CHAPTER-8

ADVOCACY FOR HOMOSEXUALITY IN INDIA

8.1 INTRODUCTION

Clauses 361 and 362 (the predecessor provisions to Sec 377 of the IPC) relate to offences respecting which it is desirable that as little as possible be said...we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision.251

Lord Macaulay252

The offence is one under Section 377 IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.

Fazal Rab Choudary v. State of Bihar253

In our view, Indian Constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be

forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

C. J. Shah

Naz Foundation v. Union of India and others

The decision in *Naz Foundation v. Union of India* marks the culmination of a very important journey in Indian law. For the first time in Indian judicial history, LGBT persons were looked at not within the frame of criminality or pathology but rather from within the framework of dignity. The shift or transition is itself remarkable when one considers the history of the interpretation of Section 377 by the judiciary. But dejectedly, Supreme Court of India stroked down the Delhi High Court Judgment on 11th December, 2013 and restored sec.377 IPC in its original form. In the history of LGBT activism in India, both the judgments are imperative and hence, discussed in detail in this chapter.

The aim of this chapter is to traces the evolution and codification of sodomy law and advocates for and against legalization of homosexuality India.

### 8.2 INDIAN PENAL CODE AND CODIFICATION OF HOMOSEXUALITY BY THE BRITISH EMPIRE

The IPC along with Section 377 as it exists today was passed by the Legislative Council and the Governor General assented to it on 6.10.1860. Less well known is the fact that the codification of homosexual offences actually began as far back as 1825, when the task of devising law for the Indian colony was entrusted to the historian Lord Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the principal drafter of the Indian Penal Code-the first ever exhaustive draft of codified criminal law produced by the British Empire.

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255 Ibid.
Introducing a draft in an 1837 speech, Macaulay discussed the clauses in detail. But when he reached his version of the anti-sodomy provision, he showed discomfort that the drafters had been compelled to think about such distasteful issues.

The 'injunction to silence' against anti-sodomy laws, propagated by jurists like Macaulay led to 'a strange state of affairs'. Nowhere till date in any anti-sodomy provision throughout the former British colonies do we see the use of the term sodomy. The stigma and shame attached to the term, coupled with the fear of its infectiousness gave rise to euphemisms around it, which also gave rise to scope in the future amendment and refinement of the offence under the guise of clarifications.

Instead of following the old British offence of 'buggery'—which in many ways considering the 'injunction to silence' and Macaulay's own reluctance to a debate or discussion on the issue, might have been the best option—he chose to draft a fresh offence. The legislative measure with 'the greatest precision' turned out to be the most unclear law on sodomy. The two proposed clauses, distinguished by the element of consent, pertaining to 'Unnatural Offences' read as follows:

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

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

The point of distinction between Cl. 361 and Cl. 362 is a longer punishment for non-consensual and lesser for consensual, clearly incorporating differing standards of

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257 See: Introductory para in italics of this chapter, Macaulay’s speech.
'harm'. However, the meaning of 'touch' was never defined. In fact the idea of 'gratifying unnatural lust' was so vague and ambiguous that it was discarded before the final draft.  

The final draft of the Indian Penal Code came into force in 1860 (delayed because of the Indian mutiny in 1857) and carried a modified definition under the title of Unnatural Offences, which then became a thumb rule for defining the offence of ‘sodomy’ in further colonial Criminal/Penal Codes. This was called Section 377 of the Indian Penal Code, the dreaded source of homophobia throughout the former British Colonies; and read as:

**Section 377: Unnatural offences**—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall be liable to fine.

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

There was no explanation provided for the meaning of 'carnal intercourse' or 'the order of nature'. It applied the offence both to heterosexuals and homosexuals and equated it to bestiality, making penetration the sole criteria. And unlike Macaulay's first draft it makes no distinction between consensual and non-consensual sex—and is therefore harsher. It punishes both consensual and non-consensual sodomy with a punishment up to 10 years to life. For lack of access and availability of other legislative records, diaries and documentation, the reasons for the change are not known. However, on the face of it, it is possible to conclude that there was a deliberate attempt to:

- Equate sensual sodomy with non-consensual, therefore not treating consensual sex separately and, perhaps, leniently.

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259 A similar offence of 'homosexual touching' is defined under Section 121 the Islamic Civil code in Iran, as Tojkheey. hap: //www.unhchr.ch/Huridocda/Huridocamsl/TestFrame/7b4f5ec0493538258025671a003ad2c7?Opendocument.

260 The final definition was based on the Latin principle ‘contra natura ordirum habiut veneream et Carnaliter cognovit’ (carnal intercourse against the order of nature).
- enhance the Punishment;
- Confine the offence from mere ‘touching’ to acts involving ‘penetration’.

At present, the understating of acts which fall within the ambit of Section 377 has changed from non-procreative\textsuperscript{261} to imitative of sexual intercourse\textsuperscript{262} to sexual perversity\textsuperscript{263}

### 8.3 JOURNEY FROM NORSHIRWAN TO NAZ

In an early 20\textsuperscript{th}-century Indian case\textsuperscript{264} a young man called Ratansi was caught and later released for attempting to have anal sex with Noshirwan. In court, Ratansi did not deny his homosexual love/sex interest, inviting the ire of the judge, who called him a ‘despicable’ specimen of humanity for being addicted to the ‘vice of a catamite’,\textsuperscript{265} on his own admission. The judge was unable to punish Ratansi and Noshirwan as they had been caught before they could finish the act- actual penetration. But once again much like in Khairati the judge, tied by the limits of the law in convicting the ‘sodomite’/’catamite’, did not shy from expressing his disgust and moral opprobrium at the sexual activity. The association of the person-a catamite, with the act, rather than the act in isolation becomes important.

**Sodom to Gomorrah**

`Why does an act, historically embedded in the Chinese custom of "playing the flute", be considered a crime?\textsuperscript{266}

The changing judicial imagination of homosexual sex played a key role in re-drawing the sexual map of ’immorality' through laws like Section 377. The meaning of 'carnal intercourse against the order of nature' was never defined. In one of the first recorded

\textsuperscript{261} Khanu v. Emperor 1925 Sind 286.
\textsuperscript{262} Lohana Vasantlal v. State AIR 1968 Guj 352
\textsuperscript{264} Noshirwan v. Emperor AIR 1934 Sind 206.
\textsuperscript{265} Ibid.
\textsuperscript{266} Leong, Laurence Wai-Teng. 1997, 'Singapore' in Donald J. West and Richard Green (eds), Sociolegal Control of Homosexuality, A Multi-National Comparison. New York: Plenum Press.
Indian cases\textsuperscript{267} unnatural offence was confined to 'anal sex' as 'the act must be in that part where sodomy is usually committed'.\textsuperscript{268}

The scope of Section 377 was redefined in \textit{Khanu v. Emperor},\textsuperscript{269} an influential decision on the Indian anti-sodomy law.\textsuperscript{270} On facts the case involved a coercive act of oral sex between an adult male and a minor. The non-consensual and coercive nature of the sexual activity did not play an important role in the decision. The only question that concerned the Court was whether oral sex, was an unnatural carnal offence under Section 377 of the IPC.

\textit{Khanu} held that the scope of Section 377 is not limited to ‘\textit{coitus per anum}’ (anal sex) and can also be extended to ‘\textit{coitus per os}’ (oral sex).\textsuperscript{271} Sodomy became a constitutive element of Section 377 along with the possibility of other sexual acts. The basis for determining what these other acts could be was not a simple process, but involved an elaborate interpretation of carnal intercourse, penetration,\textsuperscript{272} and the order of nature.

The first set of the reasoning was clinical and defined the order of nature as 'the possibility of conception of human beings'. Therefore any form of oral or anal sex is criminal as it does not lead to procreation, and worse is akin to bestiality. However, no thought was or has been given to the fact that other forms of penetrative sex, for example peno-vaginal sex with contraception, squarely falls within the same logic, and distributing of condoms should therefore also be an offence.

In the next step, carnal intercourse was defined as, ‘a temporary visitation to one organism by a member of the other organization, for certain clearly defined and

\begin{footnotes}
\item[267] \textit{Government v. Bapoji Matt} (1884 (7) Mysore LR 280): In this case the appellant was charged with Section 377 on allegations of oral sex with a minor.
\item[268] Ibid.
\item[269] \textit{Khanu v. Emperor, 1925 Sind 286}.
\item[270] It became the guiding case on sodomy in South Asia, South East Asia and East Africa.
\item[271] Ibid., p. 286: The court further concluded that ‘the sin of Gomorrah is no less carnal intercourse than the sin of Sodom’.
\end{footnotes}
limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity’ (circa). Thus as long as there is an orifice (in this instance, the mouth) which can envelop the 'penis' and provide sexual climax, it qualifies as carnal intercourse. As it cannot lead to procreation it becomes an ‘unnatural offence’.273

Apart from criminalising oral sex, the decision in Khanu opened wide doors for the attribution of a larger meaning to Section 377. Khanu was followed in a 1961 case from East Pakistan274 (present-day Bangladesh) to extend the scope of the identical Section 377 of the Pakistan Penal Code to 'thigh sex'. The court in Pakistan followed the penetration-specific definition of Khanu and held that ‘the entry of the male organ of the accused into the artificial cavity between the thighs of Giasuddin would mean penetration and would amount to carnal intercourse.275

The decision in Khanu was further followed and modified in the Indian case of Lohana Vasantlal.276 On facts, quite like Khanu, it involved three men who forced a fourth underage boy to have anal and oral sex with them. However, the judgement is so caught up with the inclusion of oral sex under 377, in a conceptual framework of 'sexual perversity' wider than Khanu that it completely forgets and belittles the actual injury and harm caused to the boy who was forced to undergo the sexual act. There is no discussion on the use of force and coercion. The accused in this case were punished not because they forced a minor into oral sex, but because they had the act of oral sex per se.

273 Ibid. Having established that oral sex was an offence like sodomy, the courts distinguished the offence as 'less pernicious than the sin of Sodom'. The reasons for this once again, attributable only to judicial imagination were that 'it cannot be practiced on persons who are unwilling. It is not common and can never be so. It cannot produce the physical changes which the other vice produces' (p. 287).
275 Ibid.
276 Lohana Vasantal and others v. The State AIR 1968 Gujarat 252; R. V. Jacobs (1817), Russ. & Ry. 331, C. C. R. -The offence of Sodomy can only be committed per anum.: Govindarajula In re. (1886) 1 Weir 382- Inserting the penis in the mouth would not amount to an offence under Section 377 IPC.
Lohana Vasantlal distinguished sex for procreation as an outdated theory, but still considered oral sex to be a criminal offence because of the sheer inappropriateness of the act.\textsuperscript{277} It went a step further, and started a discussion about the permissibility of 'oral sex' as a prelude to natural vaginal sex, as long as it does not become a substitute.\textsuperscript{278} In this manner the Lohana court devised the 'imitative test'; for example, oral sex was imitative of anal sex in terms of penetration, orifice, enclosure and sexual pleasure therefore similar to anal sex and worthy of the punishment under Section 377.

