29, 2021, 10:45 AM), <https://thelawexpress.com/india-and-the-evolution-of-lgbtqia-rights>.

life.<sup>2</sup> One could argue that the focus on diversity within sex, gender, and sexuality brings LGBT communities together. The numerous terms associated with LGBTIQ+ can be classified into the following categories:

1. Bodies, gender, and gender identities.
2. Sexual orientations
3. Societal attitudes/issues

### **Bodies, gender, and gender identities**

The term gender refers to the social characteristics of people that have historically been classified according to an assumed difference between the sexes. Gender, as a component of the social-cultural context, conveys social meaning in the form of femininity and masculinity. Gender dictates how an individual expresses their gender through signs and signals. Gender norms define an individual's clothing, physical appearance, as well as behavior, and mannerisms. Numerous ways in which we deviate from these narrowly defined and rigid gender norms. Certain women may feel more masculine, while certain men may feel more feminine, while others may feel neither or reject gender entirely.

**Cisgender/cis:** When a person's gender corresponds to the sex they were assigned at birth, the term "gender identity" is used.

**Gender binary:** The spectrum-based division of gender into two categories, man and woman, according to biological sex.

**Gender identity:** Refers to how people perceive and describe themselves – whether they are male, female, a mix of both, or neither.

**Gender pronouns:** These are how a person chooses to publicly express their gender identity by using a pronoun, whether gender-specific or gender-neutral. (GLHV, 2016). It includes the more traditional and gender-neutral pronouns such as they, they are, ze, hir, and others.

**Genderqueer/non-binary gender:** Gender-neutral and androgynous are terms used to describe people who do not identify as solely male or female and may express themselves in ways other

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<sup>2</sup> National LGBTI Health Alliance. (2013a). *LGBTI Cultural Competency Framework: Including LGBTI people in mental health and suicide prevention organisations*. Newtown: LGBTI Health Alliance (Last accessed on July 29 1 P.M)) [www.lgbtihealth.org.au/sites/default/files/Cultural%20Competency%20Framework.pdf](http://www.lgbtihealth.org.au/sites/default/files/Cultural%20Competency%20Framework.pdf).

than woman or man. The two terms have slightly different meanings. Some people use them interchangeably, but not everyone thinks they are the same thing.

Gender questioning is not always an identity, but it is sometimes used by people unsure of their gender or transitioning. This is because their gender identity shifts over time.

**Gender dysphoria:** Gender dysphoria was previously referred to as "gender identity disorder," It refers to psychological distress caused by a mismatch between an individual's gender identity and the sex assigned at birth. Gender dysphoria affects people of all gender identities.

**Intersex:** Individuals with anatomical, chromosomal, and hormonal characteristics that differ from medical and conventional understandings of male and female bodies are transgender. (Sex Discrimination Amendment Act (Sexual Orientation, Gender Identity, and Intersex Status) 2013 (Sex Discrimination Amendment Act (Sexual Orientation, Gender Identity, and Intersex Status) 2013) (Cth). Intersex people can be "neither fully female nor fully male," "a combination of female and male," or "neither fully female nor fully male."<sup>3</sup>

**Sex:** Anatomical and physiological chromosomal and hormonal characteristics make up a person's sex. Sex categorizes people as male or female at birth based on their external anatomical features. Although sex is not always explicit, some people are born with intersex characteristics, and anatomical and hormonal features can change over time.

**Sistergirl/Brotherboy:** These are terms used in the aboriginal and Torres Strait Islander communities to describe their cultural identities and roles. *Sistergirl* is a term used to describe feminine spirit people who were born male. 2016 (GLHV). Brotherboys are Indigenous people who are born female but have a male spirit. (GLHV, 2016).

**Transgender/Trans/Gender diverse:** People whose internal gender identity differs from those typically associated with the sex, regardless of whether their internal gender identity is outside or within the gender binary. Transvestite/Crossdresser, Non-, Pre-, and Post-Op Transsexuals, and those who identify as Trans/Transgender, apart from, or in addition to binary Male and Female, may use "Trans" as an abbreviation shortcut for the entire non-conforming to birth sex transgender spectrum of Transvestite/Crossdresser, Non-, Pre-, and Post-Op Transsexuals, and those who identify as Trans/Transgender. Transgender people can identify as female, male, or both. They can

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<sup>3</sup> AIZURA ET. AL., GENDER QUESTIONING 69 (Melbourne: Trans Melbourne Gender Project, GLHV, & Rainbow Coalition, 2010).

choose not to identify as either gender; they can move freely between the gender binary or reject it entirely.

People who identify as transgender/trans or gender diverse may choose to live their lives with or without modifying their bodies, clothing, or legal status and with or without medical treatment or surgery. Man, woman, transwoman, transman, trans guy, transmasculine, transfeminine, trans, gender-diverse, genderqueer, gender-non-conforming, non-binary, poly gendered, pan gendered, and many other terms are used to describe transgender/trans or gender diverse people (see Aizura et al., 2010).

The sexual orientations of transgender/trans or gender diverse people are the same as the rest of the population. The sexuality of transgender/trans or gender various people is referred to in terms of their gender identity rather than their sex. He, she, they, hu, fae, ey, ze, zir, and hir are all pronouns that transgender/trans or gender diverse people can use. It is disrespectful and harmful to use incorrect pronouns to refer to or describe transgender/trans or gender diverse people.

### **Sexual Orientations**

**Aromantic/aro:** Someone who does not find romantic attraction appealing. Aromatic people may or may not consider themselves to be asexual.

**Asexual/ace:** A sexual orientation describes people with little to no sexual attraction in or outside of relationships. People who identify as asexual can have romantic interests at any point along the sexuality spectrum. In asexual people, a lack of sexual attraction does not always imply a lack of libido or sex drive.

**Bisexual:** An individual attracted sexually, romantically, or emotionally to people of the same gender and people of another gender. Bisexuality does not presuppose the existence of only two genders. (2017, Flanders, LeBreton, Robinson, Bian, and Caravaca-Morera)

**Gay:** A person, usually a man, is sexually and romantically attracted to other men of the same gender. Additionally, the term "gay" can refer to being sexually and romantically attracted to other women.

**Heterosexual:** A person who is attracted to people of the opposite gender sexually and emotionally.

**Lesbian:** A woman establishes her primary loving and sexual relationships with other women when she identifies as a woman.

**Pansexual:** A person who, regardless of gender identity, is sexually and romantically attracted to everyone.

**Queer:** Sometimes used as an umbrella term to describe a range of sexual orientations and gender identities. Although once used as a derogatory term, now it is used by some (often young people) to describe their gender identity or sexual orientation outside the heteronormative binary.

**Sexual orientation:** The term sexual orientation refers to an individual's sexual and romantic attraction to another person. This can include but is not limited to heterosexual, lesbian, gay, bisexual, and asexual. However, it is essential to note that these are just a handful of sexual identifications – the reality is that there is an infinite number of ways in which someone might define their sexuality. Further, people can identify with asexuality or sexual orientation regardless of their sexual or romantic experiences. Some people may identify as sexually fluid; their sexuality is not fixed to any one identity.

### **Societal attitudes/Issues**

**Cisnormativity:** Cisnormativity is the belief that everyone, or nearly everyone, is cis-gendered and will identify with the gender assigned to them at birth. The existence of transgender/trans and gender-diverse people is erased by cisnormativity.

**Heteronormativity:** The societal normalization of a belief that heterosexual relationships are the only natural, normal, and legitimate expressions of sexuality and relationships, while other sexualities or gender identities are unnatural and dangerous to society. (GLHV, 2016).

**Heterosexism:** Describes a social system based on the assumption that everyone is heterosexual and that heterosexuality is inherently superior and normal. Homophobic and transphobic prejudices, violence, and discrimination against non-heteronormative sexualities and gender identities, as well as intersex varieties, are all fueled by heterosexism (Fileborn, 2012; GLHV, 2016).

**Homonormativity:** Within the queer community, homonormativity refers to the privileging of specific people or relationships (usually cis-gendered, white, gay men). This term also implies that



LGBTIQA+ people will conform to mainstream, heterosexual culture, such as accepting marriage and monogamy as natural and normal.

**Homophobia and biphobia:** Fear, hatred, intolerance of – or discomfort that exist about people who are not heterosexual.

**Misgendering:** When a person's gender identity is not reflected in how they are described or addressed. (GLHV, 2016). This can include incorrect pronoun usage (she/he/they), familial titles (father, sister, uncle), and other words with traditionally gendered meanings (pretty, handsome, etc.). It is best to inquire about a person's preferred words at a convenient time.

**Transphobia:** Prejudices and stereotypes about transgender/trans and gender diverse people cause fear, hatred, and discomfort.

Within the LGBTIQA+ communities, there are significant differences. Respect and acknowledgment for how people describe their genders, bodies, and relationships is demonstrated by understanding LGBTIQA+ terminology and inclusive language (National LGBTI Health Alliance, 2013b). In organizations that use inclusive languages, such as schools, workplaces, and services, people feel more welcome. It is worth noting that there can be many disagreements about terminology and language both within and outside the LGBTIQA+ community (GLHV, 2016).

On September 16, 2006, at a press conference in New Delhi, the following open letter was released in support of repealing Section 377 of the Indian penal code, addressed to "the government of India, members of the judiciary, and all citizens.": "To create a truly democratic and plural India, we must all work together to combat laws and policies that violate human rights and restrict fundamental freedoms." This is why concerned Indian citizens and persons of Indian ancestry urge removing section 377 of the Indian penal code, an 1861 colonial-era statute that criminalizes passionate love and private, consenting sexual actions between adults of the same sex. This old, outdated, and heinous law has served no useful purpose in independent India, as it did in the past. Due to widespread intolerance and abuse, millions of gay and bisexual men and women have been forced to live in fear and secrecy, at great personal and familial cost to their communities. It is especially disgraceful that homophobic officials have recently used Section 377 to suppress the work of legitimate HIV prevention organizations, leaving gay and bisexual men in India even more vulnerable to HIV infections. Such violations of human rights would be deplorable in any modern society. Still, they are especially so in India, founded on the principle that all people have equal

access to fundamental rights, regardless of their background. Section 377, on the other hand, presumptively treats those who love people of the same sex as criminals, which is a violation of fundamental human rights, particularly the rights to equality and privacy, which are enshrined in our constitution as well as the binding international laws that we have embraced, such as the international covenant on civil and political rights.

Let us never forget the indisputable truth expressed in the Universal Declaration of Human Rights' first article, which states that "everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind." The repeal of Section 377, which is currently being challenged in the Delhi high court, will bring us closer to our goal of achieving a just, pluralistic, and democratic society. In India, there should be no discrimination based on sexual orientation. This cruel and discriminatory law should be repealed in the name of humanity and our constitution.

*Sincerely*

... ..<sup>4</sup>

The LGBT Voices for the first time by the Indian judiciary when the Delhi high court decided in favor of homosexuals. Despite the uproar, the most surprising aspect of the Delhi High Court's decision in Naz Foundation v. Union of India<sup>5</sup> is the case's conclusion: that law has no place in the bedroom of consenting adults engaging in an activity that causes no harm to anyone.<sup>6</sup> However, despite being the custodian and protector of all people's fundamental rights, including minorities, India's supreme court chose to show the polar opposite of compassion by passing the ball to a majoritarian Parliament.<sup>7</sup> The LGBT community's fight for fundamental rights continues, but many homosexuals have given up hope and returned to the closet. The LGBT community's struggle for basic rights continues, but many homosexuals have given up hope and returned to the closet.

## **1.2 SECTION 377 & LGBT ACTIVISM IN INDIA**

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<sup>4</sup>Amartya Sen, 'Backing gay rights', Times of India, (Sep 17 2006) [http://orinam.net/377/wp-content/uploads/2013/12/377\\_OpenLetter\\_AmartyaSen.pdf](http://orinam.net/377/wp-content/uploads/2013/12/377_OpenLetter_AmartyaSen.pdf).

<sup>5</sup> Naz Foundation v. Union of India 160 (2009) DLT 277 (129).

<sup>6</sup> S.377 reads: 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 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.

<sup>7</sup> Suresh Kumar Kaushal V. Naz Foundation, (2014)1 SCC 1.

Section 377 of the Indian Penal Code, 1860, which conceptualized 'queer' as unnatural, was India's first spark for emerging queer political consciousness. It is worth noting that supposedly foreign law has survived for over 154 years, defying both anti-colonial resistance and the establishment of a democratic India that guarantees Fundamental Rights to its citizens.<sup>8</sup> For the first time, homosexuality was explicitly criminalized as 'unnatural sex,' with a severe punishment ranging from life imprisonment to death. In 1837, Lord Macaulay drafted the Indian Penal Code. Even so, it was not until 1860 that it became law.<sup>9</sup> While homosexuality was criticized in pre-colonial texts such as the Manu smriti, it is unclear whether the punishment sought to punish homosexuality per se or more general sexual transgression or caste norm violations.<sup>10</sup> This is enforced by laws such as the notorious Section 377 of the Indian Penal Code and the Criminal Tribes Act, 1871, which came into effect on September 6, 2018. Section 377 was declared unconstitutional by the five-judge panel because it criminalized two adults of the same sexual orientation having consensual sexual intercourse, which was a matter of utmost privacy. The court overturned the bench's decision in Suresh Kumar Kaushal v. Naz Foundation.<sup>11</sup> The Supreme Court cited its own decision in National Legal Services Authority v. Union of India,<sup>12</sup> in which it stated that "gender identity is intrinsic to one's personality, and denying it would be a violation of one's dignity." Discriminating against LGBT people because they are a minority of the population would violate their fundamental right to privacy.

### **1.3 EMERGENCE OF QUEER ACTIVISM IN INDIA**

The struggle against this marginalization of homosexuals gave birth to a queer political consciousness forged in the crucible of legal battles. Activist publications such as the 'Less the

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<sup>8</sup> Petersen, Carole J: *Hong Kong and the Unprecedented Transfer of Sovereignty: Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 Loyola Los Angeles INT'L L.330 337-340 (1997).

<sup>9</sup> CORRINNE LENOX & MATTHEW WAITES, HUMAN RIGHTS,SEXUAL ORIENTATION AND GEDNER IDENTITY IN THE COMMON WEALTH 83-124 (Human Rights Consortium, Institute of Commonwealth Studies, London,2013).

<sup>10</sup> Queen Empress V. Khairati I.L.R. 6 All 205.

<sup>11</sup> *Supra* note 7, at 114.

<sup>12</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

Gay Report' (1991), 'Campaign for Lesbian Rights' (CALERI Report) 1997), 'Humjinsi' (1999), and the PUCL-Karnataka report on Human Rights Violations Against Sexuality Minorities and the Transgender Community in 2001 and 2003, respectively, signaled the emergence of queer political consciousness. These documents were significant milestones for change and created a foundation for demand for rights because they articulated a more excellent vision for queer rights.

When the AIDS Bedhbhav Virodhi Andolan (ABVA) organized a public demonstration against police harassment of gay people in 1992, it was the first collective and public response to the various injustices perpetrated on queer people. This is India's first documented gay rights protest. The subject of both opposition and demand for rights became visible when secretive and silent same-sex interaction became visible. ABVA asked, "When will the police get rid of its homophobia?" Is it illegal for two consenting adults (of the same sex) to meet in a public place, become friends, and have a healthy conversation about sexuality or any other topic—which may or may not lead to sexual activity in a non-public place?<sup>13</sup>

Through the groundbreaking report *Less Than Gay* on queer rights, the ABVA provided a prophetic vision of queer rights for the first time. It placed the violence against gays and lesbians in the context of a larger culture of intolerance among the medical community, activist groups, and even intellectual circles. The report discussed subversive queer desire as well as gay men and lesbians' "intimate experiences, fears, and longings." It successfully provided an explanatory framework as early as 1991, which was then picked up and elaborated on by queer activism in the following years.<sup>14</sup> The ABVA protest against police harassment in 1992 was not the last, and there would be many more over the next two decades. The willingness to respond to violations had become a defining feature of queer activism, attracting national and even international attention. Several local campaigns against police harassment and violence (like the ABVA protest in 1992) were launched.<sup>15</sup>

### **1.3.1 FIGHTING FOR THE RIGHT TO LOVE: THE STRUGGLES OF QUEER WOMEN.**

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<sup>13</sup> ABVA Memorandum to the Commissioner of Police, New Delhi, 11.08.92 on file with the Alternative Law Forum.

<sup>14</sup> AIDS Bedhbhav Virodhi Andolan, *Less Than Gay: A Citizen's Report on the Status of Homosexuality in India*, ABVA (May 12, 2019, 21:41 PM), <https://docs.google.com/file/d/0BwDlpuQ0I6ZMXVmNwK0ajdqWEU/edit>

<sup>15</sup> *Gay Community seek reforms in archaic sexuality law*, Times of India, (17 August 2005).

While the 1992 ABVA protest was the first public demonstration, Leela and Urmila, two policewomen, decided in 1988 that they wanted social recognition for their relationship and marriage. Although both women were dismissed from service on the flimsy grounds of a "long leave of absence," their brave act inspired emerging queer activism.<sup>16</sup> ABVA referred to Leela and Urmila as "frontier women in the country's social landscape with their courageous and unusual marriage."<sup>17</sup>

The much-publicized marriage of Leela and Urmila was followed by ABVA's 'Like People Like Us' Fact-Finding Report in 1999 on Mamta and Monalisa's joint suicide attempt. Lesbian and bisexual women are frequently trapped in a prison whose walls are made up of gender and sexuality norms, according to the report. It showed how patriarchal constraints suffocate lesbian expressions of personhood to the point where suicide appears to be the only option left.<sup>18</sup> While the report started a conversation about some of the most pressing issues confronting queer women in India, the controversy over the film *Fire* brought queer women into the national spotlight. Deepa Mehta directed the film, which delicately depicted a relationship between two women.<sup>19</sup> The film should be banned, according to the Hindu Rights Activist. Following a tumultuous debate in the Indian Parliament, the Supreme Court intervened to prevent the film from being outlawed completely.<sup>20</sup> The Shiv Sena's decision to attack theatres where *Fire* was being screened turned an academic debate into a raging street battle. Such blatant attacks on the screening of *Fire* galvanized Indian civil society to defend the core democratic value of "freedom of speech and expression." These extremist groups worked tirelessly to prevent the screening of *Fire* and then reacted similarly when another controversial film, *Girl Friend*, was released almost ten years later.<sup>21</sup>

The fight to prevent *Fire*'s release and screening was framed as a free speech issue, almost consciously obscuring the film's portrayal of lesbianism. As a result of this omission, CALERI

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<sup>16</sup> JAISINGH INDIRA, HUMJINSI 92 (1999, Bina Fernandez).

<sup>17</sup> *Supra* note 14 at 50.

<sup>18</sup> See: V. N., Deepa. '*Queering Kerala*', in Gautam Bhan and Arvind Narrain (eds), *Because I Have a voice: queer politics in India* New Delhi: Yoda Press 175-196 (2005).

<sup>19</sup> Deepa Mehta *Fire* (1996) <http://WWW.imdb.com/title/tt0116308/>.

<sup>20</sup> Yusuf Khan Alias Dilip Kumar and Ors. v. Manohar Joshi and Ors. (2000) 2 SCC 696.

<sup>21</sup> *Sena turns the heat on Girlfriend*, Times of India, (June 15 2021 01:45 PM)

<https://timesofindia.indiatimes.com/city/mumbai/sena-turns-the-heat-on-girlfriend/articleshow/739488.cms>

(Campaign for Lesbian Rights) was formed to bring lesbian rights to the forefront of the debate. The articulation of lesbian rights, on the other hand, was fraught with anxiety. As one of the main characters put it:

Even as the organizers prepared for the demonstration, there was a division among us. Some [protesters] objected to the use of the term "lesbian" in the press release. Instead of 'women-women relationships,' there was pressure to speak about 'women-women relationships.' There were some issues with the term sexuality. There was a claim that the average person on the street was unprepared to hear these words.<sup>22</sup>

In the words of another protagonist, CALERI's work "challenged the assumption that lesbianism was a "question of personal choice—thus not a legitimate area of concern when the broader framework is human rights."<sup>23</sup> The mainstream human rights movement was forced to deal with the ban on Fire as a matter of freedom of expression and lesbian rights, thanks to the efforts of CALERI and others.

### **1.3.2 WIDENING THE SPECTRUM OF QUEER CONCERNS: THE EMERGENCE OF GENDER IDENTITY -BASED STRUGGLES.**

Lesbian, gay, and bisexual issues were at the forefront of queer activism in the late 1980s and early 1990s. As the 1990s progressed, however, a growing number of articulate transgender women joined the queer movement. The publication of the PUCL Report on 'Human rights violations against the transgender community was the first public acknowledgment of the transgender community's concerns. The 2003 report highlighted the issues and concerns of the transgender community by focusing on the stories of hijras and kothis, broadening the definition of who is queer beyond lesbian, bisexual, and gay identities. This was significant because lesbian, gay, and bisexual people had previously been the focus of queer activism. The report from 2003 also emphasized the importance of including gender-based demands in queer activism, such as the right

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<sup>22</sup> Ashwini Sukthankar, *Lesbian Emergence (Campaign for Lesbian Rights, A Citizen's Report, August 1999 New Delhi)* 19 (1999).

<sup>23</sup> *Id.*

to define and express one's gender identity.<sup>24</sup> The source of 'extraordinary' violence was the 'everyday' transgression of gender norms, so sexual orientation could no longer be the sole basis of queer politics.<sup>25</sup> By focusing on the rights of hijras and kothis, the 2003 report also introduces queer politics to class and economic disparities, which are a significant source of division in Indian society.<sup>26</sup> The demands for gender identity documents, ration cards, voting rights for hijras, and access to free healthcare and education result from an inclusive queer politics that sees the hijra community through multiple lenses, including gender, sexuality, religion, caste, and class.

#### **1.4 THE STRUGGLE AGAINST THE VIOLENCE OF “NORMAL TIMES”.**

The ABVA's first gay protest, demonstrations around the Fire, and Lucknow arrests were watershed moments in queer activism. In two separate reports published in 2001 and 2003, the PUCL-K documented the violence faced by the queer community. The impact of Section 377 had to be understood not only in terms of decided cases but also in terms of the filing of an FIR or the mere threat to file an FIR, as well as sexual violence, extortion, abuse, outing, and illegal police detentions, all of which leave no legal trace, according to the 2001 report. Apart from the law, the police, the family, the medical establishment, and popular culture are among the structures responsible for queer oppression, according to the 2001 report.<sup>27</sup>

Their inability to exercise civil rights is a result of the daily violence they face. Queer people are excluded from the state's records as citizens, deserving of privileges and benefits because they are a priori criminals. Queer desire and its potential to form meaningful relationships are silenced, except when referred to as 'unnatural intercourse,' which is neither named nor prohibited in civil law. We can conclude from a thorough examination of the laws governing marriage, divorce,

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<sup>24</sup> The term gender identity itself made its belated way into international law with the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007). It can be argued that the reason gender identity became an important concern was itself due to the reporting of violations from the global south, where it became increasingly apparent that gender identity was the core axis of human rights violations. For a record of violations based on gender identity, see WWW. Iglhrc.org, accessed on 10th December, 2013

<sup>25</sup> Gayatri Reddy, *With Respect to Sex*, 17 Indian J Gend Stud 215(2006).

