CHAPTER 4
CRITICAL ANALYSIS OF THE EXISTING INDIAN LEGAL FRAMEWORK
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Homophobia or transphobia is still prevalent in the Indian society. Nonetheless, homosexuality and transgenderism are not new to the country. In fact, the oldest and the first criminal code of India, Manusmriti, also referred to the homosexual acts but did not consider the same as a crime. But the Code considered homosexual acts to be something that needed to be regulated. In the light of ancient texts, it is clear that homosexuality is a part of sexual behaviour since time immemorial but its acceptance in the Indian society is still controversial. Homosexuality and never received a warm welcome, rather there were norms providing punishments for the homosexual acts.\(^{233}\)

The same is true for the transgendered individuals who are also not accepted by the society and considered as gender deviant or transgressing the established gender norms. After so many years of scientific advancement still homosexuals and transgendered individuals are mostly considered as a case of mental illness or some sort of mental or physical disorder. Recently one of the past president of the Indian Psychiatric Society, Dr Indira Sharma called homosexuality as "unnatural", thus aggravated the controversy concerning the sexual minorities. She further added that the manner in which the homosexuals discuss their rights and sex in public is offending and unnatural, as for heterosexual population do not discuss sex in public keeping it a private matter.\(^{234}\) Following this statement, the agitated individuals belonging to the sexual minorities submitted the matter before the Indian Psychiatric Society, which disaffirmed the previous statement given by Dr. Indira Sharma. In fact, the President and the General Secretary of the Indian Psychiatric Society further made a statement that there is no scientific evidence on the basis of which homosexuality could be considered as an illness or a disease.\(^{235}\)


Section 377 of the Indian Penal Code enacted in 1860 outlaws same-sex sexual acts and behaviour and also prescribes punishment for the same. In fact, it is alleged that the law criminalizing homosexuality has been often used to harass, coerce and also to arbitrarily detain the members of the sexual minorities.

4.1 Hijra Community in India

The term ‘Hijra’ is popularly used in South Asia to refer to the transgendered individuals. Hijras also face discrimination and rejection from the society, similarly like homosexuals. Hijra is also a community consisting of transgendered individuals. Most of the Hijras live in a community and resort to begging or sex work for their survival. The community is open to the transgendered individuals of all ages and has existed since time immemorial. The hijra community also adopts young transgendered individuals rejected by their families.

![Figure 6 Hijra Community in India](image)

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236 Section 377, Indian Penal Code (Act No. 45 of 1860) provides that an individual who voluntarily had a carnal intercourse against the order of nature shall be punished with life imprisonment, or imprisonment for a term which may extend to ten years or fine.

237 Siddharth Narrain, Crystallising Queer Politics- The Naz Foundation Case and its Implications for India’s Transgender Communities, 2 NUJS L. Rev. 455 (2009), 457.


Till recently, the community remained in deprivation of many civil and other rights. Furthermore, the law of the land was also discriminatory towards them. The history of discriminatory laws towards the Hijra community began with an amendment to the Criminal Tribes Act of 1871 which was introduced by the British Parliament in India. This amendment was specifically applicable to the Hijra community. During those days Hijra community was seen as a tribe and as per the discriminatory law, all the members of the mentioned tribe or castrated men were to register themselves with an appointed authority and also their actions were subjected to certain restrictions. Besides that, in the year 1908 special colonies were created for the community where they were subjected to perform hard labour. Jawaharlal Nehru, in his speech at Lahore in 1936, addressed the Criminal Tribes Act as a ‘monstrous provision of law’ and also asserted that such a discriminatory law should be repealed. He further said that a legal provision which describes a tribe as criminal is against all the basic principles of criminal justice and an attempt should be made to repeal the same. The discriminatory piece of legislation was repealed in 1951 but the stigma still remains attached to them. Even after the repeal of the law labeling transgendered individuals as a criminal tribe, the harassment and abuse of the community continue till date. In fact, the colonial attitude towards the hijra community continued even in the legislations of the post-colonial era. Nonetheless, the discriminatory feature of the Criminal Tribes Act was resurrected in the form of legislations like the Bombay Habitual Offenders Act, 1959.

Since then, the community is looked down as a tribe of criminals. Often, they are also suspected of the offences such as kidnapping, sexual offences, and castration of children etc. and also required to register their names and place of residence with the police authorities. The stigmatization and labeling of the community, is the most crucial impediment in the mainstreaming of the transgendered individuals in the society and is also a reason of the violation of their basic rights. The case of Khairati is a perfect example to show how the community has been harassed and abused on the basis of their gender identity. In the given case, Khairati was a eunuch

240 Criminal tribes Act, 1871, Act No. XXVII of 1871 modified in 1897.
241 Siddharth Narrain Supra note 237 at 458.
242 Id.
243 Id.
244 Id. at 459.
245 Queen Empress v. Khairati [I.L.R. 6 ALL 204].

