

# Recognition and Protection of LGBT Rights: LGBT rights in India- An Ignored Identity

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## Abstract

*Homosexuality has been a sin under religion and an offence under law attracting stringent punishments. Non-heterosexual orientations of various varieties have always existed in the human society everywhere on the globe but have been regarded as a matter of shame to be hidden from public eyes. In the recent past the world has however witnessed a virtual transformation in this regard.*

*Recognition of LGBT rights as a human right, as always, is one of the struggle continuing. Section 377 of Indian penal code is a well drafted but outdated code of the British colonial rule with a view to punish and criminalize sensual sodomy, is now discriminatory and against the individual privacy. Article 14, 15 and Article 21 is one of the basic structures of the Indian constitution. HLA Hart and Lord Devlin have debated on right to privacy and morality. In a country like India, moral values have a great influence over the law. One of Landmark case on homosexuality which is known as Naz Foundation v. NCT of Delhi, 2009 has upheld the validity of homosexuality and has also recognised it as a violation of fundamental right and discriminatory on the basis of their gender. However, in 2013 an appeal was filed and the Supreme Court overturned a previous judgment and upheld the validity of section 377 of the IPC. As a result, various pride parades and religious opposition are still going on.*

*Change in moral perspective is an art of the changing world and must be changed for good.*

**Keywords** – Section 377, Human Rights, Morality, Changing perspective.

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## Introduction

*“I was struck by ... how much more there needs to be done [to meet the needs of LGBT older adults] as the silver tsunami hits full force.”*

– AARP State Executive Council Member/Conference Attendee

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In India, sexuality has long been a silent battleground. Each decade has taught us more about the ways in which it underlies almost every aspect of our lives, making the socially enforced silence that envelops issues of gender and sexuality seem increasingly more deafening.<sup>1</sup> Homosexuality is not a new concept in India though nobody talks about it. Sexuality minorities have always existed in India sometimes in forms, which are culturally sanctioned (such as the Eunuchs) and at other times in invisibility and silence, their issues have never seriously been articulated. It has to be noted that homosexuality also finds a mention in the various pre – colonial laws. Homosexuality is seen as an offence in **Manusmriti**, which however can be expiated. Lesbianism by contrast merits more serious punishment. Islamic **Shariat** law treats homosexual conduct as a serious offence; though it is being argued by some recently formed gay Muslim organizations that Islamic law can be interpreted in a nonhomophobic fashion.<sup>2</sup>

<sup>1</sup> Ghautam Bhan, *Sexual Rights and Social Movement in India* in CREATING RESOURCES FOR EMPOWERMENT IN ACTION (CREA) 1, New Delhi, 2006.

<sup>2</sup> PUCL-K, HUMAN RIGHTS VIOLATIONS AGAINST SEXUAL MINORITIES IN INDIA 8 (2001).

Sexuality and gender expression matter in international development because they matter to people. Sex, sexuality and the right to your own form of gender expression are not a luxury to be enjoyed once other rights have been achieved. The right to control over your own body and protection against abuse is fundamental if we are to enjoy the other benefits of development.<sup>3</sup> And when we talk about LGBT rights then it can also be seen that LGBT rights are human rights. Human rights are intended to protect the individual from discrimination, violence and threats. They should also give LGBT people the freedom to express their gender identity and to choose how and with whom they enjoy their sexuality.<sup>4</sup> In 1991, Amnesty International for the first time came out with a policy to support the rights of people imprisoned because of their sexual orientation or because of engaging in homosexual activity in private.<sup>5</sup> Another ground – breaking verdict was issued by the United Nations Human Rights Committee in Case of *Nicholas Toonen vs. State of Australia* in which the committee acknowledged that the criminalisation of homosexuality in the State of Tasmania, Australia was a violation of Article 2 and 26 (right to privacy and right to equal protection under the law) of the International Covenant on Civil and Political Rights.<sup>6</sup> Living under the shadow of a draconian and archaic anti-sodomy law, and the weight of social norms of natural/unnatural, public/private, moral/immoral sex, same-sex desiring communities in India have only recently emerged as self-defined and clearly demarcated entities that name themselves as gay, lesbian, bisexual, kothi, hijra, etc.<sup>7</sup> With the founding of India's first gay magazine *Bombay Dost* in the late 1980's and the starting of a lesbian collective in Delhi called *Sakhi*, lesbian, gay and bisexual issues were first articulated in a public forum. Since those early beginnings, the fledgling sexuality minority rights movement has grown increasingly vocal and articulate.

