CHAPTER-5

INDIAN LEGAL FRAMEWORK AND RIGHTS OF SEXUAL MINORITIES

“Injustice anywhere is a threat to justice everywhere; whatever affects one directly, affects all indirectly”-Martin Luther King, Jr.

5.1. Introduction

After studying chapter four, the human rights framework for sexual minorities provides very broad knowledge about the human rights related provisions available in international human rights law framework including other instruments of human rights. The scope of these provisions is very wide and applies universally. As a person, these all are applicable for all including sexual minorities. Now, in Indian context, we don’t have very specific policy and legislation for sexual minorities. The main legal provision is available in Indian Penal Code (in short “IPC”) 1860. The study around Sec. 377 of IPC is main task of this chapter however; the provisions in Indian Constitution, some statutory provisions are also referred. This whole chapter is to study under the name of ‘Indian Legal Framework’ and is based on collection of relevant provisions. This chapter also includes relevant principles, theories and views of various persons in the field of human rights, law and others. Some of the initiatives by various social, legal, academic and other institutions are included. Although, these are not exclusively in the category of law but such are helpful for making any policy and legal framework.

India is a diversified country having its written Constitution that basically includes the spirit of people of India. The principles set out in the Constitution laid down guidelines for ensuring social, economic and political justice to all. Although, in Constitution, we neither have direct reference relating to sexual minorities nor specific legislation, yet natural rights, fundamental rights provisions, views of eminent persons in legal fraternity and academia have discussed the rights for sexual minority persons keeping in view the human rights for all. The views include the welfare of all. Wherever the talks are forwarded with inclusion of term ‘all’ it gives an indication that in case of not having certain specific and exclusive rights for sexual minority, they are under the ambit of ‘all’ and entitle for the same benefits available to
other persons. In this series, various academic and non-academic institutions have given their views for inclusion of sexual minorities within the mainstream society. In an article entitled “Working with masculinities”, Harsh Mander viewed that ‘Gender equality will make the world kinder, less violent, and less demanding for men as well’. The chapter has a relationship and corelationship approach while discussing about sexual minorities in particular. Although the Constitution of India does not exclusively include the term sexual minorities yet the understanding of human rights to all the persons make it relevant to look this relationship. The next section gives this relationship between the relevant Indian legal framework and sexual minorities.

5.2. Indian Constitutional Provisions and Sexual Minorities

Talking about the fundamental rights under Indian Constitution, such rights are categorically available to all persons, citizens and different groups like women, child, schedule caste, schedule tribes, and various minority community groups. Because the sexual minority persons are under the definition of a person so the scope of fundamental rights in general and minority rights in particular is extended to them also. Hence, the provisions under fundamental rights Articles i.e. from Article 13 to 32 (Part III i.e. Fundamental Rights) are relatively important and has an earlier existence. Similarly, the other provisions also make a relative existence to the fulfilment of such fundamental rights to sexual minorities by way of international obligations on India as State.

‘Article 38 of the Constitution also provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life and the State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations’.1

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2 Article 13 to 32 of Indian Constitution.
3 Article 53(1), 73(1) and 253 of Indian Constitution.
‘International law becomes implementable through the municipal courts of India largely by virtue of Article 51 and 372 of the Indian Constitution. Article 372 provides for the application of accepted norms of international law prevalent immediately before the commencement of the Constitution of India insofar as such norms are not inconsistent with the Constitution. Such inconsistency may be with respect to individual Article or the ‘basic features’ of the Constitution. Article 13(1) is an additional ground to invalidate the application of aforementioned norms provided that such a norm is inconsistent with the provisions of part III of the Constitution (Fundamental Rights). The Constitution of India fundamental rights provisions (Article 13 to 32) are all available to all including sexual minorities. The human rights relating provisions are arranged in specific legislation which is included next.

5.3. Protection of Human Rights Act, 1993 and Sexual Minorities

After the Second World War, the Universal Declaration of Human Rights, 1948 and other international human rights instruments came into force for protection of human rights all over the world. In this series, after the international community pressure, a specific legislation namely ‘The Protection of Human Rights Act, 1993 was enacted in India. This was a milestone step in terms of human rights protection in India. Although this Act also does not include the term ‘sexual minorities’ but because of general relationship of person with sexual minorities, this legislation is exclusively important one.


‘As regards the expression ‘human rights’, it may be defined from various angles, the individual, collective, moral, legal, political, social, theocratic or religious, economic, historical or international viewpoints. As regards a single definition of the term, the definition of the term as given in the Protection of Human Rights Act, 1993 is the most exhaustive one and it has been drafted by taking all the said viewpoints into consideration. Sec. 2(d) of the Act defines the term ‘human rights’ as:

“Human Rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India”\(^8\). ‘In cases of involving violation of human rights, the courts must for ever remain alive to the international instruments and Conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field’\(^9\). The specific legal relation with sexual minorities is attached with Sec. 377 of IPC and some more. The next section highlights on this.

5.4. Statutory Provisions and Sexual Minorities

‘Sec. 377 is both very similar to sodomy statutes around the world in that it reinstates and codifies the common law offence of sodomy, and at the same time, it very different from a lot of the sodomy statutes:

(a) The statute, unlike many other similar laws, does not define a specific offence of sodomy. As a piece of legislation, Sec. 377 IPC applies a vague offence without defining what “carnal intercourse” or “order of nature” are to the general public at large, the only criteria being “penetration”. It is a separate issue that the Indian Courts over the decades have interpreted and constantly re-defined “carnal intercourse” read conjunctively with the “order of nature” to include other non-procreative sexual acts.


(b) It applies to both heterosexuals and homosexuals. Over the years, the general offence of sodomy became a specific offence of homosexual sodomy\textsuperscript{10}, a significant distinction although never reflected in the Indian law has subsequently been read through in certain later cases by the Indian Court\textsuperscript{11}.

‘The objective of Sec. 377 IPC has remained unclear and unsubstantiated. The offence was introduced into British India with a presumption of a shared Biblical morality. Historians have speculated the “there were concerns that not having wives would encourage the Imperial Army to become ‘replicas of Sodom and Gomorrah’ or to pick up ‘special oriental vices’.\textsuperscript{12}.’ Is this offence meant to criminalise the act of sodomy or people who appear to be likely to commit this offence?\textsuperscript{13} was begun with the 1884 case of Queen-Empress vs Khairati\textsuperscript{14}. Same was followed in case Noshirwan vs Emperor\textsuperscript{15} in which ‘judge did reprimand one of men, Ratansi, as “despicable”\textsuperscript{16} specimen of humanity for being addicted to the “vice of a catamite”\textsuperscript{17}' on his own admission.

‘In the case of DP Minwalla vs Emperor\textsuperscript{18}, Minwalla was caught in the act of oral sex with another man in the back of a truck, in a semi-public space. Minwalla, in a desperate attempt to redeem him, submitted to a medical examination to convince the court that this 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 importance of the physical attribute.

\textsuperscript{10} S.13 of the Sexual Offences Act, 1956 of England for example read as follows “It is an offence for a man to commit an act of gross indecency with another man”, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{11} Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{12} Suparna Bhaskaran, ‘The Politics of Penetration: Sec. 377 of the Indian Penal Code’ in Ruth Vanita (ed.) \textit{Queering India: Same-Sex Love and Eroticism in Indian Culture and Society} 17 (Routledge, 2002), available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{13} This could be one of the first examples of policing of homosexuality/sexually transgressive behaviour in India. Saleem Kidwai and Ruth Vanita have argued in \textit{Same Sex Love in India: Readings from Literature and History} (St Martin Press, 2000) that prior to British rule there was no aggressive policing of homosexuality, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{14} \textit{Queen-Empress vs Khairati} 1884 ILR 6 All 204., available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{15} \textit{Noshirwan vs Emperor} AIR 1934 Sind 206, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{16} Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).

\textsuperscript{17} Ibid.

\textsuperscript{18} \textit{D P Minwalla vs Emperor} AIR 1935 Sind 78, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).
Khairati, Noshirwan and Minwalla all deal with the idea of bodies marked with signs and appearances that indicate the possibility of committing sodomy. Sec. 377 IPC could therefore be used against not only men who are actually caught in the act, but also those who give the appearance of being homosexual and therefore likely to commit the act. This has legitimised the manner of police harassment and abuse of homosexual men’\(^\text{19}\).

‘In Bapoji Bhatt\(^\text{20}\) the appellant was charged with Sec. 377 IPC on allegations of oral sex with a minor. In the absence of any other law to deal more appropriately with cases of child sex abuse, the case was charged and tried under Sec. 377 IPC, as the Sec. does not distinguish between consensual and non-consensual sex. The Courts found that the definition of “carnal intercourse against the order of nature” could not be extended to include acts of oral sex and therefore dismissed the case as “the act must be in that part where sodomy is usually committed”\(^\text{21}\). ‘The discussion into the scope and application of Sec. 377 IPC has continued in independent India way into the 1960s and 1980s. In Lohana Vasantlal the Gujrat High Court was dealing with an appeal against a conviction for performing oral sex with an underage boy. The court devised the test of “imitative” sexual intercourse, that 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 Sec. 377 IPC\(^\text{22}\). ‘The “imitative” test was further applied in State of Kerala vs K Govindan\(^\text{23}\) wherein thigh sex was also added to the laundry list of unnatural offences. The Court applied the imitative test “the male organ is ‘inserted’ or ‘thrust’ between the thighs, there is ‘penetration’ to constitute unnatural offence”\(^\text{24}\).

‘With aid from the writings of Havelock Ellis and Corpus Juris Secundum, the Lohana Court cited a definition for “sexual perversity” as an “unnatural conduct performed for the purpose of sexual satisfaction both of the active and passive

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\(^\text{19}\) Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).
\(^\text{20}\) Government vs Bapoji Bhatt (1884 (7) Musore LR 280), available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006).
\(^\text{21}\) Government vs Bapoji Bhatt (1884 (7) Musore LR 280), available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4816 (November 18, 2006). Also see also-\textit{Khau vs Emperor}, 1925 Sind 286.
\(^\text{22}\) Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4817 (November 18, 2006).
\(^\text{24}\) Ibid.
partners’ 25. ‘Perversity became a synonym for homosexuality in Fazal Rab Choudhary vs State of Bihar’ 26, while dealing with an application for mitigating the sentence for a conviction, the Supreme Court of India held that an offence under Sec. 377 IPC implies “sexual perversity” 27. The growing linkage between sodomy, perversity and homosexuality sans a discussion on a private space for consensual sexual acts was solidified in the case of Pooran Ram vs State of Rajasthan 28, where a homosexual was equated with a rapist. The Court in Pooran Ram held that “perversity” that leads to sexual offences may result either in “homosexuality or in the commission of rape” 29. ‘In Anil Kumar Sheel v. The Principal, Madan Mohan Malvia Engg. College, the judge stated that: Lord Devlin-maintained that the law should continue to support a minimum morality-however, in his opinion, the problem would always be as to how far laws should uphold morality and it depends upon the facts and circumstances of the case. A judge is to keep his finger on the pulse of the society-the law cannot undertake not to interfere’ 30.

‘The real support for Lord Devlin comes in the case of Kailash v. State of Haryana that goes a few step further- Extreme limits of logic sometime expose the perversity of a doctrine and fail to promote public good. The practice of adopting English laws is not always conducive to our own society and, therefore, we must rely on our own laws best suitable to our society and needs. Various fundamental differences in both the societies must be realised by all concern especially in the area of sexual offences. Naturally, if laws are according to the temperament of a society to which it caters to and it is only then that society could be run smoothly according to laws because such a society would then readily comply with those laws’ 31.