Khanu was a decision that was written during the British occupation of India, by British judges representing and appointed by the colonial government. The case of Lohana appeared in the Indian Courts two decades after independence of India in 1947. However, the transition to independent, democratic India did not alter the despotic colonial ideology with which Section 377 was interpreted in 1967.

In Calvin Francis v. Orissa\textsuperscript{279} the Orissa High Court outlined a case in which a man inserted his genital organ into the mouth of a 6 year old girl and observed: "In order to attract culpability under Section 377, IPC, it has to be established that (i) the accused had carnal intercourse with man, woman or animal, (ii) such intercourse was against the order of nature, (iii) the act by the accused was done voluntarily; and (iv) there was penetration. Carnal intercourse against the order of nature is the gist of the offence in Section 377.

Thus the inheritance of colonial judicial homophobia continued, and from oral and thigh sex we move to mutual masturbation in the case of Brother John Antony v.

\textsuperscript{277} Ibid. The judgement stated that the 'orifice of the mouth is not according to nature meant for sexual or carnal intercourse' (p. 254).

\textsuperscript{278} Ibid. The judgement approving Havelock Ellis’s distinction stated that: 'If the stage of the aforesaid act was for stimulating the sex urge, it may be urged that it was only a prelude to carnal intercourse...Any orificial contact "between persons of opposite sex" is sometimes almost equally as effective as the kiss in stimulating tumescence: all such contacts, indeed, belong to the group of which the kiss is the type. Cunnilingus and fellatio cannot be regarded as unnatural for they have their prototypic forms among animals...As forms of contrecatio and aids to tumescence they are thus natural and are sometimes regarded by both sexes as quintessential forms of sexual pleasure, though they may not be considered aesthetic. They became deviations, however, and this liable to be termed "perversions", when they replace the desire of coitus' (p. 253).

\textsuperscript{279} 1992 (2) Crimes 455.
State\textsuperscript{280} in 1992. In this case once again 'an assault (possibly violent) has taken place is of secondary importance'.\textsuperscript{281} The judgement delves deep into the meaning of the sexually perverse and concludes, using the imitative test, that mutual masturbation falls within 377 as 'the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal'.\textsuperscript{282}

The side references to the idea of prelude versus substitute in Lohana was finally concretized into law in the famous Singaporean decision of \textit{PP v. Kwan Kwong Weng}.\textsuperscript{283} The complainant in this case was a 19-year-old woman who had been manipulated by the accused into performing oral sex on him. Kwan Kwong Wang continued the obsession with the unnaturalness of the act and dismissed the value of consent: '...fellatio between a man and woman, whether the woman consented or not, which was totally irrelevant.\textsuperscript{284} This has a serious effect on the concept (or lack) of consent in cases of 377, as the decisions dealing with non-consensual sexual activities by undermining 'the creation of the victim' also make 'the non-existence of a victim'\textsuperscript{285} in cases of consensual sexual activities irrelevant.

The Singapore Court created a clear distinction between two kinds of oral sex, 'prelude' to vaginal sex, which is acceptable versus oral sex as 'substitute', which is not.\textsuperscript{286} Both Lohana and Kwan Kweng, disregard the 'procreation' justification as outdated. They accept and affirm that people have sex for pleasure, which in a way are a huge development and an important judicial admission. However, at the same time

\textsuperscript{280} \textit{Brother John Antony v. State 1992 Cr L.J. 1352}. The case arose from complaints by students of a boarding school against a teacher who forced the children to perform oral sex on him and also masturbated them.


\textsuperscript{282} Similarly in cases like \textit{Calvin Francis v. State of Orissa 1992 (2) Crimes 455} and \textit{State of Gujarat v. Bachmiya Musamiya 1998 (2) Guj. L. R. 2456}, the judgments are only concerned with the unnaturalness of the sexual act involved and not the plight of the victim.

\textsuperscript{283} \textit{PP v. Kwan Kwang Weng [1997] 1 SLR 697}.

\textsuperscript{284} Ibid.

\textsuperscript{285} Ibid.

\textsuperscript{286} Ibid; relying on \textit{PP v. Kwan Kwong Weng [1997] 1 SLR 697}, the Kwan Kwong Weng Court held that 'an act of fellatio which is performed between a man and a woman as a lustful substitute for and not a prelude to and enhancement for natural sex between them is carnal intercourse against the order of nature and punishable under section 377 of the Penal Code.'
the acceptance of pleasure does not lead to an acceptance of 'oral sex'. Thus a right to
sexual autonomy and practice for different consensual sexual acts like oral sex exists
but only for heterosexuals. This hetero-normative emphasis on sexual activity is an
attempt to enforce a moral sexual order, and not just prohibit an isolated sexual act.

In a similar vein, it has been argued with reference to the United state Supreme court
ruling that Lawrence V. Texas\(^{287}\) that the court created a discursive moment in which
it both decriminalised consensual homosexual relations between adults and
simultaneously authorized a new regime of heightened regulation of homosexuality\(^{288}\).
Prior to Lawrence, courts could dismiss claims made by homosexuals by easily
invoking sodomy’s criminalized and immoral nature. But since, Lawrence struck
down sodomy statutes, and immoral nature. But since Lawrence struck down sodomy
statutes, and morality as a basis for legislation has been repudiated, courts will be
forced to engage in more particularized assessments of the lives of homosexuals,
judges will have to hear homosexuality spoken about more frequently and will have to
cause homosexuality to speak\(^{289}\).

Naz Judgment based their right to privacy argument in part by citing a 1994 case
called Rajgopal v. State of Tamil Nadu (1994) in which the court asserted a citizen’s
‘right to be let alone’. Indeed, a 1984 Delhi High Court judgment, upheld later by the
Supreme Court, claimed that, ‘in the privacy of the home and married life,
neither…the right to life nor…the right to equality has any place. It is within such a
context that Naz asserted, citing the Rajgopal judgment, that ‘a citizen has a right to
safeguard the privacy of his own, his family, marriage, procreation…and education
among other matters.’ It is within this context that Naz called for a sphere of legal
non- intervention in order to at least protect a new class of newly respectable sexual
citizens.

\(^{287}\) 539 U.S. 558 (2003)
\(^{288}\) Hunter, Nan D. 2004, ‘Sexual orientation and the paradox of heightened scrutiny’, Michigan Law
\(^{289}\) Ibid.
In case of National Coalition for Gay and Lesbians Equality (the sodomy case)\textsuperscript{290}, where the section criminalizing sodomy in the Sexual Offences Act, was held to be constitutionally invalid by the constitutional court. In this case, the constitutional court constructs a model of constitutionally protected sexual relations. Constitutionally sanctioned, or ‘civil sex’ as it is characterized by Nicole Fritz is ( in contrast to prostitution/ criminal sex), ‘ private and intimate’ for the purpose of ‘nurturing relationships or taking life affirming decisions about ‘birth, marriage or family’ and facilitative of ‘deep attachments and commitments to the necessary few other individuals with whom one shares not only a community of thought, experiences and beliefs, but also distinctly personal aspect of one’s life\textsuperscript{291}. Homoerotic desire is thus de-eroticized and rendered domestic, familiar, familial, and knowable through losing its sexual charge and its capacity to destabilize norms of the hetero-patriarchal world.

**Sodomy in Matrimony**

Under common law, consensual sodomy between married couples is not an offence. The Nigerian Criminal Code of 1916 excluded sodomy between a husband and a wife. In Grace Jeyaramani\textsuperscript{292} the judge held that ‘the husband could be guilty of sodomy if the wife was not a consenting party’. Grace substantiates the point that anti-sodomy laws are really meant to prevent same-sex sodomy and not opposite-sex sodomy.\textsuperscript{293} Sodomy laws therefore are inter alia meant to prevent, what we understand in the contemporary world as consensual homosexuality and also to enforce a moral order that frowns upon any sex outside the marital relationship.

Therefore the justification or meaning of the ‘order of nature’ has now moved away from 'procreation', to heterosexual marriage. This is still a limiting idea as the 'majority of heterosexual relationships are in fact organized outside the conjugal

\textsuperscript{290} Case no.CCT 15/95.


\textsuperscript{292} Grace Jeyaramani v. E. P. Peter AIR 1982 Karnataka 46, p. 49.

\textsuperscript{293} This legitimacy of consensual sodomy within marriage is criticised by Bhaskaran as the ...wife’s lack of consent serves to release her from a marriage but an adult male’s consent lands him in prison. Bhaskaran, see note 113, p.25.
Thus the matrimonial home becomes the new order of nature, where oral sex, cunnilingus and even sodomy are permitted. Though, both the secular and the religious laws have converged on heterosexual marriage as the sole qualifying criterion for sex, pleasure and experimentation.

**Consent Irrelevant In Sodomy**

Sexual practices are based on a complicated relation with the consent to harm and injury to self. Consent in anti-sodomy laws is irrelevant. The emphasis on the 'act alone, actus reus', irrespective of consent has had the eventual effect in some cases of criminalisation of the victims of non-consensual sodomy themselves (often the very complainant).

Sadomasochism was virtually declared illegal in the decision of the House of Lords (1993, United Kingdom), which was upheld by the European Court of Human Rights (1997). The decision was that consent to injuries inflicted during a homosexual sadomasochistic encounter was not adequate defence to charges of bodily harm and injury, as ‘public policy required that society be protected by criminal sanctions against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury. The decision is in fact often relied upon by the Indian state in its arguments that consent is irrelevant, and that the section 377 anti-sodomy law should not be repealed as this might affect public interest, morality and public health.

In another such case related to consent in Sodomy titled **R v. Brown** 295, a group of four men were involved who, for a period of 10 years starting from 1978, had been in homosexual sadomasochistic relationships with each other, involving genital tortures and various methods of generating and receiving pain during sex. The judgment delivered in 1993, in the House of Lords, was based largely on private videotapes that the men had made of their sexual activities. They were tried on charges of assault

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295 [1993] 2 All ER 75.
occasioning actual bodily harm, contrary to section 47(a) of the offences against the person Act, 1861 and unlawful wounding, contrary to section 20 (B) of that act. It was established clearly that the sex had been done consensual, not involving coercion of any kind. The accused pleaded that acts carried out in private and with consent could not be considered criminal or merit conviction, but this was dismissed.

