



# Historical, Cultural and Socio - Legal Analysis of LGBTs in India

Sonam Narayan

Assistant Professor, M.J.P.Rohilkhand University, Bareilly

---

## Article Info

Volume 5, Issue 1

Page Number : 162-185

## Publication Issue :

January-February-2022

## Article History

Accepted : 01 Feb 2022

Published : 10 Feb 2022

**Abstract** - One of the most diverse, multi-colored, hierarchical, rigid, and equally forward-looking civilizations with a scientific mindset is Indian society. In literature like the Kamasutra, ancient artifacts and eloquently written descriptions of the LGBT community's contributions to Indian history can be found. In contrast to the present world, ancient Indian socio-legal views on LGBT people were flexible and reasoned. For a long time, academics have maintained that same-sex partnerships were not illegal nor viewed as immoral or wicked in pre-colonial Indian society. Homosexuality has historically been viewed in Hinduism, the largest and third-most practiced religion in the world, as natural and joyous. Many characters in the Mahabharata alter their gender, including Shikhandi, who is born female but later marries a woman and identifies as male. Fatwa-e-Alamgiri was declared in many of the ancient Mughal empires for Zina (illegal intercourse), in which there was a provision of punishments such as death by stoning for Muslims, 100 whips or 50 whips etc. However, for elite, at least, this requirement was widely disregarded in practise. In the 16th and 17th centuries, transgender people held influential positions in the courts of the Mughal emperors. Homo-eroticism was fairly prevalent in Mughal court life. In his autobiography, Babur, the Mughal Emperor, spoke of his crush on a boy. In contrast, homosexual behaviour was frowned upon by the average Mughal. Under section 377 of the IPC, the British made oral & anal sex illegal for both homosexuals & heterosexuals. This chapter will examine how homosexuality, which is often addressed in ancient writings, became prohibited throughout the Mughal dynasty (1526–1857) and was eventually codified by the British as an "unnatural sin." The chapter analyses the origin of s. 377 in the colonial history of India after going over the thoroughly documented history of LGBT people in ancient Indian writings across all of the main religions practised in ancient, mediaeval, and modern India. It tries to explain the fight for the decriminalisation of gay behaviour and the

acknowledgment of transgender rights in independent India in the latter portion.

**Keywords:** LGBT, Ancient India, Hidduism, Veds, Puranas, Ramayana, Mahabharats, Hijra

---

**Hinduism-** Hinduism is the world's oldest religion, and over 95% of all Hindus live in India. The Hindu religion does not adhere to any one dogma, worship any one God, hold to any one philosophic idea, practise any one set of religious rites or performances, and does not appear to meet the strict traditional requirements of any religion or creed, in contrast to other religions around the world. It is merely a way of life, to put it simply.

The five primary sacred texts of Hinduism are the Vedas, written in Sanskrit between 1500 and 900 B.C., the Upanishads, written between 800 and 600 B.C., the Laws of Manu, written around 250 B.C., the Ramayana, and the Mahabharata, written between 200 B.C. and 200 A.D.

The Shruti (what is heard) and Smriti (what is remembered) sections of the sacred writings of Hinduism. While the Mahabharata (which includes the Bhagavad Gita) and the Ramayana are thought to be Smriti, drawn from great sages, the Vedas and Upanishads are considered to be Shruti, divinely inspired. Sage Vyasa was the first to write the Ramayana, and Sage Vyasa was the first to write the Mahabharata.

It is important to note that the Hindu God Shiva is frequently depicted as "Ardhanarishvara," having a dual male and female nature, while discussing the status of homosexuals and transgender people in Hinduism. One of the proofs is a sculpture from the Elephanta Caves, which are close to Mumbai. The great god Shiva is depicted in his Ardhanarishwar (half man, half woman) form with the secondary sexual features of both sexes, which represents the minimization of disparities between male and female figures. The Ardhanarishwar is the cultural ideal that encourages Hindus to invoke a deity together rather than individually.

There are stories of both gods and humans experiencing gender change in the Hindu narrative tradition. Gay and transgender Hindus often worship several Hindu deities associated with gender diversity, such as Ardhanarishvara (the bisexual form of Shiva); Aravan (a hero whom Krishna married after taking the form of a woman); Ayyappa (Deity born from a deity) union of Shiva and Mohini; Bahuchara-Devi (a goddess associated with transsexuality). The Manusmriti, one of the earliest standards of conduct for Hindus, makes reference to homosexual behaviour. Although it is addressed in relation to sexual acts, homosexuality wasn't always viewed favourably.

Such behaviour is sanctioned with penalties. For instance, it is illegal for an older woman to have sex with a virgin woman. "A woman who pollutes a damsel (virgin) shall instantly have her head shaved or two fingers cut off, and be made to ride (around the town) on a donkey," Chapter 8 verse 370 of Manusmriti states. "A damsel who pollutes (another) damel must be penalised with 200 panas, pay the double of her nuptial fee, and get 10 (lashes with a) rod, according to Chapter 8 verse 369, which refers to sexual contact between two virgins."

When taken out of context, these regulations appear to be against solely homosexual relationships, but a careful examination of them reveals that they are actually concerned with a young woman's loss of

virginity, which disqualifies her from marriage. To further illustrate, chapter 8 verse 367 of the Qur'an states that "...if any man through impertinence forcibly pollutes a young lady, two of his fingers shall be immediately cut off, as well as he shall pay a fine of six hundred (panas)".

Given that the Manusmriti is the same text that places women even below a man's property, his livestock, and other assets, the disparity in treatment may have been caused by gender discrimination. According to chapter 11 verse 68, "causing damage to a priest, smelling wine or things that are not to be scented, being crooked, and sexual union with a man are historically considered to bring loss of caste<sup>494</sup>" for Brahmans and men who were born twice. The ceremonial bath is the atonement for twice-born men, according to verse 175 of the same chapter: "A twice-born man shall bathe, clothed in his clothing, after having intercourse with a male, or with a female, in a cart driven by oxen, in water, or in the daytime."

Again, it is very evident that only Brahmans and males who have been born twice are subject to these restrictions.

There is an interesting story of two queens in some versions of the famous Bengali epic *Kritivas Ramayana* on the pastimes of Lord Ramachandra. The gods were worried that Maharaja Dilip, the famous king of the Surya dynasty, had no children. Therefore, Lord Shiva appeared to the king's two bereaved queens, he blessed them to be loved and with their blessings a loving son would be born. After that one of them became pregnant. Unfortunately, the infant was born without bones, but with the help of a sage named Ashtavakra, the child was made perfect and the dynasty was run. Ashtavakra named the infant "Bhagiratha". In the *Mahabharata*, Arjuna had to become Brihannala. Similarly, Shikhandi was also a eunuch in *Mahabharata*.

**KAMA SUTRA-** Around the fourth century, the philosopher Vatsyana composed the *Kama Sutra*, a work of antiquity that discusses "Kama" (desire). It describes a variety of gender and homosexual practices in many places. It describes the methods used by both men and women of the third gender (*Tritiya-prakriti*) to practice *fellatio*. In the ninth chapter of the *Kamasutra*, two types of men are described as masculine- and feminine-types of homosexuals; Previously, in Victorian British translations, they were simply called "hijra". Such gay men also used to marry. People of the third gender who married together in the *Kamasutra* had very poor relations. In the *Kamasutra*, homosexual acts are despised, especially by Brahmins. The *Kamasutra* also mentions *svairini*, or autonomous or emancipated women, who do not marry and engage in sexual activities in their own homes or other households. Other religious writings include the *Narada Smriti*, which was composed around 400 AD and forbids the union of gay men and women. They are described as *Mukhebhaga* or males who engage in oral intercourse with other males. It said, "these four [*Irsyaka*, *Sevyaka*, *Varateta* and *Mukhebhaga*] should be disqualified for marriage, even for a woman who is raped."

The *Sushruta Samhita* is a Hindu scripture that dates back to at least 600 BCE and discusses two different sorts of gay men as well as transgender persons (*Kumbhika*, who participate in anal intercourse, and *Asek*, who engages in sexual intercourse with other men). consume semen, *sandha* (men with female qualities, behaviour and speech). It is significant to remember that male or female behaviour is predetermined at the time of conception in the womb, whether it be in men or women. This suggests that both genders are equally likely to be present. Such a birth is indeed mentioned in the South Indian epic *Kritivas Ramayana*. Other literature mention various categories of males who lack sexual excitement (known in Sanskrit as *sandha*, *kaliba*, neuter and *panda*).

Twenty categories are included in the "Sabada Kalpadrum" Sanskrit dictionary, the Kamatantra, and the Smriti-ratnavali of Vakaspati (14th century). The Narada Smriti contains similar lists of fourteen different categories. There are three different categories of gay men, intersex people (Nisarga), trans people (Sandha), and (Mukhebhaga, Kumbhaka, and Asekya).