‘However, Anil Kumar and Kailash even though vague and unsuited as cases to rule on the decriminalisation of consensual homosexuality, have helped resolve the

25 Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4817 (November 18, 2006).
26 Fazal Rab Choudhary vs State of Bihar AIR 1983 (SC) 323.
27 It went on to say 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” (Ibid, p. 323).
29 Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4817 (November 18, 2006).
puzzle that began with Khairati, Noshirwan and Minwalla. Sec. 377 is not merely about certain sexual acts committed between men but also about an identity that derives from the courts understanding of marked bodies, appearances and an analysis of perversity. It is in fact about all sexual acts committed between men, with consent—which would be tantamount to a criminalisation of homosexuality in general and even its associated expressions.\textsuperscript{32}

‘A Padmanabhan v. Joint Commissioner of Labour on 30 March, 2010, (Madras High Court), D. Murugesan, J. referred that ‘the term ‘Moral turpitude’ is a phrase which can hardly be accurately defined. It can have various shades of meaning in various sets of circumstances and will have different meanings in different contexts. No absolute standard can be laid down for deciding whether a particular act is to be considered as one involving ‘moral turpitude’. The said term is rather vague one, where it is virtually important not to be vague.’\textsuperscript{33}

Except this criminal law Sec. 377 of IPC, sexual minorities are also targeted under different penalizing provisions like Sec. 292, 376 of IPC, Sec. 5 (2) of ‘Indian Telegraph Act, 1885’, Sec. 69 of ‘Information Technology (Amendment) Act, 2008’, Sec. 33 (b) of ‘Information Technology Act, 2000’ and ‘The Immoral Traffic Act’, Military, Navy and Air Force Acts’ provisions etc.

When the Preamble of Indian Constitution says “We the people of India”, it includes the spirit of all the people including sexual minorities. Further, it guarantees the equality, non-discrimination, unity and integrity, opportunity to all, liberty of thought and expression, social, economic and political justice. Keeping in view the Constitutional mandates, Indian judiciary has laid down various case laws in which the principles of equality, non-discrimination, freedom of speech and expression, right to life and social, economic and political justice is provided to larger society. The very specific attention of judiciary has been taken in some of the cases i.e. Naz Foundation case, Suresh Kumar Khosal case, Review and Curative petition against Suresh Kumar Khosal, and National Legal Service Authority v Union of India (NALSA) case. The curative petition is presently pending with a reference to Constitutional bench of five

\textsuperscript{32} Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, \textit{EPW} 4819 (November 18, 2006).
judges. The next Section highlights on efforts of Indian judiciary with reference to sexual minorities.

5.5. Indian Judiciary and Sexual Minorities

Indian judiciary is one of the major pillars of government. To decide the dispute, arises between two or more people, is the prime function of judiciary. In doing so, the laws are interpreted too keeping in view the rules of interpretation as well as the facts and circumstances of the case. ‘Indian Courts have never recognised an absolute space for “private immorality” which does not harm others, but they have scorned on unnecessary and unjustified police access to people’s homes” were the first two cases to read the right to privacy under the Constitution. Both of these cases partially struck down police regulations that allowed surveillance and domiciliary visits in the houses of convicts, suspects and habitual criminals. The Supreme Court recognised the right to privacy and substantially restricted the scope of police interference with the sanctity of the home within legitimate grounds and interests: “Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing”.

‘In many cases’, the dealing with prison conditions in India, the judges have recorded the presence of homosexuals and the impending (and almost unavoidable possibility of homosexual sex as a serious aggravating factor to the dismal prison condition. The loquacious Justice Krishna Iyer, in the case of Lingala Vijay Kumar vs Public Prosecutor, Andhra Pradesh while reflecting on the conditions of prison stated that “these adolescents, when ushered into jail with sex-starved ‘Lepers’ sprinkled about, become homosexual offerings with nocturnal dog-fights”. The quote, consistent with justice Iyer’s unique style, is extremely reflective of how homosexuals are perceived by the Indian judiciary. Homosexuals thus become acknowledged

34 Kharak Singh vs State of UP AIR 1963 SC 1295 and Gobind vs State of Madhya Pradesh
36 Lingala Vijay Kumar vs Public ProSecutor, Andhra Pradesh 1978 SCC (4) 196, para 11, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4817 (November 18, 2006).
figures as predators and necessarily coercive sexual partners. And homosexuality has become the face of the general discourse on perversity.

‘Most strikingly all the above cases deal with non-consensual activities. Sec. 377 IPC does not exclude consensual activities; however the use of the term “voluntary” in the language of Sec. 377 IPC makes consent irrelevant. Therefore the acts of oral, anal, thigh sex along with mutual masturbation are punishable even when two consenting adults may indulge into the acts within a private sphere. In fact in the case of Mihir vs State of Orissa, Pasayat J has clarified that “consent of the victim is immaterial” in Sec. 377 IPC as “unnatural carnal intercourse is abhorred by civilised society”. Justice Pasayat unabashedly equates consensual homosexuality with rape.

‘Brother John Antony vs State’ was a 1992 case that 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. In this case once again the “unnaturalness” of the act becomes of prime important. The fact that “an assault (possibly violent) has taken place is of secondary importance”. The judgment delves deep into the meaning of the sexually perverse and discusses other forms of sexually deviant practices like “tribadism”, “bestiality”, “masochism”, “fetishism”, “exhibitionism” and “sadism” and concludes, using the imitative test, that mutual

Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4817 (November 18, 2006).
Brother John Antony vs State 1992 Cr LJ 1352; available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
‘Tribadism: Friction of the External Genital Organs by one Woman on Another by Mutual Bodily Contact for the Gratification of the Sexual Desire’, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
‘Masochism: Opposite of Sadism and Sexual Gratification Is Sought from the Desire to be Beaten, Tormented or Humiliated by One’s Sexual Partner’, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
‘Fetishism: Experiencing Sexual Excitement Leading to Orgasm from Some Part of the Body of a Woman or Some Article Belonging to Her’, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
‘Sadism: A Form of Sexual Perversion in which the Infliction of Pain and Torture Act as Sexual Stimulus’, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
masturbation falls within Sec. 377 IPC 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”\(^{48}\). This has a serious effect on the concept (or lack) of consent in cases of Sec. 377 IPC, as the decisions dealing with non-consensual sexual activities by undermining “the creation of the victim”\(^{49}\).

‘Grace Jeyaramani vs EP Peter\(^{50}\) filed an application for divorce on the principal ground that her husband forced her to have “sexual intercourse in an unnatural way” against her wish. The judge held that “the husband could be guilty of sodomy if the wife was not a consenting party”. This was one of the first cases where consent became relevant within the meaning of sodomy, even though it was not a case under Sec 377 IPC. 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”\(^{51}\).

Grace substantiates the point that even though Sec. 377 IPC applies to both heterosexuals and homosexuals, by allowing for consensual sex between heterosexual married couples it focuses the application of Sec. 377 IPC as far as consensual sex is concerned to homosexuality. Therefore, the conception of sodomy in Indian law, even though pervasive enough in letter to apply to proscribe sexual activities between men, including those committed consensually. Alok Gupta therefore, argued that Sec. 377 IPC is inter alia meant to prevent, what we understand in the contemporary world as consensual homosexuality\(^{52}\).

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\(^{48}\) Similarly in cases like *Calvin Francis vs State of Orissa* 1992 (2) crimes 455 and *State of Gujrat vs Bachmiya Musamiya* 1998(2) Gujrat LR 2456, the judgments are only concerned with the unnaturalness of the sexual act involved and not the plight of the victim, available in Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).

\(^{49}\) Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).


\(^{51}\) Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).

\(^{52}\) Ibid.
5. 5.1. Naz Foundation vs. NCT of Delhi\textsuperscript{53} Judgment

‘On July 2, 2009 the High Court of Delhi decided Naz Foundation v. Government of NCT of Delhi\textsuperscript{54} decriminalising consensual homosexual conduct of adults. The court affirmed all the major submissions of the petitioner and ruled that Sec. 377 of the Indian Penal Code, 1860 (IPC) insofar as it prohibits consensual homosexual acts in private is violative of Article 14 which the right to privacy and dignity, Article 14 which provides protection against arbitrary laws as well as Article 15 of the Constitution which prohibits discrimination on the basis of sex. The most striking feature of the judgment in Naz Foundation is that it evolved the right to sexual autonomy as part of the right to life and personal liberty guaranteed under Article 21\textsuperscript{55}.

‘On 2\textsuperscript{nd} July 2009, New Delhi’s High Court ruled that homosexual conduct should not be deemed a criminal offence, challenging more than a century of criminalization of homosexuality in India since the British introduced the Indian Penal Code (IPC) in 1860. Since the ruling, scholars have indeed found evidence that this decriminalization has led to a rise in the level of social acceptance and self-acceptance of homosexuality in India (Jain 2013)\textsuperscript{56}.

The judgment in Naz Foundation case refers facts relating to history of legislation (relating to Sec. 377 of IPC), judicial interpretation, the challenge, reply by Union of India-Contradictory Stands of Ministry of Home Affairs and Ministry of Health & Family Welfare, Affidavit of National AIDS Control Organization (NACO)/Ministry of Health & Family Welfare, responses of different respondents in case, argument between petitioner and respondent, Article 21 of Indian Constitution, Dignity, Privacy, Development of Law of Policy in India, sexuality and identity, global trend in protection of privacy dignity rights of homosexuals, compelling State interest, morality as a ground of a restriction to fundamental rights, whether Sec. 377

\textsuperscript{53} Naz Foundation vs Govt. of NCT of Delhi and Others (WP(C) No.7455/2001, Date of Decision: 2\textsuperscript{nd} July, 2009), available at http://www.nazindia.org/judgement_377.pdf, accessed on December 25, 2012. And also, Naz Foundation v. Govt. of NCT of Delhi, 160 DLT 277 (Delhi High Court 2009).


\textsuperscript{55} Ajendra Srivastava, ‘Gay Sex and the Constitution: Naz Foundation and Lawrence Compared’, 51 JILII 513 (October-December 2009).

\textsuperscript{56} Enze Han and Joseph O’Mahoney, ‘British Colonialism and the Criminalization of Homosexuality’, 27 CRIA 269, accessed on September 9, 2014.
IPC violates Constitutional guarantee of equality under Article 14 of the Constitution, Scope of criminal law (Sec. 377 IPC) in public and private morality, right to equality and equal treatment, Sec. 377 IPC targets homosexuals as a class, infringement of Article 15- Whether ‘Sexual Orientation’ is a ground analogous to ‘Sex’, “Strict Scrutiny” and “Proportionality Review”-Analysis of Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, Scope of the Court’s Power to declare a statutory provision invalid, infringement of Article 19(1) (a) to (d), doctrine of severability and various other general principles of human rights including ‘Yogyakarta Principles’. The whole judgment also includes various national and international courts case laws in

deciding the case and coming on the conclusion.

With these references, the two judge bench of Delhi High Court came to the conclusion that “We declare that Sec. 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Sec. 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By ‘adult’ we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Sec. 377 IPC that have already attained finality.” After a long legal battle against the Constitutionality of Sec. 377 of IPC, the Delhi High Court came to the conclusion. It was the bench of the then Chief Justice of Delhi High Court Hon’ble Chier Justice Ajit Prakash Shah and Hon’ble Dr. Justice S. Muralidhar. The one hundred five page judgment was delivered on July 2nd, 2009.

‘The Delhi High Court decision has set off a national debate among politicians, religious groups and even celebrities’58. ‘The Delhi High Court’s decision in Naz Foundation v. NCT of Delhi59 has been widely hailed by the media as a legal and moral victory for the Lesbian Gay Bisexual Transgender (LGBT) community in India. While the result of the judgment is the subject of a larger social debate, the analysis employed by the Hon’ble Court is an equally debatable matter involving questions of law and morality”60. A series of commenting of the Naz Foundation judgement was again begin.

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After the Naz Foundation decision, ‘The Human Rights Commission (HRC) in association with a group of NGO’s has said that the country’s legal, social, political issues related to adoption are today a grey area for Indian society. In ancient and medieval times up to recent past the status of homosexuals was an issue not addressed openly these led the imperial rulers to formulate archaic and derogatory laws ostracizing the legal and social status of homosexuals. But after Delhi High Court decision (Naz Foundation case) the antipathy has died down and now that they are accurate and socially accepted and have a right to adopt a child and will try to find a place in main stream’. Refereeing to the argument in favour of gay parent and lesbian parent, Prafulla Kumar Nayak concluded that ‘there is no reason apart from blind prejudice for gay, lesbian going through adoption rights which is meted out to them every day in the course of living in society and allow them to serve as parents either individually or even as couples’.