<sup>26</sup> Gupta, Alok, *Englishpur ki Kali* (2005) in Gautam Bhan and Arvind Narrain (eds) *Because I Have a Voice*. New Delhi: Yoda Press. (Last accessed on June 23, 2021, 11.05 P.M) <http://swbplus.bsz-bw.de/bsz253199204inh.pdf>

<sup>27</sup> PUCL-K, *Human Rights Violations Against Sexual Minorities in India: A Case Study of Bangalor*, www. Pucl.org (Last accessed on July 24 2021, 10.00 P.M).<http://feministlawarchives.pldindia.org/wp-content/uploads/sexual-minorities.pdf>

inheritance, labor, and insurance that we must be related by blood or marriage to benefit from any of these laws. A gay or lesbian partner would be ineligible to inherit property upon their partner's death, as well as any labor law benefits or insurance policy benefits because all of these benefits are reserved for members of the 'deserving' homosexual family.<sup>28</sup> Section 377, the essential legal roadblock, remained in place to address the broader range of issues that define the "ordinariness of everyday violence." Queer activists have attempted to focus on matters other than 377 at various times; however, attention has invariably returned to the infamous section as the law has remained a significant impediment to other legal reforms. Lesbians, gays, bisexuals, and hijras can all come together at queer pride marches. In a broad sense, it cultivated a diverse and vibrant community that transcended class and gender lines.

## **1.5 RESEARCH PROBLEM**

The Constitution of India lays down a non-discriminatory approach towards its citizenry regardless of the gender identity and the sexual orientation of the individual and guarantees equality of law and equal protection of law. The present study intends to analyse the positioning of the LGBTIQ+ community with respect to comprehensive anti-discriminatory laws in India and simultaneously draw a comparison between other jurisdictions. With the help of doctrinal method, the proposed study attempts to establish the need for transgender inclusiveness of sexual offences under criminal law in India to further the human rights approach and guarantee constitutional protection of the fundamental rights to the community. The study strives to lay emphasis on the categorization of non-consensual sexual offences as applicable to the community rather than bringing it under the umbrella of unnatural offences in entirety. The study further examines and reflects on the relevant constitutional and criminal law provisions, studies the judgement of the courts, reviews the systematic studies previously conducted and the principles laid down in international covenants to strengthen the argument of LGBTIQ+ barriers to full acceptance in society despite of legalizing the laws in favour of them.

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<sup>28</sup> DESAI MIHIR, HUMJINSI 92 (Bina Fernandez 1999).



## **1.6 OBJECTIVIES**

- 1) Trace out the provisions which are not sufficient to protect the LGBTIQ communities civil and political rights and followed by the composition of them and difficulties nowadays.
- 2) Find out the current legal position of LGBTIQ community in India with special Reference to Kerala.
- 3) To conduct a comparative study on the Comprehensive Anti LGBTIQ Discriminatory laws existing in USA, Canada and South Africa
- 4) Trace out the provisions of Anti-Discriminatory Legislations in USA, Canada and South Africa that can be incorporated in Transgender protection Rights Act 2019.
- 5) Find out some legal suggestions for the amendment of Transgender Protection Rights Act 2019 to close the loopholes.

## **1.7 HYPOTHESIS**

- The LGBTIQA+ communities face a wide range of violations and barriers to full acceptance in society despite of legalizing the laws in favour of them.
- The new legislation Transgender Persons (protection of rights) Act 2019 purports to protect transgender rights causes a huge blow to India's already vulnerable transgender community and undoes a lot of progress made over the past few years.

## **1.8 RESEARCH QUESTIONS**

1. Does India have an explicit comprehensive Anti-Discriminatory code for the upliftment of LGBTIQ community?
2. What are the major loopholes in the newly enacted legislation (Protection of Transgender Rights Act 2019) meant to benefit transgender community?
3. What is the major missing in India's Transgender Protection Rights Act 2019, when compared to the already existing legislations in USA Canada and South Africa.?
4. What are the major issues facing by LGBTIQ community which is very specific to India and that is not existing in another part of the world?

5. What effect does cultural lag have on the advancement of the life of LGBTIQ community?
6. What is the role of judiciary in promotion and protection of the LGBTIQ community?

## **1.9 RESEARCH METHODOLOGY**

Limited by the time horizon, the methodology employed in conducting this research is doctrinal. The reliability and dependability of the study mainly depends upon the methodology adopted. The Doctrinal study is based on the collection of data from primary and secondary sources. The primary sources of data used include statutes, regulations, declaration, notifications, guidelines and committee reports. The secondary sources of data used are books, dictionaries, encyclopedia, journals, newspapers and websites.

## **1.10 SCHEME OF THE STUDY**

Chapter I of the dissertation titled “**INTRODUCTION**” tries to identify the area of study and lays down the aims and objectives behind the research study and introduces the contemporary positioning of the LGBTIQ+ community as being the oppressed and vulnerable class in the society even after its historical presence for centuries and followed by the second chapter.

Chapter II of the dissertation titled “**CRITICAL ANALYSIS OF THE EXISTING INDIAN LEGAL FRAMEWORK**” wherein the positioning of the community in terms of the civil and criminal rights they have in India. It also dealt in detail with constitutional provisions of LGBTIQ+ minorities in India. Factors like legality of homosexuality, protection from sexual offences against the LGBTQA community, etc. are determined. The chapter then acknowledges the decriminalization of Section 377 IPC, through the Navtej Singh Johar decision of the Supreme Court, to the extent of consensual carnal intercourse/sexual conduct between two adults in private without any discrimination premised on the sexual orientation and/or gender identity. However, the chapter criticizes the failure on part of the court to equate non-consensual instances of carnal intercourse with sexual assault as provided for under Section 375 IPC and identifies the need to amend the criminal law with respect to sexual offences and make it transgender inclusive, presently exclusive to women, owing to the vulnerability of the community. The chapter also acknowledges

the Transgender Act and its short comings. This section is followed by chapter III of the dissertation.

Chapter III of the dissertation titled **“JUDICIAL RESPONSES IN PROMOTING AND PROTECTING LGBTQIA+ COMMUNITY”** aims to trace back the history of trans activism in India and development of legal and constitutional rights of the community in addition to their recognition through the NALSA judgment is discussed. The objective is to analyse development, both social and legal, in the stature of the LGBTQIA+ community and the role of judiciary in such elevation. The chapter is then followed by the chapter four.

Chapter IV of the dissertation titled **“A COMPARATIVE STUDY ON THE VARIOUS EXISTING COMPREHENSIVE ANTI LGBTQIA+ DISCEIMINATORY LEGISLATIONS IN USA, CANADA AND SOUTH AFRICA”** wherein the positioning of the community in terms of the civil and criminal rights they have in India and other jurisdictions including Canada, South Africa, United States of America is ascertained. Factors like legality of homosexuality, protection from sexual offences against the LGBTQA community, etc. are determined. The chapter is then followed by chapter four.

Chapter V of the dissertation titled **“CONCLUSIONS AND SUGGESTIONS”** illustrates the justification of the hypothesis in affirmation and reasserts the need for transgender neutrality of sexual offences so as to extend the protection to the transgender community and secure for them both social and legal liberty and a dignified life to co-exist in the society and break hetero-normative societal standards prevailing for centuries.

## **2. CHAPTER II**

### **CRITICAL ANALYSIS OF THE EXISTING INDIAN LEGAL**

### **FRAMEWORK**

*“Seven or eight years ago, I was in Kolkata for Durga Puja. When seven to eight guys approached us and called us out of line, I was standing in line with four of my transgender friends to attend the ceremony. We approached them, oblivious to what was going on. They then began abusing us by touching us in various parts of our bodies forcefully. We screamed because it happened in public. However, no one came to our aid.”<sup>29</sup>*

Individual autonomy, equality, and liberty without discrimination, as well as dignified recognition of identity and privacy, are the overarching ideals that form the four cardinal pillars of our Constitution, laying the foundation for fundamental rights and secluding certain sections of the society, separating them from the social mainstream, and compelled them to live in the shackles of prejudiced notions, dogmatic social norms, parochial mindset, rigid stereotypes, and blinkered perceptions.<sup>30</sup> Regardless of race, caste, sex, religion, community, or socioeconomic status, the inherent spirit of our Constitution is to offer every subject of our nation an equal opportunity to grow as a human being, whether he is the majority or the minority. The state must guarantee that no human being ought to be victimized. Granville Austin outlined three distinct strands of the Indian Constitution in his analysis of the first 50 years of its operation: (i) protecting national unity and integrity, (ii) establishing the institution and spirit of democracy, and (iii) promoting social changes. In what he brilliantly defines as “a seamless web,” the Strands are mutually dependent and intimately intertwined. Moreover, there cannot be social reforms until it is ensured that each country’s citizens can exploit his/her potentials to the maximum. Although drafted by the Constituent Assembly, the Constitution was meant for the people of India. That is why it is given by the people to themselves, as expressed in the opening words “We the People.” In the past, India has abstained from resolutions that sought to protect persons from violence and discrimination based on sexual orientation and gender identity. The ‘abstention’ was troubling as the Constitution is quite evident in protecting all persons from violence and discrimination. The virtual gift granted

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<sup>29</sup> UMA CHAKRAVARTI, GENDERING CASTE 18 (Sage Publications, 2018).

<sup>30</sup> Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.

to ordinary people by this Constitution is known as “basic rights,” which can also be referred to as “human rights.” As a result, it is the state’s responsibility to ensure that no human being is victimized.

In heteronormative societies, the male-female dichotomy has created havoc for the LGBTIQ+ community. Though they are in the minority, they too have a level with sacred rights. However, the sexual offenses and sexual exploitations committed against the LGBTIQ+ community owing to their distinct sexual orientation and gender identity is a radical departure from the traditional approach of equality of law. Gender identities and non-normative sexual orientations have impacted the connection between the law and the public. Consequently, it is necessary to briefly review the many discourses and controversies surrounding the legislation and its relationship with gender and sexual identities. These insights intend to light the systemic issues concerning law’s attempt to regulate gender and sexual orientation.

Given that an individual’s sexual orientation and gender identity are distinct, one would wonder why sexual orientation and gender identity are discussed. Indeed, whether someone is transgender or cisgender has nothing to do with lesbian, gay, bisexual, or straight. Despite their differences, sexual orientation and gender identity are inextricably intertwined in society and politics. Discrimination based on sexual orientation and gender identity is frequently perpetrated by the same individual or organization: the social policing of gender standards. Lesbians and transgender women, for example, are both regarded as breaching socially created norms about what it means to be a woman in many parts of the world. Even though transgender women break gender norms through their gender identity and lesbians break gender norms through their sexual orientation, both are seen as violating gender norms. Intersex issues and LGBT issues are frequently intertwined. Intersex people face prejudice because their bodies do not fit social standards for what it means to be a man or a woman, much as LGBT people face discrimination. After all, they defy cultural norms about “manhood” and “womanhood.” As a result, intersex concerns are frequently considered alongside LGBT issues by human rights advocates. The acronyms LGBTI (with the “I” meaning for “intersex”) and SOGISC (with the “SC” standing for “sex characteristics”) are becoming incredibly common.

## **2.1 LEGAL PROVISIONS AND CONSTITUTIONAL PROTECTION OF LGBTQIA+ MINORITIES IN INDIA:**

In its historic decision *National Legal Services Authority of India vs. Union of India*, the Supreme Court of India ('Supreme Court')<sup>31</sup> ('NALSA') recognized fundamental rights of transgender persons arising out of Article 14 ('right to equality'), Article 15 ('prohibition of discrimination'), According to the Indian Constitution, Article 16 ('equality of opportunity in matters of public employment), Article 19 (right to freedom of expression'), and Article 21 ('right to live with dignity) are among the most important rights guaranteed.<sup>32</sup>The Court also recognized the fundamental rights of the transgender community under the Indian Constitution and human rights. It declared that all the civil and criminal statutes that do not recognize the third gender would be discriminatory in light of Article 15 of the Constitution. Under Article 15 of the Constitution, any discrimination on the ground of "sex" is prohibited at the instance of the state. However, in this case, there is an issue regarding the rights of the Lesbians, Gays, and Bisexuals people that whether they are included in this decision because of the specific acknowledgment of the Transgenders in India. Although, Justice Radhakrishnan and A.K. Sikri mentioned in their judgment in the point 19 and 20 by including the definition of 'gender identity and 'sexual orientation' in which gender identity refers to the term in which each person felt internal and individual expression of gender which may or may not correspond with the sex assigned to them at birth. It, therefore, refers to an individual's self-identification as a man, woman, transgender, and other identified category.

On the other hand, Sexual Orientation refers to an individual who attains physical, romantic, and emotional attraction to another person. The Court interpreted "sex" to include sexual orientation and gender identity of an individual. The decision directed affirmative action on the Central and State Governments to ensure non-infringement of fundamental rights, public health, and social welfare in light of the Yogyakarta principles.<sup>33</sup> This brought a sigh of relief to the LGBTQIA community, as their human rights were upheld despite their small numbers;<sup>34</sup> however, the

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<sup>31</sup> NALSA at Writ Petition (Civil) No.400 of 2012

<sup>32</sup> *Id.*

<sup>33</sup> Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, INTERNATIONAL COMMISSION OF JURISTS.

<sup>34</sup> NALSA, *supra* note, 12 at para 123.

pragmatic reality remained unchanged. This was followed by the Supreme Court's ruling in Navtej Johar vs. Union of India<sup>35</sup> ('Navtej Johar') decriminalizing consensual sexual relationships between adults of the same gender by reading down section 377 of the Indian Penal Code, 1860 ('IPC').<sup>36</sup> Before British colonization, there were no laws against same-sex relations in India.

Indeed, some Hindu traditions positively celebrated homosexuality alongside heterosexuality as part of the spectrum of human sexuality and erotic desire. Homosexuality, however, was criminalized by the British during their rule in India under Section 377 of the Indian Penal Code (IPC) in 1861, inspired by the 1553 Buggery Act that outlawed homosexuality in England. Since then, the LGBTIQ+ community has suffered ridicule, denial of basic rights, a sense of gender identity, and abuse at the state authorities and the society. Their existence was ad infinitum questioned on the grounds of social morality, public indecency, and obscenity. The community struggled to pave its path and co-exist in society at the cost of humiliation and disgrace. The mere presence of law criminalizing same-sex relations, irrespective of whether being consensual or non-consensual, gave room for exploitation of the LGBTQA community.<sup>37</sup> With this judgment, the Supreme Court has affirmed the legal recognition of the LGBTIQ+ community and widened the scope of LGBTIQ+ rights in India. While Navtej Johar is a relatively new judgment and still awaits legal developments on the issue of further civil rights of the LGBT+ community, it has been almost five years since NALSA was delivered.

The most significant legal endeavor following NALSA was drafting a law outlining the precise framework for transgender people to exercise their rights. The Ministry of Social Justice, in a conversation with the trans activism, constituted an expert committee to make recommendations in furtherance of the judicial mandate in the NALSA decision, and based on this report, the Rights of Transgender Bill, 2014 was introduced and adopted by the Rajya Sabha and the same was sent to the Lok Sabha for consideration. The Bill had an inclusive definition of transgender.<sup>38</sup>

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<sup>35</sup> Navtej Johar, WP (Crl.) No.76/2016.

<sup>36</sup> Indian Penal Code 1860 § 377.

<sup>37</sup> Geetanjali Misra, *Decriminalizing Homosexuality in India*, TAYLOR AND FRANCIS GROUP (Last accessed on June 3, 2021) [https://doi.org/10.1016/S0968-8080\(09\)34478-X](https://doi.org/10.1016/S0968-8080(09)34478-X).

<sup>38</sup> All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include trans-men & trans-women (whether they have undergone sex reassignment surgery or hormonal treatment or laser therapy, etc.), gender queers and a number of socio-cultural identities, such as kinnars, hijras, aravanis, jogtas, etc.

Meanwhile, in 2016, the speaker allowed the introduction of a fresh bill for the transgender community, as a private member's Bill, called The Transgender Persons (Protection of Rights) Bill, 2016. The latter Bill suffered from significant shortcomings and was heavily criticized by the transgender community,<sup>39</sup> advocates or lawyers, NGOs, students, and the other activist and also failed to secure the mandates so declared by the NALSA decision. The failure of Bill is threefold, firstly, then it does not appreciate the diversity within the transgender community, that is, Lesbians, Gay, Bisexual, Transgender, Queer, Asexual persons, jogappas, hijras, aravanis, kinnars, and other socio-cultural gender identities instead it defined transgender person as someone who is not wholly a male or a female or neither a male nor a female or a combination of male and female and thereby retaining the male-female dichotomy and; Secondly the Bill recognizes sexual offences and violence against the community as crimes punishable with petty punishment of 6 months to 2 years and does not include them within the ambit of sexual offences under the IPC, and; lastly, unlike the 2014 Bill which provided for reservation for transgender persons in public education and employment, the Bill remained silent on the aspect of affirmative action on part of the central and state Government in terms of reservations for employment and education<sup>40</sup> to ensure adequate representation of the otherwise marginalized community and further the mandate laid down by the NALSA decision. After the appointment of the standing committee, around 55 recommendations were proposed. However, all of them were blatantly rejected. The Bill was kept intact in its original form.<sup>41</sup> It was again introduced in Lok Sabha on 19th July 2019, in 17th Lok Sabha on 5th August 2019 it was passed there passed and on 26th November 2019, i.e., on the Constitution Day it is also passed in Rajya Sabha and received the assent from the President of India on 5th December 2019. Now, the Transgender Persons (Protection of Rights) Bill has become an Act intending to protect the rights of the transgender, their welfare, and other related matters.

The discussion in parliament neither suggested an amendment in the criminal and civil law include the third gender within the statute, nor did they recognize the instances of sexual assault and

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<sup>39</sup> Shreya Ila Anasuya, 'Why the Transgender Community is Angry Over a Bill Meant to Protect Their Rights, THE WIRE (July 24, 2021, 10.04 AM) <https://thewire.in/lgbtqia/why-the-transgender-community-is-angry-over-a-bill-meant-to-protect-their-rights>.

<sup>40</sup> Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, 5 JILS 235 (2017).

<sup>41</sup> Rachana Mudraboyina and L.C. Kranti, A Critiques of the Transgender Persons (Protection of Rights) Bill, 2018, HUMAN RIGHTS LAW NETWORK (May 12, 2021, 11:31 AM), <https://hrln.org/wpcontent/uploads/2019/01/Critique-of-the-TransBill.pdf>.



violence against the community at the behest of the governmental agencies and by other individuals in the society. In light of the above discussion, it becomes critical to highlight the gaps in our legislative framework for LGBTIQ+ inclusion and insist on their correction to do justice to the LGBTIQ+ community's struggle.

## **2.2 THE INCIDENT THAT TRIGGERED THE TRANS ACTIVISM IN INDIA**

The AIDS Bhedbhav Virodhi Andolan published a report in 1991<sup>42</sup> revealing the atrocities faced by the transgender community like sexual violence, exploitation, assault, and extortion under the garb of Section 377 of the IPC, recommending that the said law should be repealed.<sup>43</sup> Following this in 1994, the medical officers in Tihar jail concluded that 90% of the inmates in prison indulged in consensual homosexual activity and recommended facilitation of condoms to prevent STDs. However, Kiran Bedi, inspector general of Tihar Jail, refused the facilitation of condoms on the pretext that it will promote homosexuality and consensual sexual conduct amongst homosexuals which is punishable under Section 377 IPC.<sup>44</sup> A writ petition was filed by ABVA for declaration of Section 377 as unconstitutional on the anvil of Article 14, 15, 19 and 21 of the Constitution and calling on the judiciary to repeal the said provision of law. Per contra, it was contested that Section 377 IPC should not be repealed. It keeps the principles of legal moralism intact and upholds the majoritarian morality, and its declaration as ultra vires the Constitution will be against public morality, public order, and decency. Even though the petition was dismissed in 2001 on technical grounds, it laid the foundation for trans activism in India and across South Asia to recognize their gender identity and substantial rights associated with it. This sparked outrage, and for the first time, members of the community and transgender activists came out of the closet to support the LGBTQA community's rights.

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<sup>42</sup> AIDS Bhedbhav Virodhi Andolan, *Less Than Gay: A Citizens' Report on The Status of Homosexuality in India*, ABVA, (May 12, 2021, 21:41 PM), <https://docs.google.com/file/d/0BwDlipuQ0I6ZMXVmNWk0ajdqWEU/edit>

<sup>43</sup> *Id.*

<sup>44</sup> *Supra* note 40, at 230.

## **2.3 LAW'S RELATIONSHIP WITH GENDER AND SEXUALITY**

The relationship of the law with non-normative gender identities, sexual orientation is to be discussed with utmost importance in the present scenario. In essence, the LGBTIQ+ community of the society has denied the fundamental rights and dignified status to a Section owing to the prevailing norms in the society. These insights intend to light the systemic issues concerning law's attempt to regulate gender and sexual orientation.

### **2.3.1 THE TRANSGENDER IDENTITY AND THE LAW**

Contemporarily and historically, transgenderism prevailed across the globe, including in the Native American culture,<sup>45</sup> Indian culture,<sup>46</sup> and Greco-Roman culture.<sup>47</sup> In addition to this, even many deities sported a blend of feminine and masculine characteristics or were capable of shifting from one gender to the other.<sup>48</sup> Every society is deemed to be heterogeneous comprising of only two genders – the male and the female and the third gender often remains unrecognized. This paves a path for identity crisis amongst the minority community. Due to either societal pressure or legal formalities, they have to opt-out of the two genders. They do not connect with the gender; they are confused about their identity and often feel trapped in their bodies in the dichotomous gendered society. This is a radical departure from the traditional approach of equality law, i.e., wherein discrimination is prohibited based on human traits that are immutable, i.e., traits that were not chosen<sup>49</sup> put, the language of rights, including the right to equality, presumes that the subject of rights has specific immutable characteristics. It is wrong to discriminate based on the characteristics that one was born into and, by implication, cannot be altered. Scholarship speaks of the transgender identity as broadly encompassing those individuals who do not identify with the sex (and consequently gender) assigned to them at birth.<sup>50</sup> In the Indian context, the term

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<sup>45</sup> Two Spirit People

<sup>46</sup> Men that choose to worship the feminine aspect of the divine through voluntary castration or because they were born intersexed.

<sup>47</sup> The god Hermaphrodites, son of Hermes and Aphrodite; and the acceptance of the cross-dressing behaviour of Hercules and Achilles.

<sup>48</sup> Dionysus; Lord Vishnu the male counterpart and Goddess Mohini, the female counterpart of the same Deity.

<sup>49</sup> Jessica A Clarke, *Against Immutability*, The Yale Law J 125 (2015).

<sup>50</sup> Paisley Currah, *Gender Pluralism under the Transgender Umbrella, Transgender Rights* (University of Minnesota Press, 2006) NALSA, Para 11.

transgender has also been understood as incorporating multiple cultural identities that do not fit into the strictly defined identities of male or female. Similarly, persons with intersex variations whose genitalia do not fit into the neat boundaries of either sex male or sex female,<sup>51</sup> challenge the sexed foundations of the society as well.<sup>52</sup> In a culture where discrete and binary gender divisions are essential and based on “objective” biological attributes of genitalia, bodies that threaten such divisions threaten the whole system upon which such binary gender rests.<sup>53</sup> However, despite the biological, behavioral and psychological diversity of identities, distinct separation based on sex and gender continues to be enforced by the law - a body of knowledge whose normative basis is deeply entrenched in the binary gender/sex model. The law, as a consequence, has invisible all those identities and bodies that do not fit into the strict categories of strictly male or strictly female and privileges those who do.<sup>54</sup>

In India, this deprivation struggle is also drawn from the governmental policy framework recognizing only two sexes in according right to vote, marry, claim property, a formal identity through passport, or other governmental identities. Their inability to procure subsidies for food, health, employment, or education further adds to their misery, forcing them to either engage in sex work or beggary, thereby exposing them to violence and vulnerability at the instance of the law enforcement agencies. It is significant to note that an individual cannot replace his/her sexual orientation or identity to adhere to society’s normative standards.