These texts suggest that third-gender terminologies such as sandha and napumasaka are actually "related to a variety of people who are eunuchs with women."

**Views of historians-** The status of homosexuality in Hindu literature is briefly described by historian Devdutt Patnaik as follows: "Homosexual behavior was not a mainstream issue in Hinduism; its presence was acknowledged but not accepted." In his book "Tritiya Prakriti: People of the Third Gender", a Vaishnava monk shows that early forms of Hinduism accommodated homosexual and transgender people much more favorably than in India today. Other historians claim that while homosexuality was allowed in other castes, it was not acceptable to Brahmins or Dwijis. The researchers claimed that "early Vedic teachings promoted responsible family life and asceticism, but also accepted different styles of sexuality within normal society."

### Homosexuality & Muslims

The people of Lot, also known as the inhabitants of Sodom and Gomorrah, were destroyed by the wrath of Allah because they indulged in "erotic" physical practices among men according to the Qur'an. The biblical term "people of plunder", which refers to the inhabitants of Sodom and Gomorrah, is used seven times in the Qur'an, and their destruction by Allah is clearly linked to their sexual behavior.

Abdullah Yusuf Ali translation of the Quran is used for the portions that follow. We also despatched Lut, who asked his people: Do you engage in sexual behaviour as no one before you has ever done in reaction? You are an unstable individual because you indulge your lust for males rather than females. And his followers had just this response: "They are men who do desire to be more pristine and clean, so expel them from your city." (Quran 7:80-82) "Will you approach males among all the creatures in the world and reject the partners Allah has given you? No, you are a person that crosses all boundaries! It was said: "If you don't stop, Lut! "You will undoubtedly get expelled! " "I do dislike your actions," he remarked. "No, Lord! Save my family and I from the evils they do! " We therefore delivered him and his family, with the exception of an elderly woman who stuck around. But we completely demolished the rest. We showered down a deluge of brimstone on them, and the people who disregarded our warnings suffered the consequences! Undoubtedly, this is a sign, but the majority of people reject it. And undoubtedly, he is your Lord, the Exalted in Power and Most Merciful. " (Quran 26:165.175)

"Would you really pursue men instead of women to satisfy your desires?" No, you are a grossly illiterate person! But his supporters only provided the following response: "Drive out the Lut followers from your city; these are guys who do genuinely seek to be clean and pure," they commanded. Except for his wife, who was destined to be among those who fell behind, we saved him and his family. They received a shower of brimstone from us, and those who disregarded our warnings suffered the consequences. (Qur'an 27:55- 58)

And keep in mind what Lut declared to his people: "You commit lewdness like no one in Creation (ever) has before you. Do you really approach men and block off the road? -and engage in evil deeds even in your councils? " But his followers only had one response: "Bring us Allah's wrath if thou tellest the truth." (Quran, 29:28-29). However, there is only one verse or chapter in the Quran that can be taken to mean that

gay behaviour is prohibited.

**Additional LGBT-RELATED Islamic Laws-** Homosexuality is viewed by many experts of Shariat, or Islamic law, as both a sin and a criminal offence. Islam does not specify any particular punishment; instead, local authorities are free to impose whatever they see fit. Additionally, it is unreported that the Prophet Mohammed has sentenced anyone to death for practising homosexuality. Hadith scholars like Abu Bukhari and others have questioned the veracity of any authentic hadith in which the Prophet is said to have prescribed a penalty for homosexuals.

**Homosexuality and Sikhism-** Sikhism, like Hinduism, does not have any explicit teachings regarding homosexuality. Even though the Guru Granth Sahib Ji, the Sikhs' holy book, praises marriage many times, it doesn't say anything about being gay.

The Guru Granth Sahib, the Sikh holy text, outlines the conduct expected of all Sikhs. Even though it talks a lot about marriage, it seems to say nothing about homosexuality. Sikhs today hold a variety of opinions about homosexuality.

**Buddhism and homosexuality-** Buddhists have a very diverse range of views on homosexuality. The fundamental ideas of Buddhism, however, assert that sexual pleasure in particular and sensual happiness and desire in general are obstacles to enlightenment and lower forms of enjoyment. Buddhism is a religion that is inferred by its religious philosophy to be against homosexual intercourse and is neutralist in its scripture. Buddhist followers and the leader of the religion have both said that they support "tolerance, compassion, and equal rights for all, regardless of sexual orientation." However, they have stuck to their position that any sexual act or physical indulgence that goes against the natural order of things must be condemned.

**The Criminalisation of Homosexuality is a Colonial Imposition-** "Indian Law Commission" was created in 1833, during the rule of the "East India Company" in India, and Thomas Babington Macaulay was chosen to serve as its chairman. The 488-clause Draft Penal Code was presented to the Indian government in 1837 by the Indian Law Commission, which was led by Macaulay. After the First Report was presented on July 23, 1846, C.H. Cameron and D. Eliott submitted the 2nd Report of Her "Majesty's Commissioners" for Revision & Consolidation of the Law on June 24, 1847.

These commissions came to the conclusion that the Draft Penal Code was sufficiently thorough and suitable for implementation with only minor changes. On May 30, 1851, the judges of the Sudder Court in Calcutta and the Supreme Court in Calcutta both received copies of the new Penal Code.

The updated version of the Code was created by "Mr. Bethune", a member of the Indian Legislative Council, taking into account the opinions of Mr. Justice Colvile, the Chief Justice, and Justice Buller, who were then serving as Justices of the Supreme Court in Calcutta. It was then sent to the East India Company in London. The London Company was eager to implement the penal law as soon as feasible. So they made Mr. Barnes Peacock the fourth member of the council. In light of the infamous Indian War of Independence of 1857, revised Penal Code Draft, which was then sent to a Select Committee in 1857. So, soon after, Code was passed in October 1860, and it went into effect on January 1, 1862. It is important to remember that the final version of s. 377 differed significantly from Macaulay's Draft. This was the details of Macaulay's initial draught:

S. 361: Anyone who intentionally touches a person, an animal, or allows someone else to touch him

with the object of satisfying an unnatural lust is punishable by imprisonment of either kind for a duration that cannot be less than two years and can't be less than fourteen years, as well as by a fine.

Anyone who intentionally engages in sexual activity on another person without that person's free and informed permission in order to sate an unnatural lust is punishable by either sort of imprisonment for a time that may not be less than 7 years and may not extend to life, as well as by a fine. Macaulay suggested a life sentence for satisfying unnatural lust without permission and a 14-year sentence for the same crime when permission was given.

Clauses 361 & 362, he added, "relate to an abhorrent class of offences about which it is preferable that as little should be mentioned." We leave the two clauses that we have proposed for these offences to His Lordship in Council's discretion without making any further comment. We are unwilling to add anything in the text or the notations that could spark open dialogue on this revolting subject because we firmly believe that the harm that such discussion could do to society's morality and ethics would far outweigh any benefits that might be obtained from laws that is framed with utmost precision.

It is unclear when s. 377 eventually took shape during the deliberations before the numerous people and committees after 1837. What is certain is that the draught equivalent of s. 377 was sent for enactment by the Committee of Sir Barnes Peacock in the end.

So few modifications have been made to the IPC throughout its almost 150 years of existence. The 42nd Law Commission Report, which was written early in the history of this country, did not support the amendment or repeal of s. 377. The Law Commission, headed by Justice B. P. Jeevan Reddy, stated in 2000 that anal intercourse among consensual adults of any gender should not be punished, however, because modifications to the prior statutes made that obvious.

### **Section 377 and Other Punitive Provisions Applied to the LGBT Community:**

Section 377 of the IPC, which deals with abnormal offences there, addresses homosexuality. This law against homosexuality was imported into India from the 19th-century British Penal Code.

"Whoever willfully engages in sexual intercourse with any man, woman, or animal against the order of nature shall be punished with imprisonment for life, or with imprisonment of either sort for a time which may extend to 10 years, and shall also be liable to a fine," S. 377 declares. The forbidden behaviours are referred to as "unnatural transgressions" in the marginal remark. However, this phrase is not found in the text of section 377 IPC. In contrast to "sexual intercourse," which is used in sections 375 and 497 of the IPC, "carnal intercourse" is used in section 377 of the IPC. Carnal is defined as "sensual, sexual," "of the body or flesh," and "worldly." Under Law 377 of the Indian Penal Code, consent is not a defence to an offence, and the section makes no distinction based on age.

Similar to how s. 292 of the IPC mentions obscenity, there is considerable room for homosexuality to be covered under this provision. Gay males are likewise subject to s. 294 of the IPC, which criminalises any form of "obscene behaviour in public."

It is crucial to note that in England, where this law originated, homosexuality between willing couples is no longer a crime under the Sexual Offenders Act of 1967. However, in India, consent is largely irrelevant for committing the offence as it is stated in this provision.

