*Page 513 - 522* **DOI:** *http://doi.one/10.1732/IJLMH.25174*

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

**Volume 3 | Issue 6**

**2020**

# Queer Movement and Legislation

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## ABSTRACT

*The term homosexuality and the laws prohibiting 'unnatural' sex were imposed across the world through imperial might. In India also unnatural sex was made a criminal offence by the colonial legislation, the Indian Penal Code, drafted by Lord Macauley in 1860 that criminalize "carnal intecourse against the order of nature" under section 377, punished by imprisonment that could be extended upto ten years. Our Judiciary has ever since the inclusion of this offence has tried to interpret what a "carnal intercourse against the order of nature" is, in a several judgements, in its several attempts to define the meaning and scope. There has however not been any distinction of consensual sex or otherwise, in section 377 of Indian Penal Code (IPC), which has effectively made sex between homosexuals a crime. Recently the Supreme Court in the case of Naz Foundation scrapped section 377 and upholded the decision given by the Delhi High Court, thereby declared that so long as it criminalises sexual acts between consenting adults, whether homosexual or hetrosexual is unconstitutional. This paper examines the issues of LGBTI community, and the constitutional validity of section 377 under the shadow of fundamental rights given under part three of the constitution of India.*

***Keywords:*** *LGBT, Homosexuality, Carnal Intercourse, Hetro Sexuality*

## I. INTRODUCTION

***"Love was celebrated in India in every form[2],***" said Rana Safvi, an imminent historian.

Whether we talk about Ancient or Today's India, the presence of fluid sexualities was cherished in our society. The depictions of homosexuality can be seen in the temples of Khajuraho and Mughal chronicles[3].The most striking example is the Khajuraho town in the state of Madhya Pradesh. The Chandela dynasty built the Khajuraho Temple between 950 to 1050 A.D. The erotic carvings in the temple richly depict homosexuality. Other sites depicting similar forms of art include the caves at Ajanta and Ellora in the state of Maharashtra and the Sun Temple in Konark in the state of Orissa. The term homosexuality

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[2] Vikas Pandey, *Why legalising gay sex in India is not a Western idea*, BBC News Delhi, 31 December 2018, https://www.bbc.com/news/world-asia-india-46620242
[3] Ibid

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and the laws prohibiting 'unnatural' sex were imposed across the world through imperial might. In India also unnatural sex was made a criminal offence by the colonial legislation the Indian Penal Code drafted by Lord Macauley in 1860 that criminalize "carnal intecourse against the order of nature" under section 377, punished by imprisonment that could be extended upto ten years. Our Judiciary has ever since the inception of this offence has tried to interpret what a "carnal intercourse against the order of nature" is, in several judgements in its attempt to define the meaning and scope of the alleged section. There has however not been any distinction of consensual sex or otherwise, in section 377 of Indian Penal Code (IPC), which has effectively made sex between homosexuals a crime. Recently the Supreme Court in the case of Naz Foundation[4] scrapped section 377 and upholded the decision given by the Delhi High Court, thereby declared that so long as it criminalises sexual acts between consenting adults, whether homosexual or heterosexual is unconstitutional, which was struggled against from past two decades.

## II. HISTORY

The British Empire as part of their "civilising mission" imposed various legislations, including the anti-sodomy law on all of their colonies. England incorporated the offence of "sodomy" in its common law[5] against those who were a threat to Christian Principles on which the Kingdom was founded. It is pertinent to note here that even today the christian states take the legislations in support of homo sexualty as against their religious order. Recently in 2015 when U.S. President Barack Obama told Africans that discriminating against gays was like treating people differently because of race, drawing criticism from anti-gay activists who said he was imposing his morality on the continent.[6] The laws made by the the english people was a law which targeted not only Homosexuality, but also any forms of sexual acts not leading to procreation. It can be seen that this law was directed towards any person considered "Impure" including Jews, Lepers, Prostitutes, Heretics, and Sodomites. Under the reign of Henry VIII, England experienced Catholic Reformation and therefore the English Laws got revived. "Sodomy" was considered to be a crime under the description of "detestable and abominable Vice of buggary committed with mankind or beast", under the statute of 1533. This offence was made punishable by Death.