Shakespeare once said, “What is in a name?” which in the present tense can be understood that for identification, the name may be a convenient concept. However, the characteristic essence is the core of the identity and not the name per se. The Supreme Court in 2014 gave legitimate recognition to the third gender furthering their fundamental and constitutional rights.<sup>55</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> Ana Lúcia Santos, *Beyond Binarism? Intersex as an Epistemological and Political Challenge*, *Revista Crítica de Ciências Sociais*, 6 (2014).

<sup>53</sup> Erin Lloyd, *Intersex Education, Advocacy & the Law: The Struggle for Recognition and Protection* 11 *Cardozo Women’s L.J.* 283 (2005).

<sup>54</sup> Dorian Needham, *A Categorical Imperative: Questioning the Need for Sexual Classification in Quebec*, 52 *Les Cahiers de Droit* 71-106 (2011).

<sup>55</sup> *NALSA*, *supra* note 12, at para 12.

Despite this, NALSA struggles with defining whom a “transgender person” is, showcasing the tense relationship between the law and the politics of gender identities. The Supreme Court runs through a range of identities, including individuals whose gender does not conform with the sex assigned at birth,<sup>56</sup> those who identify as neither male nor female,<sup>57</sup> the various cultural identities in India such as kothis, arvanis, jogtas, etc.<sup>58</sup> At the end, as evident in the operational part of the judgment, specifically Direction 1, the Supreme Court reduces the transgender identity to the most visible non-normative gender identity in India, i.e., the hijra identity.<sup>59</sup> Further, the judgment only makes a passing reference to transgender men,<sup>60</sup> thereby relegating them to the background. At the Consultation, it was stated that despite the NALSA judgment, gender continues to be treated as a legal category and not a constitutional category. This is not the case with sex which was and continues to be treated as a constitutional category. Thus, while the categories of male and female are viewed through the lens of sex, it is only the category of transgender that is viewed through the lens of gender. Consequently, “transgender” is the first gender (unlike male and female, which are still considered categories of sex) as opposed to the third gender.

Given the diversity of gender identities and expressions that fall within the ambit of “transgender,” countries around the world that recognize the rights of transgender persons, instead of treating “transgender” as a protected category, recognize the right to “gender identity” and “gender expression.”<sup>61</sup> This avoids the risk of the law being under-inclusive. In addition to protecting identity, it also protects gender-based expression - which may or may not be linked to one’s gender identity. However, in India, the approach towards transgender rights has been different. The 2016 Bill explicitly defined the category of “transgender” and guaranteed certain rights to such a category of persons. While the 2016 Bill conflated the transgender identity with persons with intersex variations,<sup>62</sup> an issue that led to outrage among transgender persons, the 2018 Bill amended the definition and broadly defined transgender persons as persons whose gender does not

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<sup>56</sup> *Id.* at para 11.

<sup>57</sup> *Id.* at para 14.

<sup>58</sup> *Id.* at para 44.

<sup>59</sup> *Id.* at para 129(1).

<sup>60</sup> *Id.* at para 46.

<sup>61</sup> PAISLEY CURRAH, GENDER PLURALISM UNDER THE TRANSGENDER UMBERLLA, 3-31 (University of Minnesota Press 2006).

<sup>62</sup> Transgender persons (Protection of Rights) Bill Clause 2(i).

match with the gender assigned to them at birth.<sup>63</sup> Again this Bill was introduced in Lok Sabha in 2019 and approved by Rajya Sabha and finally got the assent from President of India On 5th December 2019. Now, the Transgender Persons (Protection of Rights) Bill has become an Act, with an objective to protect the rights of the transgender, which is still faced by many criticisms from the transgender community itself.

### **2.3.2 PROVISIONS OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT,2019**

This is the first Act in India that describes the rights of transgender persons. The Act also talks about discrimination or unfair treatment against education, employment, health, right to movement, residence, or unfair treatment in Government or private organizations about the job. The Act recognized the identity of a transgender person on the ground of an application and then the certificate of identity issued by the District Magistrate. In the case of a minor, the application shall be made by the parents. The certificate is issued by DM regarding his identity, which gives the right to transgender person as proof of his identity that he is transgender. By the issuing of this certificate, if a Transgender wants surgery to change his gender, either as male or female, then again, he has to file an application to the District Magistrate along with the certificate which has been issued by the Medical Superintendent or Chief Medical Officer (CMO) then revised certificate shall be issued by District Magistrate (DM). Provided that change in gender and revised certificate issued shall not affect that person's right in the Act.

This Act has also given provisions by the appropriate Government which will work for the welfare of Transgender people, like protection and rehabilitation. The Government will take measures for their rescue, protection, welfare, and promotion and participate in cultural and recreational activities.

This Act further provides the system of nondiscrimination in employment; every establishment shall provide all the basic facilities to transgender. The establishment has to designate a complaint officer to listen to a complaint if any violation of a right is held. No transgender child will be

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<sup>63</sup> The Transgender Persons (Protection of Rights Bill) 2018.

separated from the family unless a competent court has made an order and every transgender person has a right to live freely as per his own choice.

The appropriate Government will also provide the education, social security, and health of transgender persons. This Act says that Transgender people shall get education in government-funded institutions and opportunities for sports without discriminating. Government shall formulate schemes and plans for their livelihood. Most importantly, the appropriate Government shall provide medical facilities to such person's sex reassignment surgery, counseling before and after surgery, and provision of medical expenditures. The Government will set up separate human centers of immunodeficiency to follow the rule issued by the appropriate authority, i.e., the National AIDS control organization.

Further, the Establishment of National Council for transgender persons and the council shall consist of Union Minister who will be chairperson, Vice-Chairperson as State minister, member, each representative from different offices like HRD, Home affairs, Ministry of welfare, etc. and must be working in Government of India and must not be less in rank from Joint Secretary. The Central Government may appoint one representative from all four regions. The five members of the Transgender Community from each state and Union territory, and all four regions by rotation, are to be nominated by the appropriate Government and five from non-government organizations (NGO's) who work for them and shall hold the position for three years. The National Council shall perform various functions to answer the problems or solve the queries of transgender persons, formulate policies, programs, and evaluate and monitor the policies designed for achieving the equality of the transgender community. In the Act of Chapter VIII, offenses and penalties if any of the person who denies the transgender to access public place or forces a transgender person to leave his home or his living place harms or damage the life of Transgender person, causing abuse, etc. that shall be punishable with imprisonment which shall not than six months and may extend to 2 years and with a provision of fine.

In a nutshell, it does not recognize the third gender, their self-identity, and self-determination in law; the Act does not make provisions for the reservation of the LGBTQA community as socially, and educationally backward class for education and employment to ensure adequate representation

of the marginalized community nor do the provisions lay down the with respect to health care, legal awareness or welfare schemes amongst the community and thereby, maintains the status quo of the community in terms of social exclusion and vulnerability as against the NALSA mandate of inclusion. This Act particularly states about the transgender person, not about Lesbian, Gay, or Bisexual. This Act does not prescribe the punishment for their begging and not the punishment for the rape of a transgender person as mentioned in the IPC under section-375 and 376. This Act is silent about marriage rights, property rights, succession rights, and adoption rights of Transgender people. The Act has laid down less punishment in case of infringement.

### **2.3.3 ARTICLE 14 AND TRANSGENDERS**

According to Article 14 of the Indian Constitution, the state shall not deny equality before the law or equal protection of the laws to “any individual” located inside Indian territory. Equality entails the free and equal enjoyment of all rights and liberties. The right to equality has been proclaimed a fundamental feature of the Constitution; therefore, treating equals as unequal’s or unequal’s as equals will violate the Constitution’s basic structure. Equal protection is also guaranteed under Article 14 of the Constitution, implying a positive obligation on the state to achieve equal protection of the law through required social and economic changes. Everyone, including TGs, is entitled to equal protection under the law, and nobody is denied that right. Article 14 does not limit the term ‘person’ to males or females. Those who are neither male nor female, known as hijras or transgender people, fall under the definition of a ‘person’ and are therefore entitled to legal protection under the law in all spheres of state activity, including employment, healthcare, and education, as well as the same civil and citizenship rights as every other citizen of this country. Thus, discrimination based on sexual orientation or gender identity jeopardizes equality before the law and equal protection under the law and violates Article 14 of the Indian Constitution.

### **2.3.4 ARTICLES 15 & 16 AND TRANSGENDERS**

Articles 15 and 16 prohibit discrimination against any citizen for specified reasons, including race, gender, or national origin. Indeed, both Articles prohibit all forms of gender bias and discrimination based on gender.

Articles 15 and 16 aimed to outlaw discrimination based on sexual orientation, acknowledging that sex discrimination is a historical reality that must be addressed. The Constitution's authors, it appears, highlighted the fundamental right against sex discrimination in order to avoid the direct or indirect attitude of treating people differently for not complying with binary gender stereotypes. Gender and biological characteristics are both distinct components of sex. While biological elements such as genitals, chromosomes, and secondary sexual features are included, gender aspects such as self-image, a profound psychological or emotional sense of sexual identity, and character are included. As a result, under Articles 15 and 16, discrimination based on sex encompasses discrimination based on gender-based on sex. As used in Articles 15 and 16, it does not refer exclusively to biological sex between males and females. However, it is intended to encompass individuals who identify as neither male nor female.

TGs have been refused entrance to public venues systematically under Article 15(2) rights that are not subject to any handicap, liability, restriction, or condition. TGs have also been denied the special measures contemplated under Article 15(4) to advance people who are socially and educationally backward (SEBC) as they are and so legally entitled and eligible to receive SEBC subsidies. The state is obligated to take affirmative action for its advancement to make amends for generations of injustice. TGs are also entitled to unrestricted economic, social, cultural, and political rights, as gender-based discrimination violates fundamental freedoms and human rights. Additionally, TGs have been denied rights under Article 16(2) and discriminated against based on sex in employment or public office. Additionally, TGs are entitled to appointment reservations under Article 16(4) of the Constitution. The state is obligated to take affirmative action to ensure their representation in public services is equitable.

Articles 15(2) to (4) and 16(4), taken together with the Directive Principles of State Policy and various international instruments to which India is a signatory, call for social equality, which the TGs can only achieve if they are given the facilities and opportunities they need to live in dignity and on an equal footing with the other genders.

### **2.3.5 ARTICLE 19(1)(a) AND TRANSGENDERS**



Article 19(1) of the Constitution provides many fundamental rights, subject to the state's ability to restrict their exercise. Article 19 does not confer any rights on someone who is not an Indian citizen. Article 19(1) ensures those fundamental rights are recognized and protected as natural rights inherent in a free country's citizen position. According to Article 19(1) (a) of the Constitution, all citizens have the right to freedom of speech and expression, including the right to self-expression of gender identity. Gender identity can be represented in various ways, including clothing, speech, action, or conduct. No restriction on one's appearance or choice of clothing is permissible, subject to the limitations outlined in Article 19(2) of the Constitution.

### **2.3.6 ARTICLE 21 AND THE TRANSGENDERS**

Article 21 of the Constitution of India reads as follows:

“21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.” Article 21 of the Indian Constitution is the heart and spirit of the document since it speaks of the rights to life and personal liberty. The right to life is a fundamental right, and no one, not even the state, can violate or revoke it. Article 21 encompasses all facets of life that contribute to a person's purpose. Article 21 safeguards the dignity of human life, individual autonomy, and the right to privacy, among other things. The right to dignity has been recognized as a necessary component of the right to life and is guaranteed to all humans. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608 (paras. 7 and 8), this Court held that the right to dignity is an integral part of our constitutional culture, which seeks to ensure the full development and evolution of individuals, which includes “expressing oneself in a variety of ways, freely moving about, and mixing and commingling with fellow human beings.”

At the heart of one's fundamental right to dignity is that one's gender identification is recognized. A person's sense of self and identity are fundamentally shaped by their gender, as previously stated. As a result, the legal recognition of gender identity is a component of the right to dignity and freedom provided by our Constitution and laws.

As discussed previously, articles 14, 15, 16,19, and 21 do not expressly exclude Hijras/Transgender people from their scope. However, Indian law, on the whole, recognizes the paradigm of binary genders of male and female, based on one’s biological sex. As previously stated, we cannot accept the Corbett principle of the “Biological Test,” preferring instead to follow the individual’s psychology when identifying sex and gender, and hence choose the “Psychological Test” to the “Biological Test.” The binary notion of gender is reflected in the Indian Penal Code, for example, Section 8, 10, etc. The laws related to marriage, adoption, divorce, inheritance, succession, and other welfare legislation like NAREGA 2005. Non-recognition of the identity of Hijras/Transgender people in the various legislations denies them equal protection of the law, and they face widespread discrimination.

Article 14 uses the term “person,” and Article 15 uses the terms “citizen” and “sex,” as does Article 16. Article 19 also uses the term “citizen.” The term “person” was used in Article 21. All these expressions, which are “gender-neutral,” evidently refer to human beings. Hence, they take Hijras/Transgender people within their sweep and are not limited to the male or female gender. As previously said, gender identity is at the core of oneself, based on self-identification rather than surgical or medical treatments. Gender identity, in our opinion, is an inherent element of sex, and no person, including those who identify as the third gender, can be discriminated against based on gender identity.

## **2.4 PERSONS WITH INTERSEX VARIATIONS AND THE LAW**

Another major shortcoming of the law lies in its conflation of persons with intersex variations<sup>64</sup>with transgender persons and the consequent invisibilities of persons with intersex variations.<sup>65</sup> Such conflation was first witnessed in the NALSA judgment<sup>66</sup> and subsequently in 2019 Transgender persons Act. While at a fundamental level, both the intersex and transgender rights movements share a common goal in eliminating harmful practices based on sex and gender

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<sup>64</sup> Solidarity Foundation, ‘What if it is Neither?’, [http://www.vartagensex.org/download.php?name=admin/document/\\_1540443194000-slf-intersex-issues-sem-report-23oct17.pdf](http://www.vartagensex.org/download.php?name=admin/document/_1540443194000-slf-intersex-issues-sem-report-23oct17.pdf) (Last accessed on February 19, 2021).

<sup>65</sup> *Id.*

<sup>66</sup> NALSA, *supra* note 12, at para 107.

stereotypes,<sup>67</sup> issues faced by the two communities are primarily distinct and separate. For starters, persons with intersex variations may not identify as transgender persons. Instead, one of the primary concerns of the intersex community lies in the pathologizing of their bodies and their consequent otherization. Such pathologizing starts at infancy when persons with intersex variations are subject to surgery.<sup>68</sup> Their bodies can be coerced into one of the two recognized sex categories, i.e., male or female. Such surgeries are generally not medically necessary, and may end up destroying reproductive capacities, sexual functions and pleasure, as well as eliminating options for the expression of gender and sexual identity.<sup>69</sup> When performed without informed consent, such surgeries amount to discrimination based on a failure to live up to the stereotypes associated with male and female genitalia.<sup>70</sup> In India, there is no law which prohibits the practice of such surgeries at birth.<sup>71</sup> Further, while the category of “sex” in Article 14 and 15 can be argued to also include “intersex” there is no direct judicial pronouncement recognizing intersex status as falling within the category of sex, and courts continue to often conflate persons with intersex variations with transgender persons, thus creating a messy and deeply problematic legal jurisprudence.<sup>72</sup> While legislating and judicially pronouncing on transgender rights and intersex rights, the Government and the judiciary must keep in mind the above concerns.

## **2.5 SEXUAL ORIENTATION AND THE LAW**

*“The state cannot demean their existence or control their destiny by making their private sexual conduct a crime”.*<sup>73</sup>

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<sup>67</sup> Greenberg, Julie A., *Intersexuality and the Law: Why Sex Matters* New York University Press (February 1, 2021, 9:29 PM), <https://ssrn.com/abstract=1996227>.

<sup>68</sup> I Want to Be Like Nature Made Me, (Last accessed on July 12, 2021). [https://www.hrw.org/sites/default/files/report\\_pdf/lgbtintersex0717\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/lgbtintersex0717_web_0.pdf).

<sup>69</sup> NALSA, *supra* note 12, at para 107 and Graham Mayeda, *Reimagining Feminist Legal Theory: Transgender Identity, Feminism and the Law*, 17 CJWL 423 (2005).

<sup>70</sup> *Id.*

<sup>71</sup> Malta is the first country which has outlawed surgery on intersex infants via the Gender Expression, Gender Identity, and Sex Characteristic Act, 2015. Similarly, California via its Senate Concurrent Resolution No. 110 has formally condemned surgery on intersex infants.

<sup>72</sup> The conflation of persons with intersex variation and the transgender identity is reflected in several judgments including NALSA, *Nangai v. Superintendent of Police* (W.P.No.587 of 2014); *G. Nagalakshmi v. Director General of Police* (W.P.No.38029 of 2015).

<sup>73</sup> Justice Kennedy, *Lawrence v. Texas*, 539 US 558, 18 (2003).

In academic writing, *sexual orientation* has been defined as the exclusive attraction to the alternative or similar sex, i.e., whether the object(s) of one's desire is of the same or different sex than oneself.<sup>74</sup> Thus, sexual orientation is always understood as relational, i.e., it requires consideration of the sex of the person in question and the sex of the person to whom such person is attracted. Therefore, while gender, sex,<sup>75</sup> and sexual orientation may often be conflated, they are distinct conceptual categories. Thus, gender identity and sexual orientation, as already indicated, are different concepts. However, these confluences occur both socially and, in the law, where orientation is seen as a sexual performance of gender where gender is determined by sex. In simpler terms, both law and society often see gender as being determined by sex.<sup>76</sup> Thus a person with so-called male genitalia is expected to conform to masculine behavioral traits. At the next level, there is also a conflation between gender and sexual orientation. A person who displays masculine behavioral traits is thus expected to be attracted to a person displaying feminine behavioral traits of the opposite sex. Law's relationship with sexual orientation has traditionally been associated with criminalization in the form of anti-buggery laws.<sup>77</sup> In India, section 377 of the IPC criminalized "carnal intercourse against the order of nature," thereby criminalizing all non-procreational sex between adults. While instances of prosecution under the provision were limited, it had seen widespread use as a tool of persecution.<sup>78</sup>

### **2.5.1 SECTION 377 AND ITS DECRIMINALIZATION**

Section 377 of the IPC states that any person who voluntarily has carnal intercourse against the order of nature with a man, woman, or animal will be said to have committed an unnatural offense. However, the words' carnal intercourse against the order of nature is not defined and remain ambiguous and up to the judiciary's interpretation. It takes into account unnatural offenses ranging

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<sup>74</sup> Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995).

<sup>75</sup> JUDIT BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY*, 22 (Routledge 1999).

<sup>76</sup> Francisco Vladez, *Unpacking Hetero-patriarchy: Tracing the conflation of sex, gender and sexual orientation to its origins*, 8(1) Yale L.J. 168 (1996).

<sup>77</sup> Such criminalization has been associated with the application of a Judeo-Christian conception of morality, generally see, Navtej Singh Johar v. Union of India.

<sup>78</sup> Unnatural Offences Obstacles to Justice in India Based on Sexual Orientation and Gender Identity, International Commission of Jurists, <https://www.refworld.org/docid/58d4fc074.html> (Last accessed on July 13, 2021).

from touching another person with an unnatural lust to carnal intercourse.<sup>79</sup> Initially, the judiciary interpreted it to include only coitus per anum<sup>80</sup> but later read it to include coitus per os.<sup>81</sup> In addition to this offense of bestiality,<sup>82</sup> buggery, sexual relation between females, males,<sup>83</sup> mutual masturbation between same sex<sup>84</sup> and different-sex partners, oral sex, anal sex, etc. are included within the domain of ‘carnal intercourse against the order of the nature. That is, any (un)consensual penile-animal, penile-oral, and penile-anal, howsoever minimal, amounts to carnal intercourse. The law under Section 377 is gender-neutral and includes sexual conducts of both heterosexuals and homosexuals; however, the burden of law has often fallen on the latter only.<sup>85</sup>

The Wolfenden Committee<sup>86</sup> in 1957 in its report concluded that the purpose of criminal law is to preserve public decency and morality and furthered the thesis of Mill that argued private space should be free from state interference.<sup>87</sup> That is to say, criminalizing consensual homosexuality in private space between two adults neither fits in the theoretical nor operational realm of criminal law<sup>88</sup> and hence should be decriminalized as it is a matter of private morality.<sup>89</sup> After the battle fought in the Naz Foundation decision and its overruling in the Suresh Koushal decision, the prima facie question with respect to homosexuality under Section 377 IPC was whether it is premised on the theory of legal moralism as propounded by Lord Devlin and James Fitz James Stephen or on the Harm principle advocated by Prof. HLA Hart and John Mill.<sup>90</sup> While the fifth and the fourteenth law commission and the decision of Suresh Koushal were driven by the Devlin approach and asserted that immorality per se is a reason sufficient for state interference and did not favour decriminalization of homosexuality; the Naz Foundation decision of the Court was based on assertion of the Wolfenden committee report and the argumentation of Prof. HLA Hart

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<sup>79</sup> Philips Oliver, *Sexual Offences in Zimbabwe: Fetishisms of Procreation, Perversion and Individual Autonomy*, (Last accessed on July 14,2021). <https://africabib.org/rec.php?RID=W00091741&DB=w>

<sup>80</sup> Government v. Bapoji Bhatt (1884) 7 Mysore LR 280.

<sup>81</sup> Khanu v. Emperor AIR 1925 Sind 286.

<sup>82</sup> *Id.* at 261.

<sup>83</sup> DP Minwalla v. Emperor, AIR 1935 Sind 78.

<sup>84</sup> Brother John Antony v. State, 1992 Cri LJ 1352, 1359(Mad).

<sup>85</sup> *Supra* note 37.

<sup>86</sup> Wolfenden Committee, Report on Homosexuality and Prostitution, (Chairman: Sir John Wolfenden, 1957).

<sup>87</sup> H.L.A Hart, *Law, Liberty and Morality*, 9 Am.J. Juris. 88 (1963).

<sup>88</sup> K.I. Vibhute, *Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality*, 51 JILI 12 (2009).

<sup>89</sup> Wolfenden Committee, *supra* note at 57, Section 61.