S. 46 of Chapter 6-Offenses of the Army Act, 1950 states that anyone subject to this Act who violates any shameful conduct of a crude, indecent, or unnatural kind may be sentenced to imprisonment for a term up to 7 years or much less punishment as this Act mentions upon conviction by court-martial. The Indian Armed Forces' (IAF) legal treatment of homosexuality is modelled after s. 377 of the IPC. As a result, s. 377 is the main section in India that defines and describes unnatural offences. This section says that homosexuality is a crime that can be proven, can't be released on bail, and can't be added to other crimes. It is punishable by life in prison or ten years in jail plus a fine.

The Criminal Tribes Act, 1871, which was a law under British control to regulate the people of the Hijra/Tg tribe, stated that everyone in the Hijra community was naturally "criminal" and "accustomed to non-bailable offences" .." Such persons may also be detained without warrant and punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. However, this act was repealed in August 1949.

**Interpretations by Judges-** In spite of not having a clear definition, Indian courts have interpreted "carnal inter-course against the order of nature" to encompass anal sex, oral sex, and occasionally other non-procreative sexual acts, including mutual masturbation. Despite the fact that heterosexual couples also exhibit these behaviours, homosexual sex has historically faced the brunt of the law. The "voluntary" clause in the law declares such intercourse to be unlawful, regardless of whether it is consented to.

The "European Court of Human Rights" determined in the 1980s that criminalising same-sex sexual activity violated the rights to privacy. In 1967, homosexuality was made a non-violent crime in Britain, which during the colonial era also created the IPC and s. 377. Due to the difficulty of establishing "carnal intercourse against the order of nature" in private, the legislation has rarely been invoked in court rulings in India. It is necessary to catch two people engaging in a sexual act, which is typically done in private, in order to bring about a successful conviction. Since 1930, only one person has been charged with a crime for having a sexual encounter with someone of the same sex with their permission.

The Sexual Offences Act of 1967, which was implemented in Britain in response to the Wolfenden Committee's recommendations, decriminalize acts of homosexuality and sexual abuse among consenting adults (over 21 years of age). In 1957, the Parliamentary Advisory Committee suggested repeal of laws criminalizing homosexual activities.

There were just 30 cases heard by the High Court & Supreme Court in the entire period of the Act, which ran from 1860 to 1992. 30 cases were registered, of which 18 were non-consenting, 4 were consensual, 3 of which occurred before 1940, 8 were unspecified, and 15 were assaults on juveniles.

In *Fazal Rab v. State of Bihar*, the Supreme Court was debating a case in which a man had gay relations with a child with the boy's consent. The Supreme Court remarked that the offence in this case is covered under Section 377 of the IPC, which denotes sexual perversity. After considering the boy's consent, the Supreme Court decreased the sentence from 3 years of hard labour to 6 months of hard labour.

### **Scars of the IPC's Section 377:**

In August 1994, in front of the Delhi police headquarters, the non-governmental organisation AIDS Bhedbhawe Virodhi Andolan (ABVA) held the first-ever protest March that openly advocated "gay rights." This protest happened after "Less than LGBT," the first book to publicly advocate gay rights in India, was

published in 1991. The first Hindi-language movie to feature a lesbian romance was released in December 1999 under the title "Fire. Even when the National Film Censor Board, which is in charge of approving feature films, gave it its seal of approval, people attacked moviegoers, destroyed theatres, and asked that the movie be pulled.

Many of the NGOs that showed up in support of LGBT people faced harassment as well. Sangama, an NGO based in Bengaluru that supports sexual minorities, was informally outlawed since the police forbade people from asking for their assistance and forbade them from holding meetings in the city. 595 Similar to this, in 2001, three activists from the "Bharosa Trust" and "Naz Foundation International," who were giving out condoms and educational literature to homosexual men in Lucknow, were arrested and accused under s. 377 of "operating a gay sex club." After 47 days of widespread protests, the state was compelled to free them.

As an illustration of the negative impact of Section 377 on AIDS prevention efforts, Geetanjali Mishra cites the year 1994, "when a group of doctors urged that condoms be delivered in a Delhi prison where there were high reported rates of homosexual sex." Because providing condoms would amount to sanctioning homosexual conduct, which is against the law according to Section 377, the prison administration refused. 600 The former Inspector General (IG) of Tihar Jail, Kiran Bedi, declined to offer protection to the inmates, arguing that doing so would amount to encouraging homosexual behaviour and, more crucially, would be an acknowledgement that such behaviour occurred. The rights of sexual minorities to health, dignity, privacy, and eventually their life and liberty have all been severely harmed by s. 377.

**The Road to Homosexuality Discrimination-** The first report describing the experiences of LGBT people in India was published by ABVA in November-December 1991. The startling level of blackmail, extortion, and abuse that LGBT people experience is revealed in the 70-page report titled "Less than Gay," especially at the hands of the police. The report demanded the repeal of all laws, including s. 377, that discriminate against people who identify as LGBTQ. Ironically, reporters were too ashamed to ask questions after the publication at the Press Club of India.

In "Less Than LGBT," ABVA provides a thorough account of the political climate for gay people in India in the early 1990s. A few examples listed in the article include police extortion on a daily basis, surveillance of LGBT people, and harassment of gay meetings by the police. The "Gay Manifesto" demanded the repeal of all laws that specifically criminalised same-sex actions committed by consenting adults in private, including s. 377 of the IPC and the pertinent provisions of the Army, Navy, and Air Force Acts of 1950. Recognizing the right to privacy as a fundamental right was one of the most forward-thinking and notable demands. recognise the right to privacy as a key component of the citizen's right to life and liberty, including the right to his or her sexual orientation, as stated in the third demand of its sixteen-point Charter of Demands. Only 26 years after the organisation had developed and addressed the privacy concern, the Supreme Court of India acknowledged and recognised this demand.

**The NAZ Foundation V. the Government of NCT Delhi-** In 2001, the second attempt to repeal s. 377 got under way. The Naz Foundation India Trust, a Delhi-based NGO whose members themselves had experienced police persecution during their HIV education campaigns among sexual minority communities, teamed up with the "Lawyers Collective," a free legal aid group that also served AIDS patients. It's interesting to note that they asked the Delhi High Court to amend section 377 so as to remove "private consenting homosexual intercourse between adults" rather than repeal it entirely. Children's rights organisations



disagreed with the repeal of Section 377 as a whole because it was the only statute that allowed for some degree of prosecution of sexual abuse of minors.

**Advice of the Petitioners-** The petition said that Section 377 goes against four fundamental rights in the Indian Constitution: the right to equality before the law (Article 14), which is broken by Section 377's bias against certain groups; the right to be free from sex discrimination (Article 15), which is broken by Section 377's main focus on homosexual sex; the right to fundamental liberties (Article 19); and the right to life and privacy (Article 21).

A coalition of NGOs representing various social movements working on human rights issues joined the petition to support the argument and provide testimony from people who were personally harmed by s. 377. It was established in 2003 and brought together a sizable number of NGOs fighting to advance the rights of gay, lesbian, bisexual, and transgender people, as well as child rights advocates and feminist organisations, from which a unified voice against s. 377 was formed. The coalition was able to share the accounts of those whose lives had been ruined by the discriminatory law and others' abuse of it, as well as their experiences with police blackmail and threats of prosecution. The same testimonies were eventually included in the ruling and were successful in bringing the judges' attention to the neglected lives of sexual minorities.

**Comments from the respondent-** Both the Ministry of Home Affairs and the Ministry of Health and Family Welfare provided legal views. They claim that s. 377 fills a gap in rape legislation and strives to punish those responsible for sexually abusing children. Additionally, they asserted that Indian society does not tolerate same-sex behaviour and that the country's laws only reflect ingrained social mores.

**The Decision-** However, this petition was denied because the Naz Foundation lacked locus standi and was not personally harmed by s. 377. Therefore, the petitioners requested a review of the petition's dismissal by the Supreme Court of India. The SC ruled that the Delhi HC must hear the matter because the grounds for the dismissal were invalid.

Finally, the Delhi High Court ruled in 2009 that section 377 violates articles 14, 15, and 21. After examining Article 14, the Court determined that each differentiation or classification must be based on an "intelligible differentia" that has a logical connection to the desired outcome. It stated in its conclusion that "S. 377 does not distinguish between public and private acts, or between consensual and non-consensual acts, and therefore does not consider relevant factors such as age, consent, and the nature of the act or absence of harm," it stated in its conclusion. Therefore, such criminalization in the absence of evidence of harm seems arbitrary and unreasonable." The judges ruled that the statute breached articles 14, 15, and 21 of the Constitution "so far as it criminalises voluntary sexual actions of adults in private" and that discrimination based on sexual orientation is illegal even when it is applied horizontally.