#### The Need for Protection

*“A gay man went to a senior centre in New York for lunch. He was sitting at a table with a bunch of people who were talking about the things they did over the weekend with their spouses and friends. He mentioned that he and his partner went to a movie. Two of the women told him that was disgusting, they didn't want to hear about it, and if he was going to talk about [his partner] he should find somewhere else to eat lunch.”*

– SAGE Executive Director Michael Adams

There is a need to protect LGBT community from discrimination by the State and Societal Discrimination. LGBT people are abused, raped and murdered because of their sexual orientation and gender expression. In some countries such violence is even state-sanctioned. In the United Arab Emirates, Iran, Sudan, Yemen and 12 Nigerian states, engaging voluntarily in homosexual practices is a capital offence. In Bangladesh, Kenya, Namibia, Tanzania, Uganda and Zimbabwe, homosexual behaviour incurs harsh penalties that may include public lashing and other forms of corporal punishment.<sup>8</sup> An individual faces discrimination in family, public spaces, educational institution, and workplace. In asserting the rights of lesbians and gay men to marriage/civil contract unions/domestic partnerships we presume as a prerequisite the decriminalisation of homosexuality and the protection of lesbians and gay men from human right abuse and discrimination.

1. Decriminalization of homosexuality.
2. Protection of lesbians, gay men and other sexual minorities from human right abuse.
3. Anti – discrimination on the basis of sexual orientation.
4. Domestic partnerships for lesbians and gays.<sup>9</sup>

The state is one of the powerful institutions through which discrimination against sexuality minorities is encoded, institutionalized and enforced. The prime means through which discrimination becomes a structural feature of everyday living of sexuality minority populations is through use of the law and the police. But Section 377, Indian Penal Code acts as a tool in the hands of State and Police to harass lesbians and gay men. These are many cases of a widespread pattern of police extortion, physical, verbal, and (often) sexual abuse, and blackmail perpetrated on gays/bisexuals were reported.

<sup>3</sup> PIEHL MATHILDA, *LGBT in Development – A Handbook on LGBT perspectives in development Cooperation* 4, Forum Syd, Sweden ed. 2009.

<sup>4</sup> *ibid*

<sup>5</sup> PUCL-K, *supra* note 2.

<sup>6</sup> Fernadaze Bina, *Humjinsi – A Resource Book on Lesbian, Gay & Bisexual Rights In India*, India Centre for Human Rights and Law, Mumbai 7 (1999).

<sup>7</sup> BHAN GHUTAM, *supra* note 2

<sup>8</sup> Mathilda Piehl, *supra* note 3 at 20

<sup>9</sup> Fernadaze Bina, *supra* note 6 at 10

In 2001 four activists from Bharosa Trust and Naz Foundation International, organisations working on HIV/AIDS in Lucknow, were accused of running a gay “sex club” and charged under Section 377. The activists, whose employers were recognised by the state AIDS control agency, had been distributing condoms and educational pamphlets to gay men. They were released after 47 days in custody following nationwide protests. As Gupta argues, “the Lucknow incidents show that the mere existence of Section 377, even if it cannot and is not being enforced in prosecuting sexual acts in private, adds a certain criminality to the daily lives of homosexual men and puts them under the gaze of the law and a constant threat of moral terrorism”.<sup>10</sup> One more incident also been taken into account - “I was taking a walk with friend. We were talking when two policemen came, took me aside and asked me to give them my watch and gold chain. I was very scared. My only thought was that they can take whatever they want as long as they leave me alone. If they had taken me to the police station, they would rape me. They kept repeating that they would beat me and something me. I got scared and gave them what I had in my pocket: Rs. 100 and my watch. Then they asked me to come back with more money.”<sup>11</sup> An example of the detrimental effect of Section 377 on HIV prevention occurred in 1994, when a group of physicians recommended that condoms be distributed in a Delhi prison where there were high reported rates of homosexual sex. The prison authorities refused because homosexual sex is a crime under Section 377, and distributing condoms would mean condoning a criminal act. The prison authorities' refusal to provide protection for the prisoners may have greatly increased the risk of infection among inmates.<sup>12</sup>