In *R. v. Brown*\(^{296}\) the court held that such sodomastic practices leads to serious injury & must be judged in terms of policy and public interest. The case further states that there are legitimate public acts involving bodily invasion, such as ‘dangerous sports/stunts’, ‘medical surgery’, or even ‘dangerous exhibitions/stunts’ while disallowing a private sexual act which poses the apparent danger of public disturbance. This last category of ‘dangerous exhibition’ is interesting in Indian context, where there are a variety of religious and communal practices/rituals that the state cannot do away with in the name of bodily harm, because they belong to a realm that the state cannot fully intervene in without destabilizing its own authority.

In a case from Papua New Guinea,\(^{297}\) MK filed a complaint against his employee for committing sodomy on him, and the court found a conviction against him as an accomplice. The Penal Code of Papua New Guinea was derived from the Queensland Penal Code and its anti-sodomy provision also punishes the passive sexual partner in the offence.

The main question before the court was should MK the passive sexual partner, also be punished for committing the offence of sodomy, even if he did not actually consent to it. It was decided that MK should be punished as he had permitted, or allowed his boss to penetrate him. The offence of sodomy is only concerned with the act, which in this case had been completed, irrespective of the consent (or lack of) of the passive partner.\(^{298}\) Justice Prentice writing a separate concurring judgement stated that the

\(^{296}\) [1993] 2 All ER 75.

\(^{297}\) *Regina v. MK* 1973 PNGLR 204.

\(^{298}\) Ibid. Prentice J relied on an earlier common law decision in the case of Sydney Joseph Bourne (1952, 36 Cr. App. R. 125), where the complainant’s wife, who was being forced by her husband to be repeatedly sodomised by their dog, was also charged under the offence of Buggery. The Court in Sydney held, and was followed in MK, that: ‘But the offence of buggery whether with man or beast
word ‘permit’ does not mean consent, but in fact it means to 'allow, suffer, not prevent'. In an important admission about the real purpose of anti-sodomy laws, that they are not so much concerned with independent sexual acts, but invested in the task of instituting a moral order, Prentice J. further stated:

*Buggery is one of the offences of sexual indecency which modern text writers see as not designed so much for private protection as for the enforcement of officially received opinions on particular aspects of sexual morality.*

The crimes of unnatural sex- coercive sodomy, buggery and bestiality are still punishable under section 377, are seen as the crimes of men. *Based on the criteria of penetration and their own limited understanding of sex between women, the courts here excluded ‘lesbian’ sexual activities from the scope. The exclusion was caused solely by the inability of the courts to define lesbian sexual activity within the terms of penetration and carnal intercourse. It is here that the role of the ‘gross indecency’ provision becomes relevant for criminalising sex between women.*

Notions of potentionally criminal male sexual behaviour work are consistent with the logic that views male/ men as sexually active, if aggressive beings. While section 377 and section 375 are hardly the places to look to for the codification of female/ woman’s sexual desires, these laws consistently reinforce notions of women’s heterosexuality and women as subjects to be protected from male proclivities towards sexual aggression, unless they are husbands. Heterosexual sex, even when violent towards women, is seen as natural in relation to sex which is defined in negation to it.

**8.4 THE COMMENCEMENT OF ADVOCAY FOR LGBT RIGHTS IN INDIA**

*The battle begins with Naz Foundation.....*
The petition challenging Section 377 was filed by Lawyers Collective on behalf of Naz Foundation before the Delhi High Court in 2001. The petition challenged the constitutional validity of Section 377 and made an argument for Section 377 to exclude the criminalisation of same-sex acts between consenting adults in private. The petition in technical terms asks for the statute to be 'read down' to exclude the criminalisation of same-sex acts between consenting adults in private so as to limit the use of Section 377 to cases of child sexual abuse.

The petition itself though filed by a single NGO, gradually began to represent the entire community. This process of making a 'public interest litigation' truly 'public' began by Lawyers Collective and Naz Foundation hosting a series of meetings on different stages of the petition. Over the next seven years, this process of continuous consultation with the community contributed towards making Section 377 a more politicised issue. The key stages of the petition included the affidavit filed by the Union of India (Home Ministry) which indicated that the Government would stand by the law, the affidavit filed by the National AIDS Control Organization (NACO) which in effect said that Section 377 impedes HIV/AIDS efforts, and the intervention of Joint Action Kannur (JACK, an organization which denied that HIV causes AIDS), and B. P. Singhal (a former BJP Member of Parliament, representing the opinion of the Hindu right wing that homosexuality was against Indian culture) into the petition. This process of discussion fed back into the community, fuelling feelings of outrage and indignation, hope and despair, and anger and fear, as each stage of the petition unleashed a torrent of emotions.

The periodic meetings were thus a way in which the activist community was kept deeply involved in developments and continued to respond to the changing scenario. What particularly tilted the balance was the intervention by B. P. Singhal into the petition. Suddenly the scales seemed to have tilted with Naz appearing increasingly isolated among the cacophony of voices opposing the petition. It seemed that a range of forces were coming together to protect what the community saw as a patently unjust law. In a meeting called by Lawyers Collective to discuss this development, it was
proposed that some queer groups should also implead themselves within the petition so as to support the petitioner.

It was with the birth of this idea that Voices against 377 (A Delhi-based coalition of child rights, women's rights and LGBT groups) decided to implead themselves within the petition to support the petitioner. The key emphasis of Voices was the rights of LGBT persons while Naz, because of its status as an organisation working on HIV/AIDS, would continue to emphasize on how Section 377 impeded HIV/AIDS interventions and hence the right to health of LGBT persons.

There were enormous delays spanning a sum total of seven years when the case was initially dismissed by the Delhi High Court, appealed in the Supreme Court and finally sent back to the Delhi High Court. Initially, the Delhi High Court dismissed the petition just as it was gathering steam on the ground that the petitioner Naz Foundation was not affected by Section 377 and hence had no 'locus standi' to challenge it. However when the dismissal was challenged before the Supreme Court, the Supreme Court sent the case back to the Delhi High Court to be heard expeditiously. Ever since the petition was filed by Naz Foundation in 2001, it gathered greater public support both in terms of public opinion as well as within the sphere of the courtroom. It was in September 2008 that after a long wait, the matter was finally posted for final arguments before a Bench comprising Chief Justice Shah\(^{300}\) and Justice Muralidhar\(^{301}\) of the Delhi High Court.

**The Final Arguments before the Delhi High Court: Empathy, Dignity and Group Sex**

By the time the matter was posted for final arguments in September 2008, seven years after the petition was initially filed, the key difference was that it becomes far more a part of the issues which defined contemporary India. There was a real buzz both in terms of the media coverage as well as an eager anticipation with respect to the final hearings. The court itself during the hearings was attended by community members

\(^{300}\) Henceforth referred to as C. J. Shah.
\(^{301}\) Henceforth referred to as J. Muralidhar.
who closely followed each twist in the arguments and each response by the judges. The proceedings themselves as they unfolded were covered extensively and widely by the media and the community was also kept updated by daily minutes of the hearings which were posted on community online forums.  

The petitioner’s core argument centered on the right to health and how Section 377 impeded HIV/AIDS interventions. The arguments were substantiated by case studies particularly of Lucknow (2001), when Section 377 was used to target a HIV/AIDS intervention with the men having sex with men (MSM) community. So Section 377, far from being justified by a compelling state interest, actually was an impediment to achieving the right to health of a particularly vulnerable section of the population.

The core argument of Voices against 377 was that 'Section 377 is a law which impinges on the dignity of an individual, not in a nebulous sense, but affecting the core of the identity of a person.... Sexual orientation and gender identity are part of the core of the identity of LGBT persons. You cannot take this away’. Further, arguments include that morality is insufficient reason to retain the law in a case like this where you are criminalizing a category and affecting a person in all aspects of their lives, from the time the person wakes up to the time they sleep.

The core argument of the Government of India astonishingly was that if Section 377 was read down to exclude consenting sex acts between adults in private, it would affect the right to health of society. The Counsel representing the Union of India was the Additional Solicitor General, Mr P. P. Malhotra. He cited various studies to show that homosexuality caused a very serious health problem. Citing one study he said:

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302 Quotations from the proceedings of the Delhi High Court are taken from the transcript of the proceedings. The transcripts do provide a rough idea of the way the proceedings went before the Delhi High Court, however they are not a verbatim transcript of all that transpired before the Court. It is available at www.altlawforum.org (accessed on 10 September, 2011).


304 It should be noted that the affidavits filed by the Union of India were contradictory to the Home Ministry making the case that the law was required to keep in place a societal morality and NACO making the argument that the law hampered HIV/AIDS interventions.
The sexual activity enjoyed by homosexual results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer.

Referring to notions of decency and morality, the ASG noted:

In our country it is immoral on the face of it. Society has a fundamental right to save itself from AIDS. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country. If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.

B. P. Singhal made a strong submission that Section 377 was against Indian morality. In the wards of his counsel, homosexuality was a perverted kind of sex in the name of thrill, enjoyment and fun, young shall walk into the trap of homosexual addiction. The tragic aspect of this is that alcohol, drug and disease are the natural concomitants of homosexual activity. He submitted that he ‘was on morality, the joint family structure' and that ‘we must not import evils from the west’. We have traditional values and we must go by that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.

JACK’s counsel submitted that there was ‘no scientific evidence that HIV causes AIDS', that a 'change in this provision would mean that all marriage laws would have to be changed', and that 'under Sections 269 and 277 of the IPC anyway any intentional spreading of an infectious disease would be an offence'. Opposite counsel then asserted that Naz did not come to court with clean hands and was part of an international network which was using HIV/AIDS to push an agenda.

Judicial Empathy: Listening to LGBT Voices

It was with a great deal of concern that queer activists awaited the hearing. How would the judges indeed understand complex issues of sexuality and rights? How indeed would we be able to persuade them that this was an issue of rights? Should we not have learnt from the experience of Public Interest Litigation in the 90s and stayed
away from the court as any guarantor of rights? These were some of the thoughts circulating like a nervous eddy through the queer community.

The judicial response has generally been subject to analysis in terms of the reasoned argument and the decided case. In contrast, little attention has been paid to the gamut of responses by judges on a day-to-day basis in courts. As Lawrence Liang notes:

Witnessing the courts functioning on a day to day basis also allows you to uncover another secret archive, an archive of humiliation and power. It is said that seventy percent of our communication is non verbal and this must be true of legal communication as well. The secret archive that interests me consists not of well reasoned judgments or even the unreasonable admonishment of the courts, but the various symbolic signs and gestures that accompany them. An incomplete index of the archive includes the stare, the smirk, the haughty laugh, the raised eyebrow, the indifferent yawn, the disdainful smile and the patronizing nod amongst many others.305

In this secret archive of what Liang correctly characterizes, what emerged almost as a complete surprise was another index of responses, which can rightly be characterised as standing in for the quality of judicial empathy. What came through the questions and comments of the judges was not an intention to humiliate but instead a strong sense of empathy for the suffering of LGBT persons.