Although s. 377 also extended to juveniles, the judgement was only applicable to adults. In situations where children engage in penile non-vaginal sex, the legislation would still be applicable. The cultural attitude of LGBT people began to change between the time the petition was first submitted in 2001 and the date of the ruling. As it turns out, the first NAZ petition was about LGBT people because it was believed that focusing a case on the human rights of sexual minorities would alienate the court more than persuade it. The initial NAZ petition adopted a clear focus on the health dangers imposed by s. 377. LGBT people have been subject to harassment thanks to S. 377. When homosexuality is no longer a crime, discrimination will still

exist because "it will take time for the judgement to bed-in."

**Activism Background-** The "National Human Rights Commission's" (NHRC) decision to reject a gay man's claim that he had been abused by a psychiatrist because he was given aversion therapy led to the NAZ Foundation's petition to the Delhi High Court, which eventually led to homosexuality being decriminalized.

By 2009, the socio-political landscape had changed so rapidly that the main focus of the petition was to cover the human rights of sexual minorities. This change was made possible by a group of 12 progressive NGOs and other groups that had a presence in Delhi, called "Voice Against 377". NGOs including CREA, Talking About Sexual and Reproductive Health Issues (TARSHI), Nirbhaya, Nigah Media Collective and Prism were part of the alliance.

**A Volte-Face-** Numerous appeals were filed against the Delhi High Court's ruling in the NAZ Foundation case, which was decided in favour of decriminalising homosexuality. One appeal, Suresh Kumar Kaushal v. NAZ Foundation & Oths., was the result of the consolidation of all the appeals. When the SC voted to re-criminalize homosexuality, noting that s. 377 "does not suffer from the vice of unconstitutionality and the declaration issued by the division bench of the high court is legally unsustainable," the LGBT community suffered a significant setback.

**Our Appology for the Delhi HC Judgment-** S. 377 covers all voluntary acts of carnal intercourse, regardless of gender, and is gender-neutral. They argued that it did not infringe on the right to privacy and that even the right to privacy does not excuse criminal behaviour. They further asserted that the judgement had an impact on Indian society and the conventional view of marriage. Additionally, they issued a warning against the appeal of gay acts to young people. Also, the parliament should be the one to decide if a law is moral or not.

The Appellants' arguments for why s. 377 was constitutional included the following: "The High Court committed a severe error by finding that s. 377 violated articles 14, 15, and 21 of the Constitution because it disregarded the absence of any foundational facts in the respondent's writ that would be necessary for making a determination regarding the constitutionality of any statutory provision. The written evidence that was used instead did not support the conclusion that gay people were treated unfairly by the law.

**Arguments in Support of the Delhi High Court's Decision-** S. 377 specifically targets the sexual orientation of the LGBT community. Under article 21, sexual rights are safeguarded. As a result, Section 377 denies them moral citizenship. It criminalises all forms of homosexual sexual intercourse and forbids sexual behaviour between men, which is by definition penile and non-vaginal. It harms homosexual men at a deep level and inhibits their right to dignity, personhood, and identity. Sexual intimacy is crucial for one's psychological health, and Section 377 deprives homosexuals of it. As society and times have changed, so too should the law. According to the respondent, Articles 14 and 21 are related. S. 377 does not give the discretion to choose which specific case, out of all the ones covered by the ambiguous statute, should be investigated. Criminalization worsens discrimination and makes HIV prevention programmes more difficult to implement.

The respondent argued in support of the Delhi High Court's decision that Section 377 discriminates against the LGBT population by criminalising a natural and personal trait and by including consensual activities between adults in their homes, which violates their right to privacy. They argue that, as "sexual identity" and "sexual orientation" are parts of the right to dignity granted by article 21, criminalising homosexuality under s. 377 robs LGBT of that right.

Certain behaviours that are an expression of homosexual men's fundamental sexual personality are made illegal, which has the negative effect of undermining their ability to maintain their dignity as human beings. As s. 377 criminalises all forms of sexual activity that homosexual men can engage in, it has a profound impact on them and restricts their right to dignity, personhood, and identity, as well as their equality and right to health. This is because sexual activity between men that is, by its very nature, penile and non-vaginal is prohibited.

The experience of sexual intimacy is fundamental to the human condition and is crucial for social adjustment, psychological well-being, and mental health. Homosexual men can't have this human experience because it's illegal for them to be sexual, but it's not illegal for heterosexuals. The Court must consider the temporal appropriateness of section 377 as well as shifting values. The Constitution should continue to be adaptable in order to address problems and difficulties that arise in the future. Indian culture is changing quickly, and things that used to be considered wrong shouldn't be punished anymore.

In order for other fundamental rights to be effectively realised, both the right to equality granted by Article 14 and the right to dignity and privacy granted by Article 21 of the Constitution must be upheld. The respondent further claimed that while s. 294 recognises the distinction between obscene conduct performed in private and in public, it should not be interpreted in isolation. It should be looked at in light of Article 21 of the Constitution, which says that people have the right to live alone.

They also argued that section 377 is too ambiguous and gives police too much latitude to harass members of sexual minorities. The appellants used court documents and NGO reports to show that they had been mistreated and harassed on a regular basis. The danger of AIDS rises when homosexuality is criminalised, as well as deterring members of the same LGBT group from coming out and asking for assistance.

### **Turning Over the NAZ**

On December 11, 2013, a bench of two SC judges overruled the Delhi High Court's verdict, admitting the appeal and describing it as "legally unsustainable." They concluded that Section 377 of the IPC is legal and does not contravene the Constitution. The Supreme Court and the High Court have the authority to rule on the legality of laws, but as Parliament is thought to speak for the people, it would not pass any legislation that would violate the Constitution.

**A Dawn-** Although the NAZ Foundation case marked the first time that s. 377 was ever read down by the Delhi High Court to decriminalise consensual homosexual acts between two adults, it was the landmark decision in *NALSA v. Union of India* that fundamentally altered the judicial discourse in the SC regarding the freedom of sexual orientation and gender identity. With its decision, the Supreme Court gave transgender people their rights and brought back hopes that homosexuality would no longer be illegal.

The court's analysis of the history and significance of transgender people in Indian culture noted that the transgender community is made up of people who identify as Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, etc. They have a long history in our nation and are frequently mentioned in Hindu mythology as well as other religious texts. The Vedic and Puranic literatures both contain the idea of tritiya prakrti or napunsaka.

The judges provided an explanation of international jurisprudence in this regard, noting that the European Union had provided protections from employment discrimination related to "gender reassignment" in a 1996 decision of the European Court of Justice in *P v. S and Cornwall County Council*<sup>661</sup>. When the Sex Discrimination Regulations were passed in 1999, the UK ratified this EU ruling. Any level of work is covered by this law's provisions for transgender people who "plan to undergo gender reassignment."

In the current case, Laxmi, a transgender activist, and Poojaya Mata Nasib Kaur Ji, a registered group, submitted the petition in the current case on behalf of the Kinnar community, a transgender community, and asked for the same relief—namely, the recognition of transgenders' gender. The gender of a person is established at birth, and subsequent decisions regarding adoption, marriage, inheritance, succession, taxation, and welfare are made in accordance with that gender. However, transgender people do not fit within either the male or female gender categories, as alleged in the petition. The petitioners claimed that transgender people are not given the choice to choose their gender.

### **Comments of the Petitioners**

The petitioner argued that every TG person should have the freedom to select their preferred sex and establish their sexual orientation. According to the petitioner's attorney, they have been treated as second-class citizens in this country since they do not fit into the binary gender categories and their status as third gender is not recognised. They added that transgender people are excluded from social and cultural life, which denies them the right to education, medical care, and access to public areas. It goes without saying that everything said above eventually violates their fundamental rights to equality, dignity, freedom, and life.

They further argued that the fundamental rights afforded to them as Indian citizens are violated by the non-recognition of the TG community's gender identification. Additionally, they demanded that transgender people get affirmative action and be recognised as socially and educationally disadvantaged individuals under the law.

15 One of the petitioners, Laxmi, shared her personal account of experiencing severe discrimination. She went on to say that she had been treated like a criminal by her own society and even her state. She also said that passing laws to protect the rights of transgender people falls under the constitutional prerogative of the state and all of its organs.

### **Arguments made by the Indian Union**

The Union of India detailed every single action the state had taken to enhance TG conditions.

### **Judgment**

An individual's persistent physical, romantic, and/or emotional attraction to another person is referred to as sexual orientation. In addition to homosexuals, bisexuals, heterosexuals, and asexuals, people with heavy sexual orientation also include transgender and gender-variant people, and their sexual orientation may or may not change during or after gender transmission. According to the Honourable Court, "Hijra are not men by virtue of anatomical appearance and, psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation, and they also do not have reproduction capacities as either men or women," so they cannot be categorised into the binary of men and women and instead claim to be an institutional "third

gender." In addition, the court classified transsexuals as people who have undergone "sex reorientation surgery" to align their biological sex with their gender identity and change from being female or male.