‘In the face of no definite scientific evidence, the only legitimate recourse for a Constitutional court is to rely on the Constitution and Constitutional materials and not on what is thought to be correct on other grounds like religion or personal belief. This brings the debate back strongly into the ambit of Constitutional values like equality, privacy and dignity, which is what the court did’.

Rohit Singh argued ‘that Naz Foundation is in fact a step in this direction of identifying a principled basis for distinguishing between different kinds of morality. Nobody can argue that criminal law has no role to play in regulating individual liberty in order to protect public morality. The IPC is replete with offences that are fundamentally grounded in the protection of public morality. The offence of bigamy, for instance, is rationalised as involving an “outrage on public decency and morals”’. To treat Naz Foundation’s rejection of public morality as a violation of this principle is to misunderstand the essence of Naz Foundation. Naz Foundation’s distinction between public and Constitutional morality is nothing but a distinction between

62 Id. at 67.
63 Id. at 524.
morality that is in consonance with the values of the Constitution, and morality that is not. The essence of Rawl’s or Dworkin’s arguments is also on similar lines, i.e. State action for protection of public morality must show that it falls within the permitted sphere of activity of the State, which the criminalisation of homosexuality does not.65

‘A concrete example of the hypocrisy of denying individual rights on the basis of perceived majority beliefs can be examined in the debates around same-sex marriage’66. The judgment in Naz Foundation case recognizes the “Constitutional Morality” which was articulated by Dr. Ambedkar. This Judgement was well taken by sexual minorities and same has been celebrating till now.

5.5.2. Suresh Kumar Khosal and another v. Naz Foundation and Others67 Judgment

After the Naz Foundation v. Govt. of NCT Delhi case judgment, the various Special Leave Petitions (SLPs) were filed in the Supreme Court. These petitions challenged the judgment of Delhi High Court before the Supreme Court. Number of religious groups, and political parties jointly opposed the Delhi High Court Judgment by stating that the Delhi High Court judgment is against the culture, morality, and order of nature. The battle in Supreme Court ended with a setting aside the judgment of Delhi High Court and by upholding the Constitutionality of Sec. 377 of IPC, the homosexuality was again treated as criminal offence. The judgment of Supreme Court pronounced that Sec. 377 cannot be de-criminalized but it is up to the Parliament to either scrap or repeal Sec. 377 by introducing the change in existing law.

While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the Constitutionality of Sec. 377 IPC and found that the said Sec. does not suffer from any Constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Sec. 377 IPC from the statute book or amend the same as per the suggestion made by the

Attorney General. The bench in Suresh Kumar Khosal v. Naz Foundation held that Sec. 377 of IPC does not suffer from the vice of unconstitutional and the declaration made by the Division Bench of the High Court of Delhi is legally unsustainable. ‘The Supreme Court on Friday (03-01-2014) expressed disapproval at “unwanted” and “not appreciable” comments made by the then union ministers against its verdict upholding the validity of Sec. 377 of the Indian Penal Code that criminalises homosexuality. A bench of the then Chief Justice P Sathasivam and Justice Ranjan Gogoi reminded the ministers of their “responsibilities” while underlining that their statements were not required. We agree that one or two statements by (a) few ministers are not acceptable. They are not in good taste and also unwarranted. Though they have every right to criticise our judgments but not by making such statements, and persons occupying high positions must realise their responsibilities,” the bench said’ 68. ‘In Koushal v. Naz, a two-judge bench of the Supreme Court overturned a 2009 decision of the Delhi High Court decriminalising sodomy by Sec. 377 of the Indian Penal Code. In doing so, it has recriminalized every Indian who has ever had oral or anal sex (irrespective of the gender of the person they had it with, and irrespective of consent). Koushal represents two structural failures of the Supreme Court, at least one of which has sometimes been commended as a great success by some commentators. The first structural failure is the near-total abandonment by the Supreme Court of the principle of separation of powers, and its transformation into a populist, legislative court of governance. The Second failure, one that flows from the first one, is the court’s routine dereliction of its duty to give reasons for its decisions’ 69. The said judgement has been criticized by sexual minorities.

5.5.3. Review Petition against Suresh Kumar Khosal Judgment

‘Within nine days of the Supreme Court judgment upholding Sec. 377 of the Indian Penal Code, according to which homosexuality or unnatural sex between two consenting adults is illegal and an offence, the centre moved the apex court on Friday

(20 December 2013) seeking a review of its ruling. In its review petition the then Centre said: “The judgment suffers from errors apparent on the face of the record, and is contrary to well-established principles of law laid down by the apex Court enunciating the width and ambit of Fundamental Rights under Articles 14, 15 and 21 of the Constitution.” The IPC, when enacted in 1860, was justified; but with the passage of time it had become arbitrary and unreasonable, the petition added. “It is the submission of the Union of India that Sec. 377 IPC, insofar as it criminalises consensual sexual acts in private, falls foul of the principles of equality and liberty enshrined in our Constitution. Further, Sec. 377 which criminalises intercourse ‘against the order of nature’ is a reflection of outdated sodomy laws of the United Kingdom which were transplanted into India in 1860. They do not have any legal sanctity and in any case are unlawful in view of the Constitutional mandate of Articles 14, 15 and 21 of the Constitution.”  ‘The then Centre on Friday (20 December, 2013) asserted before the Supreme Court that laws must reflect social change and society’s aspirations, and should not operate in vacuum’. 

‘The Supreme Court agreed to have a relook at the December 2013 verdict on Sec. 377 IPC that recriminalized gay sex in India. This is only the third time in the history of the apex court that a curative petition has been accepted. Also significant is the fact that the court has agreed to have open court hearing during the review proceedings. Hearing before a five judge bench is expected very soon, though the exact date is not yet known.

The review petition against the judgment in Suresh Kumar Khosal Case was filed but Supreme Court did not allowed this review petition and the same was rejected by upholding the decision in Suresh Kumar Khosal case by saying that this judgment does not have any infirmity for review. The legal movement against the sexual minorities’ rights had to file a curative after the rejection of review petition and same was proceeded again in the name of curative petition as last effort in case of legal battle in any particular case.

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71 Ibid.
5.5.4. Curative Petition against Review Petition Rejection

The curative petition was filed against the rejection of review petition in Supreme Court and ‘the Supreme Court decided to hear in an open Court the Curative Petition filed by gay activists and Naz Foundation seeking to “cure the defects” in the judgement upholding the validity of Sec. 377 of IPC, which criminalises homosexuality between two consenting adults’\(^{74}\). ‘The Supreme Court’s decision to hear arguments on the curative petition filed to “rectify” its Sec. 377 verdict sends out an important and welcome signal’\(^{75}\). The curative petition was heard on 02\(^{nd}\) February, 2016 and same has been allowed to refer to the Constitutional Bench of five judges for deciding the case further. After this reference, the same curative petition has been pending before Supreme Court for hearing and final adjudication.

5.5.5. National Legal Service Authority v. Union of India and others\(^{76}\)
Judgment

Analysing the NALSA judgment, ‘The Supreme Court, in the National Legal Service Authority (NALSA) judgment delivered on 15-04-2014 recognized the legal and constitutional rights of transgender persons, particularly the rights of the hijra community as a ‘third gender’. In judgment of immense breath and vision, Justices K.S. Radhakrishnan and A. K. Sikri have brought hope and promise of citizenship to a community that has largely been outside the legal framework’\(^{77}\).

‘Relying on the definition in the Yogyakarta Principles and clarifies the distinction between gender identity and sexual orientation. The court engages with both these categories, but focusing only on the transgender subject. Transgender is seen as an umbrella category that includes those who identify as male to female, female to male, intersexed, and transsexual persons as well as those who identify as hijras, kothis, kinnars, aravanis/thirunangis, jogappas/jogta, shivshakthis and eunuchs. Significantly, the court says the term transgender includes ‘pre-operative, post-

\(^{74}\) Legal Correspondent, ‘SC to hear plea on Sec. 377 in open Court’, *The Hindu*, April 23, 2014.
\(^{75}\) Editorial, ‘Go on, undo’, *The Indian Express*, April 24, 2014.
\(^{76}\) WP (Civil) No. 604 of 2013; also available http://supremecourtofindia.nic.in/outtoday/wc40012.pdf
operative and non-operative’ transsexuals who strongly identify with persons of the opposite sex.”

‘NALSA filed this petition in 2012. In 2013, this matter was tagged with petition filed in the Supreme Court by the Poojaya Mata Nasib Kaur Ji Women’s Welfare Society, an organisation working for kinnars, a transgender community, Laxmi Narayan Tripathi, a well-known transgender rights activist from Mumbai also intervened in this case.’ There were two central questions that the court addresses. The first was the recognition of a third gender category for hijras or equivalent cultural identities in order to facilitate legal rights. The Second was that transgender persons, for the purpose of law, should be able to identify in the gender of their choice, which could be male, female or a third gender category. In the operative part of judgment, the court held that hijras and eunuchs be treated as a “third gender” to safeguard their fundamental rights. The court also held that transgender persons have the right to decide their self-identified gender.” ‘By recognising the rights of the transgender community, the State is not doing out largesse; it is only performing its duty under the Constitution.’

‘From the point of view of Constitutional developments, the NALSA judgment is path breaking. The court relies on Article 14 (right to equality), 15 and 16 (right to non-discrimination), 19 (right to freedom of speech and expression), 21 (right to live with dignity and right to autonomy), Article 51 (Directive Principle of State Policy) (fostering respect for international law and treaty obligation) and the words justice, social economic and political in the Preamble to the Constitution.”

‘One of the most innovative parts of the judgment is the Court’s reading of Article 19(1) a, the right to freedom of speech and expression to include the right to expression of one’s self identified gender. No person can be told how to dress subject to restrictions in Article 19(2) (which include ‘public order, decency and morality). This is bold move and identifies the link between gender identity and dress, words,

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79 Ibid.
80 Ibid.
82 Ibid.
action and behaviour. This is especially important in the context of discrimination against transgender persons who challenge binary dressing and behaviour.\(^83\)

‘Again, in stark contrast to the judges in Khosal, the court observed that the role of the judiciary is only to decide disputes but also to uphold the rule of law and ensure access to justice to marginalised section of society, to which transgender persons clearly belong. The court says, “Our like of society is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it—when we discuss about the rights of TGs in the Constitutional context. We find that in order to bring about a complete paradigm shift, law has to play a more predominant role”. Moments of legal and Constitutional change that engender a complete paradigm shift are far and few in between. This is a moment that needs to be celebrated and applauded. It is now up to the legislature and Indian citizenry in general to translate these Constitutional norms into laws, policies, and regulations.\(^84\)

“The transgender people, as a whole, face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in healthcare, employment and education, leave aside social exclusion. Now, it is time for us to recognise the rights of transgender as a separate category and to ensure a dignified life for them”, observed a Bench of Justices K.S. Radhakrishnan and A. K. Sikri.\(^85\) “All this can be achieved if a beginning is made with the recognition of transgender as the third gender. By doing so, this court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and Constitutional rights. It is, therefore, the only just solution which ensures justice not only to transgender but also to society as well”\(^86\).

“Expressing its anguish at the plight of transgender, the Bench said: “Seldom, our society realises or cares to realise the trauma, agony and pain which members of the transgender community undergo”. Nor did it appreciate their innate feelings, especially of those whose mind and body disowned their biological sex. “Our society often ridicules and abuses the transgender community and in public places like

\(^84\) Ibid.
\(^86\) Ibid.
railway stations, bus stands, schools, workplace, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities”87.

The Bench said: “Social Justice does not mean equality before law on paper but translating the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy, into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the transgender which legitimately belongs to them”88.