In the labour market, heteronormativity affects LGBT people's chances of finding and keeping a job. Discrimination against LGBT people is common in rich and poor countries alike. The group of transgender people in Malaysia who call themselves Mak Nyahs describe how they are forced into prostitution or insecure service-sector jobs with no insurance or any of the other benefits normally enjoyed by Malaysian workers. This makes the Mak Nyahs part of what is called the precarious workforce, with insecure positions and little opportunity to make demands and wield influence in the workplace. They share this situation with other LGBT people in many countries.<sup>13</sup>

The United Nations' Universal Declaration of Human Rights begins with the words, “All human beings are born free and equal in dignity and rights.” The rights apply to everyone, irrespective of sexual orientation and gender expression, without distinction. Everyone should therefore enjoy the same access to and protection of human rights. Nevertheless, the rights of LGBT people are violated on a daily basis.<sup>14</sup>

Human rights offer protection against injustice, such as the right not to be arrested arbitrarily or tortured. Thousands of LGBT people worldwide can testify to unlawful processes including torture on a vast scale and, in the worst cases, execution. This has led many people to flee their homeland.<sup>15</sup> Human rights also address fundamental human needs such as an adequate standard of living, health care and education. Unfortunately no country in the world can completely protect the rights of LGBT people. Discrimination is widespread in both the workplace and the education system. Health care is often structured around well-entrenched norms that directly and indirectly exclude LGBT people. Harassment occurs in all spheres of society.<sup>16</sup>

The absence of sexual rights, coupled with anti-LGBT discrimination and repression, creates poverty among groups and individuals. It also has an impact on a socio-economic level. Discrimination and ill health adversely affect the economy as a whole, not least through loss of skills and expertise. So, it is required to provide protection to LGBT community.

#### **Constitutional Limits on Anti – Gay Rights in India**

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

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section”<sup>17</sup>

The marginal note refers to the acts proscribed as “unnatural offences”. This expression, however, is not used in the text of Section 377 IPC. The expression “carnal intercourse” is used in Section 377 IPC as distinct from the expression “sexual intercourse”, which appears in Sections 375 and 497 IPC. According to the Concise Oxford

<sup>10</sup> Misra Geetanjali, *Decriminalising Homosexuality in India*, 22, Reproductive Health Matters, New Delhi, (2009).

<sup>11</sup> Bina Fernadaze, *supra* note 6 at 11

<sup>12</sup> Geetanjali Misra, *supra* note 10

<sup>13</sup> Piehl Mathilda, *supra* note 3 at 11

<sup>14</sup> Piehl Mathilda, *supra* note 3 at 14

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> Indian Penal Code, 1860 § 377.

Dictionary (Ninth edition, 1995), the term “carnal” means “of the body or flesh; worldly” and “sensual, sexual”. Consent is no defence to an offence under Section 377 IPC and no distinction regarding age is made in the section.<sup>18</sup> The definition of “unnatural offences” is obsolete. It invites questions such as what is “the order of nature”. As conceived by whom? Previously, it was considered that the order of nature was that the sexual act be performed only for the sake of reproduction. But today it would not be considered “against the order of nature” if people have sex mainly for pleasure. Moreover, empirical evidence easily shows that homosexuality (male and female) and bisexuality (male and female) is widespread in the Indian society covering a large section of people belonging to different regional, linguistic, and religious backgrounds and social strata. Section 377 denies these people a right to their sexuality.<sup>19</sup> It does not distinguish between consensual and coercive sex. Thus cases of abuse and voluntary sex between two consenting adults can be prosecuted under this provision. This would violate the constitutionally protected right to privacy under the expanded definition of right to life (Art 21) (“*Kharak Singh vs. Union of India*”).<sup>20</sup>