### **International laws that the SC court has referred**

The Court also made reference to the following international laws that have been passed in a number of other countries and have recognised the rights of transsexual people:

- In the United Kingdom, the General Recommendation Act of 2004 and the Equality Act of 2010 both recognise gender reassignment as a protected trait, make it illegal to treat people differently because of it, and protect a number of social rights, such as marriage, parenthood, inheritance, social security, and pensions.
- Australia's Sexual Discrimination Amendment (Sexual Orientation, Gender Identity, and Intersex Status) Act, 2013 (Act 2013), makes it illegal to discriminate based on sexual orientation, gender identity, or intersex status.
- European Union transsexual legislation forbids discrimination resulting from a person's gender transition.
- South Africa's Alteration of Sex Description and Sex Status Act of 2003 allows transgender people who have had gender reassignment surgery, people whose sexual preferences have changed over time, and intersexed people to ask for a change to the sex description on their birth record.

The law on gender identity in Argentina recognises that everyone has the right to be recognised for who they are, regardless of their gender. They also have the right to freely develop who they are in accordance with their gender identity, and they can ask to have their recorded sex changed in addition to their first name and appearance. It was passed in 2012 and was recognised as the most comprehensive law on transgenders at the time.

The new rule in Germany, which took effect on November 5, 2013, permits parents of children with intersex variation to list the children's sex as "not specified."

The Equal Treatment and Promotion of Equal Opportunities Act of the European Parliament of 2003 lists sexual orientation as one of the grounds for discrimination.

Before turning to domestic law concerning transgenders, the court emphasised various international conventions, such as the Yogyakarta principles, which place an emphasis on gender equality, human dignity, and life. It also emphasised the fact that these conventions are complied with by many other nations around the world to protect the human rights of transgender people. The court then cited Article 253 of the Indian Constitution, which gives Parliament the authority to pass laws for the entirety or a portion of India's territory to implement treaties, agreements, or conventions; and Article 51 of the Directive Principles of State Policy, which commands the state to promote adherence to international treaties and laws.

The Honourable Court also cited *Dattatraya Govind Mahajan v. State of Maharashtra*, which stated that "Our Constitution is a trust with destiny, imbued with lucent solemnity in the words" justice—social, economic, and political." The Supreme Court had stated in this case that "the three great branches of the government, as creatures of the Constitution, must remember the above promise in their fundamental role as well as forget it at their peril, for to do so will be a betrayal of the chosen high values and objectives which

this nation set for itself in its objective resolution but whose elaborate summation appears in Part IV of the Paramount Parchment."

"National Human Rights Commission v. State of Arunachal Pradesh case", in which this Court stated, "We are a country ruled by the Rule of Law," provided further inspiration for the honourable judges. Every human being is given certain rights under our constitution, and citizens are given additional rights. The Court has made a thorough case for why it is crucial to acknowledge people's "sex identity gender" and to "ensure equality and non-discrimination" according to one's gender identity. Final judgement from the Honorable Court was as follows:

- - Eunuchs must be treated as a "third gender," in addition to the binary gender, in order to maintain their rights under Part III of the Constitution as well as laws enacted by Parliament and state legislatures.
- The freedom of transgender people to self-declare their gender is likewise protected, and state and federal governments are required to acknowledge their gender identification, whether it is that of a man, woman, or another gender entirely.
- In order to end all types of racial and ethnic discrimination when evaluating applicants for public employment and admittance to educational institutions, we implore the Central Government as well as the State Governments to treat them as citizens of socially & educationally underprivileged sections..
- Ordered by Center and State for setting up unique HIV cells for transgender.
- - Both the federal and state governments should take the appropriate actions to guarantee that transgender patients receive medical care in hospitals and have access to separate public restrooms and other facilities.
- Action should be taken by the state and the centre to create a variety of social welfare programmes for their improvement..
- In order for transgender to feel included in society and to avoid being considered outcasts, the Center and the state must take action to increase public understanding..

The NALSA ruling is a profoundly important and possibly game-changing judgement in this regard. The Court rejected the argument that sex discrimination in Indian constitutional law was only allowed to be based on biological sex and made it plain that it also covers prejudice based on one's gender identity. It was argued that a binary conception of gender provided the foundation for pervasive discrimination and denied hijras and transgender individuals equal legal protection. The Supreme Court has ruled that transgender people should no longer be treated with brutality, sympathy, or charity. A paradigm shift in favour of a rights-based strategy where they are acknowledged as fully human is required.

Justice Sikri in his judgment said that the eunuchs have the right to vote, right to property, right to marriage, right to claim formal identity through ration card, any kind of passport or driving licence, right to education, employment, health and Other rights will be meaningfully available.

**Homosexuality and Nalsa Judgment-** Although the Suresh Koushal v. Naz case, the focus of a curative petition at the time, was discussed, the Court did not take a position on it. The Koushal decision's key finding that

there was insufficient evidence of police harassment was undermined by the Justices' recognition that s. 377 was being misused to harass transgender people. They stated that the possibility that a transgender person might be having sex with a man also implies that homosexuals, men who have sex with men, or transgender people would also be subject to such harassment.

Thus, before the dawn of the Navtej Johar Case, the NALSA Case was the first beam of light in the gloomy sky of LGBT rights in India.

**The Naveen Johar judgement in the New Morning-** For the LGBT community, September 6, 2018 was a day unlike any other; it saw the realisation of a long-held dream. It was a significant win for the passionate and vocal LGBT movement, which had been campaigning for the repeal of IPC Section 377 for many years. The 1860 statute decriminalising the lives of LGBT people was overturned by the SC in its ruling in Navtej Singh Johar v. Union of India. The decision itself has a history of being tortured, persecuted, and harassed by the local society, so it was not made lightly. It came about as a result of widespread protest and relentless battles across the nation.

The members of this community and their relatives "owe history an apology for the delay in providing reparation for the ignominy and ostracism that they have endured throughout the centuries." On September 6, 2018, Justice Indu Malhotra read down Section 377 insofar as it criminalises adult consensual sexual acts in private.

According to Chandrachud J., "almost 68 years after we gave ourselves a liberal constitution, the offence under s. 377 of the Penal Code has persisted. Seven decades after independence, gays, lesbians, transgender people, and bisexual people are still not granted completely equal citizenship.

Chief Justice Dipak Misra referred to one of the precedents on privacy, "The rights of the LGBT community are inherent in the right to life, dwell in dignity and privacy, and they constitute the essence of freedom and liberty," and observed that punitive laws undermined the "right to choose without fear" a partner and realise "a basic right to companionship."

The law, according to Justice Rohinton Fali Nariman, was "capricious and nonsensical." According to him, decriminalising gay sex needs to be a component of a larger public education effort to "remove stigma" against LGBT people. A place of visibility and acceptance for the love and lives of the LGBT community in Indian culture has been established thanks to the fight of thousands of people across the nation over the past 25 years.

The Constitutional Bench ultimately decided to consider the following issues:

- Whether Section 377 of the IPC violates the Constitution's Article 14 right to equality Whether Section 377 violates the Constitution's Article 19, guaranteeing freedom of expression and speech
- Does Section 377 violate the Constitution's Article 21 right to a "life with dignity and in privacy"?
- Section 377 of Article 15 of the Constitution asks if discrimination based on sexual orientation is against the law.
- Is it arbitrary that Section 377 makes a consenting relationship a crime because it goes against the way things should be?