<sup>90</sup> Vibhute, *supra* note 88, at 15.

stating that state should not interfere in the matters of private sexual morality unless it causes harm to others and thereby seeking intervention on part of the judiciary to acknowledge the sexual autonomy of an individual and right to privacy of the two consenting homosexual adults in private.<sup>91</sup>

The constitutional bench of the Supreme Court unanimously declared Section 377 of the IPC as unconstitutional to the extent it criminalizes consensual sexual conduct between two adults in private, be it between homosexuals, heterosexuals, same-sex or transgender sex,<sup>92</sup> however, it continues to govern non-consensual sexual acts against adults, minors and acts of bestiality.<sup>93</sup> The Court further held consensual sexual conduct between two adult homosexuals is natural and not ‘against the order of the nature’ – a pre-requisite under Section 377 and stated

*“It is irrational, indefensible, and manifestly arbitrary. The LGBT community possesses the same human rights, constitutional and fundamental rights as other citizens do since these rights are inherent in individuals as natural and human rights. Section 377 violates Articles 14, 15, 19, and 21 of the Constitution.”*<sup>94</sup>

### **2.5.2 ON THE ANVIL OF ARTICLE 14**

The Court held that it violated Article 14 of the Constitution as it rendered differential treatment to the transgender community premised only on their sexual orientation. The Supreme Court reinforced its anti-majoritarian role and showcased its commitment towards constitutional principles by adopting an individualistic approach. The Court considered the two-fold-test of (i) intelligible differentia and (ii) rational nexus between the differentia and the object sought to be achieved by the provision.<sup>95</sup> The Court held that the purpose of Section 377 was to protect women and children from carnal intercourse and after the 2013 amendment,<sup>96</sup> Section 375 of the IPC<sup>97</sup> and POSCO<sup>98</sup> sufficiently serve this purpose, and the incidental effect is that even consensual sexual

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<sup>91</sup> *Id.*

<sup>92</sup> *Supra* note 30, at para 97, 156, 252, 253.

<sup>93</sup> *Id.* at para 21

<sup>94</sup> *Id.* at para 156.

<sup>95</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

<sup>96</sup> The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013(India).

<sup>97</sup> The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012(India).

<sup>98</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

acts, neither harming the women nor the children, are criminalized and only victimizing the LGBTQA community who indulge in such sexual conduct.<sup>99</sup> The failure within the provision to distinguish between consensual and non-consensual sexual conduct is patently arbitrary.<sup>100</sup> In addition to this, all kinds of sexual conduct of the homosexuals is penalized while only certain specific conducts of the heterosexuals, which are against the order of the nature, are penalized as per Section 377 calling for unequal treatment. The Court held that.

*“Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment.”<sup>101</sup>*

### **2.5.3 ON THE ANVIL OF ARTICLE 15**

While deciding the constitutional validity of Section 377 IPC on the parameters of Article 15, the Court held that “sex” under Article 15 includes sexual orientation and any discrimination on this ground alone amounts to discrimination under Article 15. Like another citizenry, the LGBT community is equally entitled to protection at the instance of the state<sup>102</sup> J. Chandrachud stated that Section 377 induces silence and stigmatization of the LGBT community and buds the notions of societal morality which does not accept certain relations, as being against the order of the nature.<sup>103</sup> The Court in the following words held

“Sex, as used in Article 15, refers not only to an individual’s biological characteristics but also to his or her sexual identity and character.” The LGBT community is a sexual minority that has suffered from unjustified and unwarranted hostile discrimination. It is equally entitled to the protections afforded by Article 15.<sup>104</sup> The fact that only a minuscule fraction of the country’s population constitutes the LGBT and that in the last 150 years, less than 200 persons have been prosecuted under Section 377, is neither here nor there.”<sup>105</sup>

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<sup>99</sup> *Supra* note 30, at para 237.

<sup>100</sup> *Id.* at Para 14, 94, 239

<sup>101</sup> *Id.* at Para 253 (xv).

<sup>102</sup> *Id.* at Para 15.

<sup>103</sup> *Id.* at 52.

<sup>104</sup> *Id.* at 15.1, 15.2.

<sup>105</sup> *Supra* note 70, at para 95.

#### **2.5.4 ON THE ANVIL OF ARTICLE 19**

The constitutional bench unanimously held that Section 377 violates the right to freedom of expression protected under Article 19 of the Constitution. The Court observed that homosexuality and sexual orientation are biological phenomena inherent in every individual, and a person has no control over them.<sup>106</sup> Owing to the harassment, the community fears coming out of the closet and revealing their gender identity and sexual orientation. Unlike heterosexuals, they do not express and nurture their relationships which affect not just their minds but also physical health.<sup>107</sup> The consensual sexual acts of the community in private are not harmful or injurious to any other member of the society and hence cannot be included within the ambit of reasonable restrictions under Article 19(2) on the grounds of public decency, morality and order.<sup>108</sup> J. Chandrachud further held that “the right to intimacy includes the right to the choice of partner and by criminalizing consensual same-sex relations under Section 377 amount to the denial of this right.”<sup>109</sup>

#### **2.5.5 ON THE ANVIL OF ARTICLE 21**

The Court had previously escalated the right to privacy from a legal right to a fundamental right included within the ambit of Article 21 of the Constitution. Moreover, the right to sexual privacy emanates from the right to privacy constitutionally protected, and any provision in violation of this right is unconstitutional. The Court recognized that the right of homosexuals to enjoy their fundamental right to a dignified living protected under Article 21 and criminal prosecution under Section 377 curtails this right and liberty<sup>110</sup> of the LGBT community from engaging in consensual sexual conduct.<sup>111</sup>

For the reasons above, the Court declared Section 377 as unconstitutional to the extent it criminalizes consensual sexual conduct and asserted that regardless of the number of individuals,

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<sup>106</sup> *Id.* at para 253.

<sup>107</sup> *Id.* at para 17.

<sup>108</sup> *Id.* at para 245.

<sup>109</sup> *Id.* at para 67, 151.

<sup>110</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

<sup>111</sup> *Supra* note 70, at para 16.1.



the Court must interfere if a fundamental right is being violated.<sup>112</sup> The reasoning laid down in Suresh Koushal is fallacious and impermissible within our constitutional framework.<sup>113</sup> The Supreme Court ruling of Section 377 has helped many people to open up about their sexual orientation and speak freely about it on Social media as well. They were seen celebrating the victory after the verdict. Earlier, being gay in India meant being rejected by family, ostracized by the community, and even facing violence. However, with time the attitudes of family members have been gradually shifting towards a better side.

The penultimate question after the partial decriminalization of Section 377 is how far this legal change will penetrate the society.<sup>114</sup> The questions of the civil realm regarding the acceptance of same-sex marriage, adoption, discrimination at the workplace, etc. are unanswered.<sup>115</sup> Similarly, in the criminal realm, the scope of application of sexual offenses, presently exclusive to women, on the LGBTQA community, whether non-consensual sexual assault will amount to rape under Section 375 and 376 or will it remain to be punishable as sodomy only under Section 377 IPC, the inclusion of the transgender community under the Sexual Harassment at Workplace Act,<sup>116</sup> are questions yet to be answered.

## **2.6 GENDER NEUTRALITY AND THE LAW**

While the Constitution of India recognizes equality before the law<sup>117</sup> and the equal protection of laws, gendering of laws is the norm and, in many instances, is even desirable.<sup>118</sup> Gendering of laws refers to the law covering only specific gender identities, particularly women, within its scope. For instance, the Constitution recognizes and protects “any special provision for women and children” under Article 15(3). Such a provision indicates substantive equality based on recognizing that the

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<sup>112</sup> *Id.* at Para 253(ii).

<sup>113</sup> *Id.* at Para 156(v).

<sup>114</sup> *Supra* note 37.

<sup>115</sup> *Id.* at 24

<sup>116</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2012, No. 14, Acts of Parliament, 2012 (India).

<sup>117</sup> Gendering of laws is distinct from the gendered drafting of laws since the former comprises situations where law covers only a particular gender identity within its scope. For instance, rape laws recognize only (cis) women as victims of the offence. Gendered drafting of laws on the other hand are a form of drafting where all nouns and pronouns used in the drafting of laws are male, thus presuming that the norm of humanity is male.

<sup>118</sup> Gendering of laws is desirable since the recognition of particular gender identities such as female is necessary to make special provisions in the law. Neutral application of law that is agnostic to identities may actually result in discriminatory outcomes since such neutral laws may not account for the vulnerabilities associated with identities.

guarantee of equality should be amongst equals. Substantive equality implies equality of outcomes and the equality of opportunity instead of mere equality of treatment. Since different degrees of vulnerability may be associated with identities, equal formal treatment may not achieve true emancipation. Thus, laws have to recognize identities, including gender identities, to accommodate the different vulnerabilities associated with them. The Constitution of India thus, while recognizing that laws should not discriminate based on sex, allows for special provisions for women and children, thereby acknowledging historical disadvantages of such identities compared to cisgender men. The gendering of laws, however, is not only restricted to considerations of substantive equality. In many cases, the content of law may be informed by the deep-seated assumptions of the gender binary. However, laws that operate in the binary automatically discriminate against identities, such as transgender persons outside this binary.

Further, laws operating in the binary may also flow from heteronormative assumptions and therefore may not account for non-heterosexual orientations. For instance, laws operating in the binary may assume that only men and women can have a sexual relationship, erasing sexual attraction/ experiences that may fall outside the binary. Navtej Johar and NALSA's recognition of the rights of LGBT+ persons bring questions of discrimination through the operation of gendered laws to the fore since it recognizes gender identities besides male and female and sexual orientations besides heterosexuality. In this context, 'gender neutrality or the neutral treatment of all genders in-laws becomes an intuitive response. However, the operation of gender neutrality is far more complex in practice than it appears in theory. In India, while debates regarding gender neutrality have primarily centered around criminal law, laws governing inheritance, employment and marriage continue to treat males and females differently. They do not recognize genders outside the binary. While non-discriminatory treatment against identities existing outside the binary has become an imperative post NALSA, conceptually based on the same principles, the legal treatment of the binary in the law itself may merit re-examination.

Because India is such a large and diverse country, people's perceptions and experiences with LGBTI people differ significantly. The disparity between urban and rural India and differences in language, caste, social class, and gender contribute to the difficulty of fully comprehending this subject. However, we do know that India's LGBT population is not a "minuscule minority." They

have a powerful voice that will not be silenced any longer in their fight for equality. However, if the civil rights of LGBT people in India are to be safeguarded, much more needs to be done. They have the inalienable right to define themselves on their terms, in their languages. They are free to express themselves and their identities without fear of retaliation or violence. They are human beings with human rights, and they must be recognized as such in the society in which they reside.

### 3. CHAPTER – III

## JUDICIAL RESPONSES IN PROMOTING AND PROTECTING

## LGBTIQA+ COMMUNITY

*“I am what I am, so take me as I am”<sup>119</sup>*

Three years ago, the Supreme Court decriminalized homosexuality, citing Goethe and Leonard Cohen, Shakespeare, and Oscar Wilde in a landmark decision that signaled freedom for millions of members of the LGBTQ+ community. The Indian Supreme Court issued a 495-page landmark decision on LGBT rights and love on 6 September 2018. “Navtej Singh Johar v. Union of India”<sup>120</sup> is arguably one of the most progressive and comprehensive verdicts in this field of law that the world has ever seen. The five-judge constitutional bench, led by then-chief justice Dipak Misra, read down portions of a 158-year-old colonial law under Section 377 of the Indian Penal Code, which criminalized consensual gay sex. “The verdict was delivered with such grace and sincerity that it justified the entire ordeal. Even British philosopher John Stuart Mill said, ‘However, society has fairly supplanted individuality.’ It filled my heart with joy. Nobody could ever again make us feel ashamed. We were not afraid of the law. Suri writes, “The country’s highest court sided with us.”

### 3.1 COLONIZATION AND CRIMINALIZATION

The queer (1) struggle in India has had a complicated relationship with the law. Nothing exemplifies this complexity better than the vexed relationship with the anti-sodomy law in India, Sec 377 of the Indian Penal Code (IPC).<sup>121</sup> The British colonizers introduced this law in 1860 influenced by Victorian morality. As Justice Chandrachud puts it, “the British conceived, legislated, and enforced India’s anti-sodomy law without any public debate.” Homosexuality was

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<sup>119</sup> Johann Wolfgang von Goethe, German Philosopher quoted in Navtej Singh Johar v. Union of India, 2018 (1) SCC 1, September 6, 2018.

<sup>120</sup> *Supra* note 30.

<sup>121</sup> Challenging the Anti Sodomy Law in India: Story of a Continuing Struggle Arvind Narrain, (Last accessed on June 25, 2021) <https://www.scribd.com/document/252164368/UR-Challenging-the-Anti-Sodomy-Law-in-India-Arvind-Narrain>.

so repugnant to the moral principles he espoused that Macaulay [the law’s drafter] believed the idea of a discussion was repulsive.”

### **3.2 KHAIRATI AND THE QUESTION OF GENDER IDENTITY**

Queen-Empress v. Khairati<sup>122</sup> is the first case documented in which Section 377 was used against a person identified by the court as a ‘eunuch.’<sup>123</sup> The ironically named Justice Straight was called upon to adjudicate whether a person who was arrested by the police on the grounds of habitually wearing women’s clothes had committed the offense under Section 377. The medical examination of Khairati, according to the judicial record, showed that Khairati had ‘syphilis and exhibited signs of a habitual sodomite, had indeed committed the offense of sodomy.’<sup>124</sup> The sessions court judge noted:

The man is not a literal eunuch, but he was apprehended by police while visiting his village. He was discovered singing dressed as a woman among the women of a particular family. After being examined by the Civil Surgeon, it is determined that he possesses the characteristic mark of a habitual catamite – the dilation of the anus orifice into the shape of a trumpet – as well as being infected with syphilis in the same region in a manner that evinces unnatural intercourse within the last few months.<sup>125</sup> Justice Straight decided that while he ‘appreciate[d] the desire of the authorities at Moradabad to check these disgusting practices,’ he was unable to convict Khairati, as ‘neither the individual with whom the offense was committed nor the time of committal nor the place is ascertainable.’<sup>126</sup> Although Khairati was acquitted in the end, one should note the gratuitous violence of arresting a person merely because their gender does not match their biological sex. All

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<sup>122</sup> *Supra* note 10, at 205.

<sup>123</sup> The term ‘eunuch’ is today seen as a derogatory reference to the transgender section of society known as the hijra community. This community in India has a recorded history of more than 4000 years. Most hijras live in groups that are organized into seven gharanas (houses), situated mainly in Hyderabad, Pune and Bombay. Each house is headed by a nayak, who appoints gurus, spiritual leaders who train their chelas (wards) in badhai (dancing, singing and blessing), and protect them within and outside the community. The system replicates matriarchy, creating interdependence between the ageing guru and the chela who has been cast out of her family. The nayak and senior gurus acting as lawmakers decide any disputes that take place among the hijras, and administer punishments such as imposing fines and expulsion from the community

<sup>124</sup> *Supra* note 10, at 4.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

in all, the figures of authority were complicit in weaving a discourse based upon an attitude of disgust towards Khairati, who transgressed the existing social norms of gender and sexuality. The silence in the judgment is the voice of Khairati herself. It can be inferred that Khairati, though born a man, identified as a woman and lived her life as one. The fact that she never denied having ‘dressed and ornamented as a woman’<sup>11</sup> can be interpreted as an indication of how vital her chosen gender was to her. It was her gender transgression that implicated Khairati as a potential criminal under Section 377, a reality that she never denied but continued to own stubbornly. Her insistence on her chosen gender gave Khairati a dignity that was difficult to obliterate.

Khairati’s case points to the fact that transgressive gender is mainly absent in the colonial legal record. The fragment that records Khairati’s travails speaks to the question of a more considerable absence from the history of the lives and stories of those who were persecuted on the grounds of their gender identity. Khairati’s story also points to the work to find and tell how the law in colonial India was used for persecution based on gender identity.

### **3.2 NOWSHIRWAN V. EMPEROR: CALLING A NEW WORLD INTO BEING**<sup>127</sup>

In a 1935 decision from Sind, a province of Pakistan, Nowshirwan Irani, a young Irani shopkeeper, was charged with having committed an offense under Section 377 with youth aged about 18 called Ratansi. According to the prosecution, Nowshirwan invited Ratansi to his house, locked the door, and began taking liberties with the young man, who resisted the overtures and desired to leave. This incident was discovered when Solomon, a police officer, and his friend Gulubuddin peered “through a chink in the door panels” and observed the two attempting to commit sodomy.

The judge was not convinced by the prosecution story that Nowshirwan had forced Ratansi to have carnal intercourse. He believed Ratansi had been made to pose as a complainant and, as a result, made hopelessly discrepant statements. The judge was unwilling to rely on the testimony of eyewitnesses Solomon and Gulubuddin, whose behavior he found peculiar. Further, the medical evidence could prove neither forcible sexual intercourse (the prosecution story) nor an attempt to commit the act of sodomy. According to the judge, ‘as the appellant had not progressed beyond a certain stage of lascivious companionship, even in the worst-case scenario, I believe he does not

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<sup>127</sup> Noshirwan v. Emperor AIR 1934 Sind 206.

deserve to be convicted of any of the offenses with which he was charged or could have been charged.”<sup>128</sup> The two accused were released. Their conviction was set aside as the act of sodomy was never completed. On his admission, the judge reprimanded one of the men, Ratansi, for being a “despicable”<sup>129</sup> specimen of humanity for being addicted to the “vice of a catamite.”<sup>130</sup> Once again, we associate the person – a catamite – with the action rather than alone. However, the relevance of the association of the act with the person is never explained. The tragic story of Nowshirwan and Ratansi speaks to the absence of a specific vocabulary. The language of love and intimacy, longing and desire, and the expression of spontaneous bodily affection find no safe habitation within the terms of the law, which degrades such experimental creation of new forms of intimacy. One could look at Nowshirwan and Ratansi as being unwitting frontiersmen in the history of the battle against Section 377 and as being among its first recorded tragic victims. Nowshirwan’s story remains emblematic of the ethical and moral poverty of the judicial discourse, even though it grappled with homosexual expression for more than 158 years. It is important to note that despite the Indian Constitution coming into force with the language of equality, non-discrimination, and dignity, the judiciary in the postcolonial era continued to characterize homosexuality with terms such as ‘unnatural,’ ‘perversity of mind’ and ‘immoral.’ The ethical language of dignity and rights were never perceived as applying to LGBT persons (see Narrain, 2008).

### **3.3 FROM SODOM TO GOMORRAH**

In *Bapoji Bhatt*,<sup>131</sup> the appellant faced S 377 charges for alleged oral sex with a minor. In the absence of any other statute dealing with child sex abuse more appropriately, the case was charged and tried under S 377, making no distinction between consensual and non-consensual sex. The courts determined that the definition of “carnal intercourse against the order of nature” could not be expanded to include acts of oral sex. They thus dismissed the case because “the act must occur in that part of the body where sodomy is typically committed.”<sup>132</sup> In defining what constituted

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<sup>128</sup> *Id.*

<sup>129</sup> *Supra* note 10, at 208.

<sup>130</sup> *Id.*

<sup>131</sup> *Government v. Bapoji Bhatt* (1884 (7) Mysore LR 280).

<sup>132</sup> *Id.* at 282.

‘carnal intercourse against the order of nature’ in *Lohana Vasanthlal Devchand v. The State*,<sup>133</sup> the court noted that ‘the act of oral sex involves enveloping of [the] penis by the mouth, thus creating an alternative socially unacceptable activity, which is against the order of nature.

The judiciary used this idea of sex without the possibility of conception over the last 149 years to characterize homosexuality as a ‘perversion,’ ‘despicable specimen of humanity,’ ‘abhorrent crime,’ ‘result of a perverse mind’ and ‘abhorred by civilized society. The judicial interpretation included both acts of consensual sex and sexual assault under its catchall category of ‘carnal intercourse against the order of nature. Technically speaking, Sec 377 does not prohibit homosexuality or criminalize homosexuals as a class but targets sexual acts instead. However, because these sexual actions are exclusively associated with homosexuals, homosexuals are the only group subject to prosecution under the legislation. The Indian Constitution has never impacted the judicial understanding of Sec 377. Since 1860, through over fifty years of the Indian Constitution, the judiciary continues to follow the colonial justices of the Khanu era in defining homosexuals as ‘despicable specimens of humanity. The right to equality, dignity, or the right to expression has never been seen fit to apply to lesbians, gays, bisexuals, hijras, or others whose sexuality does not conform to the heterosexual norm.

### **3.4 FROM GROSS INDECENCY TO SEXUAL PERVERSITY**

Oliver Philips argues in his analysis of Zimbabwe’s anti-sodomy jurisprudence that the need for labels to fit various sex possibilities has resulted in a “continual process of definition, denigration, and capitulation.”<sup>134</sup> The debate over the scope and application of 377 lasted well into independent India’s 1960s and 1980s. The Gujarat High Court heard an appeal against a conviction for oral sex with an underage boy in *Lohana Vasantlal*. The court determined that oral sex was imitative of anal sex in terms of penetration, orifice, enclosure, and sexual pleasure, thus comparable to anal sex and punishable under S 377.

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<sup>133</sup> *Lohana Vasanthlal Devchand v. The State* AIR 1968 Gujrat 252.

<sup>134</sup> *Supra* note 79, at 184.



The “imitative” criteria were expanded in the State of Kerala versus K Govindan,<sup>135</sup> in which thigh sex was added to the laundry list of unnatural acts. The court applied the mock test “the male organ is ‘inserted’ or ‘thrust’ between the thighs, there is ‘penetration’ to constitute an unnatural offense.”<sup>136</sup> The critical factor here is not the coercive aspect of the sexual activity, which would be appropriate given the facts of the case, but the act’s ability to be accommodated within the definition of “carnal intercourse against the natural order.” Without discussing a private space for consensual sexual acts, the growing association between sodomy, perversity, and homosexuality was solidified in the case of Pooran Ram vs. State of Rajasthan,<sup>137</sup> in which a homosexual was equated with a rapist. According to the court in Pooran Ram, “perversity” in sexual offenses can result in “homosexuality or the commission of rape.”<sup>138</sup> In numerous cases,<sup>139</sup> involving prison conditions in India, judges have cited the presence of homosexuals and the imminent (and almost unavoidable) possibility of homosexual sex as a significant aggravating factor contributing to the prison’s deplorable state. While reflecting on the prison conditions in the case of Lingala Vijaykumar vs. Public Prosecutor, Andhra Pradesh, the eloquent justice Krishna Iyer stated that “these adolescents, when ushered into jail with sex-deprived ‘Lepers’ scattered about, become homosexual offerings with nocturnal dogfights.”<sup>140</sup> The comment, characteristic of Justice Iyer’s distinct approach, highly indicates how the Indian judiciary views homosexuality. Thus, homosexuals become recognized as predators and coercive sexual partners. Thus, homosexuals become recognized as predators and coercive sexual partners. Moreover, homosexuality has become the face of the general discourse on perversity.

Notably, all of the preceding cases involve non-consensual activities. While S 377 does not preclude consensual activities, the term “voluntary” in the statute’s language renders consent irrelevant. Thus, oral, anal, and thigh sex and mutual masturbation are all punishable acts, even when two consenting adults engage in the acts in a private sphere. Indeed, in *Mihir vs. the State of Orissa*,<sup>141</sup> Pasayat J clarified that the victim’s consent is irrelevant under S 377 because “unnatural

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<sup>135</sup> State of Kerala v. K Govindan (1969) Cr LJ 818.

<sup>136</sup> *Id.* at, para 20.

<sup>137</sup> Pooran Ram v. State of Rajasthan 2001 Cr LJ 91.

<sup>138</sup> *Id.* at, para 31.

<sup>139</sup> Sunil Batra v. Delhi Administration 1978 SCC (4) 494.

<sup>140</sup> Lingala Vijaykumar v. Public Prosecutor, Andhra Pradesh 1978 SCC.

<sup>141</sup> *Mihir v. State of Orissa* 1992 Cr LJ 488.

carnal intercourse is abhorred by civilized society.” Justice Pasayat categorically compares consensual homosexuality to rape.