Section 377 IPC is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, i.e., for the purpose of procreation only. Any non-procreative sexual activity is thus viewed as being “against the order of nature”. The submission is that the legislation criminalising consensual oral and anal sex is outdated and has no place in modern society. In fact, studies of Section 377 IPC jurisprudence reveal that lately it has generally been employed in cases of child sexual assault and abuse. By criminalising private, consensual same-sex conduct, Section 377 IPC serves as the weapon for police abuse; detaining and questioning, extortion, harassment, forced sex, payment of hush money; and perpetuates negative and discriminatory beliefs towards same-sex relations and sexuality minorities; which consequently drive the activities of gay men and MSM, as well as sexuality minorities underground thereby crippling HIV/AIDS prevention efforts. Section 377 IPC thus creates a class of vulnerable people that is continually victimised and directly affected by the provision.<sup>21</sup> It is also important to note that this section does not prohibit homosexuality, but only prohibits certain sexual acts, which both homosexuals and heterosexuals, married and unmarried people, might engage in. However this section is almost always used to target sexuality minority populations as they are erroneously seen as the only ones to perform ‘carnal intercourse against the order of nature’.<sup>22</sup>

Article 14 states that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India i.e.; ‘Equality’ means ‘Legal Equality’ and not natural equality. ‘Equality before the law’ means that among equals the law must be equal and must be equally administered. That like must be treated alike.

The expression “sex” as used in Article 15 which deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, cannot be read restrictive to “gender” but includes “sexual orientation” and, thus read, equality on the basis of sexual orientation is implied in the said fundamental right against discrimination.<sup>23</sup>

Prohibition against homosexuality in Section 377 IPC curtails or infringes the basic freedoms guaranteed under Article 19 (1) (a) (b) (c) & (d), which deal with the protection of certain rights regarding freedom of speech, etc; in that, an individual’s ability to make personal statement about one’s sexual preferences, right of association/assembly and right to move freely so as to engage in homosexual conduct are restricted and curtailed.<sup>24</sup>

Article 21 which includes “Everyone has the right to work or right to livelihood” is violating because of Section 377 of IPC. Not daring to be open in the workplace or being forced to lie about their domestic life is an experience common to LGBT people worldwide. Unspoken norms and expectations in the workplace can be difficult enough, but in some countries it is expressly forbidden to employ LGBT people in education and the military. In a study, *ADEIM – Simbiosis 2006*, interviews with lesbians in Colombia showed that 14 per cent had lost their job at some point because of their sexual orientation, while 16 per cent had been refused a job for the same reason. In all, 30 per cent of interviewees had experienced workplace discrimination, and 36 per cent knew of other lesbians who had also suffered discrimination. The situation of transgender people worldwide gives even greater cause for concern.<sup>25</sup>

Article 21 which also includes “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family” is denied because of Section 377 of IPC. LGBT people’s right to health is

<sup>18</sup> Naz Foundation v. Government of NCT of Delhi and Others, WP(C)7455/2001

<sup>19</sup> PUCL-K, *supra* note 2.

<sup>20</sup> PUCL-K, *supra* note 2.

<sup>21</sup> Naz Foundation v. Government of NCT of Delhi and Others, [WP(C)7455/2001].

<sup>22</sup> PUCL-K, *supra* note 2.

<sup>23</sup> Naz Foundation v. Government of NCT of Delhi and Others, [WP(C)7455/2001].

<sup>24</sup> Naz Foundation v. Government of NCT of Delhi and Others, [WP(C)7455/2001].