**The Decision-** The verdict was delivered on September 6, 2018. The court ruled that section 377, which makes private consensual activities between adults (those who are older than 18 and are capable of consenting) illegal, violates the Constitution's articles 14, 15, and 21. However, it was made clear that such permission had to be given freely, voluntarily, and without fear of reprisal or other forms of pressure. Additionally, it was declared that the application of section 377 can be relied upon in all ongoing cases even though it will not result in the reopening of any closed prosecutions. The following are the key factors taken into account in the judgement:

- The Indian Constitution seeks to transform a traditional, unequal democracy into a modern, hierarchical society. The concept of constitutional morality compels the state's institutions to preserve this diversified social fabric and to restrain any movement toward majoritarianism or popular emotion. It is unfair to associate devotion and loyalty with constitutional morality with the prevailing sentiments of the time.
- In addition to the state and the judiciary having a responsibility to uphold this fundamental right to dignity, society as a whole also has a duty to uphold the dignity of others since it is required under the Constitution. It is a manifestation of the constitutional fraternity component.
- A person's emotional behaviour can be influenced by factors other than orientation to seek intimacy with people of the same gender, which may result in two people being attracted to one another biologically. It must be viewed as a voluntary action that reflects a consensual decision.
- In light of the majority ruling, the public acceptability test was in no way a justification for ignoring rights that have been granted the sanctity of constitutional protection. The Court noted that small and isolated minorities suffer severe dangers of discrimination simply because their opinions, beliefs, or way of life are different from the "majority" in a democratic constitution founded on the Rule of Law. Their rights are nonetheless just as vital as those of other citizens, notwithstanding this.
- According to the Suresh Kaushal case, a very small percentage of persons identify as homosexual, bisexual, or transgender because doing so would violate the equality principle entrenched in Article 14 of the Constitution. Because "corporal intercourse" and "order of nature" are ambiguous, Section 377 is unlawful. This violates Article 14 of the Constitution's equality requirement.
- According to the idea of progressive realisation of rights, the state must take the appropriate actions to ensure that economic, social, and cultural rights are gradually realised.
- IPC's S. 377 ignores the reality that such activity among adults in private areas is neither detrimental to society nor contagious, and it also fails to distinguish between voluntary and non-consensual sexual actions between able-bodied adults.
- The court affirmed the determination made by the Mental Healthcare Act of 2017 that homosexuality is not a mental illness or condition. Treatment of homosexuality as a disorder has a significant negative influence on the mental health & overall welfare of LGBT persons. People's mental health suffers from "growing up in a culture that devalues and silences same-sex attraction."
- A way for a person to express their sexual desire, including the freedom to pick their partner and the choice of relationship they want.



- The right to health of transgender persons and men who have sex with males is seriously threatened. Wide-ranging impacts of this "important group" include removing them from the public health system.
- States are required by international human rights treaties and legal precedent to protect all people from abuses of their human rights, including those motivated by their sexual orientation. According to international agreements such as the UDHR, ICCPR, and ICESCR, the punishment of consensual private activities between same-sex adults is a infringement of the freedom from discrimination, the right to privacy, and the equality.

The SC Court's four rulings, handed down by its five justices, link sentimental assertions of compassion, respect, empathy, optimism, and love to expansive constitutional ideals of inclusiveness, democracy, and dignity. The ruling stated that LGBT people have the same rights to all constitutional protections as other citizens, including the freedoms guaranteed by the constitution. Additionally, LGBT people have a right to equal citizenship without any kind of discrimination as well as equal protection under the law.

The decision has also elevated the idea of transformative constitutionalism to a whole new level, opening the door for a number of reforms and revisions to the country's legal system that would bring about changes consistent with those in the rest of the world.

The decision will also play a significant role in fostering public trust that the rule of law will stand up for and defend the rights of all citizens, no matter how few or insignificant they may be. However, the decision would have had a greater impact on the ground if, in addition to recognising the LGBT community's sexual rights, it had also recommended positive steps to hasten the community's development and social and economic participation. However, the judgement has given the neighbourhood fresh vitality.

Theresa May, the former prime minister of the UK, was quoted by the honourable J. Indu Malhotra in the same ruling as saying, "They were wrong then, and they are wrong today," which is the greatest way to express the injustice of criminalising homosexuality. Even though the verdict cannot instantly make this century-old injustice right, at least it has indicated the appropriate course.

**Transgender Rights Protection Act-** In reaction to the landmark Supreme Court decision in *NALSA v. UOI* in 2014, which supported the rights of transgender individuals, the legislature passed the Transgender Persons (Protection of Rights) Act, 2019, and the President assented to it on December 5, 2019. According to the Act, its objectives are to defend the rights of transgender individuals, watch out for their welfare, and deal with issues pertaining to these objectives.

A "transgender person," as defined by the Act, is a person whose gender does not correspond to the gender given to them at birth. This definition encompasses people who identify as transgender men and women (whether they have undergone sex reassignment surgery, hormone therapy, laser therapy, or any other therapy), people with intersex differences, people who are gender queer, and people who belong to socio-cultural groups like queer, Hijra, Arvani, and Jogta, among others.

**Identity Recognition-** A TG person has the option to apply for an identity certificate. If the transgender person later decides to transition into a female or a male, this certificate may also be changed. Even if it is stated in the law that transgender people have the right to self-perceived gender identity, more clarity

regarding the process would be preferable. One could argue that the act of seeking a certificate and adhering to a particular procedure goes against the spirit of the judgement, which identifies privacy, gender self-determination, and personal autonomy as essential rights of transgender people.

**Discrimination Protection-** Nowadays it is illegal to discriminate against transgender people. However, no penalties have been established for a person discriminated against by a TG person, nor is any financial reimbursement guaranteed for a TG person who experiences discrimination. It appears that the protection provided for TG people would actually be quite ineffective in the absence of any measures under the Bill. Furthermore, no specific enforcement authority has been established.

**Penalties-** Some of the explicitly recognised offences against TG people include forcing them to engage in bonded labour, denying them the right of passage, forcing them to leave their home or community, injuring them, or physically or sexually abusing them. These offences, which include widespread sexual abuse of transgender people, are punishable by between 6 months and 2 years in prison and a fine. These rules seem to be weaker versions of the criminal laws that are already in place. For example, similar crimes against people of different genders are punished with a minimum sentence of seven years.

**National Transgender Council** - According to the Act, a National Council for Transgender Persons must be established and must include at least 30 members. Only five members of the transgender community are represented out of 30. Additionally, the individuals would be chosen by the central government, which would seriously limit their autonomy. Every member who isn't a central government worker will be chosen by the Central Government. This raises serious concerns about the Council's ability to be independent and separate from the administration, and therefore to challenge the government. The NALSA decision gave the government the mandate to regard the TG community as a socially and educationally underprivileged class and to grant them preference in hiring for public positions and admittance to educational institutions. The Bill says nothing on this subject. The NALSA ruling, which compelled the state to protect transgender people's constitutional rights, including the ability to self-identify as a gender and to regard them as a socially and educationally backward class for the purposes of reservations, led to the creation of the Act. The Act is far from what the Supreme Court ordered.

**Conclusion-** It is evident that the LGBT community has existed for a while as a result. It is said in almost every religion. The Transgender Persons Bill 2019 in India repeals the Criminal Tribes Act, 1871, which deemed the entire community of TG people to be essentially "criminal" and "accustomed to the systematic performance of non-bailable offences." According to the Transgender (Protection of Rights) Act 2019, both contemporary Indian culture and its legal system are now devoid of criminal penalties for consenting sexual acts among two adults who are of the same gender. Although there has been significant progress in the system's reform with respect to LGBT people's rights, there is still much work to be done.

#### References

- 1 (1884) ILR 6 All 204.
- 2 (2018) 5 SCC 1.
- 3 (2018) 7 SCC 192.
- 4 10(1981) 1 SCC 608.
- 5 172nd Report of the Indian Law Commission on the Penal Code (October 14, 1837), 3990-91.

- 6 A. Miller, "Sexuality and Human Rights: Discussion Paper", Geneva: International Council on Human Rights Policy (2009).
- 7 A.B. v. Western Australia (2011) HCA 42.
- 8 Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an: Complete Translation with Selected Notes* (Islamic Foundation, UK, 2016).
- 9 ADM Jabalpur v. Shivkant Shukla (1976) 2 SCC 521
- 10 AIDS Bhedbhav Virodhi Andolan (ABVA) New Delhi, India, "Less than Gay-A Citizen's Report on the Status of Homosexuality in India" (Nov-Dec 1991).
- 11 AIDS Bhedbhav Virodhi Andolan (ABVA), an organization fighting discrimination against those affected by HIV or AIDS.
- 12 AIR 1966 SC 1119
- 13 AIR 1977 SC 915
- 14 AIR 1996 SC 1234
- 15 AIR 2018 SC 1933 : 2018 (5)
- 16 Alain Dhanielou, *The Complete Kamasutra: the first unabridged modern translation of the classic Indian text* (Park Street Press, Rochester VT, 1994)
- 17 Alka Pande, *Ardhanareshwara: The Adrogyne*, (Rupa Press, New Delhi, 2008)
- 18 Alok Gupta, "S. 377 and the Dignity of Indian Homosexuals" 41(46) EPW (2006).
- 19 Amara Das Wilhelm, *Tritiya Prakriti: People of Third Sex 131*(Xlibris Corporation, Philadelphia, 2004).
- 20 Anuradha Parasar, "Homosexuality In India –The Invisible Conflict", available at: <http://www.delhihighcourt.nic.in/library/art.s/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>, (last visited on Oct 20, 2018).
- 21 Anuvinda P and Tiruchi Siva, "A Story Of Two Bills", *The Indian Express* Oct 28, 2016, available at <<https://indianexpress.com/art./opinion/columns/transgenders-persons-bill-rajya-sabha-private-member-bill-3195872/>> (last visited on June 05, 2020).
- 22 Argentina Gender Identity Law, 2012.
- 23 Army Act 1950, (Act 46 of 1950), s. 46 (Similar provisions exists in the Air force Act and Navy Act.)
- 24 Arvind Narrain (ed.), *Right to love, Navtej Singh Johar v. Union of India: A Transformative Constitution and the Rights of LGBT Persons* (Alternative Law Forum, Bangalore 2018).
- 25 Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change 49* (Books for Change, Bangalore, 2004)
- 26 Arvind Sharma, "Homosexuality & Hinduism" in Arlene Swidler (ed.), *A Part of Homosexuality and World Religions 46-80* (Trinity Press International, Valley Forge, PA, 2003)
- 27 Attorney- General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission (2003) Fam CA 94.
- 28 Australia Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.
- 29 Bina Fernandez (ed.), *Humjinsi : A Resource Book On Lesbian, Gay, And Bisexual Rights in India 55-65*(Combat Law Publications for India Centre for Human Rights and Law, Mumbai, 1st edn, 2002).  
565Ruth Vanita (ed.), *Queering India Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge, Delhi, 2001).
- 30 Calvin Francis v. Orissa, 1992 (2) Crimes 455.