Later, during the reign of Mary I the statute got repelled saying that the Church would look

[4] Naz Foundation vs Government Of Nct Of Delhi And Others, 02 July 2009, 160 Delhi Law Times 277, p.48
[5]Buggery Act (25 Hen VIII C.6), (January, 15, 1533)
[6] Edith Honan, Jeff Mason, Obama in Kenya says gays need equality, draws African criticism, REUTERS, (JULY, 25, 2015), https://in.reuters.com/article/us-obama-africa-gay/obama-in-kenya-says-gays-need-equality-draws-african -criticism-idUSKCN0PZ0MZ20150725

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into such matters. The Parliament of England re-enacted it during 1563.

During this time, many writers wrote, expressed their views on Homosexuality being a sin. In one of the writings by Thomas Coke, a politician, he describes that, "Buggery is a detestable and abominable sin, amongst Christians not to be named[7]." He further states that, "It is committed by Carnal Knowledge against the Ordinance of the Creator and the Order of Nature, by Mankind with Mankind, or with Brute Beast, or by Womankind with Womankind or Brute Beast."[8]

Buggery remained a capital offence in England and Wales until the enactment of the Offences against the Person Act 1861. However, male homosexual acts still remained illegal and were punishable by imprisonment and in 1885 section 11 of the Criminal Law Amendment Act 1885[9] detailed the laws regarding homosexuality to include any kind of sexual activity between males and it must be noted that Lesbians were still not acknowledged by the legislation.

Currently, homosexual acts are legal in almost all of the western countries, and in some countries violence against LGBT people is classified as a "hate crime". Outside the western world, many countries are potentially dangerous to their LGBT population due to their discriminatory legislation and violence. These include countries where the majority population is Islamic, most African countries besides South Africa, most Asian countries besides Israel, Japan, Taiwan, Thailand and the Philippines, and countries such as Serbia, Albania, Montenegro, Russia, and Poland.

## III. QUEER MOVEMENT IN INDIA

The idea of human rights rests on the central premise that all humans are equal. It follows that all humans have dignity and all humans should be treated as equal. Anything that undermines that dignity is a violation, for it violates the principle of equality and paves the way for discrimination.

The human rights of lesbian, gay, bisexual, transgender and intersex people (LGBTI) are coming into sharper focus around the world, with important advances in many countries in recent years, including the adoption of new legal protections. The preamble to the Indian Constitution mandates justice -- social, economic, and political equality of status for all. The

[7]Alok Gupta, HUMAN RIGHTS WATCH, (December, 17, 2008) https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism#1053
[8]Adrija Roychowdhury, Section 377: A British legacy from which we have finally broken free, TNIE, (September, 6, 2018, 4:32:02 pm)
[9]48 & 49 Vict. c 69

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right of equality before law and equal protection under the law is guaranteed in Articles 14 and 21 of the Constitution of India.

6 September 2018 was the day when The Supreme Court struck down the 19th Century law criminalising Homosexuality in India, Section 377 of the Indian Penal Code.

The judgement came after a decade long struggle by the gay community and was given by a five judges bench consisting of Chief Justice Dipak Misra and Justices R. F. Nariman, D. Y. Chandrachud, A. M. Khanwilkar and Indu Malhotra.

The struggle by activists and various members of the LGBT Community began 20 years ago. Before going into the timeline of events that took place to bring about this huge amendment in the Penal Code, let us first examine what section 377 of IPC is and what was the issue that infused such a long battle in the history of this legislation.

**Section 377 of the Indian Penal Code**

377. Unnatural offences. —*Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with impris-onment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

The offence under the heading Unnatural offences was first introduced in the criminal law in 1860, by Lord Macauley and the plain reading of the text suggests that it was carnal intercourse against the order of nature, which was culpable. From 1860 onwards the courts were busy trying their best to interpret this section and especially what a carnal intercourse meant in this very section. In its earliest approach the courts only restricted the section to include anal sex into the meaning. But later in a 1934 case, the Lahore High Court in ***Khanu v Emperor***[10] has held that "carnal intercourse with a bullock through nose is an unnatural offence punishable under Section 377 of the Indian Penal Code". The court held that "the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible". The courts in India have interpreted the term "carnal intercourse against the order of nature" so broadly that it now includes from oral and anal sex to penetration into artificial orifices such as folded palms or between thighs. Many times, this distorted application of section 377 due to the ambiguity of the text has led to arbitrary application of the law and this has led to the struggle against the validity of the law. Moreover, consent is wholly immaterial under section 377 and as such