The article concludes with the recommendation and guidelines for ‘Centre and State governments should seriously address the problems faced by them such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence on Sex Reassignment Surgery (SRS) for declaring one’s gender is immoral and illegal’89. ‘SC recognises third gender, glimmer of hope for gays’90. ‘Discrimination no longer my favourite word-finally, we have a foot in the door’91.

‘In a significant step, the Supreme Court on Tuesday (15 April, 2014) recognised the transgender community as a third gender along with male and female’. Further, ‘The Bench said “recognition of transgender as a third gender is not a social or medical issue but a human rights issue. Transgender are also citizens of India. The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender”. By virtue of this verdict, all identity documents, including a birth certificate, passport, ration card and driving licence would recognise the third gender’,92. This judgment is major example of gender equality in India. ‘The Calcutta High Court quashed all the charges framed

88 Ibid.
89 Ibid.
91 Aleesha Matharu, ‘Discrimination no longer my favourite word-finally, we have a foot in the door’, The Indian Express, April 16, 2014.
against Pinki Pramanik’\(^93\) who was alleged on the basis of sexual orientation and gender identity.

5.5.6. Navtej Singh Johar & Ors. v. Union of India

A fresh writ petition\(^94\) on Sec. 377 of IPC was filed before Supreme Court by well-known sexual minority celebrities in India. This petition to the Union of India through the Ministry of Law & Justice was filed on April 27\(^{th}\), 2016. The petition seeks writ of mandamus, declaring the right to sexuality, right to sexual autonomy, and right to choose a sexual partner to be part of the right to life guaranteed under Article 21 of the Constitution\(^95\), repealing of Sec. 377 IPC on the basis that it violates the basic right to life. The petition is fresh and separate from Naz Foundation case petition. This petition is to be heard first time on 29\(^{th}\) June 2016. The central government stand is not clear on this and likely to get some direction by the Supreme Court. The hearing on 29\(^{th}\) June 2016 was ended with referral of petition to the Chief Justice of India for deciding whether this petition should be clubbed with Naz Foundation petition (With Pending Curative Petition) because of having same issues?

5.6. Some Related Views and Sexual Minorities

In the words of Justice V.R. Krishna Iyer, “I wish we had a socialist secular democratic republic with a judicature that will be fundamentally fair and passionately indignant so that everyone gets what is due to him, securing dignity, morality and spiritual integrity. The executive administration of a society can be truly sacred and sublime only when the judiciary and the legal decisions it pronounces are altogether unaffected by considerations of class, community, fraternity and cultural ethos”\(^96\).

Evaluating the ‘three arguments of the Delhi High Court’

Evaluating the ‘three arguments of the Delhi High Court’\(^97\), Pritam Baruah concluded and ‘have argued for stronger foundations of the ideas of non-discrimination, privacy and human dignity used by the court in Naz Foundation. Though his arguments do not build up to one central

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\(^93\) Times News Network, Calcutta High Court drops rape charge against athlete Pinki Paramanik, Times of India, September 12, 2014.
\(^94\) Navtej Singh Johar & Ors. Vs. Union of India.
\(^95\) Available at http://orinam.net/377/navtej-johar-vs-uoi-petition, visited on June 28\(^{th}\), 2016.
argument, there is one tenor common to all Sec.s of the paper⁹⁸. He also suggested that ‘cases involving serious Constitutional issues may require a court which is dedicated to Constitutional issues and which is properly equipped with time, resources and personnel to deal with them’⁹⁹. He also emphasised in conclusion the two important remarks i.e. ‘the first is with regard to the ideas of coherence and judicial law making, and the Second is with respect to the use of the term Constitutional morality by the court’¹⁰⁰. ‘The court in Naz Foundation has followed this well-travelled path by demonstrating that the idea of immutability and constructive immutability are common to the grounds in Article 15 and since sexual orientation is an immutable characteristic, it should be provided the protection of Article 15’¹⁰¹.

‘Spurred by the recent Supreme Court ruling on Sec. 377, there have been protests raging across the nation, and in its attempt to land-support to the cause, Akshara Theatre performed a dramatization of the trials of Oscar Wilde, the famous fashionable 19th Century playwright who found himself facing criminal proceedings under Sec. 377 of the British Penal Code, at the end of the 19th century. The play titled “The Importance of Revoking 377”, is directed by Gopal Sharman and performed by him along with Jalabala Vaidya, Sunit Tandon, Angad Thakur, Rakesh Palisetty and others’¹⁰².

A film titled ‘And you thought you know me’, was screened at Open Frame International Film Festival held on 28 September, 2013. ‘The discussion after And you thought you know me, sexual rights activist Pramada Menon’s first film, is a case in point. Through interviews with five women who identify themselves as being outside of the heterosexual framework, the film acknowledges and celebrates the queer experience in Delhi. Of the five women, two were never seen in the film; their voices are overlaid with a montage of Delhi’¹⁰³. ‘A world music album comprising

⁹⁹ Ibid. at 523.
¹⁰⁰ Ibid.
¹⁰¹ Ibid.
songs by nine (9) transgender artists from across India is going to hit the stands soon104.

‘Many argue that homosexuality goes against nature’s will. Is it so? Let us just acknowledge that homosexuals are born with the natural tendency to prefer people of their own sex. If the rule is that opposite poles attract, every rule has an exception105. ‘Criminalizing homosexuality and calling it unnatural is not going to deter the gay community from its activities. The Supreme Court ruling is only going to marginalize the community further. It has upheld an archaic law. What is the rationale behind passing the onus to the legislature? Given the amount of legislature work that is pending before Parliament, the sexual minority community can hardly rely on it for any respite106. In contrast to the Ketan Anand’s view, K. P. Sanal Kumar, replied that ‘Sec. 377 was incorporated more than 150 years ago. I (K. P. Sanal Kumar) did not hear any debate on the subject till the Delhi High Court’s judgement decriminalizing gay sex. There is no need for panic or disappointment over the Supreme Court’s verdict; it has only restored what existed for before 150 years. As rightly suggested by the Supreme Court, it is for the legislators to delete or modify the Sec. as they deem fit107.

Articulating about the book titled ‘No One Else: A Personal History of Outlawed Love and Sex’, written by Siddharth Dube and Harper Collins, Arvind Narrain includes that ‘till today, children are bullied in schools around the country on grounds of their sexual orientation or gender identity’108. ‘Bad laws can always be used to harass innocent citizens and to create a climate of fear and repression that is antithetical to how a modern, independent society should function109.

‘The Delhi High Court judgment in Naz Foundation v. Govt. of NCT Delhi case has been hailed by legal experts who described it as a ‘progressive’ verdict in keeping with the changing times. Former Law Minister Shanti Bhusan, Senior Advocate KK Venugopal and KTS Tulsi termed it’s a “landmark judgment” which

107 Ibid.
will have a bearing across the country. “It is an absolutely correct judgment and I welcome it whole heartedly. It is a much-delayed judgment and it should have come much earlier”, Bhushan said\textsuperscript{110}. Venugopal said “It is a very progressive judgment in keeping with the time”. His views were shared by Tulsi who said “It is a historic judgment that ended centuries of injustice against people who have caused no harm to society”. Advocate Kamini Jaiswal said “The Court accepted the hard reality of society and with the changing trend of the society, the needs to be changed”\textsuperscript{111}. ‘Dean, Students’ Welfare, Lucknow University, Prof. Nishi Pandey welcomed the High Court verdict saying it was long overdue. “Such people should have got recognition earlier. They are happy in their own little world and only want people’s acceptance,” Pandey expressed. She added that Indian society had been progressive on many fronts in recent years and it was a suitable time to think of such a change\textsuperscript{112}. ‘Former Lucknow University Vice Chancellor Dr. Roop Rekha Verma felt that it was time to realise that sexuality had different forms and welcomed the Court verdict. “Earlier, the general perception was that only man-woman relationship existed but that did not hold true in the modern world. It is good to remove stigma from alternative forms of sexuality. Over the years the Indian society has accepted many changes and this too is going to normalise in days to come,”\textsuperscript{113} she said.

‘Head of the Sociology department (Lucknow University) Prof. AK Srivastava said, “It is not a crime to be a gay. At the same time, we cannot deny that the Indian society was not ready for it openly,” he said. “It is the people who have to decide whether they are ready to coexist in a system allowing homosexuality”, he stressed. He felt that the issue should be left to individual choice and preference. However, Head, Department of Political Science, Prof. SK Dwivedi dissented saying that it was an unnatural practice\textsuperscript{114}. “About time, Not only is it a calm, lucid, clean judgment full of common sense, but it also has been written in an impressive literary style,”\textsuperscript{115} ‘The Delhi High Court on Thursday (02.07.2009) legalised homosexual acts between consenting adults by overturning a more than 150 year old law finding

\textsuperscript{110} Pioneer New Service (New Delhi), The Pioneer, July 3, 2009.
\textsuperscript{111} Ibid.
\textsuperscript{113} Ibid.
\textsuperscript{114} Ibid.
it unconstitutional and a hurdle in the fight against HIV/AIDS\textsuperscript{116}.

Referring many arguments for right to dignity, right to privacy and right to equality, Ajendra Srivastava concluded with ‘a comparison between the Naz Foundation and Lawrence shows striking similarities between the two. Privacy argument of the former closely follows the latter. However, the former differs from the latter in that it equally emphasizes privacy, dignity and equality whereas the latter gives primacy only to privacy. On the whole, Naz Foundation and Lawrence have much in common’\textsuperscript{117}.

Forwarding the understanding of marriage, ‘Jonathan Rauch, a gay American author wrote in his book on gay wed-lock, the essence of marriage is not sex or children or even self-fulfilment, but rather a lifelong commitment, recognised and supported by society, by two people to “have and to hold for better for worse till death us do part”.\textsuperscript{118} ‘If the government musters courage to decriminalize homosexuality, or if the Delhi High Court effects such a change on the petition challenging Sec. 377 of IPC, India will shed the dubious distinction of being among the 10 countries that impose life sentence for gay sex’\textsuperscript{119}.

‘Until, almost seven years back in the Naz India case the Delhi High Court decreed that Sec. 377 of the Indian Penal Code, which was used to criminalize them, no longer applied to consenting adults. It was a rare example of the courts cutting through the thicket of archaic laws we have acquired from the British and accrued to ever since then. It is a job that could have been done by Parliament, if it could turn its attention from cartoon controversies and political procrastinations. But since this seems impossible, it was left to judge like AP Shah and S Muralidhar, who wrote up for the rights of individuals\textsuperscript{120}. Discussing about the human rights, ‘Justice Krishna Iyer, a human being is entitled to these (human rights) from womb to tomb’\textsuperscript{121}. ‘It is extremely difficult to justify in practice what cannot be justified in theory; but a Sec.

\textsuperscript{116} Harish V Nair, ‘It’s okay to be gay’, \textit{Hindustan Times}, July 3, 2009.
\textsuperscript{117} Ajendra Srivastava, ‘Gay Sex and the Constitution: Naz Foundation and Lawrence Compared’, 51 \textit{JILI} 522 (October-December 2009).
\textsuperscript{118} Gay Marriage, ‘To have and to hold: The trend toward giving homosexuals full marriage rights is gaining momentum’, \textit{The Indian Express}, November 23, 2012.
\textsuperscript{119} Manoj Mitta, ‘Is India ready to accept gays?’ \textit{The Times of India}, June 29, 2009.
\textsuperscript{120} Vikram Doctor, ‘The Power To Abuse’, \textit{The Times of India}, July 5, 2012.
(Sec. 377 of IPC) that has failed both the test of jurisprudential theory and failed miserably in practice has no justification whatsoever in bring a part of our penal code.\textsuperscript{122}

In First Lucknow Social Sciences Congress (LUCSOC) 2013, Prof. Alpana Srivastava discussed that “Social Science is a very high profile area all the time”. She pointed out that there are three factors which are required for a good society, these three factors are: ‘social justice, sustainability behaviour and emotional concern’.\textsuperscript{123} According to Aditya Bondyopadhyay, a primer on Sec. 377 of Indian Penal Code-

‘(1) Sec. 377 is about sodomy or the act of anal sex. A man who has anal sex with another man, or another woman, or an animal is guilty of the crime as given in Sec. 377.