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belonging to the hijra community and was accused of dressing and singing as a woman in public. He was also under a close observation, in accordance with the then Criminal Tribes Act, 1951, when he was caught singing and dancing dressed as a woman among other women. Khairati was also subjected to a medical examination where it was found that his orifice was deformed to a wedge-shape. It was also found that Khairati had also contracted syphilis. On the basis of this medical examination, he was convicted for committing unnatural offence as explained under section 377 of the Indian Penal Code. Although the accused admitted his being habitual to dress as a woman but denied to have been subjected to unnatural intercourse and also alleged that he was not dressed as a woman when the police authorities found him. Khairati was convicted under Section 377 by the lower court but later on, his conviction was quashed by the Allahabad High Court on the basis of vague evidence.

Another case concerning gender identity issues that attracted much of media attention is Kamla Jaan’s case. Kamla Jaan, a member of hijra community, was elected as the Mayor of Katni in 1999 and consequently became the first transgender mayor in the country. Her contesting election was challenged by the opposition party on the ground of being unqualified. It was also argued that the post for which Kamla Jaan was appointed was reserved for a female candidate and Kamla Jaan being a hijra did not fit to that. The question of law before the Court was that whether hijras belong to the category of male or female? The legal recognition of the transgendered individuals is also one of the grounds on the basis of which the community is often subjected to discriminatory acts. The judges referred to various Epics and other ancient texts such as Mahabharata, Manusmriti, and Kamasutra etc. and came to a conclusion that apart from males and females there exists another category of persons who are neither male nor female. It was also observed by the Court that through a medical examination, the gender status of the respondent could be established but the respondent refused to undergo such medical examinations. Finally, it was observed by the Court that the term ‘female’ means a person who could give birth to a life and on the basis of this definition, it was held that Kamla Jaan was not a female and hence

246 Siddharth Narrain op cit.
247 Id.
249 Siddharth Narrain, Supra note 237 at 458.
not qualified to be elected as a Mayor on the seat reserved for a woman. The High Court of Madhya Pradesh also upheld the decision of the lower court. However, the directions of the Election commission which suggest that a hijra is eligible to be registered on the electoral roles either as a male or a female, was completely ignored in the given case\textsuperscript{250}.

Another case, involving violence and hatred toward the community is Jayalakshmi’s case\textsuperscript{251}. In this case the deceased transgender committed suicide. It was submitted by the brother of the deceased that the aravani was physically and sexually abused by the police officials and other people in the police station. The authorities were held guilty by the bench headed by the then Chief Justice of Madras High Court and the brother of the deceased was awarded compensation of Rs.5 Lakhs.

The hijra community has been targeted by the police authorities since the colonial era. In the present time as well the community is often seen with suspicion by the state authorities. In an incident in Bengaluru in the year 2008, whole hijra community was targeted due to a single case of alleged abduction. The police authorities also directed the land-lords to not to rent out their homes to the members of hijra community on the grounds of their involvement in immoral acts. Following the same, a considerable number of hijras were evicted. The community is also alleged to forcibly castrate

\textsuperscript{250} Id.
\textsuperscript{251} W.A.No. 1130 of 2006 and WP.No.24160 of 2006 decided by the High Court of Judicature at Madras, Dated 10.07.2007.
young boys, which in itself is a serious allegation that attracts charges of kidnapping, attempt to murder and grievous hurt. However, it has been observed that the authorities did not act cautiously to investigate such cases in fact in many cases members of the hijra community are already presumed to be the offenders which is totally against the principles of criminal justice and human rights. Nonetheless, the cases in which the young boys approach hijra community for voluntary castration are often ignored by the authorities. Young transgendered adolescents tend to run away from their homes and approach the community to become a part of it largely due to family and societal rejection. Hijras are often convicted for the offence of extortion and begging, apart from being booked under Section 377 of the Indian Penal Code 252.

The legal recognition of the hijras after sex reassignment surgery continued to be a controversial issue till recent. The transgendered individuals, after the sex reassignment surgery, often face complications in their documentation. Until the year 2005, there were only two categories of gender options given in the passport application. Nevertheless, the Central Government placed ‘E’ category in the application for the passports for the transgendered individuals. In fact, they can also get a voter ID and the other identity cards by mentioning their status as of the third gender. There are certain positive developments towards the legal recognition of the transgendered individuals, but the problem persists in many areas where the only binary system of gender is recognized. Changing of the gender status in documents, after the sex reassignment surgery is in itself a tiring task in the given bureaucratic system. More so, there are no guidelines or norms related to the changing of legal status after the sex reassignment surgery and also there are no efforts on the part of Government authorities concerned for making the tedious task of changing the gender, easier for the community 253.

Another important concern related to the transgendered community is safe and pocket-friendly access to the sex reassignment surgery. The sex reassignment surgery is a crucial requirement of the community. The Penal law of the country recognizes castration as a criminal offence, punishable under the Indian Penal Code. However, there is also a provision in the Penal Code which provides that an act done in a good

252 Siddharth Narrain, Supra note 237 at 461.
253 Id.
faith and with the consent to suffer is excluded from the definition of grievous hurt. There are many hospitals providing the facility of sex reassignment surgery but the legality of the surgery is still ambiguous in the absence of proper norms and directions of the State authorities. Although till date there are no cases related to the prosecution of the doctors for performing the sex reassignment surgery but due to the transphobic attitude and other provisions of the existing law such as Section 377 of the Indian Penal Code, the community is still far away from the reach of proper health services.  