[10] Khanu v. Emperor,AIR 1932 Cal 487

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anyone whether or not a consenting partner in the act are considered to be at wrong. In the case of ***Jagjit Singh v State***[11] consentual sodomy was considered a crime under this section. The lack of consent-based distinction in the offence has made homosexual sex synomous to rape and has also treated homosexuality at par with perversity. This section also suffers the vice of ambiguity as the words "against the order of nature" are difficult to be defined.

## IV. CONSTITUTIONAL VALIDITY OF SECTION 377 I.P.C.

The constitutional validity of section 377 was challenged in the Delhi High Court in the case of ***Naz Foundation v Government of Delhi & Ors***.[12] In this case it was argued That this section envelops within its scope the consensual sex between two adults and as such is violative of the fundamental rights guaranteed in Articles 14, 15, 19 and 21 of the Constitution. It was also contended that Article 21 can be denied only in case of compelling state interest which is missing in this case.[13] The petitioner also contended that the legislative intent behind section 377 is based on stereotypes that are outmoded and have no historical or logical backing. They also argued that the expression "sex" as used in Article 15 also includes "sexual orientation" and thus according to Article 15 there can be no discrimination on the basis of sexual orientation. Section 377 of IPC was prayed to be declared *ultra vires*, insofar as it criminalizes consensual sexual acts between two consenting adult partners. It is pertinent to mention here that sexual orientation of any individual was considered as his private matter in the judgement given by Supreme Court on 24 August 2017 in the most famous Aadhar Case[14]. This is what Supreme Court said in the aadhar matter:-

**Sexual Orientation:** "***Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.***"[15]

The two wings of Union of India filed a complete counter affidavit in this case. The Ministry of Home Affairs in the Naz Foundation matter tried to justify section 377 on the grounds of public health, morality and public disapproval. The Union of India filed an affidavit disapproving the decriminalization of section 377. The Ministry of Health & Family Welfare,

[11] Jagjit v. State 1969 PLR 34 (SN)
[12] 2009,111 DRJ (I)
[13] Naz Foundation v Government of Delhi & Ors, (2010) Cri LJ 94 (Delhi).
[14]Alison Saldanha, From sexual orientation to Aadhaar: 5 issues Right to Privacy may impact, BS, (August, 25, 2017, 08:07 IST)
[15]Ibid

however, supported the claim of petitioners stating that the presence of section 377 in the statute book has hampered the HIV/AIDS prevention efforts and that its deletion would help in treating homosexuals suffering from HIV/AIDS.[16]

The Delhi High Court rejected the contention of the Ministry of Home Affairs on the ground that restricting the right under Article 14 and 21 popular morality or public disapproval cannot be a valid ground. The court further added that only constitutional morality and not public morality can restrict fundamental rights to the extent such rights are in contravention of that constitutional morality. The High Court opined that social morality must succumb to the concept of constitutional morality. It said ***"Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it***."[17] On account of their sexual orientation only homosexuals cannot be considered as violating constitutional morality. Accepting all the contentions of the petitioners the Court declared that part of section 377 *ultra vires* which criminalised consensual sexual acts of adults in private, and did not declared Section 377 unconstitutional in its entirety. Non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors were still treated as criminal acts attracting prosecution.

This order of the Delhi High Court was challenged before the Supreme Court in the case of ***Suresh Kumar koushal and another v Naz Foundation & others***[18] by groups of religious bodies and individuals including the All India Muslim Personal Law Board, the Apostolic Churches Alliance and the Utkal Christian Council. The Naz Foundation judgment was overturned by the Supreme Court of India in this case by a two-judge bench. Amongst other things the court stated that the LGBT community comprised only a "***minuscule fraction of the total population***" and that the mere fact that the powers under Section 377 were misused by the police were not a reflection of the constitutional validity of the Section. Further, the court stated that Section 377 IPC applied irrespective of age and consent and that it did not mean to criminalize any person or identity or orientation. Section 377 only identified certain acts which, when committed, would constitute an offence. The very reading of section 377 itself does not bar homosexuals as such rather it only criminalises the sexual act against the order of nature. The Bench further observed that such a prohibition regulated sexual conduct regardless of gender identity and orientation. The court further rationalised the inclusion of section 377, saying that it was inserted to protect social values and morals. The Supreme Court accepted this contention and set aside the order of the High court. The court stated that