<sup>25</sup> Mathilda Piehl, *supra* note 3 at 16.

overlooked when a health-care system is founded on the assumption that all patients are heterosexual. This means, for instance, that safe-sex information does not reach the right groups in the right way. There have been examples where HIV-prevention campaigns targeted exclusively at heterosexuals have reinforced the misconception that HIV cannot be transmitted through anal sex.<sup>26</sup> An example of the detrimental effect of Section 377 on HIV prevention occurred in 1994, when a group of physicians recommended that condoms be distributed in a Delhi prison where there were high reported rates of homosexual sex. The prison authorities refused because homosexual sex is a crime under Section 377, and distributing condoms would mean condoning a criminal act. The prison authorities' refusal to provide protection for the prisoners may have greatly increased the risk of infection among inmates.<sup>27</sup>

Article 21 also provides constitutional protection of dignity which requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. The expression "dignity of the individual" finds specific mention in the Preamble to the Constitution of India.<sup>28</sup>

Right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that privacy – dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21. It is averred that no aspect of one's life may be said to be more private or intimate than that of sexual relations, and since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie easily at the core of the "private space", they are an inalienable component of the right of life. Prohibition of certain private, consensual sexual relations (homosexual) provided by Section 377 IPC unreasonably abridges the right of privacy and dignity within the ambit of right to life and liberty under Article 21.<sup>29</sup> In *Kharak Singh v. The State of U.P.*<sup>30</sup>, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.

The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and give additional protection under Article 19. Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with the personal liberty must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14, it would be no procedure at all within the meaning of Article 21.<sup>31</sup> The Court thus expanded the scope and ambit of the right to life and personal liberty enshrined in Article 21 and sowed the seed for future development of the law enlarging this most fundamental of the fundamental rights.

Article 21A which says "Everyone has the right to education" is denied because of Section 377 of IPC. In the education system, research has shown that effeminate boys, for instance, are at greater risk of bullying and harassment.<sup>32</sup>

### The Struggle For and Against Gay Rights in India

*"In our view, Indian Constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBT's are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual."*

-C.J. Shah, *Naz Foundation v. Union of India and others*<sup>33</sup>

<sup>26</sup> Mathilda Piehl, *supra* note 3

<sup>27</sup> Geetanjali Misra, *Decriminalising Homosexuality in India*, Page No-22, Reproductive Health Matters, New Delhi, 2009.

<sup>28</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C)7455/2001.

<sup>29</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C)7455/2001.

<sup>30</sup> *Kharak Singh v. The State of U.P* [(1964) 1 SCR 332]

<sup>31</sup> *Maneka Gandhi v. Union of India*, [(1978) 1 SCC 248].

<sup>32</sup> Mathilda Piehl, *supra* note 3.

In the historic judgment, the Delhi High Court had read down section 377 of the IPC to exclude consensual sex among adults. Justice Muralidharan anchored his judgment to Jawaharlal Nehru's words that the notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Nehru on December 13, 1946. **Nehru said, 'Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion..... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.'** **The court said that** the provisions of Section 377 of IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' the court means everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. In the end court said "This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172<sup>nd</sup> Report which we believe removes a great deal of confusion."<sup>34</sup>

On 11<sup>th</sup> December 2013, the Supreme Court upheld section 377 of the IPC in *Suresh Kumar Kaushal and another v. Naz Foundation and others*<sup>35</sup>. The judgment said: "We hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable." Justifying its ruling, it said, "The High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgender and in last more than 150 years, less than 200 persons have been prosecuted for committing offence under Section 377." Noting that despite recommendations for amendment, Parliament has retained the law, the decision says, "This shows that Parliament, which is undisputedly the representative body of the people of India, has not thought it proper to delete the provision. Such a conclusion is further strengthened by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, the Parliament has not made any amendment in the law." It, however, left the door open for the executive to bring the necessary amendments to the law. "Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General".

### **The Hart – Devlin Morality Debate**

Over a little more than a decade, in three very different contexts, courts rejected the public morality rationale for sodomy laws. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998), *Lawrence v. Texas* (2003), and *Naz Foundation v. Union of India* (2009) were constitutional challenges to laws that criminalised same-sex sexual conduct. Equality and privacy were significant in all three cases. This part looks at the privacy response to the public morality justification.<sup>36</sup> The enforcement of morals through legal sanctions is not a new topic to legal philosophers. It has, in the past decade, been the object of a new and thorough examination, though it is still open to further discussion. The "new morality" of the second half of the twentieth century will also contribute to keep the fire alive as a result of the widening gap between the traditional Christian morality and the morals that modern society seems increasingly prepared to accept and tolerate.<sup>37</sup> It is now thirty-five years since H.L.A. Hart published *Law, Liberty and Morality*, which marked the beginning of the Hart-Devlin debate concerning the enforcement of morality by the criminal law. It is 125 years since James Fitzjames Stephen published *Liberty, Equality and Fraternity*, which initiated a similar debate with John Stuart Mill. Both of these debates concerned the legitimate role of the use of criminal sanctions to punish immoral conduct.<sup>38</sup>