Sodomy laws are only helpful in prosecuting cases of non-consensual sex. However, this cannot be used to justify the retention of anti-sodomy laws or legitimize the common law offense of sodomy. Justice Ackermann, in his opinion decriminalizing consensual sodomy in South Africa, stated that “the fact that the ambit of the offense was extensive enough to include ‘male rape’ was coincidental.”<sup>142</sup> Prosecuting non-consensual sexual acts under sodomy laws trivializes the sexual offense’s coercive elements, as “...the charge focuses on the priori “unnaturalness” of male-male sex.”<sup>143</sup> *State vs. Brother John Antony*<sup>144</sup> was a 1992 case brought by students of a boarding school against a teacher who compelled them to perform oral sex on him and masturbated them. Once again, the “unnaturalness” of the action takes precedence in this case. The fact that “an assault (possibly violent) occurred is of secondary importance.”<sup>145</sup> The judgment delves deeply into the definition of sexual perversion and discusses other forms of sexual deviance such as “tribadism,”<sup>146</sup> “bestiality,”<sup>147</sup> and “masochism,”<sup>148</sup> among others. “Fetishism,”<sup>149</sup> “exposure,”<sup>150</sup> and “sadism”<sup>151</sup> and concludes, using the mock test, that mutual masturbation falls within 377 because “the petitioner’s male organ is said to be tightly grasped by the victims’ hands, forming an orifice-like structure for manipulation and movement of the penis through insertion and withdrawal.”<sup>152</sup>

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<sup>142</sup> *National Coalition of Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC), para 69.

<sup>143</sup> *Supra* note 17 at 193

<sup>144</sup> *Brother John Antony v. State* 1992 Cr LJ 1352.

<sup>145</sup> *Id.*

<sup>146</sup> *Supra* 27 at 1353, ‘Tibadism: Friction of the External Genital Organs by One Woman on Another by Mutual Bodily Contact for the Gratification of the Sexual Desire’.

<sup>147</sup> *Ibid* ‘Bestiality: Sexual Intercourse by a Human Being with a Lower Animal’.

<sup>148</sup> *Ibid* at 1354’ Masochism: Opposite of Sadism and Sexual Gratification Is Sought from the Desire to be Beaten, Tormented or Humiliated by One’s Sexual Partner’.

<sup>149</sup> *Supra* 27 ‘Fetishism: Experiencing Sexual Excitement Leading to Orgasm from Some Part of the Body of a Woman or Some Article Belonging to Her’.

<sup>150</sup> *Id.* ‘Exhibitionism: Exposure of Genital Organs in Public’.

<sup>151</sup> *Id.* ‘Sadism: A Form of Sexual Perversion in Which the Infliction of Pain and Torture Act as Sexual Stimulus’.

<sup>152</sup> Similarly in cases like *Calvin Francis vs State of Orissa* 1992 (2) Crimes 455 and *State of Gujarat vs Bachmiya Musamiya* 1998 (2) Gujarat L R 2456, the judgments are only concerned with the unnaturalness of the sexual act involved and not the plight of the victim.

This has a significant impact on the concept (or lack thereof) of consent in 377 cases, as decisions dealing with non-consensual sexual activities undermine “the victim’s creation” and thus render “the non-existence of a victim”<sup>153</sup> irrelevant in cases of consensual sexual activities. The National Commission for Women in 1993<sup>154</sup> advocated the deletion of Section 377 to give legitimacy to same-sex relationships between consenting adults. Even though it was considered a progressive step, the commission did not consider the community’s views and concerns. Additionally, for more than a decade, the bill laid dormant.

### **3.5 NAZ FOUNDATION v. NCT DELHI: THE PROMISE OF HOPE**

At various times, activists have wondered whether Sec 377 is the be-all and the end-all of our struggle and whether the courts are ever capable of taking this issue on board and delivering a favorable judgment. This process of discussion, with many confusions and little clarity as to the course of action, received a focal point with the petition challenging Sec 377 that was filed unilaterally by the Lawyers Collective on behalf of Naz Foundation (India) Trust, a non-governmental organization, before the Delhi High Court in 2001. The petition argued that Section 377 was unconstitutional to the extent that it prohibited sexual actions between consenting adults of the same sex in private. Additionally (in technical words), the petition requests that the act be ‘read down’ to exempt same-sex acts between consenting adults in private, allowing for the ongoing use of Sec 377 in cases of child sexual abuse.

However, this petition faced massive criticism from the LGBTIQ community as they felt that there had been no consultation before filing the petition. The community members articulated a strong disagreement with challenging Sec 377 based on the right to privacy, arguing that while it may be a legal strategy, it did not reflect the normative claims of the community. One of the valid points put forward by the community was that privacy, when viewed as the freedom to be themselves at home, free from state control, was a class-bound concept. Not many other than some privileged Lesbian, Gay, Bisexual, Transgender (LGBT) members had the luxury of having homes and enjoying the right to privacy. In fact, for most kothis, hijras, and lower-income gays and lesbians,

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<sup>153</sup> Supra 26

<sup>154</sup> Sexual Violence against Women and Children Bill, 1993.

private space was a privilege they did not have. If the court were to go ahead and decriminalize same-sex activity between adults in private, it would make no significant difference to their lives. This critique eventually fed back into the nature of the legal intervention, with the privacy argument being distinguished into zonal privacy and decisional privacy with *Voices Against 377* making the argument that privacy was not a concept of space alone (i.e., I have a right to do what I want in my home) but rather a concept about the autonomy of decision-making when it came to personal decisions such as the decision about how and with whom to forge affectionate and relational ties.<sup>155</sup> For next seven years the meetings hosted by Lawyers Collective and Naz Foundation s contributed towards Sec 377 becoming a more politicized issue in the community. To provide greater thrust to the cause, the National AIDS Control Organization and 'Voices Against 377' extended their support to the petition.<sup>156</sup> In 2009, the first-time judiciary moved outside the range of responses through Justice Shah and declared the 150 years old draconian law as unconstitutional and legalized homosexual activities between consenting adults. This decision can be characterized as representing the quality of judicial empathy. The judgment is of vital importance as the judges' questions, and comments revealed not the intention to humiliate but instead in response to a trans activism movement, upholding the rights of privacy and dignified life of the LGBTQA community. Chief Justice Shah communicated this empathy in ample measure upholding the spirit of the constitution, breaking the hetero-normative societal standards, and accommodating the voices of the sexual minority. In addition, 'Moral indignation, however, long, is not a valid basis for overriding individuals' fundamental dignity and privacy rights. In our view, constitutional morality must take precedence over dignity and private rights, even if this is the majority view.'<sup>157</sup> Moreover, the theme of constitutional morality derived from constitutional values brings about a paradigm shift in how the law looks at LGBT persons. This created a magical space for the LGBTIQ community, who were so used to the sneers and jeers of society, suddenly felt that they were being heard and respected. Simply through the art of empathetic listening, the judges restored dignity to a section of society upon whom the government seemed intent on pouring nothing but contempt and scorn.

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<sup>155</sup> ANNIE, *CLOSE RANGE: BROKEBACK MOUNTAIN AND OTHER STORIES* 298 (Harper Perennial, London, New York 2006).

<sup>156</sup> *Supra* note 5, at 277.

<sup>157</sup> *Id.* note at para (86).

However, this journey of victory from Nowshirwan to the Naz Foundation, in some ways, proved fragile, as the decision in 2013 in *Suresh Kumar Koushal v. Naz Foundation*<sup>158</sup> was to show.

### **3.6 SURESH KUMAR KOUSHAL AND THE FAILURE OF CITIZENSHIP**

Suresh Kumar, an astrologer who had nothing to do with the litigation so far, petitioned the Supreme Court challenging the historic Delhi High Court Judgment just seven days after the Naz Foundation decision. He was joined subsequently by 14 others from the spectrum of Indian society, comprising all religions, all united by one thing only, opposition to the Naz judgment.<sup>159</sup> This vociferous opposition from representatives of all significant Indian faiths prompted those in favor of the Delhi High Court judgment. As a result, the parties before that court, Voices Against 377 and Naz Foundation, were joined by 19 parents of LGBT persons, 14 mental health professionals, 11 law teachers, 16 teachers, and Shyam Benegal, a public-spirited intellectual, who all filed interventions before the Supreme Court. On 11 December 2013, a two-judge bench of the Indian Supreme court chose to disregard the violations it had caused. The judges ignored the actual impacts that section 377 has on queer lives and concluded:

A minuscule fraction of the country's population constitutes lesbians, gays, bisexuals, or transgender people, and in last more than 150 years, less than 200 persons have been prosecuted (as per the reported orders) for committing offenses under Section 377 IPC, and this cannot be made the sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the constitution.<sup>160</sup>

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<sup>158</sup> *Supra* note 7, at 1278

<sup>159</sup> *Suresh Kumar Koushal and another v. Naz Foundation and others*, Special Leave Petition (SLP) no. 15436 of 2009 was the first SLP to be filed against the Naz judgment. Since then, 15 other parties have also filed SLPs challenging the Naz judgment: *Apostolic Churches Alliance through its Bishop v. Naz Foundation*; *S.K. Tizarawala v. Naz Foundation*; *Bhim Singh v. Naz Foundation*; *B. Krishna Bhat v. Naz Foundation*; *B.P. Singhal v. Naz Foundation*; *S.D. Pratinidhi Sabha v. Naz Foundation*; *Delhi Commission for Protection of Child Rights v. Naz Foundation*; *Ram Murti v. Government of NCT of Delhi*; *Krantikari Manuvadi Morcha Party v. Naz Foundation*; *Raza Academy v. Naz Foundation*; *Tamil Nadu Muslim Munnetra Kazhagam v. Naz Foundation*; *Utkal Christian Council v. Naz Foundation*; *Trust Gods Ministry v. Naz Foundation*; *All India Muslim Personal Law Board v. Naz Foundation*; *Joint Action Kannur v. Naz Foundation*.

<sup>160</sup> *Suresh Kumar Koushal v. Naz Foundation*, 2013 (15) SCALE 55: MANU/ SC/1278/2013.

The decision is best described in Vikram Seth's eloquent words as a 'bad day for law and love' (2013). The judgment was heavily criticized for displaying poor legal reasoning – even lack of fundamental legal analysis – as well as a lack of understanding of the queer issue.<sup>161</sup> Dhavan described it as hurriedly written, deeply flawed, contradictory, and contrary to constitutional understandings.”<sup>162</sup> The judgment chose a narrow, formalistic focus and failed to demonstrate why it concluded that Section 377 was constitutionally valid. It seems the court entirely neglected its role of guardian and showed a complete lack of understanding of how Section 377 has impacted and still impacts LGBTIQ people. Beyond equality, privacy, and dignity, the one concept developed in the Naz judgment has important implications, and not just for India. The vague formulation of section 377 in this inspirationally Benthamite Code was deliberate — Macaulay, its drafter, wanted to avoid any discussion of 'an odious class of offenses' which a clearer phrasing could have given rise to.<sup>163</sup> The provision then traveled around the British Empire, is the main reason that about four in five Commonwealth nations still criminalize homosexuality. Many commentators have already pointed out the spectacular lack of legal aptitude, understanding of human rights, and compassion in Koushal.<sup>164</sup> The ruling based on the Indian Constitution's commitment to protecting fundamental rights of minuscule groups, as articulated by Dr. Ambedkar, was failed to appreciate in Koushal's judgment. The Naz court applied this notion of constitutional morality derived from Dr. Ambedkar and the notion of inclusiveness as expressed in 1947 by Jawaharlal Nehru<sup>165</sup> to LGBT persons.

While the reasoning is a critical component of the law, judicial decisions are delivered at their best with a profound empathy for human suffering. A court moved by human suffering produces judgments like the pavement-dwellers (Olga Tellis).<sup>166</sup> The bonded laborers (Bandhua Mukti Morcha).<sup>167</sup> It could be argued that ruling based on profound appreciation to human suffering,

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<sup>161</sup> Raveev Dhavan, *SC judgment on Section 377: a flawed pre-retirement order written in a rush*. The Times of India, (Last accessed on July 26, 14:15 PM) <http://timesofindia.indiatimes.com/india/SC-judgment-on-Section-377-A-flawed-pre-retirement-order-written-in-a-rush/articleshow/27539754.cms>

<sup>162</sup> *Id.*

<sup>163</sup> Report of the Indian Law Commission on the Penal Code, October 14, 1837, 3990-91. See also Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals* Economic and Political Weekly (July 26, 2021, 9:29 PM).

<sup>164</sup> Surabhi Shukla, *Media Stories on 377 SC Judgment*, ORINAM BLOG (July 27, 2021 9:25 PM) <http://orinam.net/377/media-stories-377-sc-judgment/>.

<sup>165</sup> In his 'Tryst with destiny' speech, Constituent Assembly, delivered at midnight, 14–15 Aug. 1947, on the eve of independence, available at: <http://nehruemorial.nic.in/en/gift-gallery.html?id=214&tmpl=component> (Last accessed on July 27, 10.00 PM)

<sup>166</sup> *Olga Tellis and others v. Bombay Municipal Corporation* AIR 1986 SC 180.

<sup>167</sup> *Bandhua Mukti Morcha v. Union of India and others* (1997) 10 SCC 549.

judges embody a form of constitutional compassion that should be at the heart of the judicial function. Referring to Gandhi, he said: ‘The ambition of the most remarkable man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over. The first structural failing, which many progressives point to as an example for how the judiciary should be formed, is the Supreme Court’s near-complete abandonment of the idea of separation of powers and metamorphosis into a populist, legislative court of governance. The second failure, which derives from the first, is the court’s frequent inability to explain. Koushal exemplifies two Supreme Court structural failings. The court turned a blind eye to human misery for its decisions and the legal academies to hold it accountable for this failure. For all those who believe in the fundamental rights of individuals to express themselves irrespective of the barriers of caste, religion, and sexuality, the decision in Koushal represents an undeniable setback.

### **3.7 NATIONAL LEGAL SERVICES AUTHORITY v. UNION OF INDIA**

A little over four months since the severe setback, those involved in the Suresh Kumar Koushal case gave trans activism throughout the country. In 2014 the blossoming activism led to a remarkably progressive judgment in *National Legal Services Authority v. Union of India*,<sup>168</sup> wherein the court explicitly recognized the identity of the third gender, protecting their fundamental rights under Article 14 of the Constitution of India, 1950. The judges began with a powerful acknowledgment of the wrongs inflicted on the transgender community.

Our society frequently mocks and victimizes the transgender community. They are marginalized and treated as untouchables in public spaces such as railway stations, bus stops, schools, workplaces, malls, theatres, and hospitals, even though the moral failure stems from society’s unwillingness to contain or embrace diverse gender identities and expressions. This mindset must change.<sup>169</sup> The judges traced a place for the transgender community and recognized a cultural sanction to transgender existence. In the court’s opinion, this society was not discriminated against and was a part of the ruling class under the Muslim Mughal rulers. In 1871 the British passed the Criminal Tribes Act under which the very existence of the hijra community was rendered criminal.

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<sup>168</sup> NALSA supra note 12, at 112.

<sup>169</sup> *Id.* para at 1–2.

By referencing the unjust arrest of Khairati,<sup>42</sup> which, as noted above, was the first documented case of the use of Section 377, the judges recognized that using it formed another part of the colonial apparatus that ends up targeting the hijra person. The court held that “person” under article 14 is not limited to mean a man and a woman but extends to the transgender community and holds that the denial of rights to the transgender community is a violation of the right to equality (Article 14), the right to non-discrimination (Article 15), the right to affirmative action (Article 16), the right to freedom of expression (Article 19(1)(a)) and the right to dignity (Article 21).

The National Legal Services Authority judgment (NALSA judgment) is particularly innovative in its understanding and was a progressive step to safeguard the constitutional offspring in line with constitutional morality. The decision also identified the legal recognition of gender identity and freedom guaranteed under our constitution. The NALSA judgment was remarkable as it upheld the rule of law, regardless of the numerical significance of the community and the normative societal standards of morality. The state and central governments were directed to recognize the self-identified gender of persons, be they male, female, or third gender, without surgery being a prerequisite. Following the legitimate recognition of the third gender as an integral part of personal autonomy and self-expression, the law prohibiting rape and other sexual offenses should have been gender-neutral, as the trans community, like women, now falls under the oppressed and vulnerable category, making them susceptible to sexual violence and harassment as a result of societal power dynamics.<sup>170</sup> The Court has also recognized the LGBTQA community as a vulnerable and oppressed class in the NALSA decision and gave legal recognition to the community.

A study conducted by Alok Gupta on over 50 reported judgments under Section 377 reflected that over the past 50 years, 30% of the cases dealt with sexual assault and abuse of minors. The remaining dealt with non-consensual sexual activities with women and between men. Prosecution of cases involving consensual sexual conduct under Section 377 was almost none. Instead, the police agency grossly misused the law for exploitation and harassment of the LGBTQA community by charging them under Section 377.<sup>171</sup> Later, the accused persons are either

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<sup>170</sup> State v. Sheodayal AIR 1956 SC 8

<sup>171</sup> Alok Gupta, Section 377 and the Dignity of Indian Homosexuals, ECONOMIC AND POLITICAL WEEKLY, 4817 (May 08, 2019, 15:30 PM), <https://www.jstor.org/stable/4418926>.



discharged by the police officer owing to a lack of substantial medical evidence to prove carnal intercourse against the order of the nature, or a closure report is filed leading to the release of the accused person.<sup>172</sup> Section 377 was being used as a tool for sexual violence, exploitation or harassment by the governmental institutions and agencies against the sexual minorities.<sup>173</sup> Acknowledgment of the vulnerability of the LGBTQA community and the fact that the people who belong to it are whole human beings with rights in NALSA, won back part of what was lost through Koushal.

### **3.8 THE RIGHT TO PRIVACY PAVES THE WAY FOR LGBTQ RIGHTS IN INDIA**

In 2017, in the case of Puttaswamy v. Union of India,<sup>174</sup> did take the drastic step of overruling the Kharak Singh and M.P. Sharma cases. The Supreme Court gave an expansive interpretation of privacy. It held that it is a fundamental right.<sup>175</sup> Additionally, the court, taking a critical view of the regressive step taken in the Suresh Koushal decision, observed that sexual orientation is an essential attribute of privacy.<sup>176</sup> Equal protection necessitates the non-discriminatory protection of each individual's identity. People with diverse sexual orientations do not present any psychological impairment or deficiency that would justify applying a law distinct from those with a heterosexual sexual orientation and criminalizing their sexual actions. This observation of the Supreme Court raised the hopes of the transgender community concerning their spatial privacy, decisional privacy, or privacy of choice. The Delhi High Court has corrected the long-standing mistake made by the Delhi High Court. It has incorporated the right to consensual, private, homosexual sex under the right to privacy.

### **3.9 NAVTEJ SINGH JOHAR AND OTHERS v. UNION OF INDIA: A BATTLE FOR ALL**

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<sup>172</sup> *Id.* at 4819-4820.

<sup>173</sup> K.I. Vibhute, Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality, JOURNAL OF INDIAN LAW INSTITUTE, 12 (May 08, 2019, 16:03 PM), <https://www.jstor.org/stable/43953422>.

<sup>174</sup> K.S. Puttaswamy v. Union of India, (2018) 1 SCC 809.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

In 2018, several writ petitions were referred to the Supreme Court to adjudicate on “right to sexuality,” “right to sexual autonomy,” and “right to choice of a sexual partner” guaranteed by Article 21 of the Constitution of India. It was also prayed by the petitioners to declare Section 377 of the Indian Penal Code as unconstitutional. One of such petitions presented by dancer Navtej Singh Johar before the three-judge bench referred to the Suresh Koushal case. The three-judge bench felt that there were many aspects to be considered and referred to the Constitutional Bench, and five other petitions were joined to this petition. The government, through an affidavit, articulated that the court may determine the constitutionality of Section 377 IPC as per its wisdom. Considering the petitions and examining the same through various aspects, the learned five-judge bench of the Apex Court declared section 377 of IPC unconstitutional. The court declared the section unconstitutional to the extent that it criminalizes consensual sexual conduct between two adults in private, regardless of whether they are homosexuals, heterosexuals, same-sex partners, or transgender individuals. It does, however, continue to regulate non-consensual sexual acts against adults, minors, and bestial acts. It does, however, continue to regulate non-consensual sexual acts against adults, minors, and bestial acts. The judges are moved by the LGBT community’s suffering, as evidenced by both the content and tone of the verdict. It contrasts with the previous “Koushal”-verdict in 2013 wrote about “so-called rights” of “a minuscule minority.” Even the NALSA verdict of 2014 focused on the transgender community being colored by pity rather than genuine compassion and recognition of responsibility.

In “Navtej Singh Johar,” the verdict begins with Chief Justice Misra quoting Goethe: “I am what I am, so take me as I am.”

Justice Malhotra goes on to state that “History owes an apology to the members of this community and their families for the delay in providing redress for the centuries of ignominy and ostracism.” In this case, the judges apologized for being wrong and letting the LGBTIQ community suffer at society’s hands and sought to atone for it by promising that things must become better today and in the future for LGBTIQ persons. Though the verdict applies in India, the words have a universal application.

As mentioned above, through mobilization against section 377, the court took a shift from criminalization approach to human rights approach; and from majoritarian morality to constitutional morality, holding that constitutional morality cannot be martyred for social morality<sup>177</sup> nor can the two be substituted for each other; constitutional morality will always trump social morality.<sup>178</sup> Justice Deepak Misra held,

“Under the guise of social morality, members of the LGBT community must not be outlawed or subjected to stepmotherly treatment by society; if such treatment is permitted to continue, the constitutional courts, which are tasked with protecting fundamental rights, will be failing in their duty.”<sup>179</sup>

The court also held that retention of Section 377 conforms to the heterosexual expectations of society. In doing so, it perpetuates discrimination owing to a symbiotic relationship between anti-homosexual legislation and traditional gender roles. The judges discarded the social concerns and saw the LGBT struggle as part of a necessary feminist struggle leading to the progressive realization of the right of the sexual minorities and furthering transformative constitutionalism. While the LGBT problem has been framed primarily in terms of rights, civil questions such as same-sex marriage, adoption, workplace discrimination, and so on remain unaddressed. Similarly, in the criminal realm, the scope of application of sexual offenses, presently exclusive to women, on the LGBTQA community, whether non-consensual sexual assault will amount to rape under Section 375 and 376 or will it remain to be punishable as sodomy only under Section 377 IPC, the inclusion of the transgender community under the Sexual Harassment at Workplace Act,<sup>180</sup> are questions yet to be answered.

In “Navtej Singh Johar,” the judges do not engage much in this discourse. Since ancient times, over 2,000 years of Indian literature [demonstrates] those homosexual relationships have flourished within the community and have been embraced in a variety of forms,” Justice Chandrachud writes in a footnote, referring to the work of Ruth Vanita and Saleem Kidwai. When it comes to morality, the judges are concerned with “constitutional morality,” a term initially

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<sup>177</sup> Supra note 30, at 253(v).

<sup>178</sup> *Id.* at para 80-81.

<sup>179</sup> *Id.* at para 122.

<sup>180</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (India).

proposed by Dr. Ambedkar. “Constitutional morality is not a natural sentiment,” the judges quote him as stating. It needs to be nurtured. The courts’ principle of non-retrogression, which states that once rights are recognized, they cannot be taken away, is very significant.

In numerous subsequent cases, the courts have maintained this progressive stance. In *Arun Kumar v. Inspector General of Registration*,<sup>181</sup> the Madurai Bench of the Madras High Court upheld the marriage of a trans woman and a cis man in 2019. It confirmed that it was valid under the 1956 Hindu Marriage Act. Additionally, the court stated that a ‘bride’ included any intersex/transgender person identified as female. It was observed that “the only factor to consider is how the individual perceives herself.” Despite the law’s hetero-normative definition of consummation as one between a cis male and cis female, the court’s validation of this marriage demonstrates the court’s willingness and capacity to interpret beyond the traditional definition of gender identity.