C. J. Shah communicated this judicial empathy in ample measure and took judicial notice of the social discourse of homophobia by saying that we all know what kind of sneers and mockery this issue is treated with in society. To substantiate this point, he narrated the moving instance of a boy who was subjected to jibes and sneers because of his sexuality and so was unable to take his exam. It was only after a judicial intervention that he was allowed to take his exam without harassment and in C. J. Shah's words, 'he thankfully passed.'

If one were to abstract three important moments in the courtroom arguments spanning over 11 days they were;

**The first important moment was when the counsel for Naz, Mr. Anand Grover read the opinion of Albie Sachs in *National Coalition for Gay and Lesbian Equality v. Minister of justice*.**\(^{306}\) This decision by the South African Constitutional Court ruled that the offence of sodomy violated the right to equality and dignity and struck it down. As J. Sachs powerfully noted:

*In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, and that impinges on the dignity and self-worth of a group.*\(^{307}\)

The judges were visibly moved by J. Sachs' opinion and conferred among themselves. C. J. Shah wished that the Additional Solicitor General (ASG) had been in court to listen to J. Sachs' opinion. Almost subtly, you could sense that the burden had shifted from the counsel to the judges. They now had to contend with the weighty presence of J. Sachs and the burden of history when they wrote their judgement. In case there were any doubts on this point, Voices against 377 submitted an outline of submissions which argued:

This case ranks with other great constitutional challenges that liberated people condemned by their race or gender to live lives as second class citizens, such as *Mabo v. Queensland*\(^{308}\) (where the High Court of Australia declared that the aboriginal peoples of Australia had title to lands prior to colonisation), *Brown v. Board of Education*,\(^{309}\) (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the 14th Amendment) and *Loving*

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\(^{307}\) Ibid., para 127.

\(^{308}\) (1992) 175 CLR 1.

\(^{309}\) 344 U.S. 1 (1952).
v. Virginia,\textsuperscript{310} (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional).\textsuperscript{311}

The second important moment was when the judges zoned in on what they saw as the core argument for retaining Section 377, public morality. They asked the counsel for Voices against 377 how he would respond to the public morality justification for retaining Section 377. Mr. Shyam Divan’s response on behalf of ‘Voices against 377’ was:

\begin{quote}
Any law or statutory provision that denies a person’s dignity and criminalises his or her core identity violates Article 21 of the Constitution. Section 377 operates to criminalise, stigmatise, and treat as ‘unapprehended felons’ homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalises individuals upon attaining majority, for no fault of the person and only because he is being himself. Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not-even an argument of ‘compelling State interest’ can sanction a statute that destroys the dignity of an estimated 25 lakh individuals.\textsuperscript{312} This argument that the state cannot plead ‘compelling state interest’ when the core value of dignity is at stake, seemed to resonate deeply with the judges with them repeatedly asking the ASG to respond to what they characterised as ‘a very strong argument on dignity.’
\end{quote}

The third important moment was the series of exchanges between the judges and the ASG and the counsel for B. P. Singhal and JACK. In contrast to the evident empathy with which the judges heard both Naz and Voices against 377, the ASG as well as the counsels for JACK and BP Singhal were subject to questions which showed the judicial impatience with the nature of arguments and hinted at the deep structure of their judicial sympathies.

\textsuperscript{310} 388 U.S. 1 (1967).
\textsuperscript{312} Ibid., para 9.2 and 9.3.
At one particularly funny moment, counsel for B. P. Singhal, Mr. Sharma, referred to *R. V. Brown*, 313 which was a decision of the House of Lords in which they had ruled that consensual sadomasochistic practices between adults were not entitled to protection on grounds of privacy to make the point that 'homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and when they were consenting adults, criminal acts warranting prosecution were committed in the course of such perversity.' He said that `it was disconcerting to see tendency of homosexuals to indulge in group sex'. Chief Justice Shah noted:

When the *R. v. Brown* judgement was delivered, sodomy was not a crime in the UK. So even if Section 377 is read down and homosexual acts between consenting adults do not amount to an offence under section 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if the partner has consented to it.

Chief Justice Shah then inquired about the relevance of the judgement. Mr. Sharma responded that the 'anus is not designed by nature for any intercourse and if the penis enters the rectum, victim is found to get injury.' The activity itself causes bodily harm.

Chief Justice Shah asked whether the submission that this act itself causes injury because it is unnatural or is likely to cause injury, had been argued before; whether in any culture, western or oriental, in several countries where the ban has been lifted, in WHO Reports, had anyone argued that the act itself causes injury? Could *Brown* actually be forced to the logical conclusion that sex between two males itself is a cause of injury? Why had this submission never been raised any court till now?

Mr. Sharma continued to real from *Brown* to make the point that `drink and drugs are employed to obtain consent and increase enthusiasm; there is genital torture on anus, testis, bloodletting, Burning of penis...'

Mr. Anand Grover intervened to say that *Brown* was to do with violence and dealt with a fact situation not contemplated by Wolfenden and that this was recognized by the judgement itself.

313 [1993] 2 All ER 75.
What the three moments extracted above demonstrate is that the judges in the course of the hearings, showed sensitivity not only to instances of brutal violence but equally to the more subtle language of discrimination and this made the court proceedings, for the brief duration of the hearings, a magical space.

*LGBT persons who were so used to the sneers and jeers of society suddenly felt that they were not only being heard but also respected.* The judges just through the art of empathetic listening restored dignity to a section of society on whom the Government seemed intent on pouring nothing but contempt and scorn. Judges spoke about sex without a sneer and for the first time in recorded judicial history of the Indian courts, managed to actually talk about homosexual sex within the context of intimacy and love. The discourse of love and affection, intimacy and longing became a part of the judicial register and displaced the relentless focus on the stripped down homosexual act as a threat to civilization at its very roots. The conflation of homosexuality with excess through the focus on group sex was challenged by the nature of judicial questioning, and the discourse about homosexuality was linked to contexts of emotion and feeling.

**A New Language of Morality- Paradigm Shift from Popular Morality to Constitutional Morality**

The question of morality has been central to the concerns around Section 377 and was sought to be addressed by different parties in the *Naz Foundation* case. Both the Union of India as well as interveners such as B. P. Singhal and JACK constantly sought to make the point that reading down the section would destroy society's morals. The judges too were deeply troubled by the question of morality and constantly sought to get the parties to respond to the question of morality as ground for retaining Section 377.

The way the judgement dealt with the question of morality was by introducing the term 'constitutional morality' which became: the term on which the rest of the judgement hinged.
The very origin of the law has its historical roots in a notion of morality which emerged from a Judeo-Christian sensibility. It can be traced historically to a time when there was no separation between law and morality, and law was meant to reflect a religious morality. Thus the offence of sodomy, for which the initial punishment was death penalty, was a part of Canon law which became in turn a part of English Law and finally ended up on the statute of the Indian Penal Code. This notion of law and morality as an integrated system, was first challenged by the Wolfenden Committee report in 1957 which was set up to examine the criminalization of homosexuality.

The Report in its recommendations made a strong argument for the decriminalisation of consenting same-sex acts between adults in private. As the Wolfenden Committee famously noted:

“It is not, in our view, the function of the law to intervene in the private lives of citizens...Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business”.314

The recommendations of the Wolfenden Committee Report in turn became the subject matter of one of the most famous legal debates in history between Lord Devlin and Prof. H. L. A. Hart, which has remained a staple of legal education around the world, ever since it first took place.315 Lord Patrick Devlin articulated the classic defence of why homosexuality should continue to remain a criminal offence. In his view, even if homosexuality was a private immorality, it should continue to be punished as Devlin argued that homosexuality was an attack upon a 'society's constitutive morality'. In his view, a society's existence depended upon the maintenance of shared political and moral values. To maintain those values and in fact to ensure societal survival, it was essential that even a private immorality like homosexuality should continue to remain a criminal offence.

It was as a counter to Devlin's statement that Prof. H. L. A. Hart articulated the classic defense of the Wolfenden Committee Recommendations. Hart, following from Mill's defence of liberty argued that the basis of the criminal law lies in preventing harm to others. There is no basis in Hart's philosophy for the law to actually intervene to legislate on public morality. Hart argued that there is no empirical evidence for the proposition that if law did not support a public morality, society would collapse. If such was indeed the case, we should assume that there can be no change in societal morality as any change in social morality becomes equated to a collapse of societal morality. In effect, Hart offered a resounding defence of the core recommendation of the Wolfenden Committee, that 'there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business'\textsuperscript{316}

The impact of Hart's thinking in India cannot be underestimated. Every student of law and jurisprudence has had to contend with his thinking. Legal academic circles and in particular jurisprudence professors will still swear by Hart's work as the acme of positivist jurisprudence. Academically minded judges too have cited Hart in the judgments of the Indian High Courts and Supreme Courts. In short, in a difficult terrain of a complete lack of exposure to the discourse of homosexual rights, the work of H. L. A. Hart provides a remarkably useful starting point for speaking to judges, lawyers and legal academics in a language that they not only know, but have been taught to venerate.

Such being the case, the \textit{Nazi} judgement could have been well justified in making the argument for the decriminalisation of homosexuality, based on Hart's position that it was not the law's business to regulate a zone of private morality. Such an understanding would have been sufficient to achieve the result of reading down Section 377 to exclude consensual sex between adults from the ambit of criminalisation. However, the judges chose to tread a more ambitious path.

The judges begin by referencing Dr. Ambedkar, who in the Constituent Assembly had noted: '\textit{Constitutional morality is not a natural sentiment. It has to be cultivated. We}

\textsuperscript{316} Wolfenden Committee report, 1957, para 24.
must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.\textsuperscript{317}

They went on to state:

\textit{“Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality”}.\textsuperscript{318}

They added that \textit{‘moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view’}.\textsuperscript{319}

What the judges did by articulating the notion of constitutional morality was to change the terms within which homosexual expression had been thought of by the judiciary. From the first tentative steps when Hart and Wolfenden had made space within the law for 'private immorality', now homosexual expression was to be seen as not just something which needs to be 'tolerated' but rather as something which needs to be protected, as protecting the expression of homosexuality goes to the heart of the meaning of the freedoms guaranteed under the Indian Constitution. In a reversal of the terms of the debate, it became 'moral' to protect LGBT rights and 'immoral' to criminalise people on grounds of their sexuality. To protect what Devlin might have called 'society's constitutive morality' and the judges called 'constitutional morality', it became essential to ensure that LGBT expression was protected.

\textit{Constitutional morality in the judges’ reading requires that LGBT persons are treated as equal citizens of India, that they cannot be 'discriminated against on grounds of}\n
\textsuperscript{317} Naz Foundation v. Union of India and others, para 79, available at www. lawyerscollective.org/node/ 1003 (accessed on 20.08.11).
\textsuperscript{318} Ibid.
\textsuperscript{319} Ibid., para 86.
their sexual orientation and that their right to express themselves through their intimate choices of who their partner is be fully respected. It's only when the dignity of LGBT persons is respected that the Indian Constitution lives up to its foundational promise. Taken one step further, constitutional morality also requires the court to play the role of a counter majoritarian institution which takes upon itself the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.