- 31 Civil Appeal No.952/2006, dated 03.02.2006.
- 32 Concise Oxford Dictionary, 9th ed. (1995).
- 33 Controversy erupted after Kiran Bedi, IG of the Tihar jail in Delhi, refuses to provide condoms for inmates, saying it would encourage homosexuality, besides admitting that inmates indulge in it.
- 34 Corbett v. Corbett (1970) 2 All ER 33.
- 35 Devdutt Pattnaik, *The Man Who Was a Woman and Other Queer Tales from Hindu Lore* (Routledge, New York, 2001).
- 36 Distribution of Population by Religion, available at: [https://censusindia.gov.in/census\\_And\\_You/religion.aspx](https://censusindia.gov.in/census_And_You/religion.aspx) (last visited on Jan 31, 2021)
- 37 Editorial, “S. 377 Based on Law Passed by Henry VIII in 1533”, *The Wire* Sept 08, 2018
- 38 Equal Treatment and the Promotion of Equal Opportunities Act, 2003.
- 39 European Directive 2006/54/EC.
- 40 Fazal Rab Choudhary v. State of Bihar AIR 1983 Cr LJ 632 (SC).
- 41 Fazal Rab Choudhary v. State of Bihar, AIR 1983 SC 323.
- 42 From the first ever report titled “Less Than Gay” in Nov-Dec 1991 on Homosexuality in India to landmark decision of Navtej Singh Johar, the Supreme Court has finally struck down S. 377, Decriminalising Homosexuality in India.
- 43 Fung Kei Cheng, “Being Different with Dignity: Buddhist Inclusiveness of Homosexuality” 7(4) *Social Science* 51 (2018), available at: <https://doi.org/10.3390/socsci7040051> (last visited on Aug 15, 2020).
- 44 G Agoramoorthy, M Hsu, “India’s Homosexual Discrimination and Health Consequences” 41(4)
- 45 Geetanjali Misra, “Decriminalising homosexuality in India”, 17(34) *Reproductive Health Matters* 20–28 (2009) See also, *Zeitgeist Films, Fire* (1996).
- 46 *Goodwin v. United Kingdom* (1996) 22 EHRR 123.
- 47 *Govindarajula In re.*, (1886) 1 Weir 382.
- 48 Section 292, I.P.C, 1860. (A book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect (is) such as to tend to deprave and corrupt person.)
- 49 Hereinafter, 2016 Bill.
- 50 History.com Editors, “Hinduism”, A&E Television Networks, (October 6, 2017) available at: <https://www.history.com/topics/religion/hinduism> (last visited on May 2, 2020)
- 51 Hon’ble Justice G. S. Singhvi and Hon’ble Justice S. J. Mukhopadhaya.
- 52 I.K. Magoo, *Sexual Offences & Homosexuality In India* (Capital Law House, Delhi, 2009)
- 53 Imaad ul Hasan, “Denotified 68 Years Ago, ‘Criminal’ Tribes Still Fight Stigma, Poverty”, *Outlook*, Aug 30, 2020, available at <<https://www.outlookindia.com/website/story/india-news-denotification-68-years-ago-on-this-day-ex-criminal-tribes-still-fight-stigma-poverty/359558>> (last visited on Dec 20, 2020).
- 54 *Indian History Sourcebook: The Laws of Manu, c. 1500 BCE* translated by G. Buhler available at: <https://sourcebooks.fortham.edu/india/manu-full.asp> (last visited on Aug 8, 2021).
- 55 James William Coleman, *The new Buddhism: The western transformation of an ancient tradition* 146 (Oxford University Press, Cambridge, 2002).

- 56 Jatin Gandhi and Smriti K Ramachandran, “RS passes Bill on transgender rights”, The Hindu, April 24, 2015, available at < <https://www.thehindu.com/news/national/rajya-sabha-passes-private-bill-on-transgenders/art.7138056.ece>> (last visited on June 05,2020).
- 57 Javaid Rehman and Eleni Polymenopoulou, “Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World” 37(1) Fordham International Law Journal (2013).
- 58 Jim Wafer, “Mohammed and Male Homosexuality” in Stephan O Murray and Will Roscoe (ed.), *Islamic Homosexualities: Culture, History & Literature* 89 (New York University Press, 1997).
- 59 Julius Lipner, “Sacred texts in Hinduism” British Library, Sept 23, 2019, available on: <https://www.bl.uk/sacred-texts/art.s/sacred-texts-in-hinduism#> (last visited on January 28, 2020)
- 60 Jyoti Puri, “Concerning Kamasutras: Challenging Narratives of History and Sexuality” 27(3) *Journal of Woman in Culture & Society* 603-639 (2002)
- 61 K. Bhardwaj, “Reforming Macaulay.” *The Asian Age*, July 5, 2009, available at <[www.asianage.com/archive/htmlfiles//OP-ED/Reforming%20Macaulay.html](http://www.asianage.com/archive/htmlfiles//OP-ED/Reforming%20Macaulay.html)> (last visited on July 16, 2019)
- 62 Khanu v. Emperor AIR 1925 Sind 286.
- 63 Kharak Singh v. State of U.P. AIR 1963 SC 1295 (hereinafter Kharak Singh)
- 64 Law Commission of India, “14th Report on Reform of Judicial Administration” 10 (Sept, 1958).
- 65 Lohana Vasantlal Devchand v. State AIR 1968 Guj 252.
- 66 M.P. Sharma v. Satish Chandra 1954 AIR SC 300 (hereinafter MP Sharma)
- 67 Mable Sunny, “Legalising Marriage Rights for LGBTQ+ Community India” 1(8) *White Black Legal* (Jan 2020).
- 68 Macauley Legislative Minute of June 6th 1836, India Legislative Consultations April 3, 1837, No. 28. See also *Supra* note 536 at 11.
- 69 Manusmriti, Chapters
- 70 N. Tan, “Was 1992 a Turning Point for Homosexuals in Contemporary India?” 23 *Sexuality & Culture* 142–153 (2019) available at: <https://doi.org/10.1007/s12119-018-9548-9> (last visited on August 04, 2020).
- 71 Narada Smriti
- 72 National Legal Services Authority was formed on 9th November 1995 under the authority of the Legal Services Authorities Act, 1987. Its purpose is to provide free services to eligible candidate and to organize Lok Adalat for speedy resolution of cases. The Chief Justice of India is patron in chief of NALSA while second senior most judge of Supreme Court of India is Executive Chairman.
- 73 Nicole Kligerman, “Homosexuality in Islam: A Difficult Paradox” 2(3) *Macalester Islam Journal* (2007, available at: <https://digitalcommons.macalester.edu/islam/vol2/iss3/8> (last visited on Dec 31, 2020).
- 74 P v. S and Cornwell County Council Case C-13/94 (1996) IRLR 347.
- 75 P. Chatterjee, “AIDS in India: police powers and public health” 367(9513) *Lancet* 805–806 (2006) available at: [https://doi.org/10.1016/S0140-6736\(06\)68319-0](https://doi.org/10.1016/S0140-6736(06)68319-0) (last visited on July 31, 2020)
- 76 P. J. Bearman, Th. Bianquis, et. al., 5 *Encyclopaedia of Islam* (E. J. Brill, Leiden, 1980).
- 77 Pathak Manoj Kumar, Rohini et.al., “Social, Medical And Human Rights Issues Related To Transgenders In India” 19 *Journal of Punjab Academy of Forensic Medicine And Toxicology* (2019). 479Mughal Dynasty available at: <https://www.britannica.com/topic/Mughal-dynasty> (last visited on 1 August 2020).