While considering a petition filed by a lesbian couple seeking protection from police and family harassment, the court noted that the LGBTQIA+ community “cannot be left in a vulnerable environment” where their safety and protection are not guaranteed. Additionally, J. Venkatesh volunteered to participate in psychological and educational sessions with a professional psychologist to unlearn and overcome his prejudices toward the queer community and better understand their struggles. He distinguished himself as a queer community ally by stating that “[i]gnorance is no excuse for normalizing any form of discrimination.” J. Venkatesh also noted in his judgment the importance of the legislature enacting legislation and the importance of protecting queer persons from the hostile environment(s) until then. As a result, he issued guidelines to ensure the safety and protection of queer people’s rights. The guidelines were issued to educate law enforcement and corrections officers, the judiciary, educational institutions, and physical and mental health professionals about LGBTQIA+ issues. In this regard, the most recent and consequential judgment was issued on 7 June 2021 by J. Anand Venkatesh of the Madras High Court in *S Sushma v. Commissioner of Police*,<sup>182</sup> which has been lauded as a gift to the LGBTQ community during pride month.

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<sup>181</sup> *Arun Kumar v. Inspector General of Registration* WP(MD)No.4125 of 2019.

<sup>182</sup> *S Sushma v. Commissioner of Police* W. P. No. 7284 of 2021.

The most notable aspect of the guidelines was the directive to the Union and State Governments to prohibit medical professionals from attempting to ‘cure’ or ‘change’ queer people’s gender identity and sexual orientation. Additionally, it was stated that strict action should be taken against any medical professional who engages in any form or method of conversion therapy, including the revocation of their license to practice. Furthermore, the rules prioritized public outreach, directing Anganwadis (Indian rural child care centers) and other shelter houses to protect and shelter trans persons. The state created public awareness campaigns on LGBTQIA+-related topics. Another noteworthy point in these guidelines was the direction to the judiciary, which stated that any issue involving the LGBTQIA+ community must be addressed sensitively, and the appropriate adaptive mechanism – such as counseling, monetary support, or legal assistance – must be implemented following the facts and circumstances of each case. The overarching goal of these guidelines was to establish a safe(r) space for the LGBTQ community.

Although India established a precedent by formally adopting the Yogyakarta Principles in the NALSA case and decriminalizing ‘unnatural sex’ in the Navtej Singh Johar case to protect the right to life, liberty, and privacy, the country continues to lag in granting sexual minorities their due [and inherent] rights, recognition, and representation – not only in the judiciary but also in the public sector. By recognizing the diversity of partnerships and families, the preceding decisions functioned as a spark in the struggle against marginalization and social exclusion. As former Chief Justice Deepak Mishra stated in the Navtej Singh Johar case, constitutional morality must prevail over social morality to protect the LGBTQIA+ community’s rights. Thus, these decisions demonstrate the judiciary’s capacity to adapt, depart from conventional understandings of socio-legal phenomena, and foster a more inclusive environment. Perhaps the best assurance is the societal transformation demanded by the judges, which the LGBT movement and its allies have fought for and must continue to fight for in numerous ways.

## 4 CHAPTER -IV

### A COMPARATIVE STUDY ON THE VARIOUS EXISTING COMPREHENSIVE ANTI LGBTIQA+ DISCRIMINATORY LEGISLATIONS IN SOUTH AFRICA, CANADA, USA

#### 4.1 SOUTH AFRICA

*I am fighting for the abolition of apartheid. Moreover, I fight for freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.*

*Simon Nkoli, first Gay and Lesbian Pride March in Johannesburg, South Africa, 1990. (Luirink, 2000)*

#### 4.1.1 HISTORY

South Africa became the first country to constitutionally ban discrimination on the grounds of sexual orientation and gender identity (SOGI), and the same were entrenched in the permanent constitution in 1996.<sup>183</sup> Clearly, this is no small achievement, and the success speaks to the extraordinary legal and political context of South Africa today. In the Apartheid era, which officially lasted from 1948-1994 (Thompson, 1990), the country was governed by the National Party, where homosexuality was considered a criminal offense punishable with imprisonment. The community was coerced to undergo gender reassignment surgery to cure their sexual orientation and keep it within the bounds of the societal hetero-sexual norms. This law led to the harassment and social exclusion of the LGBTQA community in Africa. The battle spawned the gay and lesbian groups, which sought to elevate LGBT problems to the forefront of the anti-apartheid movement both in South Africa and overseas.<sup>184</sup>

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<sup>183</sup> Constitution of the Republic of South Africa, 10th December 1996 available at <https://www.refworld.org/docid/3ae6b5de4.html>

<sup>184</sup> J COCK, ENGENDERING GAY AND LESBIAN RIGHTS: THE EQUALITY CLAUSE IN SOUTH AFRICAN CONSTITUTION 36 (*Woman's Studies International Forum* 2002)

The connections between the anti-apartheid campaign and the struggle for LGBT rights are best exemplified by the legendary narrative of Simon Nkoli, an activist against both apartheid and institutionalized homophobia. He established the first mass-based black gay and lesbian organization, the Gay and Lesbian Organisation of the Witwatersrand (GLOW).<sup>185</sup> He stated: “I am fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.”<sup>186</sup> He insisted upon the inseparability of the struggles against apartheid and homophobia, challenging his comrades in both movements to fight together.<sup>187</sup> Simon’s story is well-known in South Africa. However, it needs to be spread throughout the global LGBT community. His effort symbolizes a new and inspiring type of action that is not sectarian nor exclusive but rather encompasses the most comprehensive concept of human suffering. There is no inspirational figure in India quite like Simon Nkoli, who spans the worlds of anti-imperialism and the right to self-definition. However, like Simon Nkoli, another renowned hero fought both external (imperialist) and internal (caste) control. Dr. B.R. Ambedkar was a significant figure - the first untouchable leader of modern times and a politician, lawyer, and statesman who tirelessly fought against upper caste India’s discriminatory attitudes against the Dalit group.<sup>188</sup> While there is no evident connection between the Dalit community’s fight and that of the LGBT community, there is a fundamental one. According to Dr. Ambedkar, morality could never be used to justify depriving a minority of their rights.

#### **4.1.2 THE LAW REFORM MOVEMENT CHALLENGES THE PENALIZATION OF SAME-SEX RELATIONSHIPS.**

“The gay community grew, and there were more parties than ever recorded previously. Individuals appeared to set aside their differences, and everyone pitched in.”

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<sup>185</sup> R Louw, *Sexual orientation*, 8 South African Human Rights Yearbook 260, 245-266 (1997)  
[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1021-545X2013000200003](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2013000200003).

<sup>186</sup> Marc Epprecht, “*Unnatural Vice*” in *South Africa: The 1907 Commission of Enquiry*, 134, Int. J. Afr. Hist. Stud 124-140, (2001).

<sup>187</sup> Ryan Richard Thoreson, *Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa*, 34, J. South. Afr. Stud. 679-697, (2008).

<sup>188</sup> See generally Gail Omvedt (2004). The word Dalit, which means 'oppressed', is a self-description of what were called the 'untouchable' communities.

- 'Hannah,' participant in the Law Reform Movement

In the early months of 1968, it was revealed that the South African government was considering toughening the country's already strict anti-homosexuality legislation. The majority of Afrikaners in government were members of the NGK – the *Nederduitse Gereformeerde Kerk* – or, in English, the Dutch Reformed Church (DRC), which backed apartheid and viewed homosexuality as a sin or mental disorder at the time. The government had established a Parliamentary Select Committee to determine what reforms to make and how far to go. Julian was representing “the LGBT community of South Africa” in opposing any further tightening of the homosexuality laws. To combat prosecution, white homosexual and lesbian organizations formed the Law Reform Movement. On April 10, 1968, South Africa hosted its first LGBT public assembly. This group's tactics included pushing legislators to modify the proposed legal modifications. This organization of the country's LGBT community and subsequent mobilization against planned Immorality Act amendments were later regarded as “the beginnings of a gay movement in South Africa.”

One of its subcommittees produced submissions to parliament, while another collated the most recent psychiatric and scientific research on homosexuality. A third was devoted to fundraising by organizing events in members' homes and other private settings throughout the country.

Additionally, the fundraising committee arranged a public meeting at the Park Royal Hotel near Johannesburg's Joubert Park - the country's first mass conference of homosexual men and lesbians. The Law Reform Movement rejoiced that the new legislation maintained the criminalization of homosexual behavior at parties but did not extend it to private homosexual acts. The movement had accomplished its primary objective of ensuring LGBT people's right to privacy in their sexual lives. The movement disintegrated following this, yet this represents a watershed point in LGBTQIA+ history.

- Inclusion of sexual orientation in the Republic of South Africa's Interim Constitution Act 200 of 1993
- Inclusion of sexual orientation in the Republic of South Africa's Interim Constitution Act 200 of 1993



- Prior to the 1980s, homosexuality was a common occurrence in the gold mines of South Africa.

There had been little sign of gay rights struggle.<sup>189</sup> To discourage non-procreative sex, the law dictated that ‘while homosexual acts in private [were], in effect, of no legal consequences behavior associated with homosexual practices, such as sodomy, “unnatural” sexual acts including masturbation, and acts designed to promote “homosexual behavior” [were] proscribed.’ It was legal to be labeled as a homosexual but illegal to engage in homosexual sex practices.<sup>190</sup> However, during the 1980s, gay life was politicized.<sup>191</sup> The Gay Association of South Africa (GASA) was the first vibrant gay and lesbian organization established in Johannesburg in 1982.<sup>192</sup> Its primary purpose was to act as a social hub for white middle-class gay men.<sup>193</sup> Until the late 1980s, the African National Congress lacked a policy on sexual orientation, with some senior party officials dismissing LGBT matters as irrelevant.<sup>194</sup> In the late 1980s, ANC firmly committed to removing all forms of discrimination and oppression extend to protecting gay rights in a liberated South Africa.<sup>195</sup> The process of all-party negotiations led to the drafting of series of Bill of rights: the Charter of Social Justice (by a group of progressive legal academics); the government Law Commission draft Bill of Rights; the ANC draft Bill of Rights; the National Party government draft; as well as those of other political parties<sup>196</sup> and subsequently the enactment of the Interim Constitution, which included a Bill of Rights to see South Africa through the general elections of 1994 and five years after that. The ANC draft Bill of Rights included a mention of sexual

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<sup>189</sup> M Gevisser, *A different fight for freedom: A history of South African lesbian and gay organisation from the 1980s to the 1990s* in M Gevisser & E Cameron (eds) *Defiant Desire Gay and Lesbian Lives in South Africa* 14 -86 Johannesburg, (1995).

<sup>190</sup> G. Isaacs and B. McKendrick, *Male Homosexuality in South Africa: Identity Formation, Culture and Crisis* 151 (Cape Town, Oxford University Press (1992)

<sup>191</sup> P de Vos, *"The 'inevitability' of same-sex marriage in South Africa's post-apartheid state"* (2007) 23 SAJHR 432-465 at 435.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 50.

<sup>194</sup> EC Christiansen "Ending the apartheid from the closet: Sexual orientation in the South African constitutional process" (1997) 32 *International Law and Politics* 997-1058 at 1024.

<sup>195</sup> T. Mbeki to P. Tatchell, 24 November 1987, in Hoad et al., *Sex and Politics*, p. 149.

<sup>196</sup> H. Corder et al., *A Charter for Social Justice* (1992); S.A. Law Commission, Project 58: Group and Human Rights, Working Paper 25 (1989); S.A. Law Commission, Interim Report on Group and Human Rights (1991); African National Congress, *A Bill of Rights for a New South Africa - A Working Document* by the ANC Constitutional Committee (1990); S.A. Government, *Proposals on a Charter of Fundamental Rights* (1993); Democratic Party, *Draft Bill of Rights* (1993).

orientation (albeit not within the primary equality guarantees). The ANC's 1992 policy conference explicitly endorsed the anti-discrimination principle regarding sexual orientation.<sup>197</sup> The fact that most parties agreed that express or implicit anti-discrimination protection for gays and lesbians must be included is extraordinary. However, it did not ensure that the Interim Constitution included an explicit reference to sexual orientation.<sup>198</sup> While drafting the constitution's interim rights, the Technical Committee of Theme Committee Four of the Constitutional Assembly<sup>199</sup> wielded tremendous influence over the substantive rights. Moreover, on a practical level, once rights were entrenched, they could not easily be omitted from the permanent constitution, even if technically permissible under law. Further, enumeration in the Interim Constitution was necessary to secure inclusion in the permanent version. Finally, a list of essential rights dubbed the Bill of Rights included an equality clause prohibiting discrimination on particular grounds, including sexual orientation. Thus, section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) prohibited direct or indirect discrimination based on sexual orientation.

#### **4.1.3 THE FINAL CONSTITUTION'S RETENTION OF THE SEXUAL ORIENTATION CLAUSE**

On May 8, 1996, South Africa became the first country to prohibit discrimination based on sexual orientation constitutionally. Two years later, these interim constitutional safeguards were strengthened and incorporated into the eventual "final" constitution, passed by the democratically elected Constitutional Assembly. Section Nine of the 1996 South African Constitution's Bill of Rights<sup>200</sup> forbids public and private discrimination based on sexual orientation.<sup>201</sup> The 1996 Constitution's inclusion of an explicit prohibition on discrimination based on sexual orientation

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<sup>197</sup> E Cameron, *Sexual orientation and the Constitution: A test case for human rights*, 110 *SALJ* 450-472 at 451(1993).

<sup>198</sup> C Christiansen, *Ending the apartheid from the closet: Sexual orientation in the South African constitutional process*, 32 *International Law and Politics* 997-1058 at 1031(1997).

<sup>199</sup> The Technical Committee of Theme Committee Four dealt with fundamental rights. The mandate and work of this Committee was guided by Constitutional Principle II, which states: "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter Three of the Constitution."

<sup>200</sup> S. AFR. CONST. (1996) Ch. 2, Sec. 9(3), 9(4); similar protections were included in the Interim Constitution, S. AFR. INTERIM CONST. (Act 200 of 1993) Ch. 3, Sec 8(2). See *infra*-Part II.D. for a comparison of the textual language

<sup>201</sup> *Supra* note 197.

was a notable victory. The new South African Constitution forbids discrimination based on “race, gender, sexual orientation, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.” The South African Parliament adopted the constitution by an overwhelming majority, with the African National Congress (ANC), the Pan African Congress, and the National Party. The ANC, which controls over sixty percent of parliament seats, has consistently opposed discrimination based on sexual orientation, in part due to the long engagement of gay and lesbian activists in the anti-apartheid battle. The current South African posture towards its gay and lesbian citizens contrasts starkly with the legal status of gays and same-sex sexual activity in other countries.

#### **4.1.4 CONSTITUTIONAL COURT CASES AND VICTORIES FOR THE LGBTIQ+ COMMUNITY.**

Despite the 1996 Constitution’s ban of unjustified discrimination based on sexual orientation, legislation outlawing consensual intercourse between two males and other discriminatory laws remained on the books. Negative social attitudes about LGBT individuals were widespread as well. Lobby groups and LGBT rights activists made it abundantly evident that additional legal and social changes were required to make the constitution relevant.

Edwin Cameron, a well-known homosexual rights activist and lawyer, collaborated with other activists in this legal sphere to develop a litigation strategy for the NCGLE. It was built on a ‘gradualist approach’ with a list of movement objectives. It proposed that litigation starts with the least controversial and most winnable objectives, such as decriminalizing same-sex sexuality and achieving an equal age of consent. After that, the strategy would focus on specific partnership rights, eventually recognizing same-sex marriage and adoption. The National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission challenged the constitutionality of current legislation criminalizing sodomy in the case of the National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others. The court concentrated on the equality clause and applied established standards for assessing unjustified discrimination. In its landmark decision, the court analyzed the adverse social and psychological effects of criminalizing sodomy on gay men and concluded that it impairs their dignity profoundly. The Sodomy Act’s

provisions were judged to be unjust and ruled illegal. This was a significant victory for the LGBTQIA+ community, as it established a precedent for future decisions.

#### **4.1.5 EXTENDING THE RIGHTS ACCORDED TO SAME-SEX LIFE PARTNERS**

The LGBT community has consistently made substantial courtroom victories to increase its freedoms. After the Immigration Act recognized lesbian and gay relationships, several more instances established rights for same-sex life partnerships. These included pension benefits (*Satchwell v. President of the Republic of South Africa*, 2002), adoption rights (*Du Toit v. Minister of Welfare and Population Development*, 2003), and the right of a lesbian couple to artificial insemination (*Satchwell v. Minister of Welfare and Population Development*, 2003). (*Satchwell v. Minister of Welfare and Population Development*, 2003). (*J v. Director-General, Department of Home Affairs*, 2003). These lawsuits involved the unjustified discrimination of specific laws and the violation of the partnership's dignity. They resulted in the courts rewriting the word's or permanent same-sex life partnership' to include same-sex couples in the scope of the rights at issue.

Since 2000, about 40 lesbians have been murdered, and each week, approximately ten lesbians are raped by men who believe they are 'correcting' the women's sexual inclinations. Qualitative research uncovered offenders' beliefs that rape will 'cure' lesbians of their lesbianism and convert them to heterosexuality. Additionally, gay males have frequently been abused and terrorized. In the early 2010s, a team of serial killers murdered approximately eight LGBT males. Thus, despite constitutional rights, the LGBT community is subjected to an onslaught of terrible violence. Since the 2000s, the Forum for the Empowerment of Women (FEW) and others have spoken out against this form of abuse. The Anti-Hate Crime Task Force was formed and charged with developing a response to violence against LGBTI groups. However, because authorities do not record separate statistics on killings motivated by homophobia, developing a sustainable program to address hate crime is complex.

Beverley Palesa Ditsie, a member of Nkateko, stated: "Even after the new constitution was approved in 1996, which guaranteed our rights, the violence and intimidation persisted unabated,

particularly for those of us living in townships, rural areas, homophobic homes, and communities. We marched to demonstrate our commitment to reclaiming our dignity and our proper place in society.” Several active and visible LGBTQIA+ organizations continue to battle against hate crimes and violence.

## **4.2 CANADA**

### **4.2.1 DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION: THE HISTORICAL BACKGROUND**

Legal discrimination against same-sex-oriented people prevailed in Canada until recently, and it was a significant homophobic barrier to recognizing same-sex-oriented people’s human rights. Homosexuality was declared illegal in the early colonial period, and the penalty for “the abominable act of buggery” (also known as sodomy) was death. In 1861, the law was slightly modified when the sentence became imprisonment for ten years to life. However, throughout the next century, the laws governing “homosexuals acts” became increasingly strict. Beginning in 1890, accused gays were usually charged with the crime of “gross indecency.” In 1948 and 1961, the penal law was amended to further prohibit homosexuality by creating the categories of “criminal sexual psychopath” and “dangerous sexual offender.” In the late 1960s, two significant events triggered the liberalization of Canadian laws and attitudes. Everett George Klippert, a mechanic from the Northwest Territories jailed in 1965 on accusations of “gross obscenity,” was the first of them. His sentence was prolonged indefinitely after he was declared a “serious sexual offender” by prison psychiatrists, a decision that was questioned and criticized in the mainstream media.

The decision by the British parliament to decriminalize certain gay offenses was the second. Following the publishing in 1957 of a public inquiry known as the Wolfenden Report, which urged decriminalization, debate on the topic had been rising in British and Canadian media for the previous decade. Those suggestions were finally implemented in the summer of 1967, and with the humiliating Klippert scandal still raging, some members of Canada’s parliament, including Justice Minister Pierre Trudeau, began pressing for reform. Following Trudeau’s election to the

prime minister's office, his government passed Bill C-150 in May 1969, decriminalizing gay sex for the first time in Canada's history.

Amendments to the Criminal Code came into effect in August 1969, making private sexual actions between two consenting adults permissible (over the age of twenty-one). Even though the word "gay" did not exist in the amendment, same-sex-oriented people and others began to refer to it as the "homosexual law" because it allowed Canada's same-sex-oriented population to come out of the closet. Following this modification of the Criminal Code, homosexual and lesbian groups sprouted up throughout Canada, rapidly growing in membership.<sup>202</sup>

"The 1970s are hailed as the decade of [lesbian and] gay rights" in Canada.<sup>203</sup> This decade saw the rise of a growing number of political action groups that lobbied hard for "sexual orientation" to be included among the forbidden grounds for discrimination mentioned in human rights laws across the country. Except for the Quebec Charter of Human Rights, this effort was unsuccessful in the 1970s.<sup>204</sup>

#### **4.2.2 GAY LIBERATION IN THE 1970s**

During this period, gay liberation was essentially a predominantly white movement, but not exclusively male. During the 1970s, the women's movement was a powerful magnet for lesbian activists. Despite mainstream feminism's unwillingness to address lesbian issues, many women decided to join the feminist movement rather than gay liberation. Gay liberation militants used the term "gay" to refer to both males and women. Throughout the 1970s and succeeding decades, the link between lesbian and gay male politics was a source of contention. By contrast, it is not until the 1980s that race becomes an explicit factor in lesbian and gay politics.

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<sup>202</sup> <sup>202</sup> MARION FOSTER & KENT MURRAY, A NOT So GAY WORLD: HOMOSEXUALITY IN CANADA 29(1972).

<sup>203</sup> EVELYN KALLEN, LABEL ME HUMAN: MINORITY RIGHTS OF STIGMATIZED CANADIANS (1989) at 168

<sup>204</sup> *Id.* at 169.

In August 1971, Ottawa hosted the country's first gay rights demonstration. The marchers, whom groups organized from Ottawa, Toronto, and Waterloo, Ontario, as well as Vancouver and Montreal, presented a brief to parliament seeking civil rights and held posters declaring the gay liberation movement's slogans.<sup>205</sup> Its objectives were to bring lesbians and gays out of the closet, to develop a gay community, to achieve societal acceptability for homosexuality, and to liberate sexuality more broadly from the tight constraints of a patriarchal and heterosexist social structure roles. However, in the near term, gay liberation was premised on defining and proclaiming gay and lesbian identity and establishing an institutional and organizational foundation for its consolidation.

However, in the near term, gay freedom was premised on defining and proclaiming gay and lesbian identity and establishing an institutional and organizational foundation for its consolidation. Civil rights demands were inspired by the strategic and ideological framework established by the US civil rights and women's movements. While achieving rights was significant in and of itself, it was also a strategy for establishing a social movement, establishing a homosexual community, boosting gay consciousness, and bringing gays out of the closet, in short, for the development of political identity. Brian Waite, the article's author, said that "Winning this demand will not eliminate our persecution in and of itself, but many gay men and women will develop a greater sense of pride and consciousness in the process of fighting for it."<sup>206</sup> The publisher, Pink Triangle Press, also launched the Canadian Lesbian and Gay Archives in 1973, which has grown to be a recognized historically significant collection of LGBT content. The true objective of gay liberation was societal reform, and if establishing a lesbian and gay community was critical to accomplishing this aim, the first step in establishing a social movement was for people to come out "Exit." Gay liberation organizations in the 1970s pushed for legal equality through legislative reforms to human rights codes on both the federal and provincial levels. During the 1970s, the three regional organizations interested in asserting rights claims in the courts were GATE Vancouver, CGRO, and the ADGQ. These organizations served as the LGBT liberation movement's organizational, strategic, and ideological backbone core. Despite its limited size, GATE Vancouver (1971-1980)

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<sup>205</sup> Brief footage of this demonstration can be seen in the film *Jim Loves Jack: The James Egan Story* (Toronto: David Adkins Productions, n.d.)