In the judges' fitting conclusion:

If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized.

**Recognition of Swaraj in ‘Naz’: the foundation principle behind article 15 & homosexuality**

“Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him...will it restore him to a control over his own life and destiny? In other words, will it lead to swaraj for the hungry and spiritually starving millions?20?

Swaraj or autonomy inspired the freedom struggle against colonial rule and is a foundation principle of our constitution. ‘The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.’21.

The Delhi high court in Naz foundation recognized the importance of this principle in our constitutional scheme and held that ‘personal autonomy is inherent in the grounds

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mentioned in Article 15\textsuperscript{322}. In doing so, the court was merely following the precedent set in Anuj Garg, where the Supreme Court held the value that underpins ‘Article 15’\textquotesingle{s} prohibition on sex discrimination to be right to autonomy and self-determination\textsuperscript{323}.

If we look closely, article 15 has a closed list of five specified grounds—religion, race, caste, sex and place of birth. But there are other grounds, such as, HIV status, pregnancy, gender identity, language, sexual orientation, disability etc., which are also effectively immutable or entail a fundamental choice. Until now, discrimination on the basis of these unspecified analogous grounds has been challenged under Article 14, often successfully. Because of Naz judgment, a heightened protection of ‘strict scrutiny’ under article 15 will also be available to those grounds ‘that are not specified in Article 15’ of the constitution. Therefore, grounds such as disability and pregnancy are not specified in Article 15, they now have its protection. Notice that the high court had already held that the ‘sex’, a specified ground, includes sexual orientation\textsuperscript{324}, and that discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalizations about the conduct of the either sex\textsuperscript{325}. Thus, section 377 discriminates on the ground of sex itself.

Another constitutional innovation made by Naz judgment under article 15 is the pronouncement by the high court that it provides protection from discrimination perpetuated not only by the state (vertical effect) but also by private bodies.\textsuperscript{326}(horizontal effect).

Article 15 (2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public places. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under article 15\textsuperscript{326}.

Article 15 (2) itself, which reads:

\textit{\textquotedblleft No citizen shall, on the ground only of religion, race, caste, sex or place of birth or any of them, be subject to any disability, liability, restriction, or condition with regard...\textquotedblright}\footnote{\textsuperscript{322} Naz, p.112.}  
\textsuperscript{323} \textsuperscript{Ga}@g, pp. 33,41.Again at p.45: ‘personal freedom is a fundamental tenet......’  
\textsuperscript{324} Naz Foundation case, pp. 100, 104.  
\textsuperscript{325} Ibid., p.99  
\textsuperscript{326} Ibid., p. 104.
to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing Ghats, roads, and places of public resort maintained wholly or partly by state funds or dedicated to the use of the general public.”

Indeed, even though the Naz court does not cite it explicitly, the horizontal effect of article 15 was already established by the Supreme Court in Vishaka v. State of Rajasthan\(^\text{327}\).

A key element of the additional solicitor general’s defence of section 377 was that the provision was hardly enforced against gays. On this contention, the Learned High Court bench held that

“In fact, admitted case of the union of India that section 377 of the IPC had generally been used in cases of sexual abuse or child abuse, and conversely that it had hardly been in cases of consenting adults, shows that criminalization of adult same sex conduct does not serve any purpose\(^\text{328}\).”

Therefore, the theme of 'constitutional morality' thus brings about a paradigm shift in the way the law thinks about LGBT persons. Protecting the rights of LGBT persons is not only about guaranteeing a despised minority their rightful place in the constitutional shade, but it equally speaks to the vision of the kind of country we all want to live in and what it means for the majority.

The Naz foundation judgment declaring unconstitutional the Indian penal code provision that penalizes same-sex relationships as ‘an offence against nature’ is inaugural in many ways. It marks at long last an end to what has been named as the ‘sodometrics’ of the Indian penal code and thus invalidates the enactment of Victorian sexual morality into Indian society, law and culture. It expands the frontiers of human liberties and rights. It reaffirms the truth that the promise of justice is best fulfilled when justice begin to listen to the voices of stigmatized persons and people. It emphasis and understands that the creation and perpetuation of stigma by popular sanctions reinforced by legal ones, destroys many an individual life project and has

\(^{327}\) AIR 1997 SC 3011.  
\(^{328}\) Naz, 160 Delhi Law Times, at Para 86.
deathly repercussions for the communities of continually discriminated and disadvantaged people.

The Hon’ble justice Ajit Prakash Shah and Justice Murlidhar emphasizing on dignity held:

“At least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person’s freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.”

Further emphasizing on right to dignity and right to privacy as a dimension of fundamental right under article 21 of the constitution held:

“In the Indian constitution, the right to live with dignity and right to privacy both are recognized as dimensions of article 21. Section 377 IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality and this violates article 21 of the constitution. As it stands, section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under article 21 of the constitution.”

The court further held on repercussions of keeping section 377 alive in the following words:

“The criminalization of homosexuality condemns in perpetuity a sizeable section of society and forces them to live their lives in the shadow of harassment, exploitation,

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330 Para. 48. Ibid.
and humiliation, as well as cruel and degrading treatment at the hands of the law enforcement machinery.\textsuperscript{331}"

The judges further commented on the argument of keeping and safeguarding morality in India. The Naz Judgment’s potential for minority rights has further strengthened by the judges, given that they make clear that public morality and majoritarian opinion have to be subservient to the constitutional morality and protection of fundamental rights. Court rightly insisted that:

"Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. Popular morality, as distinct from constitutional morality derived from constitutional values is based on subjecting notions of rights and wrongs. Constitutional morality stands derived from basic constitutional values and may provide ‘a valid justification for restriction of the fundamental rights under article 21’. Thus, if there is any morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality."

Court further held:

"In our scheme of things, constitutional morality must outweigh the argument of public morality, even it be the majoritarian view."

Finally the court’s interpretation of ‘privacy’ to refer to a broad notion of autonomy and personhood has meant that section 377 cannot be applied in public places, where much of same-sex intimacy takes place. Further, the petitioner, in arguing that section 377 of the IPC violated the right to life provision of the Indian Constitution, argued:

‘the preamble to the constitution recognises that the rights enshrined within are designed to “assure the dignity of the individual and protect those cherished human values as the means of ensuring the individual’s full development and evolution’…private sexual relations, including preference and orientation, are deeply

\textsuperscript{331} Para.52. Ibid.
\textsuperscript{332} Para 79. Ibid.
\textsuperscript{333} Para. 86. Ibid.
held and matters and a core part of an individual’s identity. In this respect, sexual orientation invokes individual right of personhood, liberty, privacy, equality, conscience, expression and association. On this basis, it is submitted that sexual relations are an inalienable component of the right to life. One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals, leading on occasions, to depression and the serious consequences which can follow.

**The substance of the Naz judgment in brief is as following:**

The Hon’ble court located the rights to dignity & privacy within the Right to Life & Personal liberty guaranteed by Article 21 of the constitution and held that criminalization of consensual gay sex violates these rights. The court also held that S.377 offends the guarantee of equality enshrined in Article 14 of the constitution because it creates an unreasonable classification and targets homosexuals as a class. Also, Article 15 forbids discrimination based on certain characteristics including sex. The court said that the word “sex” includes not only biological sex but also sexual orientation & therefore discrimination on the ground of sexual orientation is not permissible under Article 15. The court also noted that the right to life under Article 21 includes the right to health and concluded that S.377 is an impediment to public health because it hinders HIV Prevention efforts. The court did not strike down S.377 as a whole. The section was declared unconstitutional in so far it criminalizes consensual sexual acts of adults in private. The judgment kept intact the provision in so far it applies to non consensual non-vaginal intercourse with minors. The court further held that the judgment would hold good until parliament choose to amend the Law.

**Reception of Judgment:**

The judgment was applauded by LGBT activist, commentators & organizations like UNAIDS, while some religious leaders & politicians voiced displeasure over the judgment. Naz has understandably evoked hostile reception from any religious leaders...
and organizations who find it unacceptable leading to filing the petition before
supreme court of India.

The government found no fault with the judgment and did not appeal. However, a
number of people who had no real standing in the matter did challenge it. Two judges
of the Supreme Court heard the appeal in early 2012. Then, 21 months later, and on
the very morning of the retirement of one of them, the judgment was finally
pronounced. The Delhi High Court judgment was set aside, Section 377 was reinstated
in full, and even private, adult, consensual sexual acts other than the one considered
'natural' were criminalized again.

8.5 ARGUMENTS FOR RETAINING PENALIZATION OF
HOMOSEXUALITY

There are two strains of arguments repeatedly faced by queer activists in opposition to
their demand for the repeal of anti-sodomy laws. First is the cultural argument: anti-
sodomy laws in Africa and Asia are in fact culturally reflective and part of the
independent, modern, democratic nation state. Second, the less subtle but equally
homophobic argument is based on the apparent non-use of the law."

The main opposition against homosexuality, as pointed out by leading religious
groups and activist are:

- Homosexuality overall hurts their religious sentiments, in particular by
describing the section 377 IPC prohibition as an archaic residue of Victorian
sexual ethics and morals.
- Homosexuality also questions the authority of the sacred / scripture texts and
traditions.

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on Lesbian, Gay and Bisexual Rights in India. Mumbai: India Center for Human Rights and Law; It is
argued that anti-sodomy laws are not really being enforced so why invest time and energy with them,
when there are so many more important issues in developing countries. See: Posner, Richard. 1992,
Sex and Reason. Cambridge, Mass.: Harvard University Press; Versey, Farzana. 2006, 'Does it pay to be
gay?', Deccan Chronicle, 19 September, 2006, available at Imp://
qmediawatch.wordpress.com/2006/09/30/a-biased-article-does-it-pay-to-be -gat /.
• Encourages ‘sinful’ conduct (via the recognition of privacy right) of members of the faith communities and disobedience of religious prescriptions and proscriptions.

• Homosexuality has endangered the ‘holy family’, that is the institution of the heterosexual family, as conceived by dominant religious traditions.

• Remains heavily fraught with individual and social health consequences and impacts, especially of the HIV/AIDS, not entirely within the means of the Indian state, law and social resources to combat.

• Opens the floodgates of immorality and drop down all concepts of decency and morality.

• Other subsidiary claims such as, Cultural decay, Social collapse, Child abuse, foreign infiltration, Misuse of AIDS funding etc.

Addressing the sodomy law in 1983, India’s supreme court proudly declare that ‘neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking’.