4.2 The Naz Foundation Case  
The Naz foundation case marks the beginning of a new era in the history of the rights of the sexual minorities in India. The case somehow seems to have opened the gates to various debates related to the homosexual and transgendered individuals in India. The case appears to deal with the issue of criminalization of consensual same-sex acts and behaviour under the Section 377 of the Indian Penal Code but it also addresses the discrimination based on sexual orientation and gender identity. The Judges in this case also mentioned the jurisprudence of International Human Rights which provides for the protection of human rights without any discrimination based on sexual orientation and gender identity. The Court also relied on the Yogyakarta Principles, which is the compilation of the principles relating to the sexual orientation and gender identity issues. It was held by the Delhi High Court that the law criminalizing consensual same-sex acts and behaviour between the adults to be unconstitutional. The judgment was welcomed by the International Human Rights organizations, various civil societies and also by the members of the sexual minorities.  

However, on Dec. 11, 2013, the Supreme Court, in Suresh Kumar Koushal’s case, reversed this significant ruling of the Delhi High Court given in the Naz Foundation case stating that there are not sufficient instances to hold Section 377 as unconstitutional and discriminatory towards the members of the sexual minorities. In

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254 Id. at 462.  
256 Siddharth Narain, Supra note 237 at 461.  
the given case, the Supreme Court held Section 377 to be Constitutional. Furthermore, the Supreme Court also rejected the review petition in Suresh Kumar Koushal’s case. This said decision is discriminatory towards the sexual minorities and also reflects the homophobic attitude.

Following the Apex Court’s rejection of the review petition, Naz Foundation filed a curative petition in the Supreme Court to rectify the judgment of Suresh Kumar Koushal’s case which criminalized consensual same-sex behaviour between adults. Naz Foundation is the original petitioner in the case which challenged the constitutionality of Section 377 of the Indian Penal Code. The curative petition filed by the Naz Foundation maintains that the present case is fit for the Court’s curative jurisdiction as the human rights of the sexual minorities are at stake and justice should prevail on the notions of Rule of Law. The petitioners also maintained that in the decision of Suresh Kumar Koushal’s case, the most serious error was neglecting the fact that the amendment in the criminal law in 2013, prohibits nonconsensual penile vaginal and penile-non vaginal sexual acts between man and woman which implies that consensual penile vaginal and penile-non vaginal sexual acts between heterosexual adults is permitted. However, such sexual acts between consenting homosexual adults is prohibited. Therefore the law criminalizing consensual same-sex acts and behaviour is discriminatory and violative of Article 14 and 15 of the Constitution. A three-judge Bench comprising of the Chief Justice of India T.S. Thakur, and Justices Anil R. Dave and J.S. Khehar accepted that the law criminalizing consensual same-sex activities between adults may lead to discrimination and denial of other basic rights such as the right to privacy and dignity. The bench, however, referred the petition further to a Constitutional bench to be set

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262 Id.
shortly for hearing this petition. The bench did not admit the petition and also did not issue any directions thereto and referred it to a Constitutional bench, as it was pointed out by the Court that the petition poses certain questions of law which are Constitutional in nature.  

4.3 Unnatural Offences under Natural Law Theory

The term “unnatural offence” in itself has generated much debate in the recent times. The law criminalizing homosexuality and the language incorporated thereof, suggesting consensual homosexual acts to be ‘crimes against nature’ or ‘unnatural acts’, has its roots in the Natural law theory. The major reason for the non-acceptance of consensual homosexual acts and its criminalization is Natural law theory, which suggests that consensual same-sex activity is against the order of nature and therefore considered to be immoral. More so, in present times, there are adherents of Natural law theory, who not only defend the ongoing discrimination against homosexuals but also make arguments against homosexual marriage.

Criminal law in India criminalizing homosexuality was drafted during the colonial period and since then such behaviour is condemned not only in the Indian society but also in the other former British colonies. The provision of law in India criminalizing consensual homosexuality, i.e., Indian penal code based on British criminal law came straight from the Natural law theory. The reason lies in the fact that as per the natural law theory, the law is of divine origin and homosexuality is considered immoral according to Bible. And based on biblical notions, the same was also considered as a criminal offence, prescribed under archaic English law and practiced in the majority of States. Although, the legal system of the United Kingdom has evolved with time so as to decriminalize homosexuality, but the various commonwealth nations and old British colonies are still continuing with archaic laws which were initially developed under the influence of the English laws. Considering the continuing struggle for decriminalization of consensual homosexual acts in many parts of the world including India, it is important to critically analyze the arguments of Natural law theorists on the basis of which the same has been termed as ‘unnatural act.

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4.3.1 Natural Law Based on Reason or Abstract Notion?

Natural law theory is pervasive in almost all the disciplines since the ancient period of Greek civilization\textsuperscript{264}. In fact, in the present times, it has formed an important instrument of justification and reasoning of various existing political and legal theories. Although, Natural law theory lost its significance in the 19\textsuperscript{th} century with the popularity of Positivism, but the Natural law thinking revived in the 20\textsuperscript{th} century and still remains an important weapon in the present ideologies.