(2) Sec. 377 has however disproportionately been used against male to male sex acts only. Therefore, in practice it has come about to be an effective anti-homosexuality law.

(3) We have also had prior judgments by courts that have extended the scope of Sec. 377 to oral sex, inter-thigh sex, and mutual masturbation. In other words it covers nearly every sex act possible between 2 males!

(4) Incidentally Sec. 377 is a victim-less crime! The only such crime in the books! It is applied even if the act was consensual between the parties! Therefore, another way of looking at it would be to say that the State is criminalising a class of citizens not because of some crime or harm they have caused, but because of the prejudice and hatred that the State has against that class of citizens.

(5) Interestingly, only the penetrator (top) is a criminal under Sec. 377. The penetrated (bottom) is charged with abetment that is, helping the criminal in performing the crime.

(6) Sec. 377 needs to go because it denies a class of citizens their basic fundamental right to a life of dignity and non-discrimination.

\textsuperscript{122} Animesh Sharma, ‘Sec. 377: No Jurisprudential Basis’, \textit{EPW} 14 (November 15, 2008).

\textsuperscript{123} Prof. Alpana Srivastava in First Lucknow Social Sciences Congress (LUCSOC) 2013, held at BBAU, Lucknow, March 14\textsuperscript{th}-15, 2013.
Finally, it needs reiterating that we have asked for Sec. 377 to be interpreted in a manner so that it does not apply to sex that was done privately between the adults and with consent. We have not asked for it to be repealed because today if some man/male is raped, that is the only law we can use against the rapist!”

In a monthly talk, Arvind Narrain presentation traced out the story of the Constitutional challenge to Sec. 377 of the Indian Penal Code and concludes ‘by mapping the challenge of advancing the rights of sexual minority persons as a socio-political and legal struggle’.

‘The repeal of Sec. 377 of the Indian Penal Code in 2009, which had decriminalized same-sex relations, was a sign of changing attitudes to gays and lesbians in India. The overturning of this decision by India’s Supreme Court in December 2013 is an indication of how fragile rights relating to gender and sexuality are in India.’

‘Fire rests at an intersect between a series of competing discourses on diasporic identity, sexuality, nationalism, religion, modernity, and globalization.’

‘To be sure, many aspects of this interpretation are true, it is not possible to deny the high levels of violence that people of same-sex sexual orientation (and gender non-normative people) have faced in India, at least in the recent past. Further, there is no doubt that with increased visibility of homosexual subjects, non-normative gender and sexual practices have been made increasingly explicit and articulated as ‘a problem’. This apparent problem, however, cannot simply be understood through a linear narrative of a conservative tradition giving way to a modernity, evidenced through juridical acknowledgement of new forms of the liberal sexual citizenship (Boyce 2006).’

‘Proceeding from these concerns entails research and advocacy that complicates representations of same-sex practices and subjects, suggesting arrange of

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124 Aditya Bondyopadhyay, ‘[Harmless Hugs] A primer on Sec. 377 of Indian Penal Code’, accessed on 15.09.2015.
127 Id. at 234.
explicit and implicit possibilities within a more normative arena of otherwise seemingly heterosexual intentions and heteronormative locals. This stance facilitates a more nuanced understanding of same-sex sexual subjects who may not be readily inscribed within a manifest social schema of homosexual stances, locations or identities, but who are present in affect and consequence. Perhaps most importantly, such a perspective offers the potential for new insights into the unarticulated oppressions and violence that men who have sex with men and women who have sex with women suffer, typically ‘invisiblised’ in heteronormative representations of gender but intrinsic to same-sex sexual practices and ongoing claims to rights. ‘India is the preferred destination for infertile couples as well as gay couples seeking surrogacy’.

‘To come “out” and declare your sexual preferences would have been unthinkable a while ago but today there is a confidence in a community that is much maligned. These stories allow you to intimately experience a world that is misunderstood, stereotyped and judged harshly. To single out any of the stories would be unfair since each of them is quite unique, lively, some explicit and sensuous.’

‘Three different rulings (Naz Case, Suresh Kumar Khosal Case, NALSA Case) of the Supreme Court (SC) on the rights of sexual minorities and that of religious minorities to adopt children have led to discussions and debates as perhaps never before. While the December 2013 ruling upheld the criminalising of consensual sex between adult homosexuals, the more recent one recognised transgender as the third gender with the right to claim a formal identity and thus the right to marry, own property, inherit and adopt. In February this year (2013), the apex court pronounced that all Indian citizens, irrespective of their religious identity, have the right to adopt a child under the Juvenile Justice Act. These rulings on two of Indian society’s most

sensitive topics-sexuality and religion-have brought to the fore issues beyond their immediate impact.¹³²

‘Will the marriages and families that are now legally allowed to transgender be under the various personal laws? If so, how will that be ensured? After all, the most vocal proponents of the Uniform Civil Code (UCC) may well be uncomfortable with transgender marrying and raising children, if their stand on Sec. 377 is an indication. The Supreme Court too has generated a legal conundrum-do transgender who marry and raise a family have a right to have sex or will that still remain criminalised?’¹³³

‘There are contradictions in the rulings of the Supreme Court over the last one year itself. The three judgments have also thrown up questions as to whether criminal law should reflect a society’s moral values or whether the State should uphold the rights of all citizens regardless of the majority’s social and cultural values. Moreover, the judgment on transgender has exposed a contradiction in the stand of political parties which oppose homosexuality but want a (Uniform Civil Code) UCC; if the UCC excludes sexual minorities then it can neither uniform nor universal for all citizens. Society at large, too, now cannot shy away from a long postponed conversation with itself on matters of sexuality and morality. What this churning throws up remains to be seen’¹³⁴.

Analysing the Naz Foundation case in Delhi High Court and Supreme Court, Prof. Upendra Baxi, emeritus Professor of Law, University of Warwick, the U.K., discussed that ‘The Naz 2 decision of the Supreme Court reverses the progressive, egalitarian, inclusive, and Constitutionally wise decision of the Delhi High Court (HC) (Naz 1: Baxi 2011 for a detailed analysis) and it has been criticised by liberal opinion in India (Sheikh and Narrain 2013) and everywhere. In one fell swoop, Naz 2 took away everything that the Delhi HC had conferred on sexual minorities. The SC denied not merely the right to perform same-sex acts but also their status as minorities, describing them as “miniscule”, ruling as “not proven” the terror and torture they undergo at the hands of police, and holding laconically that theirs was not

¹³² Editorials, ‘No Going Back: The Supreme Court’s rulings on sexual minorities have had a churning effect’, XLIX EPW 8 (April 26, 2014).
¹³³ Ibid.
¹³⁴ Ibid.
a complaint against denial of identity rights but an unsustainable plea for immunity for the performance of acts contrary to “nature”. By taking his arguments, Prof. Upendra Baxi further discussed the ‘Supreme Court arguments in Naz 2 as ‘fallacious arguments’ and referred the suggestion to decide the case of Constitutionality of a law prior to Constitution enactment, with a bench larger than two justices as Keshwananda Bharti was decided by the full court. By the editorials of Economic & Political Weekly, it was argued that ‘Sec. 377 of the Indian Penal Code must be repealed because it denies Constitutional rights to sexual minorities’.

While concluding in the paper entitled “Navigating the Noteworthy and Nebulous in Naz Foundation”, Vikram Raghavan emphasised that ‘Naz Foundation gives new meaning to identity politics in India. Dominant political and legal conceptions of identity focus on groups traditionally knitted together by religious, caste, or linguistic ties. By acknowledging the distinct status of persons, whose only common bond is sexual orientation, and addressing them as a collective (actually using the phrase “LGBT”), Naz Foundation recognises the emergence of new social identities while carefully sidestepping lingering concerns about their elite roots and urban biases’. In so doing, Naz Foundation, unlike any other decision before it, has the unique potential to diminish popular, but irrational, more condemnation of stigmatized groups.

Witness the headlines in the Indian press reporting the decision “It is ok to be Gay”, “Sexual Equality”, “Gay and Finally Legal”, and “Sexual revolution in India”. It is for this reason, perhaps, the some commentators have argued that Naz Foundation is India’s Roe moment. Indeed, the mass publicity and fanfare

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136 Id. at 13.
137 Editorial, EPW 6 (October 25, 2008).
139 Id. at 416.
140 Stigma against gays is widely prevalent even among urban middle classes are considered to be socially progressive. See e.g., The Rainbow Schism, Hindustan Times, August 13, 2009 (according to a recent survey, 62 percent of respondents think homosexuality is a disease; 80 percent believe that same-sex relationships are against Indian Culture and over 90 percent say they have no gay friends.), available in Vikram Raghavan, ‘Navigating the Noteworthy and Nebulous in Naz Foundation’, NUJS Law Review 2 NUJS L. Rev. 397 (2009), 417 (July-September 2009).
heralding the decision presents a rare opportunity for activists to reshape public opinion and influence a wider social debate about gay rights.142

This is especially important, as gays and other disaffected groups cannot only rely on courts to advance their civil rights agenda. They must build new political coalitions and engage the legislative processes.143 Finally, the decision bolsters the Delhi High Court’s reputation for being India’s most important Constitutional Court apart from the Supreme Court. In recent years, the High Court has produced some innovative decisions that push the boundaries of our Constitutional jurisprudence.144

The then Chief Justice Shah and Justice Mrualidhar, who comprised the Naz Foundation bench, also recently dismissed a petition, which wanted a reality television program for its sexual content. Refusing to take the case, the then Chief Justice reportedly observed that Indian Culture “is not so fragile” to be affected by single program.145 Naz Foundation is the latest milestone in the Delhi High Court’s impressive track record, and a demonstration that one does not always need to depend on the Supreme Court for Constitutional salvation.146

While dealing with the Naz Foundation judgment, Rukmini Sen in her paper took two points (a) ‘Tracing a history of what had been the efforts taken by the civil society and the responses of the legal system before the 2009 judgment. This is necessary in order to see the continuities and discontinuities with past on the issue of homosexuality. (b) Categorizing the dominant responses to the judgment under certain conceptual discussions, namely responding to a movement, upholding privacy


143 There are some encouraging signs that this is happening. See, e.g; Transgender to Enter Politics, The Hindu, September 7, 2009 (group of transgender persons decide to contest elections to Secure greater rights, available in Vrakram Raghavan, ‘Navigating the Noteworthy and Nebulous in Naz Foundation’, NUJS Law Review 2 NUJS L. Rev. 397 (2009), 417 (July-September 2009).

144 Two notable gems are Magbool Fida Hussain v. Raj Kumar Pandey, 2008 Cr. L. J. 4107 (Del) (decrying misuse of obscenity proSecutions) and justice and Parents Forum for meaningful Education v. Union of India, AIR 2001 Del 212 (affirming Constitutional rights of Children and Outlawing Corporal Punishment in Delhi Schools).


rights and the spirit of the Constitution. She analysed the responses in Delhi High Court judgment (Naz Foundation) in five categories: ‘Responding to a movement; Privacy and Dignity; Beyond Sexual Minority Rights; Spirit of Constitution; Organised Religion, Heteronormative reinforcement; Accommodative voice’. She further emphasized on some ‘unresolved concerns’ that ‘the judgment brings within the public domain certain discussions which get recognition. A question which is naturally raised is whether all these responses come in from a particular Sec. only because the court has responded to the issue? This question comes the debates surroundings rights of people with homosexual orientation have been doing rounds since the early 1990s, with activists, NGOs and victims deliberating upon it. It remains to be seen whether this judgment actually brings a wider community within the field of discussion about an issue which has long been put under the closet. The judgment breaks the silence on this count at least. Or is it because the judiciary claims a status and credibility in India more than activists and NGOs and that is the reason why the urban educated elite definitely have some opinion on the judgment? The arguments given in the judgment undoubtedly sound; are not being made for the first time. In fact it can be argued that when the campaign on Lesbian Rights Memorandum, 172nd Law Commission Report and the Sexual Assault Bill drafted by the National Commission for Women (NCW) had proposed deletion of sec. 377 IPC, the judgment stops at merely decriminalising and goes a few steps backward, rather than forwarding an already existing approach.