<sup>206</sup> Brian Waite, "Strategy for Gay Liberation," *The Body Politic* 3 (1972), 4.

was the city's primary gay liberation group. Its head, Maurice Flood, was a significant theorist of gay liberation. Its publication, *Gay Tide*, served as a vital instrument for the organization and analysis of gay liberation and served as the impetus for GATE's Litigation. The Supreme Court of Canada heard the *Gay Tide* issue for the first time. The ADGQ was a Montreal-based civil rights organization that was Quebec's leading gay liberation organization.

However, the ADGQ instance demonstrates that the exception to the rule—inclusion of sexual orientation in human rights codes—was unavailable as a tool for organizing the Quebec movement. The Coalition for Homosexual Rights in Ontario, founded in 1975, was one of Canada's few provincial-level gay rights organizations (GO). GATE Toronto and GO, both of which represented urban areas, were outspoken supporters of homosexual freedom and the civil rights approach. Together with others from around the country, these organizations created the pan-Canadian National Gay Election Coalition (NGEC) in 1974, followed by the National Gay Rights Coalition (NGRC) from 1975 to 1980. Despite this, the 1970s saw the birth and fall of a pan-Canadian lesbian and homosexual rights coalition that aimed to put a wide variety of rights concerns on the Canadian political agenda by mirroring the civil rights frame of member organizations. Until the establishment of pan-Canadian AIDS organizations,<sup>3</sup> the National Gay Election Coalition of 1974 and the National Gay Rights Coalition were the only national lesbian and gay organizations (EGALE).

Additionally, the late 1970s saw two significant legislative reforms. Québec revised its Human Rights Code in 1977 to prohibit discrimination against individuals based on their sexual orientation. That same year, the Canadian Immigration Act was revised to remove an immigrant prohibition on gay men.

### **4.2.3 THE 1980s**

While LGBT rights progressed, homosexuals and lesbians continued to experience discrimination, including police harassment. Tensions reached a zenith in 1981 in Toronto, resulting in what became known as Canada's Stonewall. On February 5, 1981, the Toronto Police Department conducted raids on four bathhouses, resulting in the arrest of nearly 300 males. The following day,



a crowd of 3,000 marched toward the 52 Division police precinct and Queen’s Park, shattering car windows and starting fires along the way. Such raids persisted in Canada over the next two decades, culminating in a 2002 attack on a Calgary bathhouse. In Toronto, where relations with the police were especially tense, the raids culminated in a police search of the Pussy Palace, a women-only event, in 2000. Charges were dropped, and the ensuing lawsuit resulted in the creation of training programs for Toronto police officers on how to engage with members of the LGBT community.

Additionally, the 1980s saw a number of significant judicial successes. In 1982, Canada returned its constitution to the United States and enacted the Charter of Rights and Freedoms, laying the foundation for numerous subsequent equality judgments. In 1985, Section 15 of the Charter became effective, guaranteeing the “right to equal protection and benefit of the law without discrimination, including, but not limited to, discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability” — but not sexual orientation. Svend Robinson, a British Columbia MP, came out as Canada’s first openly gay member of parliament in the spring of 1988.

#### **4.2.4 THE HIA/AIDS CRISIS.**

In the 1980s, Canada also experienced the HIV/AIDS epidemic outbreak, which negatively affected the LGBT community. Throughout the decade, gay men believed that the medical establishment and the government were ignoring their health and increasingly took issues into their own hands.

The movement became increasingly organized and politically proactive as the crisis worsened. AIDS Vancouver launched Canada’s first AIDS service group in 1983, providing care to individuals living with HIV or AIDS. In the same year, Gays in Health Care, the Hassle-Free Clinic, and The Body Politic formed the Toronto AIDS Committee, subsequently renamed the AIDS Committee of Toronto. Another watershed moment occurred in 1988 when AIDS Action Now (AAN) was founded; a group used direct action to pressure governments into taking significant action to confront the problem.

The first AAN action was a protest against a drug study in Toronto for Pentamidine, a medicine already licensed in the United States for AIDS patients. AAN delivered coffins to the Toronto General Hospital, where the research was conducted, pleading for the medicine to be quickly available. Protests were successful, and within two years, Brian Mulroney's administration developed a policy allowing access to experimental treatments and launching the country's first national AIDS strategy. AAN established its treatment registry, the Canadian AIDS Treatment Information Exchange, which collaborates with health care organizations around the country, including the Prisoners HIV/AIDS Support Action Network and the HIV/AIDS Legal Clinic of Ontario.

The impact of HIV/AIDS continues to be seen; at the end of 2016, the Public Health Agency of Canada projected that roughly 63,000 Canadians were living with the disease. It is disproportionately prevalent not only among gay men but also among Indigenous people and residents of HIV-endemic nations.

The epidemic's stigmatizing effect on gay males has also continued and in several ways. In the mid-1980s, the Red Cross, which managed Canada's blood donor system at the time, introduced a regulation prohibiting any guy who had sex with another man even once since 1977 from donating blood. This restriction remained in place until 2013 when it was altered to allow males to donate if they had not had sex with another man in the preceding five years. Canadian Blood Services, which now administers the blood donor system, decreased the period of ineligibility from five to one year in 2016. Héma-Québec, which oversees the province's blood donor system, also lowered the ineligibility term during that period.

#### **4.2.5 THE 1990s AND 2000s**

A cascade of legal victories for LGBT people followed from precedents set in the 1980s. As homosexuals and lesbians became more visible, these changes reflected the community's sustained and growing acceptance within mainstream Canadian culture.

- Several of these victories occurred on the courtroom floor. Among them were

- a 1992 federal court decision lifting the ban on gays and lesbians serving in the military,
- The Supreme Court's 1994 judgment permitting gays and lesbians to apply for refugee status based on their fear of persecution in their home countries, and
- A 1995 Ontario ruling was allowing same-sex couples to adopt.

Additionally, the Supreme Court declared in 1995 that Section 15 of the Charter of Rights and Freedoms, which provides the "right to equal protection and benefit of the law without regard for discrimination," recognized sexual orientation as a forbidden ground of discrimination. This decision came as a consequence of an appeal filed by Jim Egan and Jack Nesbit against a decision by Health and Welfare Canada to deny Nesbit spousal benefits under the Old Age Security Act. While Egan and Nesbit lost their appeal, the Supreme Court's decision that the Charter protects sexual orientation set the door for future legal challenges to discriminatory legislation. Sexual orientation was included in the Canadian Human Rights Act the following year, including federally controlled activities.

In 1999, the Supreme Court declared in *M v. H* that same-sex couples in common-law relationships must be allowed the same rights as opposite-sex spouses. The federal government enacted Bill C-23 in 2000 to bring federal statutes into compliance with the ruling.

In 2000, the Supreme Court decided in favor of Vancouver's Little Sister's bookstore, holding that gay publications, even sexually explicit, are protected under the Charter's freedom of speech protections. The store had sued Canada Customs for multiple confiscations of LGBT materials. However, the issue persists, with LGBT bookstores charging that Customs guards disproportionately invoke the Supreme Court's 1992 Butler decision to discriminate against homosexual and lesbian publications. That judgment established the authority to seize media involving scenes of sex combined with acts of violence and cruelty.

Additionally, these years saw the debut of several openly homosexual and lesbian politicians. Glenn Murray became North America's first out gay mayor in 1998 when he was elected mayor of Winnipeg. Libby Davies of the New Democratic Party became the country's first openly lesbian member of parliament in 2001. Scott Brison was appointed the country's first out homosexual cabinet minister in 2004. Another milestone was eventually achieved when Kathleen Wynne

became the province's first openly gay or lesbian premier in 2013 after being chosen as the Ontario Liberal Party's new leader. In spring 2014, she became Canada's first openly homosexual or lesbian premier.

Much of the news for LGBT Canadians in the early 2000s focused on the question of same-sex marriage. The Ontario Superior Court determined in 2002 that outlawing same-sex marriage violated Charter rights. In 2003, a similar judgment was made in British Columbia. Michael Leshner and Michael Stark became Canada's first same-sex couple when the Ontario Court of Appeal upheld the verdict in 2003.

By 2005, only Nunavut, the Northwest Territories, Alberta, and Prince Edward Island permitted same-sex marriage. Bill C-38 became law on July 20 of that year, making Canada the fourth country in the world to permit same-sex marriage. Canada raised the age of sexual consent from 14 to 16 in 2008. Consent for anal sex, on the other hand, remains at 18, prompting claims of discrimination against LGBT adolescents.

#### **4.2.6 THE 2010s AND BEYOND**

In the 2010s, many of the LGBT community's challenges centered on youth and trans persons, with bullying protection and gender identity becoming essential causes.

Bullying in schools has been a major source of worry among Canadian homosexuals and lesbians. While several provinces have implemented anti-bullying legislation, regulations passed in 2012 and 2013 in Ontario and Manitoba mandate all publicly funded institutions, including religious schools, to recognize student-organized gay-straight alliances.

Trans people's rights in Canada remain at the forefront of the fight for equality. Bill C-16, introduced by the federal government in 2017, updated the Canadian Human Rights Act to add gender identity and expression as banned grounds of discrimination. Additionally, it amended the Criminal Code to include gender identity and expression. As a result, the legislation strengthens protections against hate propaganda and hate crimes directed against transgender and gender-diverse individuals. Additionally, all provinces and territories mention gender identification expressly in their human rights codes.

Transgender activists have also made it simpler for transgender individuals to change their gender on official documents without gender reassignment surgery. In 2012, the Ontario Human Rights Tribunal declared the surgical clause unconstitutional, and the British Columbia legislature and an Alberta court followed suit in 2014. In 2015, the Manitoba government repealed the surgical provision. By 2018, every other province and territory had adopted the same policy.

The conflict between LGBT rights and religious liberty has also been highlighted. Trinity Western University (TWU), a private Christian university in British Columbia, wanted to commence operations of a law school in 2016. Both the British Columbia government and the Federation of Law Societies of Canada have approved the proposal. However, the Ontario, Nova Scotia, and British Columbia bar associations have stated that they will not recognize graduates due to the school's communal covenant, which requires students to abstain from sexual intercourse "that undermines the sacredness of marriage between a man and a woman." While the courts in Nova Scotia and British Columbia sided with TWU, the Ontario Court of Appeal ruled against the institution, describing the mandatory covenant as "very discriminatory" toward the LGBTQ population. TWU and the Law Society of British Columbia both appealed to the Supreme Court of Canada in 2017. The Supreme Court unanimously declared in June 2018 that law societies had the jurisdiction to withhold accreditation to TWU based on the requisite covenant. TWU discontinued its requirement that all students joined the covenant in August 2018.

With the gradual advancement of rights for LGBT Canadians, many have shifted their attention to the plight of gays and lesbians who experience more brutal persecution abroad. These instances have become the focal point of a large number of today's Pride festivities. This culminated in 2014 when Toronto hosted the fourth World Pride Event, which included a week-long symposium on human rights.

### **4.3 USA**

*"Equality means more than passing laws. The struggle is won in the hearts and minds of the community, where it counts."*

- Barbara Gitting

Lesbian, bisexual, gay, transgender, and queer (LGBTQ) issues have received increased attention in society in the last decade. Changes in public sentiments regarding LGBTQ individuals and the

right to marry and recent Supreme Court rulings that have struck down bans on gay marriage are indicative of continuing increases in acceptance of the civil liberties of LGBTQ individuals. According to Flores (2014), public acceptance of LGBTQ rights has doubled since the early 2000s. Nearly 60% of Americans currently favor LGBTQ marriage, 63% support adoption rights, and 72% support job discrimination protection. Additionally, due to the Obergefell v. Hodges Supreme Court decision, all 50 states in the United States have legalized gay marriage (2015). In June, fifty years ago, members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community responded violently to a police raid at New York City’s Stonewall Inn, dubbed the Stonewall Riots. Considered the first big demonstration for homosexual equality, the Riots spurred following June gay pride parades. President Bill Clinton proclaimed June 1999 as “Gay and Lesbian Pride Month.” President Barack Obama renamed the month “LGBT Pride Month” in 2009.

#### **4.3.1 THE BEGINNING OF THE GAY RIGHTS MOVEMENT**

The gay rights movement, often known as homosexual rights or gay liberation, has made tremendous strides during the last century, particularly in the last two decades. Henry Gerber, a German immigrant, formed the Society for Human Rights in Chicago in 1924, the country’s first known gay rights organization. Gerber’s modest organization published a few issues of the “Friendship and Freedom” newsletter, the country’s first gay-interest publication. Despite the creation of such groups, homosexual political engagement was typically hidden. The organization disbanded in 1925 due to police raids—but 90 years later, the United States government classified Gerber’s Chicago home as a National Historic Landmark. The homosexual rights movement stalled for the next few decades. However, LGBT people in various parts of the world were briefly in the spotlight. WWII and its aftermath began to alter that dynamic. The conflict drew a large number of young people to cities and elevated the LGBT community’s visibility. During World War II, the Nazis imprisoned homosexual men in concentration camps, marking them with the infamous pink triangle insignia used to identify sexual offenders. However, there was an increased political activity, with a strong emphasis on decriminalizing sodomy.

#### **4.3.2 THE GAY RIGHTS MOVEMENT SINCE THE MID-20<sup>th</sup> CENTURY**

In the 1960s, the LGBT rights movement made some early strides. Illinois was the first state to repeal anti-sodomy laws in 1961, essentially decriminalizing homosexuality. Dr. John Oliven created the term “transgender” in 1965 in his book *Sexual Hygiene and Pathology* to refer to someone who was born into the body of the incorrect sex. Despite this development, LGBT individuals were often subjected to harassment and persecution in public spaces like pubs and restaurants. In New York City, gay men and women could not be provided drink in public due to liquor laws that deemed homosexual gatherings “disorderly.”

Gay political organizations proliferated throughout the 1970s and 1980s, primarily in the United States and Europe, eventually extending to other world regions. Their relative size, strength, and success and their tolerance by authorities varied substantially. In the United States, organizations such as the Human Rights Campaign, the National Gay and Lesbian Task Force, and ACT UP (AIDS Coalition to Unleash power) began agitating for legal and social reforms; in the United Kingdom, Stonewall and Outrage! began agitating for similar reforms; and dozens and dozens of similar organizations began agitating in Europe and elsewhere.

### **4.3.3 GAY POLITICAL VICTORIES**

In the 1970s, the growing visibility and involvement of LGBT individuals aided the movement on several fronts. For example, the New York Supreme Court ruled in 1977 that transgender woman Renée Richards could compete in the United States Open tennis tournament. The Supreme Court’s judgment in law was the first big step toward constitutionalizing LGBT rights.<sup>207</sup> In it, the court invalidated a Texas statute that criminalized certain forms of private consensual sexual contact between individuals of the same sex.<sup>208</sup> The court’s tone was forceful and rather eloquent at times. “When sexuality is manifested overtly in intimate activity with another person, the action might serve as a component of a more durable personal tie. The constitutional guarantee of liberty protects LGBT individuals’ right to make this choice.”<sup>209</sup> In *Goodridge v. Department of Public Health*,<sup>210</sup> the Massachusetts Supreme Judicial Court held that legislation denying same-sex couples the benefits and obligations of civil marriage violated the state constitution’s principles of

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<sup>207</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>208</sup> *Id.* at 578.

<sup>209</sup> *Id.* at 567.

<sup>210</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass.2003)

liberty and equality.<sup>211</sup> The entire concept of an amendment gained traction following Lawrence and Goodridge. After the Lawrence decision, the White House began investigating the prospect of an amendment.<sup>212</sup> The president did not advocate an amendment until after Goodridge when he stated that the Massachusetts decision was one of the grounds for his endorsement.<sup>213</sup> Since the Goodridge ruling, the amendment has been debated twice on the floor of both chambers of Congress.

While the Federal Marriage Amendment's definition of marriage is deeply founded in national culture, the notion of constitutionalizing it is wholly alien to that heritage. The amendment would trample on values cherished by this nation since its inception. Along with transferring authority from legislators to courts, the amendment would impose present-day ideals on future generations.

#### **4.3.4 OUTBREAK OF AIDS**

The onset of AIDS in the United States dominated the 1980s and early 1990s campaign for LGBT rights. In 1981, the Centers for Disease Control and Prevention released a paper detailing the infection of five previously healthy homosexual men with an uncommon form of pneumonia. In 1987, advocates for gay rights conducted the second National March on Washington for Lesbian and Gay Rights. This was the first time that ACT UP (AIDS Coalition To Unleash Power), an advocacy group dedicated to improving the lives of AIDS patients, garnered national attention, according to the organization.

Bill Clinton campaigned for president in 1992 on a promise to end the military's prohibition on homosexuality. However, after failing to secure sufficient support for such an open policy, President Clinton signed the "Don't Ask, Don't Tell" (DADT) policy into law in 1993, allowing gay men and women to serve in the military as long as they kept their sexual orientation hidden. President Obama fulfilled a campaign pledge to repeal DADT in 2011; at the time, over 12,000

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<sup>211</sup> *Id.* at 968.

<sup>212</sup> Mike Allen & Alan Cooperman, *Bush Plans to Back Marriage Amendment*, WASH. POST (Last accessed on Aug 15, 2021) <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2003090500>.

<sup>213</sup> Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES (Last accessed on Aug 25, 2021) <https://www.nytimes.com/2004/02/25/us/same-sex-marriage-the-president-bush-backs-ban-in-constitution-on-gay-marriage.html>.



officers had been fired from the military for refusing to conceal their sexual orientation. On September 20, 2011, Don't Ask, Don't Tell was formally repealed.

#### **4.3.5 GAY MARRIAGE AND BEYOND**

In 1992, the District of Columbia passed laws allowing homosexual and lesbian couples to register as domestic partners, thereby granting them some of the same privileges as married couples (Three years before, the city of San Francisco approved a similar ordinance, and California later expanded those rights to the entire state in 1999).

In 1993, Hawaii's highest court declared that prohibiting gay marriage would violate the state's constitution. However, state voters disagreed and approved legislation prohibiting same-sex marriage in 1998.

Federal politicians also disagreed, and in 1996, Clinton signed the Defense of Marriage Act (DOMA) into law. The law prohibited the federal government from awarding same-sex couples federal marriage benefits and permitted states to refuse to recognize same-sex marriage certificates from other states.

While marriage rights have regressed, homosexual rights campaigners have achieved other successes. Courts were given the authority to impose harsher sentences on people convicted of crimes motivated by the victim's sexual orientation when a new anti-hate crime act was passed in 1994.

More than half of LGBTQ Americans report concealing a personal connection and altering other elements of their personal or professional lives to avoid discrimination.

Additionally, President Barack Obama signed a new hate crime legislation into law in 2009. The new law, usually known as the Matthew Shepard Act, increased the 1994 hate crime statute's authority.

In vengeance for the 1998 murder of Matthew Shepard, who was pistol-whipped, tortured, chained to a fence, and then left to die, the perpetrators committed this act. The assassination was believed to have been motivated by Shepard's perceived homosexuality. President Obama fulfilled a campaign pledge to repeal DADT in 2011; at the time, over 12,000 officers had been fired from the military for refusing to conceal their sexual orientation.

A few years later, the Supreme Court struck down Section 3 of DOMA, which permitted the government to deny married same-sex couples federal benefits. DOMA was quickly rendered ineffective when the Supreme Court ruled in 2015 that states cannot prohibit same-sex marriage, effectively legalizing gay marriage throughout the country.

#### **4.3.6 TRANSGENDER RIGHTS**

The Boy Scouts of America dropped its ban on openly gay leaders and workers following that landmark 2015 verdict. Moreover, in 2017, it lifted a century-old ban on transgender males, bringing it into line with the Girl Scouts of the United States of America, which has long been accepting LGBT leaders and children (the organization had accepted its first transgender Girl Scout in 2011).

In 2016, the United States military dropped its prohibition on openly transgender service members. A month after Eric Fanning was appointed Secretary of the Army, making him the first openly gay secretary of a United States military branch. In March 2018, President Donald Trump issued a new transgender policy for the military, effectively excluding most transgender people from serving in the military once again. President Biden signed an executive order overturning this rule during his sixth day in office, which became effective on January 25, 2021.

While LGBT Americans now have same-sex marriage rights and a slew of other rights that appeared unthinkable a century ago, supporters' work is far from complete. LGBT Americans continue to face a lack of universal anti-discrimination rules in the workplace. Gay rights advocates must also contend with an expanding number of state laws allowing companies to refuse service to LGBT individuals based on religious convictions, as well as "bathroom laws" prohibiting transgender individuals from using public restrooms that do not correspond to their biological sex.

#### **4.3.7 THE CURRENT STATE OF THE LGBTIQ+ COMMUNITY IN THE USA**

For the bulk of its four years in power, the Trump administration launched an all-out assault on LGBTQ people’s rights, supported discriminatory legislation, and erected roadblocks to essential government services. The administration’s damages worsened existing inequities and disparities between LGBTQ and non-LGBTQ persons in areas such as health, employment, the judicial system, encounters with law enforcement, education, housing, and immigration. The real-world effects of these policies have harmed the daily lives of LGBTQ people, particularly LGBTQ persons of color who live at the intersection of several identities and face multiple forms of systematic and institutional discrimination. In collaboration with the impartial and independent research organization NORC at the University of Chicago, the Center for American Progress designed one of the most comprehensive surveys to date on the lives, attitudes, and experiences of LGBTQ Americans. The survey interviewed 1,528 self-identified LGBTQ persons aged 18 or older and was conducted June 9–30, 2020, using NORC’s Ameri Speak online panel.

Major findings from the survey include:

- More than one in three LGBTQ Americans, including more than three in five transgender Americans, have suffered prejudice in the last year.
- Discrimination has a detrimental effect on the mental and economic well-being of many LGBTQ Americans, with one in two reporting moderate or severe psychological effects.
- To avoid discrimination, more than half of LGBTQ Americans report concealing a personal connection and altering other elements of their personal or professional lives.

The Biden-Harris campaign pledged to fight for LGBTQ rights, stating, “As President, Biden will stand with the LGBTQ+ community to ensure America finally lives up to the promise upon which it was founded: equality for all.” He will demonstrate moral leadership by advocating for equal rights for all LGBTQ+ individuals, ensuring that our laws and institutions safeguard and enforce their rights, and advancing LGBTQ+ equality globally.<sup>214</sup>

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<sup>214</sup> Joe Biden, “Out for Biden,” <https://joebiden.com/lgbtq/> (last accessed on July 28, 2021 11.00 PM).