In summary, Natural law theory asserts that the law is of divine origin and can be discovered by reason. During ancient times, the law was necessarily associated with the divine entity. The terms ‘Natural law’ and ‘Eternal law’, were considered as synonymous. Hesiod in his writings also pointed out that the chief of Olympian gods, Zeus, gave law to the mankind as his greatest gift\textsuperscript{265}. Natural law theory and its association with religion continued till the middle ages, where theological origin theory of law was further developed by St. Augustine and St. Thomas Aquinas. In the middle ages, the church was considered as the guardian of the law given by divine entity. The earliest premises of the Natural law thinking tended to link reason with some notions of theology\textsuperscript{266}. St. Thomas Aquinas explained the law as an authoritative dictate of reason laid down by a person who has the charge of the perfect community\textsuperscript{267}. Since God has the charge of the perfect community, the authoritative rule of action coming from him is law. Therefore, Natural law is not only to be understood as a religious notion but as the basis of living a rational life for the betterment of the community. Natural law simply draws a strict theoretical line between right and wrong acts. In simpler words, it talks about morality, i.e., ‘what ought to be’. For example, to violate the strictures of Natural law, such as by killing someone or by physically abusing others, is to commit acts which are not only immoral but also unjustifiable. Similarly, consensual same-sex activities were also considered as sinful and irrational. Therefore, such acts were also recognized as a criminal offence in most of the countries. The justification for criminalizing consensual same-sex acts was perceived to be religious norms prescribed in Bible and

\textsuperscript{264} Michael Freeman, Lloyd’s Introduction to Jurisprudence, Thomas Reuters, 9\textsuperscript{th} Edition (2014), 75.
\textsuperscript{266} Ian Mcleod, Legal Theory, Palgrave Macmillan (2005), 55.
\textsuperscript{267} Id. at p.52
other forms of *lex divina*. Although, with the emergence of the gay liberation movement in the West, the perception of a considerable percentage of the population across the world, regarding homosexuality and other sexual minorities, has undergone a drastic change but the criminalization of consensual homosexual acts still remains the central issue of debate for various legal and political structures. In the given changing social order, it is pivotal to probe into the religious norms on the basis of which Natural law theorist support criminalization of consensual homosexuality.

The term ‘homosexuality’ originated in the 19th century, much subsequent to the era of Bible. It was coined by Karoly Maria Benkert, a German psychologist. Therefore Bible and other holy scriptures to do not explicitly use the term ‘homosexuality’, but condemn the similar sexual behaviour. Nonetheless, substantiating criminalization of homosexuality on the grounds of Natural law thinking of Middle Ages suggesting the law to be of divine origin, in itself is contentious. In fact, many people contributed to the writing of Bible. And for other holy scriptures, condemning homosexuality, also owe its existence to human beings. Human writings are not free from flaws and there is a probability of errors in these Holy Scriptures too. Therefore criminalizing homosexuality on the basis of ancient holy texts is like being a mindless follower of a law without probing into the rationale behind such precept. More so, the term ‘homosexuality’ is not explicitly mentioned in any of the Holy Scriptures, therefore it is also asserted that the references to the same sexual behaviour in Bible and other holy texts are related to violence, idolatry, and exploitation based on same-sex behaviour. Therefore, what is condemned is not consensual homosexuality, but violent homosexual acts which are not consensual, fetishism and sexual abuses based on homosexual behaviour.

Sharia law or Islamic law is one of the oldest substantial legal systems and also influenced western penal law. It also condemns homosexuality as an immoral act. The punishment prescribed by the law includes death by stoning, mutilation of limbs, lashes etc., which are not approved by many developed nations. More so, Sharia law is derived from Quran and Hadith, which are not untouched by human intervention for its present existence.

Nonetheless, the contemporary Natural law thinking emphasizes practical reasons contrary to the speculative knowledge of nature. It is also advocated by many legal theorists that practical reason is the foundation of Natural law theory. For instance, practical reason is also the foundation of Kant’s moral philosophy. The rationalistic version of modern natural law theory suggests that law is the dictate of practical reasons. Hugo Grotius, who laid down the ground for the secular and rationalistic version of the modern Natural law, asserted that natural law would subsist even if God did not exist.

4.3.2 Homosexuality: Natural Phenomenon v. Unnatural Offence

The word ‘unnatural’ means different from what is normal or expected, or from what is generally accepted as being right. It also implies phenomenon which is contrary to the ordinary course of nature; abnormal or not existing in nature. This connotes that the ‘unnatural offences’ mentioned under Section 377 of the Indian Penal Code, covered under the sexual offences means those sexual behaviours which are contrary to nature. The said provision of law defines ‘unnatural offences’ as voluntary carnal intercourse ‘against the order of nature with any man, woman or animal’. The given definition of the same-sex sexual act has generated much debates in the present times.

It poses a question on the criteria by which consensual same-sex sexual behaviour and acts are treated as against the order of nature. The current controversy related to the decriminalization of consensual same-sex activities has also raised a question, ‘whether consensual homosexuality is a natural phenomenon or an unnatural act?’