The Delhi high court has partially decriminalized sec. 377 for protection of fundamental rights, but it was not swallowed down by many people who were not even the original stakeholders before Delhi High Court. Hence, they filed an SLP in Supreme Court of India for retaining sec. 377 IPC in its original form.

Admitting the appeal from the high court’s decision, the chief Justice of India reportedly observed that no one had prosecuted for ‘gay sex’ under section 377 IPC.

While entertaining the special leave petition in Suresh Kumar Kaushal & another versus Naz foundation of India & Ors. (2013) A bench of Justice GS Singhvi & Justice S J Mukopadhyaya reversed the landmark judgment of Delhi high court of

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335 Fazal Rab Chaudhary v. State of Bihar, 1983, AIR 1983 SC P.301 at para.8, ‘Various fundamental differences in both the societies [England and India]must be realized by all concerned, especially in the area of ‘sexual offences’, one judge held. In fact, historians contend that in India before British rule, there was no aggressive policing of homosexual conduct; see: Kidwai Saleem and Ruth Vanita (eds), 2000, same-sex love in India: Readings from literature and History. New York: St. Martin’s Press.

2009, decriminalizing consensual private acts of homosexuality by adults & upheld back the constitutional validity of S.377 IPC.

**Following are the main incepts from the arguments presented before Supreme Court of India advocating for retaining of section 377 IPC:**

1. That the High Court committed serious error by declaring Section 377 IPC as violative of Articles 21, 14 and 15 of the Constitution insofar as it criminalises consensual sexual acts of adults in private completely ignoring that the writ petition filed by respondent no.1 did not contain foundational facts necessary for pronouncing upon constitutionality of a statutory provision.

2. Shri K. Radhakrishnan, learned senior counsel appearing for intervener in I.A. No.7 – Trust God Missionaries argued that Section 377 IPC was enacted by the legislature to protect social values and morals. He referred to Black’s Law Dictionary to show that ‘order of nature’ has been defined as something pure, as distinguished from artificial and contrived. He argued that the basic feature of nature involved organs, each of which had an appropriate place. Every organ in the human body has a designated function assigned by nature. The organs work in tandem and are not expected to be abused. If it is abused, it goes against nature. The code of nature is inviolable. Sex and food are regulated in society. What is pre-ordained by nature has to be protected, and man has an obligation to nature. He quoted a Sanskrit phrase which translated to “you are dust and go back to dust”.

3. Another counsel appearing for suresh Kaushal, Mr. Huzefa Ahmadi submitted that the right to sexual orientation can always be restricted on the principles of morality and health.  

4. Counsel for Kaushal also argued that the High Court was not at all justified in striking down Section 377 IPC on the specious grounds of violation of Articles 14, 15 and 21 of the Constitution and submitted that the matter should have

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337 Shri Ahmadi also referred to the dissenting opinion given by Justice Scalia and Justice Thomas in Lawrence v. Texas wherein it was stated that promotion of majoritarian sexual morality was a legitimate state interest. Shri Ahmadi stressed that Courts, by their very nature, should not undertake the task of legislating.
been left to Parliament to decide as to what is moral and what is immoral and whether the section in question should be retained in the statute book.

5. Shri Praveen Aggarwal, another counsel for Kaushal argued that all fundamental rights operate in a square of reasonable restrictions. There is censorship in case of Freedom of Speech and Expression. High percentage of AIDS amongst homosexuals shows that the act in dispute covered under Section 377 IPC is a social evil and, therefore, the restriction on it is reasonable.

6. Another argument for retention is that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.

7. That a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgender and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra virus the provisions of Articles 14, 15 and 21 of the Constitution.

8. The right to privacy has been guaranteed by Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant on Civil and Political Rights and European Convention on Human Rights. It has been read into Article 21 through an expansive reading of the right to life and liberty. The scope of the right as also the permissible limits upon its exercise have been laid down in many cases.338

9. That Article 21 provides that the right to life and liberty is subject to procedure prescribed by law.339

338 Kharak Singh v. State of UP & Ors. (1964) 1 SCR 332 and Gobind v. State of MP (1975) 2 SCC 148. In Mr. X v. Hospital Z (1998) 8 SCC 296, this court observed: “As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.”

10. That mere possibility of abuse of a provision of law does not per se invalidate legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done “not with an evil eye and unequal hand”.

11. SC also ruled that LGBT rights activist had not placed any tangible material before the HC to show that S.377 had been used for prosecution of homosexuals as a class. Also, no verified findings that homosexuals were being singled out for a discriminatory treatment.

12. Supreme Court also held that HC was not right in observing that s.377 IPC obstructs personality development of homosexuals or affects their self esteem.

13. SC also ruled that anal intercourse between two homosexuals is a high risk activity, which exposes both the participating homosexuals to the risk of HIV/AIDS. It further held that Homosexual behavior is proved as one of the most destructive behavior a person could engage in.

14. Homosexual acts are unnatural & against the order of nature. Based upon the modest medical findings, the human body is simply not designed to engage in homosexual acts. Every part of body is meant to perform a specific purpose & must be used for that purpose only. Conversely the opposite is absolutely true; the sexual activity is perfectly designed to be between a man & woman.

15. If homosexuality is legalized the instances of HIV/AIDS will increase & overall health status of people in our country will go down.

16. Decriminalizing consensual sex between persons of the same sex is against our religious teachings & would give rise to male prostitution.

17. Deviation from conventional sexual morality leads to hostility in the society.

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A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, Authorised Official and Income-Tax Officer and Anr.) [1956]29 ITR 349(SC); In Mafatlal Industries Ltd. and Ors. v. Union of India and Ors. : 1997(89)ELT247(SC), a Bench of 9 Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable.
8.6 ADVOCACY FOR DECRIMNALIZATION OF HOMOSEXUALITY IN INDIA

8.6.1 BRITISHERS EXPERIMENTED WITH SODOMY LAW

A very strong argument put forward by LGBT Activist is that Britishers actually experimented with Sodomy Law throughout the world. ‘Gross Indecency’ was a very wide offence that could possibly cover all kinds of non-penetrative sexual acts between two men. Although this provision was never introduced in the Indian Penal Code itself, it was incorporated in subsequent legal codes, even those that derived from the Indian Penal Code—like the Sudanese Penal Code in 1899, and Singapore and Malaysian Penal Codes as far back as 1938.341

The Indian Penal Code was applied through most of Asia and Africa. A process of evolutionary adaptation began as every territory used the existing codes, ‘improving and bringing them up to date, and the resulting product is then used as the latest model for an enactment elsewhere’.342 By the Straits Settlement of 1882, the Indian Penal Code travelled to Singapore, Malaysia and Brunei.343 Between 1897 and 1902, the Indian Penal Code was applied in Kenya, Uganda, and Tanzania.344 However, the passage of the Indian Penal Code into East Africa was not without protest, which came from the British residents. The association of British in East Africa was strongly

341 Section 377A was introduced into the Singapore Penal Code by Section 7 of the Penal Code (Amendment) Ordinance 1938 (No. 12 of 1938). The reason as stated in the Proceedings of the Legislative Council of the Straits Settlements in 1938 was to ‘[make] punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of s 377 of the Code.’ Page C81 dated 25 Apr 1938. See microfiche no 672, Straits Settlement, Legislative Council, Proceedings (SE 102) Vol. 1938 (Central Library Reprographic Dept, National University of Singapore).
344 East Africa Protectorate (Kenya) received the Indian Penal Code in 1897 by the East Africa Protectorate Order in Council, 1897 and Uganda by a similar Uganda order in 1902.
opposed to the imposition of the Code and the policy of placing 'white men under laws intended for a coloured population despotically governed'.

Thereafter the Indian Penal code was adapted as the Sudanese Penal Code in 1899. The Sudanese Penal Code of 1899 represents a rare progressive strain in the codification of 'unnatural offences'. The Sudanese provision although identical to the Indian Section 377, added a slight twist; it reads:

S. 318 "Whoever has carnal intercourse against the order of nature with any person without his consent shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine; provided that a consent given by a person below the age of sixteen years to such intercourse by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.

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

In the Sudanese Penal Code the 'gross indecency' provision, like with sodomy, only punished non-consensual 'gross indecency'. The silent and undocumented success of the Sudanese Penal Code in rationalizing the Penal Code, as far as the sodomy and gross indecency offences were concerned, was lost after the Sudanese Government in 1991 imposed a Shariat-inspired penal code, providing specific punishments for Zina. The rationalisation of the sodomy offence in the colonial Sudanese Penal

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345 Morris, see note 34, p. 13
347 Ibid., p. 444, Section 319: 'Whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine; Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.'
348 Ottoson, see note 2. In the Sudanese Penal Code of 1991, Section 148 defines Sodomy as: '(1) Any man who inserts his penis or its equivalent into a woman's or a man's anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy; (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment; (b) If the offender is convicted for the second time he shall be punished with
Code was offset by the new categories of 'rogues and vagabonds' in it (unlike the IPC, its direct predecessor) that specifically target effeminate homosexual men indulging in prostitution. In an inadvertent move, the identity of the homosexual was criminalized over the act.

Queensland Penal Code and Colonial Bureaucrat

The Queensland Penal Code (QPC) was drafted in 1899 by the Chief Justice of Queensland (Australia), Sir Samuel Griffith, based on the draft prepared by J. F. Stephens in 1878. It came into force in 1901 and was the second most influential Penal Code, especially in British Africa. The QPC followed the IPC in drafting the ‘unnatural offence’ but also introduced the category of the ‘passive' sexual partner, the one who ‘permits’. Thus Section 208 of the Queensland Penal Code read as follows:

Any person who —

a) Has carnal knowledge of any person against the order of nature; or

b) Has carnal knowledge of an animal; or

c) Permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

The inclusion of the permitting catamite was deliberate to provide a clarification that both partners in the act of sodomy were criminal. Even though ‘penetration’ was an essential ingredient to prove an ‘unnatural offence’, the QPC introduced an independent offence of ‘attempts to commit unnatural offences’. Thus even in the absence of penetration, otherwise an essential ingredient of ‘unnatural offences’, any and every undefined ‘attempt’ could create a presumption of the offence.

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349 Section 6 of the QPC: 'Carnal Knowledge: When the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration.'

350 Section 209 of the QPC: 'Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labor for seven years.'
The following story of the spread of QPC in Africa is important to discredit the mythical claims of modern African and Asian leaders that anti-sodomy laws represent values of independent African nations. While the offence of sodomy was continuously being refined during the adaptation of the penal codes in newer colonies, it was not done through any clear organised process. These laws were introduced into the history of Africa and Asia merely through the whims and fancies of the pervasive colonial agent—the bureaucrat.