[16] Naz Foundation v Govt of Delhi & Others 2010
[17] Kalpana Kannabiran, India: From 'perversion' to right to life with dignity, (July, 06, 2009)
[18] Suresh Kumar Koushal & Anr v Naz Foundation & Others ((2014) 1 SCC 1), AIR 2014 SC 563

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every legislation enacted by the Parliament or State legislature carries with it a presumption of constitutionality. This principle applies retrospectively through Article 13 of the Constitution[19], which means that if there were any laws prevalent throughout the territory of India which were inconsistent with the constitution, they shall stand void from the day the constitution came into force. The court further said that If no amendment is made to a particular law it can be inferred that the legislature did not find it to be in contrast with the constitution. Post-independence almost 30 amendments have been made in the Indian Penal Code including amendments in the chapter of sexual offences under which unnatural offences fall. "***However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India, has not thought it proper to delete the provision"***. The court ultimately declared section 377 to be constitutionally valid. However, the court left it open for the Legislature to revisit the law.

The reversal by the Supreme Court of the Naz Foundation judgment created an uproar in civil society, liberal circles, large sections of the media (as well as international agencies) leading to a demand for the reconsideration of the two Judge Bench decisions by a larger Supreme Court Bench. The Naz foundation in 2016 filed a curative petition challenging this judgement of Supreme Court, which was referred to a five judge bench, which unanimously overruled the Judgement of Suresh Kumar Koushal.

In 2017, a 9 judge bench of the Supreme Court in ***K.S. Puttaswamy v Union of India***[20], unanimously ruled that the Constitution established a fundamental right to privacy creating a zone of personal autonomy within which the State cannot intrude. The judgement mentioned Section 377 as a "discordant note which directly bears upon the evolution of the constitutional jurisprudence on the right to privacy." In the judgement delivered by the 9-judge bench, Justice Chandrachud (who authored for Justices Khehar, Agarwal, Abdul Nazeer and himself), held that the rationale behind the Suresh Koushal (2013) Judgement is incorrect, and the judges clearly expressed their disagreement with it. Justice Kaul agreed with Justice Chandrachud's view that the right of privacy cannot be denied, even if there is a minuscule fraction of the population which is affected. He further went on to state that the majoritarian concept does not apply to Constitutional rights and the courts are often called upon to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India[21]. The judges led by Justice Chandrachud who stated that the right to privacy and the "protection of sexual orientation lie at the core of

[19]Article 8, Draft Constitution, 1948
[20]Justice K.S.Puttaswamy(Retd) vs Union Of India And Ors. (2017) 10 SCC 641
[21]Justice K.S.Puttaswamy(Retd)& vs Union Of India & Ors (2015) ALL WP(C) No.494 of 2012

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the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution". This judgement laid the jurisprudential foundation for the Navtej Singh Case[22] which came up for judicial scrutiny in 2018.

In 2018, the five-judge constitution bench of the Supreme Court consisting of chief justice Dipak Misra and justices Dhananjaya Y. Chandrachud, Ajay Manikrao Khanwilkar, Indu Malhotra, and Rohinton Fali Nariman started hearing the challenge to constitutionality of Section 377 in ***Navtej Singh Johar v Union of India[23].*** The Union Government did not take a position on the issue and left it to the "wisdom of the court" to decide on Section 377. The petitioners invoked the right to sexual privacy, dignity, right against discrimination and freedom of expression to argue against the constitutionality of Section 377. The bench After hearing the petitioners' plea for four days pronounced its verdict on 6 September 2018. Announcing the verdict, the court reversed its own 2013 judgement of restoring Section 377 by stating that using the section of the IPC to victimize homosexuals was unconstitutional, and henceforth, a criminal act. In its ruling, the Supreme Court stated that consensual sexual acts between adults cannot be a crime, deeming the prior law "irrational, arbitrary and incomprehensible."[24]

Rationale of Navtej Singh judgement is given hereunder:

**Whether Section 377 is Violative of Article 14**: Section 377 of IPC lacked a reasonable nexus with the object of protecting women and children, as the non-consensual acts which have been criminalized by virtue of Section 377 of IPC. Rape have already been designated as penal offences under Section 375 of IPC and under the POCSO Act. On the contrary, the presence of Section 377 of IPC in its present form has resulted in effect whereby even 'consensual acts', which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) due to some inherent characteristics defined by their identity and individuality, have been maliciously abused. Such dual standards meted out to a class of people (LGBT) is unconstitutional for being violative of Article 14 of the Constitution.