The term ‘natural’ implies things existing in or derived from nature. It is still presumed in many States penalizing homosexuality that consensual homosexual acts are not ‘natural’ as they are not derived from nature and the same is explained in many legal systems including India. Section 377 under Indian Penal Code, 1860, which criminalizes consensual homosexuality, is a product of British colonial-era law.

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270 Edgar Bodenheimer, Supra note 265 at 35.
based on biblical notions. In the present legal scenario, consensual homosexuality is no more considered as against the order of nature under the English laws following Dudgeon v. United Kingdom.\textsuperscript{274} In fact, in the year 2016, the nation had around more than 30 LGBT members of Parliament, which is exceptional in the history of any other parliament around the world\textsuperscript{275}. However, criminalization of the same-sex sexual acts has been retained in many nations including India, considering the same to be against the order of nature.

The old school Natural law thinkers considered ‘consensual homosexual acts’ as unnatural acts on the basis of no procreation generating from such sexual acts. The Natural law theorists emphasized procreation as the sole object of marriage and sexuality and for them, the sexual acts were to be generative in order to be considered not against moral principles. This implies that the sexual acts and marriage of infertile couples also fall under the category of ‘immoral acts’ or ‘unnatural acts’ because of non-generative sex, which is not true. In reality, the sexual acts in which both or one of the partners is infertile are considered morally good. Therefore, ‘non-generative sex’ argument as the basis of considering consensual same-sex behaviour as an unnatural act, in itself is contradictory. Procreation is not the only purpose of sexuality and marriage. The other objects of sexual acts include pleasure and biological instincts. According to ‘Kamasutra’, which is an ancient Hindu text on human sexual behaviour, written by Vatsyayana, there are four important goals of human life. These goals are \textit{Dharma}, \textit{Artha}, \textit{Kama} and \textit{Moksha}. \textit{Dharma} refers to virtuous living; \textit{Artha} refers to material prosperity, \textit{Kama} refers to sensual desires of life and \textit{Moksha} refers to liberation\textsuperscript{276}. This further connotes that apart from procreation, sensual desire or pleasure is also one of the objects of sexual acts.

\textbf{Homosexuality is animal species}- Previously, it was widely believed that animals indulge into sexual acts for only procreation and not pleasure. However, the same

\begin{itemize}
\item \textsuperscript{274} Dudgeon v. United Kingdom, \textit{Supra note} 158. In this case, European Court of Human Rights held that the law criminalizing consensual private homosexual acts violated right to private and family life as enshrined in the European Convention on Human Rights.
\item \textsuperscript{275} Matt Hooper, The UK has more LGBT MPs than anywhere else in the world, Gay Times, (Feb. 21, 2016), http://www.gaytimes.co.uk/news/28378/the-uk-has-more-lgbt-mps-than-anywhere-else-in-the-world/, (Last accessed on 20/10/17).
\end{itemize}
does not hold true. In fact, many scientific studies suggest that all animals have sex for pleasure.\footnote{Cara Santa Maria, Is Sex for Pleasure Uniquely Human?, HuffPost, (Nov. 13, 2011), http://www.huffingtonpost.in/entry/sex-for-pleasure_n_1090811, (Last accessed on 20/10/17).} It is also argued by many scholars, that most of the animals are not aware of the fact that sexual acts lead to procreation, and hence they do that for pleasure. In fact, masturbation is very common among a considerable number of animal species. There are also many species which are observed to be engaged in autoerotism\footnote{Id.}. And also according to various research studies, homosexuality has been observed in 1500 species\footnote{Against Nature- an exhibition on animal homosexuality, Natural History Museum (Feb. 25, 2009), University of Oslo, Norway, http://www.nhm.uio.no/besok-oss/utstillinger/skf品德tende/againstnature/index-eng.html, (Last accessed on 20/10/17)}. Therefore, homosexuality in animals provides for the foundation of argument in favour of decriminalising consensual homosexuality in human beings and considering the same as a natural phenomenon. Homosexuality in animal species has also been cited by American Psychiatric Association and other groups in the United States Supreme Court for the case Lawrence v. Texas\footnote{539 U.S. 558, 558 (2003).} which quashed anti-homosexual laws of 14 states\footnote{Brief for Amici Curiae, http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf, (Last accessed on 20/10/17).}.

The labeling of a ‘natural’ phenomenon as ‘unnatural’, is what that is causing hardship to the sexual minorities since ages. This labeling does not only leads to stigmatization but also discrimination based on sexuality. It further conveys that the homosexual behaviour is not acceptable in the society along with the person indulging in such same-sex acts and behaviour, as it is ‘unnatural’. Even though it has been scientifically proven and reiterated in the reports of various organizations that ‘homosexuality is natural’ and it is something, people are born with and not a disease, still the old draconian law criminalizing homosexuality and labelling it as unnatural, is still in force in many parts of the world including India. The law in itself is violative of the principles of natural justice and equality and also discriminatory towards homosexual and transgendered individuals. Thus, the law criminalizing consensual same-sex behaviours and acts between adults is contrary to the principles of the International Human Rights law which prohibits discrimination on the basis of sexual orientation.
Nonetheless, the Natural law argument against homosexuality has no substantial ground as such sexual behaviour is found in nature and prohibiting the same on the grounds of natural law argument is nothing but the misinterpretation of the Natural law theory. In fact, one can find arguments in support of decriminalization of the consensual same-sex acts between adults on the basis of Natural law theory.