Morality implies a basic reference to the distinction of what is right from what is wrong. Various moralities differ as to the extent of what is right and what is wrong, or good and bad, and therefore, each community, nation or society may have its own morality, according to the local beliefs, whether social, political, religious or other. Moreover, the expressions "morals" and "morality", though broad in meaning, have too often been understood to have a close connection with sexual morality.<sup>39</sup> Professor H.L.A. Hart proposes two working definitions of morality: "positive morality", or the morality actually accepted and shared by a given social group, and "critical morality", which may be defined as "the general moral principles used in the criticism of

<sup>33</sup> 160 (2009) DLT 227.

<sup>34</sup> <http://kafila.org/2009/07/02/the-magic-of-the-human-spirit-and-of-a-nations-passion-three-queers-for-the-delhi-high-court/>, 24.12.2014

<sup>35</sup> Civil Appeal No. 10972 of 2013

<sup>36</sup> Allison Jernow, *Morality Tales In Comparative Jurisprudence: What The Law Says about Sex*, 3.2 Amsterdam Law Forum at 11, Amsterdam (2011).

<sup>37</sup> Yves Caron, *The Legal Enforcement of Morals and the So – Called Hart – Devlin Controversy*, 15 McGill Law Journal at 9.

<sup>38</sup> Gerald Dworkin, *Devlin Was Right: Law And The Enforcement Of Morality*, 40 William And Mary Law Review at 927 (1999).

<sup>39</sup> Yves Caron, *supra* note 37.

actual social institutions including positive morality".<sup>40</sup> In response to growing dissatisfaction with the treatment of both prostitution and homosexuality in England, the Wolfenden committee was appointed to reevaluate the state of the laws. The issue of legalizing of homosexuality and prostitution was investigated by the Wolfenden Committee headed by Sir John Wolfenden. The Report claimed that it is not the duty of the law to concern itself with immorality. As to homosexuality, it recommended, "practices between consenting adults in private should no longer be a crime." As to prostitution, it recommended that "though it should not itself be made illegal, legislation should be passed 'to drive it off the streets' on the ground that public soliciting was an offensive nuisance to ordinary citizens."<sup>41</sup> The Wolfenden Committee adopts the view that laws must be acceptable to the general moral sense and that laws should not enter the field of "private moral conduct" unless such conduct affects public good. The reasoning supporting both findings was the committee's belief that the function of criminal law was,

To preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.<sup>42</sup>

The law is the guardian of the public good, and has no function "to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes" of preserving public order.<sup>43</sup> This general concept of the law has led the Committee to further distinguish between "public morality" and "private morality" or immorality that is the private life of individuals as such:

There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the private, and personal responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.<sup>44</sup>

As a consequence, the Wolfenden Committee recommended, *inter alia*, "that homosexual behaviour between consenting adults in private should no longer be a criminal offence",<sup>45</sup> because of the so-called area of private morality. Apart from its own reasons, the Committee cites the *Report of the Street Offences Committee*, which stated that criminal law "is not concerned with private morals or with ethical sanctions".<sup>45</sup> It was argued that homosexuality should be decriminalized on the basis of freedom of choice and privacy of morality.

Professor H.L.A. Hart and Patrick Devlin contributed to the debate. Hart's primary concern goes to the individual, whereas Devlin's preoccupation is for society. Their theories, in the end, are not that far apart; Hart deals with the opposition between law and morality, while Devlin discusses the interplay of law and morality.<sup>46</sup> They both focused on the question whether a society can survive without enforcement of a particular prevailing moral code, such as a code on sexual behaviour that prohibits homosexual relations.<sup>47</sup>

Devlin framed the question as: "What is the connection between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?" Devlin argued that society depended on a shared, public morality and that society therefore had a right to make laws in defence of such morality. He dismissed the notion of a sphere of 'private' morality.<sup>48</sup>

It is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the

<sup>40</sup>Yves Caron, *supra* note 37.