Outside Australia, the QPC was first enforced in Papua New Guinea and Northern Nigeria in the nineteenth century. It then became a model for the drafting of a uniform Federal Criminal Code in Nigeria in 1916. The Code in the 1950s was used as a model to re-draft the criminal codes of East Africa, where it replaced the Indian Penal Code. However, the journey and adoption of the QPC and IPC across Africa was not as smooth. The colonial office had no continuous or persistent policy with regards to codification. Nigeria has been the classic example, where the territorial division between Northern and Southern Nigeria became a battleground for the despotically appointed colonial heads of state and their scheming advisers.  

The Chief Justice of Northern Nigeria, H. C. Gollan, decided to adopt the Queensland Penal Code as the model for the Northern Nigeria Penal Code, which came into force in 1904. However, the High Commissioner and the Secretary of State of Southern Nigeria wanted a penal code modelled on the Indian Penal Code. John Shuckburg-Risely, adviser to Lord Elgin, the Secretary of the southern part, thought that the Indian Penal Code departed too far beyond English principles of law and strongly opposed the idea. Risely along with Hugh Bertram Cox, another adviser, managed to convince the Secretary after which the process was derailed and finally dropped. A decade later, despite cries that the code would add more crimes and enslave people, a common Criminal Code based on the Northern Code (modeled on QPC), was brought in force in 1916, two years after the amalgamation of Nigeria.

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352 Ibid., p. 151.
Even though the 'unnatural sex' provision in the Criminal Code of Nigeria remained faithful to the QPC, it continued the 'furtive' engagement with the offence by taking advantage of the existing vagueness in the meaning of 'carnal knowledge'. It re-defined 'carnal knowledge' to exempt sex between 'a husband and wife'. Thus the vagueness in the language created a scope for refining and limiting the offence, to the real and ultimate objective—to regulate sex between men, and also unmarried couples. This also created an anomaly with the rationale of 'order of nature', which rested on the idea of non-procreative sex. Here the idea of 'natural' sex has shifted from procreative to marital heterosexual sex.

However, two more radical changes were still due to come to the randomized process of criminal codification in Africa. After the codification of the Criminal Code of Nigeria, the colonial office in East Africa wanted the influence of the Indian Penal Code eliminated. Here another adviser to the Secretary of State, Henry Grattan Bushe, who like Risley did not consider the Indian Penal Code 'English' enough, played an important role. The fact that Macaulay, indisputably an Englishman, had drafted the Indian Code seems to have been overlooked. Bushe was successful in his efforts and soon had the colonial office on the side of the Nigerian Criminal Code. In 1930, Kenya, Uganda and Tanzania all abandoned the Indian Penal Code and adopted drafts based on the Nigerian Criminal Code. Thus they inherited much wider provisions, as they punished a passive partner in sodomy, attempts to sodomy and gross indecency. A legal historian argues that the 'personal views and prejudices' of Risely (in his initial advocacy for the QPC in Nigeria), and Bushe (who lobbied for the

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353 Section 6: "'Unlawful carnal knowledge" means carnal connection which takes place otherwise than between husband and wife."
354 'Bushe determined that a body of criminal law and procedure, more in accord with English law, should be introduced into East Africa.' Morris, see note 44, p. 14.
355 For example Section 140 of the Penal code of Uganda reads: 'Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.' Section 141: 'Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to imprisonment for seven years.' Section 143: 'Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.'
abandonment of IPC in East Africa), formulated the policy for adoption of criminal codes, where none existed.\footnote{Morris, see note 44, p. 6.}

In one last sweeping change in 1960, the territory of Northern Nigeria chose to have a separate Penal Code, independent of the Federal Criminal Code, and took the Sudanese Penal Code of 1899 as its basis, which was ironically based on the IPC, and which Northern Nigeria had earlier rejected. Despite the injunction to silence, once again a ‘furtive’ attempt was made to re-craft sodomy. The non-criminalisation of consensual sodomy in the Sudanese Penal Code did not go unnoticed. The Northern Nigeria Penal Code reverted to the old consent-neutral IPC definition in Section 377.\footnote{Gledhill, see note 38, Section 284-., p. 443: 'Whoever has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine. Explanation: Mere penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'} However, just to avoid confusion and bafflement, it did not do the same with the ‘gross indecency’ provision, which remained applicable only to non-consensual activities.\footnote{Ibid., p. 444, the gross indecency (Section 285) provision of the Northern Nigeria Penal Code, 1960 was identical to Section 319 of the Sudanese Penal Code, 1899.}

Along with the Sudanese Penal Code, one other anomaly is the shape the anti-sodomy law took in Ghana. Ghana is one of the few former British colonies\footnote{Bhutan and Liberia also treat sodomy as a petty misdemeanour.} in the whole of Africa and Asia where consensual sodomy is treated as a mere misdemeanor.\footnote{A misdemeanour is a less serious offence. Those people who are convicted of misdemeanours are often punished with a fine, probation, community service or part-time imprisonment, served on the weekends or a maximum punishment of up to 12 months.} This is the result of the ideological differences between colonial drafters of the penal codes. R. S. Wright, a liberal jurist, strongly influenced by the ideas of personal liberty propagated by John Stuart Mill,\footnote{Mill, John Stuart. 1974; On Liberty, Harmondsworth: Penguin, p.68. He stated that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’} was asked by the British colonial office to draft a penal code for Jamaica. Wright's Code was different from the Queensland and Indian Penal Codes on the issue of law and morality. Wright's Code separated consensual buggery from non-consensual and punished the former with a maximum two-year
penalty. Wright's Code never made it to Jamaica for which it was originally drafted, but it was applied in St. Lucia in the Caribbean and also became the principal source for the drafting of the Penal Code of Ghana.\footnote{362} Thus under Section 105 of Chapter 6 titled 'Sexual Offences' of the Penal Code of Ghana: ‘Whoever is guilty of unnatural carnal knowledge-(a) of any person without his consent, is guilty of first degree felony; (b) of any person with his consent, or of any animal, is guilty of a misdemeanor’.

I draw the following four conclusions which demonstrate that Britishers has actually experimented with sodomy laws:

a) The offence of sodomy was not a simple, long-established offence that has remained unchanged. In fact the colonial authorities were continuously grappling with the correct definition, meaning and scope of sodomy. And the injunction to silence was nothing but a sham, a cover for disguise, an excuse to make laws without discussion and finally an attempt to legitimize prejudice and autocracy.

b) The offence of sodomy, with the exception of Sudan or Ghana, was continuously re-defined with the clear purpose to widen its scope, moving gradually from the act to homosexual identity.

c) The ‘order of nature’ has moved beyond procreation and to conjugal heterosexuality.

d) The Penal Codes and their anti-sodomy provisions that are so often defended as morally and culturally reflective, were never drafted trough any deliberative process, public discussion, and did not build on or support customary law, but were in fact that random impositions by colonial officers, at their own whims and fantasies.

8.6.2 GROSS INDECENCY- JUSTIFICATION FOR HARASSMENT OF HOMOSEXUALS

The introduction of the offence of 'gross indecency' by the famous Labouchere Amendment in England in 1897, was an acknowledgement that two men could practice many other sexual acts apart from sodomy, and that a wider criminal framework was needed to criminalise them. The 'gross indecency' provision remains undefined. It depends on what a man on the street, a policeman in a public park or a judge on the bench considers indecent. Recently, a 1998 amendment to the Tanzanian Penal Code has clarified that gross indecency is indeed any sexual act that 'falls short of actual intercourse and may include masturbation and indecent behaviour without any physical contact'. Thus, these non-penetrative sexual activities between two men could involve kissing, holding hands, sleeping together and or possibly looking at each other with an intimate intention without any overt physical contact.

The usefulness of the gross indecency provision in arresting homosexual men can be seen in the 1946 Singapore case of Captain Marr.\(^{363}\) Captain Marr, a naval officer was charged with committing gross indecency with a young Indian prostitute called Sudin, even when no one had witnessed the offence. The police found the Captain's watch with Sudin and Sudin's shirt was discovered in the Captain's room, which became persuasive evidence that 'gross indecency' had taken place. This is significantly different from an allegation of sodomy, which generally relies upon medical examination as proof of sodomy. Thus the lack of any physical signs of penetration creates a strong, albeit refutable, presumption on the non-occurrence of sodomy. Gross indecency on the other hand could be inferred from any 'suspicious activity' between two men.

The category of the offence of grossly indecent, and its application between men only, unlike the sodomy offence that applies to both homosexuals and heterosexuals, was a clear attempt to specifically target a category of men who have sex with each other—as habitual sodomites, perverts and consenting adult homosexuals.

8.6.3 SECTION 377 IPC & FORENSIC INJUSTICE

\(^{363}\) Rex v. Captain Douglas Marr [194611 MLJ 77.
'The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and morphology, with an indiscreet anatomy and possibly a mysterious physiology.'

Michel Foucault's

‘Infundibuliform' literally means 'funnel shaped' and has been used to describe two things in particular—shapes of flowers and anuses of habitual sodomites. Here, we are concerned with the latter. The relevance of anal examination can be seen in one of the first reported cases in appeal under Section 377 of the IPC. In the case of Queen-Empress v. Khairati in 1884, Khairati was convicted under Section 377 by the Sessions Judge on the charge 'that he, within four months previously to the 15th of June (1883), the exact time it being impossible to state, did in the district of Moradabad abet the offence of sodomy, by allowing some unknown person to commit the offence of sodomy on his person…'. Khairati was identified as a eunuch, as he ‘was found singing dressed as a woman among the women of a certain family'.

The trial court further stated that ‘… he is shown to have the characteristic mark of a habitual catamite—the distortion of the orifice of the anus into the shape of a trumpet also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.’ Thus Khairati was not arrested and convicted for any particular incident of sodomy, but on suspicion based on appearance, substantiated by medical examination. The lower court finally stated in conclusion that ‘the three facts proved against the accused—his appearance as a woman, the shape of the anus, the venereal disease—irresistibly lead to the conclusion that he has recently subjected himself to unnatural lust'. Justice Straight, on appeal set

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365 Queen-Empress v. Khairati, 1884 ILR 6 ALL 204.
366 Eunuch here refers to a hijra—a transgender identified person belonging to a traditional community of dancers, beggars and sex workers.
367 Khairati, pp. 602.
368 Khairati was possibly one of the first recorded examples of policing of (home) sexuality in India. Saleem Kidwai and Ruth Vanita (eds.) have argued in Same Sex Love in India: Readings from Literature
aside the conviction as the time, the place or the identity of the accomplice was unknown. However, he called the police efforts in ‘checking these disgusting practices... laudable’.

Sexual offences create a controversial legitimacy for the state to allow forensic intervention into the bodies of the victims to determine the occurrence of the offence, to separate the truth from false accusation, and often to establish the exact extent to which sexual interaction has taken place. For example, victim of rape to be examined by medical-forensic experts, to record physical injuries/signs of the occurrence of rape or penetration. These invasive practices of maintaining a sexual record, have famously, under the various colonial Contagious Diseases Acts, created the idea of the ‘common’ or habitual prostitute, with repeated convictions under the Act due to the presence of venereal diseases.\textsuperscript{369} The same applies for cases under sodomy and the creation of a ‘habitual sodomite’.