- 78 People's Union for Civil Liberties-K, "Human rights violations against sexuality minorities in India: a PUCL-K fact-finding report about Bangalore" 11-12 (Feb 24, 2018).
- 79 Peter Marvey, *An Introduction to Buddhist: Foundation Values and Issues* 416 (Cambridge University Press, UK, 2000) (means people who have both male and female characteristics is such as, hermaphrodites.)
- 80 Priyanka Mittal, "NGO highlights lacunae in Bill for transgenders' rights protection", *Mint*, Aug 22, 2016, available at <<https://www.livemint.com/Politics/SndnEZjKezZQVTlcCdQXGN/The-many-problems-with-the-Transgender-Persons-Bill-2016.html>> (last visited on June 05, 2020).
- 81 Puri J., *Sexualizing the State: Sodomy, Civil Liberties and the I.P.C.* In: *Contesting Nation: Gendered Violence in South Asia: Notes on the Postcolonial Present.* Chatterji AP, Nazir Chaudhry L (eds.) (Zubaan Books/Kali for Women, New Delhi, 2009).
- 82 R Kapur, *Erotic Justice* (Permanent Black, New Delhi, 2005)
- 83 *R v. Harris & McDuinness* (1988) 17 NSWLR 158.
- 84 *R v. Tan* (1983) QB 1053, 1063, 1064.
- 85 *R. V. Jacobs* (1817) Russ & Ry 331 C.C.R..
- 86 R.Ramasubban, "Political inters between HIV/AIDS, sexuality and Human Rights: A History of Resistance to the Anti-sodomy Law in India." 3(2) *Global Public Health* 22-38 (2008).
- 87 Rakshat Puri and Kuldip Akhtar, "Sarmad, The Naked Faqir" 20(3) *India International Centre Quarterly* 65-78(1993)
- 88 Reference Holy Quran, 84, 11:77-83, 21:74, 22:43, 26:165-175, 27:56-59 & 29:27-33, See also Muhammad Farooq Buzdar and Nagina Kanwal, *Summary of Holy Quran: An Ultimate Guide Series* 24( Buzdar Insights, Malaysia, 2019)
- 89 *Revista de Saúde Pública* 657-660 (2007).
- 90 Richard Burton, *The Kama Sutra of Vatsyayana* (The Easton Press, Connecticut, 2004).
- 91 Ruth Vanitha (ed.), *Queering India: Same-sex Love and Eroticism in Indian Culture and Society* 235(Routledge, New York, 2002).
- 92 S. Bhaskaran, *Made in India: Decolonizations, Queer Sexualities, Trans/national Projects* 134(Springer, New York, 2004)
- 93 Sanjeev Kumar, Kalpana Devi, et. al., "Protection against violence and discrimination based on sexual orientation and gender identity" 5(2) *International Journal of Legal Developments and Allied Issues* (March 2019).
- 94 Sanjeev Kumar, *LGBT Community in India: A Study* (Educreation Publishing, Delhi, 2019)
- 95 Saroj Kumar Sahu, "Depiction of Homosexuality in Ayurveda" 5(1) *Indian Journal of Health, Sexuality & Culture* (June 2019).
- 96 Schedule I, *The Code of Criminal Procedure* 1974
- 97 Scott Kugle and Stephen Hunt, "Masculinity, Homosexuality and the Defence of Islam: A Case Study of Yusuf al-Qaradawi's Media Fatwa" 2(2) *Religion and Gender* 254-279 (2012)
- 98 *Secretary, Department of Social Security v. SRA* (1993) 43 FCR 299.
- 99 Shobha Agarwal, "ABVA Writ Petition for Repeal of s. 377" in Bina Fernandez (ed.) *Humjinsi : a resource book on lesbian, gay, and bisexual rights in India*, 52 (Combat Law Publications for India Centre for Human Rights and Law, Mumbai, 1st edn, 2002)

- 100 Shobha Agarwal, *Reminiscing ABVA's Struggle for Gay Rights in the Twentieth Century – A Brief History of That Time*, 1/09/2018 available at: <https://countercurrents.org/2018/09/reminiscing-abvas-struggle-for-gay-rights-in-the-twentieth-century-a-brief-history-of-that-time> (last visited on July 02, 2020)
- 101 Siddharth Narrain, "From Aadhaar to the Closet: Impact of Supreme Court's Privacy Judgment on S. 377 Litigation", *TheWire*, Aug 25, 2017, available at <<https://thewire.in/gender/aadhaar-privacy-judgment-supreme-court-s.-377>> (last visited on Sept 29, 2019)
- 102 Sikh Views on Same Sex Relationships, available at: [www.sarbat.net](http://www.sarbat.net) (last visited on July 22, 2020)  
528Satwinder Bains, "Interrogating Gender in Sikh Tradition and Practice" 11(1) *Religions* 34 (2020) available at: <https://doi.org/10.3390/rel11010034> (last visited on Aug 08, 2020).
- 103 South Africa Alteration of Sex Description and Sex Status Act, 2003.
- 104 Srijia Sanyal and Abhik Maiti, "A Discordant Harmony – a critical evaluation of the queer theory from an Indian perspective" 5(1) *International Journal of Asian History, Culture and Tradition*, 15- 31(March, 2018).
- 105 Stances of Faiths on LGBTQ Issues: Buddhism, available at: <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-buddhism>, (last visited on Jan 20, 2019).
- 106 Sudhir Kakkar, "We invoke a deity on its own but as a couple" *Hindustan Times*, March 13, 2011.
- 107 Supra note 15, referring the case *Queen Empress v. Khairati* (1884) ILR 6 All 204 wherein a transgender was punished u/s 377 and later acquitted in appeal.
- 108 Supra note 547 (Explanation to S. 377 IPC -Penetration is sufficient to constitute the carnal intercourse necessary to the offences described in this s. Punishment – Imprisonment for life or imprisonment for 10 years and fine.)
- 109 Supra note 571, (It went on to say that "No force appears to have been used neither omissions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking").
- 110 Tarunabh Khaitan, "Koushal v Naz: Judges Vote to Recriminalise Homosexuality" 78(4) *Modern Law Review* 672–694 (2015).
- 111 That is the one introduced by a legislator in his personal capacity not acting on behalf of the executive. Hereinafter, Private Member Bill.
- 112 The Code of Criminal Procedure 1974, (Act 2 of 1974), sch. I,
- 113 The Constitution of India, art 15.
- 114 The High Court of Delhi, Writ Petition 1784 of 1994(Civil )
- 115 The I.P.C, 1860, s. 294 (Obscene acts and songs.—Whoever, to the annoyance of others, (a) does any obscene act in any public place, or (b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.)
- 116 The I.P.C, 1860, s. 377 (Act No. 45 of 1860) (Held unconstitutional by Supreme Court of India).
- 117 The UK General Recommendation Act, 2004.
- 118 Transgender Persons (Protection of Rights) Act, 2019, (Act 40 OF 2019), s. 2(k),
- 119 Transgender Persons (Protection of Rights) Act, 2019, Act No. 40 OF 2019 (Hereinafter, The Act)
- 120 V. Chandran, 'From Judgment to Practice: S. 377 and the Medical sector', 6 *Indian Journal of Medical Ethics* 198 (2009).

- 121 Vidula Chopra Rastogi, "Pride and prejudice" The Hindu, April 23, 2017.
- 122 Vidya Krishnam, "How the LGBTQ rights movement in India gained momentum" TheHindu, July 14, 2018 available at <<https://www.thehindu.com/society/its-been-a-long-long-time-for-the-lgbtq-rights-movement-in-india/art.24408262.ece> > (last visited on March 25, 2019).
- 123 Voices against 377 (2008) available at: [www.voicesagainst377.org](http://www.voicesagainst377.org) (last visited on Aug 15, 2019).
- 124 Voices Against 377' is a coalition of 12 Non-Governmental Organisations and progressive groups based in Delhi. It is a point of inters. and dialogue between various social movements that these groups represent, where a united voice is being articulated against S. 377 of the I.P.C which criminalizes adult and consensual sexual acts deemed to be against the order of nature available at <http://www.voicesagainst377.org/> (last visited on August 20, 2020).
- 125 Wayne R Danes (ed.), Encyclopedia of Homosexuality (Garland, New York, 1990).
- 126 Writ Petition (civil) no. 572 of 2016, Writ Petition (criminal) no. 88 of 2018, Writ Petition (criminal) no. 100 of 2018, Writ Petition (criminal) no. 101 of 2018, Writ Petition (criminal) no. 121 of 2018.
- 127 WRIT PETITION (CIVIL) NO. 572 OF 2016.
- 128 Writ Petition(civil) No. 604 of 2013.
- 129 Zeitgeist Films, Fire (1996.)
- 130 Ziya Us Salam, "An emperor with foibles" The Hindu, February 15, 2014.