<sup>41</sup>Eric Tennen, *Is The Constitution In Harm's Way? Substantive Due Process And Criminal Law*, Berkeley Journal of Criminal Law, 5 (2004)

<sup>42</sup>Wolfenden Report, 1957.

<sup>43</sup>Yves Caron, *supra* note 37 at 15.

<sup>44</sup>Wolfenden Report, 1957.

<sup>45</sup>Yves Caron *supra* note 37 at 16.

<sup>46</sup>Yves Caron, *supra* note 37 at 21

<sup>47</sup>RUSSELL HARDIN, *THE MORALITY LAW AND ECONOMICS*, KLUWER ACADEMIC PUBLISHERS, NETHERLANDS, 1-10 (1992).

<sup>48</sup>Allison Jernow, *supra* note 36 at 6.

State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.<sup>49</sup>

In short, Devlin believed that criminal law existed not only for the protection of individuals but also for the protection of society. Without laws to reflect and enforce morals, society would disintegrate. "Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies." For Devlin, the morals underlying the law were derived from "the sense of right and wrong which resides in the community as a whole." Society's morals were "those standards of conduct which the reasonable man approves." The reasonable man was also variously described as "the man in the street" or "the man in the Clapham omnibus."<sup>50</sup>

As opposed to Lord Devlin, who refers to the general sense of right and wrong in society, Professor Hart seeks to rationalize the human activity: the problem is "one of critical morality about the legal enforcement of positive morality".<sup>51</sup> Hart rejected the idea that Devlin's 'shared morality' provided the justification for its own enforcement. In a series of lectures, Hart argued that the coercive force of the criminal law should not be used to enforce morality in the absence of other more tangible harms. Thus for Hart the mere belief that certain kinds of sexual activity were immoral was not enough to justify their prohibition. Hart was especially critical of Devlin's thesis that private acts of 'immorality' threatened social disintegration. He criticized Devlin by asserting, "There are again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society." Hart reiterated Mill's "harm principle", Hart pointed out that societies survive changes in basic moral views. It is absurd to suppose that when such a change occurs, to say one society has disintegrated and been succeeded by another. Hart posited that morality is not the only justification for certain acts, which, on their face, seemed to cause no individual harm (e.g. euthanasia, where one party consents to his own killing). Hart believed that those rules could be explained and justified by paternalism.

### Conclusion

Section 377 of the IPC is very discriminatory in nature. Section 377 is inspired by the 18th century Victorian morality which believed that procreation is the only purpose of sex. The 20th century thought process is far removed from such retrograde beliefs and ideas. The judgment by the Supreme Court ignores the spirit of inclusiveness, which is at the heart of the Indian Constitution, as envisioned by the founders of this plural and diverse democracy. It tragically abandons the principle of constitutional morality – the principle that subjective moralities or majority views cannot be allowed to marginalise and exclude minority communities. In the long history of the Supreme Court's judgments that affirm human rights, this judgment marks a low point where the fundamental rights of citizens have been contracted, and stands together with the decisions upholding the Emergency and Mathura rape case. The court has failed to recognize a person's internationally protected right to privacy and non-discrimination. Wheels of time are turning and we hope that the Gay or LGBT community get their rights and protection from the government as well as from the society.

<sup>49</sup> DEVLIN, MORALS AND THE CRIMINAL LAW: THE ENFORCEMENT OF MORALS at 25, OXFORD: UNIVERSITY PRESS 1965

<sup>50</sup> Allison Jernow, Morality Tales In Comparative Jurisprudence: What The Law Says about Sex, Page No-6, Amsterdam Law Forum, Vol 3.2., Amsterdam, 2011.

<sup>51</sup> Yves Caron, *supra* note 37 at 27