Therefore a complete impact of sodomy laws cannot be understood by looking at the substantive legal offence alone. Evidentiary rules and requirements to prove the offence of sodomy have played a key role, in constituting the criminal identity of the homosexual. In Khairati the forensic evidence was taken as proof that sodomy definitely had taken place at a prior time, for lack of any further culpable evidence. The ‘culpability’ of disfigured anuses can be attributed to the role of the medico-forensic writers.

This criterion, broadly of the funnel-shaped anus, suggesting an elasticity to the anal sphincter due to permanent exposure to anal penetration, becomes the decisive means for determining the ‘habitual’ homosexual nature of the person and consequently tools for abuse, harassment, torture and entrapment. Another forensic expert moves beyond just the physical signs of penetration to the way the sodomite prepares his appearance.


and History (St. Martin Press, 2000) that prior to British rule there was no aggressive policing of homosexuality.
He lists ‘the shaving of the anal hair but not necessarily the pubic hair’ as evidence to impugn a habitual, passive sodomite.\(^{370}\)

The conjectures of forensic writers are not attempts to document single sexual acts, but in fact to infer life histories and identities.\(^{371}\) In the Indian case of **D. P. Minwalla v. Emperor**,\(^{372}\) the defendant uses the lack of a marked anus as a proof of a non-criminal life history. Mr. Minwalla was caught in the act of anal sex with another man in the back of a truck, in a semi-public space. Mr. Minwalla, in a desperate attempt to redeem himself, submitted to a medical examination to convince the court that his anal orifice was not shaped like a ‘funnel’ which is a sign of a habitual sodomite. The court confirmed the conviction of Minwalla with a reduced sentence, mindful of the absence of the important physical attribute.

The relevance of the anal examination in invoking assumptions about life histories can also be seen in a case from Pakistan inherited the Indian Penal Code and retains Section 377 in its original language. However, in the early 1970s the Hudood Ordinance under Section 12 introduced the offence of Zina, which punishes sex between men only when it is coupled with the act of abduction.\(^{373}\) In Muhammad Din\(^{374}\) the two accused were charged with the offence of Zina for forcibly committing sodomy on another young man at a Railway Station in Lahore at night. The medical examination of the complaint stated that ‘the Doctor found no marks of fresh violence on the anus and rectum of the complaint… The anus of Muhammed Aslam was found moderately funnel shaped and he appeared to be a habitual passive agent.’

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\(^{371}\) Moran, see note 18.

\(^{372}\) **D.P Minwalla v. Emperor, AIR 1935 Sind 78.**

\(^{373}\) The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979, Section 12 Kidnapping or abducting in order to subject person to unnatural lust: ‘Whoever kidnaps or abducts any person in order that such person may be subjected, or may, be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be, so subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine’ and, if the punishment be one of imprisonment, shall also be awarded the punishment of whipping not exceeding thirty stripes.’

\(^{374}\) **Muhammad Din v. The State PLD 1981 ESC 191.**
On the basis of the medical report the court rejected the argument that the ‘victim’ was at the railway station so late, because he had missed the train. The court in fact stated: ‘It appears that complaint had gone to the railway station long after the train for Narowal had left, and … for some other purpose.’ The other purpose according to the court was ostensibly linked to the shape of the anus, as ‘this view received support from the medical evidence that he appeared to be a habitual passive agent’. The court thus refused to believe ‘that the complaint had been kidnapped or abducted for the purpose of subjecting him to unnatural lust’. The court dropped the charge under Zina and convicted the accused under Section 377 which punishes sodomy without the requirement of consent or coercion.

**Following are the arguments advanced for decriminalization of homosexuality in India:**

1. Section 377 has had a considerable effect on the same sex couples in India. Although, female same sex couples cannot technically commit this offence, both men and women in same sex relationships have been subjected to harassment, as the mere existence of the law is often used by the law enforcement agencies to threaten people who they perceive to be homosexuals. This is despite the fact that the law criminalizes conduct, not status, and there is even a provision in section 388 of the Indian Penal Code which imposes an especially high punishment for a person who wrongfully threatens to have another charged under section 377. Sodomy laws convert all gay men and lesbians into presumptive felons based on their sexual orientation. Gay citizens are consequently treated as criminals without any proof of conduct. This conflation of status and conduct is both legally improper and factually inapt.

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375 US Supreme Court in *Lawrence V. Texas, Justice O’Connor*, held that, ‘by creating a criminal class, sodomy law stigmatize gay men and lesbians, which weighs heavily on their psyche. By labeling gay men and lesbians as criminals, sodomy laws make gay individuals target for physical violence in the form of gay bashing, sometimes perpetrated as de-facto enforcement of sodomy laws. Sodomy laws encourage the abuse of gay citizens by both private individuals and police officers, because sodomy laws convert all gay men and lesbians into presumptive felons based on their sexual orientation, a status. Gay citizens are often treated as criminals without any proof of conduct.’ See: ‘people’s Union for Civil Liberties, Karnataka (PUCL-K) Fact finding Report,(2001).p.104-105’.
2. The history of unnatural offences against the order of nature and their enforcement in India during the Mogul time, British time and post independence, shows that the concept was introduced by the British and there was no law criminalising such acts in India. It is based on Judeo-Christian moral and ethical standards which conceive of sex on purely functional terms, that is, for procreation. Post independence the section remained on the statute books and is now seen as part of Indian values and morals.

3. Though facially neutral, an analysis of the judgments shows that heterosexual couples have been practically excluded from the ambit of the section and homosexual men are targeted by virtue of their association with the proscribed acts.

4. The criminalisation of Section 377 impacts homosexual men at a deep level and restricts their right to dignity, personhood and identity, privacy, equality and right to health by criminalising all forms of sexual intercourse that homosexual men can indulge in as the penetrative sexual acts they indulge in are essentially penile non vaginal. The section ends up criminalising identity and not mere acts as it is usually homosexual or transgender persons who are associated with the sexual practices proscribed under Section 377.

5. Criminalisation creates a culture of silence and intolerance in society and perpetuates stigma and discrimination against homosexuals. Homosexual persons are reluctant to reveal their orientation to their family. Those who have revealed their orientation are faced with shock, denial and rejection and some are even pressurized through abuse and marriage to cure themselves. They are subjected to conversion therapies such as electro-convulsive therapy although homosexuality is no longer considered a disease or a mental disorder but an alternate variant of human sexuality and an immutable characteristic which cannot be changed.


377 American Psychiatry Association and American Psychological Association filed an amicus brief in Lawrence v. Texas demonstrating the harm from and the groundlessness of the criminalisation of same sex sexual acts.
6. Section 377 thwarts health services by preventing collection of HIV data, impeding dissemination of information, forcing harassment, threats and closure upon organisations who work with MSM, preventing supply of condoms as it is seen as aiding an offence; limits access to health services, driving the community underground; prevents disclosure of symptoms; increases sexual violence and harassment against the community; and creates an absence of safe spaces leading to risky sex.

7. It is clear that Section 377 IPC, whatever its present pragmatic application, was not enacted keeping in mind instances of child sexual abuse or to fill the lacuna in a rape law. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness. In any way, the legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private.

8. This law (sec. 377 IPC) is in complete contrast to the averments in NACO's affidavit. NACO has specifically stated that enforcement of Section 377 IPC adversely contributes to pushing the infliction underground; make risky sexual practices go unnoticed and unaddressed. Section 377 IPC thus hampers HIV/AIDS prevention efforts.

9. It is not within the constitutional competence of the State to invade the privacy of citizen’s lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interests “must be legitimate and relevant” for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest.

10. The argument that public morality of homosexual conduct might open floodgates of delinquent behaviour is not founded upon any substantive material, even from such jurisdictions where sodomy laws have been abolished. Moral indignation, howsoever strong, is not a valid basis for overriding individuals’ fundamental rights of dignity and privacy. As held by Learned Judges in Naz Foundation case,
constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.

11. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution. 

12. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and Lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do.\textsuperscript{378}

13. Section 377 must be read in light of constitutional provisions which include the “right to be let alone”. The difference between obscene acts in private and public is statutorily recognized in Section 294 IPC.

14. Section 377 targets the LGBT community by criminalizing a closely held personal characteristic such as sexual orientation. By covering within its ambit, consensual sexual acts by persons within the privacy of their homes, it is repugnant to the right to equality.

15. Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well being and social adjustment. By criminalising sexual acts engaged in by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals.

16. Section 377 is ultra virus Articles 14, 15, 19(1) (a) and 21 of the Constitution in as much as it violates the dignity and personhood of the LGBT community. Sexual rights and sexuality are a part of human rights and are guaranteed under Article 21. It is scientifically established that consensual same sex conduct is not “against the order of nature”. LGBT persons do not seek any special rights. They merely seek their right to equality of not to be criminalized for being who they are. Our

Constitution does not deny any citizen the right to fully develop relationships with other persons of the same gender by casting a shadow of criminality on such sexual relationships. Justice Vivian Bose in *Krishna v. State of Madras, 1951 SCR 621* stated: ‘When there is ambiguity or doubt the construction of any clause in the chapter on Fundamental Rights, it is our duty to resolve it in favour of the freedoms so solemnly stressed.’

17. It is true that the courts should ordinarily defer to the wisdom of the legislature while exercising the power of judicial review of legislation. But it is equally well settled that the degree of deference to be given to the legislature is dependent on the subject matter under consideration. When matters of “high constitutional importance” such as constitutionally entrenched human rights – are in issue the courts are obliged in discharging their own sovereign jurisdiction, to give considerably less deference to the legislature than would otherwise be the case. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution derives its power or authority under the Constitution and has to act within the limits of powers. The judiciary is constituted as the ultimate interpreter of the Constitution. In the present case, the two constitutional rights relied upon i.e. 'right to personal liberty' and 'right to equality' are fundamental human rights; which belong to individuals simply by virtue of their humanity.

**8.7 CONCLUSION**

In order to make an argument against laws that prohibit, criminalise and punish same-sex acts, it is essential to conjure the image of the wounded homosexual, who is not only harmed materially but also at the level of the psyche, by the symbolism of the law.

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Fundamental rights must be interpreted in an expansive and purposive manner so as to enhance the dignity of the individual and worth of the human person. The rights under Articles 14, 19 and 21 must be read together. The right to equality under Article 14 and the right to dignity and privacy under Article 21 are interlinked and must be fulfilled for other rights to be truly effectuated. The Constitution is a living document and it should remain flexible to meet newly emerging problems and challenges.