She finally concluded that ‘it is also realised how over periods of time positions on ‘Controversial’ social issues change like shifting political ideologies and that there is so little consensus among different organs, departments, commissions of the government. The judgment is definitely a well-researched document addressing and even defining some of the basic legal principles. It is a judgment which causes for celebration as has expectedly happened, but it also raises doubts on whether this can

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148 Id. at 491.
149 Id. at 502.
150 Ibid.
be sustained, and the legislature will start from where the judiciary ended rather than reinventing\textsuperscript{151}.

Analysing the right to privacy in Naz Foundation judgment, Saptarshi Mandal says that ‘the privacy argument in Naz Foundation has both limitations and radical possibilities but the limitations should not lead us to conclude that the ‘privacy argument’ is not important. It is indeed to the contrary, as Naz Foundation has shown\textsuperscript{152}. According to Mahendra P. Singh, ‘the Constitutional interpretation in Naz Foundation is not in line with the interpretation of the Constitution as established by the Supreme Court. As some of the issues decided in Naz Foundation conflict with large bench decisions of the Supreme Court up to seven judges, the Naz Foundation interpretation could be upheld as practice and precedent of the court only by a bench of not less than nine judges\textsuperscript{153}. He further ‘suggested with some difficulty the possibility of reading down Sec. 377 IPC by making it non-applicable to “Consensual sexual acts between adults in private”.’\textsuperscript{154}.

‘As a matter is pending the Supreme Court and the Supreme Court has enormous powers to devise appropriate procedures and remedies according to the requirement of each case instead of availing of the option of strong review of either upholding or invalidating Sec. 377 IPC. It could also exercise a weak form of review by asking the Parliament to re-examine Sec. 377 IPC in the light of new developments in law as already suggested by the Law Commission. Though, of course, such a review assumes unconstitutionality of Sec. 377 IPC, the Supreme Court does it without arriving at such a conclusion\textsuperscript{155}. ‘The judgment of India’s highest Court has re-established discrimination based on sexual orientation. A close reading of the

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\textsuperscript{154} Ibid.
}
judgment upholding Sec. 377 of the Indian Penal Code indicates that the Supreme Court misread the Constitution and legal precedent. More worryingly, it failed to uphold the fundamental rights of Indian citizens.156

Discussing the Naz Foundation judgment, Shamnad Basheer, Sroyon Mukherjee and Karthy Nair conclude that ‘in deploying vague phrases such as ‘unnatural offences’ and ‘against the order of nature’, Sec. 377 IPC is Constitutionally flawed. Apart from the indeterminacy of the expression ‘unnatural’ in a context such as sexual preferences, there is no connection between the objective that is sought to be achieved (presumably preventing harmful sexual activities) and the classification made between natural versus unnatural sex.157 Further, ‘As mentioned above, if the court in Naz Foundation struck down the entire Sec., there would have been a lacuna in the law, and so the court did what was strategically best under the circumstances.

However, the fact that the law continues to label homosexuality and other non-harmful sexual preferences as ‘unnatural’ is problematic. The optimal solution would be, as the Law Commission recommends, for the Parliament to scrap Sec. 377 IPC in its entirety and instead introduce other provisions that address specific categories of problematic non-consensual sexual activities. Till then, Indian homosexuals will have to contend with living ‘unnatural’ lives. Not a bad place to be in, given that righteous ‘monogamists’ have also been accused of breaching a similar ‘natural order’.158

‘Having demystified sec. 377 IPC to the extent of almost the obvious, that it does in fact stand to criminalize homosexual conduct and homosexuality in toto, Alok Gupta move to his next query on how because of the difficulty in arresting people for sexual conduct in private, the enforcement of Sec. 377 IPC has also become pervasive and is being used against homosexuals in a more general and arbitrary manner.159

159 Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4819 (November 18, 2006).
'By the lack of a “cause of action” the Delhi High Court was referring to government records of actual prosecution, arrest, conviction and sentence under 377 IPC of consenting adults who were caught for having sex in private. Even when Sec. 377 IPC applies to any “Voluntary” act, it is almost impossible to find a single reported case in the last 50 years where two adults have been punished in the courts for consensual homosexual sex in private'160.

'Several studies161 focusing on the actual application of Sec. 377 IPC show that most cases that actually come under it deal with non-consensual and coercive sexual activities. Out of over 50 reported judgments under Sec. 377 IPC that Alok Gupta has looked at more than 30 percent deal with cases of sexual assault or abuse of minors, the rest deal with non-consensual sexual activities between men and with women. Only two cases from the 1920s and 1930s, conclusively, deal with consenting sexual activities between adult males'162.

'So in a way the Delhi High Court was right that Sec. 377 IPC, at least in independent India, does not appear to be enforced against consenting homosexual persons. But there is a huge fallacy in this sort of conclusion. Reliance on reported judgments of the courts of appeal are limiting as trial court proceedings are not similarly archived. So we have no data on cases under Sec. 377 IPC that went to trial, and were never appealed and therefore remain unreported. To fully understand the impact of anti-sodomy laws our own benchmarks of what constitutes evidence and record of harm, cause and injury need to be revised and re-looked-away from the old requirement of government records'163. ‘The current reality of the use of Sec. 377 IPC, where because it is not possible to catch homosexuals in the act of the offence, the police are catching homosexual men and transgender persons all the time, merely on the suspicion that because of their appearance they are indulging in homosexual sex’164.

'Sec. 377 of the Indian Penal Code, which criminalizes homosexual relations, has no jurisprudential justification as it makes illegal a consensual, voluntary sexual

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160 Alok Gupta, ‘Sec. 377 and the Dignity of Indian Homosexuals’, EPW 4819 (November 18, 2006).
161 Ibid.
162 Ibid.
163 Ibid.
164 Id. at 4820.
act that does not harm a third party and falls within individual autonomy. The State cannot use its power to punish a particular practice on grounds of immorality only because a morality believes it to be so. This law also defines a criminal class not by virtue of its behaviour but by sexual orientation.\(^\text{165}\)

‘To what extent can morality as espoused by the State, be a ground for criminalisation of activities?’ If certain behaviour is regarded as morally wrong, is this sufficient justification for the creation of a criminal offence?\(^\text{166}\). ‘The Supreme Court judgment recognising the rights of transgendered person is a landmark ruling and restores faith in the Court’s ability to recognise gross injustice. The Bench comprising Justices K. S. Radhakrishan and A. K. Sikri has also restored the image of the court as capable of bold moves when it comes to addressing the denial of the right to be human simply on the basis of one’s sexual status and conduct. The Court’s progressive image was in tatters after the Suresh Kumar Kaushal v. Naz Foundation ruling in December 2013 that recriminalized gays and lesbians, and overruled the 2009 Delhi High Court’s decision that Sec. 377 of the Indian Penal Code was not applicable to consensual sexual relations between adults.\(^\text{167}\). She concluded with ‘right to humanity’.

‘I (Raju Ramachandran) am clear that the Constitution is not for the exclusive benefit of governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the ‘butcher, the baker and the candlestick maker’.\(^\text{168}\) Further, referring of Article 14, 15, 16, 19 and 21 of Indian Constitution, Raju Ramchandran pointed out that in gay rights case (Naz Foundation case), Delhi High Court forwarded the right to equality, dignity, autonomy, personal liberty, privacy and right to life which was refused by Supreme Court in Suresh Kumar Khosal case.

In summing up, Raju Ramchandran concluded that, ‘One Court, two mindsets’, ‘the lesson that we need to learn is this: Constitutional adjudication is serious business. Article 145(3) requires that a minimum number of five judges sit to decide

\(^\text{165}\) Animesh Sharma, ‘Sec. 377: No Jurisprudential Basis’, \textit{EPW} 12 (November 15, 2008).

\(^\text{166}\) ibid.

\(^\text{167}\) Ratna Kapur, ‘Beyond male and female, the right to humanity’, \textit{The Hindu}, April 19, 2014.

\(^\text{168}\) Raju Ramchandran, ‘One Court two mindsets’, \textit{The Indian Express}, April 18, 2014.
any substantial question of law relating to the interpretation of the Constitution. The Court ought to do this strictly"\(^\text{169}\).

‘Transgendered citizens have won a long-denied right, as the Supreme Court formally acknowledged a “third gender” status for them. Responding to a Public Interest Litigation (PIL) that appealed for greater mainstreaming and recourse against discrimination for transgender, the Court has declared that they should be given priority in education and employment, and recognised their status as socially and economically backward”\(^\text{170}\). ‘Live-in-relationship and homosexuality are the most latest and burning issues in India and need to discuss and debate in human rights perspective and culture utmost’\(^\text{171}\).

On dated 23\(^{rd}\) May, 2013, according to a jurisprudence and human rights subject teacher said about the study of homosexuality that give it a relation with theory of natural justice as well as the theory of Rosco Pound i.e. theory of “social engineering”. He discussed that “law is made for individuals and not individuals are made for law” hence, law has to give or provide at least something to a group or community irrespective of any other belief. He also argued for the utility of fundamental rights to each and every individual for which State has a duty to protect and provide. The scope of fundamental rights includes the sexual minority person also. For deciding the issue of homosexuality in Supreme Court, Mohd. Abdul Khadeer, Advocate, Former Addl. Public ProSecutor, High Court of A.P., Hyderabad suggested in his paper ‘that a larger bench of Supreme Court may call for expert opinions from psychologists, medical doctors, social scientists to ascertain the effect of homosexuality on body, mind and behavioural trait of homosexuals. It is a case of cross-cultural conflict between India and western countries’\(^\text{172}\).

Rajesh Chaudhary expressed about the repealing of Sec. 377 of IPC so that the police harassment of homosexual persons could be stopped\(^\text{173}\). He argued for

\(^\text{169}\) Raju Ramchandran, ‘One Court two mindsets’, \textit{The Indian Express}, April 18, 2014.
\(^\text{170}\) Editorial, ‘Righting a Wrong’, \textit{The Indian Express}, April 16, 2014.
\(^\text{171}\) Prof. S. K. Bhatnagar viewed in a National Seminar held at Swami Sukhdevanand Law College, Shahjanpur, UP, November 24\(^{th}\)-25\(^{th}\), 2012.
repealing of Sec. 377 IPC on the basis of having Protection of Child from Sexual Offences (POCSO). He emphasized that Sec. 377 IPC was mainly used for protecting the children from sexual offences. Joginder Singh (Ex-Director, CBI) argued that if the society needs to grow, then there must understand the needs of present. It means we have to change with respect to time¹⁷⁴.

According to Anil Srivastava, CEO, Q-Radio, Bangaluru, ‘Does a person have the rights on his own body? Whether the law has reached to our bedroom? If yes, then what will happen next? The human rights are primary and all other things are Secondary, he added¹⁷⁵. During researcher’s discussion with an Advocate, he mentioned about the sexual minority persons that these are highly refined nature persons. During the discussion, he emphasized that once he got a chance to visit France where he first time met with some sexual minority persons. He also welcomed and wished me for doing research on such complicated subject.

Referring to Justice J S Verma, Dipankar Gupta said that, ‘likewise, Justice Verma had no hesitation in upholding the rights of gay people. Once again, it was about individual rights. He did not refer to them as “beautiful” people, or something equally fetching, nor was he overflowing with patronising generosity. For him, it was simply a matter of human dignity that nobody has the right to trample on it in the name of the majority. If he had been alive today, his voice could not have been ignored by the Supreme Court and Sec. 377 IPC would have been history by now’¹⁷⁶.