Natural law theory, basically provides that the law can be discovered by the reasons to be found in nature and decriminalization of consensual homosexual acts is based on the reasons established by nature itself. Contrasting sexual orientations are found in the nature and punishing a person for something that he or she is born with is a gross violation of the basic principles of natural justice and equality. The law needs to be updated and transformed with the changing social order, where the individuals belonging to the sexual minorities have gained much visibility and cannot be ignored. It’s high time when homosexuals should not only be acknowledged by the law but also protected against ongoing discrimination.

4.4 Impact of Criminalization of Private Homosexual Acts on Homosexual and Transgendered Children

When it comes to homosexual and transgendered children in India, such issues are mostly suppressed at home only. Talking about sexual orientation or sexuality is still a taboo in the Indian society. And therefore most of the children belonging to the sexual minorities do not disclose their sexual orientation or gender identity before the society because they are under the fear as they had already witnessed that being a homosexual or a transgendered individual is despicable and considered as against morals. And also if they disclose their sexual orientation or gender identity, there is a chance of being discriminated and hurt by others.

In a country like India, where the consensual private homosexual acts and behaviours are criminalized, the situation is worse for the homosexual and transgendered children who are already struggling with their sexuality and transgenderism. Such children are at a higher risk of being subjected to violence or other discriminatory acts in their family and society since they are considered as deviants who do not abide by the societal norms concerning sexuality and gender. Moreover, criminalization of
homosexuality may aggravate stigmatization and the fear of family rejection among the young homosexual transgendered population.

Due to the fear of being rejected by the society and stigmatization, the members of the sexual minorities including children tend to hide their actual sexual orientation and gender identity from the family and community. This concealment of what they actually are is detrimental to the physical and mental health of young homosexual and transgendered individuals who are already struggling with their sexuality and gender. Such young people also tend to run away from their families, which in turn exposes them to various hazards such as homelessness, physical or sexual abuse, substance abuse etc. as discussed in the previous chapters. This tendency to hide actual sexual orientation and gender identity is the reason why such cases of discrimination against adolescents on the basis of sexual orientation and gender identity fail to attract the attention of media and law.

In fact, the parents of such homosexual and transgendered children mostly react with anger, fear, aversion or dejection when they come to know about the sexuality or transgenderism of their children. This reaction of the parents is mostly due to the fear of their children being rejected and discriminated in the society on the basis of their sexual orientation and gender identity. To protect their children from such anticipated discriminatory acts and distress and also in order to protect the reputation of the family, parents usually react negatively in the given homophobic or transphobic environment. The negative reaction of a family towards gay and transgendered children also includes a forcible attempt to change one’s sexual orientation and gender identity through various therapies.

It has been found in various research-based studies that such attempts to change the sexual orientation and gender identity of individuals are detrimental to their overall health and well-being. It was also reiterated in the report of the American Academy of Pediatrics that the therapies directed at the transition of sexuality or transgenderism may result in depression, anxiety, and self-condemnation. It was also found that while resorting to such therapies for changing sexuality or transgenderism, there is a very
slim or no chance of such change\textsuperscript{282}. Furthermore, an attempt to convert homosexual or transgendered adolescents is more threatening as compared to that of converting adults.

Young homosexual and transgendered children are more likely to face family rejection and societal pressure to convert into what they are not. In fact, as compared to the heterosexual or other population conforming to the gender norms of the society, homosexual and transgendered children are more likely to experience depression, suicidal tendencies, and segregation, and also they are likely to become victims of various violent acts as discussed in the previous chapters. Despite the dangers and risks involved in subjecting a homosexual or a transgendered adolescent to such therapies, there are no legal provisions to prevent children and other individuals belonging to the sexual minorities from being subjected to such reparative therapies. Moreover, a considerable number of therapists also continue to claim that homosexuality or transgenderism is a sort of disorder which ought to be changed\textsuperscript{283}.

It is believed by a considerable number of parents and adults that homosexuality or transgenderism is a psychiatric disease which can be corrected. In fact, it has been reported by many psychologists that the parents of homosexual and transgendered children often forcibly take their children to the psychiatrist under the hope to fit them among heterosexual and gender conforming population. It was reported by Dr. Pulkit Sharma, psychologist, (VIMHANS) that once an educated family approached him to give electric shocks to their son in order to make him fit in the heterosexual population. Dr. Samir Parikh, chief psychiatrist (Max Healthcare) also asserted that most of the parents who approach psychologists for changing the sexual orientation or gender identity of their children widely believe that homosexuality or transgenderism is a mental disease which can be cured\textsuperscript{284}. Dr. Sandeep Vohra, senior consultant psychiatrist (Apollo Hospital), pointed that it is more difficult for the upper-class and educated families to accept their homosexual or transgendered children. It is also submitted by many LGBT rights activists that in the given homophobic and


\textsuperscript{283} Id. at 518.

transphobic environment, many doctors also try to take advantage of the parents of homosexual or transgendered children to make a good fortune out of their distress. In fact, one of the gay rights activist, Ashok Row Kavi reported that renowned psychiatrists are also involved in making money by giving electric shock therapies to the homosexual and transgendered individuals and thus endangering their lives\textsuperscript{285}.