#### **4.4 INDIA**

In India, Section 377 exists since the Britain Buggery Act, 1533 enacted by King Henry VIII, when the country was colonized, prohibited carnal intercourse against nature's order and termed it an unnatural offense. This led to the marginalization of the LGBTQA community since the Victorian era. While the law of a similar nature was abolished in many western countries, post-colonial countries like Africa and Asia continued to retain it. The community has suffered ridicule, denial of basic rights, a sense of gender identity, and abuse at the state authorities and society. Their existence was ad infinitum questioned on the grounds of social morality, public indecency, and obscenity. The community struggled to pave its path and co-exist in society at the cost of humiliation and disgrace. In 2009, the community in Delhi had a glimpse of hope when the Delhi High Court limited the scope of the law under Section 377 IPC to consensual sexual intercourse between two consenting homosexual adults. The rationale was to secure health care for the community which was otherwise prone to HIV/AIDS. However, the decision gave no legitimate recognition to the third gender, and the hetero-normative societies understood only the male-female dichotomy. The atrocities faced by the community were untold until 2010 when Professor Siras was suspended from the Aligarh University after having clandestinely photographed with another man in a compromising position within the four walls of his house without any concern as to his privacy. The mere presence of law criminalizing same-sex relations, irrespective of whether being consensual or non-consensual, gave room for exploitation of the LGBTQA community.<sup>215</sup> A consolidated compendium shows blackmail, extortion, sexual assault, including rape by the investigating agency, sexual hate crimes, and sexual assault.<sup>216</sup> Abuse of power by the police officials is a matter of routine owing to the age-old intolerance against the sexual minorities in the societal structure.<sup>217</sup> Thereafter, in an appeal against the Naz Foundation decision, the Supreme Court in 2013<sup>218</sup> reinstated the provision of Section 377 IPC as it was prior to the 2009 decision holding it to be constitutional. The court further reiterated that the decisions of the foreign courts are only persuasive and not binding on the Indian Courts, and a law should not be decriminalized and be made unconstitutional only because courts in other jurisdictions are following this trend.

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<sup>215</sup> Geetanjali, *supra* note 37 at 5, 24

<sup>216</sup> *Id.* at 24-25.

<sup>217</sup> *Id.* at 26-28.

<sup>218</sup> *Supra* note 7, at 1.

The court went on to say that Indian society is not ready for this revolutionary reform, especially when the LGBTQA community constitutes only a minuscule minority. The judgment led to LGBTQA processions and pride parades criticizing the decision as regressive and thus, caused hue and cry throughout the nation. After this uproar and trans activism throughout the country, the Supreme Court in 2014, in the case of *NALSA v. Union of India*, legally identified the third gender and the transition from one gender to another. In furtherance, the court also recognized the community's fundamental rights under the Indian Constitution and human rights. It declared that all the civil and criminal statutes that do not recognize the third gender would be discriminatory in light of Article 15 of the Constitution. In accordance with Article 15 of the Constitution, any discrimination on the ground of "sex" is prohibited at the instance of the state. The court interpreted "sex" to include the sexual orientation and gender identity of an individual. The decision directed affirmative action on the part of the Central and the State Governments to ensure non-infringement of fundamental rights, public health, and social welfare of the community in light of the Yogyakarta principles.<sup>219</sup> This gave a sense of relief to the LGBTQA community as their human rights were upheld even though they are insignificant in number;<sup>220</sup> however, the pragmatic reality remained unchanged despite the recognition. The Ministry of Social Justice, in a conversation with the trans activism, constituted an expert committee to make recommendations in furtherance of the judicial mandate in the *NALSA* decision, and based on this report, the Rights of Transgender Bill, 2014 was introduced and adopted by the Rajya Sabha and the same was sent to the Lok Sabha for consideration. The Bill had an inclusive definition of transgender.<sup>221</sup> Meanwhile, in 2016, the speaker allowed the introduction of a fresh bill for the transgender community, as a private member's bill, called The Transgender Persons (Protection of Rights) Bill, 2016. The latter bill failed to secure the mandates so declared by the *NALSA* decision. The failure of bill is threefold, firstly, then it does not appreciate the diversity within the transgender community, that is, Lesbians, Gay, Bisexual, Transgender, Queer, Asexual persons, jogappas, hijras, aravanis, kinnars, and other socio-cultural gender identities instead it defined transgender person as someone who is not wholly a male or a female or neither a male nor a female or a combination of male and female and thereby

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<sup>219</sup> Yogyakarta, *supra* note 33 at 16.

<sup>220</sup> *NALSA*, *supra* note 12, at 9, Para 123.

<sup>221</sup> All persons whose own sense of gender does not match with the gender assigned to them at birth. They will include trans-men & trans-women (whether they have undergone sex reassignment surgery or hormonal treatment or laser therapy, etc.), gender queers and a number of socio-cultural identities, such as kinnars, hijras, aravanis, jogtas, etc.

retaining the male-female dichotomy and; Secondly the bill recognizes sexual offences and violence against the community as crimes punishable with petty punishment of 6 months to 2 years and does not include them within the ambit of sexual offences under the IPC, and; lastly, the bill remained silent on the aspect of affirmative action on part of the central and state government in terms of reservations for employment and education<sup>222</sup>to ensure adequate representation of the otherwise marginalized community and further the mandate laid down by the NALSA decision. After the appointment of the standing committee, around 55 recommendations were proposed. However, all of them were blatantly rejected, and the bill was kept intact in its original form.<sup>223</sup> A modified version of this 2016 Act, called the Transgender Persons (Protection of Rights) Bill, the Lok Sabha passed 2018 falls short of embracing the struggle of the LGBTQ community. In essence, the opinion of the community itself was not taken into account. In a nutshell, it does not recognize the third gender, their self-identity, and self-determination in law; the bill does not make provisions for the reservation of the LGBTQA community as socially and educationally backward class for education and employment to ensure adequate representation of the marginalized community nor do the provisions lay down the with respect to health care, legal awareness or welfare schemes amongst the community<sup>44</sup> and thereby, maintains the status quo of the community in terms of social exclusion and vulnerability as against the NALSA mandate of inclusion.

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<sup>222</sup> Aniruddha, *supra*–Chapter I at 4, 235

<sup>223</sup> Rachana Mudraboyina and L.C. Kranti, A Critiques of the Transgender Persons (Protection of Rights) Bill, 2018, Human Rights Law Network (Last accessed on August 5, 2021, 11:31 AM), <https://hrln.org/wpcontent/uploads/2019/01/Critique-of-the-TransBill.pdf>

## CHAPTER -V

### CONCLUSION AND SUGGESTIONS

*“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy ad ostracism that they have suffered through the centuries”<sup>224</sup>*

Constitutions are not merely charters of governance; they are also ethical documents that lay down a collective commitment that community members make to set principles and to each other about the kind of life they would wish to pursue. Thus, the political form that we choose to govern our societies is not separable from how we govern ourselves as individuals and in our relations to each other. Who or how I choose to love is, then, both an individual choice and a question of political form and expression? Following Jawaharlal Nehru’s Quote included in the court’s judgment of words being ‘magical things,’ one way of reading the constitution is to see it as a city of words built on the foundation promise made in its preamble towards securing for its citizens Justice, Liberty, Equality, and Fraternity. It is important to recall that these are virtues that justify why we give ourselves a constitution.

The law manifesting Victorian ideologies was retained in Section 377 IPC, making the community’s existence in public thorny. The community has remained in the closet for decades, and still, they and their families have faced sexual assault, violation, and exploitation, which cannot be undone. The legislature and the executive have failed in their obligation to protect this community from the institutional ideologies at the instance of the police agencies and from the societal perception of their immoral existence. For decades, the LGBTQA community has been a marginalized and vulnerable section of society, compared to persons who identify as heterosexual. This is linked to homophobia (the fear or hatred of homosexuality) (the fear or hatred of homosexuality). While many nations have made considerable gains in advocating for human rights, LGBT rights continue to fight for universal recognition. Due to the omission of sexual orientation from the 1948 Universal Declaration of Human Rights, some people view LGBT rights

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<sup>224</sup> *Supra* note 30, at 791.

as problematic. The statement does mention, however, that “everyone is entitled to all of the rights and freedoms enumerated in this declaration without regard for any discrimination.”

People are increasingly expressing their sexual orientation openly and mobilizing to demand their rights. As a result of the work of these organizations and their allies, global recognition of LGBT rights is increasing, and governments in certain countries are beginning to pass legislation supporting LGBT rights and anti-discrimination laws. International human rights organizations with clout, such as Amnesty International and Human Rights Watch, have maintained successful campaigns. In the coming years, the most critical issues for LGBT rights on a global scale will be eradicating persecution based on sexual orientation; ensuring legal protection against hate crimes and hate propaganda; ensuring equal rights and privileges (marriage, common-law partnerships, medical decision-making, wills and estates, parenting and adoption); and working to combat homophobia and heterosexism.

Through its decisions in NALSA and Navtej Singh Johar, the Supreme Court has attempted progressive realization of the fundamental and human rights of the community. The court has legitimized their existence as the third gender in the society and further decriminalized consensual sexual conduct between adults in private. Legal recognition and acceptance of their sexual conduct are of no avail until and unless the laws and the policy framework are instituted to encourage the community to come out of the closet with an assurance to protect the sexual citizenship, sexual rights, and dignity of the individual members of the community. Presently, the criminal law discriminates between the victims of sexual offenses based on their gender; In contrast, the sexual offenses committed against women are made punishable; those against the LGBTQA community are not even recognized in the statute book.

Additionally, failure on the part of the court to associate non-consensual carnal intercourse, between two adults, against the order of nature as sexual assault has abridged the community’s aspirations as such acts continue to fall within the umbrella of Section 377 of IPC. Such interpretation of the law is erroneous and manifestly discriminatory on the anvil of Article 15 of the Constitution and antithetical to the principle of equality enshrined under Article 14 of the Constitution. The non-categorization of sexual offenses that can be committed against the



LGBTQA community as against the specific categorization of offenses that can be committed against women is problematic. The victims of similar sexual offenses cannot be given discriminatory treatment at the instance of the state solely on the premise of gender identity and sexual orientation. A sexual assault against the LGBTQA community should be punished likewise and with the same impact, seriousness, and range of quantum of punishment as in the case of women without diluting it under the ambit of unnatural offense.

It is therefore imperative to cause the amendment to the existing criminal law provided for under IPC and other laws like the Sexual Harassment of Women at Workplace and the Domestic Violence Act, which fall within the criminal realm to recognize that sexual offenses can be committed against the sexual minorities and are punishable with the same seriousness regardless of the gender of the victim. In accordance with Wolfenden Committee Report and the criminal jurisprudence asserted by it, the accused is punished for the sexual offense committed by him, and the punishment is not premised on the gender of the victim. As far as the point of vulnerability is concerned, the LGBTQA community, just as women, are vulnerable to sexual violence, harassment, and exploitation, as established in the chapter. The community needs ample protection from the state to further their substantive rights as recognized by the judiciary, including the right to choose a sexual partner and have consensual sexual activities in private. Despite the transgender movement's spectacular gains over the previous decade, which has resulted in more public awareness and substantial legislative triumphs, trans persons continue to confront open prejudice, a high rate of violence, and poor health outcomes. Trans individuals of color frequently experience much worse health and economic results as they negotiate several oppressive systems.

In most EU Member States, same-sex couples lack the same protections and rights as opposite-sex couples. As a result, individuals face discrimination and disadvantage when accessing social security programs such as health care and pensions. The majority of LGBT people continue to conceal their sexual orientation or face harassment in the workplace out of fear of losing their jobs. Young LGBT persons are particularly susceptible because they face estrangement from family and friendship networks, harassment at school, and invisibility, resulting in academic underachievement, school drop-out, mental illness, and homelessness in certain situations. LGBT persons are denied equitable access to vital social commodities such as employment, health care,

education, and housing. However, it also marginalizes them in society, putting them in vulnerable groups at risk of social exclusion. I am going to highlight some of the significant issues confronting LGBT people worldwide:

1. **Marginalization and Social Exclusion:** At the individual, interpersonal, and societal levels, marginalization is at the heart of exclusion from fulfilling whole social lives. Marginalized people have a limited amount of control over their lives and available resources; they may become stigmatized and are frequently the target of opposing public opinions. The stigma associated with sexual orientation and gender identity or expression that deviates from the anticipated heterosexual, non-transgender norm keeps many LGBT persons on the periphery of society. This marginalization isolates LGBT persons from several support structures, frequently including their own families, resulting in limited access to resources that many others take for granted, such as medical care, justice, legal services, and education. Additionally, due to a lack of other resources, many LGBT youngsters are forced to engage in criminalized activities such as sex work to live, pushing them farther into the outskirts of society and exposing them to a greatly increased risk of HIV.
2. **Legal Injustice:** LGBT groups have a critical stake in issues of legal injustice. Certain segments of the LGBT community suffer disproportionately from violence and discrimination, sometimes at the hands of law enforcement authorities. There have been numerous reported cases of police brutality directed at LGBT individuals in the United States in recent years. Numerous police departments continue to face allegations of insensitivity, including failing to respond adequately to violence directed at LGBT persons. For example, LGBT people of color, teenagers, and sex workers are disproportionately vulnerable to police misbehavior and abuse; transgender people are more likely to be targeted by police and handled inappropriately or abusively while in police custody. Individuals who identify as LGBT are not legally protected from abusive and discriminatory behavior. Numerous oppressive legal regulations and statutes deny LGBT-identified individuals the same fundamental human rights and privileges as non-LGBT individuals.

3. **Victims of hate Crimes and Violence:** Lesbian, Gay, Bisexual, and Transgender individuals, as well as those assumed to be LGBT, are often targets of hate crimes and violence. Throughout their lives, LGBT persons face stigma and prejudice and are frequently the subject of sexual and physical abuse, harassment, and hate crimes.
4. **Challenges facing LGBT elders:** As they age, lesbian, gay, bisexual, and transgender (LGBT) people encounter a number of unique concerns. They frequently lack proper health care, cheap housing, and other necessary social services as a result of institutionalized heterosexism. Numerous issues confronting LGBT elders also derive from the fact that they frequently lack the same family support systems as heterosexual people. There is a dearth of information about LGBT elders as a result of government and academic researchers' widespread inability to include questions about sexual orientation and gender identity in their studies of the elderly. Legal and legal frameworks historically discriminated against LGBT persons have social and economic ramifications, denying LGBT elders access to financial resources and community support networks.
5. **Poor Economic Condition and Discrimination in the Workplace:** Apart from homophobia, lesbian, gay, bisexual, and transgender persons face daily discrimination and poverty. Discrimination against LGBT individuals in the workplace is a significant factor in the socioeconomic status discrepancies LGBT people face. Gay and transgender people face socioeconomic inequality in large part as a result of widespread occupational discrimination. Discrimination immediately results in job insecurity and high turnover, increasing homosexual and transgender people's unemployment and poverty rates, as well as the income difference between LGBT and straight people. According to economist Lee Badgett's 1998 research, *Income Inflation: The Myth of Affluence Among Gay, Lesbian, and Bisexual Americans*, LGBT persons do not earn more than heterosexual people. Badgett emphasizes the economic diversity of LGBT populations, noting that LGBT persons frequently earn less than their heterosexual colleagues.
6. **Problems of Terminology:** Problems in language occur when terminology is unclear or when terminology has been associated with negative stereotypes. When the language is too vague, problems occur concerning lesbians, gay men, and bisexual persons, or the concepts are poorly defined. Language may be ambiguous in reference, so the reader is uncertain about its meaning or inclusion and exclusion criteria; The term homosexuality has

historically been associated with deviance, mental illness, and criminal behavior, and discriminating language may perpetuate these negative preconceptions. Sexual orientation is favored over sexual preference in psychological writing to refer to lesbian, gay, bisexual, and heterosexual people's sexual and affectional relationships.

7. **Barriers to Care:** People who are lesbian, gay, bisexual, and transgender (LGBT) face particular obstacles, barriers, and challenges that frequently make it challenging to find and receive competent and affirming healthcare. Heterosexist assumptions can adversely affect the quality of treatment, and fear of a negative experience keeps many LGBTs from seeking help. Organizations and individual therapists are not always LGBT-friendly, and some therapists may not even recognize their heterosexism. The death of activist Ananya Kumari Alex, 28, the first transgender candidate in the state to contest the assembly elections, has snowballed into a controversy after her friends and family members alleged negligence by Renai Medicity, where she underwent sex reassignment surgery. "There was apparent negligence by the hospital and the doctor who performed the surgery. Institutional murder of Ananya Kumari; According to the Transgender Survey Kerala (2014), 54% of transgender people in Kerala earn less than 5000 rupees per month and just 11.6 percent work in regular employment. In Kerala, about 90% of transgender students drop out of school as a result of taunting from classmates, instructors, neighbors, and family. The primary conclusion derived from these facts is that society actively excludes transgender people from reaching freedom. They are pushed into poverty and have a worse level of living as a result of the stigma and social rejection they suffer.

The hour needs to extend the principle of equality, make the existing criminal law transgender-inclusive, and recognize the legal space for the community. As per the statistical report issued by Equaldex on homosexual activity, India is one of the 150 countries wherein homosexual activities have been legalized. The decriminalization of sexual conduct between all consenting adults was an awaited step towards recognizing the substantive rights of the LGBTQA community.

## **SUGGESTIONS**

After the research, the researcher noticed that though our country guarantees human rights to its citizens, a minority of the Indian population that term themselves to be LBGT's have been

neglected. Thus, in light of the above-mentioned discussion, the following proposals can be made for recognizing the role that individuals and institutions can play.

1. Support the most marginalized LGBT community—people of color, low-income, young, elderly, and transgender.
2. Collaborate on cross-issue work that addresses LGBT issues affecting low-income and people of color.
3. Engage foundation personnel in public education about issues impacting LGBT low-income individuals and LGBT persons of color, particularly those involving transgender individuals.
4. Schools and teacher education programs are legally obligated to address LGBT problems and concerns. Schools can employ the following policies and procedures to help promote health and safety among LGBT youth:
  - I. Encourage pupils to treat one another with respect and prevent bullying, harassment, and violence towards any student.
  - II. Establish safe spaces, such as counselors' offices, designated classrooms, or student groups, where LGBTQ students can receive assistance from administrators, teachers, and other school personnel.
  - III. Encourage the formation of student-led and student-organized school organizations dedicated to fostering a safe, inviting, and accepting school environment (e.g., gay-straight alliances, which are school clubs open to youth of all sexual orientations).
  - IV. Ascertain that health curricula and educational materials include information pertinent to LGBTQ adolescents regarding HIV, other STDs, and pregnancy prevention, including ensuring that curriculum and educational materials employ inclusive language and terminology.
  - V. Encourage school districts and faculty to establish and publish training on providing safe and supportive school settings for all students, regardless of sexual orientation or gender identity, and encourage faculty to attend these sessions.
  - VI. Facilitate access to community-based clinicians familiar with delivering health care to LGBTQ kids, including HIV/STD testing and counseling. Facilitate access to community-based providers who have expertise working with LGBTQ youth in need of social and psychiatric care.

- 5.) Consider LGBT issues as a central theme in all economic and racial justice work.
- 6.) Advocate on behalf of LGBT racial and economic justice efforts with charitable counterparts.
- 7.) The media must play a responsible role in changing society's attitudes by reporting on LGBT issues and creating a culture of tolerance and freedom for minorities.
- 8.) Legal funds need to be created to take on Public Interest Litigation on LGBT issues.
- 9.) Health practitioners must get training to raise their awareness of LGBT identification as a possible risk factor for self-harm, suicidal behavior, and depression. Respective authorities should guarantee that LGBT people have access to and use health, mental health, and social care services.
- 10.) National and state governments should establish programs to assist employers in creating more welcoming and inclusive workplaces and workplace cultures for LGBT individuals.
- 11.) To combat domestic and public violence, the domestic violence statute must be amended to include non-spousal and parental abuse.
- 12.) Police reforms must be introduced & implemented. Police at all levels should undergo sensitization workshops to break down their social prejudices and train them to accord sexual minorities the same courteous & humane treatment they give towards the general public. Also, transparency should be adopted in dealing with sexual minorities.
- 13) Avoid using stigmatizing or pathologizing terminology when referring to homosexual men, lesbians, and bisexual individuals (e.g., "sexual deviant," "sexual inversion").
- 14.) Local authorities, policymakers, schools, and families need more education on accepting gender-variant children, treating people of different sexuality and gender identity equality, and applying for policies and programs in a —friendly manner, rather than being hostile.
- 15.) The LGBT people must also educate themselves more. During visits to NGOs, many leave schools in between, are not educated enough, or lack seriousness towards their studies. Many of them are engaged in the typical barber work, fashion designing, & other such vocational jobs. Few of them pick up prostitution as an easy way to make money. All this leads to failure to influence the general public's mindset and ultimately leads to hatred, disrespect, and non-acceptance on the part of society.
- 16.) On the whole, they have to boost up their self-esteem, earn respect so that their issues can be seriously considered & supported by society at large. They need to bring political awareness & send representatives to parliament; only then can a favorable legislature be expected. Because the

crux remains that until & unless they are not supported by society, neither legislature nor judiciary will stand beside them.

Therefore, to conclude, one can say that progressive steps have been taken towards the acknowledgment of the rights of the LGBTQA community; however, to ensure penetration of this legal change in the society, questions of civil and criminal realm relating to the substantive rights have to answer at the instance of the legislature at the earliest. Mere decriminalization of consensual sexual conduct between consenting adults does not do justice to the LGBTQA community; instead, it opens up avenues to be addressed by the legislature to ensure that the state protects this marginalized community, its sexual rights, gender identity, and orientation. The state has to protect individuals, regardless of their gender identity and sexual orientation, from sexual offenses, exploitation, and violence by enacting separate legislation or amending the existing ones and simultaneously furthering the mandate of the international covenants, which India is a signatory. The state is also obligated to ensure that the community is not harassed, at the instance of the police agency, while exercising their right to consensual sexual conduct in private. To cherish the liberty so declared in favor of the sexual minorities, it is imperative to extend legal protection to the community against sexual offenses and incidentally give them the social acceptance they were deprived of centuries.

*“So long as you do not achieve social liberty, whatever freedom is provided by the law is of no avail to you.”*

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**APPENDIX**

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**Kalamassery, Kochi – 683 503, Kerala, India**

**CERTIFICATE ON PLAGIARISM CHECK**

1.	Name of the Candidate	Diana Laurence Paul
2.	Title of Thesis/Dissertation	“The state of LGBTIQ+ rights in India and taking the narrative forward: Living Free and Equal”,
3.	Name of the Supervisor	Prof. (Dr.) Mini S
4.	Similar Content (%) Identified	
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# Plagiarism Report

The screenshot displays a Microsoft Word document titled "Document2" with a Grammarly sidebar on the right. The document content is as follows:

**1. CHAPTER -1**  
**INTRODUCTION**

The term "lesbian, gay, bisexual, and transgender, gender diverse, intersex, queer, asexual, and questioning (LGBTIQ+)," which is more commonly abbreviated as LGBT, refers to a broad coalition of groups that are diverse in terms of gender, sexual orientation, race/ethnic origin, and socioeconomic status. The communities encompassed by this widely used umbrella term face distinct gender identity and sexual orientation issues. The LGBT community represents the various aspects of gender, sexuality, romance, and other spectrums, and diversity, self-love, acceptance, courage, and sympathy are humane virtues. India is the homeland and birthplace of the Hijra community, a term that translates as transgender. *This community was once revered and considered holy messengers, and their blessings were sought on significant occasions such as marriage and childbirth. The community is now treated as beggars, and the term Hijra is frequently used as a derogatory slur.*<sup>1</sup> The broad concepts of sexual orientation and gender identity are critical for comprehending the term LGBTIQ+ in its entirety. In developed and developing countries, LGBTIQ+ is referred to by a variety of acronyms and terms. The wide range of terms and languages related to them are given below.

- sex
- bodies
- gender
- sexuality
- sexual attraction
- experiences
- legal and medical classifications

It is critical to acknowledge the complexity of people's lived experiences and recognize that the aspects mentioned above may apply differently and at different times

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