‘A. Revathi, a vivacious transsexual woman, whose prose and poetry has been translated into Kannada, English and Hindi shares: “I was originally a boy named Doraisamy. Although my parents accepted my sexuality privately, they discouraged me from dressing as a woman in public. I could not find a job and depended on them financially”.’¹⁷⁷ ‘In February 2012, Anu C. became the first transgender to be

appointed as an employee (on probation) in the group D category in the Karnataka High Court.\footnote{178}

5.7. Rules of Interpretation and Sexual Minorities

When any ambiguity, inconsistency or repugnancy arises for understanding the proper meaning of a term or express word in law then it is obvious in such case that the rules of interpretation is applied. The understanding of ‘carnal intercourse against the order of nature’, privacy, liberty and freedom, life, unnatural, etc. are interpreted by Indian judiciary with interpretation rules specifically relating to Sec. 377 IPC definition. The literal rule (grammatical rule), mischief rule, golden rule, harmonious constructions are major rules of interpretation. Paper titled ‘Judicial Actions in Violation of Fundamental Rights: A Case Study to Naresh Shridhar Mirajkar versus State of Maharashtra’\footnote{179} discusses about the violation of fundamental rights by judicial actions. In finding the conclusion the research question for the study comes as ‘whether the judicial actions in violation of fundamental rights is subject to judicial scrutiny just as the legislature and the executive’.\footnote{180}

The study concludes that ‘the approach adopted by the Hon’ble Supreme Court of India was erroneous. Instead of relying upon the Universalist method of comparative Constitutional interpretation, it had been better to adopt the Genealogical approach and compare with the U.S. Constitution because India owes its great heritage to America for the concept of fundamental rights included in part III of the Indian Constitution. Therefore, for the reasons mentioned hereinabove, in case of any ambiguity or on a question related to interpretation of part III a reference and comparison to the U.S. Constitution and rulings of the Supreme Court of U.S. was mandated’.\footnote{181}

\footnote{180} Id. at 2.
\footnote{181} Id. at 4.
‘The Municipal Courts of India must take note of these existing norms of international human rights. This has been affirmed by the Supreme Court of India\(^\text{182}\) which has also held that there is need to evolve and adopt “principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy.”\(^\text{183}\) In ‘The Morality of Law’, it is said that ‘the Golden Rule to read something like this: “So soon as I have received from you assurance that you will treat me as you yourself would wish to be treated, then I shall be ready in turn to accord a like treatment to you”\(^\text{184}\).

‘Confronted with contradictory viewpoints regarding the criterion for determining the “legislative intent” of a beneficial provision, what are the crutches that trial court judges have at their disposal while delivering “Constitutional Justice”. Justice A K Sikri and Justice Aruna Suresh attempt to provide an answer: Where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statue has been enacted rather than the one which the statue would put hindrances in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result\(^\text{185}\).

‘Beyond protection of individual rights, the courts also have a mandate to evolve the science of jurisprudence as it was brought to our notice by Chief Justice S

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\(^{185}\) Suresh Khullar vs Vijay Kumar Khullar 1 (2008) DMC 719 Del., available in Flavia Agnes, ‘Conjugality, Property, Morality and Maintenance’, XLIV EPW 63 (October 31, 2009).
B Sinha, Justice Ramesh Madhav Bapat and N V Ramana of the Andhra Pradesh High Court in the following words: ‘The interpretation of law is not merely for the determination of a particular case but also in the interest of law as a science. As such, interpretation of law must be in accordance with justice, equality and good conscience, and more so, in furtherance of justice. If the court prima facie comes to the conclusion that the plaintiff/petitioner is entitled to interim maintenance, it can award, interim maintenance in the interest of justice, without being fettered by orthodox prejudices, by showing liberal readiness to move with times’\textsuperscript{186}. In case of dealing with the issue of Constitutionality of sec. 377 IPC, the rules of interpretation have to play a major role ahead.

5.8. Law Commission Reports and Sexual Minorities

The fifth and the fourteenth Law Commissions of India, headed by former judges of the Supreme Court of India and composed of well-known experts in law, which, on reference from the Government of India, respectively in the later half (1971)\textsuperscript{187} and at the end of the twentieth century (1997)\textsuperscript{188} undertook a comprehensive review of the IPC, however, did not delve deep into the complex interplay of morals vis-à-vis legal intervention against adult consensual homosexual behaviour in private. The fifth Law Commission merely took note of the stand of the Wolfenden Committee that consensual homosexuality between adults in private, being a matter of private immorality, be decriminalized, as it is not the law’s business to enter into the matters of private immorality.\textsuperscript{189} Recalling the inconclusive end of the debate sparked of by the Wolfenden Committee, the fifth Law Commission believed that disapproval of homosexuality by the Indian community justifies Sec. 377 IPC, the law against homosexuality, in the Penal Code.\textsuperscript{190} While the fourteenth Law Commission preferred

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\textsuperscript{189} K I Vibhute, ‘Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality’, 51 JILI 16 (January-March 2009).
\textsuperscript{190} Ibid.
\end{flushleft}
to endorse the proposals for reform suggested by the fifth Law Commission and to add a few more suggestions to it without examining (im)moral contours of the anti-homosexuality law.\footnote{K I Vibhute, ‘Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality’, 51 JILI 16 (January-March 2009).}

‘The fifth Law Commission, which for the first time, undertook a comprehensive review of the more than a century old IPC, sought ‘informed public opinion’ on (de)criminalization of homosexuality and the punishment provided therefore, and decriminalization of consensual sexual act between adults in private for suggesting reforms in provisions of Sec. 377 of the Penal Code. The questions included in its questionnaire read: (i) should unnatural offences be punishable at all, or with heavy sentences as provided in Sec. 377 IPC?, and (ii) should exception be made for cases where the offence consists of acts done in private between consenting adults?\footnote{Ibid.} The Commission received conflicting and indecisive ‘informed public opinion’ from the respondents who chose to respond to its questionnaire. Majority of the respondents favoured retention of Sec. 377 in the Penal Code. However, some of the respondents felt that homosexual acts between consenting adults in private need not be treated as offences, but others thought that consensual homosexuality in private, being ‘abominable and loathsome which tend to make men and women deprived’, need to be punished ‘in all circumstances’. Nevertheless, there seemed to be general feeling among the respondents that the punishment provided in Sec. 377 IPC is ‘unduly harsh and quite unrealistic’\footnote{Id. at 16-17.}. Recalling the functional orbit of criminal law outlined by the Wolfenden Committee and the proposition stressed by it that it is not the business of criminal law to enforce notions of private morality as well as the view of (unnamed) distinguished thinkers emphasizing the need to preserve the society’s cherished beliefs through criminal law, the Law Commission observed\footnote{Id. at 17.}:

There are, however, a few sound reasons for retaining the existing law in India. First, it cannot be disputed that homosexual acts and tendencies on the part of one spouse may affect the married life and happiness of the other spouse, and from this point of view, making the acts punishable by law has a social justification.
Secondly, even assuming that acts done in private with consent do not in themselves constitute a serious evil, there is a risk involved in repealing legislation which has been in force for a long time. The position might be different if we were merely refraining from legislating about a type of private conduct whose suitability for punishment is in dispute, but we are not legislating on a blank slate. Ultimately, the answer to the question whether homosexual acts ought to be punished depends on the view one takes of the relationship of criminal law to morals. The debate on the subject, sparked off by the Report of the Wolfenden Committee, has not yet come to an end. There will always be two views on the question how far it is the business of criminal law to enforce notions of private morality. If one shares the reasoning of the Committee, namely, that there is a sphere of private morality in which criminal law has no business, then the answer is clear, but it is well known that there are distinguish thinkers who take a different view, emphasizing the need for preserving the society’s cherished beliefs.195

‘With this reasoning and implicitly following the line of argument of Lord Devlin that criminal law is justified in enforcing morals, the Law Commission recommended retention of homosexuality (including homosexual act between consenting adults in private) in the Penal Code. It opined: It appears to us that, in this highly controversial field, the only safe guide is what would be acceptable to the community. We are inclined to think that Indian society, by and large, dis-approves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private.196

‘However, the Commission felt that the punishment (life imprisonment or imprisonment of either description for a term up to ten years) provided for ‘unnatural offences’ in Sec. 377 IPC is ‘very harsh’ and ‘unrealistic’. It recommended scaling down of the punishment to imprisonment for a term up to two years, or fine or both. However, it recommended a comparatively longer term of imprisonment (up to seven years) for such an unnatural sexual assault on a minor girl or boy by an adult. Its proposed Sec. 377 IPC read as-

196 Id. at 17-18.
377. Buggery.-Whoever voluntarily has carnal intercourse against the order of nature with any man or woman shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and where such offence is committed by a person over eighteen years of age with a person under that age, the imprisonment may extend to seven years.

Explanation.- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Sec. 197

‘It is pertinent to note that the Indian Penal Code (Amendment) Bill, 1978, through its clause 160, sought to substitute the existing Sec. 377 IPC by new Sec. 377 IPC drafted on the lines suggested by the fifth Law Commission. However, clause 160, like other clauses of the Bill, could not become effective as the Amendment Bill, though passed by the Rajya Sabha, lapsed due to the dissolution of the Lok Sabha in 1980’ 198.

‘The fourteenth Law Commission, with a view to suggesting reforms in the Penal Code, undertook a comprehensive review in 1997 of the IPC. It sought public opinion about: (i) the clause 160 of the Amendment Bill of 1978, (ii) mandatory minimum punishment for unnatural sexual assault by an adult on a minor girl or boy, and (iii) retention in Sec. 377 IPC of consensual sexual act between consenting adults in private. The question formulated for the purpose read as 199:

Sec. 377: Unnatural Offences.

(a) Do you agree that the following clause 160 of the Amendment Bill be substituted for Sec. 377 IPC as suggested by the Law Commission in its 42nd Report-

(b) Do you agree that a minimum punishment of imprisonment not less than ten years be prescribed where the offence is committed by an adult on minors?


(c) Should consensual adult homosexuality remain as an offence under IPC?

Most of the persons, including the State Law Commissions, supported all the three issues indicated in the question. They have shown their concurrence to the proposal that homosexual acts between consenting adults should continue to be an offence under Sec. 377 of the Penal Code. However, women organizations suggested that the word ‘unnatural’ from the marginal note of the Sec. be deleted and bestiality, like in the original Sec., should be included in Sec. 377 IPC.200

‘The fourteenth Law Commission, placing its reliance on the feedback to its questionnaire, endorsed the fifth Law Commission’s proposal for reform and the consequential clause 160 of the 1978 Amendment Bill. However, recalling the growing incidence of unnatural sexual assaults on minor children, it recommended that a mandatory minimum sentence of imprisonment for a term not less than two years (which may extend to seven years) be provided for unnatural sexual assault on a minor person. It accordingly recommended that words ‘the imprisonment may extend to seven years’, appearing in unnumbered paragraph 2 of the above recommended Sec. 377 IPC, be substituted by the words ‘he shall be punished with imprisonment of either description for a term which shall not be less than two years but may extend to seven years and fine’. Nevertheless, the Commission proposed that a court, for adequate special reasons to be recorded in the judgment, be allowed to reduce the recommended mandatory minimum sentence.201

‘Thus, both the Law Commissions, it seems, were influenced by the Lord Devlin’s assertion that immorality per se empowers a State to legislate against it, when they did not favour decriminalization of homosexuality, including homosexual acts between consenting adults in private. The Commissions merely recommended lenient punishment for it. Nevertheless, they suggested decriminalized of bestiality’202.

202 Id. at 19-20.
‘However, a careful reading of the paragraph quoted above from the forty Second Law Commission report highlighting the reasons that prompted the fifth Law Commission to recommend retention of consensual homosexuality between adults in private, also gives an impression that the Law Commission also took into account the ‘harm to others’ principle while recommending retention of homosexuality, including adult consensual homosexuality. Homo-sexual acts and tendencies on the part of one spouse, it apprehended, may have adverse effects on the married life and happiness of the other spouse. Homosexuality, consensual or non-consensual, is a potential threat to the family institution. Hence, retention of homosexuality in the IPC, as claimed by the Law Commission, has ‘a social justification’. However, one may, like HLA Hart, argue that the ‘threat’ perceived by the Law Commission is merely an assumption as it is not supported by the facts. Nevertheless, in this context it becomes imperative to recall the Lord Devlin’s three assertions, namely, immorality, for the purpose of law, is what every right minded person is presumed to consider to be immoral; every immoral act is harmful, and it is impossible to set theoretical limits to the power of the State to legislate against immorality. Probably, these assertions lie at the heart of the Law Commission’s recommendations for retention in Sec. 377 IPC. The recommendation of Law Commission 172nd report is exclusively related to the repealing of Sec. 377 of IPC. Some more Law Commission Reports have the relevance if this regard.