A transgendered girl, Katrina reported that she was physically and sexually abused, often subjected to corporal punishments and given electric shocks by the authorities and staff members of a mental institute where she was sent for a reparative therapy for ‘gender correction. The transgendered girl admitted to have suicidal tendencies and also attempted to commit suicide thrice\textsuperscript{286}. In the year 2012, a transgendered girl brought a suit against her parents for availing sex reassignment surgery. The transgendered girl filed a petition in the Bombay High Court alleging that her parents obstructed her scheduled sex reassignment surgery by threatening the doctors. Whereas, her parents argued that the sex reassignment surgery cannot be seen as a personal choice or freedom and requires the consent of the family\textsuperscript{287}. Her parents further alleged that the transgendered girl was misguided by her friends and doctors of the hospital concerned. It was held by the Court that the transgendered girl is an adult and has a right to make such choices. The Court further held that there is no law which prohibits sex reassignment surgery.

4.5 Obligation of the State to Protect the Rights of the Sexual Minorities under Indian Legal Framework

4.5.1 State Obligation under the Constitution of India

i. To protect the right against discrimination and right to equality.

Article 14\textsuperscript{288} of the Constitution of India provides for the right to equality and also ensures the rule of law. In order to promote and protect the right to equality, separate provisions are enshrined in Part III of the Constitution to deal with certain issues

\textsuperscript{285} Id.

\textsuperscript{286} Id.


\textsuperscript{288} INDIA CONST. art. 14. It provides that it is the obligation of the State to ensure the protection of the right to equality and equal protection of law to all the individuals.
related to discrimination. Article 15 further enumerates various prohibitive grounds of discrimination. It provides that, it is the obligation of the State to protect individuals against discrimination based on religion, race, place of birth and sex. Article 14 and 15 together ensure the right to equality and protection against discrimination to all the individuals.

The ruling of the Naz foundation case still holds significance in the context of human rights protection in India, despite the fact that the same has been overturned by the Supreme Court of India.

The petitioners in the given case argued that the criminalization of consensual same-sex acts and behaviour between adults is a discrimination on the grounds of sexual orientation. They also advocated that the prohibitive grounds enumerated under Article 15 of the Constitution also includes sexual orientation implicitly. The petitioners also pointed out that ‘sex’ as a prohibitive ground of discrimination is not restricted to ‘gender’ but also includes ‘sexual orientation’. Therefore, the question of law in the given case was that whether discrimination based on sexual orientation can be covered under Article 15. For the purpose of decoding the mentioned question of law, the judges relied on the Declaration of Principles of Equality developed by the experts and issued by the Equal Rights Trust. The Declaration is regarded as the contemporary International Human Rights principles of equality. Part II of the Declaration deals with the right to protection against discrimination of all forms. The Declaration enumerates various prohibitive grounds of discrimination such as, race, color, ethnic or social origin, nationality, religion, belief, political or other opinions, sex, sexual orientation, gender identity, age, disability, health issue, or any other ground related to these grounds.

The Court agreed with the contention of the petitioners and held that ‘sex’ as a prohibitive ground of discrimination under Article 15 of the Constitution also includes

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289 INDIA CONST. art. 15.
290 Naz Foundation v. Govt. of NCT of Delhi Supra note 255.
291 See Siddharth Narrain Supra note 237 at 467.
293 Id.
sexual orientation and gender identity. The primary object of the fundamental right of equality and non-discrimination on the basis of sex or sexual orientation connotes that any individual should not be discriminated or treated in a prejudicial manner on the notions of ‘normal’ or ‘natural’ sexuality and gender roles.

Prohibition of discrimination based on sexual orientation and gender identity flows from the principles of justice and equality. International human rights law also includes these grounds as a part of prohibitive grounds of discrimination mentioned in various Conventions and treaties. It has been observed by various jurists and legal commentators that the discrimination based on sexuality and transgenderism is a violation of Article 15, although the same is not explicitly mentioned in the Article as these grounds are corresponding to the other explicit grounds of discrimination mentioned in the provision. The principle of non-discrimination includes all those grounds within the ambit of prohibitive grounds which are based on one’s autonomy.

Nevertheless, the Supreme Court, in Suresh Kumar Koushal’s case overturned the decision of Naz Foundation case but the Apex Court maintained that Section 377 does not criminalize a particular group of people, sexuality or transgenderism but recognizes those acts which on the commission would constitute the offence as mentioned in the given provision of law. The object of the law contained in the Section 377 of the Indian Penal Code is to regulate sexual behaviours by prohibition irrespective of sexual orientation and gender identity of the individuals.