**Whether Section 377 is Violative of Article 15:** Article 15 (1) of the Constitution provides that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them"[25] The expression "sex" is fluid and not a static

[22]Navtej Singh Johar vs Union Of India Ministry Of Law (2018) W. P. (Crl.) No. 76 of 2016
[23] Navtej Singh Johar v Union of India Ministry of Law and Justice Secretary (2018)
[24]'Gay sex is not a crime,' says Supreme Court in historic judgment, TNN, (September, 06, 2018), https://timesofindia.indiatimes.com/india/gay-sex-is-not-a-crime-says-supreme-court-in-historic-judgement/articleshow/65695172.cms
[25] P.M.Bakhshi, Constitution of India:Universal Law Publication Co. Pvt. Ltd. (2003), pp.26

concept, so it cannot be attached to a biological male or female only. In the context of Article 15 it has to have a wider interpretation and should be extended to sexual orientation of any individual. Section 377 of IPC imposed discrimination based the basis of sexuality on an entire class of persons (LGBT). This was a clear contravention of Article 15(1) of the Constitution.

**Whether Section 377 is Violative of Article 19:** Public order, decency and morality as grounds to restrict the fundamental right of expression including individual choice cannot be accepted as reasonable restrictions to uphold the validity of Section 377 of IPC. Section 377 of IPC takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality. Section 377 of IPC amounted to an unreasonable restriction as it made carnal intercourse between consenting adults within their private space, a criminal offence. Such an interpretation is against the basic right of expression of any individual. Homosexuality is innate; you are born with it. Therefore, the restriction imposed by Section 377 is unreasonable and does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression.

**Whether Section 377 is Violative of Article 21:** Section 377 abridges both human dignity as well as the newly articulated fundamental right to privacy. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep, the right of every individual including the rights of LGBT to express their choices in terms of choice of partner or sexual orientation without fear of prosecution. Section 377 IPC, in its present form, is violative of the right to dignity and the right to privacy under Article 21 of the Constitution.

## V. CONCLUSION

The LGBT community has historically been vulnerable to violence, harassment, discrimination, exclusion, stigmatisation and prejudice both in society at large and at the workplace. The Navtej Singh Case is a great win for the LGBT community in that homosexual acts have now been decriminalised. The right to public health is another aspect of human rights thathad been seriously undermined through the criminalisation of same sex behaviour. Kiran Bedi, the Inspector General of Police in Delhi was vehemently criticised for her refusal to distribute condoms to the inmates of jail on the pretext that such supply would promote homosexuality. In this context, the concerns of the National AIDS Control Organisation (NACO) are pertinent. Fear of the law-enforcement agencies obstructs disclosure, which in turn impedes HIV/AIDS prevention programmes and increases the risk

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of infection in high-risk groups. Section 377 as it stood before the judgement of the Supreme Court in 2018 was in contrast to the concept of dignified life as enshrined in the right to life under article 21 of the Constitution. Lastly the LGBT community is not a miniscule minority. No authentic census has been conducted in India on the exact number but the number is likely to be close to 4% of the population, if one were to go by the studies done by Alfred Kinsey, an American scientist in the last century. There is no known reason to believe otherwise. The decriminalising of the particular section with respect to consensual acts between partners of their choice is definitely going to contribute to restoring the dignity to the homosexuals who have struggled so hard from past many decades for their rights.

*"I have spoken against the injustice of apartheid, racism, where people were penalized for something about which they could do nothing, their ethnicity… I therefore could not keep quiet, it was impossible, when people were hounded for something they did not choose, their sexual orientation."*- ***Archbishop Desmond Tutu***

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 [ISSN 2581-5369]