5.9. National Human Rights Commission (NHRC) and Sexual Minorities

The Protection of Human Rights Act 1993, under which the National Human Rights Commission (NHRC) has been set up, defines human rights as “rights guaranteed under the Constitution of India or International Covenants”. The mandate of the NHRC under Sec 21(1) includes the power to inquire *suo motu* into “a petition presented to it by a victim or any person on his behalf, into complaint of… violation of human rights or abetment thereof…” The NHRC under Sec 12(f), (g), (h) and (i) also has the power to study treaties and other international instruments on human rights and make recommendations for their effective implementation, undertake and

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204 Law Commission of India Reports 42nd, 64th, 84th, 101st, 109th, 131st, 156th, 210th, 212th, 219th, 228th
promote research in the field of human rights, spread human rights literacy among various sections of society and encourage the efforts of non-governmental organizations and institutions working in the field of human rights.

It is in this context that a petition was filed in the case of a patient at the All India Institute for Medical Sciences (AIIMS), who had been undergoing treatment by a doctor in the psychiatry department for four years to cure him of his homosexuality. The patient went to Naz Foundation India (an organization working on MSM issues), and the coordinator of the MSM project, Shaleen Rakesh, filed a complaint with the NHRC alleging psychiatric abuse. The patient himself noted that “men who are confused about their sexuality need to be given the opportunity to go back to heterosexuality. I have never been confused but was nevertheless told that I had to be ‘cured’ of my homosexuality. The doctor put me on drugs, which I had been taking for four years.” The treatment reportedly involved two components: counselling therapy and drugs. During counselling therapy sessions, the doctor explicitly told the patient that he needed to curb his homosexual fantasies, as well as start making women rather than men the objects of his desire. The doctor also administered drugs intended to change the sexual orientation of the patient, providing loose drugs from his stock rather than disclosing the identity of the drugs through formal prescription. The patient reported experiencing serious emotional and psychological trauma and damage, as well as a feeling of personal violation. The moment the petition was filed, there was a wide mobilization of the sexuality minority community and a number of letters were written to the NHRC urging it to protect the rights of the community. The NHRC, after admitting the complaint, finally chose to reject it. Informal conversations with the than Chairman of the NHRC revealed that the Chairman believed that until Sec 377 IPC was repealed nothing could be done and in any case most of the organizations were foreign-funded, without any real grassroots support. According to another NHRC source, “homosexuality is an offence under IPC, isn’t it? So, do you want us to take cognizance of something that is an offence?”

Former Chief Justice J. S. Verma, when he was the Chairman of the National Human Rights Commission (NHRC), was asked why the NHRC was not accepting the complaint by a homosexual man who was being treated for being homosexual. He responded by saying that until the law was changed nothing much could be done. See A. Narrain, Queer: Despised Sexuality, Law and Social Change 120 (Bangalore: Books for Change, 2004).
The National Human Rights Commission (NHRC) has said it is of the view that all people, regardless of their sexual orientation or gender identity, should be able to enjoy their rights. Reacting to the Supreme Court judgment that criminalises gay sex, the NHRC said in a statement that it had noted with concern the public response to the ruling. It appealed to the government to urgently take all necessary legislative treatment on the basis of sexual orientation or gender identity so that no individual or a group is deprived of rights, and hence, Sec. 377 of IPC should be suitably notified. The United Nations Programme on HIV/AIDS (UNAIDS) has also expressed its deep concern on the issue. “The Delhi High Court decision of 2009 restored the dignity of millions of people in India, and was an example of the type of reform we need for supportive legal environments that are necessary for effective national AIDS responses,” said Executive Director of UNAIDS Michel Sidibe.

“We want government and civil society to provide HIV information and services to all people, including gay and other men, lesbian, bisexual and transgender people, and enable them to access the services without fear of criminalisation.” The High Court decision to annul law was widely considered a milestone against homophobia and towards zero HIV-related discrimination. In the past four years (now six years) since law was annulled, there was a more than 50 per cent increase (now latest discussed) in the number of sites providing HIV services for gay and other men who have sex with men, as well as transgender people in India. For the protection of public health and human rights, UNAIDS wanted India and all countries to repeal laws that criminalised adult consensual same sex sexual conduct. Such criminalisation hampered HIV responses across the world. These laws not only violated human rights but also made it more difficult to deliver HIV prevention and treatment services to a population which was particularly affected by HIV. On an average globally, gay and other men who had sex with men were 13 times more likely than the rest of the population to be living with HIV.”

5.10. Some Initiatives

5.10.1. University Grant Commission (UGC) and Sexual Minorities

On a regular basis after the National Legal Service Authority v. Union of India judgment (NALSA judgment) that recognized the hijra community or transgender as ‘Third Gender’, the University Grant Commission has sought to provide the a separate place to third gender persons. It includes the grants for the proposal relating to transgender persons. It also includes the opportunity for transgender persons to study in all educational institutions. Since then many colleges and universities in India are providing reservation to the third gender by including a separate column in the name of ‘other’ or ‘third gender’ or ‘transgender’.

5.10.2 Academic Institutions’ Scenario in Delhi

After the judgment of National Legal Service Authority (NALSA) case, many academic institutions introduced transgender option in gender column. Other related activities have also been raised in this series. New admission policies are also framed by the academic institutions. This is not only at university level but also at college level. The Delhi University (DU) has been very actively progressing in this regard as during the empirical research study, the sexual minorities related events were part and parcel. A new era has been started in this series that belongs to raising the voices of sexual minorities through peaceful demands.

As similar to Delhi University, the Jawaharlal Lal University (JNU) is one of the institutions known for vibrant academic discussions and debates. A group of sexual minority persons has been working there. The various events have been organizing there. A member of sexual minority persons from Jawaharlal Lal Nehru University was once a candidate in student election. This University has also indicated about framing of some policies particularly for campus premises to the sexual minority persons. The Indian Institute of Technology (IIT) Delhi is also one of the institutes where the voices of sexual minority persons have a platform. Indian Institute of Technology has also provided the assurance to have certain policies for sexual minorities there.

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207 Delhi University working on Policy for transgender, Delhi, Press Trust of India, April 19, 2015.
5.10.3. Other Academic Institutions and Sexual Minorities

Except the academic institutions in Delhi, various other premier institutes like National Law School, Bangalore, National University of Juridical Sciences, Kolkata, Tata Institute of Social Sciences, Maharashtra, Punjab University, Punjab, Chaudhary Charan Singh University Meerut, etc. have been active in discussing, debating, writing, organizing seminars, conferences, lectures, workshops, etc. relating to sexual minorities. Such institutions are also in line of adopting and providing the special policies for sexual minorities so that they may have at least safe place and good treatment. They are also recognizing transgender in their admission process.

5.10.4. Ministry of Home/ Health/ Social Empowerment and Justice/Ministry of Child and Women Development/National Aids Control Organisation and Sexual Minorities

‘In 2005, the then Centre government introduced the “E” category for eunuchs in the passport form and other documents. The Election Commission has “O” for others; Aadhaar included “T” for transgender and census forms also now acknowledge gender-variant identities’\(^\text{208}\). ‘But apart from recognition of formal citizenship, and the strength in numbers that this brings, they also need policy action to fight the discrimination, and even violence, that they face. While states like Tamil Nadu have set progressive examples, with a dedicated transgender welfare board, separate public facilities, preferential admissions, ration cards and so on, there needs to be comprehensive action across India to give them their due in healthcare, housing, workplace opportunities’\(^\text{209}\).

‘For the sexual minority community and its supporters, it’s been a decade-long struggle for social inclusion and human rights. The Centre has introduced a third category under ‘sex’ in documents like passport. Moreover, the Tamil Nadu and Karnataka governments have provided special benefits for sexual minorities like a monthly pension for ‘hijras’ aged above 45 years, higher education scholarships and health insurance. Unfortunately, the provision for reserved seats in universities has not been utilised, since many sexual minorities do not complete their schooling.

\(^{208}\) Delhi University working on Policy for transgender, Delhi, Press Trust of India, April 19, 2015.

\(^{209}\) Ibid.
Incidentally, Tamil Nadu also created a Transgender Welfare Board under its Department of Social Welfare in April 2008, and Karnataka plans to follow suit.210

‘The Committee, set up by the Ministry of Social Justice and Empowerment and chaired by the Additional Secretary of the Ministry, after examining the status of hijra community, has said action must be taken against parents who neglect or abuse their gender non-conforming children and doctors who practice electro-shock or other kinds of unethical “Conversion” therapy. Criminal and disciplinary action must be taken against delinquent police officers for violation of human rights of transgender persons’.211 Further, the Expert Committee has ‘recommended that ‘transgender’ be declared the third gender, with the individual having the right to choose gender, and has asked the government to prepare a law to prevent discrimination and atrocities against these people. Importantly, it has asked the National Crime Record Bureau to collect and compile statistics of crimes against them’.212 The report is available with website of Ministry of Social Empowerment and Justice.

The then ‘Union Health Minister Ghulam Nabi Azad on Tuesday (24 December, 2013) described as ‘harsh’ the Supreme Court judgment that criminalised homosexuality by reversing the 2009 Delhi High Court verdict. “The Supreme Court judgment could have been advisory in nature. One may have difference of opinion over sexual preference but the judgment was harsh to brand them sexual minority people criminals,” the Minister told The Hindu’.213 ‘For its part, the National AIDS Control Organisation (NACO) says reaching out to the MSM community is a major challenge. The HIV infection prevalence rate among MSM is 7.3 per cent as compared to a national adult prevalence rate of 0.31. The sexual minority (lesbian, gay, bisexual and transgender) is defined as a high-risk group by the NACO-now the Department of AIDS Control with HIV infection prevalence among MSM being the highest, between 6.54 and 7.23 per cent. According to the NACO 2010-11 annual report, India had an estimated 40 lakh persons in the MSM community, of whom 10 per cent were at risk of contracting HIV infection’.214

212 Ibid.
214 Ibid.
In the final written arguments by Voices against 377 states that ‘Various government agencies and departments have already acknowledged and given a degree of legal recognition to sexual minority persons. For example, the Annual HIV Sentinel Surveillance Country Report released jointly by the National AIDS Control Organisation and the National Institute of Health and Family Welfare, recognises Men who have sex with Men (MSM) as a vulnerable population and recommends “Increase the reach and effectiveness of prevention programmes for men who have sex with men (MSM) and transgender populations”.’

Furthermore, individuals no longer must mark themselves as only either male or female passport forms issued by the Ministry of External Affairs since hijra’s and other transgender persons can tick on the ‘Other’ box under the heading of sex.

5.10.5. Indian Medical Association (IMA) and Sexual Minorities

‘In India an organisation like the Indian Medical Association (IMA), not exactly famous for its espousal of human rights causes, has supported repeal of Sec. 377 and has chosen to pronounce that homosexuality is not a disease. This was in response to reports of HIV positive cases in Tihar jail and IMA's recognition of the fact that condom supply would not be taken up unless homosexuality is decriminalised. This is one kind of reaction-supporting gay rights because it is necessary for AIDS control and prevention.

Except these, various other academic and socio-legal institutions are coming forward to make their own separate policies, programs, schemes, rules and regulations for inclusion of sexual minorities within the mainstream through providing them the equal space available to others. Although, these are not specifically part and parcel of legislation but these all provide a public institutions as well as an atmosphere of discussing and debating on the issue of homosexuality in general and multiple complex issues relating to sexual minorities in particular. The Bollywood industry has been so passionate to speak on the issue of sexual minority rights. The next chapter is focused on particular area of research study as well as the observations and major findings during the study.

215 Final Written Arguments by Voices against 377, para 55.
216 Id. at para 56.