The Apex Court, in determining the constitutionality of Section 377 with respect to the principle of equality as enshrined under Article 14 of the Constitution, referred to Re:Special Courts Bill and asserted that the concept of equality does not mean that every person should be treated alike but it implies that persons similarly circumsatnced shall be treated alike both in privileges conferred and liabilities imposed alike. And it was held that the classification of a class for the purpose of

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294 Naz Foundation v. Govt. of NCT of Delhi op cit.
295 Siddharth Narrain Supra note 237at 468.
296 (2014)1SCC1.
297 Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors. Supra note 257.
298 1987 (1979) 1 SCC 380.
legislation in the given case was ‘rational’ and not arbitrary and based on the reasonable nexus.

ii. To protect the right to freedom of expression irrespective of sexual orientation or gender identity

Article 19 of the Constitution guarantees the right to freedom of speech and expression to all its citizens. Part III of the Constitution ensures the right to freedom of speech and expression to all its citizens without regard to sexual orientation or gender identity. The right to freedom of speech and expression also includes the expression of one’s identity through the anatomic features, dressing, choice of name, conduct or behaviour, and also the freedom to seek, receive or impart any information or ideas including that related to the human rights and sexual orientation and gender identity issues.

iii. To protect the right to life, liberty, and privacy of persons irrespective of sexual orientation or gender identity

Article 21 of the Constitution of India provides for the right to life and personal liberty. The right also includes the right to live with dignity. Article 21 has been interpreted liberally and it also implies that the right to life means something more than mere survival or mere animal existence. Therefore, the right to life includes all those aspects of life which are essential for an individual to live with dignity and to make one’s life meaningful and complete.

Article 21 enshrined in the Constitution is a negative right and it provides that State should not interfere with the right to life and personal liberty of individual except for the procedure established by law. Nonetheless, in a considerable number of cases, the judiciary has interpreted the right in terms of the positive obligations of the State so as to ensure the right to live with dignity and better enjoyment of the life. In Francis Coralie, the Supreme Court expanded the scope of Article 21 and gave a wide meaning to the right to life and personal liberty. It was held by the Apex Court that the right life does not mean merely ‘animal existence’ but also includes the right to

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299 Suresh Kumar Koushal Op cit.
301 Id.
live with ‘human dignity’. The Court has thus given broad specifications to be considered under Article 21.

The question before the court was whether the right to life includes the obligation of the State to protect limb or something more than that. It was observed in the given case that the right also includes the right to live with dignity and it follows the right to bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading, writing, learning and expressing, liberty of movement and association with others and also the right to carry on such a conduct or behaviour which constitutes the bare minimum expression of the human self. The realization of the positive rights including economic, social and cultural rights depends on the availability of funds but the right to basic necessities of life and the right to carry on such conduct which constitute the bare minimum expression of one’s self are the basic tenets of the right to live with dignity.\(^{303}\)

The Right to life also includes the right to protection against cruel, inhuman or degrading treatment. Therefore, the State is under the obligation to protect all the individuals including homosexual and transgendered individuals of all ages, against inhuman or degrading treatment. Subsequently, torture or ill-treatment including hate-crimes on the basis of sexual orientation and gender identity violates the right to life and liberty.

In Naz Foundation case\(^ {304}\), the Court observed that the right to life enshrined in Article 21 includes the right to live with human dignity and the right to freedom of choice related to an individual’s autonomy. It was further held that the protection of the right to privacy is an important pre-requisite to ensure the protection of human dignity. In a recent case\(^ {305}\), the Supreme Court held that the right to privacy is a fundamental right guaranteed by the Constitution of India. The right to privacy also includes preservation of the right to respect for private and family life, personal intimacies, procreation, marriage and sexual orientation. It was further maintained by the Court that the right to privacy is an inherent right which cannot be denied even to a minuscule fraction of the population. It implies that privacy is not only about what

\(^{303}\) M.P Jain *Supra note* 300 at 1226.

\(^{304}\) Naz Foundation v. Govt. of NCT of Delhi *Supra note* 255.

\(^{305}\) Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors 2017 (10) SCALE 1.
one does at home but it also includes decisional privacy as to how to live one’s life. The given judgment has an important bearing on the issue of criminalization of consensual private homosexual acts between adults.

In National Coalition of Gay and Lesbian Equality (NCGLE) v. Minister of Justice, it was observed by the Constitutional Court of South Africa, that the aspect of one’s sexuality, gender or sexual orientation is inherent in every individual to the extent that an individual cannot leave behind those aspects of gender or sexuality at his home. The right to privacy allows permits individuals to make autonomous choices about their lives. The judgments concerning the right to privacy, dignity, and autonomy have an important implication for the rights of sexual minorities.

The Apex Court in Suresh Kumar Koushal’s case, maintained that a legislation should be just, fair and reasonable based on the principles of legitimate state interest and the principle of proportionality. The Court pointed that the right to live with dignity is included as a part of the right to life. On the previous ruling of the High Court which contended that Section 377 violates the right to privacy, dignity, and autonomy, the Apex Court criticized High Court for relying largely upon the judgments from foreign jurisdictions in its anxiety to protect the rights of sexual minorities. The Apex Court concluded that Section 377 is not unconstitutional. In the given case, the Apex Court neglected the application of Article 21 to Section 377.

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307 Siddharth Narrain Supra note 237 at 466.
308 Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors. Supra note 257.